ICSID Case No ARB/10/5: *Tidewater v Venezuela*, Decision on Jurisdiction

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I Introduction

On 8 February 2013, an arbitration tribunal constituted under the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*[1] delivered its decision on jurisdiction in a case filed against the Bolivarian Republic of Venezuela ('Venezuela') by eight corporate entities ('Claimants').[2] The decision focused on whether Venezuela consented to submit disputes with the Claimants to ICSID. The bases of consent invoked by the Claimants were: (a) art 22 of the Venezuelan Law on the Promotion and Protection of Investments ('*Investment Law*');[3] and (b) the bilateral investment treaty between Venezuela and Barbados ('Venezuela-Barbados BIT').[4] Venezuela argued that neither of the instruments invoked by the Claimants could constitute valid consent under the *ICSID Convention*. In considering Venezuela's objections, the tribunal addressed two main questions. The first question was whether art 22 of the *Investment Law* constituted a standing offer to arbitrate under the *ICSID Convention*. The second question was whether insertion of an entity incorporated in Barbados into the upstream ownership structure of the Claimants' investment in Venezuela, allegedly in anticipation of the dispute, constituted abuse of the Venezuela-Barbados BIT.

A fundamental question arising from this decision is the tribunal's avoidance of the 'nationality' requirement found in art 25 of the *ICSID Convention*. Throughout the decision, there was no discussion of the 'nationality' of the investor, even though nationality is an objective jurisdictional requirement that must be satisfied in order to file a claim under the *ICSID Convention*.[5] The tribunal's failure to mention the nationality of the Claimant while analysing the 'abuse of treaty' argument is particularly striking. The tribunal appears to have assumed jurisdiction under the *ICSID Convention* on the grounds that the investor was a national of Barbados, without explicitly determining the nationality of the investor, and

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1 *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October1966) ('*ICSID Convention*').

2 *Tidewater Inc, Tidewater Investment SRL, Tidewater Caribe, CA, Twenty Grand Offshore, LLC, Point Marine, LLC, Twenty Grand Marine Service, LLC, Jackson Marine, LLC, Zapata Gulf Marine Operators, LLC v The Bolivarian Republic of Venezuela* (Decision on Jurisdiction) (ICSID Arbitral Tribunal, Case No ARB/10/5, 8 February 2013) ('*Tidewater v Venezuela*'). Tidewater Inc, the parent company domiciled in Texas, US, Tidewater Investment SRL ('Tidewater Barbados'), a company incorporated in Barbados, Tidewater Caribe CA ('Tidewater Caribe'), a company incorporated in Venezuela, and five other corporate entities including Twenty Grand Offshore, LLC, Point Marine, LLC, Twenty Grand Marine Service, LLC, Jackson Marine, LLC and Zapata Gulf Marine Operators, LLC.

3 Decreto con Rango y Fuerza de Ley de Promoción y Protección de Inversiones [Decree with Status and Force of Law for the Promotion and Protection of Investments] (adopted by Venezuela by means of Decree-Law No 356 of 3 October 1999).

4 *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, 1984 UNTS 181 (entered into force 31 October 1995).

5 Christoph H Schreuer et al, *The ICSID Convention: A Commentary* (Cambridge University Press, 2nd ed, 2009) 264.

that therefore, the Venezuela-Barbados BIT constituted the consent of the parties. However, had the tribunal assessed the nationality of the investor under art 25 of the *ICSID Convention*, it would have found that the investor was a national of the United States. This being the case, the tribunal would not have had jurisdiction to settle the dispute, since the US and Venezuela have not signed an investment treaty that would constitute the basis of consent for ICSID's jurisdiction.

II Factual Background

The dispute related to the business of the Tidewater Group[6] in Venezuela, which provided marine support services in Venezuela's oil industry from 1958 until 2009.[7] Services were provided to the national oil company of Venezuela (Petroleos de Venezuela, SA or 'PDVSA') and two other national and semi-national companies through a company established in Venezuela, Tidewater Marine Service, CA ('SEMARCA').[8] SEMARCA was not included in this case as a claimant by the Tidewater Group, although it was the host state entity carrying out Tidewater Group's investment in Venezuela, a direct party to the contracts with the national Venezuelan companies and the entity whose operations were expropriated.[9] SEMARCA's shares were owned by Tidewater Caribe, which in turn was owned by Tidewater Marine International, Inc (a company incorporated in the Cayman Islands) until February 2009. This Cayman Islands entity was, in turn, owned by Tidewater, Inc, the parent company. In February 2009, the Cayman Islands entity incorporated Tidewater Barbados and transferred to it the whole shareholding in Tidewater Caribe. Tidewater Barbados itself was wholly owned by Tidewater Marine International Inc. In the words of the tribunal, 'Tidewater Barbados was inserted into the chain of ownership and became the owner, through Tidewater Caribe, of SEMARCA'.[10]

During 2008 and 2009, when the PDVSA failed to make payments to its service providers, including SEMARCA, a contractual dispute emerged between the parties. Amid lack of payment, SEMARCA continued to provide services to PDVSA. However, in order to maintain service provision, SEMARCA regularly requested funds from its parent company, Tidewater Inc, during that period.[11] In addition, the parent company was directly involved in the negotiations to settle the contractual dispute between SEMARCA and PDVSA.[12] In March 2009, PDVSA went into negotiations with its service suppliers to reduce its debt.[13] On 7 May 2009 the Venezuelan Parliament enacted the Organic Law that Reserves to the State the Assets and Services Related to Primary Activities of

6 According to the representations on its website, Tidewater Group is 'the leading provider of larger Offshore Service Vessels to the global energy industry' and Tidewater has a 'global footprint'. Tidewater, *Welcome to Tidewater* (2011) <http://www.tdw.com/>.

7 *Tidewater v Venezuela* (ICSID Arbitral Tribunal, Case No ARB/10/5, 8 February 2013) [152].

8 Ibid [153].

9 Ibid [173].

10 Ibid [4].

11 Ibid [155].

12 Ibid [163].

13 Ibid [167].

Hydrocarbons ('*Reserve Law*')[14]. SEMARCA's assets and operations in Venezuela were, thereafter, expropriated pursuant to the *Reserve Law*.[15]

III Jurisdiction of ICSID Arbitration Tribunals

The *ICSID Convention* provides a dispute settlement framework for investment disputes between foreign investors and host states. Its applicability is dependent upon satisfaction of the jurisdictional criteria incorporated in its art 25, namely that: (a) the disputing parties are ICSID Contracting States and nationals of another ICSID Contracting State; (b) the dispute arose directly out of an investment in the host state; and (c) both parties consent in writing for submission of the dispute to an arbitration tribunal under the *ICSID Convention*. These are objective jurisdictional requirements that cannot be waived by parties' agreement, and ICSID arbitration tribunals must ensure all three requirements are satisfied before moving on to the merits of the case.[16] Consent in writing need not be expressed in a single instrument. It is widely accepted that certain clauses in national investment laws or investment treaties may constitute standing offers by the state to arbitrate under the *ICSID Convention*.[17] Such an offer can be accepted by the investor by way of filing a request for arbitration with ICSID.

IV The Decision

In its Decision on Jurisdiction, the tribunal addressed two main questions that were related to the requirement of consent under art 25 of the *ICSID Convention*. The first question was whether the language of art 22 of the *Investment Law* gave rise to a standing offer to arbitrate under the *ICSID Convention*. The second question involved an abuse of treaty allegation. Venezuela argued that there was an abuse of the Venezuela-Barbados BIT as Tidewater Barbados was a corporation of convenience established only for purposes of gaining access to ICSID dispute settlement.

A *Consent under Article 22 of the Venezuelan* Investment Law

This exact same issue was previously settled by other ICSID tribunals,[18] but as there is no rule of binding precedent in ICSID arbitration, the tribunal made its own independent

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14 Ley Orgánicaque Reserva al Estado Bienes y Servicios Conexos a las Actividades Primarias de Hidrocarburos [Organic Law that Reserves to the State the Assets and Services Related to Primary Activities of Hydrocarbons] (7 May 2009); See *Tidewater v Venezuela* (ICSID Arbitral Tribunal, Case No ARB/10/5, 8 February 2013) [171].

15 *Tidewater v Venezuela* (ICSID Arbitral Tribunal, Case No ARB/10/5, 8 February 2013) [173].

16 Schreuer et al, above n 5, 144.

17 Report of the Executive Directors on the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (18 March 1965) [24]. The first ICSID decision to accept investment treaty consent was *Asian Agricultural Products Limited v Democratic Socialist Republic of Sri Lanka* (Award)(1997) 4 ICSID Rep 246; See also Jan Paulsson, 'Arbitration Without Privity', ICSID Review: (1995) 10 *Foreign Investment Law Journal* 232; Andrea Marco Steingruber, *Consent in International Arbitration* (Oxford University Press, 2012) 202.

18 *Mobil Corporation Venezuela Holdings BV, Mobil Cerro Negro Holding Ltd, Mobil Venezolana de Petroleos Holdings Inc, Mobil Cerro Negro Ltd, and Mobil Venezolana de Petroleos Inc v Bolivarian Republic of Venezuela* (Decision on Jurisdiction) (ICSID Arbitral Tribunal,Case No ARB/07/27,10 June 2010) ('*Mobil v Venezuela*'); *Brandes Investment Partners, LP v Bolivarian Republic of Venezuela* (Final Award) (ICSID Arbitral Tribunal, Case No ARB/08/3,02 August 2011) ('*Brandes v Venezuela*'); *Cemex Caracas Investments BV and Cemex Caracas II Investments BV v Bolivarian Republic of Venezuela* (Decision on Jurisdiction) (ICSID Arbitral Tribunal, Case No ARB/08/15, 30 December 2010) ('*Cemex v Venezuela*').

assessment of the provision.[19] The tribunal first established the legal principles applicable to the interpretation of art 22 of the *Investment Law*. The *Investment Law* was a domestic piece of legislation that had effects at the international level, and therefore, both national and international law had a bearing on the interpretation of art 22.[20] The tribunal limited the application of national law to the existence and validity of the instrument rather than to ascertaining the meaning of it.[21] In this respect, the tribunal held that whether art 22 of the *Investment Law* produces the international legal effects specified in art 25 of the *ICSID Convention* was a matter to be interpreted pursuant to international law.[22]

The tribunal then assessed whether art 22 was sufficiently unambiguous to constitute a standing offer for ICSID arbitration. The tribunal held that the wording of art 22, when interpreted in good faith and in the light of its context, was not clear enough to constitute a standing offer.[23] This outcome is consistent with the *Brandes v Venezuela*, *Mobil v Venezuela* and *Cemex v Venezuela* decisions.[24]

B *Consent under the Barbados-Venezuela BIT*

Following this dismissal of art 22 of the *Investment Law* as a source of consent, the tribunal moved on to analyse the Venezuela-Barbados BIT's applicability as an instrument of consent. Only Tidewater Barbados and Tidewater Caribe were treaty claimants; thus, the six other entities were excluded from the analysis, as their sole basis of consent was art 22. The question before the tribunal was whether the February 2009 restructuring that led to the inclusion of Tidewater Barbados within the ownership structure constituted an abuse of the Venezuela-Barbados BIT. Venezuela argued that the restructuring was done after the dispute had already arisen between the parties, or alternatively in anticipation of the dispute, for the sole purpose of gaining access to ICSID.[25] In support of its jurisdictional challenge, Venezuela stated that the contractual dispute between SEMARCA and PDVSA was linked to the expropriation of SEMARCA's business. The Claimants stated that the restructuring was made in order to minimise the risks of their operations in Venezuela, but this was neither done after the dispute had arisen nor in anticipation of the dispute. According to the Claimants, the dispute arising out of expropriation of the investment was not the continuation of the contractual dispute and they were simply using their legitimate right to restructure their investment to minimise the risks and costs of the investment.

The tribunal held that the contractual dispute was separate from the dispute arising out of expropriation of SEMARCA's business. The tribunal agreed with the Claimant's view and held that the claims of Tidewater Barbados that were based on causes of action arising

19 *Tidewater v Venezuela* (ICSID Arbitral Tribunal, Case No ARB/10/5, 8 February 2013) [78].

20 Ibid [81].

21 Ibid [101].

22 Ibid [106]; The approach of the tribunal was different from all three tribunals that have decided on the question previously. The *Brandes v Venezuela* tribunal held that art 22 must be first interpreted under the national law, but interpretation principles found in international law shall be taken into account to reach a final conclusion. The *Cemex v Venezuela* and the *Mobil v Venezuela* tribunals took the approach that art 22 constituted a unilateral act of the state and shall be interpreted under international law only.

23 Ibid [141].

24 *Mobil v Venezuela* (ICSID Arbitral Tribunal,Case No ARB/07/27,10 June 2010) [140]; *Cemex v Venezuela* (ICSID Arbitral Tribunal, Case No ARB/08/15, 30 December 2010) [138]; *Brandes v Venezuela* (ICSID Arbitral Tribunal, Case No ARB/08/3, 2 August 2011) [118].

25 *Tidewater v Venezuela* (ICSID Arbitral Tribunal, Case No ARB/10/5, 8 February 2013) [144].

after the restructuring fell under the jurisdiction of ICSID, and that there was no abuse of treaty.[26] In this respect, the tribunal underscored the distinction between corporate structuring in the existence or in anticipation of a dispute and corporate structuring to take advantage of the best available legal framework for future disputes not yet anticipated.[27] According to the tribunal, the latter was a completely legitimate exercise. On this premise, it was held that, since the expropriation of SEMARCA's business could not have been reasonably contemplated at the time of restructuring, there was no treaty abuse by the Claimants.[28]

The distinction made by the tribunal based on the timing of the restructuring corresponds with many of the previous ICSID decisions on the same issue.[29] In those cases, tribunals have held that, unless the company is a mere corporate shell created solely to gain access to ICSID after the dispute has already arisen or while its emergence is foreseeable, the corporate form could not be set aside. If the corporate restructuring was done at an earlier stage, there can be no abuse of treaty. In other cases, even though states alleged abuse of corporate form in order to take advantage of a specific investment treaty to gain access to ICSID, the tribunals did not find it necessary to conduct an abuse of treaty analysis, when the wording of the treaty was clear as to its beneficiaries.[30]

V Conclusion

An important question stemming from this decision is the tribunal's disregard of the 'nationality' angle of jurisdiction under the *ICSID Convention*. Tidewater Caribe and SEMARCA were entities established in Venezuela. As corporate investors, they fall under the second half of art 25(2)(b) of the *ICSID Convention*, which provides that investors that carry out their investments through host state corporations shall be treated as a national of their foreign controllers' state of nationality. The tribunal did not analyse the controllers of the Venezuelan entities with respect to art 25(2)(b). The tribunal only held in passing that Tidewater Barbados was the ultimate owner of SEMARCA.[31] This is not fully accurate, as Tidewater Barbados itself is owned by a Caymanian entity, which in turn is owned by Tidewater Inc. Further, direct ownership and actual control of a company can be at the hands of different entities. The representations of the Claimant indicate that actual control over SEMARCA's operations was exercised by Tidewater Inc, the parent company, which also owned Tidewater Barbados.[32] It was Tidewater, Inc, the US company, which was directly involved in the negotiations with the Venezuelan authorities in the wake of the

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26 Ibid [198].

27 Ibid [183]–[184].

28 Ibid [150]–[195].

29 *Autopista Concesionada de Venezuela, CA v Bolivarian Republic of Venezuela* (Decision on Jurisdiction) 6 ICSID Rep 419 (2004); *Tokios Tokelės v Ukraine* (Jurisdiction) 20 ICSID Rev—FILJ 205 (2005); *Aguas del Tunari SA v Republic of Bolivia* (Decision on Respondent's Objections to Jurisdiction of October 21, 2005) 20 ICSID Rev—FILJ 450 (2005); *Phoenix Action Ltd v Czech Republic* (Award) (ICSID Arbitral Tribunal, Case No ARB/06/5, 15 April 2009); *Mobil v Venezuela* (ICSID Arbitral Tribunal,Case No ARB/07/27,10 June 2010).

30 *The Rompetrol Group NV v Romania* (Decision on Jurisdiction and Admissibility) (ICSID Arbitral Tribunal, Case No ARB/06/3, 18 April 2008); *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary* (Award) (ICSID Arbitral Tribunal, Case No ARB/03/16, 02 October 2006).

31 *Tidewater v Venezuela* (ICSID Arbitral Tribunal, Case No ARB/10/5, 8 February 2013) [166].

32 See ibid [68]–[70], referring to statement of the CEO and Chairman of the Board of Tidewater Inc on 14 May 2009 stating that the group did not want to abandon the Venezuelan market, and the Claimants' argument that 'the restructuring was part of a unified corporate strategy'.

contractual dispute[33] and it directly funded the operations of SEMARCA during that period.[34] In spite of all these indicators of actual control, the parent company's attempt to distance itself from the investment succeeded. This is in contrast with the decision in *Banro American Resources, Inc and Société Aurifère du Kivu et du Maniema SARL v Democratic Republic of the Congo*,[35] where the tribunal placed its focus on the actual control of the investment, rather than the legal structures involved.[36]

In spite of the strong indications of control by the US parent company, the tribunal seems to have placed control in the hands of the Barbados entity, which appears merely to hold, directly and indirectly, shares of the Venezuelan entities. If the tribunal had made a nationality assessment under art 25 of the *ICSID Convention*, it could have avoided the abuse of treaty analysis for purposes of establishing ICSID's jurisdiction. Abuse of treaty analyses require identification of the alleged abuser's knowledge and intent at the time of the alleged abuse, which, in most cases, cannot be definitively proven. An alternative route for tribunals to minimise abuse of treaty assessments within the ICSID mechanism would be to take the *ICSID Convention*'s 'nationality' requirement into more careful consideration.

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33 *Tidewater v Venezuela* (ICSID Arbitral Tribunal, Case No ARB/10/5, 8 February 2013) [163]. On February 2009, Mr Gerard Kehoe, Senior Vice President of Tidewater Inc, wrote to PDVSA directly regarding the payment of the arrears.

34 *Tidewater v Venezuela* (ICSID Arbitral Tribunal, Case No ARB/10/5, 8 February 2013) [155].

35 *Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema SARL v Democratic Republic of the Congo* (Award) (2002) 17 ICSID Rev.—FILJ 382 (excerpts).

36 In this context, the Tribunal provided as follows:
'the veil' of the group's structure would be 'pierced' to reveal the parent company as the actual Claimant in this proceeding. This approach, which would have the advantage of allowing the financial reality to prevail over legal structures, would also be consistent with the press releases published on Banro Resource's website, which describe the measures adopted by the Congolese Government as targeting Banro Resource (August 6, 1998 release), the action taken with respect to the Congolese Government as being taken by managers of Banro Resource (release of October 29, 1998), and the arbitration proceeding instituted by Banro American as being instituted by Banro Resource 'through its wholly-owned subsidiary of 100% Banro American Resources, Inc.' (releases of March 16, May 12, and September 29, 1999): *Banro American Resources, Inc and Société Aurifère du Kivu et du Maniema SARL v Democratic Republic of the Congo* (2002) 17 ICSID Rev—FILJ 382 [7].