

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

In the arbitration proceeding between

BOLIVARIAN REPUBLIC OF VENEZUELA

Applicant

and

TIDEWATER INVESTMENT SRL AND TIDEWATER CARIBE, C.A.

Respondents

ICSID Case No. ARB/10/5

**DECISION ON THE APPLICANT'S REQUEST FOR A CONTINUED
STAY OF ENFORCEMENT OF THE AWARD**

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

Secretary of the Committee
Marco Tulio Montañés-Rumayor

Date of dispatch to the Parties: February 29, 2016

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I. THE PROCEDURAL HISTORY

1. On July 9, 2015, the Bolivarian Republic of Venezuela (the “**Applicant**” or “**Venezuela**”) filed with the Secretary-General of the International Centre for Settlement of Investment Disputes (“**ICSID**”) an application for annulment (the “**Application for Annulment**”) of the award rendered on July 7, 2015 in ICSID Case No. ARB/10/5 (the “**Award**”), brought by Tidewater Investment SRL and Tidewater Caribe, C.A. (the “**Respondents**” or “**Tidewater**”).
2. The Application was filed in accordance with Article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“**ICSID Convention**”) and Rule 50 of the ICSID Rules of Procedure for Arbitration Proceedings (“**Arbitration Rules**”).
3. In its Application, Venezuela requested the Secretary-General to provisionally stay enforcement of the Award (“**Stay Request**”) concerning the amount of US\$46.4 million plus interest in favor of Tidewater.¹ Venezuela also requested that the stay be maintained until the *ad hoc* Committee issued its Decision on the Application for Annulment.²
4. On July 16, 2015, the Secretary-General registered the Application for Annulment and notified the Parties of the provisional stay of enforcement of the Award pursuant to Rule 54(2) of the ICSID Arbitration Rules.
5. On September 9, 2015, the Secretary-General notified the Parties that the *ad hoc* Committee (the “**Committee**”) had been constituted in accordance with Rule 52(2) of the ICSID Arbitration Rules. The Committee was composed of Judge Abdulqawi Ahmed Yusuf (Somali) as President; Tan Sri Dato’ Cecil W. M. Abraham (Malaysian) and Professor Rolf Knieper (German), as Members.

¹ Application for Annulment, para. 18.

² *Ibid.*

6. The annulment proceeding was thus deemed to have begun on the above date. The Parties were also informed that Mr. Marco Montañés-Rumayor, Legal Counsel, ICSID, would serve as Secretary of the Committee.
7. On September 17, 2015, the Committee decided to extend the provisional stay of enforcement of the Award until it ruled on such request after its first session. The Committee also fixed a schedule to receive written submissions regarding Venezuela's Stay Request.
8. On October 7, 2015, in accordance with the schedule fixed by the Committee, Venezuela filed a submission in support of the continuation of the provisional stay of enforcement of the Award ("**Venezuela's Stay Submission**"). The Stay Submission was accompanied by Exhibits R-88, R-131 to R-145, and by Legal Authorities RL-180 to RL-187.
9. On October 28, 2015, Tidewater filed a reply to Venezuela's submission of October 7, 2015 ("**Tidewater's Reply**"). The Reply was accompanied by Exhibits C-1 to C-5, and Legal Authorities CL-1 to CL-39.
10. On November 23, 2015, the Committee held its first session with the Parties in Paris, France. Immediately after the first session, the Committee also heard oral argument ("**Stay Hearing**") on the issue of the Stay Request.

II. THE PARTIES' POSITIONS

a. *The Applicant's Position*

11. Venezuela first argues that Tidewater has the burden of proof and that it has not shown “prejudice”³ or “good cause why a lifting of the stay is necessary.”⁴ In its view, Tidewater would not be harmed if the Stay Request is granted because interest is provided for in the Award. Therefore, if Tidewater prevails in the annulment proceeding, interest would accrue at an annual compound rate of 4.5% on all amounts awarded during the period of time that this proceeding is pending.⁵
12. The Applicant further contends that, unlike Tidewater, the lifting of the stay would harm Venezuela when Tidewater tries to enforce the Award while the amount of damages to be paid is uncertain.⁶ At the Stay Hearing, the Applicant’s counsel argued that such enforcement is “*prejudicial for Venezuela because we don't receive a settlement for that. We don't receive a release of liability for the payment as made.*”⁷
13. Second, Venezuela claims in its Stay Submission that the continuation of the provisional stay of enforcement has become “standard practice”⁸ and is “almost automatic”⁹ in ICSID annulment proceedings. In support of its proposition, Venezuela asserts that “*out of 42 committees (other than this Committee), only three have refused to grant the continuation of the stay.*”¹⁰ Venezuela concludes that there are no “unusual” or “exceptional” circumstances in this case that would justify a departure from this practice.¹¹

³ Venezuela’s Stay Submission, para. 4.

⁴ Venezuela’s Stay Submission, para. 5.

⁵ Venezuela’s Stay Submission, para. 5; Hearing Transcript, p. 27, lines 1-7.

⁶ Hearing Transcript, p. 27, lines 1-7.

⁷ Hearing Transcript, p. 80, lines 4-6.

⁸ Venezuela’s Stay Submission, para. 5.

⁹ Venezuela’s Stay Submission, para. 5, citing *Victor Pey Casado and Foundation “Presidente Allende” v. Republic of Chile*, ICSID Case No. ARB/98/2 (Annulment Proceeding), Decision on the Republic of Chile’s Application for a Stay of Enforcement of the Award, May 5, 2010, para. 25.

¹⁰ *Ibid.*

¹¹ Venezuela’s Stay Submission, para. 6.

14. Third, Venezuela submits that its Stay Request should not be viewed as a way to delay payment.¹² To the contrary, Venezuela is “*just exercising a right under the Convention*”¹³ as there can be “*no doubt that there are serious grounds for the annulment of the Award.*”¹⁴ In any event, Venezuela submits that the Parties agreed to an accelerated schedule for the filing of the written pleadings on annulment.¹⁵
15. The Applicant also points out to Venezuela’s “*track record of providing compensation for nationalizations,*”¹⁶ including the settlements reached with companies affected by the 2009 nationalization at issue in this case. In addition, Venezuela has not defaulted on its sovereign debt and has complied (and will continue to comply) with its international obligations.¹⁷
16. Finally, Venezuela argues that there is no legal or factual basis to partially lift the suspension of the enforcement of the Award.¹⁸ In its view, a partial lifting of the Stay of Enforcement “*necessarily implies a pre-judgment of the merits*”¹⁹ because the Application is directed to annul the amount of damages awarded by the Tribunal in the original proceeding.
17. Venezuela submits that the section of the Award that relates to the calculation of damages must be annulled because the Tribunal failed to state reasons and committed a manifest excess of powers and a serious departure from a fundamental rule of procedure. If that section of the Award is annulled, it would be up to a new tribunal to calculate the damages to be awarded.²⁰

¹² Venezuela’s Stay Submission, para. 9.

¹³ Hearing Transcript, p. 27, lines 9-11.

¹⁴ Venezuela’s Stay Submission, para. 9.

¹⁵ Hearing Transcript, p.16, lines 6-11.

¹⁶ Venezuela’s Stay Submission, para. 6.

¹⁷ Venezuela’s Stay Submission, para. 8.

¹⁸ Hearing Transcript, p. 28, line 22; p. 29, lines 1-6.

¹⁹ Hearing Transcript, p. 28, line 22; p. 29, lines 1-6.

²⁰ Hearing Transcript, p. 29, lines 17-22.

18. Therefore, in light of the above reasons, Venezuela concludes that its Stay Request should be granted.

b. *The Respondents' Position*

19. The Respondents first oppose the Stay Request by arguing that Venezuela, as the requesting party, has the burden of proving that a stay is required. In their view, Venezuela has failed to meet that burden.²¹

20. To support this proposition, Tidewater points to the language of the ICSID Convention and the Arbitration Rules. According to the Respondents, an annulment committee has discretion to grant a stay of enforcement, under Convention Article 52(5), only if the *party seeking a stay* establishes that a stay is *required* under the circumstances.²² Moreover, Rule 54(4) of the ICSID Arbitration Rules requires the requesting party to “*specify the circumstances that require the stay.*”²³

21. Second, Tidewater asserts that contrary to the Applicant’s claim, the Stay Request Venezuela seeks is not ICSID “standard practice.” In its view, Venezuela’s argument that only three out of 42 annulment committees have refused to grant the continuation of the stay is misleading because it fails to mention that in many of those 42 cases, the request was granted only on the condition that the award debtor post a security.²⁴

22. Third, Tidewater contends that Venezuela’s Stay Request is dilatory in nature.²⁵ In support of its position, Tidewater cites to *MTD v. Chile* which held that “*a stay is not appropriate where the annulment application is merely ‘dilatory’.*”²⁶

²¹ Tidewater’s Reply, para. 22.

²² Tidewater’s Reply, para. 22.

²³ Tidewater’s Reply, para. 22.

²⁴ Tidewater’s Reply, para. 22.

²⁵ Tidewater’s Reply, para. 27.

²⁶ Tidewater’s Reply, para. 27, citing to *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. The Republic of Chile*, ICSID Case No. ARB/01/7 (Annulment Proceeding), Decision on the Respondent’s Request for a Continued Stay of Execution, June 1, 2005, para. 28 (Ex. RL-185).

23. The Respondents argue that even assuming that Venezuela can show “*serious grounds for annulment*” of the disputed amount of US\$10.938 million of the Award, there are no grounds at all for annulment of the undisputed US\$35.462 million portion of the Award.²⁷ Therefore, the Stay Request regarding that unchallenged debt serves “*no purpose other than to delay its inevitable enforcement.*”²⁸
24. Tidewater claims that Venezuela has not established that a stay of enforcement of the “whole” Award is required.²⁹ Venezuela’s Application concerns “*a fraction of the total compensation*”³⁰ because it challenges only the portion of the Award that granted compensation *exceeding “the highest conceivable amount that could have been calculated using even [Claimants’] own expert’s DCF model and applying the elements that the Tribunal determined should be employed.”*³¹
25. Tidewater further contends that the portion of the compensation awarded by the Tribunal that does *not* exceed the above amount, is “*completely unchallenged and indisputably final.*”³² Accordingly, Venezuela must pay that portion of the Award regardless of the outcome of this annulment proceeding.
26. In light of the above reasons, Respondents request that the Committee deny Venezuela’s Stay Request. They further ask that “*at a minimum, the Committee should lift the stay with respect to the portion of the Award that Venezuela’s Application does not dispute —specifically, US\$35.462 million, plus interest.*”³³

²⁷ Tidewater’s Reply, para. 27.

²⁸ Tidewater’s Reply, para. 27.

²⁹ Tidewater’s Reply, para. 27.

³⁰ Tidewater’s Reply, para. 3.

³¹ Tidewater’s Reply, para. 3.

³² Tidewater’s Reply, para. 3.

³³ Tidewater’s Reply, para. 32.

III. RELEVANT PROVISIONS OF THE ICSID CONVENTION AND THE ARBITRATION RULES

27. Article 52 of the ICSID Convention provides:

(1) *Either party may request annulment of the award by an application in writing addressed to the Secretary General...*

.....

(5) *The Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Committee rules on such request.*

28. Article 53 of the ICSID Convention provides:

(1) *The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.*

(2) *For the purposes of this Section, "award" shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52.*

29. Rule 54 of the ICSID Arbitration Rules reads as follows:

Stay of Enforcement of the Award

(1) *The party applying for the interpretation, revision or annulment of an award may in its application, and either party may at any time before the final disposition of the application, request a stay in the enforcement of part or all of the award to which the application relates. The Tribunal or Committee shall give priority to the consideration of such a request.*

- (2) *If an application for the revision or annulment of an award contains a request for a stay of its enforcement, the Secretary-General shall, together with the notice of registration, inform both parties of the provisional stay of the award. As soon as the Tribunal or Committee is constituted it shall, if either party requests, rule within 30 days on whether such stay should be continued; unless it decides to continue the stay, it shall automatically be terminated.*

- (3) *If a stay of enforcement has been granted pursuant to paragraph (1) or continued pursuant to paragraph (2), the Tribunal or Committee may at any time modify or terminate the stay at the request of either party. All stays shall automatically terminate on the date on which a final decision is rendered on the application, except that a Committee granting the partial annulment of an award may order the temporary stay of enforcement of the unannulled portion in order to give either party an opportunity to request any new Tribunal constituted pursuant to Article 52(6) of the Convention to grant a stay pursuant to Rule 55(3).*

- (4) *A request pursuant to paragraph (1), (2) (second sentence) or (3) shall specify the circumstances that require the stay or its modification or termination. A request shall only be granted after the Tribunal or Committee has given each party an opportunity of presenting its observations.*

- (5) *The Secretary-General shall promptly notify both parties of the stay of enforcement of any award and of the modification or termination of such a stay, which shall become effective on the date on which he dispatches such notification.*

IV. THE ANALYSIS OF THE COMMITTEE

30. The first task of the Committee is to analyse the provisions of the ICSID Convention and the Arbitration Rules relevant to the present case. According to Article 52(1) of the Convention “either party” may initiate the annulment proceedings, and thus seek a remedy against the award, if it feels aggrieved by the findings of the award or the procedure leading towards it. Although the Convention does not explicitly refer to a request for annulment of part of an award, it specifically gives the *ad hoc* Committee, under Article 52(3), the authority to annul the award or any part thereof. In its Application for Annulment dated July 9, 2015, Venezuela requests, inter alia, that: “*b. the stay of execution of the Award be maintained until the Decision of the ad hoc Committee on this Application for Annulment.*” It also requests that: “*c. the Award be partially annulled under Article 52(1), subparagraphs (b), (d) and (e).*”³⁴
31. While the Committee is mindful of the fact that it is not called upon at this stage of the proceedings to take a decision on the partial annulment of the Award requested by Venezuela, it is of the view that this distinguishing feature of the present Application for Annulment is relevant to its decision on the Stay Request. It will therefore have to address this issue, which was discussed by the Parties in their written submissions, and argued even more extensively during the Stay Hearing. Thus, the Committee will consider this issue in the broader context of its analysis of whether the circumstances of the present case require a continued stay of enforcement.
32. Article 52(5) of the ICSID Convention and Rule 54 of the Arbitration Rules contain the fundamental provisions related to the stay of enforcement of an award. Paragraph 1 of Rule 54 of the Arbitration Rules provides that the party applying for an annulment, and either party, may request a stay of the

³⁴ Application for Annulment, pp. 9-10.

enforcement of part or all of the award to which the application relates. Two points merit to be highlighted here. First, a request for stay of enforcement is not necessarily limited to the party seeking annulment, since paragraph 1 explicitly refers to “either party”. Secondly, the request may concern either “*part or all of the award to which the application relates*”, which implies that the committee has the discretion to stay the enforcement of part or all of the award depending on the requests of the parties, and on the circumstances of the specific case.

33. Paragraph 2 of Rule 54 of the ICSID Arbitration Rules deals with the granting of provisional stay of enforcement by the Secretary-General of ICSID and the obligation of the committee, once it is constituted, to rule on whether such stay should be continued, failing which the stay will be automatically terminated. A stay of enforcement may also be modified or terminated by a committee at any time at the request of either party, in accordance with paragraph 3, after it had been granted under paragraph 1 or continued under paragraph 2 of Rule 54 of the Arbitration Rules. It is the opinion of the Committee that the stay of enforcement referred to in paragraph 1 of Rule 54 of the Arbitration Rules is the one requested in the Application for Annulment and automatically granted by the Secretary-General when the Application is filed in the form of provisional stay.

34. Paragraph 4 of Rule 54 of the Arbitration Rules prescribes that a request for stay of enforcement must specify the circumstances that require the stay or its modification or termination. This is based on Article 52(5) of the ICSID Convention which provides that the committee may stay enforcement of the award “*if it considers that the circumstances so require.*” Thus, while it is for the parties, when making a request, to provide a clear indication of the circumstances that require such stay, it is for the committee to assess them and decide whether those circumstances effectively require a stay of enforcement. This follows from Article 53 of the ICSID Convention which provides that an ICSID award is “binding on the parties”, and that “*each party shall abide by*

and comply with the terms of the award except to the extent that enforcement shall have been stayed.”

35. Neither the ICSID Convention nor the ICSID Arbitration Rules spell out the nature of the circumstances to be specified. Various *ad hoc* committees have, however, indicated the circumstances to which they attached particular importance in examining a request for stay of enforcement in a specific case. For example, the *ad hoc* committee in the case concerning *Sempra Energy International v. Argentine Republic* regarding the latter’s request for a continued stay of enforcement of the award, stated that “*previous ad hoc Committees have attached importance to the following circumstances: 1) prospects of compliance with the award; 2) causation of economic hardship; 3) prospects of recoupment; 4) a dilatory motive.*”³⁵
36. In its Stay Submission, Venezuela puts forward three circumstances it deems relevant to its request. First, that Venezuela would suffer prejudice if the stay was lifted by the Committee because “*the Tidewater partieswill undoubtedly take measures to enforce the award.*”³⁶
37. Secondly, that “*Venezuela has an impressive track record of providing compensation for nationalization*”, providing examples of settlements reached with companies affected by the 2009 oil nationalization and “*the earlier similar process conducted in 2005 with respect to 35 operating service agreements.*”³⁷
38. Thirdly, that “*there can be no doubt as to the existence of serious grounds for annulment of the Award under the ICSID Convention*”, and that it is not the case here that the application is “*without any basis under the Convention*” or is purely “*dilatory*” in nature.³⁸

³⁵ See, *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16 (Annulment Proceeding), Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement, p. 4.

³⁶ Venezuela’s Stay Submission, p. 2.

³⁷ *Ibid*, pp. 4-5.

³⁸ *Ibid*, p. 5.

39. During the Stay Hearing, Venezuela also emphasized that it is not possible “*to lift the stay of enforcement of a portion of the damages awarded as argued by the Tidewater Parties.*” According to Venezuela, “*there is no legal basis, no factual basis to partially lift the stay of enforcement of the Award.*” Moreover, for Venezuela “*a partial lift of the stay of enforcement necessarily implies... a prejudgment of the merits of the Annulment Application since the Application is directed to annul the amount of damages awarded by the Tribunal.*”³⁹
40. For Tidewater, the sole circumstance specified by Venezuela in support of its request is that the Respondents “*will undoubtedly take measures to enforce the Award and Venezuela will suffer prejudice*”; but that “*does not justify a stay of any part of the Award.*”⁴⁰ More importantly, in the view of Tidewater, “*even if the Republic’s concern about Respondent’s enforcement of the Award were a basis for staying the challenged portion of the Award, it could not possibly justify a stay of enforcement of the unchallenged portion.*”⁴¹ Thus, Tidewater contends that Venezuela must pay the unchallenged portion of the award “*regardless of the outcome of this annulment proceeding, and ... cannot claim that it is prejudiced by Respondents’ efforts to enforce it.*”⁴² They finally request that “*the Committee deny Venezuela’s request for an unconditional stay of the whole Award*” and that “*at a minimum, the Committee should lift the stay with respect to the portion of the Award that Venezuela’s Application does not dispute – specifically US\$35.462 million, plus interest.*”⁴³
41. The Committee will now consider the above-summarized arguments of the Parties in light of the provisions of the ICSID Convention and the Arbitration Rules related to the stay of enforcement of an award as analysed in the preceding paragraphs.

³⁹ Hearing Transcript, p. 28, lines 19-22, and p. 29, lines 1-6.

⁴⁰ Tidewater Reply, p. 15.

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*, p. 18.

42. First, the Committee does not find the assertion concerning the alleged impressive record of Venezuela for providing compensation for nationalizations to be of direct relevance to the circumstances that may require a stay. Although it may be true that Venezuela provided compensation for nationalizations, the fact that this case was submitted to ICSID shows that an unsettled dispute exists between the Parties with respect to compensation. According to the Award: “... *the Parties were unable to agree on the basis or the process by which such compensation would be calculated and paid.*”⁴⁴
43. Secondly, the Committee considers that it is premature at this stage of the annulment proceedings to assess the Application for Annulment on its merits. Venezuela is exercising its right under the ICSID Convention to request an annulment, and the Committee does not find at this point in time that its request is dilatory in nature. This is, in any case, a matter that will have to be addressed at a subsequent phase of the proceedings.
44. Thirdly, with regard to the possibility that Venezuela may suffer prejudice if the stay of enforcement was not granted by the Committee because Tidewater will take measures to enforce the Award, the Committee notes that Venezuela has not specified the nature of the prejudice that it would suffer from such enforcement measures. Moreover, the Committee recalls Article 53(1) of the ICSID Convention, which provides that:
- “The Award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention”*
45. This preliminary assessment of the circumstances specified by the Parties with regard to Venezuela’s Stay Request needs to be completed by an analysis of the arguments presented by them to the Committee on the possibility of a partial

⁴⁴ Award, para. 145, p .49.

stay of enforcement. Indeed, during the Stay Hearing, both Parties have exhaustively addressed this issue and advanced different views on whether the discretion of the Committee under the provisions of the ICSID Convention and the Arbitration Rules extends to stay the enforcement of part of the award, and whether in the specific circumstances of this case a partial lifting of the stay of enforcement is warranted.

46. The Committee considers that it is important to recall briefly the context in which this debate took place. In the Application for Annulment of Venezuela it is stated that: “*Venezuela notes at the outset that this Application does not relate to any of the legal holdings of the Tribunal, but only to one issue emerging from paragraphs 197, 201, and 202 of the Award.*”⁴⁵ Paragraph 197 of the Award contains the conclusions of the Tribunal on its Discounted Cash Flow (“DCF”) calculation “*applying the elements that it ... found to be appropriate*” and describing those elements. Paragraph 201 of the Award reproduces the spread of figures presented by the two experts of the Parties which the Tribunal considered to be 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).”

47. Paragraph 202 is worth quoting in full and reads as follows:

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

⁴⁵ Application for Annulment, para. 3.

48. On March 20, 2015, Venezuela submitted an Application for Revision to the Secretary-General of ICSID pursuant to Article 51(1) of the ICSID Convention and Rule 50 of the Arbitration Rules in which it requested, *inter alia*, that:

*“the amount of compensation provided for in the Award be revised to take into account the fact that the figure presented by the Tidewater Parties’ expert in his presentation on the last day of the Hearing in response to the Tribunal’s questions, and using the guidelines set forth by the Tribunal in paragraph 197 of the Award, was US\$30.401 million, not US\$48.443 million.”*⁴⁶

49. By decision dated July 7, 2015, the Tribunal denied the Application for Revision on the basis of inadmissibility.⁴⁷ Following the Tribunal’s Decision on Revision, Venezuela lodged an Application for Annulment on July 9, 2015 in which it states that: *“The Tribunal’s Decision on Revision does not in any sense cure the infirmities in the Award itself, and, in fact, underscores the point that the Award should be partially annulled on the grounds of failure to state reasons, manifest excess of powers and serious departure from a fundamental rule of procedure.”*⁴⁸

50. In its Application for Annulment, Venezuela notes that: *“Therefore, the total amount stated in paragraph 201 of the Award as the figure according to the Tidewater Parties expert should have been US\$30.401 million (i.e. US\$13.917 million + US\$16.484 million= US\$30.401 million), not US\$48.443 million.”*⁴⁹

51. Venezuela also makes the following statement in footnote 12 of its Application for Annulment: *“Had the correct figure from slide 8 (US\$ 13.917 million) been inserted in paragraph 201 of the Award, the difference between the parties’ experts would have been only US\$ 3 million, i.e. US\$30.401 million (for 11*

⁴⁶ Venezuela’s Application for Revision, p. 5, para.13(c).

⁴⁷ *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5 (Revision Proceeding), Decision on Application for Revision, July 7, 2015, p. 14. (“Decision on Revision”).

⁴⁸ Application for Annulment, p. 9, para. 17.

⁴⁹ *Ibid*, p. 5, para. 12.

vessels) for Claimants versus US\$27.407 million (for 15 vessels) for Respondent.” According to Venezuela: “If the US\$13.917 million figure, which was for an 11 vessel business, had been scaled up to a 15 vessel business, then the figure for Claimants in paragraph 201 of the Award would have been US\$35.462 million (i.e. US\$18.978 million...plus US\$16.484 million for non-recurring activities receivable), and the spread between the parties would have been US\$35.462 million (for 15 vessels) for Claimants versus US\$27.407 million (for 15 vessels) for Respondent.”⁵⁰

52. Before the *ad hoc* Committee, Venezuela insisted on a continued stay of enforcement of the whole Award, despite its Application for partial annulment, and its Application for Revision based on a miscalculation of the US\$46.4 million in compensation awarded to the Claimants, as well as the calculations presented in both applications which clearly show that there is an unchallenged portion of the compensation provided in the Award. According to Venezuela “there is no legal basis, no factual basis to partially lift the enforcement of the Award,” and “[A] partial lift of the stay of enforcement necessarily implies....a pre-judgment of the merits of the Annulment Application since the Application is directed to annul the amount of damages awarded by the Tribunal.”⁵¹ However, when a member of the Committee asked Counsel for Venezuela during the hearing whether it was Venezuela’s case that “they do not owe even one cent to the Claimants”; Counsel for Venezuela conceded that “that is not the case.”⁵² Moreover, when the same member asked Counsel for Venezuela if it was Venezuela’s case that “they do not owe at least the 27.407 million, which appears to be an admitted sum, based on your expert’s calculation?” Counsel for Venezuela replied: “we do not dispute that amount.”⁵³

⁵⁰ *Ibid*, p. 7.

⁵¹ Transcript, p.28, line 22, and p. 29, lines 1-6.

⁵² Transcript, p.80, lines 16-20.

⁵³ *Ibid*, p. 80, lines 21-22, and p. 81, lines 1-4.

53. Tidewater contends that “*Venezuela cannot justify a stay of enforcement of the whole Award because it only challenges a small fraction of that Award.*”⁵⁴

According to Tidewater:

*“Venezuela suggests proportionally scaling up Mr. Kaczmarek’s [i.e. expert for Tidewater] 11 vessel valuation to a 15 –vessel calculation. We agree that when you do that, you get a total value of US\$35.4 million. By Venezuela’s logic, the Tribunal could have awarded any level of compensation up to that amount. This means that at least US\$35.4 million of the US\$46.4 million in compensation awarded by the Tribunal is unchallenged by the Application, and that is, Members of the Committee, more than 75 per cent of the Award. And we respectfully submit that there is no basis at all to continue the stay of enforcement of that uncontested debt.”*⁵⁵

54. With regard to the discretion of the Committee to lift partially the stay of enforcement, Tidewater argues that such power is expressly provided for in Rule 54(3) of the ICSID Arbitration Rules.⁵⁶

55. In considering the requests submitted by the Parties on the continued stay of enforcement of the whole Award (Venezuela), and on the partial lifting of the stay of enforcement (Tidewater), the Committee notes that Venezuela contests the figure of US\$46.4 million determined by the Tribunal on the ground that it “*was substantially higher than the highest conceivable amount that could have been calculated using even the Tidewater Parties own experts’ DCF model and applying the elements that the Tribunal determined should be applied.*” It also argues that “*such a compensation amount would not have flowed from the Tribunal’s reasoning, and, in fact, the US\$46.4 million would have been unconnected to any reasoning or calculations.*”⁵⁷ However, Venezuela does not dispute the figure presented by its own experts to the Tribunal in paragraph 201 of the Award, i.e. US\$27.407 million. Indeed, Counsel for Venezuela confirmed during the Stay Hearing that “*we do not dispute that amount.*”

⁵⁴ *Ibid*, p. 58, lines 6-9.

⁵⁵ *Ibid*, p. 62, lines 5-17.

⁵⁶ *Ibid*, p. 63, lines 19-22, and p. 64, lines 1-2.

⁵⁷ Application for Annulment, para. 13.

56. Consequently, the Committee considers that there is an unchallenged portion of the damages awarded by the Tribunal, which amounts to US\$27.407 million. In the opinion of the Committee, the Application for Annulment as well as the Stay Request can logically apply only to the difference between this undisputed amount (US\$27.407 million) and the amount determined by the Tribunal for compensation (US\$46.4 million), which Venezuela does not agree with. Indeed, in its Additional Observations on its Application for Revision, Venezuela, after stating that there was a mistake in the figure reported in paragraph 201 of the Award regarding the Tidewater experts' presentation, observes that:

“if the Tribunal had been aware of this fact, the Award presumably would have been somewhere between approximately US\$27.407 million (the valuation of the Applicant’s experts) and US\$35.462 million (the valuation of the Tidewater Parties’ expert, scaled up for a 15-vessel valuation, plus the non-recurring receivables).” Venezuela adds: “Only the Tribunal could answer the question of exactly where it would have fallen within that range.”⁵⁸

As noted above, the Application for Revision was rejected by the Tribunal.

57. Having established that there is a portion of the damages awarded by the Tribunal that is not disputed by Venezuela, the Committee will now turn to the legal issue of whether it has the discretion under the relevant provisions of the ICSID Convention and the Arbitration Rules to stay or lift part of the enforcement of the Award. The Parties disagree on this point. However, as pointed out in paragraph 32 above, it is the view of this Committee that it has the discretion to stay part or all of the Award depending on the requests of the Parties, and on the circumstances of the specific case under paragraph 1 of Rule 54 of the Arbitration Rules. According to Schreuer’s Commentary of the ICSID Convention: *“The ad hoc Committee’s discretion extends to whether it stays*

⁵⁸ Applicant’s Additional Observations on its Application for Revision, p. 5.

*enforcement of part or all of the award and to the modification or termination of the stay.”*⁵⁹

58. Paragraph 1 of Rule 54 of the ICSID Arbitration Rules is quite clear in this sense: “...*either party may...request a stay in the enforcement of part or all of the award to which the application relates. The Tribunal or Committee shall give priority to the consideration of such a request.*” In the present case, Venezuela argued in favour of staying the enforcement of the whole Award; while Tidewater requested the Committee to “*lift the stay with respect to the portion of the Award that Venezuela’s Application does not dispute- specifically US\$35.462 million, plus interest.*” The Committee does not, however, agree with Tidewater that the unchallenged portion of the Award amounts to US\$35.462 million. It considers that the amount undisputed by Venezuela is US\$27.407 million, which is the valuation presented by its own expert to the Tribunal.
59. It is also the view of the Committee that the ICSID Arbitration Rules confer upon it the discretion, under paragraph 3 of Rule 54, to modify or terminate at any time the provisional stay of enforcement referred to in paragraphs 1 and 2 of Rule 54 requested in the Application for Annulment and automatically granted by the Secretary-General of ICSID. Moreover, the Committee may modify or terminate the continued stay of enforcement granted by it under those provisions at any time before the disposition of the Application for Annulment. In the present case, a provisional stay of enforcement of the whole Award was requested by Venezuela in its Application for Annulment, and the Secretary-General of ICSID granted automatically such provisional stay of enforcement pursuant to Article 52(5) of the ICSID Convention and Rule 54(2) of the Arbitration Rules.

⁵⁹ See, C. Schreuer with L. Malintoppi, A. Reinisch, and A. Sinclair, *The ICSID Convention, A Commentary*, 2nd ed. 2009, p. 1067.

60. Following the constitution of the Committee, one of the first decisions it adopted on September 17, 2015, which the Parties were immediately apprised of, was to extend the provisional stay of enforcement of the Award until it ruled on such request after its first session. It is this extension of the provisional stay of the whole Award which it granted in its decision of September 17, 2015 that the Committee has now concluded should be modified, after hearing the Parties, by changing it to a continued stay of enforcement on a part of the Award.

61. Thus, the Committee, taking into account the specific circumstances of this case as well as the relevant provisions of the ICSID Convention and the Arbitration Rules analysed above, finds that it is appropriate to lift the stay of enforcement on the undisputed portion of the damages awarded by the Tribunal, which, as recognized by Venezuela during the Stay Hearing, amount to US\$27.407 million.

V. DECISION

62. Pursuant to Article 52(5) of the ICSID Convention and Rule 54, paragraphs 1, 2 and 3 of the Arbitration Rules, the Committee decides that:
- a. the stay of enforcement is lifted with regard to the undisputed amount of US\$27.407 million plus interest from May 8, 2009 to the date of payment at the rate of 4.5% per annum, compounded quarterly; and
 - b. the stay of enforcement of the amount of US\$18.993 million in Claimants' compensation awarded by the Tribunal and of US\$2.5 million in partial reimbursement of Claimants' costs is maintained.

[Signed]

Tan Sri Dato' Cecil W.M.
Abraham
Member

[Signed]

Professor Rolf Knieper
Member

[Signed]

Judge Abdulqawi Ahmed Yusuf
President of the *ad hoc* Committee