

**ICSID Case No ARB/10/5**

**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.  
ZAPATA GULF MARINE OPERATORS, L.L.C.**

**Claimants**

and

**THE BOLIVARIAN REPUBLIC OF VENEZUELA**

**Respondent**

---

**PROCEDURAL ORDER No 1  
ON PRODUCTION OF DOCUMENTS**

---

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

Secretary of the Tribunal

Mr Marco Tulio Montañés-Rumayor

---

*Representing Tidewater*

Mr Oscar M. Garibaldi  
Mr Miguel López Forastier  
Mr Joshua B. Simmons  
COVINGTON & BURLING LLP  
1201 Pennsylvania Avenue, NW  
Washington, D.C. 20004-2401  
UNITED STATES OF AMERICA

*Of counsel*

Mr Bruce Lundstrom  
TIDEWATER INC.  
2000 West Sam Houston Parkway South  
Suite 1280  
Houston, Texas 77042

*Representing Venezuela*

Procuradora General de la Republica  
Av. Los Ilustres cruce can calle Francisco Laze Marti.  
Edificio Procuraduria General de la Republica. Piso 8.  
Urb. Santa Monica.  
Caracas 1040,  
VENEZUELA

Mr George Kahale III  
Mr Eloy Barbará de Parres  
Ms Gabriela Álvarez Ávila  
Ms Claudia Frutos-Peterson  
Curtis, Mallet-Prevost, Colt & Mosle LLP  
101 Park Avenue  
New York, NY 10178  
UNITED STATES OF AMERICA

## CONTENTS

I.	<b>Introduction</b>	[1]
A.	<b>Request for Arbitration and Constitution of the Tribunal</b>	[1]–[3]
B.	<b>Procedure</b>	[4]–[5]
C.	<b>The Requests for Documents</b>	[6]–[14]
II.	<b>The Claimants’ Request for Production of Documents</b>	[15]
A.	<b>The Claimants’ Request</b>	[15]–[16]
B.	<b>The Respondent’s Objections</b>	[17]–[18]
C.	<b>The Tribunal’s Assessment</b>	[19]–[21]
III.	<b>The Respondent’s Request for Production of Documents</b>	[22]
A.	<b>Introduction</b>	[22]–[23]
B.	<b>Respondent’s First Request – Documents Relating to the Incorporation of Tidewater Investment S.R.L. and the Transfer of Shares To It</b>	[24]
(1)	<b>The Request</b>	[24]–[25]
(2)	<b>The Claimants’ Response</b>	[26]
(3)	<b>The Tribunal’s Assessment</b>	[27]–[35]
C.	<b>Respondent’s Second Request – Documents Identifying the Services Underlying the Accounts Receivable</b>	[36]
(1)	<b>The Respondent’s Request</b>	[36]–[37]
(2)	<b>The Claimants’ Response</b>	[38]
(3)	<b>The Tribunal’s Assessment</b>	[39]–[42]
IV.	<b>Decision</b>	[43]

### I. Introduction

#### A. *Request for Arbitration and Constitution of the Tribunal*

1. On February 16, 2010, Tidewater Inc, Tidewater Investment SRL, Tidewater Caribe, C.A., Twenty Grand Offshore, L.L.C., Point Marine, L.L.C., Twenty Grand Marine Service, L.L.C., Jackson Marine, L.L.C. and Zapata Gulf Marine Operators, L.L.C. (together ‘**Tidewater**’ or ‘**Claimants**’) filed with the International Centre for Settlement of Investment Disputes (‘the Centre’ or ‘ICSID’) a Request for Arbitration under the ICSID Arbitration Rules against the Bolivarian Republic of Venezuela (‘**Venezuela**’ or ‘**Respondent**’).
2. Tidewater alleges that Venezuela unlawfully expropriated its investments in the maritime-support industry in Venezuela without compensation. It submits that the Centre has jurisdiction over this dispute as all relevant countries are parties to the ICSID Convention (‘**the Convention**’)<sup>1</sup>, those countries being Venezuela, Barbados

---

<sup>1</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States (signed 18 March 1965, entered into force 14 October 1966).

(under the laws of which Tidewater Investment S.R.L. is constituted) and the United States (under the laws of which all the other Claimants are constituted, except Tidewater Caribe, C.A. which is a wholly-owned subsidiary of Tidewater Investment S.R.L.). Accordingly, Tidewater submits that each of the Claimants is *vis-à-vis* the Respondent a “national of another Contracting State.”<sup>2</sup> It invokes two grounds for the Tribunal’s jurisdiction:

- (a) Article 22 of the Venezuelan Law on the Promotion and Protection of Investments (**‘Investment Law’**), which Tidewater submits constitutes a standing consent to ICSID arbitration;<sup>3</sup> and
- (b) The bilateral investment treaty between Venezuela and Barbados (under the law of which country Tidewater Investment S.R.L. is constituted) (**‘Barbados BIT’**).<sup>4</sup>

Tidewater submits that it consented to ICSID jurisdiction in a letter to Venezuela on 11 December 2009.<sup>5</sup>

3. Venezuela disputes the Tribunal’s jurisdiction:

- (a) It maintains that Article 22 does not constitute a standing consent to arbitrate all investment disputes under ICSID;<sup>6</sup> and
- (b) It contends that Tidewater Investment S.R.L. is a *‘corporation of convenience’* incorporated for the sole purpose of *‘gaining access’* to ICSID. Accordingly, it submits that Tidewater’s invocation of the Barbados BIT is an abuse of the Treaty.<sup>7</sup>

---

<sup>2</sup> Article 25 of the Convention, cited in Request for Arbitration (16 February 2010), [19]–[20].

<sup>3</sup> *Ley sobre Promoción y Protección de Inversiones* (adopted by the Republic of Venezuela by means of Decree-Law No 356 of 3 October 1999). See Request for Arbitration, [25]–[27].

<sup>4</sup> 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). See Request for Arbitration, [29]–[31].

<sup>5</sup> Request for Arbitration, [32].

<sup>6</sup> Respondent’s Answer to Claimants’ Objections to Respondent’s First Request for the Production of Documents (23 February 2011), [3]. All references to documents filed by Venezuela are to the English translations provided. The full sequence of submissions on the requests for documents is detailed below.

<sup>7</sup> *Ibid*, [4].

**B. Procedure**

4. On August 31, 2010, the ICSID Secretariat informed the parties that, pursuant to ICSID Arbitration Rule 6, the Tribunal consisting of Professor Campbell McLachlan QC (President) (a national of New Zealand), Dr Andrés Rigo Sureda (a national of Spain) and Professor Brigitte Stern (a national of France) was deemed to have been constituted on that date.<sup>8</sup>
5. The Tribunal's First Session was held on January 24, 2011, at the seat of the Centre in Washington, D.C. At that session the Tribunal ordered that, in accordance with Arbitration Rule 41 and pursuant to the parties' agreement, Venezuela's objections to the Tribunal's jurisdiction would be addressed by the Tribunal prior to the pleading on the merits. Accordingly, the Tribunal set a calendar for the written and oral phases of the jurisdictional phase of the arbitration,<sup>9</sup> pursuant to which Venezuela is required to file its Memorial on Jurisdiction on May 6, 2011, to be followed by a Counter-Memorial, Reply, Rejoinder and oral phase.

**C. The Requests for Documents**

6. At the First Session, the parties agreed that the IBA Rules on the Taking of Evidence in International Arbitration ('the IBA Rules') could be used as a guide by the Tribunal and the parties.<sup>10</sup>
7. The Tribunal set the following timetable for the parties to request from each other the production of documents relevant to the jurisdictional phase:<sup>11</sup>
  - (a) Each party would deliver to the other party a Request to Produce documents at the First Session;
  - (b) On or before February 7, 2011, each party would produce the documents requested or, where applicable, state its objections to the request; and
  - (c) If any documents were not available by February 7, 2011, they would be produced on a rolling basis, but in any case no later than February 21, 2011.

---

<sup>8</sup> A proposal for the disqualification of Professor Stern, made on September 28, 2010, was dismissed on December 23, 2010, whereupon the proceedings resumed.

<sup>9</sup> Minutes of First Session, Part I, [14.2].

<sup>10</sup> *Ibid*, Part II, [1.1].

<sup>11</sup> *Ibid*, Part II, [1.3].

8. The parties then made the following filings relating to document production:

<b>Date</b>	<b>Description</b>	<b>Hereafter identified as</b>
24 January 2011	Claimants' First Request for Production of Documents.	<b>Claimants' Request</b>
24 January 2011	Respondent's First Request for Production of Documents.	<b>Respondent's Request</b>
7 February 2011	Claimants' Objections and Responses to the Respondent's First Request, enclosing a number of documents and objecting to the production of other documents.	<b>Claimants' Response</b>
7 February 2011	Respondent's Answer to Claimant's Request for Production of Documents, stating that none of the documents requested are available, and indicating that privilege would apply to some of them if they did exist.	<b>Respondent's Response</b>
22 February 2011	Claimants' Supplemental Production of Documents, enclosing one additional document.	<b>Claimants' Supplemental Production</b>
23 February 2011	Respondent's Answer to Claimants' Objections to Respondent's First Request for Production.	<b>Respondent's Second Response</b>
17 March 2011	Claimants' Response to Respondent's Answer to Claimants' First Document Request and Claimants' Reply to Respondent's Answer to Claimants' Objections.	<b>Claimants' Second Response</b>
21 March 2011	Respondent's Observations on Claimants' Communication.	<b>Respondent's Third Response</b>
25 March 2011	Claimants' Rejoinder	<b>Claimants' Third Response</b>

9. On March 22, 2011 the Tribunal wrote to the parties, inviting them to indicate by close of business on March 23, 2011, whether either party wished to apply to the Tribunal to make any further submissions on the document requests. The Claimants, by letter dated March 23, 2011 requested leave to file a short rejoinder by March 25, 2011. On March 24, 2011, the Tribunal granted this request and continued: "[a]fter close of business on Friday March 25, 2011, the pleadings on these First Requests for Document

*Production are closed and the Tribunal will proceed to deliberation and the issue of its procedural order."*

10. As a result of the exchanges between the parties, the issues between them requiring a decision from the Tribunal have been significantly narrowed. The Tribunal now proposes to deal in turn with each of the outstanding requests, where the parties have not reached agreement, setting out the nature of the request, the basis for the objection, and the Tribunal's decision thereon.
11. Before turning to the particular requests, it will be helpful to set out the legal context in which these requests for the production of documents fall to be considered. Article 43(a) of the ICSID Convention and ICSID Arbitration Rule 34 empower the Tribunal, *'if it deems necessary at any stage of the proceedings (a) [to] call upon the parties to produce documents or other evidence.'*
12. In the present case, the parties have agreed that the IBA Rules may guide the Tribunal and the parties in the taking of evidence and that Articles 3 and 9 will provide particular guidance in relation to the production of documents. Article 3 provides a procedure for the request of documents, and Article 9 addresses the admissibility of documents. It is a general premise of the Rules that the parties shall conduct themselves in good faith in the taking of evidence.<sup>12</sup>
13. Within the framework of the Convention and Rules, and using the IBA Rules as a guide, the Tribunal has a wide discretion in considering the parties' Requests. The IBA Rules provide that a Tribunal may order the production of a document if:<sup>13</sup>
  - (a) The document is 'relevant' to the case and 'material' to its outcome (Article 3.3(b));
  - (b) None of the reasons for objection in Rule 9.2 (including privilege) apply; and
  - (c) The Request to Produce complies with the requirements of Article 3(3).

The Tribunal is guided by this approach.

14. The Claimants emphasise the high threshold of *'necessity'* under Article 43 and Rule 34, suggesting that production of a document should only be ordered if the document is *'essential'* to the resolution of the dispute.<sup>14</sup> The Tribunal considers that the primary

---

<sup>12</sup> Article 9(7).

<sup>13</sup> Article 3(7).

<sup>14</sup> Claimants' Second Response, [8]; Claimants' Third Response, [1]–[5].

purpose of the phrase ‘*if it deems it necessary*’ in the Convention and Rules is to confirm that it is for the Tribunal ultimately to determine whether the requested evidence is what it needs in order to decide the matter before it.<sup>15</sup> The Tribunal further considers that, in deciding whether or not it is necessary to order production of a document, it should be guided by the tests of relevance and materiality in the IBA Rules.<sup>16</sup> The Tribunal finds no underlying conflict between these concepts. As it was put by the Tribunal in *Aguas del Tunari S A v Bolivia*, the ICSID Convention and Rules grant a tribunal ‘*a substantial measure of discretion regarding the production of documentary evidence although such discretion was guided by several considerations:*

*[T]he Tribunal’s discretion to order the production of evidence is informed by concepts of materiality, relevance and specificity present in the laws of evidence generally and by the customs of evidentiary production in international arbitration generally. More particularly, Article 43 provides that the Tribunal may order the production of evidence at any stage in the proceedings when in the Tribunal’s judgment such an order is “necessary”.*<sup>17</sup>

## II. The Claimants’ Request for Production of Documents

### A. The Claimants’ Request

15. The Claimants requested the following documents from the Respondent:
1. *All documents related to the preparation and drafting of the provision that was enacted as Article 22 of the Investment Law....*
  2. *All documents related to meetings of the Consejo de Ministros and Gabinete Económico at which the Investment Law was discussed.*
16. The Claimants submit that these documents are relevant to and necessary for the Tribunal’s resolution of the Respondent’s likely objections to jurisdiction, ‘*because they go to the heart of one of the jurisdictional issues before the Tribunal – whether Article 22 of the Investment Law expresses the Respondent’s consent to submit this*

<sup>15</sup> *History of the ICSID Convention*, II:2, 805–807.

<sup>16</sup> IBA Rules, Article 3(3)(b) and (9)(2)(a); *ADF Group Inc v United States* (Award) ICSID Case No ARB(AF)/00/1 (9 January 2003), [29].

<sup>17</sup> *Aguas del Tunari S A v Bolivia* (Decision on Jurisdiction) ICSID Case No ARB/02/3 (21 October 2005), [25]; accord Schreuer et al *The ICSID Convention: A Commentary* (2 ed, 2009) 643–644.

*investment dispute to ICSID arbitration.*<sup>18</sup> They submit that it is not sufficient for the Respondent to assert that the Respondent has searched for those documents before in the context of earlier proceedings,<sup>19</sup> and question the Respondent's claim to privilege on the basis of the 'secrecy' of the deliberations of the Ministerial Council.<sup>20</sup> The Claimants nevertheless submit that, if the Tribunal upholds such a privilege, the Claimants' privileged documents requested by the Respondent should also be excluded from production to ensure fairness and equality between the parties.<sup>21</sup>

### **B. The Respondent's Objections**

17. The Respondent does not dispute the request on grounds of relevance. Rather, it states that it *'does not possess, maintain or control'* any of the documents sought by the Claimants.<sup>22</sup> It states that, in the context of other cases *'the Republic has made every effort to find relevant documentation from other sources, but unfortunately, those efforts have been unsuccessful.'* It further submits that, if the documents did exist, those relating to the deliberations of the Ministerial Council would be privileged.<sup>23</sup>
18. Nevertheless, the Respondent has indicated that it will conduct a new investigation to confirm that there is nothing to produce, and will inform the Claimants and the Tribunal in due course if this investigation is fruitful.<sup>24</sup>

### **C. The Tribunal's Assessment**

19. The proper construction of Article 22 of the Investment Law will plainly be an issue of central importance in the Tribunal's determination of its jurisdiction. The Claimants seek to invoke the jurisdiction of the Centre in part on the basis of the Respondent's consent expressed in Article 22 of the Investment Law.<sup>25</sup> In turn, the Respondent's own preliminary formulation of its jurisdictional objections states *'the Investment Law*

---

<sup>18</sup> Claimants' Request, 1; Claimants' Second Response, [14].

<sup>19</sup> Claimants' Second Response, [15].

<sup>20</sup> *Ibid*, [16]–[18].

<sup>21</sup> *Ibid*, [19].

<sup>22</sup> Respondent's Objections, [2(b)].

<sup>23</sup> *Ibid*, [2(c)] relying on Article 55 of the Organic Law of Public Administration (31 July 2008).

<sup>24</sup> Respondent's Third Response, [18].

<sup>25</sup> Request for Arbitration, [25]–[27].



*does not constitute a standing consent to arbitrate all investment disputes before ICSID.*<sup>26</sup> The Tribunal does not at this stage prejudge the legal test applicable to resolution of this issue. Nevertheless, it considers that the two categories of documents requested by the Claimants are reasonably likely to be both relevant and material in assisting it to determine the proper construction of Article 22.

20. The Respondent does not dispute relevance. Rather it states that it has no such documents, relying upon the manner in which the Investment Law was promulgated and searches made in previous cases. Nevertheless, it has volunteered to undertake a fresh search for the documents in question.
21. The Tribunal decides that the Respondent should state which sources it has so far checked and undertake a fresh search. If documents within the scope of the Claimants' request are discovered in the course of the Respondent's further investigation, the Respondent must produce copies of those documents; save for any which it claims it should be excluded from production on any of the grounds specified under IBA Rule 9. If documents are found which fall within the request, but which the Respondent wishes to exclude from production, it must produce a schedule itemising the documents which it objects to producing, identifying their author, date, type of document and the grounds for its objection. In that event, the Claimant may, if it wishes to do so, contest the objection.

### III. The Respondent's Request for Production of Documents

#### A. Introduction

22. The Respondent originally sought nine categories of documents. In their response, the Claimants objected to each of these requests on a number of grounds, including privilege. Nevertheless, the Claimants supplied a number of the documents sought *'subject to and without waiving those objections'*.<sup>27</sup> The Respondent has accepted that, at present, the Claimants' disclosure is sufficient in respect of a number of the categories.<sup>28</sup> Whilst noting the Claimants' maintenance of its objections, the Tribunal

---

<sup>26</sup> Respondent's Second Response, [3].

<sup>27</sup> Claimants' Objections at Part II.

<sup>28</sup> Respondent's Second Response, 3–5.

proceeds on the basis that the documents which have been produced are available for the full use of both parties and the Tribunal for the purposes of this arbitration.<sup>29</sup>

23. There remain two outstanding requests on which the parties are not agreed, and which accordingly require the Tribunal's determination. These will be dealt with in turn.

**B. Respondent's First Request – Documents Relating to the Incorporation of Tidewater Investment S.R.L. and the Transfer of Shares To It**

**(1) The Request**

24. The first set of documents in dispute are categories (b) and (e):<sup>30</sup>

(b) *Copy of any minutes, memoranda, presentations or any other document that contains or refers to the reasons for the formation and insertion of Tidewater Investment, S.R.L. in the corporate structure of Tidewater;*

...

(e) *Copy of any minutes, memoranda, presentations or any other document that contains or refers to the reasons for the transfer of the stocks of Tidewater Caribe, C.A. in favor of Tidewater Investment, S.R.L*

25. As noted above, the Respondent seeks this information as relevant to its claim of abuse of treaty.<sup>31</sup> The Respondent disputes that legal advice privilege can attach to correspondence that addresses the 'business rationale' of the restructuring.<sup>32</sup>

---

<sup>29</sup> Pursuant to Article 3(13) IBA Rules, the parties and the Tribunal are obliged to keep the documents confidential and to use them only for the purposes of this arbitration.

<sup>30</sup> Respondent's Request, 2–3.

<sup>31</sup> Respondent's Second Response, [4], [16].

<sup>32</sup> *Ibid*, [20].

**(2) The Claimants' Response**

26. The Claimants object to the production of the documents in question on three grounds:<sup>33</sup>

- (1) *The documents are 'not reasonably calculated to resolve issues relating to the Republic's jurisdictional objections'.* The Claimants maintain that the threshold of necessity, relevance and materiality that must be met before an ICSID tribunal will order the production of documents is high, and that they are not met in this case. They rely particularly on the fact that the restructuring in question took place two months before the expropriation that is the subject of the dispute.<sup>34</sup>
- (2) *The documents are protected by legal advice privilege.* The Claimants maintain that certain documents are also protected by privilege. They submit that *'legal advice is legal advice, whether or not that legal advice relates to a "business rationale."*<sup>35</sup>
- (3) *The requests are 'overbroad'.* The Claimants submit that these requests are *'overbroad or contain terms that are not defined or that are vague, ambiguous or unintelligible.'*<sup>36</sup> The Claimants allege that the Respondent's request is a *'fishing expedition'*.<sup>37</sup>

**(3) The Tribunal's assessment**

27. The Respondent intends to object to the Tribunal's jurisdiction under the Barbados BIT on the basis of abuse of treaty. That is an argument that the Tribunal will have to resolve in its Decision on Jurisdiction. The Respondent squarely alleges that the reasons for and circumstances of the creation of Tidewater Investment S.R.L. and its acquisition of Tidewater Caribe, C.A. show that the former company is a *'corporation of convenience belatedly incorporated by the U.S. Claimant Tidewater Inc. in*

---

<sup>33</sup> Claimants' Objections, 2–4. The structure of the Claimants' objections conforms to the three-step test under the IBA Rules, Article 3(7).

<sup>34</sup> Claimants' Objection, citing Articles 3.3(b) and 3.14 of the IBA Rules; Claimants' Second Response, [26]–[31].

<sup>35</sup> Claimants' Objection, citing Articles 9.2(b) and 9.3 of the IBA Rules; Claimants' Second Response, [32]–[37].

<sup>36</sup> Claimants' Objection, citing Article 3.3(a) of the IBA Rules.

<sup>37</sup> Claimants' Second Response, [30]; Claimants' Third Response, [5].

*anticipation of litigation and with the purpose of gaining access to ICSID—an abusive manipulation of the dispute resolution mechanism provided by’ the Barbados BIT and the ICSID Convention.*<sup>38</sup>

28. The Claimants submit that there is nothing improper or illegitimate about restructuring for the purpose of gaining the protection of a treaty for *future* disputes, and note that the restructuring was completed two months before the expropriation took place. It therefore submits that the documents are irrelevant to any allegation of treaty abuse.<sup>39</sup>
29. The Tribunal considers that production of the category of Claimants’ documents relating to the incorporation of Tidewater Investment S.R.L and the transfer of the shares of Tidewater Caribe, C.A. is necessary. Those documents are *relevant* and *material* to the case because they are reasonably likely to assist the Tribunal to decide the jurisdictional objection raised by the Respondent. The Tribunal expresses no view on the substantive merits of the Respondent’s allegation of abuse of treaty. For this purpose, it is required to take the Respondent’s jurisdictional objections at face value and consider its Request for Documents against the background of those jurisdictional objections.
30. In the Tribunal’s view the Claimant’s argument based upon the timing of incorporation belongs to the substantive jurisdictional phase of this arbitration. The Tribunal is not in a position to determine that issue now, on the basis of limited facts and submissions. The Respondent also disputes whether the expropriation in question was in fact a ‘future dispute’.<sup>40</sup> At this point, the Tribunal has to determine whether the documents sought are relevant and material to the jurisdictional objection that the Respondent intends to raise, not whether that jurisdictional objection is likely to succeed.
31. Before turning to the Claimants’ claim of privilege, the Tribunal will address their objection that the Respondent’s request constitutes a ‘fishing expedition’. The Tribunal notes that Article 3(3)(a) of the IBA Rules requires that a Request to Produce contain either (i) ‘*a description of each requested Document sufficient to identify it*’ or

---

<sup>38</sup> Respondent’s Second Response, [4].

<sup>39</sup> Claimants’ Second Response, [29].

<sup>40</sup> Respondents’ Third Response, [9].

(ii) *'a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist'*.

32. The Tribunal acknowledges that (absent the express decision of the parties) Common Law-style pre-trial discovery does not belong in international arbitration. However, it does not accept that the Respondent's request is nothing more than a request for 'hypothetical' documents (as the Claimants submit).<sup>41</sup> The Tribunal considers that the Respondent has particularised its request sufficiently narrowly to comply with the requirements of Article 3(3)(a)(ii). The Respondent's request is focused on the particular issue of Tidewater S.R.L's incorporation and receipt of the shares of Tidewater Caribe, C.A. A company, as a legal person, can only come into existence as a conscious act of creation by others, which act must be recorded in writing. The Claimants' invocation of privilege shows that documents within the scope of this request exist. Some lack of specificity is clearly contemplated by that Rule, because a party will always be limited in its ability to specifically identify documents which it only *believes* to exist.
33. The Tribunal now turns to the Claimants' objection that the documents sought by the Respondent are protected by legal advice privilege. Article 9(2)(b) of the IBA Rules provides that the Tribunal may exclude from production any document for reasons of *'legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable.'* Article 9(3) of the Rules adds a number of factors which a tribunal may take into account in considering a claim to legal privilege, paragraph (a) of which provides:

*In considering issues of legal impediment or privilege under Article 9.2(b), and insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, the Arbitral Tribunal may take into account:*

*(a) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice.*

34. The Claimants state that the documents in respect of which it claims privilege were made between lawyer and client *'in the context and for the purpose of obtaining or*

---

<sup>41</sup> Claimants' Second Response, [31].

*providing* legal advice.<sup>42</sup> The essential dispute between the parties is whether communications between lawyer and client relating to business purpose or rationale are protected by privilege. The Respondent submits that *'[b]usiness purposes are not commonly protected by attorney-client privilege.'*<sup>43</sup> The Claimants reply that *'[a]s long as a communication is made in the context and for the purpose of seeking or providing legal advice, as the documents at issue are, the entire communication, including any business considerations that might be imbedded in such communication, is protected by the privilege.'*<sup>44</sup>

35. The Tribunal considers that, in principle, documents which it might otherwise be necessary to produce may legitimately be privileged from production if they consist of confidential documents *'made in connection with and for the purpose of providing or obtaining legal advice.'* But, in the context of the specific category of documents sought, it is necessary to consider such a claim to privilege on a document-by-document basis. The Claimants have offered to produce an itemised schedule of the documents in respect of which privilege is asserted.<sup>45</sup> Accordingly, the Tribunal orders the Claimants to prepare a schedule of all the documents falling within the scope of the Respondent's request, taking into account the Tribunal's observations on relevance and materiality above, briefly setting forth the author and recipient, date and type of document and the basis for the privilege claimed in respect of each. If, on the basis of such an itemised schedule, the Respondent still maintains a claim to production of any of these documents, it will be for the Respondent to make further application to the Tribunal, explaining the legal basis upon which it is submitted that the documents are liable to be produced as not being privileged.

**C. Respondent's Second Request – Documents Identifying the Services Underlying the Accounts Receivable**

**(1) The Respondent's Request**

36. The last request for documents still in dispute is category (i):

---

<sup>42</sup> Claimants' Third Response, [8].

<sup>43</sup> Respondent's Second Response, [20].

<sup>44</sup> Claimants' Third Response, [7].

<sup>45</sup> Claimants' Second Response, footnote 53.

(i) *Identification of the services underlying the claim of the accounts receivable, including the description of the services, the agreement pursuant to which they were rendered, proof that they were rendered and proof of acceptance of the contracting party.*

37. The Respondent refers to several agreements entered into by Tidewater's principal Venezuelan subsidiary, Tidewater Marine Service, C.A. (**SEMARCA**): (i) two charter agreements with PDVSA Petróleo, S.A. (a State-owned company) and (ii) a charter agreement with PetroSucre, S.A.<sup>46</sup> The Claimants allege that at the time of the expropriation PDVSA Petróleo and PetroSucre owed sums of money to SEMARCA, and that these accounts receivable in question form part of the total value that was expropriated.<sup>47</sup> The Respondent seeks to establish that these accounts receivable *'are derived from a strictly commercial relationship over which ICSID has no jurisdiction.'*<sup>48</sup>

### **(2) The Claimants' Objection**

38. The Claimants object to this request principally on the basis that the documents are irrelevant at the present stage in the proceedings. The Claimants submit that the accounts receivable form part of the total value of the assets expropriated, and are therefore only relevant to quantum, not jurisdiction.<sup>49</sup> They also object to this request on the basis that it seeks information that is either publicly available or in the Respondent's possession (as a result of the expropriation),<sup>50</sup> and that the request is overbroad.<sup>51</sup>

### **(3) The Tribunal's Assessment**

39. Article 3(1) of the IBA Rules provides:

*Within the time ordered by the Arbitral Tribunal, each Party shall submit to the Arbitral Tribunal and to the other Parties all documents available to it on which it relies, including public documents and those in the public domain,*

---

<sup>46</sup> Respondent's Second Response, [12].

<sup>47</sup> Request for Arbitration, [48].

<sup>48</sup> Respondent's Second Response, [14].

<sup>49</sup> Claimants' Second Response, [39]–[40].

<sup>50</sup> *Ibid*, [41].

<sup>51</sup> Claimants' Objection, 2.

*except for any documents that have already been submitted by the another Party.*

40. As noted by the Respondent, the Claimants refer to the charter agreements set out in paragraph 37 above in its Request for Arbitration. The Tribunal acknowledges the Claimants' submissions as to the appropriate threshold for the production of documents.<sup>52</sup> Nevertheless, the Tribunal considers that a different approach is warranted in relation to specific documents expressly referred to in the Request for Arbitration, since such documents are relied upon by the Claimants themselves. Such documents are therefore necessary in order to understand the nature of the claims advanced by the Claimants. This the Tribunal must do in order to determine the extent of the jurisdiction of the Centre and the Tribunal.
41. As stated above, the ICSID Convention and Rules confer upon the Tribunal the power to order the production of documents '*if it deems it necessary.*' The Tribunal considers that it is necessary that the Claimants produce at this stage copies of the contracts identified above, namely:
- (a) The charter agreements between SEMARCA and PDVSA Petróleo;
  - (b) The charter agreement between SEMARCA and PetroSucre.

The Tribunal notes that the Claimants are only obliged to produce those documents still in their possession, custody or control.<sup>53</sup> If any of these documents were, but are no longer, in the Claimants' possession, custody or control, the Claimants must state when and how they ceased to be so.

42. However, the Tribunal considers that other documents within the Respondent's request relating to the accounts receivable of SEMARCA are not relevant to the question of jurisdiction. At the time of expropriation, any such accounts receivable would have constituted an asset belonging to SEMARCA which the Claimants allege was expropriated by the Respondent. The details of those accounts receivable are therefore not relevant to the jurisdictional phase of this dispute, and the Claimants will not be ordered to produce them.

---

<sup>52</sup> Claimants' Second Response, [7]–[11].

<sup>53</sup> Article 3(4) of the IBA Rules.



**V. Decision**

43. For the reasons given above, the Tribunal orders that:

- (1) In accordance with its undertaking, the Respondent shall conduct a new investigation into whether any documents falling within the scope of the Claimant's Request to Produce Documents concerning the preparation and drafting of Article 22 of the Investment Law exist. As soon as the investigation is completed, but no later than 13 April 2011, the Respondent must:
  - (a) Inform the Claimants and the Tribunal of the sources which it has searched for documents falling within the scope of the Claimants' request;
  - (b) Produce to the Claimants and the Tribunal copies of any documents falling within the scope of the Claimants' request that it does not object to producing; and
  - (c) Produce to the Claimants and the Tribunal a schedule of all documents falling within the scope of the Claimants' request that it objects to producing, describing the nature of the document and the nature of Respondent's objection to production.
- (2) In relation to categories (b) and (e) of the Respondent's Request to Produce Documents, the Claimants must no later than 6 April 2011:
  - (a) Produce to the Respondent and the Tribunal copies of any documents falling within the scope of categories (b) and (e) of the Respondent's request that it does not claim are privileged from disclosure; and
  - (b) Produce to the Respondent and the Tribunal a schedule of all documents falling within the scope of categories (b) and (e) of the Respondent's request that it alleges are protected by privilege, describing the nature of the document and the basis for the claim of privilege.
- (3) In relation to category (i) of the Respondent's Request to Produce Documents:

- (a) The Claimant must (to the extent that the documents are still in the Claimants' possession, custody or control) produce to the Respondent and the Tribunal, no later than 6 April 2011, copies of:
- (i) The two charter agreements between SEMARCA and PDVSA Petróleo, S.A.; and,
  - (ii) The charter agreement between SEMARCA and PetroSucre, S.A.
- (b) To the extent that these documents were, but are not now, in the Claimants' possession, custody or control, the Claimants shall state when and how they ceased to be so.
- (c) The Claimants are not required to produce any further documents pursuant to category (i) of the Respondent's Request to Produce Documents at this time.
- (4) To the extent that either Party still wishes to contest any objection to production asserted under paragraphs (1)(c) or (2)(b) above, it must file its application within three business days of receipt of the schedule there referred to, setting forth the particular documents whose production is sought and the grounds upon which it contends the document is amenable to production. Following any such application, the Party objecting to production will have three business days to reply before the Tribunal renders any further procedural order on the matter.

[signed]

---

Professor Campbell McLachlan QC

President

For and on behalf of the Tribunal

Date: March 29, 2011