ICSID Review, Vol. 31, No. 1 (2016), pp. 138–146
doi:10.1093/icsidreview/siv045 Published Advance Access January 7, 2016

CASE COMMENT

Tidewater v Venezuela[1]

The Award of 13 March 2015

Christian Tomuschat[2]

I. INTRODUCTION

The Award in *Tidewater Investment SRL & Tidewater Caribe CA v Bolivarian Republic of Venezuela* of 13 March 2015 could almost be called a routine case of investment protection. But it had to tackle one major issue where the legal position had not yet reached uncontested clarity. At stake was the final stage of a process of complete nationalization of the oil industry, including the related service industries, initiated by Venezuela by virtue of a law of 7 May 2009 (Reserve Law).[3] Under this law, Venezuela brought the entire oil industry under its control, going far beyond the drilling activities that had already been nationalized many years earlier in 1975. It was also prepared to pay compensation. But the Claimants, who had provided maritime support services to the State-owned Venezuelan oil companies, were dissatisfied with the amount of compensation offered to them on the basis of the alleged book value of their assets. Eventually, the central issue turned out to be the question of whether, because of that divergence of views concerning the appropriate amount of indemnity which had prevented prompt payment, the expropriation was lawful or unlawful and whether, accordingly, the compensation had to be increased by lost profits that had not been taken into account in the valuation of the properties taken.

II. THE FACTUAL BACKGROUND—EXPROPRIATION

The US Tidewater Group of companies had a complex structure. The parent undertaking, Tidewater Inc. was a Texas (United States) company. When the Reserve Law came into operation, Tidewater Inc. owned the first Claimant, Tidewater Investment SRL, which on its part owned the second Claimant, Tidewater Caribe, CA, a company incorporated in Venezuela. The operative business had been performed by SEMARCA (Tidewater Marine Service, CA), a subsidiary undertaking owned by Tidewater Caribe, CA, also constituted under the laws of Venezuela. Tidewater Investment SRL was incorporated in Barbados

[1] *Tidewater Investment SRL & Tidewater Caribe CA v Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/5, Award (13 March 2015).

[2] Humboldt University of Berlin, Faculty of Law, Berlin, Germany. Email: Chris.Tomuschat@gmx.de.

[3] *Ley Orgánica que 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).

and enjoyed the protection of the bilateral investment treaty (BIT) between Barbados and Venezuela of 15 July 1994.[4] Pursuant to a corporate reorganization, the ownership of Tidewater Caribe had been transferred to Tidewater SRL shortly before the Venezuelan nationalization program was carried out (9 March 2009).

The expropriation process went rapidly forward in three steps. First of all, on 7 May 2009 the Reserve Law was enacted. The next day, on 8 May 2009, Ministerial Resolution 51 (8 May 2009) specified further details of the new economic configuration by establishing a list of the affected undertakings, which included SEMARCA. The practical implementation followed on 9 May and 12 July 2015 when the assets and business operations of SEMARCA were physically seized. SEMARCA's managers were forced out of the office buildings and prohibited from re-entering them while the non-managerial staff was instructed henceforth to work for the relevant Venezuelan State-owned company. The Venezuelan Government did not expropriate SEMARCA's shares by a formal act.[5] Although it sought to call into doubt the legal characterization of its measures as an expropriation, there could be no doubt that in fact an expropriation had taken place for which Venezuela owed compensation to Tidewater. Tidewater had been completely dispossessed of the enjoyment of its assets. Only a naked legal title remained that had lost any economic significance. In any event, the measures taken were equivalent to expropriation. The Tribunal had no great difficulties to arrive at this conclusion, in conformity with the general view as it prevails in international jurisprudence and legal doctrine.[6] Expropriation is not a formalistic concept. Its criteria are met if the owner has de facto been deprived of the actual benefits of its assets. In addition, the Reserve Law explicitly referred to the word 'expropriation' in one of its key provisions.

However, it remained to be determined whether a true taking of assets had taken place over and beyond the headquarters of SEMARCA and its vessels of which the Venezuelan State had taken physical control. SEMARCA had cooperated with the Venezuelan oil companies on the basis of short-term contracts which were regularly renewed, without having any entitlement to such renewal. In dealing with this the unique nature of Tidewater's business operations, the Tribunal followed a broad interpretation of property and assets recognizable as investment by stating that any right which can be the object of a commercial transaction may be taken into account in this respect.[7] It emphasized the fact that Tidewater's investment in Venezuela had begun many years before its acquisition of SEMARCA and that this investment was open-ended as to time. An investment may include goodwill and know-how as well as other tangible and intangible assets, including contractual rights. Given this complex network of assets supporting its commercial activity, Tidewater constituted a company in good standing. Even the domestic legislation of Venezuela recognized such a complex situation of assets as an investment.[8]

[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, entered into force 31 October 1995) (Barbados–Venezuela BIT).

[5] See *Tidewater Investment SRL & Tidewater Caribe CA v Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/5, Counter-Memorial by the Respondent (25 October 2013) referred to in the Award (n 1) paras 58, 62.

[6] ibid para 121.

[7] ibid para 116.

[8] ibid para 119.

III. ISSUES OF JURISDICTION

Although the investments of Tidewater SRL and Tidewater Caribe were both placed within the scope *ratione personae* and *ratione materiae* of the Barbados BIT, the Respondent challenged the jurisdiction of the Tribunal. By a decision of 8 February 2013, the Tribunal rejected this challenge. On the one hand, it did not follow the Claimants who had argued that Article 22 of the Venezuelan Investment Law[9] was to be interpreted as 'standing consent' to the jurisdiction of the International Centre for Settlement of Investment Disputes (ICSID) system of arbitration. In fact, the provision referred explicitly to the 'terms' of jurisdiction laid down regarding the case at hand in the relevant 'treaty or agreement', which in the case of ICSID require consent to be expressed by an additional act.[10] On the other hand, the Tribunal disagreed with the Respondent who had argued that to transfer ownership of Tidewater Caribe to Tidewater SRL in March 2009 was an abusive manoeuver, destined to withdraw Tidewater Caribe from the reach of Venezuelan legislation. The Tribunal found that the dispute about the expropriation had not yet arisen at the date of reorganization of Tidewater's structures, two months before the enactment of the Reserve Law. Neither had there been any anticipatory warnings indicating that a general reform of the oil industry through governmental intervention was imminent. The Tribunal concluded that it was perfectly legitimate and lawful for an undertaking to organize itself in such a way that risks to its economic interests can be averted to the extent possible: 'it is a perfectly legitimate goal and no abuse of an investment protection treaty regime, for an investor to protect itself from the general risk of future disputes with a host state'.[11] The action brought by the Claimants was hence deemed to be admissible to the extent that protection under Article 8 of the Barbados BIT was requested.

IV. LAWFUL OR UNLAWFUL EXPROPRIATION?

The only real issue that remained to be addressed concerned the characterization of the taking of the Claimants' assets as a lawful or unlawful measure. According to the rule enshrined in Article 5(1) of the BIT, the amount of compensation due for a lawful expropriation corresponds to the market value of the assets taken. In the case of unlawful expropriation, by contrast, the general rules of State responsibility[12] apply according to which a wrong-doing State has to wipe out all the consequences of its wrong. Accordingly, it was incumbent on the Tribunal first to elucidate whether the steps taken by Venezuela amounted to a lawful or an unlawful expropriation.

In principle, by virtue of their sovereignty, States are free to expropriate property located in their territory provided that they meet certain conditions laid down in international law, either by treaty or in general rules. It is not the purpose of treaties for the protection of foreign property strictly to prohibit expropriation.

[9] Decree with Status and Force of Law for the Promotion and Protection of Investments (3 October 1999) reproduced in paras 108–9 of the Decision on Jurisdiction of 8 February 2013, *Tidewater v Venezuela*, ICSID Case No ARB/10/5.

[10] Convention on the Settlement of Investment Disputes between States and National of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) (ICSID Convention) art 25(1).

[11] *Tidewater v Venezuela*, Award (n 1) para 184.

[12] Now codified in the ILC Rules on Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/83 (2001) (ILC Articles on State Responsibility).

Rather, expropriation is made subject to specific criteria suited to ensure that expropriation cannot be effected arbitrarily, grossly to the disadvantage of the foreign investor. Thus, the relevant BIT between Barbados and Venezuela provides:

> Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as 'expropriation') in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party on a nondiscriminatory basis and against prompt, adequate and effective compensation.[13]

This is a commonly used clause, to be found in many investment protection treaties. It reflects a general understanding of standards for a lawful expropriation.[14]

The Barbados–Venezuela BIT describes also with great care the required level of compensatory payments as well as their modalities. Article 5(1), second sentence, states:

> Such compensation shall amount to the market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial rate until the date of payment, shall be made without delay, be effectively realizable and be freely transferable.

Then again, the Venezuelan Reserve Law introduced a rather harsh method of valuation of assets taken by providing that the just price for any expropriation shall be limited to the book value of the assets, adding that (Article 6): '[I]n no event there shall be taken into account lost profits or indirect damages.' Understandably, the Claimants argued that using the 'book value' did not correspond to the market value prescribed by the BIT. By contrast, Venezuela contended that its method of calculation was fully in conformity with the BIT. The dispute, which had its origin in 2009, could only be settled by the Award under review of 13 March 2015, more than five years later. The Tribunal held that indeed the Venezuelan offer, derived from the book value, did not live up to the standard of the market value determined by the BIT. For the valuation of the assets taken, it applied instead the discounted cash flow method since it recognized SEMARCA as a going concern.

A. *The Different Requirements of Lawful Expropriation*

Did Tidewater's victory concerning the appropriate yardstick of compensation mean that the expropriation was unlawful from the very outset since compensation according to the fair market value was one of the conditions explicitly foreseen? Many grounds come together suggesting that the three conditions have a different nature and cannot be applied in the same manner.

The first condition, namely that the planned expropriation must be performed 'for a public purpose related to the internal needs' of the State concerned, can be generally ascertained at the time of the occurrence of the expropriating measure.

[13] Barbados–Venezuela BIT (n 4) art 5(1).
[14] See, in particular, the World Bank Guidelines on the Treatment of Direct Foreign Investment (1992) 31 ILM 1379 s IV.1.

Apart from exceptional instances of emergency, a measure as serious as expropriation must be diligently prepared and cannot be effected *ad hoc*, on the spur of the moment. Obviously, any government must have a large margin of appreciation in determining whether, according to its own judgment, an internal need exists which may be satisfied by the taking of foreign property.[15] The Tribunal had no doubt that the completion of the nationalization of the oil industry was intended to further the general interest of the Venezuelan nation, and the Claimants did not object.[16] However, should in a given case no public purpose be identifiable, the conclusion seems to be inescapable that a planned expropriation is unlawful and must entail consequences under the general rules of State responsibility as codified by the International Law Commission (ILC) in its draft of 2001.[17] It is axiomatic that the violation of international standards, laid down in binding instruments, gives rise to responsibility with the consequence that the entire damage must be repaired. Bearing this axiomatic standard in mind, the thousands of BITs with which we are confronted today were concluded by their respective contracting parties. The lack of a public interest affects expropriatory measures from the very first moment. Under such circumstances, the compensation does not remain confined to the value of the assets taken, but will additionally include other harmful consequences, in particular lost revenues (*lucrum cessans*). The duty then is to make good all the damage suffered by the injured person as a consequence of the relevant unlawful act or action.

The same is true with regard to the second condition of lawful taking of property. Non-discrimination is a basic requirement of legitimacy. When property is taken in a discriminatory fashion, it appears that the action does not serve the public interest. This is not the place to go into the subtle differentiations which need to be made in this connection, in particular regarding the distinction between nationals and aliens. In any event, however, if expropriation measures are taken arbitrarily, the unlawfulness affects those measures from the very first moment. No additional assessment is necessary. Such measures are unlawful per se. In the instant case, the facts as found by the Tribunal did not provide any hint as to differential treatment lacking any justification.[18] Although the Claimants invoked discrimination, their contentions were not borne out by the evidence before the Tribunal.

Even in pure logic it is much more difficult to come to an unchallengeable conclusion in instances where the victim of an expropriation measure complains about the insufficient amount of the compensation offered to it. In fact, although prompt, adequate and effective compensation is listed as one of the conditions of lawful expropriation, it stands to reason that the appropriate amount can only be calculated after an expropriation has taken place in fact. The duty to provide compensation emerges as a consequence of the action having been performed. Neither general rules of international law nor any of the BITs requires that compensation must be paid beforehand, as is sometimes provided for in national

[15] See *James and Others v the United Kingdom*, European Court of Human Rights (ECtHR) App 8793/79, Judgment (21 February 1986) para 46; *Pressos Compania Naviera SA and Others v Belgium*, ECtHR, App 17849/91, Judgment (3 July 1997) para 37; *The Former King of Greece and Others v Greece*, ECtHR, App 25701/94, Judgment (23 November 2000) para 87.

[16] *Tidewater v Venezuela*, Award (n 1) para 124.

[17] See (n 12).

[18] *Tidewater v Venezuela*, Award (n 1) para 128.

legislation.[19] However, if public authorities just dispossess the owner without even promising any kind of indemnity, the limits of the concept of expropriation within the community of civilized and law-minded nations is simply exceeded. On balance, some compromise must be found.

B. *International Jurisprudence*

In order to resolve the controversial issue of lawfulness or unlawfulness, the Tribunal turned to prominent international precedents. It was the famous *Chorzów* Judgment of the Permanent Court of International Justice (PCIJ) of 13 September 1928 which observed that even cases where full compensation had not been provided could remain within the scope of the concept of expropriation and were not automatically to be classified as unlawful actions generating a duty to make reparation for any ensuing prejudices.[20] This is indeed a useful distinction supported by many good reasons. Only in very rare cases do the two sides, the owner and the expropriating authorities, readily agree on the price to be paid for the expropriated object. Without attempting to evade its responsibilities the governmental authorities may propose and defend a price which they deem to be adequate and fully making good the loss suffered by the owner. Disputes about the proper amount of compensation are legitimate and should not be generally placed under the threat of a fundamental change of perspective—from expropriation to an internationally wrongful act. In order for a flexible settlement to be possible, the affected owner must be given an opportunity to negotiate or be provided with a legal remedy that has some prospect of success. If the authorities simply deny that they have taken a measure requiring compensation to be paid,[21] or if they offer only a ridiculous price far below the real value of the object concerned,[22] the owner is fully entitled to claim reparation under the auspices of State responsibility.[23] In such instances, the foundations of mutual trust are destroyed. The owner knows that he has to face up to an uphill struggle where his financial interests are exposed to a deadly threat. Expropriation, on the other hand, is an eventuality that has to be reckoned with from the very beginning as an element of the legal order of the receiving State. If, by contrast, the scope of expropriation is intentionally exceeded, the full consequences of international responsibility seem to become ineluctable.[24]

In judicial practice, the path followed by *Tidewater v Venezuela* had already been delineated by many decisions of investment tribunals. One may speak of complete agreement between the different tribunals that had to address the issue. One

[19] No such requirement is explicitly laid down in Article 115 of the Constitution of Venezuela.

[20] *Case Concerning the Factory at Chorzów (Germany v Poland)*, PCIJ 1928 Series A No 17, Judgment (13 September 1928) 46.

[21] See *Wena Hotels Limited v Arab Republic of Egypt*, ICSID Case No ARB/98/4, Award (8 December 2000), (2002) 41 ILM 896, para 58; *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary*, ICSID Case No ARB/03/16, Award (2 October 2006) para 444; *Burlington Resources, Inc v Republic of Ecuador*, ICSID Case No ARB/08/5, Decision on Liability (14 December 2012) paras 543–5.

[22] See *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Republic of Kazakhstan*, ICSID Case No ARB/05/16, Award (29 July 2008).

[23] However, according to recent jurisprudence, the amount of compensation should not vary depending on whether the expropriation was lawful or unlawful, see *Rumeli v Kazakhstan* (n 22) para 793.

[24] The situation described in the *Yukos* case exemplifies complete disregard for any legal rule: see *Hulley Enterprises Limited (Cyprus) v Russian Federation*, PCA Case No AA 226, Award (18 July 2014) paras 1580–5.

should mention in the first place the case of *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt* where the timespan between the relevant taking and the final conclusion of the dispute between the parties through an award extended to 14 years. This was not viewed as a circumstance rendering the expropriation unlawful.[25] The Tribunal in the instant case has referred to a number of cases where likewise, explicitly or implicitly, the tribunals held that a dispute about the relevant amount of compensation, prompted by an offer deemed insufficient by the Claimant, was not considered as a factor changing the nature of an expropriation from lawfulness to unlawfulness.[26] None of these earlier judgments, however, proceeded to an in-depth analysis of the issue to be determined.[27]

The Tribunal itself did not present a deep new analysis of the controversy. In consonance with the predominant opinion, it embraced a solution of pragmatic fairness, holding that if plausible divergences about the amount due to the investor with the attending delay of payment lead mechanically to the application of the rules of State responsibility, the specific rules of the BITs would generally be displaced. The entire regime of compensation for expropriation would then lose its *raison d'être*.[28] Only in extreme cases of denial of compensation should State responsibility become the applicable yardstick. As long as, like in the instant case, the decision on the amount due was entrusted to a judicial body, the confines of lawful expropriation were not exceeded. Lastly, the Tribunal found that the determination made by Venezuela that only the book value was to be taken into account for the purposes of compensation did not necessarily conflict with the market value as prescribed by the BIT. The BIT refrained from enjoining a specific method for the calculation of compensation.[29]

As a whole, the jurisprudence of the European Court of Human Rights (ECtHR) is richer. In the case of *Papamichalopoulos v Greece*,[30] the Court had to deal with a case of dispossession where the applicants were deprived for no less than 28 years of the enjoyment of a large area without the Greek Government making any efforts to remedy the situation. It came to the conclusion that under such circumstances, where the State had totally ignored the legal regime of expropriation, the dispossession had to be characterized as an unlawful action. Nonetheless, the Court maintained the distinction introduced by the Permanent Court of Arbitration in *Chorzów* according to which an expropriation can in principle be lawful even if no fair compensation has been paid. The *Papamichalopoulos* case, obviously, went beyond anything that could, albeit in a remote way, resemble expropriation according to law. Consequently, for the taking of assets to be lawful, there must at least be some connection with the concept of expropriation as regulated under the relevant domestic legislation.

[25] *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt*, ICSID Case No ARB/84/3, Award (20 May 1992).

[26] *Antoine Goetz and others v Republic of Burundi*, ICSID Case No ARB/95/3, Award (10 February 1999) para 130; *Compañia del Desarrollo de Santa Elena SA v Republic of Costa Rica*, ICSID Case No ARB/96/1, Award (17 February 2000) paras 68 and 71 (here the relevant time span extended to 21 years); *Mondev International Limited v United States of America*, ICSID Case No ARB(AF)99/2, Award (11 October 2002) para 71.

[27] But see *Amoco International Finance Corporation v Islamic Republic of Iran*, Iran–US Claims Tribunal, Partial Award (14 July 1987), (1988) 27 ILM 1314, paras 189–206.

[28] *Tidewater v Venezuela*, Award (n 1) para 138.

[29] ibid para 145.

[30] *Papamichalopoulos v Greece*, ECtHR, App 14556/89, Judgment (31 October 1995).

In subsequent cases, the ECtHR has maintained its position that the lack of prompt and fair compensation was not to be regarded as the determinative criterion of lawfulness or unlawfulness. In *Guiso-Gallisay v Italy*, it did point out that certain methods of provisional expropriation employed in Italy might 'render futile any hope of compensation' but relied on other features of its constant jurisprudence for guidance.[31] In fact, the ECtHR requires any governmental interference to be based on legal rules that are sufficiently accessible, precise and foreseeable.[32] The final Judgment in the same case reiterated that lawful expropriation could very well take place even in the absence of compensation at the initial stage.[33] However, in the case under review the measures taken had affected the enjoyment of the properties concerned in such a substantial way that there was no escaping declaring them to be unlawful under the mentioned standards of the rule of law. Most recently, in the case of *Vistiņš and Perepjolkins v Latvia* once again the basic premise was confirmed that a simple dispute about the adequate size of the compensation due does not taint the expropriation process with unlawfulness. Full pecuniary reparation for any harm sustained by the taking of property could only be claimed if the expropriation was unlawful *per se* for breaching basic standards of the rule of law.[34]

In practice, the difference between the two methods of valuation may not be considerable even when the line of demarcation is maintained as a matter of principle. First, interest owed for the time between the taking of the assets concerned and the final payment will lead to a certain equalization, particularly so if compound interested is applied. Reference may also be made to the recent tendency to shift the relevant date from the day of dispossession to the day of the delivery of the award if grave defects have marred the expropriation process.[35] Lastly, however, the modern method of basing the valuation process on the discounted cash flow method in the case of a going concern makes the separate accounting of lost profits to some degree superfluous and even contradictory inasmuch as the future business prospects are considered as a key element of determining the appropriate market value.[36] In fact, in the instant case the discounted cash flow analysis permitted the Tribunal take into account prospective profits.[37] Accordingly, the distinction between lawful and unlawful expropriation seems indeed partially to lose the key relevance it seemed to have in the past, in any event where a going concern is in issue.

In the legal literature, broad agreement exists as to the maxim that failure immediately to pay full compensation does not render an expropriation unlawful with all the attendant consequences. The opinion expressed by Sornarajah in the

[31] *Guiso-Gallisay v Italy*, ECtHR, App 58858/00, Judgment (8 December 2005) paras 81, 90.
[32] See also *Carbonara and Ventura v Italy*, ECtHR, App 24638/94, Judgment (30 May 2000) paras 64, 67.
[33] *Guiso-Gallisay v Italy*, ECtHR, App 58858, Judgment (22 December 2009) para 91.
[34] *Vistiņš and Perepjolkins v Latvia*, ECtHR, App 71243/01, Judgment (25 March 2014) paras 33, 34.
[35] See *ADC v Hungary* (n 21) paras 496–9; *Siemens AG v Argentine Republic*, ICSID Case No ARB/02/08, Award (6 February 2007) para 352; *Reinhard Hans Unglaube v Republic of Costa Rica*, ICSID Case No ARB/09/20, Award (16 May 2012) paras 306–7.
[36] See Matthias Herdegen, *Principles of International Economic Law* (OUP 2013) 368; Thomas M Wälde and Borzu Sabahi, 'Compensation, Damages, and Valuation', in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 1049, 1066–7.
[37] *Tidewater v Venezuela*, Award (n 1) para 165.

second edition of his book on investment protection that non-payment affects legality[38] has remained an isolated voice, and he does not elaborate any further on that proposition. One may take it that the statement by Irmgard Marboe to the effect that a dispute about the appropriate amount of compensation does not lead to the unlawfulness of an act of expropriation reflects a position which is now generally accepted.[39]

V. CONCLUSION

One may take it that *Tidewater v Venezuela* has definitely brought to its end the controversy as to whether, in principle, belated payment of compensation entails unlawfulness of the relevant act of expropriation.[40] On the other hand, the tendency to equate lawful and unlawful expropriation as to the due amount of compensation may progressively lead to a uniform regime, determined by the clauses in the relevant BITs. Obviously, this consensus does not prevent delicate instances of balancing in instances where additionally grave deficiencies of the expropriation process are found to have occurred.

[38] M Sornarajah, *The International Law of Foreign Investment* (3rd edn, CUP 2010) 406.

[39] *Die Berechnung von Entschädigung und Schadensersatz in der internationalen Rechtsprechung* (Lang, 2009) 81. In the same vein, see Jeswald W Salacuse, *The Law of Investment Treaties* (OUP 2010) 328.

[40] *Tidewater v Venezuela*, Award (n 1) para 141.From the earlier literature see, in particular, Derek William Bowett, 'State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach', (1988) 59 Brit YB Intl L 49, 69.