Allan R. Brewer-Carías

INTERNATIONAL INVESTMENT ARBITRATION AND VENEZUELAN LAW

LEGAL OPINIONS ON STATE'S CONSENT FOR ARBITRATION, PUBLIC INTEREST CONTRACTS, MINING CONCESSIONS, ADMINISTRATIVE SILENCE, REVOCATION OF ADMINISTRATIVE ACTS, REVERSION OF ASSETS IN CONCESSIONS AND EXPROPRIATION PROCEEDING

Cuadernos de la Biblioteca *Allan Brewer-Carías*

Instituto de Investigaciones Jurídicas de la
Universidad Católica Andrés Bello, Nº 19

editorial jurídica venezolana

2023

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INTERNATIONAL INVESTMENT ARBITRATION AND VENEZUELAN LAW

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Nº 19

editorial jurídica venezolana

Caracas/2023

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ISBN: 979-8-88895-768-4

Editado por:
Editorial Jurídica Venezolana
Avda. Francisco Solano López, Torre Oasis, P.B., Local 4,
Sabana Grande, – Caracas, 1015, Venezuela
Teléfono (58) 212-762.38.42. Fax. (58) 212-763.5239
http://www.editorialjuridicavenezolana.com.ve

Impreso por: Lightning Source, an INGRAM Content company
para Editorial Jurídica Venezolana International Inc.
Panamá, República de Panamá.
Email: ejvinternational@gmail.com

Composición y montaje
Letra Times New Roman, 12
Interlineado sencillo. Mancha 13 x 19.5 cm.

TABLE OF CONTENTS

PART TWO

ON THE PRINCIPLES OF ADMINISTRATIVE PROCEDURE, THE EFFECTS OF ADMINISTRATIVE SILENCE AND THE REVOCATION OF ADMINISTRATIVE ACTS IN THE FIELD OF MINING ACTIVITIES

AUTHOR'S NOTE

This book is a recollection of the Legal Opinions I gave before International Investment Arbitration Tribunals of the International Centre for Settlement oOf Investment Disputes (ICSID), on matter of Venezuelan Public Law, specifically related to the State's Consent for Arbitration through the 1999 Investment Protection and Promotion Law; the notion of Public Interest Contracts and its authorization by the National Assembly, the Mining Concessions regime and in particular, the Reversion of Assets to the State at the termination of Concessions; the effects of Administrative Silence in Administrative pprocedures; the Revocation of Administrative Acts, and the Expropriation Proceeding.

These Legal Opinions were given between 2009 and 2016, in the following cases: **ICSID Case No. ARB/07/27**: ***Mobil Corporation Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., Mobil Venezolana de Petróleos, Inc***. (Claimants) ***v.*** *The Bolivarian Republic of Venezuela* (Respondent) 10 April 2009; **ICSID Case No. ARB/08/3:** ***Brandes Investment Partners, LP*** (Claimant**)** ***v***. ***The Bolivarian Republic of Venezuela*** (Respondent**)** 26 June 2009; **ICSID Case No. ARB/07/30***:* ***ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V., ConocoPhillips Gulf of Paria B.V., ConocoPhillips Company*** *(Claimants)* ***v. The Bolivarian Republic of Venezuela*** *(Respondent)* 29 October 2009; **ICSID Case No. ARB/10/14:** ***OPIC Karimun Corporation*** (**Claimant**) ***V***. ***Bolivarian Republic of Venezuela*** (**Respondent)** (First Opinion) 29 October 2011**,** (Second Opinion) 26 April 2012; **ICSID Case No. ARB(AF)/09/1:** ***Gold Reserve Inc***. (**Claimant)** **v.** ***The Bolivarian Republic of Venezuela*** (**Respondent)** (First Opinion) 15 September 2010; (Second Opinion) 28 July 2011); **Caso CIADI/ARB/10/19:** ***Flughafen Zürich A.G., Gestión e Ingeniería IDC S.A***. (***Demandantes***) ***C***. ***República Bolivariana de Venezuela*** (***Demandada***) (Primera Opinión) 5 Mayo 2012, (Segunda Opinión) 28 Agosto 2012; (Tercera Opinión), 4 Febrero 2013; **Caso CIADI No. ARB (AF)/14/11:** ***Anglo American PLC*** (De-

mandante) -Contra- ***República Bolivariana de Venezuela*** (Demandada) (Primera Opinión**)** 24 Abril 2015; (Primera Opinión Complementaria) 13 Mayo 2016; (Segunda Opinión Complementaria) 20 Septiembre 2016; and **ICSID Case No. ARB/12/13. *Saint-Gobain Performance Plastics Europe*** (Claimant) **-v-** ***The Bolivarian Republic of Venezuela*** (Respondent) 10 June 2014**;** (Second Opinion) 11 June 2014.

All the Cases in which the aforementiones matters were considered and discussed, had their origins in unconstitutional and illegal decisions of the Venezuelan Government confiscating, exrpropriating or affecting foreign investments in the country, and all of them ended with Arbitral Tribunals decisions condemning the State for its unconstitutional and illegal actions, declaring its liability.

The book has been included in the Series of the *Allan R. Brewer-Carías Library* of the Legal Research Institute of the Andrés Bello Chatolic University of Caracas, Venezuela.

New Yor, July 2023

PART ONE

ON THE CONTENT AND SCOPE OF THE 1999 VENEZUELAN INVESTMENT PROMOTION AND PROTECTION LAW AND THE STATE'S CONSENT FOR ARBITRATION BEFORE ICSID EXPRESSED IN THE LAW

1.

Case No. ARB/07/27: *Mobil Corporation Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., Mobil Venezolana de Petróleos, Inc.* (Claimants) *v. The Bolivarian Republic of Venezuela* (Respondent)

INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES

DECLARATION OF ALLAN R. BREWER-CARIAS,

10 APRIL 2009

I, Allan R. Brewer-Carías, hereby declare that the following is true and correct:

1. I have been a member in good standing of the Venezuelan Federal District Bar since 1963. Since 1973, I have been a partner of Baumeister & Brewer, a law firm located at *Torre América, PH, Avenida Venezuela, Urbanización Bello Monte, Caracas 1050, Venezuela.* I specialize in public law, particularly constitutional, administrative, and public economic law, which includes mining and hydrocarbons law. Currently, I am a resident in the United States of America, in the city of New York, NY.

Qualifications

2. In 1962, I received my law degree from *Universidad Central de Venezuela* (Central University of Venezuela). I performed post graduate studies in France, at the then University of Paris (1962-1963), and in 1964 I received a Doctorate in Law (D. J.) from the Central University of Venezuela.

3. I have taught Administrative and Constitutional law in the Central University of Venezuela since 1963. During the academic years 1972-1974, I was Visiting Scholar at Cambridge University (Center of Latin American Studies), U.K., and during the academic year 1985-1986, I was a Professor at Cambridge University, where I held the *Simón Bolívar Chair,* teaching a course on *"Judicial Review in Comparative Law"* in the LL.M. Program of the Faculty of Law; being a Fellow of Trinity College. In 1990, I was an Associate Professor at the University of Paris II (Panthéon-Assas) in the 3º Cycle Course, where I taught a course on *"La Procedure Administrative Non Contentieuse en Droit Comparé"* (Principles of Administrative Procedure in Comparative Law). Since 1998, I have also taught in the Administrative Law Masters program at *El Rosario* University, and at *Externado de Colombia* University, both in Bogotá, Colombia, on the subject of *"Principios del Procedimiento Administrativo en América Latina"* (Principles of Administrative Procedure in Latin America), and of *"El Modelo Urbano de la Ciudad Colonial Hispanoamericana"* (The Urban Model of the Hispanic American Colonial Cities). In 1998, I gave a series of lectures at the University of París X (Nantèrre) on *"Droit économique au Vénézuéla"* (Economic Law in Venezuela) as an Invited Professor.

4. Between 2002 and 2004, I was a Visiting Scholar at Columbia University in the City of New York. In 2006, I was appointed Adjunct Professor of Law at Columbia University Law School, where I taught a Seminar on *Judicial Protection of Human Rights in Latin America, A Constitutional Comparative Law Study on the Amparo Proceeding* during the Fall 2006 and Spring 2007 Semesters.

5. Since 1982, I have acted as Vice-President of the International Academy of Comparative Law, The Hague, and have been a Professor at the International Faculty for Teaching of Comparative Law of Strasbourg. I am a member of the Venezuelan Academy of Social and Political Sciences, and served as its President from 1997 to 1999. I am a member of the *Société de Legislation Comparée* (Society of Comparative Legislation) in Paris. In 1981, I was awarded the Venezuelan Social Sciences National Prize.

6. During the past decades, I have participated in numerous academic programs – including congresses, seminars and courses – giving lectures in universities and public institutions in Europe, the U.S. and Latin America on matters of public law.

7. I have published numerous books on matters of public law, in English, French and Spanish. These publications are identified in **Appendix A** to this Declaration.

8. From 1978 to 1987, I was Director of the Public Law Institute at the *Universidad Central de Venezuela* (Central University of Venezuela). During my tenure, I directed the Seminars on the Andean Pact Process of Economic Integration (since 1967) and on the Venezuelan Nationalization Process of the Oil Industry (since 1975). Since 1980, I have been the Editor and Director of the *Revista de Derecho Público* (Public Law Journal), Fundación Editorial Jurídica Venezolana, Caracas.

9. In 1999, I was elected Member of the *Asamblea Nacional Constituyente* (National Constituent Assembly) in Venezuela. Although I was an opposition member (one of only four, out of 131 Members), I contributed to the drafting of many provisions of the 1999 Constitution. All my proposals and dissenting votes are collected in Allan R. Brewer-Carías, *Debate Constituyente (Aportes a la Asamblea Nacional Constituyente)*, 3 Vols., Fundación de Derecho Público, Editorial Jurídica Venezolana, Caracas 1999.

10. I am the author of numerous articles addressed to the functioning of the Constitutional Chamber of the Supreme Tribunal of Justice, matters of the judicial review system, the sovereign immunity of the State, and arbitration in public law and public contracts in Venezuela. Recent articles that warrant mention are identified in **Appendix B** to this Declaration.

Scope of the Opinion

11. This opinion is rendered in connection with ICSID Case No. ARB/07/27, which is being pursued by *Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd. and Mobil Venezolana de Petróleos, Inc.* (collectively, the **Claimants**), against the *Republic of Venezuela* (the **Respondent**). *Covington & Burling LLP,* counsel to the Claimants, have asked me to render an opinion on the following issues:

- The meaning of Article 22 of the 1999 Investment Law (**Article 22**) and whether it contains the Republic of Venezuela's consent to submit disputes to international arbitration in the International Centre for Settlement of Investment Disputes (ICSID).

- The various efforts to obtain a judicial interpretation of Article 22 before the Constitutional Chamber and the Politico-Administrative Chamber of the Supreme Tribunal of Justice prior to 2008.
- The interpretation of Article 22 by the Constitutional Chamber of the Supreme Tribunal of Justice in Decision No. 1.541 of October 17, 2008.
- A general description of the composition and functioning of the Supreme Tribunal of Justice under the 1999 Constitution.
- A general description of the situation of the Judiciary in Venezuela.
- The notions of "investment," "international investment," and "international investor" in the 1999 Investment Law.

12. As a practicing lawyer, specialized in constitutional and administrative law, I offer this declaration and opinion based on my experience and knowledge of Venezuelan law, accumulated during more than forty-five years of academic activity and practice of the legal profession, the latter mainly in Venezuela.

Documents Considered

13. For the purpose of this opinion, I have reviewed and considered the following documents:

A. The "Request for Arbitration" filed by the Claimants before the International Centre for Settlement of Investment Disputes (ICSID) on September 6, 2007, and its relevant exhibits, including Decree-Law No. 356 of October 3, 1999 on the Law on the Promotion and Protection of Investments (*Official Gazette* No 5.390 (Extra) of October 22, 1999) (**1999 Investment Law**) (**Ex. C-8**).

B. The "Memorial of the Bolivarian Republic of Venezuela on Objections to Jurisdiction" filed on January 15, 2009 (**Respondent Memorial**), and its relevant exhibits.

C. The "Legal Expert Opinion of Enrique Urdaneta Fontiveros" dated January 12, 2009 (**Urdaneta Opinion**), and its relevant exhibits, including in particular: Decree No. 1.867 of July 11, 2002 on the Regulation of the 1999 Investment Law (*Official Gazette* No. 37.489 of July 22, 2002) (**2002 Investment Law Regulation**) (**Ex. RL-2**); Supreme Tribunal of Justice, Politico-Administrative Chamber, Decision No. 1.209 of June 20, 2001 (Case: *Hoteles Doral C.A. v. Corporación L. Hoteles C.A.*) (Exp. No.

2000-0775) (**Ex. RL-7**); Decision No. 00098 of January 29, 2002 (Case: *Banco Venezolano de Credito, S.A.C.A. v. Venezolana de Relojería, S.A. (Venrelosa) y Henrique Pfeffer C.A.*) (Exp. No. 2000-1255) (**Ex. RL-8**); Decision No. 00476 of March 25, 2003 (Case: *Consorcio Barr, S.A. v. Four Seasons Caracas, C.A.*) (Exp. No. 2003-0044) (**Ex. RL-9**); Decision No. 00038 of January 28, 2004 (Case: *Banco Venezolano de Crédito, S.A. Banco Universal*) (Exp. No. 2003-1296) (**Ex. RL-10**); Supreme Tribunal of Justice, Constitutional Chamber, Decision No. 1.541 of October 17, 2008 (*Official Gazette* No. 39.055 of November 10, 2008) (**2008 Decision No. 1.541**) (**Ex. RL-22**); Decision No. 291 of the Andean Community, Regime for the Common Treatment of Foreign Capital and Trademarks, Patents, Licensing Agreements and Royalties, dated March 21, 1991 (**Ex. RL-24**); Decree No. 2095 on the Regulation of the Regime for the Common Treatment of Foreign Capital and Trademarks, Patents, Licenses and Royalties (*Official Gazette* No 34.930 of March 25, 1992) (**Ex. RL-25**).

D. The Expert Opinion of Christoph Schreuer, dated April 10, 2009, provided in connection with this arbitration.

E. Such other documents, mentioned in this statement, as I have considered necessary for the purpose of rendering an opinion on the questions presented.

14. For the purposes of this opinion and to the extent here indicated, I rely on the accuracy of the statements of fact by the Claimants in their Request for Arbitration.

Summary of Conclusions

15. My analysis reaches the following conclusions:

- This expert witness shares the view that the interpretation and effects of Article 22 in relation to the ICSID Convention are properly governed by principles of international law. Nevertheless, he has been asked to address the issue from the point of view of Venezuelan law and this opinion is rendered from that standpoint.
- Venezuelan rules of statutory interpretation lead to the conclusion that Article 22 of the 1999 Investment Law expresses a unilateral open offer of consent of the Republic of Venezuela to ICSID arbitration. This is the sense that appears from the meaning of the words used in their context and from the intention of the legislator. Notably, the language "shall be submitted to international arbitration" (*serán sometidas al arbitraje inter-*

nacional) is an expression of command that conveys the mandatory nature of Article 22. The provision "if it so establishes" (*si así éste lo establece*) means that the command of Article 22 applies if the respective treaty or agreement (Article 22 refers to other treaties alongside the ICSID Convention) contains provisions establishing arbitration. This condition is satisfied by the ICSID Convention.

- The conclusion that Article 22 is a unilateral open offer of consent is confirmed by a publication of the high ranking official entrusted with directing the drafting of the 1999 Investment Law. It is also consistent with the Constitutional mandate in Article 258 of the 1999 Constitution to promote arbitration.

- The interpretation of Article 22 proposed by the Republic of Venezuela, the **Urdaneta Opinion** and the **2008 Decision No. 1.541** is fundamentally flawed. It is incorrect to interpret "if it so establishes" as a requirement that the State's consent be incorporated in the ICSID Convention, because "so" cannot refer to a term ("consent") that is not used in the preceding sentence ("shall be submitted to international arbitration according to the terms of the respective treaty or agreement"). Moreover, interpreting "if it so establishes" as an equivalent of "if the ICSID Convention establishes consent" would turn this phrase into an impossible condition (a condition that cannot be fulfilled), depriving Article 22 of any meaningful effect.

- The additional arguments offered by the **2008 Decision No. 1.541** to support its conclusion that Article 22 cannot be interpreted as an expression of consent are legally unsound and inherently contradictory. Moreover, the conclusion of the **2008 Decision No. 1.541** regarding Article 22 contrasts with a 2001 ruling of the same Constitutional Chamber on the constitutionality of Article 22, the reasoning of which presupposes that Article 22 is an expression of consent to ICSID arbitration.

- The **2008 Decision No. 1.541** is the product of a politically influenced judiciary that was called upon to bolster the Republic of Venezuela's position in pending ICSID cases. The Constitutional Chamber acted *ultra vires* when it undertook to interpret Article 22 of the 1999 Investment Law at the request of the Government of the Republic of Venezuela, because the Politico-Administrative Chamber has exclusive competence (*competencia*) to interpret statutes. This is a conclusion that the same Constitutional Chamber endorsed in 2007 when it ruled that it had no

competence to hear a petition for interpretation of Article 22 filed by three Venezuelan lawyers.

- The Republic of Venezuela's proposed interpretation of the notions of "international investment" and "international investor" in the 1999 Investment Law is incorrect. Neither the 1999 Investment Law nor the Regulation require **direct** ownership or **direct** effective control of an international investment.

I. ARTICLE 22 OF THE 1999 INVESTMENT LAW AND CONSENT TO ICSID JURISDICTION

1. The origin and intent of the 1999 Investment Law

16. As explained in detail in this Part I, Article 22 of the 1999 Investment Law expresses the written consent of the Republic of Venezuela to ICSID arbitration, under Article 25,1 of the ICSID Convention.[1] This consent is in the form of an open offer of arbitration (*oferta abierta de arbitraje*), which is subject to acceptance by the other party to a relevant dispute.[2] As discussed below, Article 22 reflects a pro-arbitration trend that had developed in Venezuela over the past few decades, which crystallized in Article 258 of the 1999 Constitution.

17. President Hugo Chávez was first elected in December 1998 and took office on February 2, 1999. The stated economic policy of the new government at that time included encouraging foreign investment in the country. In April 1999, the Congress enacted an Enabling Law, authorizing the National Executive to "[e]nact provisions in order to promote the protection and promotion of national and foreign investments with the purpose of establishing a legal framework for investments and to give them greater legal

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1 For the reasons stated in this Part, the conclusion to the contrary in the **Respondent Memorial** (par. 5, 91) and in the **Urdaneta Opinion** (par. 12-16, 25) is incorrect.

2 For a reference to the various forms of written consent by ICSID Contracting States, which include domestic legislation see "Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of other States" dated March 18, 1965 in *1 ICSID Reports 28*, par. 24 ("[…] a host state might in its investment promotion legislation offer to submit disputes arising out of certain classes of investments to the jurisdiction of the Centre, and the investor might give his consent by accepting the offer in writing.")

security." (Article 1,4,f).[3] A few months later, on October 3, 1999, the President of the Republic issued Decree-Law No. 356 on the Law on the Promotion and Protection of Investments (**1999 Investment Law**), in the exercise of the legislative powers delegated by the Enabling Law.

18. It is a matter of public knowledge that the 1999 Investment Law was drafted under the direction of the then Ambassador Werner Corrales-Leal, Head of the Permanent Representation of Venezuela before the WTO and the UN entities headquartered in Geneva. Ambassador Corrales, who since 1998 had had an important role in the formulation of Venezuelan policy toward investments, was entrusted with that task by the new Chávez administration. As Head of that Permanent Representation, Ambassador Corrales prepared reports and opinions for the Government.

19. One of those reports, dated April 1999 and written by Ambassador Corrales with Marta Rivera Colomina, an official at the Permanent Representation, contains ideas for the design of the legal regime of promotion and protection of investments in Venezuela.[4] The document explains that "a regime applicable to foreign investments, must leave open the possibility to resort to international arbitration, which today is accepted almost everywhere in the world, either by means of the mechanism provided for in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) or by means of the submission of the dispute to an international arbitrator or an *ad hoc* arbitral tribunal like the one proposed by UNCITRAL."[5] This view was made even more explicit in an article by the

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3 See *Ley Orgánica que Autoriza al Presidente de la República Para Dictar Medidas Extraordinarias en Materia Económica y Financiera Requeridas por el Interés Público* (Organic Law Authorizing the President of the Republic to Issue Extraordinary Measures in Economic and Financial Matters Required by the Public Interest), in *Official Gazette* Nº 36.687 of April 26, 1999.

4 See Werner Corrales-Leal and Martha Rivera Colomina, "Algunas ideas relativas al diseño de un régimen legal de promoción y protección de inversiones en Venezuela," April 30, 1999. Document prepared at the request of the Minister of CORDIPLAN.

5 *Id*., pp. 10-11 ("[…] *un régimen aplicable a las inversiones extranjeras, debe dejar abierta la posibilidad de recurrir al arbitraje internacional, lo cual hoy es aceptado en casi todo el mundo, bien sea a través del mecanismo consagrado en la Convención sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de otros Estados (CIADI) o mediante el sometimiento de la disputa a un*

same authors, published shortly after the 1999 Investment Law came into effect. That article stated that "a regime applicable to foreign investments, must leave open the possibility to **unilaterally** resort to international arbitration, which today is accepted almost everywhere in the world, either by means of the mechanism provided for in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) or by means of the submission of the dispute to an international arbitrator or an *ad hoc* arbitral tribunal like the one proposed by UNCITRAL."[6] The reference to **unilateral** resort to international arbitration makes it clear that the person entrusted with drafting the 1999 Investment Law intended Article 22 to express the State's consent to ICSID arbitration, which is the only way the investor could have **unilateral** resort to such arbitration. Put differently, speaking of unilateral resort to arbitration in connection with the 1999 Investment Law presupposes that said law provides the State's consent that is necessary for the investor to have the right to unilaterally resort to arbitration.

20. The 1999 Investment Law was sanctioned by the Government as evidence of its commitment to develop and promote private (foreign and domestic) investment in Venezuela, and was contemporaneous with the mandate in the 1999 Constitution to promote alternative mechanisms for dispute resolution, such as arbitration.[7] As we shall see, it was the Government's

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árbitro internacional o a un tribunal de arbitraje ad hoc como el que propone UNCITRAL.")

6 See Werner Corrales-Leal and Marta Rivera Colomina, "Algunas ideas sobre el nuevo régimen de promoción y protección de inversiones en Venezuela" in Luis Tineo and Julia Barragán (Compilators), *La OMC Como Espacio Normativo,* Asociación Venezolana de Derecho y Economía, Caracas, 2000, p. 185 (emphasis added) ("[…] *un régimen aplicable a las inversiones extranjeras, debe dejar abierta la posibilidad de recurrir unilateralmente al arbitraje internacional, lo cual hoy es aceptado en casi todo el mundo, bien sea a través del mecanismo consagrado en la Convención sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de otros Estados (CIADI) o mediante el sometimiento de la disputa a un árbitro internacional o a un tribunal de arbitraje ad hoc como el que propone UNCITRAL.*")

7 See, for instance, website of the Venezuelan Embassy in Switzerland, "CONOZCA NUESTRO PAÍS. INVERSIONES. ¿POR QUÉ INVERTIR EN VENEZUELA?" *available at* www.embavenez-suiza.com/inversiones.html, cached version recorded February 8, 2008 *available at* http://web.archive.org/web/20080205011315/http://www. embavenez-suiza.com/inversiones.html (last visited March 24, 2009) ("*La política sobre tratamiento de la inversión privada en Venezuela se basa en la*

official policy at that time to offer resolution of disputes by arbitration as a means of promoting investment. The **Urdaneta Opinion** (par. 18) asserts that Article 22 is a non-binding "declaration of principles," and that at the time of the 1999 Investment Law the "prevailing culture in Venezuela" was "traditionally hostile to arbitration." That is simply untrue. The prevailing culture and official policy at that time were to offer arbitration to investors in order to attract investments.

21. The supposed "hostility" to arbitration that the **Urdaneta Opinion** attributes to 1999 is premised on events that had occurred one hundred years earlier and had been long superseded. At the turn of the 20th Century, arbitration was rejected in Venezuela on matters of public law by application of the "Calvo Clause,"[8] and as a result of events of 1902 that gave rise

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igualdad de trato y garantías de seguridad jurídica para inversionistas nacionales y extranjeros. Evidencias del compromiso del gobierno nacional para el fomento, protección y abaratamiento de las inversiones privadas en Venezuela son el Decreto Ley de Promoción y Protección de Inversiones […] La política de promoción de inversiones es el reflejo de la programación constitucional en materia económica. La Constitución de 1999 prevé la inversión privada como instrumento de desarrollo, al tiempo que consagra expresamente principios de libre competencia; garantías del derecho de propiedad; favorecimiento de mecanismos alternativos de resolución de disputas, como el arbitraje, la conciliación y mediación; y la ya referida igualdad de tratamiento para inversiones nacionales y extranjeras […].") ("The policy on treatment of private investment in Venezuela is based on equal treatment and guaranties of legal security for national and foreign investors. Evidence of the national government's commitment to the promotion, protection and cost reduction of private investment in Venezuela are the Decree Law on the Promotion and Protection of Investments […] The policy on the promotion of investments is a reflection of the constitutional program on economic matters. The 1999 Constitution provides that private investment is an instrument for development, and at the same time it provides expressly for the principles of free competition; guaranties of the right to property; favors alternative mechanisms of dispute resolution, such as arbitration, conciliation and mediation; and the already mentioned equality in treatment for national and foreign investments […].)

8 The Calvo Clause had its origin in the work of Carlos Calvo, who formulated the doctrine in his book *Tratado de Derecho Internacional*, initially published in 1868, after studying the Franco-British intervention in Rio de a Plata and the French intervention in Mexico. The Calvo Clause was first adopted in Venezuela in the 1893 Constitution as a response to diplomatic claims brought by European countries against Venezuela as a consequence of contracts signed by the country and foreign citizens. See Tatiana Bogdanowsky de Maekelt, "Inmunidad de Jurisdicción de los Estados" in *Libro Homenaje a José Melich Orsini,* Vol. 1, Caracas 1982, pp. 213

in Venezuela to the "Drago Doctrine."[9] On matters of private law, even though binding arbitration had been authorized in the 19th Century in the civil procedure regulations as a means of alternative dispute resolution, the 1916 Code of Civil Procedure established arbitration only as a non-binding method of dispute resolution, that is, without making the arbitration agreement mandatory (Articles 502-522).

22. That attitude of suspicion or hostility to arbitration changed steadily from the middle of the 20th Century. After the 1961 Constitution adopted the principle of relative sovereign immunity (based on a similar provision contained in Article 108 of the 1947 Constitution), the insertion of binding arbitration clauses in public contracts became a generally accepted practice, recognized as valid.[10] In addition, Venezuela ratified the 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards,[11] the 1975 Inter-American Convention on International Commercial Arbitration,[12] and the 1958 United Nations Convention on the

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ff.; Allan R. Brewer-Carías, "Principios especiales y estipulaciones obligatorias en la contratación administrativa" in *El Derecho Administrativo en Latinoamérica*, Vol. II, Ediciones Rosaristas, Colegio Mayor Nuestra Señora del Rosario, Bogotá 1986, pp. 345-378; Allan R. Brewer-Carías, "Algunos aspectos de la inmunidad jurisdiccional de los Estados y la cuestión de los actos de Estado (*act of state*) en la jurisprudencia norteamericana" in *Revista de Derecho Público Nº 24*, Editorial Jurídica Venezolana, Caracas October-December 1985, pp. 29-42.

9 The Drago Doctrine was conceived in 1902 by the then Argentinean Minister of Foreign Relations, Luis María Drago, who – in response to threats of military force made by Germany, Great Britain and Italy against Venezuela – formulated his thesis condemning the compulsory collection of public debts by the States. See *generally* Victorino Jiménez y Núñez, *La Doctrina Drago y la Política Internacional,* Madrid 1927.

10 See Alfredo Morles, "La inmunidad de Jurisdicción y las operaciones de Crédito Público" in *Estudios Sobre la Constitución, Libro Homenaje a Rafael Caldera,* Vol. III, Caracas, 1979, pp. 1.701 ff; Allan R. Brewer-Carías, *Contratos Administrativos*, Colección Estudios Jurídicos N° 44, Editorial Jurídica Venezolana, Caracas 1992, pp. 262-265. The same provision established in the 1961 Constitution was incorporated in the 1999 Constitution. See Beatrice Sansó de Ramírez, "La inmunidad de jurisdicción en el Artículo 151 de la Constitución de 1999" in *Libro Homenaje a Enrique Tejera París, Temas sobre la Constitución de 1999,* Centro de Investigaciones Jurídicas (CEIN), Caracas 2001, pp. 333-368.

11 *Official Gazette* No. 33.144 of January 15, 1985.

12 *Official Gazette* No. 33.170 of February 22, 1985.

Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).[13]

23. In 1986, the Code of Civil Procedure was amended to allow parties to make a binding agreement to submit controversies to arbitral tribunals, and to exclude the jurisdiction of ordinary courts (Articles 608-629). In addition, special statutes allowed for arbitration in areas related to copyright, insurance, consumer protection, labor, and agrarian reform.[14]

24. In 1995, Venezuela ratified the ICSID Convention and,[15] between 1993 and 1998, it signed many bilateral treaties on investments (BITs) providing for international arbitration.[16] In 1998, Venezuela adopted the Commercial Arbitration Law,[17] which is based on the Model Law on International Commercial Arbitration of UNCITRAL.[18]

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13 *Official Gazette* (Extra) No. 4832 of December 29, 1994. For an account of international instruments relevant to Venezuela's recognition of international arbitration, *see* **2008 Decision No. 1.541**, p. 365.485.

14 See laws listed in Francisco Hung Vaillant, *Reflexiones Sobre el Arbitraje en el Sistema Venezolano*, Caracas, 2001, pp. 90-101; Paolo Longo F., *Arbitraje y Sistema Constitucional de Justicia*, Editorial Frónesis S.A., Caracas, 2004, pp. 53-77 and **2008 Decision No. 1.541**, p. 365.485.

15 *Official Gazette* No. 35.685 of April 3, 1995.

16 See list of Venezuelan bilateral treaties on the promotion and protection of investments at Venezuelan Ministry of for Foreign Relations *available at* http://www.mre.gov.ve/ metadot/index.pl?id=4617;isa=Category;op=show; ICSID Database of Bilateral Investment Treaties *available at* http://icsid.worldbank.org/ICSID/FrontServlet; UNCTAD, Investment Instruments On-line Database, Venezuela Country-List of BITs as of June 2008 *available at* http://www.unctad.org/Templates/Page.asp?intItemID=2344&lang=1. See also, José Antonio Muci Borjas, *El Derecho Administrativo Global y Los Tratados Bilaterales de Inversión (BITs),* Caracas 2007, pp. 101-102; Tatiana B. de Maekel, "Arbitraje Comercial Internacional en el sistema venezolano" in Allan R. Brewer-Carías (Editor), *Seminario Sobre la Ley de Arbitraje Comercial*, Academia de Ciencias Políticas y Sociales, Caracas 1999, pp. 282-283; Francisco Hung Vaillant, *Reflexiones Sobre el Arbitraje en el Sistema Venezolano*, Caracas 2001, pp. 104-105; and **2008 Decision No. 1.541**, pp. 365.485-365.486.

17 *Official Gazette* No. 36.430 of April 7, 1998.

18 See *generally* Arístides Rengel Romberg, "El arbitraje comercial en el Código de Procedimiento Civil y en la nueva Ley de Arbitraje Comercial (1998)" in Allan R.

25. In August 1999, the Supreme Court of Justice dismissed a challenge to the constitutionality of the parliamentary act (*Acuerdo*) that authorized the Framework of Conditions for the "Association Agreements for the Exploration at Risk of New Areas and the Production of Hydrocarbons under the Shared-Profit Scheme" ("*Convenios de Asociación Para la Exploración a Riesgo de Nuevas Areas y la Producción de Hidrocarburos Bajo el Esquema de Ganancias Compartidas*"), dated July 4, 1995.[19] The Supreme Court of Justice held that the Congressional authorization and, in particular, the inclusion of arbitration clauses in public law contracts, were valid under the 1961 Constitution in force at the time.[20]

26. Finally, at the time that the 1999 Investment Law was adopted through a Decree Law (October 1999), the National Constituent Assembly was drafting the 1999 Constitution (September-November 1999).[21] The 1999 Constitution incorporates arbitration as an alternative means of adjudication and as a component of the judicial system (Article 253).[22] The Constitution

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Brewer-Carías (Editor), *Seminario sobre la Ley de Arbitraje Comercial*, Academia de Ciencias Políticas y Sociales, Caracas 1999, pp. 47 ff.

19 *Official Gazette* No. 35.754 of July 17, 1995.

20 See decision in Allan R. Brewer-Carías (Compilator), *Documentos del Juicio de la Apertura Petrolera (1996-1999),* Caracas, 2004 *available at* www.allanbrewercarias.com (Biblioteca Virtual, I.2. Documentos, No. 22, 2004), pp. 280-328. I acted as counsel to PDVSA in that proceeding, defending the constitutionality of that *Acuerdo.* The Constitutional Chamber of the Supreme Tribunal of Justice recently confirmed the ruling made under the 1961 Constitution, holding that Article 151 of the 1999 Constitution allows the incorporation of arbitration provisions in contracts of "public interest" (*interés público*). See **2008 Decision No. 1.541**, p. 365.488.

21 As previously stated, I was a Member of the National Constituent Assembly in 1999. In that capacity, I contributed to the drafting of the 1999 Constitution, and in particular of Article 151 which establishes the possibility for arbitration in public contracts.

22 1999 Constitution, Article 253. (*"**Artículo 253**. La potestad de administrar justicia emana de los ciudadanos o ciudadanas y se imparte en nombre de la República por autoridad de la ley. / Corresponde a los órganos del Poder Judicial conocer de las causas y asuntos de su competencia mediante los procedimientos que determinen las leyes, y ejecutar o hacer ejecutar sus sentencias. / El sistema de justicia está constituido por el Tribunal Supremo de Justicia, los demás tribunales que determine la ley, el Ministerio Público, la Defensoría Pública, los órganos de investigación penal, los o las auxiliares y funcionarios o funcionarias de justicia, el sistema peni-*

not only embraces arbitration; it requires the State to promote it,[23] in particular through legislation (Article 258).[24]

27. These milestones show that in 1999 there was no prevailing culture of hostility to arbitration. On the contrary, the 1999 Constitution, the legal system as a whole, and the international instruments to which Venezuela was a party embraced and promoted arbitration.[25]

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tenciario, los medios alternativos de justicia, los ciudadanos que participan en la administración de justicia conforme a la ley y los abogados autorizados para el ejercicio.") ("**Article 253**. The authority to administer justice emanates from the citizens and is granted in the name of the Republic by authority of law. / It corresponds to the organs of the Judicial Power to take cognizance of suits and matters of their competence through the procedures that the laws determine, as well as to enforce their decisions or to have them enforced. / The system of justice is constituted by the Supreme Tribunal of Justice, the other courts that the law determines, the Public Ministry, the Public Ombudsman, the organs of criminal investigation, the auxiliaries or officials of justice, the penitentiary system, the alternative means of justice, the citizens who participate in the administration of justice in accordance with the law and the lawyers authorized for practice.")

23 1999 Constitution, Article 258. (*"**Artículo 258**. […] La ley promoverá el arbitraje, la conciliación, la mediación y cualesquiera otros medios alternativos para la solución de conflictos."*) ("**Article 258**. […] The law shall promote arbitration, conciliation, mediation and any other alternative means of dispute resolution.") Article 258 appeared with similar language in the October 12, 1999 bill of the Constitution (Article 292). See *Constitutional Convention Gazette, Book of Debates*, Printing House of the Congress of the Republic of Venezuela, October-November 1999, Session No. 21, p. 1 ff. and Session No. 37, p. 15 ff.

24 The promotion of arbitration is an obligation of all organs of the State. See **2008 No 1.541 Decision,** p. 365.485. On the recognition of arbitration as an alternative means of adjudication by the 1999 Constitution, see *generally* Paolo Longo F., *Arbitraje y Sistema Constitucional de Justicia*, Editorial Frónesis S.A., Caracas, 2004; Supreme Tribunal of Justice, Constitutional Chamber, Decision No. 186 of February 14, 2001 (Case: Constitutional Challenge of Articles 17, 22 and 23 of the 1999 Investment Law).

25 ICSID arbitration continued to be incorporated in the bilateral treaties for promotion and protection of investments signed and ratified after 1999. See Venezuela-France Bilateral Investment Treaty in *Official Gazette* No. 37.896 of March 11, 2004.

2. The text and structure of Article 22 of the 1999 Investment Law

28. In accord with the policy defined by the State in 1999 to promote and protect international investments, Article 22 expressed the consent of the Venezuelan State to submit to international arbitration controversies regarding international investment. The article provides as follows:

> "Article 22. Controversies that may arise between an international investor, whose country of origin has in effect with Venezuela a treaty or agreement on the promotion and protection of investments, or **controversies in respect of which the provisions of** the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA) or **the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID) are applicable, shall be submitted to international arbitration according to the terms of the respective treaty or agreement, if it so establishes,** without prejudice to the possibility of using, as appropriate, the contentious means contemplated by the Venezuelan legislation in effect."[26]

29. This article is a compound provision that contains three parts: the first one, concerning bilateral or multilateral treaties or agreements on the promotion and protection of investments; the second one, dealing with the MIGA Convention; and the last one, dealing with the ICSID Convention. Because Article 22 addresses three different sets of treaties or agreements, it is hardly surprising that it does not follow any particular model or pattern of national legislation which address only consent to ICSID jurisdiction.

30. This is one reason why it makes no sense for the **Respondent Memorial** and the **Urdaneta Opinion** to draw inferences from a comparison

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[26] 1999 Investment Law, Article 22 (emphasis added). The original text in Spanish is as follows: "*Artículo 22. Las controversias que surjan entre un inversionista internacional, cuyo país de origen tenga vigente con Venezuela un tratado o acuerdo sobre promoción y protección de inversiones, o las controversias respecto de las cuales sean aplicables las disposiciones del Convenio Constitutivo del Organismo Multilateral de Garantía de Inversiones (OMGI – MIGA) o del Convenio sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de Otros Estados (CIADI), serán sometidas al arbitraje internacional en los términos del respectivo tratado o acuerdo, si así éste lo establece, sin perjuicio de la posibilidad de hacer uso, cuando proceda, de las vías contenciosas contempladas en la legislación venezolana vigente.*"

between Article 22 and expressions of consent to ICSID arbitration in other national laws or in the ICSID "model" clauses, designed to provide consent only to ICSID jurisdiction.[27] Article 22 must be interpreted not by reference to any pattern or model, but in accordance with its own structure and terms, taking into account its compound nature.

3. The rules of interpretation of statutes under Venezuelan Law

31. Article 22 is an instrument of national law that purports to express consent to international arbitration by reference to international treaties and agreements. For the reasons stated by Professor Schreuer in his Opinion, I concur that the interpretation and effects of Article 22 in relation to the ICSID Convention are properly governed by principles of international law. Without prejudice to the foregoing, I have been asked to analyze Article 22 from the standpoint of Venezuelan Law and I proceed to do so.

32. In Venezuela, the main rules on statutory interpretation are set forth in Article 4 of the Civil Code. This article provides that the interpreter must attribute to the law "the sense that appears evident from the **proper meaning of the words**, according to **their connection** among themselves and the **intention of the Legislator**." The article goes on to state that, "when there is no precise provision of the Law, the provisions regulating similar cases or analogous matters shall be taken into account; and should doubts persist, general principles of law shall be applied."[28]

33. In Decision No. 895 of July 30, 2008, the Politico-Administrative Chamber of the Supreme Tribunal of Justice referred to four relevant elements to be taken into account in the interpretation of legal provisions.[29] The first element is the **literal, grammatical or philological** one,

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27 **Respondent Memorial** (par. 93-97; 112-116); **Urdaneta Opinion** (par. 16). See also, **2008 Decision No. 1.541** (pp. 365.494-365.495).

28 Civil Code, Article 4 (emphasis added). ("*Artículo 4: A la Ley debe atribuírsele el sentido que aparece evidente del significado propio de las palabras, según la conexión de ellas entre sí y la intención del legislador. Cuando no hubiere disposición precisa de la Ley, se tendrán en consideración las disposiciones que regulan casos semejantes o materias análogas; y, si hubiere todavía dudas, se aplicarán los principios generales del derecho*.")

29 *Revista de Derecho Público No 115*, Editorial Jurídica Venezolana, Caracas 2008, pp. 468 ff.

which must always be the starting point of any interpretation. The second element of interpretation is the **logical, rational or reasonable** one, which aims at determining the *raison d'être* of the provision within the legal order. The third element is the **historical** one, through which a legal provision is to be analyzed in the context of the factual and legal situation at the time it was adopted or amended and in light of its historical evolution. The fourth element is the **systematic** one, which requires the interpreter to analyze the provision as an integral part of the relevant system. The Politico-Administrative Chamber noted that interpretation is not a matter of choosing among the four elements, but of applying them together, even if not all of the elements are of equal importance. In addition, the Supreme Tribunal of Justice has identified two other elements of interpretation: the **teleological** one – that is, the need to identify and understand the social goals or aims that led to the law being adopted – and the **sociological** one, which helps to understand the provision within the context of the social, economical, political and cultural reality where the text is going to be applied.[30]

34. From the standpoint of Venezuelan law, only the principles that govern the **interpretation of statutes** may have some bearing on the interpretation of Article 22. The Respondent's reliance on certain decisions of the Politico-Administrative Chamber of the Supreme Tribunal of Justice is misplaced,[31] because those decisions deal with alleged substantive requirements for the validity of bilateral expressions of consent to arbitration (*cláusula compromisoria*) in the internal legal order. There is a basic conceptual distinction between Venezuelan principles of statutory interpretation and alleged substantive requirements for the validity or enforceability of a contractual agreement to arbitrate under the domestic legal order. The latter have no application in a case like this, where the matter at stake is whether

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30 *Id*.

31 **Respondent Memorial** (par. 83) and **Urdaneta Opinion** (par. 17, footnote 14). Citing Politico-Administrative Chamber of the Supreme Tribunal of Justice, Decision No. 1209 of June 20, 2001 (Case: *Hoteles Doral C.A. v. Corporación L. Hoteles C.A*) (Exp. No. 2000-0775) (**Ex. RL-7**); Decision No. 00098 of January 29, 2002 (Case: *Banco Venezolano de Credito, S.A.C.A. v. Venezolana de Relojeria, S.A. (Venrelosa) y Henrique Pfeffer C.A*) (Exp. No. 2000-1255) (**Ex. RL-8**); Decision N° 00476 of March 25, 2003 (Case: *Consorcio Barr, S.A v. Four Seasons Caracas, C.A.*) (Exp. No. 2003-0044) (**Ex. RL-9**); Decision N° 00038 of January 28, 2004 (Case: *Banco Venezolano de Crédito, S.A. Banco Universal*) (Exp. No. 2003-1296) (**Ex. RL-10**).

the State's expression of consent embodied in a statute meets the requirements of an international treaty (the ICSID Convention) to set in motion the jurisdiction of international tribunals operating under that treaty.[32]

35. Moreover, the underlying circumstances of those cases – which the Respondent fails to discuss – differ from the present case. In all of those proceedings, the Politico-Administrative Chamber was called upon to resolve a conflict of jurisdiction between the ordinary courts and arbitral tribunals, arising out of the parties' disagreement over the dispute resolution mechanism agreed in the underlying contract. The plaintiffs filed suit in a domestic court and the defendant applied to have it removed to arbitration. In the final analysis the decisive question for the Politico-Administrative Chamber was whether the parties had unequivocally chosen a single mechanism of dispute resolution in their contracts, entirely ousting or waiving the option to resort to the jurisdiction of the ordinary courts. In *Hoteles Doral C.A. v. Corporación de L'Hoteles C.A.* (**Ex. RL-7**), *Banco Venezolano de Crédito v. Venrelosa et al.* (**Ex. RL-8**), and *Consorcio Barr v. Four Seasons Caracas* (**Ex. RL-9**), the Politico-Administrative Chamber ultimately concluded that, although the contract provided for arbitration as an option that

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[32] It should also be noted that the **Urdaneta Opinion**'s reliance on Professor Hung Vaillant's publication (par. 17, footnote 15) is also misleading. Instead of subscribing to an alleged stringent Venezuelan law standard of "clear" and "unequivocal" language, Professor Vaillant states that, according to the pro-arbitration principle in Article 258 of the Constitution, "[…] *se debe tratar de sostener la validez en todos aquellos casos de duda, siempre que tal admission no conduzca a una violación de normas de orden público ni atente contra las buenas costumbres. En resumen, en caso de duda, se deberá pronunciar a favor de la existencia del Arbitraje.* […]*"* ("[…] one should try to sustain its validity [of Arbitration] in all those cases of doubt, as long as such admission does not lead to a violation of norms of public order or impairs good customs. In sum, in case of doubt, one should pronounce in favor of the existence of Arbitration. […]") Francisco Hung Vaillant, *Reflexiones Sobre el Arbitraje en el Sistema Venezolano*, Caracas 2001, p. 66. Professor Vaillant makes this statement in the context of discussing the general principles that govern arbitration under Venezuelan Law, a section that Professor Urdaneta omits. *See id*. pp. 63-69. In that section Professor Vaillant addresses those principles that should serve to *"establecer la solución adecuada cada vez que existe una antinomia o una laguna legal; asi como también en aquellos casos en los cuales es necesario interpretar un texto oscuro de una cláusula o de un pacto arbitral." Id*. p. 63 ("to provide for an adequate solution each time that there is an antinomy or a legal gap; as well as in those cases in which it is necessary to interpret an obscure text of an arbitration clause or of an arbitration agreement.")

the parties could choose, it had also left recourse to local courts as an open option for either party (**Ex. RL-7** and **RL-9**), or precisely to the party who had chosen to resort to court (**Ex. RL-8**).

36. As the language of Article 22 contains no option for the Republic of Venezuela to resort to court, the premise of those decisions is not present in this case. Article 22 does not preclude resort to "the contentious means contemplated by the Venezuelan legislation in effect" but that is an option only for the investor, because the Republic of Venezuela has already expressed its unilateral consent to arbitration. The very purpose of arbitration provisions is to give the investor the option to resort to arbitration instead of being required to litigate the dispute in the courts of the host-State.

37. Article 23 of the 1999 Investment Law gives **the investor** the possibility of submitting disputes regarding the application of the 1999 Investment Law to a domestic court or a local arbitral tribunal, but again, the option is only for the investor. Accordingly, the Republic of Venezuela's expression of consent to arbitration remains unaffected by those options.

38. The decision in *Banco Venezolano de Crédito S.A., Banco Universal v. Armando Diaz Egui et al.* (**Ex. RL-10**) turns on an issue entirely irrelevant to this arbitration. In that case, the Politico-Administrative Chamber held that the arbitration provision at issue established that in enforcement actions (*ejecución de garantías*) as the one at issue in that case, arbitration applied "only in cases where there is opposition from the defendants." The Chamber refused to remove the case to arbitration on the ground that the defendant had failed to allege the existence and effectiveness of an arbitration agreement as a preliminary objection at the first procedural opportunity it had in the proceeding.

4. Analysis of Article 22 of the 1999 Investment Law

39. The portion of Article 22 referring to the ICSID Convention provides that "[…] controversies in respect of which the provisions of […] the Convention on the Settlement of Investment Disputes Between States and the Nationals of Other States (ICSID) are applicable, **shall be submitted to international arbitration** according to the terms of the respective treaty or

agreement, if it so establishes, […]."[33] As discussed below, when this text is interpreted according to the rules of interpretation set forth in Article 4 of the Civil Code, the **sense** that **evidently appears** from the **proper meaning of the words used**, in accordance with **their connection** and with the **intention of the legislator** is the following: Article 22 states the unilateral consent of the Republic of Venezuela to the submission of disputes to ICSID arbitration, leaving to qualified investors the decision whether to give their own consent or to resort to the Venezuelan courts.[34]

40. In the Spanish phrase "*serán sometidas a arbitraje internacional*" (shall be submitted to international arbitration), the tense of the verb indicates that it is an expression of command. The phrase conveys the sense that international arbitration of disputes is a mandatory system, in the sense that, once properly invoked by the other party to a dispute, the Republic of Venezuela has **a duty** or **obligation to comply** with the applicable procedural rules and **to abide** by the decision of the arbitral tribunal. In this regard, the English translation "shall be submitted" for "*serán sometidas*," which is common ground between the parties, shows that the translators correctly understood the Spanish original as conveying the mandatory sense just described.[35] Consequently, the text of this provision ("*shall be submitted to*

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[33] (Emphasis added) ("[…] *las controversias respecto de las cuales sean aplicables las disposiciones del ... Convenio sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de Otros Estados (CIADI), serán sometidas al arbitraje internacional en los términos del respectivo tratado o acuerdo, si así éste lo establece*.")

[34] I expressed the same opinion more than three years ago in an article written for a seminar organized by the Venezuelan Academy of Political and Social Sciences and the Venezuelan Arbitration Committee. See Allan R. Brewer-Carías, "Algunos comentarios a la Ley de promoción y protección de Inversiones: contratos públicos y jurisdicción" in Irene Valera (Coordinadora), *Arbitraje Comercial Interno e Internacional. Reflexiones Teóricas y Experiencias Prácticas*, Academia de Ciencias Políticas y Sociales, Comité Venezolano de Arbitraje, Caracas 2005, pp. 286-287; also published in *Estudios de Derecho Administrativo 2005-2007*, Editorial Jurídica Venezolana, Caracas 2007, pp. 453-462; also *available at* www.allanbrewercarias.com, (Biblioteca Virtual, II.4. Artículos y Estudios No. 473, 2005) pp. 7-9.

[35] "**Shall** can express (A) the subject's *intention to perform a certain action* or cause it to be performed, and (B) *a command.*" The use of **shall** to express *a command* "is chiefly used in regulations or legal documents. In less formal English **must** or **are to** would be used instead of **shall** in the above sentences." See A. J. Thomson and

international arbitration") is a **unilateral express statement of consent to ICSID arbitration freely given in advance by the Republic of Venezuela**.[36] As discussed below, none of the other aspects of the text or the other elements of interpretation leads to a different conclusion.

41. The mandate to submit disputes to ICSID arbitration refers to "controversies in respect of which the provisions of the [ICSID Convention] are applicable." As an initial observation, the term "controversies" appears for a second time in Article 22, in parallel to the first reference to "controversies" between an international investor whose country of origin has in effect a treaty or agreement for the promotion and protection of investments and the Republic of Venezuela. Grammatically, this duplicate and parallel reference indicates that the second category of "controversies" related to the ICSID Convention is not necessarily subsumed within the first category of "controversies" related to investment treaties or agreements. Therefore, when Article 22 refers to the "controversies" related to the ICSID Convention no reference is made to "international investor," as this term is defined in the 1999 Investment Law.

42. The second category of "controversies" comprises those in respect of which the provisions of the ICSID Convention are applicable. According to Article 25,1 of the ICSID Convention, ICSID jurisdiction "shall

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A. V. Martinet, *A Practical English Grammar*, Fourth Edition, Oxford University Press 2001, pp. 208, 246.

[36] In the same sense, see, e.g., Gabriela Álvarez Ávila, "Las características del arbitraje del CIADI" in *Anuario Mexicano de Derecho Internacional*, Vol. II, Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México, UNAM, México 2002, pp. 4-5, 17 footnote 23, *available at* http://juridicas.unam.mx/publica/rev/derint/cont/ 2/cm/ (last consulted on December 4, 2007); Eugenio Hernández Bretón, "Protección de inversiones en Venezuela" in *Revista DeCITA, Derecho del Comercio Internacional, Temas de Actualidad,* (*Inversiones Extranjeras*)*,* No 3, Zavalía, 2005, pp. 283-284; Guillaume Lemenez de Kerdelleau, "State Consent to ICSID Arbitration: Article 22 of the Venezuelan Investment Law" in *TDM*, Vol. 4, Issue 3, June 2007; M.D. Nolan and F.G. Sourgens, "The Interplay Between State Consent to ICSID Arbitration and denunciation of the ICSID Convention: The (Possible) Venezuela Case Study" in *TDM*, Provisional Issue, September 2007; José Antonio Muci Borjas, *El Derecho Administrativo Global y los Tratados Bilaterales de Inversión (BITs),* Caracas 2007, pp. 214-215; José Gregorio Torrealba R, *Promoción y Protección de las Inversiones Extranjeras en Venezuela*, Funeda, Caracas 2008. pp. 56-58, 125-127.

extend to any legal dispute arising directly out of an investment, between a Contracting State […] and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre." As the ICSID Convention does not itself supply consent, it is unreasonable to interpret Article 22, which expressly provides that disputes shall be submitted to arbitration, as looking to the ICSID Convention to supply the consent that Article 22 itself purports to supply. Consequently, the only way to give effect to the mandate in Article 22 that disputes "shall be submitted" to ICSID arbitration is to interpret the phrase "controversies in respect of which the provisions of the [ICSID Convention] are applicable" as referring to any disputes that meet all the requirements for ICSID jurisdiction **other than consent**, which is supplied by Article 22 itself. Any other interpretation would render this portion of Article 22 circular and would deprive it of any effect, in violation of the principle of effective interpretation or *effect utile*.

43. The portion of Article 22 referring to the ICSID Convention ends with the phrase "if it so establishes" ("*si así éste lo establece"*) (translated in the **Respondent Memorial** (par. 78) as "if it so provides"). This phrase, interpreted according to the **sense** that **evidently appears** from the **proper meaning of the words** used, in accordance with **their connection** among themselves and with the **intention of the Legislator,** refers to the need for the "respective treaty or agreement" **to contain provisions establishing international arbitration** in order for the preceding express command (shall be submitted) to be capable of being executed. As the ICSID Convention paradigmatically establishes a system of international arbitration for the settlement of investment disputes, the condition "if it so establishes" is clearly satisfied in the case of the portion of Article 22 that refers to the ICSID Convention. As we shall see, the phrase "if it so establishes" refers primarily to the possibility that treaties or agreements for the promotion and protection of investments might not provide for international arbitration of disputes to which they apply.

44. As already mentioned, Article 22 is a compound provision that combines three rules concerning three different kinds of international instruments: first, treaties or agreements on the promotion and protection of investments; second, the MIGA Convention; and third, the ICSID Convention. Although the phrase "if it so establishes" applies to each of the three rules, the condition that it embodies (that the treaty or agreement establish interna-

tional arbitration) is satisfied in the case of the ICSID and MIGA Conventions,[37] which clearly provide for arbitration, and is also satisfied in the case of those treaties or agreements for the promotion and protection of investments that do provide for international arbitration.[38] On the contrary, the condition is not satisfied in the case of treaties or agreements for the promotion and protection of investments that do not provide for international arbitration of disputes between the host State and foreign investors. Accordingly, "if it so establishes" reflects a contingency only in the case of treaties or agreements for the promotion and protection of investments, which may or may not provide for international arbitration of such disputes.

45. The final part of Article 22 ("without prejudice to the possibility of using, as appropriate, the contentious means contemplated by the Venezuelan legislation in effect") further confirms that Article 22 is an expression

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[37] The MIGA Convention contemplates two kinds of disputes: (a) disputes between the Agency and a Member country (Article 57), which shall be settled in accordance with the procedures set out in Annex II to the Convention and (b) disputes involving MIGA and a holder of a guarantee or reinsurance (Article 58), which shall be submitted to arbitration in accordance with such rules as shall be provided for or referred to in the contract of guarantee or reinsurance. Article 22 of the 1999 Investment Law can refer only to disputes of the first kind (those that could arise between MIGA and a Member State), because disputes of the second type do not involve the Venezuelan State or any other Venezuelan instrumentality. In the case of disputes that could arise between MIGA and a Member State, Annex II of the Convention provides a procedure for settlement that calls for negotiation followed by arbitration, with conciliation as a permissible alternative. According to Article 57(b)(ii) of the MIGA Convention, this procedure may be superseded by an agreement between the State and MIGA concerning an alternative method for the settlement of such disputes, but such an agreement must be based on Annex II, which means that it must also contain resort to arbitration. As the MIGA Convention provides for international arbitration in either situation, the condition "if it so establishes" is satisfied and Article 22 requires submission of such disputes to international arbitration according to the terms of the MIGA Convention.

[38] The Spanish text, which uses the subjunctive mood, makes clear that it refers not only to treaties or agreements of this kind to which the Republic of Venezuela was a party at the time the 1999 Investment Law was adopted, but also treaties or agreements to which it may become a party at any time in the future. Historically, while most agreements of this kind concluded by States around the world provide for international arbitration of investor-State disputes, some agreements do not. The Republic of Venezuela may become a party to treaties or agreements of this kind that do not provide for the resolution of controversies through arbitration.

of consent to arbitration. That statement indicates that Article 22 does not have the effect of preventing the investor from using domestic litigation remedies. If Article 22 were a mere declaration of the State's willingness to agree to arbitration in a separate document as opposed to a firm expression of consent to arbitration by the State, there would have been no need to disclaim that Article 22 did not prevent the investor from resorting to domestic remedies.

46. The interpretation of Article 22 as containing an open offer by the State to submit investment disputes to ICSID arbitration not only results from the **literal or grammatical** element of statutory interpretation, but also from applying the **logical, rational or reasonable** element of interpretation. According to Ambassador Corrales' published account, the State's offering unilateral consent to arbitration in order to promote investment was part of the *raison d'être* of the 1999 Investment Law.[39] Considering Article 22 **systematically** and in a **historical** perspective, expressing consent to international arbitration was in accord with the trend in favor of international arbitration described above, including the State's ratification between 1993 and 1998 of treaties for the protection and promotion of investments that accepted international arbitration, as well as the other legal provisions regarding arbitration adopted at the time.

47. Furthermore, using the **teleological** and **sociological** element of statutory interpretation, the economic and social situation prevailing at the time the 1999 Investment Law was enacted explains the legislator's intent to promote investments and the offering of consent to international arbitration as a means to do so.[40] The economic policy and the whole legal order exist-

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39 *Supra*, par. 19. The Constitutional Chamber of the Supreme Tribunal of Justice has held that the determination of the intention of the Legislator must "start from the will of the drafter of the provision, as it results from the debates prior to its promulgation." See Supreme Tribunal of Justice, Constitutional Chamber, Decision No. 1.173 of June 15, 2004 (Case: Interpretación del Artículo 72 de la Constitución de la República Bolivariana de Venezuela) (Exp. 02-3.215), in *Revista de Derecho Público N° 97-98*, Editorial Jurídica Venezolana, Caracas 2004, pp. 429 ff.

40 In 2008, Domingo Maza Zavala, member of the Board of Directors of the Venezuelan Central Bank until 2007 reported that "*Los ingresos fiscales en el período 1964–1998 (gobiernos J. Lusinchi, C.A. Pérez y R. Caldera) fueron de Bs. 91.109 MM; y sólo en el período 1999–2006 fueron de Bs 99.242 MM. Los ingresos petroleros que en 1998 fueron de US$ 16.735 MM; en los años subsiguientes ascendieron así: 1999: US$ 16.735 MM; 2000: US$27.874 MM; 2001: US$ 21.745 MM; 2002: US$ 21.532 MM; 2003: US$ 22.029 MM; 2004: US$ 32.871 MM; 2005: US$*

ing in 1999 tended to promote foreign investment and international arbitration. This general intent is clearly reflected in the 1999 Investment Law as a whole, which is primarily devoted to promoting and protecting foreign investment by regulating the actions of the State in the treatment of such investment. Submission of disputes to international arbitration is precisely one of the principal means of protecting foreign investors and investments.[41]

5. The interpretation of Article 22 proposed by the Republic of Venezuela

48. The interpretation of Article 22 put forward in the **Respondent Memorial**, as well as the interpretations made in the **2008 Decision No. 1.541** and the **Urdaneta Opinion,** to which the Respondent refers for support, are either not consistent with principles of statutory interpretation under Venezuelan law or depend upon arguments that are flawed and logically incorrect.[42]

48.143 MM; 2006: US$ 56.438 MM; 2007 US$62.555 MM." Regarding *gasto público* he added that "*Al comienzo del mandato de Chávez el gasto público era de 15.000 millones de dólares anuales, ahora es de unos 80.000 millones.*" See *Joaquim Ibarz,* "Ahora, en Venezuela, hay más pobreza que antes de Chávez" in *La Vanguardia*, Edición impresa, Barcelona, España, February 11, 2008 *available at* http://www.lavanguardia.es/free/edicionimpresa/res/ 20080211/53. (The fiscal income in the 1964–1998 period (governments of J. Lusinchi, C.A. Pérez y R. Caldera) were Bs. 91.109 MM; and only in the 1999–2006 period were Bs 99.242 MM. The oil income that was US$ 16.735 MM in 1998; increased in the subsequent years as follows: 1999: US$ 16.735 MM; 2000: US$27.874 MM; 2001: US$ 21.745 MM; 2002: US$ 21.532 MM; 2003: US$ 22.029 MM; 2004: US$ 32.871 MM; 2005: US$ 48.143 MM; 2006: US$ 56.438 MM; 2007 US$62.555 MM. Regarding public expenditure he added that: "At the beginning of the Chávez' administration public expenditure was of 15.000 millions of dollars per year, now is of around 80.000 million.")

41 Even **2008 Decision No. 1.541** (p. 365.490) recognizes that one of the ways States attract foreign investment is to make a unilateral promise to submit disputes to arbitration ("It is not possible to ignore that States seeking to attract investments must in their sovereignty decide to grant certain guarantees to investors, in order for such relationship to take place. Within the variables used to achieve said investments, it is common to include an arbitration agreement, which in the investors' judgment provides them with security in relation to the — already mentioned — fear of a possible partiality of State tribunals in favor of [the tribunals'] own nationals.")

42 See analysis of **2008 Decision No. 1.541** and its historical context as a political decision at *infra* par. 90 *et seq*.

49. To begin with, it is an error to suppose (as the Respondent and the opinion on which it relies do) that the phrase "if it so establishes" refers to the State's **consent** to arbitration. First, there is nothing in the text of Article 22 suggesting or supporting such an interpretation. The antecedent sentence ("shall be submitted to international arbitration according to the terms of the respective treaty or agreement") makes no reference to consent; it refers to international arbitration. As the "so" in "if it so establishes" cannot refer to a concept that is not included in the antecedent sentence, the Respondent's interpretation is unfounded. Second, it should be remembered that the "it" in "if it so establishes" refers, in the context we are addressing in this case, to the ICSID Convention. Therefore, interpreting "if it so establishes" as though it meant "if the ICSID Convention establishes consent to arbitration" would turn this phrase into an impossible condition (one that cannot be fulfilled), because the ICSID Convention does not itself provide for a Contracting State's consent to ICSID arbitration. It is precisely because the ICSID Convention requires consent by a separate written instrument, such as a piece of national legislation like Article 22,[43] that it cannot be presumed – as the **Respondent Memorial** and the **Urdaneta Opinion** do – that the drafters of Article 22 intended the absurdity of subjecting the mandate relating to ICSID arbitration to a condition that was not and could not be fulfilled. Under Venezuelan law, any interpretation of a statute that leads to absurdity or that would deprive a statutory provision of any effect must be rejected.[44] The principle of effective interpretation (*effet utile*) has been recognized to be a critical canon for the interpretation of statutes. For example, the Civil Cassation Chamber of the Supreme Tribunal of Justice has declared that "it would be absurd to suppose that the Legislator does not try to use the most precise and adequate terms in order to express the purpose and scope of its provi-

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[43] It is settled that under Article 25,1 of the ICSID Convention an ICSID Contracting State may express its written consent to submit to the jurisdiction of the Centre by way of the Contracting State's legislation for the promotion of investments. See *supra,* footnote 2.

[44] See Supreme Tribunal of Justice, Constitutional Chamber, Decision No. 1.173 of June 15, 2004 (Case: Interpretación del Artículo 72 de la Constitución de la República Bolivariana de Venezuela) (Exp. 02-3.215), in *Revista de Derecho Público N° 97-98*, Editorial Jurídica Venezolana, Caracas 2004, pp. 429 ff.

sions, or deliberately omits elements that are essential for their complete understanding."[45]

50. Furthermore, the **2008 Decision No. 1.541** (pp. 365.495-365.496) attempts to show that interpreting Article 22 as expressing the State's consent to international arbitration would be "unacceptable" in any legal order. Those attempts miss the mark, and show an internal contradiction in the decision. While on the one hand the Constitutional Chamber concedes that a State can express its consent unilaterally and generically in investment legislation (pp. 365.491-365.492) a method of consent that is clearly allowed in the ICSID Convention and is firmly established in international practice,[46] on the other hand, the Chamber offers arguments that amount to denying that very same point. In particular, **2008 Decision No. 1.541** argues that, if Article 22 were interpreted as a general offer of consent and that offer were accepted by an investor, a wide range of matters within the scope of the statute would automatically (*de pleno derecho*) be submitted to arbitration, without the State being able to assess the benefits or disadvantages of arbitration in each case, in violation of an alleged principle of "informed" consent (p. 365.494). Yet this is precisely what happens, as the intended consequence, whenever a State chooses to consent to arbitration, generically, by means of a national statute or a treaty. In the same vein, the **2008 Decision No. 1.541** argues that interpreting Article 22 as containing a generic offer of arbitration would lead to the "absurdity of considering that the State may not choose a forum or jurisdiction of convenience or more favorable to its interests (*Forum Shopping*)" (p. 365.496). This is not an absurdity at all; it is the normal effect of a generic expression of consent, which is uniformly accepted under the ICSID Convention. A State that gives generic consent to arbitration in treaties or in statutes has given up the right to assess the benefits or disadvantages of international arbitration on a case-by-case basis, in exchange for the investment promotion benefits derived from a generic offer of international arbitration to foreign investors.

51. The **2008 Decision No. 1.541** also argues that interpreting Article 22 as a generic offer of consent would in effect abrogate bilateral and

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45 Supreme Tribunal of Justice, Civil Cassation Chamber, Decision No. 4 of November 15, 2001 (Case: *Carmen Cecilia López Lugo v. Miguel Angel Capriles Ayala et al.*), p. 7.

46 See *supra*, footnote 2.

multilateral investment treaties that provide for different dispute resolution methods, because investors protected by those treaties could invoke the most-favored-nation clause (MFN) contained in them to take advantage of ICSID arbitration, thereby avoiding the dispute resolution mechanisms provided for in the treaty (p. 365.496). This argument has no basis. Assuming that an investment treaty to which Venezuela is a party has an MFN clause that covers dispute settlement, and assuming that ICSID arbitration is more favorable than the dispute-settlement method contemplated in such treaty, an investor claiming under that treaty would already have the right to invoke ICSID arbitration, because the MFN clause of that treaty would incorporate by reference the dispute-settlement provisions of other investment treaties to which Venezuela is a party, which provide for ICSID arbitration. Under the logic of the **2008 Decision No. 1.541**, the treaty of the example would have been "abrogated" by the other treaties, independently of how Article 22 is interpreted, a conclusion that shows that the argument proves nothing. Besides, the argument in the **2008 Decision No. 1.541** amounts to asserting that a State cannot consent to ICSID jurisdiction by statute if it has entered into investment treaties that provide for different methods of dispute resolution, a conclusion that has no basis.

52. Furthermore, there is no basis for the argument in the **2008 Decision No. 1.541** (pp. 365.496-365-497), that interpreting Article 22 as an open offer of consent would create an inconsistency with Articles 5, 7, 8 and 9 of the 1999 Investment Law. There is, in fact, no contradiction between the open offer of consent in Article 22 and any of those other provisions.

53. Article 5 guarantees that the provisions of the 1999 Investment Law shall not derogate from any higher level of protection under international treaties or agreements for the promotion and protection of investments. This means that the level of protection under the 1999 Investment Law was intended to be a floor, leaving room for higher levels of protection under treaties. Article 5 also provides that, in the absence of any such treaty or agreement, and notwithstanding the MFN clause in the 1999 Investment Law, an investor will benefit only from the protection established in that Law (the 1999 Investment Law) until such time as the investor is covered by a treaty or agreement containing an MFN clause (in which case the investor will benefit from that particular treaty and any other more favorable treatment required by other treaties, as well as from the 1999 Investment Law). Article 5 also requires the State to seek, in the negotiation of such treaties, the greatest level of protection for Venezuelan investors and to ensure that, in

any case, such level of protection is not inferior to that granted to the investors of the other contracting State in Venezuela. There is nothing in these provisions that contradict giving consent to ICSID jurisdiction in Article 22.

54. Article 7 of the 1999 Investment Law establishes a basic principle of national treatment. International investments and investors are to have the same rights and obligations as national investments and investors, except as otherwise provided in special statutes and in the 1999 Investment Law itself. There is no contradiction between this principle and an open offer of consent to ICSID jurisdiction in Article 22 because, even though such offer necessarily benefits only foreign investors,[47] the offer of consent is an exception provided for in the 1999 Investment Law itself.

55. Article 8 of the 1999 Investment Law prohibits discrimination against international investors based on the country of origin of their capital, subject to exceptions for agreements on economic integration or tax matters. There is no contradiction between this provision and the open offer of consent to ICSID jurisdiction in Article 22, which applies to foreign investors in general, without regard to the origin of their capital. Any investor that is a national of a State that is or becomes a party to ICSID can accept the offer of consent. If Article 8 were inconsistent with Article 22, it would also be inconsistent with Article 5, because Article 5 presupposes the existence of different legal regimes for international investors, depending on whether they are nationals of countries having treaties or agreements for the promotion or protection of investments with Venezuela, or are protected only by the 1999 Investment Law.

56. Article 9 of the 1999 Investment Law establishes the principle that international investments and investors will have the right to the most favorable treatment under Articles 7 and 8 of the same Law. This means that they are entitled to the better of national treatment under Article 7 or most-favored-nation treatment (non-discrimination on the basis of the country of origin of their capital) under Article 8, with the exceptions authorized by those provisions. Since, as already discussed, the open offer of consent in

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[47] Under Article 25 of the ICSID Convention the investor must be a national of a State other than the State party to the dispute (Venezuela in the situation at issue), except when for reasons of foreign control the parties have agreed that a national of the Contracting State party to the dispute "should be treated as a national of another Contracting State for the purposes of this Convention."

Article 22 is not inconsistent with either Article 7 or 8, it cannot be inconsistent with Article 9.

57. The two hypothetical examples posed by the **2008 Decision No. 1.541** (p. 365.497) do not show any contradiction between the open offer of consent in Article 22 and any of the other provisions just discussed. In the first hypothetical example, the Constitutional Chamber argues that, if Article 22 is interpreted as containing an open offer of consent, a State member of ICSID that does not have a treaty on investments with Venezuela (and has not consented to ICSID jurisdiction in an investment law of its own) would be in a better position *vis-à-vis* a State member of ICSID that has such a treaty, because the first State would not be subject to ICSID claims by Venezuelan investors, while the second State would. Once again, this argument proves nothing. The 1999 Investment Law does not guarantee equal treatment for States; it guarantees certain levels of treatment for investors, primarily international investors. Nor does any provision of the 1999 Investment Law require reciprocity, that is, that Venezuelan investors must have the right to submit controversies to ICSID against States whose nationals may benefit from the open offer of consent in Article 22. Since consent to ICSID jurisdiction by statute is by nature a unilateral act, to challenge such consent on grounds of lack of reciprocity amounts to denying, contrary to uniform practice, the possibility of any consent by statute.

58. In the second example, the **2008 Decision No. 1.541** argues that, if Article 22 is interpreted as an expression of consent, an investor of a country that is a party to the ICSID Convention but does not have a treaty on investments with Venezuela would be in a better position than an investor of a country that is not a party to the ICSID Convention but has a treaty with Venezuela providing for non-ICSID arbitration. The "better position" would result from ICSID arbitration being supposedly more favorable to an investor than the non-ICSID arbitration provided in the treaty. In fact, ICSID arbitration may or may not be more favorable to an investor than another arbitration regime that may be established in a treaty. But even assuming that, in a particular case, ICSID arbitration is more favorable than the arbitration regime in a treaty, the hypothesis is not inconsistent with any provision of the 1999 Investment Law, which does contemplate the possibility of parallel regimes under treaties and under the 1999 Investment Law. Under the same logic, the State could not become a party to a treaty that does provide for ICSID arbitration, because investors protected by such treaty would receive better

treatment than investors protected by a treaty that provides for a different arbitration regime.

59. Not only is the **2008 No. 1541 Decision** legally unsound, but it is internally contradictory. The following examples serve to illustrate the point:

- First, while **2008 Decision No. 1.541** concedes and pays lip service to the proposition that international law applies to the interpretation of Article 22 (p. 365.493), it later advocates an interpretation entirely based on alleged principles of "national order." Later, the decision undermines the merits of its own analysis by stating that there is little value ("utility") in an analysis limited to considerations of "internal order." (p. 365.493.)
- Second, as already noted, the **2008 Decision No. 1.541** concedes that a State can express its consent to arbitration unilaterally and generically through its investment legislation (pp. 365.491-365.492), but it then argues that Article 22 cannot be interpreted as an expression of consent on the ground that it would deprive the Republic of Venezuela from analyzing the advantages of arbitration "in each case" (p. 365.494) and from choosing "a forum or jurisdiction of convenience or more favorable to its interests ("*Forum Shopping*")" (p. 365.496).[48] Put differently, for the Constitutional Chamber, the problem with interpreting Article 22 as an expression of consent is that it would prevent the State from forum shopping on a case by case basis.
- Finally, although **2008 Decision No. 1.541** devotes several paragraphs to reiterating the existence of a constitutional mandate to promote arbitration (Article 258 of the Constitution) (pp. 365.484-365.486), it ultimately reaches an interpretation of Article 22 that does nothing of the kind.

60. The lack of a coherent and logical legal analysis contrasts with various statements in **2008 Decision No. 1.541** that make it evident that this ruling was the product of a political agenda that the Constitutional Chamber was called upon to defend. By its own admission, the Constitutional Chamber was operating on the understanding that it was bound to further the interests of the State. Most notably, the Chamber stated:

"[A]lthough the Republic and the government[,] in conformity with

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48 *Supra*, par. 50.

> prevailing Constitution and laws[,] are limited in the reach of their powers against other subjects of international law due to fundamental principles of the legal order — […] it is also [true] that **national sovereignty and self-determination allow and oblige the organs of the Government to establish the most favorable conditions for the achievement of the interests and purposes of the State** established in the Constitution […]."[49]

II. THE ATTEMPTS, BETWEEN 2000 AND 2008, TO OBTAIN A JUDICIAL INTERPRETATION OF ARTICLE 22 OF THE 1999 INVESTMENT LAW IN A SENSE CONTRARY TO ARBITRATION

61. Since the 1999 Investment Law was adopted, and precisely because Article 22 expresses the State's consent to submit disputes to international arbitration, various unsuccessful attempts have been made by individuals opponents of that policy, to obtain a different interpretation from the Venezuelan courts. After those failed efforts and in the context of several ICSID arbitration proceedings that had been initiated by investors against the Republic of Venezuela on the basis of Article 22, the Venezuelan Govern-

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[49] **2008 Decision No. 1.541,** p. 365.493 (emphasis added). The protection of national sovereignty and self-determination were a constant theme informing various statements in this decision. For example, when holding that the interpretation of all laws must be made in accordance with the Constitution, the Court went on to explain that this meant "*to protect the Constitution itself from any deviation of principles and from any separation from the political project that it embodies by the will of the people*" adding that *"part of the protection and guarantee of the Constitution of the Bolivarian Republic of Venezuela is rooted, then, in a political perspective in fieri*, ***disinclined toward ideological linkages to theories that may limit, under the pretext of universal validity, the national sovereignty and self-determination****, as required by article 1° eiusdem* (…)." *Id.*, p. 365.493 (emphasis added). Earlier, **2008 Decision No. 1.541** had expressed some skepticism about a generalized perception of impartiality of arbitral jurisdiction, noting that "the displacement of the jurisdiction from State tribunals to those of arbitration frequently occurs because the settlement of disputes will be made by arbitrators who[,] in [a] considerable [number of] cases[,] are related to and **tend to favor the interests of multinational corporations, thus becoming an additional instrument of domination and control of national economies** […]" and adding that "it is somewhat unrealistic simply to make an argument of the impartiality of arbitral justice in detriment of the justice provided by the judicial authorities of the Judiciary, to justify the applicability of the jurisdiction of contracts of general interest." *Id*., p. 365.488 (emphasis added).

ment obtained, in record time, a decision of the Constitutional Chamber of the Supreme Tribunal of Justice on the interpretation of Article 22 (**2008 Decision No. 1.541** of October 17, 2008). In this section, I explain the circumstances of the **2008 Decision No. 1.541** in the context of the earlier failed attempts to obtain a judicial interpretation of Article 22 and the current political control to which the Constitutional Chamber is subject.

1. General considerations on the system of judicial review in Venezuela and the judicial interpretation of the Constitution

62. The Supreme Tribunal has issued decisions concerning the 1999 Investment Law in the context of proceedings of judicial review or petitions (*recursos*) of interpretation of the Constitution and statutes in the abstract.

63. Following a long tradition,[50] the Venezuelan system of judicial review is a mixed system,[51] which combines the classical diffuse method of judicial review (American model) established in Article 334 of the Constitution,[52] with the concentrated method of control of constitutionality of statutes (European model), established in Articles 335 and 336 of the Constitution. According to Articles 335 and 336 in the Venezuelan legal order, the Supreme Tribunal is the "highest and final interpreter" of the Constitution. Its role is to assure a "uniform interpretation and application" of the Constitu-

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50 See *generally* Allan R. Brewer-Carías, *Instituciones Políticas y Constitucionales*, Vol. VI, La Justicia Constitucional, Universidad Católica del Táchira, Editorial Jurídica Venezolana, San Cristóbal-Caracas, 1998; Allan R. Brewer-Carías, *Estado de Derecho y Control Judicial*, Instituto de Administración Pública, Madrid 1985; Allan R. Brewer-Carías, *Justicia Constitucional. Procesos y Procedimienos Constitucionales*, Ed. Porrúa, México 2006; Allan R. Brewer-Carías, *El Sistema Mixto o Integral de Control de Constitucionalidad en Colombia y Venezuela,* Bogotá 1995.

51 See Allan R. Brewer-Carías, *Judicial Review in Comparative Law,* Cambridge University Press, Cambridge 1989, pp. 275-277.

52 1999 Constitution, Article 334. ("***Articulo 334***. […] *En caso de incompatibilidad entre esta Constitución y una ley u otra norma jurídica, se aplicarán las disposiciones constitucionales, correspondiendo a los tribunales en cualquier causa, aún de oficio, decidir lo conducente.* […]") ("**Article 334**. […] In the event of an incompatibility between this Constitution and a law or any other legal norm, the Constitutional provisions shall be applied, corresponding to the courts in any case, even *sua sponte*, to decide what is needed. […]")

tion and "the supremacy and effectiveness of constitutional norms and principles." For such purpose, the Constitution created a Constitutional Chamber within the Supreme Tribunal, whose role is to exercise "constitutional jurisdiction." (Articles 266,1 and 262). That Chamber has the exclusive power to declare the nullity of statutes and other State acts issued in direct and immediate execution of the Constitution, or having the force of law (statute) (Article 334).[53]

64. To implement the concentrated method of judicial review, the Constitution provides for different means of recourse to the courts, including the action for unconstitutionality of statutes (*acción de inconstitucionalidad*), which any citizen can file directly before the Constitutional Chamber.

65. In addition to the means of judicial review established in the Constitution, the Constitutional Chamber of the Supreme Tribunal of Justice has created a petition (*recurso*) for abstract interpretation of the Constitution (petition for **constitutional interpretation**), which has been extensively used.[54] The petition for **constitutional interpretation** was created by the Constitutional Chamber without any constitutional or legal support. The Constitutional Chamber attributed to itself the sole power to decide it.[55]

66. In cases dealing with interpretations **of the Constitution**, the Constitutional Chamber is empowered to give binding effect to its decisions

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53 These include "acts of government," internal acts of the National Assembly, and executive decrees having the rank of statutes.

54 See Supreme Tribunal of Justice, Constitutional Chamber, Decision No. 1077 of September 22, 2000 (Case: *Servio Tulio León Briceño*) in *Revista de Derecho Público Nº 83*, Caracas, 2000, pp. 247 ff. See Allan R. Brewer-Carías, "*Quis Custodiet Ipsos Custodes*: De la interpretación constitucional a la inconstitucionalidad de la interpretación" in *VIII Congreso Nacional de Derecho Constitucional, Peru*, Fondo Editorial 2005, Colegio de Abogados de Arequipa. Arequipa, September 2005, pp. 463-489, also a*vailable at* www.allanbrewercarias.com, (Biblioteca Virtual, II.4. Artículos y Estudios No. 475, 2005) pp. 1-33; Allan R. Brewer-Carías, "Le recours d'interprétation abstrait de la Constitution au Vénézuéla" in *Renouveau Du Droit Constitutionnel, Mélanges en L'honneur de Louis Favoreu*, Dalloz, Paris, 2007, pp. 61-70.

55 No provision of the 2004 Organic Law of the Supreme Tribunal of Justice attributes this power to the Constitutional Chamber of the Supreme Tribunal of Justice. See Allan R. Brewer-Carías, *Ley Orgánica del Tribunal Supremo de Justicia*, Editorial Jurídica Venezolana, Caracas 2004, pp. 103-109.

(Article 335). According to Decision No. 1.309 of June 19, 2001 (Case: *Hermann Escarrá*),[56] the decisions of the Constitutional Chamber on petitions of abstract interpretation of the Constitution have effects *erga omnes*, that is to say, they are binding on all courts of the Republic of Venezuela, but they apply only prospectively (*pro futuro*, *ex nunc*), that is, they do not have retroactive effects.

67. There is a second type of petition of interpretation in Venezuela: the petition (*recurso*) of **interpretation of statutes**. Unlike the prior one, this type is provided for in the Constitution (Article 266,6) and in the 2004 Organic Law of the Supreme Tribunal of Justice (Article 5, paragraph 1,52). The competence to decide these petitions corresponds to the Chamber of the Supreme Tribunal (Politico-Administrative, Civil, Criminal, Social or Electoral Chamber) that has competence over the subject-matter of the statute.[57] When a petition for interpretation results in the interpretation of a statute, such interpretation applies only prospectively.[58]

68. A petition (*recurso*) of interpretation has the purpose of obtaining from the Supreme Tribunal a declarative ruling to clarify the content of legal or constitutional provisions. To have standing to file a petition of interpretation, a petitioner must invoke an actual, legitimate and juridical interest in the interpretation based on a particular and specific situation in which he stands, which requires interpretation of the legal or constitutional provision in question. The Constitutional Chamber has held that in a petition for constitutional interpretation, the petitioner must always point to "the obscurity, the ambiguity or contradiction between constitutional provisions."[59]

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[56] Ratified in Supreme Tribunal of Justice, Constitutional Chamber, Decision No. 1.684 of November 4, 2008 (Case: *Carlos Eduardo Giménez Colmenárez*) (Exp. No. 08-1016), pp. 9-10.

[57] Before 2000, the only petition (*recurso*) of interpretation existing in the Venezuelan legal order was the petition of interpretation of statutes in cases expressly provided by them. It was established in Article 42,24 of the 1976 Organic Law of the Supreme Court of Justice, and exclusively attributed to the Politico-Administrative Chamber of that court. This changed in the 1999 Constitution.

[58] See also *infra* par. 89.

[59] Allan R. Brewer-Carías, "*Quis Custodiet Ipsos Custodes*: De la interpretación constitucional a la inconstitucionalidad de la interpretación" in *VIII Congreso Nacional de Derecho Constitucional, Peru*, Fondo Editorial 2005, Colegio de Abogados de Arequipa. Arequipa, September 2005. pp. 463-489, also a*vailable at*

In Decision No. 2.651 of October 2, 2003, the Constitutional Chamber ruled that the proceeding did not have an adversarial nature, and left it to the court's discretion whether to call to the proceeding those that could have something to say on the matter.[60]

69. When deciding a petition of statutory interpretation, chambers of the Supreme Tribunal (other than the Constitutional Chamber) are not empowered to establish a binding interpretation of constitutional provisions. Conversely, when the Constitutional Chamber decides a petition of interpretation of the Constitution, it is not empowered to establish binding interpretations of statutory provisions. Accordingly, a petition of statutory interpretation regarding the 1999 Investment Law can be filed only before the Politico-Administrative Chamber of the Supreme Tribunal, as the Constitutional Chamber indeed decided when it declined to assume jurisdiction to resolve a petition of interpretation of Article 22 of the 1999 Investment Law filed by three Venezuelan lawyers in 2007.[61]

2. The 2001 decision upholding the constitutionality of Article 22 of the 1999 Investment Law

70. The first case filed before the Supreme Tribunal in connection with Article 22 of the 1999 Investment Law was an action of unconstitutionality filed by two individuals challenging Articles 17, 22 and 23 of the 1999 Investment Law. The Constitutional Chamber upheld the constitutionality of the challenged provisions in Decision No. 186 of February 14, 2001.[62]

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www.allanbrewercarias.com, (Biblioteca Virtual, II.4. Artículos y Estudios No. 475, 2005) pp.1-33.; Allan R. Brewer-Carías, "Le recours d'interprétation abstrait de la Constitution au Vénézuéla" in *Renouveau Du Droit Constitutionnel, Mélanges en L'honneur de Louis Favoreu*, Dalloz, Paris, 2007, pp. 61-70.

60 Supreme Tribunal of Justice, Constitutional Chamber, Decision No. 2.651 of October 2, 2003 (Case: *Ricardo Delgado,* Interpretation of Article 174 of the Constitution), pp. 30-32.

61 Supreme Tribunal of Justice, Constitutional Chamber, Decision No. 609 of April 9, 2007 (Case: Interpretation of Article 22 of the 1999 Investment Law).

62 Supreme Tribunal of Justice, Constitutional Chamber, Decision No. 186 of February 14, 2001 (Case: Challenge Constitutionality Articles 17, 22 and 23 of the 1999 Investment Law).

71. The petitioners argued *inter alia* that Article 22 was contrary to Articles 157,31 (*sic*) and 253 of the Constitution, because it "attempt[s] to authorize private parties [*los particulares*] to leave aside the application of Venezuelan public law provisions, in favor of arbitral organs, which as it is known, apply equity criteria without necessarily complying with positive law provisions."[63] This statement implies that the petitioners understood Article 22 as an open offer by the State to submit controversies on international investments to international arbitration. Only on that understanding could the petitioners complain that Article 22 made it possible for "private parties [*los particulares*] to leave aside the application of Venezuelan public law provisions in favor of arbitral organs […]."

72. In rejecting the petition as it concerned Article 22, the Constitutional Chamber reasoned that:

> "the plaintiffs incur in the mistake of considering that by virtue of the challenged provisions previously quoted [Articles 22 and 23 of the 1999 Investment Law], there is an attempt to give an authorization to leave aside public law provisions in favor of arbitral organs, taking away from national courts their power to decide the potential disputes that may arise in connection with the application of the Decree Law on the Promotion and Protection of Investments. In fact, this Chamber considers that the prior statement is an error because it is the Constitution itself which incorporates within the system of justice the alternative means of justice, among which, the arbitration is obviously placed.
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> […]
>
> The Chamber notices that the plaintiffs seeking the nullity have not noticed, from the constitutional provision they claim as violated, that the alternative means of justice are also part of the Venezuelan system of justice and that the quotation of the cited article 253 in their pleading does not contain the last part of this provision."[64]

73. The Constitutional Chamber noted that the Constitution incorporates alternative means of adjudication, including arbitration, within the

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63 *Id.,* p. 4.

64 *Id.*, pp. 25-26.

Venezuelan system of justice. It highlighted that arbitration – national and international – has a constitutional basis in Article 258 of the 1999 Constitution, and specifically concluded that "**the arbitral settlement of disputes, provided for in** the impugned **articles 22** and 23[] does not conflict in any manner with the Fundamental Text."[65]

74. The Constitutional Chamber referred to the mandate to promote arbitration in Article 258 of the Constitution ("The law shall promote arbitration, conciliation, mediation and any other alternative means of dispute resolution") and explained that:

> "[...] the law, in this case an act with rank and force of such, promoted and developed the referred constitutional mandate, **by providing for arbitration as an integral part of the mechanisms for settlement of controversies** that may arise between an international investor, whose country of origin has in effect with Venezuela a treaty or agreement on the promotion and protection of investments, or **controversies with respect to which the provisions of** the Convention Establishing the Multilateral Investment Guarantee Agency (OMGI-MIGA) or **the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) are applicable**. It must be made clear that in accordance with the challenged norm itself, the possibility of resorting to the contentious means established under the Venezuelan legislation in effect remains open, when the potential dispute arises and these avenues are appropriate.
>
> This Chamber considers that **the provision for arbitration** under the terms developed in the challenged norm[…] does not violate the sovereign power of national courts to administer justice […]."[66]

75. In this decision, the Constitutional Chamber tacitly acknowledged that Article 22 contains the express consent of the State to submit to international arbitration controversies regarding investment. The reasoning quoted in the preceding paragraphs would make no sense unless the Constitutional Chamber understood Article 22 as expressing the State's consent to international arbitration.

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65 *Id.,* p. 28 (emphasis added).

66 *Id.,* p. 27 (emphasis added).

3. The 2007 decision of the Constitutional Chamber declaring its lack of jurisdiction to interpret Article 22 of the 1999 Investment Law

76. On February 6, 2007, a group of lawyers filed a petition (*recurso*) for statutory interpretation of Article 22 of the 1999 Investment Law before the Constitutional Chamber of the Supreme Tribunal.[67] The stated purpose of the petition was to obtain an interpretation of Article 22 "to determine whether [Article 22] established or not the arbitral consent necessary to allow foreign investors to initiate international arbitrations against the Venezuelan State."[68]

77. The petitioners added that they were not asking the Constitutional Chamber to declare Article 22 unconstitutional, a matter that had been resolved in 2001. They argued instead that "one thing is that the article at issue be constitutional and another very different is that such article establish a general and universal consent to allow any foreign investor to request that its disputes with the Venezuelan State be resolved by means of international arbitration, a matter with respect to which the wording of the article is not clear."[69] (The petitioners in that case failed to recognize that the Constitutional Chamber had implicitly resolved that question of statutory interpretation when upholding the constitutionality of the challenged article.) The petitioners formulated the following specific questions:

> "Does article 22 of the Law on the Promotion and Protection of Investments contain the arbitral consent by the Venezuelan State in order for all the disputes that may arise with foreign investors to be submitted to arbitration before ICSID?
>
> In case of a negative [answer] (sic), what is the purpose and use of article 22 of the Law on the Promotion and Protection of Investments?"[70]

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67 Supreme Tribunal of Justice, Constitutional Chamber, Decision No. 609 of April 9, 2007.

68 *Id.*, p. 3

69 *Id.*, p. 3.

70 *Id.*, pp. 3-4.

78. In Decision No. 609 of April 9, 2007, the Constitutional Chamber ruled that it had *no* competence to decide on the interpretation of Article 22.[71] It explained that the matter was within the competence of the Politico-Administrative Chamber of the Supreme Tribunal.[72] This was a ratification of the Constitutional Chamber's position that it had no competence to decide petitions of interpretation of statutes; its competence being limited to petitions of interpretation of the Constitution and of instruments within the "block of constitutionality."[73] The Constitutional Chamber concluded that this was "a matter of Public Law, on the relations (in this case, the solution of controversies) derived from foreign investments in the Venezuelan State, which means that competence, according to the subject-matter, corresponds to the Politico-Administrative Chamber of this Supreme Tribunal, on the basis of number 6 of article 266 of the Constitution and number 52 of article 5 of the Organic Law of the Supreme Tribunal of Justice."[74] Accordingly, the Constitutional Chamber ordered that the file be transferred to the Politico-Administrative Chamber.

4. The 2007 decision of the Politico-Administrative Chamber declaring the inadmissibility of a petition of interpretation of Article 22 of the 1999 Investment Law

79. The Politico-Administrative Chamber decided the aforementioned petition in Decision No. 927 of June 5, 2007, declaring the request inadmissible because the petitioners lacked standing.[75]

80. The Politico-Administrative Chamber reasoned that the petitioners had failed to demonstrate the existence of a particular juridical situation affecting them in a personal and direct way that could justify a judicial

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71 *Id*., p. 7.

72 *Id.*, p. 7.

73 The Constitutional Chamber pointed out that the petition referred to a "legal provision that regulates arbitration in relation to foreign investments, with respect to which the petitioners have doubts as to whether it contains a declaration of general (legal) consent by the Venezuelan State to be always submitted to such means of dispute resolution or if, on the contrary, it is only a provision that requires such consent in each opportunity in which it is necessary." *Id*., p. 6.

74 *Id*., p. 6.

75 Supreme Tribunal of Justice, Politico-Administrative Chamber, Decision No. 927 of June 5, 2007.

decision on the scope and application of Article 22.[76] The Politico-Administrative Chamber noted that the petitioners had based their interest only on their activities as lawyers, and had not referred expressly to any personal and direct interest in the requested interpretation.[77] The Chamber also emphasized that a petition of interpretation must not be used for mere academic purposes.[78]

5. The 2008 Decision No. 1.541 of the Constitutional Chamber interpreting Article 22 of the 1999 Investment Law and the problems of independence and autonomy the Venezuelan Judiciary

81. After the aforementioned failed attempts by various individuals to obtain judicial decisions interpreting Article 22 of the 1999 Investment Law, the Government of Venezuela did succeed in obtaining a judicial decision by the Constitutional Chamber (**2008 Decision No. 1.541** of October 17, 2008).

82. The **2008 Decision No. 1.541** was issued in response to a petition of interpretation of Article 258 of the Constitution filed on June 12, 2008 by the Republic of Venezuela represented by a number of attorneys designated by the *Procurador General de la República* (Attorney General). The petition states expressly that the request was prompted by the ICSID cases against the Republic of Venezuela pending at the time the petition was filed.[79]

83. Although the **2008 Decision No. 1.541** ostensibly resolved a petition labeled as a request of constitutional interpretation of Article 258 of the Constitution, the Constitutional Chamber went on to issue a statutory interpretation of Article 22 of the 1999 Investment Law. As already discussed, this was a matter that the Constitutional Chamber itself had acknowledged to

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76 *Id*., p. 14.

77 *Id*.

78 *Id*.

79 Supreme Tribunal of Justice, Constitutional Chamber, Petition for Interpretation filed by Hildegard Rondón de Sansó, Alvaro Silva Calderón, Beatrice Sansó de Ramírez *et al*., on behalf of the Bolivarian Republic of Venezuela, concerning the last section of Article 258 of the Constitution of the Bolivarian Republic of Venezuela, of June 12, 2008, p. 10.

be within the exclusive competence of the Politico-Administrative Chamber.[80]

84. The **2008 Decision No. 1.541** states that it is possible for a State to express its consent to submit the resolution of disputes to international arbitration in a statute (p. 365.492), but it accepts the Government's position that Article 22 does not have that effect.

85. The Constitutional Chamber decided the matter in a very unusual abbreviated proceeding within only 120 days (including 30 days of judicial vacation) and without any adversarial hearings. The petition was filed on June 12, 2008 and it was notified to the Constitutional Chamber on June 17, 2008. Only one month later, on July 18, 2008, the Chamber issued a decision admitting the petition, after omitting the oral hearing on the ground that it was a "merely legal" matter.[81] The Constitutional Chamber set a maximum term of 30 days to decide the case, which would begin to count five days after a newspaper notice giving interested parties five days to file their arguments.[82] The newspaper notice was published on July 29, 2008. On September 16, 2008, three individuals filed arguments as third parties (*escrito de coadyuvancia*), but their participation was denied by the Constitutional Chamber on grounds of lack of standing.[83] The final decision in the case was issued one month later, on October 17, 2008.

86. As aforementioned, the petition of constitutional interpretation was established by the jurisprudence of the Constitutional Chamber for the sole purpose of interpreting obscure, ambiguous or inoperative constitutional provisions.[84] Article 258 requires no such interpretation. It states that:

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80 *Supra*, par. 78.

81 Supreme Tribunal of Justice, Constitutional Chamber, Decision of July 18, 2008. Magistrate Pedro Rafael Rondón dissented from the decision to admit the petition. He explained that Article 258 was not obscure, and added that the petition was being used to obtain a legal opinion from the Constitutional Chamber, contravening prior decisions of the same Chamber. Finally, he noted that the petition included a request for interpretation of a statutory provision (Article 22) which exceeded the competence of the Constitutional Chamber. Dissent, Decision of July 18, 2008.

82 *Id*., p. 8.

83 **2008 Decision No. 1.541**, p. 365.483.

84 *Supra*, par. 68.

> "The law shall promote arbitration, conciliation, mediation and any other alternative means of dispute resolution."

As there is nothing obscure, ambiguous or inoperative in this provision, it is obvious that the real purpose of the petition of constitutional interpretation filed by the representatives of the Republic of Venezuela was not to obtain a clarifying interpretation of Article 258. Instead, they used this petition as a vehicle for obtaining an interpretation of Article 22 of the 1999 Investment Law in the sense that it does not contain the State's unilateral consent to arbitration. In particular, the Republic of Venezuela requested a declaration that "article 22 of the 'Investment Law' may not be interpreted in the sense that it constitutes the consent of the State to be subjected to international arbitration" and "that article 22 of the 'Investment Law' does not contain a unilateral offer of arbitration, that is, it does not make up for the lack of an express declaration granted by the Venezuelan authorities in writing in order to be subjected to international arbitration, nor through a bilateral agreement or treaty explicitly establishing it […]."[85]

87. The Constitutional Chamber noted that the 1999 Constitution allows the Republic of Venezuela to give its unilateral consent to have disputes, particularly disputes regarding foreign investments, resolved by international arbitration.[86] However, the Constitutional Chamber then went on to interpret Article 22 of the 1999 Investment Law and concluded, as the Representatives of the Republic of Venezuela had requested, that this provision did not constitute such an expression of unilateral consent.[87]

88. Magistrate Pedro Rafael Rondón Haaz, who had dissented from the Constitutional Chamber decision to admit the petition (*recurso*),[88] also dissented from **2008 Decision No. 1.541**. Magistrate Rondón stressed that the Constitutional Chamber had acted *ultra-vires* when engaging in the interpretation of a statutory provision (Article 22).[89] He reiterated his earlier dissent and stated that:

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85 **2008 Decision No. 1.541**, p. 365.483.

86 **2008 Decision No. 1.541**, pp. 365.486 and 365.492.

87 *Id.*, pp. 365.495-365.497. The flaws in the Constitutional Chamber's reasoning are addressed elsewhere in this Opinion.

88 *Supra*, footnote 81.

89 Dissenting Opinion, **2008 Decision No. 1.541**, p. 365.498.

- Article 258 does not raise any reasonable doubt. It does not require a clarifying interpretation because it only contains a request directed to the Legislator in order to promote arbitration.
- The petition of interpretation at issue had the purpose of obtaining from the Constitutional Chamber a "legal opinion" by means of an *a priori* judicial review process that does not exists in Venezuela. It sought the exercise of a legislative function by the Constitutional Chamber.
- The decision of the majority does not interpret or clarify Article 258 of the Constitution because this clear provision does not give rise to any doubts.
- The Constitutional Chamber exceeded its competence when it engaged in the interpretation of Article 22 of the 1999 Investment Law. The interpretation of statutory provisions is of the exclusive competence of the Politico-Administrative Chamber of the Supreme Tribunal of Justice.
- The Constitutional Chamber contradicted its own jurisprudence and exceeded its powers of constitutional interpretation, as well as its powers of judicial review concerning international treaties.

89. The dissenting Magistrate correctly notes that the Constitutional Chamber in interpreting Article 22 exercised a "legislative function" by providing, through an *a priori* judicial review procedure, rules that the Legislature must follow in the future in order to express the State's consent to international arbitration through a statute.[90] One consequence of this legislative exercise is that, under Venezuelan law, the Constitutional Chamber's interpretation of Article 22 can only have effects *ex nunc*, *pro futuro*, as acts of "legislative" nature cannot have retroactive effects.[91] Consequently, the **2008 Decision No. 1.541** cannot affect cases in which investors accepted, before October 17, 2008, the State's open offer to submit disputes to ICSID arbitration. Moreover, those effects are limited to the Venezuelan courts, that is, the effects of **2008 Decision No. 1.541** under Venezuelan law do not affect the powers of an ICSID tribunal to interpret Article 22 independently in ruling on its own jurisdiction.

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90 Dissenting Opinion, **2008 Decision No. 1.541**, p. 365.498.

91 See Supreme Tribunal of Justice, Constitutional Chamber, Decision No. 1.309 of June 19, 2001 (Case: *Hermann Escarrá*). See also, Decision N° 1.684 of November 4, 2008 (Case: *Carlos Eduardo Giménez Colmenárez*).

6. Comments on the situation of the judiciary in Venezuela and the subjection of the Constitutional Chamber to political control

90. The **2008 Decision No. 1.541** can only be fully understood by taking into account that the Judicial Branch in Venezuela and in particular, the Constitutional Chamber of the Supreme Tribunal are subject to political interference in politically sensitive cases. In this section, I explain the principles that ought to inform the functioning of the Judicial Branch under the 1999 Constitution and contrast them with the very different reality that prevails in Venezuela at the present time, and that influenced the **2008 Decision No. 1.541**.

A. The 1999 National Constituent Assembly and the 1999 Constitution

91. The Constitution of the Bolivarian Republic of Venezuela (the 1999 Constitution) was drafted and sanctioned by a National Constituent Assembly (*Asamblea Nacional Constituyente*) and came into effect on December 30, 1999, after being approved by referendum held on December 15, 1999.

92. The Constituent Assembly was elected in July 1999 in an electoral process that took place without the active participation of the traditional political parties. As a result, President Hugo Chávez's supporters ended up holding more than 95% of the seats. Before the Constituent Assembly embarked on drafting a new constitution, it dissolved and seized control (*intervino*) of all branches of the national and state governments and dismissed all the public officials elected just a few months before (1998), namely the representatives to the former National Congress, the Legislative Assemblies of the States and the Municipal Councils as well as the State Governors and Municipal Mayors.[92] The sole public office that was exempted from this intervention was the office of the President of the Republic.

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[92] See the decrees of intervention of the branches of Government, in Allan R. Brewer-Carías, *Debate Constituyente (Aportes a la Asamblea Nacional Constituyente)*, Vol. I (August-September 1999), Fundación de Derecho Publico-Editorial Jurídica Venezolana, Caracas 1999. This amounted to a *coup d'Etat.* See *generally* Allan R. Brewer-Carias*, Golpe de Estado y Proceso Constituyente en Venezuela*, Universidad Nacional Autónoma de México, Mexico 2002; Guayaquil, 2006.

93. In particular, the Constituent Assembly expressly declared the Judicial Branch to be "in emergency" and interfered with its autonomy. Since then, the independence of the Venezuelan Judiciary has been progressively and systematically dismantled.[93] The Supreme Court of Justice was abolished in December 1999.[94] The result of this process has been the tight Executive control over the Judiciary, especially the Constitutional Chamber of the newly created Supreme Tribunal of Justice.[95]

94. The National Constituent Assembly drafted the new Constitution and submitted the draft to two debates in October and November 1999. The new Constitution was sanctioned and signed on November 19, 1999, approved in a popular referendum held on December 15, 1999, and duly proclaimed by the National Constituent Assembly on December 20, 1999. It

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93 See *generally* Allan R. Brewer-Carías, "La progresiva y sistemática demolición de la autonomía e independencia del Poder Judicial en Venezuela (1999-2004)" in *XXX Jornadas J.M Dominguez Escovar, Estado de Derecho, Administración de Justicia y Derechos Humanos*, Instituto de Estudios Jurídicos del Estado Lara, Barquisimeto 2005, pp. 33-174; Allan R. Brewer-Carías, "El constitucionalismo y la emergencia en Venezuela: entre la emergencia formal y la emergencia anormal del Poder Judicial" in Allan R. Brewer-Carías, *Estudios Sobre el Estado Constitucional (2005-2006)*, Editorial Jurídica Venezolana, Caracas 2007, pp. 245-269; and Allan R. Brewer-Carías "La justicia sometida al poder. La ausencia de independencia y autonomía de los jueces en Venezuela por la interminable emergencia del Poder Judicial (1999-2006)" in *Cuestiones Internacionales. Anuario Jurídico Villanueva 2007,* Centro Universitario Villanueva, Marcial Pons, Madrid 2007, pp. 25-57, *available at* www.allanbrewercarias.com, (Biblioteca Virtual, II.4. Artículos y Estudios No. 550, 2007) pp. 1-37. See also Allan R. Brewer-Carías, *Historia Constitucional de Venezuela*, Editorial Alfa, Tomo II, Caracas 2008, pp. 402-454.

94 The Supreme Court of Justice was abolished by the December 22, 1999, transitory regime established by the Constituent Assembly after the approval of the 1999 Constitution by popular referendum. On the transitory regime, see *generally* Allan R. Brewer-Carias, *La Constitucion de 1999. Derecho Constitucional Venezolano*, Vol. II, Editorial Jurídica Venezolana, Caracas 2004, pp. 1150 ff.

95 See Allan R. Brewer-Carias, "*Quis Custodiet ipsos Custodes*: De la interpretación constitucional a la inconstitucionalidad de la interpretación" in *VIII Congreso Nacional de derecho Constitucional*, Peru, Fondo Editorial 2005, Colegio de Abogados de Arequipa, Arequipa, September 2005, pp. 463-489, also *available at* www.allanbrewercarias.com, (Biblioteca Virtual, II.4. Artículos y Estudios No. 475, 2005) pp. 1-33; and in Allan R. Brewer-Carías, *Crónica de la "In" Justicia Constitucional. La Sala Constitucional y el Autoritarismo en Venezuela*, Caracas 2007.

entered into force on the thirtieth of that month and year, the day of its publication in the *Official Gazette.*[96]

95. Article 7 of the 1999 Constitution expressly declares the Constitution to be the supreme law of the land and the foundation of the entire legal order. Consequently, all persons and organs of the State are subject to it and have a constitutional duty to fulfill and respect its provisions (Article 131). The Constitution provides for means designed to protect its own supremacy. The most important of these safeguards are related to the Judiciary and to the judicial system. In this regard, Article 253 of the Constitution proclaims that the power to render justice emanates from the citizenry and is exercised in the name of the Republic and by the authority of the law. For such purposes, Article 26 of the Constitution provides that the State must guarantee a "cost-free, accessible, impartial, adequate, transparent, autonomous, independent, responsible, equitable, and expeditious [system of] justice." The same Article 253 provides that the system of justice is composed not only by the organs of the Judicial Branch, comprising the Supreme Tribunal of Justice and all the other courts established by law, but also by the Public Ministry (Public Prosecutor), the Peoples' Defendant, the organs of criminal investigation, judicial staff and assistants, the penitentiary system, the alternative means of adjudication, the citizens who participate in the administration of justice according to the law, and the attorneys authorized to practice law. Article 258 imposes on the Legislator the duty to promote arbi-

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[96] *Official Gazette* Nº 36.860 of December 30, 1999. In 2007, President Chávez proposed a constitutional reform that was sanctioned by the National Assembly but rejected by the people through referendum held in December 2007. Through this failed reform, President Chávez intended to reinforce the system of centralization and concentration of power that he had managed to develop. See *generally* Manuel Rachadell, *Socialismo del Siglo XXI. Análisis de la Reforma Constitucional Propuesta por el Presidente Chávez en Agosto de 2007*, FUNEDA, Editorial Jurídica Venezolana, Caracas 2008; Héctor Turuhpial Carriello, *El Texto Oculto de la Reforma*, FUNEDA, Caracas 2008; Allan R. Brewer-Carías, *Hacia la Consolidación de un Estado Socialista, Centralizado, Policial y Militarista. Comentarios sobre el Sentido y Alcance de Las Propuestas de Reforma Constitucional 2007,* Editorial Jurídica Venezolana, Caracas 2007. In February 2009, at the request of President Chávez, the National Assembly took the initiative of a new Constitutional Reform which purpose was to eliminate the constitutional limits that the 1999 Constitution established for the reelection of elected officials. The reform was approved by referendum held on February 14, 2009, and allows the President of the Republic of Venezuela to be elected in a continual and indefinite way.

tration, conciliation, mediation, and other alternative means of conflicts resolution.

B. The theoretical constitutional rules regarding the appointment, stability and dismissal of judges

96. Article 254 of the Constitution declares the principle of the independence of the Judicial Branch and establishes that the Supreme Tribunal of Justice shall have "functional, financial, and administrative autonomy." In order to guarantee the independence and autonomy of courts and judges, Article 255 provides for a specific mechanism to ensure the independent appointment of judges and to guaranty their stability. In this regard, the judicial office is considered as a career, in which the admission, as well as the promotion of judges within it, must be the result of a public competition or examinations to ensure that the candidates are adequately qualified. The candidates are to be chosen by panels from the judicial circuits, and the judges are to be designated by the Supreme Tribunal of Justice. The Constitution also creates a Judicial Nominations Committee (Article 270) to assist the Judicial Branch in selecting the Magistrates for the Supreme Tribunal of Justice (Article 264) and to assist judicial colleges in selecting of judges for the lower courts. This Judicial Nominations Committee is to be composed of representatives from different sectors of society, as determined by law. The Constitution also guarantees the stability of all judges, prescribing that they can only be removed or suspended from office through the procedures expressly provided under the law (Article 255).

97. As of the date of this opinion, none of the constitutional provisions regarding the appointment and stability of judges has been implemented. On the contrary, since 1999, the Venezuelan Judiciary has been almost exclusively made up of temporary and provisional judges,[97] and the public

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[97] A provisional judge is one appointed pending a public competition. A temporal judge is one appointed to perform a specific task or for a specific period of time. In 2003, the Inter-American Commission on Human Rights explained that: "The Commission has been informed that only 250 judges have been appointed through competitive professional examinations as provided for in the Constitution. Of a total of 1772 judges in Venezuela, the Supreme Court of Justice reports that only 183 are tenured, 1331 are provisional, and 258 are temporary." *Report on the Situation of Human Rights in Venezuela*; OAS/Ser.L/V/II.118. doc.4rev.2; December 29, 2003, par. 174, *available at* http://www.cidh.oas.org/countryrep/Venezuela2003eng/toc.htm. The Commission

competition processes for the appointment of judges with citizens participation has not been implemented. Consequently, in general, judges lack stability, and since the constitutional provisions creating the Judicial Disciplinary jurisdiction have not been implemented by legislation, matters of judicial discipline are currently in the hands of the "Functioning and Restructuring Commission of the Judiciary"[98] (not established in the Constitution but created by the National Constituent Assembly in 1999) which has the power to remove temporary judges without due process guarantees,[99] and in those of a Judicial Commission of the Supreme Tribunal of Justice, which has also discretionary powers to remove all temporary judges.[100]

C. The reality concerning the appointment and removal of the current Supreme Tribunal of Justice

98. The Constitution of 1999 created the Supreme Tribunal of Justice, as the highest court in the country, in substitution of the former Supreme Court of Justice established under the previous 1961 Constitution. The Su-

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also added that "one issue with an impact on the autonomy and independence of the judiciary is the provisional nature of judges within the Venezuelan legal system. Information from different sources indicates that at present, more than 80% of Venezuela's judges are 'provisional.'" *Id.*, par. 161.

98 The Politico-Administrative Chamber of the Supreme Tribunal of Justice has ruled that the dismissal of temporary judges is a discretional power of the Functioning and Restructuring Commission of the Judiciary. This Commission was created after 1999 and adopts its decisions without following any administrative procedure. See Decision No. 00463-2007 of March 20, 2007; Decision No. 00673-2008 of April 24, 2008 (quoted in Decision No. 1.939 of December 18, 2008, p. 42). The same position has been established by the Constitutional Chamber in Decisions No. 2414 of December 20, 2007; and Decision No. 280 of February 23, 2007.

99 See Allan R. Brewer-Carías, "La justicia sometida al poder y la interminable emergencia del poder judicial (1999-2006)" in *Derecho y Democracia. Cuadernos Universitarios*, Órgano de Divulgación Académica, Vicerrectorado Académico, Universidad Metropolitana, Año II, No. 11, Caracas, September 2007, pp. 122-138, also published as Allan R. Brewer-Carías, "La justicia sometida al poder (La ausencia de independencia y autonomía de los jueces en Venezuela por la interminable emergencia del Poder Judicial (1999-2006))" in *Cuestiones Internacionales. Anuario Jurídico Villanueva 2007,* Centro Universitario Villanueva, Marcial Pons, Madrid, 2007, pp. 25–57, *available at* www.allanbrewercarias.com, (Biblioteca Virtual, II.4. Artículos y Estudios No. 550, 2007) pp. 1-37.

100 See Supreme Tribunal of Justice, Constitutional Chamber, Decision No. 1.939 of December 18, 2008 (Case: *Gustavo Álvarez Arias et al*.)

preme Tribunal is composed of six Chambers: Constitutional, Politico-Administrative, Electoral, Civil Cassation, Criminal Cassation and Social, and may also sit in Plenary Session (*en banc; Sala Plena*). The 1999 Constitution regulates in detail the qualifications to be met by the Magistrates of the Supreme Tribunal, but leaves to the Organic Law of the Supreme Tribunal of Justice to determine the number of Magistrates sitting in each Chamber and the competence of each Chamber (Article 262). In addition, the Supreme Tribunal is in charge of the "governance and administration of the Judiciary" (Article 267), replacing the former "Council of the Judiciary" as head of the Judicial Branch. In order to accomplish these functions, the Supreme Tribunal acting in Plenary Session, has created an Executive Board of the Judiciary.

99. The Constitution assigns to the National Assembly the power to elect the Magistrates of the Supreme Tribunal, for a single term of 12 years (Article 264). Candidates must be nominated at their own initiative or by organizations related to judicial activities, to a "Judicial Nominations Committee" integrated only by "representatives of the different sectors of society" (Article 270). This Committee, having heard the opinion of the community, must pre-select a group of nominees to be presented to the "Citizen" Branch of Government Power (Prosecutor General, Comptroller General, Peoples' Defendant) which must make a second pre-selection of nominees, which is the one to be submitted to the National Assembly (Article 264). The Constitution also provides that citizens have the right to file well founded objections to any of the nominees before the Judicial Nominations Committee or before the National Assembly. The main purpose of this constitutional procedure was to limit the discretionary power that the former Congress had in appointing Magistrates to the Supreme Court of Justice, which was often exercised on the basis of political agreements and without any sort of citizen or society control.

100. Ignoring these constitutional provisions (and without waiting for the regular legislature to enact the Organic Law of the Supreme Tribunal of Justice as contemplated by the Constitution), the Constituent Assembly issued "Decree on the Regime for the Transition of Public Powers," on December 22, 1999,[101] this is, a week after the referendum that approved the Constitution. This decree dismissed the fifteen Justices of the former Supreme Court of Justice that were still in office, and appointed, on a transitory

[101] *Official Gazette* No. 36.859 of December 29, 1999. On the transitory regime, see Allan R. Brewer-Carias, *La Constitucion de 1999. Derecho Constitucional Venezolano*, Vol. II, Editorial Jurídica Venezolana, Caracas 2004, pp. 1013-1025.

basis, twenty new Magistrates for the new Supreme Tribunal of Justice. In the absence of constitutional or legal provisions specifying the number of Magistrates for each Chamber, the Constituent Assembly appointed five Magistrates for the Constitutional Chamber and three Magistrates for each of the other five Chambers. These appointments were made without complying with the constitutional provisions regarding the nomination of candidates by a Judicial Nomination Committee integrated by representatives of the different sectors of society.[102] This appointment procedure had no basis in the Constitution or in any statute, nor could this decree be justified as the exercise of a constituent power, because the Constituent Assembly had no power to enact constitutional provisions without popular approval by referendum, and no referendum was held on this matter.[103]

101. After the new National Assembly was elected in 2000, it had to comply with the constitutional mandate to enact the Organic Law of the Supreme Tribunal of Justice in order to determine the number of Magistrates of each of its Chambers, and to provide for the composition, organization and functioning of the Judicial Nominating Committee so as to elect, in a definitive way, the Magistrates of the Supreme Tribunal of Justice. But instead of enacting such Organic Law, on November 14, 2000, the National Assembly adopted a "Special Law for the Ratification or Election of the High Officials of the Citizens Power and of the Magistrates of the Supreme Tribunal of Justice for the First Constitutional Term."[104] This law created a Parliamentary Commission composed of a majority of representatives as a "Nominating Committee" to select the Justices, by-passing the constitutional provision imposing the need to create and regulate the Judicial Nominating Committee composed exclusively by representatives of different sectors of society. The National Assembly, in fact, appointed "a Commission integrated by 15 representatives, which shall act as the Committee for the Evaluation of Nomina-

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[102] See Allan R. Brewer-Carías, "La participación ciudadana en la designación de los titulares de los órganos no electos de los Poderes Públicos en Venezuela y sus vicisitudes políticas" in *Revista Iberoamericana de Derecho Publico y Administrativo*, Year 5 N° 5-2005, San Jose, Costa Rica 2005, pp. 76-95, *available at* www.allanbrewercarias. com, (Biblioteca Virtual, II.4. Artículos y Estudios No. 469, 2005) pp. 1-48.

[103] The Decree on the Regime for the Transition of Public Powers was issued after the referendum of December 15, 1999, that approved the 1999 Constitution. It was not submitted to a separate referendum.

[104] *Official Gazette* Nº 37.077 of November 14, 2000.

tions" (Article 3), to select "a list of twelve (12) persons representing the different sectors of society by means of mechanisms of consultation," and present the list to the National Assembly so that it may choose, by an absolute majority, six (6) persons to sit on the Commission (Article 4).

102. The Peoples' Defendant at the time (which had been one of the High Officials provisionally appointed in December 1999), filed an action of unconstitutionality (*acción de inconstitucionalidad*) with an *amparo* petition against the "Special Law," in order to protect the citizens' rights of political participation.[105] The Supreme Tribunal has not ruled on that petition to this date. In a preliminary ruling, however, the Magistrates of the Constitutional Chamber, instead of recusing themselves, decided that the constitutional provisions for the appointment of Magistrates of the Supreme Tribunal did not apply to them, that is, to the same individuals who were deciding the matter. They reasoned that they were to be "ratified" and not "appointed."[106] The Peoples' Defendant who challenged the Special Law was not confirmed in his position. The "Special Law" thus consolidated the earlier political appointment of Magistrates of the Supreme Tribunal and the political control of the Judiciary through an extra-constitutional appointments process.

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105 See *El Universal,* December 14, 2000, pp. 1-2.

106 The Constitutional Chamber took the view that they could be "ratified" by the Special Law without complying with the Constitution, because the Constitution provided only for the "nomination" of Magistrates and did not contemplate the "ratification" of those already in office. The Chamber ruled: "Consequence of the necessary application of the Regime for the Transition of the Public Powers which – as this Chamber has pointed out – has constitutional rank, is that it is only with respect to the Magistrates of the Supreme Tribunal of Justice that the concept of ratification shall be applied, [a concept] that is not provided for in the Constitution, as a result of which the phrase in Article 21 of the Regime for the Transition of Public Powers, according to which definitive ratifications shall be done according to the Constitution, is inapplicable, since as this Chamber has previously stated, the current Constitution did not provide (*sic*) norms on ratification of Magistrates to the Supreme Tribunal of Justice." See Supreme Tribunal of Justice, Constitutional Chamber, Decision of December 12, 2000 in *Revista de Derecho Público Nº 84*, Editorial Jurídica Venezolana, Caracas, 2000, p. 109. See comments in Allan R. Brewer-Carías, "La participación ciudadana en la designación de los titulares de los órganos no electos de los Poderes Públicos en Venezuela y sus vicisitudes políticas" in *Revista Iberoamericana de Derecho Público y Administrativo*, Year 5, Nº 5-2005, San José, Costa Rica 2005, pp. 76-95, *available at* www.allanbrewercarias.com, (Biblioteca Virtual, II.4. Artículos y Estudios No. 469, 2005) pp. 1-48.

103. The National Assembly finally enacted the Organic Law of the Supreme Tribunal of Justice in 2004.[107] However, the Judicial Nominating Committee regulated by the law was not composed by representatives of the different sectors of society, as required by the Constitution. It was integrated by eleven (11) members, from which five (5) were elected from the representatives to the National Assembly, and the other six (6) from the other sectors of society, elected in a public proceeding (Article 13, paragraph 2). In practice, this Committee acts as a Parliamentary Commission with additional non-parliamentary members, operating within the National Assembly (Article 13).

104. For the first time since the approval of the 1999 Constitution, the 2004 Organic Law of the Supreme Tribunal of Justice established the number of the Magistrates of the Supreme Tribunal, increasing it to a total of 32 Magistrates. The nomination and appointment by means of the new "Nominating Committee" was completely controlled by the political organs of the Government. This was publicly acknowledged by the President of the Parliamentary Nominating Commission in charge of selecting the candidates for Magistrates of the Supreme Tribunal (who a few months later was appointed Ministry of the Interior and Justice). In December 2004, he stated to the press:

> "Although we, the representatives, have the authority for this selection, the President of the Republic was consulted and his opinion was very much taken into consideration." He added: "Let's be clear, we are not going to score own-goals. On the list, there were people from the opposition who comply with all the requirements. The opposition could have used them in order to reach an agreement during the last sessions, but they did not want to. We are not going to do it for them. There is no one in the group of candidates that could act against us […]."[108]

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[107] *Official Gazette* Nº 37.942 of May 20, 2004. For comments on this law, see *generally* Allan R. Brewer-Carías, *Ley Orgánica del Tribunal Supremo de Justicia. Procesos y Procedimientos Constitucionales y Contencioso-Administrativos*, Caracas, 2004.

[108] See *El Nacional*, Caracas December 13, 2004. The Inter-American Commission on Human Rights suggested in its Report to the General Assembly of the OAS for 2004 that "These provisions of the Organic Law of the Supreme Court of Justice also appear to have helped the executive manipulate the election of judges during

105. The President's influence on the Supreme Tribunal was admitted by himself, when he publicly complained that the Supreme Tribunal had issued an important ruling in which it "modified" the Income Tax Law, without previously consulting the "leader of the Revolution," and warning courts against decisions that would be "treason to the People" and "the Revolution." That was a very controversial case, decided by the Constitutional Chamber of the Supreme Tribunal in Decision No. 301 of February 27, 2007.[109] The President of the Republic said:

> "Many times they come, the National Revolutionary Government comes and wants to make a decision against something that, for instance, deals with or has to pass through judicial decisions, and then they begin to move against it in the shadows, and many times they succeed in neutralizing decisions of the Revolution through a judge, or a court, and even through the very same Supreme Tribunal of Justice, behind the **backs of the Leader of the Revolution**, acting from within against the Revolution. This is, I insist, **treason to the people, treason to the Revolution**."[110]

2004." See Inter-American Commission on Human Rights, *2004 Report on Venezuela*, par. 180.

109 Supreme Tribunal of Justice, Constitutional Chamber, Decision No. 301 of February 27, 2007 (Case: *Adriana Vigilanza y Carlos A. Vecchio*) (Exp. No. 01-2862) in *Official Gazette* No. 38.635 of March 1, 2007. See comments in Allan R. Brewer-Carías, "El juez constitucional en Venezuela como legislador positivo de oficio en materia tributaria" in *Revista de Derecho Público No. 109*, Editorial Jurídica Venezolana, Caracas 2007, pp. 193-212, *available at* www.allanbrewercarias.com, (Biblioteca Virtual, II.4. Artículos y Estudios No. 508, 2007) pp. 1-36; and Allan R. Brewer-Carías, "De cómo la Jurisdicción constitucional en Venezuela, no sólo legisla de oficio, sino subrepticiamente modifica las reformas legales que "sanciona", a espaldas de las partes en el proceso: el caso de la aclaratoria de la sentencia de Reforma de la Ley de Impuesto sobre la Renta de 2007**"** in *Revista de Derecho Público No. 114*, Editorial Jurídica Venezolana, Caracas 2008, pp. 267-276, *available at* http://www.brewercarias.com/Content/449725 d9-f1cb-474b-8ab2-41efb849fea8/Content/II.4.575.pdf.

110 (Emphasis added.) (*"Muchas veces llegan, viene el Gobierno Nacional Revolucionario y quiere tomar una decisión contra algo por ejemplo que tiene que ver o que tiene que pasar por decisiones judiciales y ellos empiezan a moverse en contrario a la sombra, y muchas veces logran neutralizar decisiones de la Revolución a través de un juez, o de un tribunal, o hasta en el mismísimo Tribunal Supremo de Justicia, **a espaldas del líder de la Revolución**, actuando por dentro contra la*

106. Another important aspect of the new Organic Law of the Supreme Tribunal of Justice concerned dismissal of the Magistrates of the Supreme Tribunal. According to Article 265 of the 1999 Constitution, a Magistrate can be dismissed only by the vote of a qualified majority of two-thirds of the National Assembly, following a hearing, in cases of "grave faults" (*faltas graves*) committed by the accused, following a prior qualification by the Citizens Power. The Organic Law of the Supreme Tribunal of Justice defines "grave faults" very broadly, leaving open the possibility of dismissal based exclusively on political motives.[111] Furthermore, the qualified two-thirds majority was required by the Constitution in order to avoid leaving the tenure of the Magistrates in the hands of a simple majority of Legislators. The Organic Law of the Supreme Tribunal of Justice circumvented this requirement by authorizing the dismissal of Magistrates by a simple majority vote that revokes the "administrative act of their appointment" (Article 23,4).[112] The National Assembly has already used its power to dismiss Magistrates who have ruled on sensitive issues against the Government's wishes.[113]

Revolución. Eso es, repito, traición al pueblo, traición a la Revolución." (Emphasis added.)) *Discurso en el Primer Encuentro con Propulsores del Partido Socialista Unido de Venezuela desde el teatro Teresa Carreño* (Speech in the First Event with Supporters of the Venezuela United Socialist Party at the Teresa Carreno Theatre), March 24, 2007, *available at* http://www.minci.gob.ve/alocuciones/4/13788/primer_encuentro_con.html, p. 45.

111 See Allan R. Brewer-Carías, *Ley Orgánica del Tribunal Supremo de Justicia*, Editorial Jurídica venezolana, Caracas 2004, p. 41.

112 *Id.,* pp. 39-41.

113 That was the fate of Franklin Arrieche, Vice-President of the Supreme Tribunal of Justice, who delivered a decision dated August 14, 2002, regarding the criminal proceedings against the military generals who acted on April 12, 2002. The decision ruled that there were no grounds to prosecute the generals because no military coup had taken place. This was also the fate of Alberto Martini Urdaneta, President of the Electoral Court, and Rafael Hernandez and Orlando Gravina, Judges of the same court who signed Decision N° 24 of March 15, 2004 (Case: *Julio Borges, Cesar Perez Vivas, Henry Ramos Allup, Jorge Sucre Castillo, Ramón Jose Medina and Gerardo Blyde vs. the National Electoral Council*), a ruling that suspended the effects of Resolution N° 040302-131 of the National Electoral Council dated March 2, 2004, which stopped the recall of the presidential referendum at that time.

D. The subjection of the Venezuelan Judiciary to political control

107. As described above, the constitutional principles tending to assure the autonomy and independence of judges at all levels of the Judiciary are yet to be applied, particularly regarding the admission of candidates to the judicial career through "public competition" processes, with citizen participation in the procedure of selection and appointment, and regarding the prohibition of removal or suspension of judges except through disciplinary trials before a disciplinary courts and judges (Articles 254 and 267). In reality, since 1999 the Venezuelan Judiciary has been composed primarily of temporary and provisional judges, without career or stability, appointed without the public competition process of selection established in the Constitution, and dismissed without due process of law, for political reasons.[114]

108. This reality amounts to political control of the Judiciary, as demonstrated by the dismissal of judges who have adopted decisions contrary to the policies of the governing political authorities. Another example will serve to illustrate this point. In summary, when a contentious-administrative court ruled against the government in a politically charged case, the government responded by intervening (taking over) the court and dismissing its judges and, after the Inter-American Court of Human Rights ruled that the dismissal had violated the American Convention of Human Rights and Venezuela's international obligations, the Constitutional Chamber upheld the government's argument that the decision of the Inter-American Court cannot be enforced in Venezuela.

109. On July 17, 2003, the Venezuelan National Federation of Doctors brought an *amparo* action in the First Court on Contentious-Administrative Matters in Caracas,[115] against the Mayor of Caracas, the Ministry of Health and the Caracas Metropolitan Board of Doctors (*Colegio de Médicos*). The petitioners asked for a declaration of the nullity of certain measures of the defendant Officials through which Cuban doctors were hired

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[114] See Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Venezuela*, OEA/Ser.L/V/II.118, doc. 4 rev. 2, December 29, 2003, par. 174, *available at* http://www.cidh.oas.org/countryrep/Venezuela2003eng/toc.htm.

[115] Contentious-administrative courts have competence to review administrative decisions.

for a much publicized governmental health program in the Caracas slums, without complying with the legal requirements for foreign doctors to practice the medical profession in Venezuela. The National Federation of Doctors argued that, by allowing foreign doctors to exercise the medical profession without complying with applicable regulations, the program was discriminatory and violated the constitutional rights of Venezuelan doctors.[116] One month later, in August 21, 2003, the First Court issued a preliminary protective *amparo* measure, on the ground that there were sufficient elements to consider that the constitutional guaranty of equality before the law was being violated in the case. The Court ordered, in a preliminary way, the suspension of the Cuban doctors' hiring program and ordered the Metropolitan Board of Doctors to replace the Cuban doctors already hired with Venezuelan ones or foreign doctors who had fulfilled the legal requirements to exercise the medical profession in the country.[117]

110. In response to that preliminary judicial *amparo* decision, the Minister of Health, the Mayor of Caracas, and even the President of the Republic made public statements to the effect that the decision was not going to be respected or enforced.[118] Following these statements, the government-controlled Constitutional Chamber of the Supreme Tribunal of Justice adopted a decision, without any appeal being filed, assuming jurisdiction over the case and annulling the preliminary *amparo* ordered by the First Court; a group of Secret Service police officials seized the First Court's premises; and the President of the Republic, among other expressions he used, publicly called the President of the First Court a "bandit."[119] A few weeks later, in

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[116] See Claudia Nikken, "El caso "Barrio Adentro: La Corte Primera de lo Contencioso Administrativo ante la Sala Constitucional del Tribunal Supremo de Justicia o el avocamiento como medio de amparo de derechos e intereses colectivos y difusos" in *Revista de Derecho Público No. 93-96*, Editorial Jurídica Venezolana, Caracas, 2003, pp. 5 ff.

[117] See Decision of August, 21 2003, in *id.,* pp. 445 ff.

[118] The President of the Republic said: "*Váyanse con su decisión no sé para donde, la cumplirán ustedes en su casa si quieren* […]" (You can go with your decision, I don't know where; you will enforce it in your house if you want […]). See *El Universal,* Caracas, August 25, 2003 and *El Universal*, Caracas, August 28, 2003.

[119] See Inter-American Court of Human Rights, *Apitz Barbera et al. (Corte Primera de lo Contencioso Administrativo) v. Venezuela* (Judgment of August 5, 2008), *available at* www.corteidh.or.cr, par. 239. See also, *El Universal,* Caracas, October 16, 2003; and *El Universal*, Caracas, September 22, 2003.

response to the First Court's decision in an unrelated case challenging a local registrar's refusal to record a land sale, a Special Commission for the Intervention of the Judiciary, which in spite of being unconstitutional continued to exist, dismissed all five judges of the First Court.[120] In spite of the protests of all the Bar Associations of the country and also of the International Commission of Jurists;[121] the First Court remained suspended without judges, and its premises remained closed for about nine months,[122] period during which simply no judicial review of administrative action could be sought in the country.[123]

111. The dismissed judges of the First Court brought a complaint to the Inter-American Commission of Human Rights for the government's unlawful removal of them and for violation of their constitutional rights. The Commission in turn brought the case, captioned *Apitz Barbera et al.* (*Corte Primera de lo Contencioso Administrativo vs. Venezuela*) before the Inter-American Court of Human Rights. On August 5, 2008, the Inter-American Court ruled that the Republic of Venezuela had violated the rights of the dis-

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120 See *El Nacional*, Caracas, November 5, 2003, p. A2. The dismissed President of the First Court said: "*La justicia venezolana vive un momento tenebroso, pues el tribunal que constituye un último resquicio de esperanza ha sido clausurado*." (The Venezuelan judiciary lives a dark moment, because the court that was a last glimmer of hope has been shut down.") *Id*. The Commission for the Intervention of the Judiciary had also massively dismissed almost all judges of the country without due disciplinary process, and had replaced them with provisionally appointed judges beholden to the ruling power.

121 See in *El Nacional*, Caracas, October 10, 2003, p. A-6; *El Nacional*, Caracas, October 15, 2003, p. A-2; *El Nacional*, Caracas, September 24, 2003, p. A-4; *and El Nacional*, Caracas, February 14, 2004, p. A-7.

122 See *El Nacional*, Caracas, October 24, 2003, p. A-2; and *El Nacional*, Caracas, July 16, 2004, p. A-6.

123 See *generally* Allan R. Brewer-Carías, "La progresiva y sistemática demolición institucional de la autonomía e independencia del Poder Judicial en Venezuela 1999–2004" in *XXX Jornadas J.M Domínguez Escovar, Estado de derecho, Administración de justicia y derechos humanos,* Instituto de Estudios Jurídicos del Estado Lara, Barquisimeto, 2005, pp. 33–174; Allan R. Brewer-Carías, "La justicia sometida al poder (La ausencia de independencia y autonomía de los jueces en Venezuela por la interminable emergencia del Poder Judicial (1999-2006))" in *Cuestiones Internacionales. Anuario Jurídico Villanueva 2007,* Centro Universitario Villanueva, Marcial Pons, Madrid, 2007, pp. 25–57, *available at* www.allanbrewercarias.com, (Biblioteca Virtual, II.4. Artículos y Estudios No. 550, 2007) pp. 1-37.

missed judges established in the American Convention of Human Rights, and ordered the State to pay them due compensation, to reinstate them to a similar position in the Judiciary, and to publish part of the decision in Venezuelan newspapers.[124] Nonetheless, on December 12, 2008, the Constitutional Chamber of the Supreme Tribunal issued Decision No. 1.939, declaring that the August 5, 2008 decision of the Inter-American Court of Human Rights was non-enforceable (*inejecutable*) in Venezuela. The Constitutional Chamber also accused the Inter-American Court of having usurped powers of the Supreme Tribunal of Justice and asked the Executive Branch to denounce the American Convention of Human Rights.[125]

112. The case just discussed, including in particular the *ad hoc* response of the Constitutional Chamber to the decision of the Inter-American Court of Human Rights, shows clearly the present subordination of the Venezuelan Judiciary to the policies, wishes and dictates of the President of the Republic.[126] The Constitutional Chamber has in fact become a most

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[124] Inter-American Court of Human Rights, *Apitz Barbera et al. (Corte Primera de lo Contencioso Administrativo) v. Venezuela* (Judgment of August 5, 2008), *available at* www.corteidh.or.cr.

[125] Supreme Tribunal of Justice, Constitutional Chamber, Decision No. 1.939 of December 18, 2008 (Case: *Abogados Gustavo Álvarez Arias et al.*) (Exp. No. 08-1572).

[126] This situation has been recently summarized by Teodoro Petkoff, editor and founder of *Tal Cual*, one of the important newspapers in Caracas, as follows: "Chavez controls all the political powers. More that 90% of the Parliament obey his commands; the Venezuelan Supreme Court, whose number were raised from 20 to 32 by the parliament to ensure an overwhelming officialist majority, has become an extension of the legal office of the Presidency… The Attorney General's Office, the Comptroller's Office and the Public Defender are all offices held by 'yes persons' absolutely obedient to the orders of the autocrat. In the National Electoral Council, four of five members are identified with the government. The Venezuelan Armed Forces are tightly controlled by Chávez. Therefore, form a conceptual point of view, the Venezuelan political system is autocratic. All political power is concentrated in the hands of the President. There is no real separation of Powers." See Teodoro Petkoff, "Election and Political Power. Challenges for the Opposition" in *Harvard Review of Latin America*, David Rockefeller Center for Latin American Studies, Harvard University, Fall 2008, pp. 12, *available at* http://www.drclas.harvard.edu/revista/articles/view/1125. See Allan R. Brewer-Carías, "Los problemas de la gobernabilidad democrática en Venezuela: el autoritarismo consttucional y la concentración y centralización del poder" in Diego

effective tool for the existing consolidation of power in the person of President Chávez.[127]

113. It is within the aforementioned context of subjection of the Judiciary to political control that, at the Government's request, the Constitutional Chamber purported to interpret Article 258 of the Constitution, which needed no interpretation, and went further, acting beyond the scope of its competence and contradicting its own prior decisions, and "interpreted" Article 22 of the 1999 Investment Law according to the Government's position, with an eye to the various international arbitration cases pending against the State at the time of the request.

III. THE NOTIONS OF "INVESTMENT," "INTERNATIONAL INVESTMENT," AND RELATED NOTIONS IN THE 1999 INVESTMENT LAW

114. The **Respondent's Memorial** (par. 118-125) and the **Urdaneta Opinion** (par. 26-40) elaborate an objection to jurisdiction based on a purported application of the notions of "international investment," "international investor," "foreign direct investment," "owner," "ownership," and "effective control," as these terms are used in the 1999 Investment Law. As demonstrated in this Part, the proposed interpretation of these terms in the **Respondent Memorial** and the **Urdaneta Opinion** is incorrect and the reasoning on which such interpretation is based is logically flawed.

115. In order to fully understand the way in which the aforementioned terms are used and defined in the 1999 Investment Law, it is necessary to take into account the legal regime governing foreign investment that preceded, and was generally superseded, by that Law. At the time of the enactment of the 1999 Investment Law, Venezuela was a member of the Andean Community of Nations, which resulted from the transformation of the original 1969 Andean Pact Integration Agreement.[128] For that reason, at that time

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Valadés (Coord.), *Gobernabilidad y Constitucionalismo en América Latina*, Universidad Nacional Autónoma de México, México 2005, pp. 73-96.

127 In 2001, when approving more than 48 decree laws issued via delegate legislation, President Chávez stated: "*La ley soy yo. El Estado soy yo."* ("The law is me. The State is me.") See *El Universal,* Caracas December 4, 2001, pp. 1,1 and 2,1.

128 The Andean Pact was later transformed into the Andean Community of Nations, from which Venezuela withdrew in 2006. The announcement was made by the President of the Republic of Venezuela in a meeting with the Presidents of Bolivia, Paraguay and Uruguay held in Asunción on April 20, 2006. See, *El Universal,* Ca-

the Venezuelan legal order included Decision 291 of the Andean Community (Regime for the Common Treatment of Foreign Capital and Trademarks, Patents, Licensing Agreements and Royalties) of March 21, 1991 (**Ex. RL-24)**, and the implementing Regulations, adopted by Decree No. 2.095 of March 25, 1992 (**Ex. RL-25**) (collectively, the **Andean Pact Regime**).[129] The Andean Pact Regime was the only legal regime concerning foreign investment that existed in Venezuela at the time the 1999 Investment Law was adopted.

116. The Andean Pact Regime, although less restrictive than its predecessor regime under the Andean Pact, was still primarily concerned with the registration and strict regulation of foreign investment and did not contain provisions for the promotion or protection of such investments, other than a general principle of national treatment, subject to certain exceptions regarding economic sectors reserved to national enterprises.[130] In contrast, the 1999 Investment Law explicitly provides for the promotion and protection of investments (as its title indicates) and does so by establishing broad standards of protection, similar to those found in typical bilateral or multilateral treaties or agreements on investments. The aims of the 1999 Investment Law are clearly stated in its Article 1, which states:

> "This Decree-Law is intended to provide investments and investors, both domestic and foreign, with a stable and foreseeable legal framework in which they may operate in an environment of security, through the **regulation of the State's action** towards such investments and investors, with a view towards achieving the increase, diversification and harmonious integration of investments in favor of domestic development objectives."[131]

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racas, April 21, 2006; *El Universal*, Caracas, April 24, 2006; *El Universal,* Caracas, April 20, 2006. The decision was formally notified by the Venezuelan Foreign Minister to the General Secretary of the Andean Community on April 22, 2006.

[129] See **Ex. RL-24** and *Official Gazette* No 34.930 of March 25, 1992 (**Ex. RL-25).**

[130] Decision 291, Article 2 (**Ex. RL-24**); Decree No. 2095, Articles 13, 26-28(**Ex**. **RL-25**).

[131] 1999 Investment Law, Article 1 (emphasis added.) ("*Este Decreto-Ley tiene por objeto proveer a las inversiones y a los inversionistas, tanto nacionales como extranjeros, de un marco jurídico estable y previsible, en el cual aquéllas y éstos puedan desenvolverse en un ambiente de seguridad, mediante la regulación de la actuación del Estado frente a tales inversiones e inversionistas, con miras a lograr el*

117. While the primary focus of the Andean Pact Regime was to regulate foreign investment and the status of foreign enterprises in contrast to national enterprises,[132] the primary focus of the 1999 Investment Law is to regulate the conduct of the State toward national and foreign investment and investors, in order to protect and promote investment. Indeed, even a superficial comparison between the two regimes shows that it was a fundamental objective of the 1999 Investment Law to complement the existing legal regime for the treatment of foreign investment and for foreign and national enterprises with a new regime better aimed at the promotion and protection of investments. This is a key point to be borne in mind if the interpreter is to reach a correct understanding of the provisions of the 1999 Investment Law.

1. The notion of "Investment"

118. Article 3,1 of the 1999 Investment Law defines "investment" as "**every asset destined to the production of income**, under any of the entrepreneurial or contractual forms permitted by Venezuelan legislation."[133]

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incremento, la diversificación y la complementación armónica de las inversiones en favor de los objetivos del desarrollo nacional.")

132 This conclusion is based on the text of the relevant documents and my personal experience. Starting in 1968, I was involved in the Venezuelan negotiations regarding the Andean Pact. I was the Legal Counsel to the Venezuelan Ministerial Delegation to the Signing Meeting of the Cartagena Agreement in Cartagena, Colombia in 1969 and was the Venezuelan Observer to the First Meeting of Foreign Minister of the Andean Pact, held in Lima on 1970. As President of the Presidential Commission of Public Administration during 1969-1972, due to my legal and academic expertise on the legal aspects of economic integration processes, I advised the Government on matters related to the Andean Economic Integration process and, as Head of the Administrative Reform Agency, I was the official in charge of promoting the organization of the Institute of Foreign Trade (*Instituto de Comercio Exterior*) created by the *Ley que Crea el Instituto de Comercio Exterior* (Law Creating the Institute of Foreign Trade), *Official Gazette*, No. 29.294, August 17, 1970.

133 1999 Investment Law, Article 3,1. ("*Inversión: Todo activo destinado a la producción de una renta, bajo cualquiera de las formas empresariales o contractuales permitidas por la legislación venezolana, incluyendo bienes muebles e inmuebles, materiales o inmateriales, sobre los cuales se ejerzan derechos de propiedad u otros derechos reales; títulos de crédito; derechos a prestaciones que tengan valor económico; derechos de propiedad intelectual, incluyendo los conocimientos técnicos, el prestigio y la clientela; y los derechos obtenidos conforme al derecho público, incluyendo las concesiones de exploración, de extracción o de explotación de recursos naturales y las de construcción, explotación, conservación y mantenimiento de obras públicas nacionales y para la prestación de servicios públicos naciona-*

By way of illustration, the same provision indicates that "investment" includes:

> "personal and real property, tangible or intangible, over which property rights and other rights *in rem* are exercised; negotiable instruments; rights to any performance having an economic value; intellectual property rights, including know how, prestige and good will; and rights obtained in accordance with public law, including concessions for the exploration, extraction or exploitation of natural resources, and for the construction, exploitation, conservation and maintenance of national public works and for the provision of national public services, as well as any other right conferred by law or by administrative decision adopted in accordance with the law."[134]

119. Under this definition, every asset destined to the production of income under any entrepreneurial or contractual form permitted by Venezuelan legislation is an "investment" for the purposes of the 1999 Investment Law. In contrast, the Andean Pact Regime did not contain any definition of "investment;" it defined particular **types** of investment, as discussed below.

2. The notion of "International Investment"

120. Article 3,2 of the 1999 Investment Law defines "international investment" as "the investment that is the property of, or is effectively controlled by foreign natural or legal persons."[135] It follows from this definition, together with the definition of "investment" in Article 3,1, that an "international investment" is "every asset destined to the production of income, under any of the entrepreneurial or contractual forms permitted by Venezuelan legislation," that is "the property of, or is effectively controlled by foreign natural or legal persons."

121. At the time the 1999 Investment Law was adopted, there were investments in Venezuela made under the Andean Pact Regime, which did not use the term "international investment." The Andean Pact Regime used an entirely different conceptual framework, based on the concepts of "foreign

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les, así como cualquier otro derecho conferido por ley, o por decisión administrativa adoptada en conformidad con la ley.")

134 *Id.*

135 *Id.*, Article 3,2 ("*Inversión internacional: La inversión que es propiedad de, o que es efectivamente controlada por personas naturales o jurídicas extranjeras.* […]")

direct investment," "national investment," "subregional investment," "neutral capital investment" (based on a definition of "neutral capital"), and "investment of a mixed enterprise" (based on a definition of "mixed enterprise").[136] Given this situation, it was necessary for the drafters of the 1999 Investment Law to determine how the conceptual structure of the preexisting Andean Pact Regime would fit within the new conceptual structure of the 1999 Investment Law.

122. This was accomplished by establishing that the new concept of "international investment" included the various types of investment that, under the Andean Pact Regime, presupposed ownership or control by foreign natural or juridical persons. Article 3,2 of the 1999 Investment Law thus provides:

> "International investment embraces [*abarca*] foreign direct investment, subregional investment, investment of neutral capital, and investment of an Andean Multinational Enterprise."[137]

In turn, Article 3,3 clarifies that "foreign direct investment," "subregional investment," "investment of neutral capital" and "investment of an Andean Multinational Enterprise" are "those defined as such in the Decisions approved by the Andean Community of Nations, and in their regulations in Venezuela."[138] Therefore, the concept of "international investment" in the 1999 Investment Law **includes** those earlier concepts defined in the Andean Pact Regime, but is **not limited to** those concepts,[139] because the concept of

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136 **Decree No. 2095,** Article 2 **(Ex. RL-25)**; and **Decision 291,** Article 1**. (Ex. RL-24)**.

137 1999 Investment Law, Article 3,2. ("[…] *La inversión internacional abarca a la inversión extranjera directa, a la inversión subregional, a la inversión de capital neutro y a la inversión de una Empresa Multinacional Andina*.")

138 *Id.*, Article 3,3 ("*Inversión extranjera directa, inversión subregional, inversión de capital neutro e inversión de una Empresa Multinacional Andina: Las definidas como tales en las Decisiones aprobadas por la Comunidad Andina de Naciones, y en su reglamentación en Venezuela*.")

139 This conclusion is further confirmed by Ambassador Werner Corrales' public account on the 1999 Investment Law. Ambassador Werner Corrales explains: "*La ley Venezolana en su Art. 3 consagra un criterio amplio al considerar inversión a '…todo activo destinado a la producción de una venta (sic), bajo cualquiera de las formas empresariales o contractuales permitidas en la legislación venezolana …' pudiendo asumir las modalidades de inversión internacional, inversión extranjera directa e inversión venezolana. Al referirse a la inversión extranjera directa se alude también a inversión subregional, inversión de capital neutron e inversión de*

"international investment" as defined in the 1999 Investment Law, is more comprehensive, as discussed below, than those old concepts of the Andean Pact Regime put together.[140]

3. The notion of "International Investor"

123. Article 3,4 of the 1999 Investment Law defines "international investor" as "the owner of an international investment, or whoever effectively controls it."[141] This definition is based on the definition of "international investment," which is in turn based on the definition of "investment." Notice that the definition of "international investor" does not require **direct** ownership or **direct** effective control of an international investment. The provision does not distinguish between different forms of ownership or effective control.

124. The Single Paragraph of Article 3 states that "The Regulation of this Decree-Law shall set forth the conditions under which an investment shall be declared to be property of or effectively controlled by a Venezuelan or foreign natural or legal person."[142] This provision was necessary because "in-

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Empresa Multinacional Andina.") ("[…] Article 3 provides for a broad criteria as it considers as an investment '… every asset destined to the production of income, under any of the entrepreneurial or contractual forms permitted by the Venezuelan legislation […]' which may assume **the modality of international investment, foreign direct investment or Venezuelan investment**. When it refers to foreign direct investment, it refers also to sub-regional investment, investment of neutral capital and investment of a Multinational Andean Company.") Ambassador Corrales' statement makes it clear that international investment is a separate "modality" from foreign direct investment. See Werner Corrales-Leal and Marta Rivera Colomina, "Algunas Ideas Sobre el Nuevo Régimen de Promoción y Protección de Inversiones en Venezuela" in Luis Tineo and Julia Barragán (Compilators), *La OMC Como Espacio Normativo, Un Reto Para Venezuela,* Asociación Venezolana de Derecho y Economía, Caracas, 2000, p. 176 (emphasis added).

140 The concept of "international investment" in the 1999 Investment Law is more comprehensive than the aggregate of "foreign direct investment," "subregional investment," "investment of neutral capital" and "investment of an Andean Multinational Enterprise" because "international investment" is based on a broader concept of "investment" than that presupposed by the Andean Pact Regime. See *infra***.** par. 128.

141 1999 Investment Law**,** Article 3,4 ("*Inversionista internacional: El propietario de una inversión internacional, o quien efectivamente la controle*.")

142 1999 Investment Law, Article 3. ("*Parágrafo Único: El Reglamento de este Decreto-Ley establecerá las condiciones en las cuales se considerará que una inversión*

ternational investment" and "Venezuelan investment" are defined in Article 3 in parallel terms, and in both cases the application of the concept depends on ownership or effective control by either a Venezuelan or foreign person. Since "international investment" and "Venezuelan investment" are mutually exclusive concepts, the legislator left to the regulator the task of avoiding conflicts by clarifying the operation of ownership and effective control.

125. The Regulation addresses ownership in Article 3 and effective control in Article 4.[143] In both articles, the Regulation states that "it is under-

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es propiedad de, o es controlada efectivamente por una persona natural o jurídica venezolana o extranjera.")

143 2002 Investment Law Regulation**,** Article 3 (*"A los efectos del Parágrafo Unico del artículo 3 del Decreto con Rango y Fuerza de Ley de Promoción y Protección de Inversiones, se entiende que una inversión es propiedad de inversionistas internacionales, cuando su participación en la empresa receptora de la inversión sea del cien por ciento (100%) del capital social, patrimonio o activos de la misma, según la forma juridical que esta empresa adopte."*) ("Article 3. For purposes of the Sole Paragraph of Article 3 of the Decree with the Status and Force of Law for the Promotion and Protection of Investments, it is understood that an investment is the property of international investors when their participation in the enterprise recipient of the investment is one hundred percent (100%) of the capital stock, patrimony or assets of the same, according to the legal form adopted by such enterprise."); Article 4 (*"A los efectos del Parágrafo Unico del artículo 3 del Decreto con Rango y Fuerza de Ley de Promoción y Protección de Inversiones, se entiende que una inversión es controlada efectivamente por inversionistas internacionales: 1. Cuando su participación en la empresa receptora de la inversión sea igual o superior al cincuenta y uno por ciento (51%) del capital social, patrimonio o activos de la misma, según la forma juridica que esta empresa adopte; o 2. Cuando, a juicio del organismo correspondiente conforme al artículo 6 de este Reglamento, con independencia del porcentaje de participación de inversionistas internacionales en la empresa receptora de la inversión estos inversionistas estén en capacidad de decidir sobre las actividades de la misma, sea mediante: a) El ejercicio de los derechos de propiedad o uso de la totalidad o de una parte de los activos de la empresa receptora de la inversión; o, b) El control igual o superior a la tercera parte de los votos de sus órganos de dirección o administración; o, c) El control sobre las decisiones de sus órganos de dirección y administración, mediante cláusulas contractuales, estatutarias o por cualquier otra modalidad; o, d) El ejercicio de una influencia decisiva sobre la dirección técnica, comercial, administrativa y financiera de la empresa receptora de la inversión."*) ("Article 4. For purposes of the Sole Paragraph of Article 3 of the Decree with the Status and Force of Law for the Promotion and Protection of Investments, it is understood that an investment is effectively controlled by international investors: 1) When their participation in the enterprise recipient of the investment is equal to or higher than fifty-one percent (51%)

stood that an investment is" owned (or effectively controlled) by international investors when their participation in the enterprise receiving the investment is a certain percentage of the capital, patrimony or assets, depending on the legal form of the enterprise. The percentage of participation in the enterprise receiving the investment is 100% for ownership and at least 51% for effective control, although the Regulation provides for alternative criteria of effective control of the enterprise receiving the investment based on the investors' capacity to decide on the activities of the receiving enterprise, in the judgment of the *Superintendencia de Inversiones Extranjeras.*

126. The Regulation does not deal with ownership or effective control of the investment. The Regulation deals only with ownership and effective control of the enterprise receiving the investment, but it does not require **direct** ownership or **direct** effective control of such enterprise. If the Regulation were interpreted as restricting the definition of "investment" in the statute by requiring ownership or effective control of an enterprise receiving the investment (a requirement that does not appear in the definition), the Regulation would be unconstitutional, because a norm of inferior rank (in this case, a regulation) cannot validly restrict the scope of a norm of superior rank (in this case, a decree having the rank and force of a statute). According to the Venezuelan constitutional system, regulations cannot introduce changes in the law or distort the spirit, purpose or reason of the law.[144]

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of the capital stock, patrimony or assets of the same, depending on the legal form adopted by such enterprise; or 2) When, in the judgment of the corresponding entity according to Article 6 of this Regulation, regardless of the percentage of participation of international investors in the enterprise recipient of the investment, these international investors have the capacity to decide on the activities of the same [enterprise], be it through: a) The exercise of property rights or rights of use over all or part of the assets of the enterprise recipient of the investment; or b) The control equal or superior to one third of the votes of its directive or management bodies; or c) The control of the decisions of its directive or management bodies, through contractual [clauses], statutory clauses, or in any other way; or d) The exercise of a decisive influence over the technical, commercial, administrative, and financial direction of the enterprise recipient of the investment.")

144 1999 Constitution, Article 236 (*"Son atribuciones y obligaciones del Presidente o Presidenta de la República: […] (10) Reglamentar total o parcialmente las leyes sin alterar su espíritu, propósito y razón*.) ("The attributions and obligations of the President of the Republic are: […] (10) To regulate the laws totally or partially, without altering their spirit, purpose and reason.")

4. "International investment" and "direct investment"

127. For the reasons explained in the foregoing paragraphs, it is incorrect to argue, as the Respondent does (**Respondent Memorial**, par. 120), that "in order to establish their status as 'international investor' under the 1999 Investment Law, the Claimants must have been the 'owner' of the **direct investments** in Venezuela or the one who 'actually controlled' them."[145] An earlier sentence in the same paragraph makes clear that the Respondent was referring to the Andean Pact Regime concept of "foreign direct investment." In any event, there is nothing in the 1999 Investment Law suggesting that an "international investment" is limited, if made by foreign investors like the Claimants, to a "foreign direct investment" under the Andean Pact Regime or that an "international investor" must be the owner of a "direct" investment, in the sense of an investment owned or controlled directly rather than through subsidiaries. The Respondent's argument confuses the issues in several ways.

128. First, it is not necessary for an investor in the position of the Claimants to have a "foreign direct investment" (in the sense of the Andean Pact Regime) in order to hold an "international investment," as this term is defined in the 1999 Investment Law. It should be recalled that the concept of "international investment" is defined as "**every asset destined to the production of income**, under any of the **entrepreneurial or contractual** forms permitted by Venezuelan legislation" that is "the property of, or is effectively controlled by foreign natural or legal persons." In contrast, the concept of "foreign direct investment" is defined merely in terms of **contributions** made by foreign natural or juridical persons to the **capital** of an enterprise.[146] In other words, the concept of "international investment" in the 1999 Investment Law is based on a much broader concept of "investment" than is "foreign direct investment" under the Andean Pact Regime.

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145 (Emphasis added).

146 Under the Andean Pact Regime, "Direct Foreign Investment" is defined as "contributions from abroad owned by foreign individuals or legal entities, to the capital of an enterprise, in freely convertible currency or in physical tangible assets, such as industrial plants, new and overhauled machinery, and new and overhauled equipment, spare parts, parts and pieces, raw materials and intermediate products. / Also considered as direct foreign investments are investments made in local currency from resources that are entitled to be remitted abroad and such reinvestments as may be made in accordance with this Regime. […].) **Decision 291,** Article 1 (**Ex. RL-24**). *See also,* **Decree No. 2.095**, Article 2 (Ex. **RL-25**).

Furthermore, under the Andean Pact Regime, the contributions that constitute "foreign direct investment" must be **owned** by the foreign investor,[147] while an "international investment" under the 1999 Investment Law may be either **owned or effectively controlled** by a foreign investor (Article 3,2). Therefore, the Respondent's argument that the Claimants must hold "foreign direct investments" in order to hold "international investments" contradicts the very definition of "international investment" in the 1999 Investment Law. On the contrary, an investor may hold an "international investment" for the purposes of the **1999 Investment Law**, whether or not it holds a "foreign direct investment" (or any other type of investment) under the Andean Pact Regime.[148]

129. Second, it is not necessary for an investor to hold an "international investment" **directly**, as opposed to holding it through subsidiaries. Once again, the 1999 Investment Law and the Regulation require only that an international investment be owned or effectively controlled by foreign natural or juridical persons; it does not require that the ownership (or more precisely the effective control) be **direct**, that is, without intermediate companies. As aforesaid, the definition of "foreign direct investment" in the Andean Pact Regime does not limit the scope of "international investment" in the 1999 Investment Law. It does not matter that the 1999 legislator did not include the phrase "direct or indirect" as a qualification to ownership or effective control. The **Respondent Memorial** (par. 120-121) and the **Urdaneta Opinion** (par. 28-32) interpret paragraphs 2 and 4 of Article 3 as if the references to ownership and effective control were limited by the non-existent word "direct." This amount to introducing a distinction that the Legislator has not made, in violation of a classical rule of statutory interpretation, **when the Law does not distinguish the interpreter is not allowed to distinguish**.[149]

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147 *Id.*

148 Consequently, the statement in the **Urdaneta Opinion** that, in his experience with foreign investment matters in Venezuela, "the concept of **registered foreign investment in shares of companies always refers to the direct and immediate owner,** and not to other entities in the corporate chain" (par. 32 (emphasis added)), must refer to the concepts of "foreign direct investment" and "foreign enterprise" according to the Andean Pact Regime. That experience is irrelevant to determining the meaning of the concept of "international investment" in the 1999 Investment Law.

149 This classical aphorism is commonly applied by Venezuelan courts. See, e.g., Supreme Tribunal of Justice, Civil Cassation Chamber, Decision No. RC.00089 of

130. The **Urdaneta Opinion** (par. 32) and the **Respondent Memorial** (par. 121, footnote 150) contend that the absence of the words "direct or indirect" in the 1999 Investment Law and the Regulation is significant because "such terms are commonly used in other regulatory schemes in Venezuela." Whether other statutes in Venezuela use the language "direct or indirect" is irrelevant to the interpretation of the 1999 Investment Law and the Regulation. The suggestion that Venezuelan common practice is to include the word "indirect" whenever indirect ownership or control are to be covered is incorrect. For example, Article 5,24 of the Organic Law of the Supreme Tribunal of Justice,[150] another Venezuelan provision that uses the expression "control" without the direct or indirect qualification has been interpreted by the Supreme Tribunal as referring to "indirect" control.[151]

March 13, 2003, p. 4, a decision recently cited with approval in Supreme Tribunal of Justice, Civil Cassation Chamber, Decision No. RC.00029 of February 11, 2009, p. 2.

150 Article 5,24 of the Organic Law on the Supreme Tribunal of Justice provides: *"Es de la competencia del Tribunal Supremo de Justicia como más alto Tribunal de la República […] 24.) Conocer de las demandas que se propongan contra la República, los Estados, los Municipios, o algún Instituto Autónomo, ente público o empresa, en la cual la República ejerza un control decisivo y permanente, en cuanto a su dirección o administración se refiere, si su cuantía excede de setenta mil una unidades tributarias (70.001 U.T.)."* (It is competence of the Supreme Tribunal of Justice as the highest Tribunal of the Republic to: […] 24. Hear claims filed against the Republic, the States, Municipalities, or any Autonomous Institute, public entity or enterprise, upon which the Republic exercises ***decisive and permanent control***, regarding their management or administration, if its quantum exceeds seventy thousand and one tributary units (70.001 T.U.).") (Emphasis added.)

151 Supreme Tribunal of Justice, Decision No. 1.551 of September 18, 2007 (Case: *Administradora Onnis, C.A., v. Informática, Negocios and Tecnología S.A.*) (Exp. No. 2007-0786). In this case, the Politico-Administrative Chamber acknowledged that the expression "decisive and permanent control" from Article 5,24 of the Organic Law of the Supreme Tribunal of Justice covers indirect control. The issue was whether the defendant Informática, Negocios y Tecnología S.A (INTESA) was an enterprise in which the Republic of Venezuela, a State or Municipality exercised "decisive and permanent control" to grant competence over the dispute to the administrative courts (*juzgado contencioso admnistrativo*). INTESA was a company incorporated in Venezuela, owned by SAIC Bermuda (60% shareholding) and PDV Informática y Telecomunicaciones, S.A. (PDV-IFT) (40% shareholding). PDV-IFT was in turn wholly owned by Petróleos de Venezuela, S.A. (PDVSA), and PDVSA is in turn wholly owned by the Republic of Venezuela. *Id.*, pp. 2, 4-5. The Politico-Administrative Chamber decided that "while **the Republic through PDVSA is**

131. Third, the requirement that control be "effective" itself indicates that what matters is not a particular legal form of control, but the way an investment is controlled in the reality of international business. In order to have "effective control" over an investment, the controlling person must in fact have the power to appoint those who manage the investment. Such power can be possessed either directly or indirectly, for instance, through ownership of a sufficient percentage of stock in a chain of companies established for the purpose of owning and controlling the investment in Venezuela.

132. Fourth, for the purposes of applying the regime of the 1999 Investment Law, the status of an investment under the Andean Pact Regime does not matter. Article 4 of the 1999 Investment Law makes it clear that, while investments made under the Andean Pact Regime continue to be subject to that regime, they "shall also enjoy the protection established in this Decree-Law, and shall be able to enjoy the benefits and incentives that this

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owner of only a **40% of the shares of [INTESA**] […] such percentage although it does not represent a majority shareholding, it does represent an important contribution by the Republic […]" and concluded that "**the Republic has a decisive participation** in the defendant company […]." *Id.*, p. 5 (emphasis added). Put differently, the Politico-Admnistrative Chamber recognized that **indirect** holding of shares of INTESA by the Republic of Venezuela was enough to satisty the "decisive and permanent control" requirement, needed to grant to the administrative courts competence over the case against INTESA. Given its quantum, the case was assigned to the relevant Regional Superior Administrative Court (*Juzgado Superior de lo Contencioso Administrativo Regional*). *Id.*, p. 6.

Strictu sensu, Article 5,24 of the Organic Law on the Supreme Tribunal of Justice refers to the competence of the Supreme Tribunal of Justice over disputes over 70,001 U.T. While the dispute at issue did not reach that quantum, Decision No. 1.551 explained that it was applying the criteria established on Decision No. 01209 of September 2, 2004, which distributed competence among the various administrative courts according to the quantum, for cases against the entities identified in Article 5,24 of the Organic Law of the Supreme Tribunal of Justice (that is, the Republic, States or Municipalities, or Autonomous Institutes, public entities or enterprises in which the Republic, the States or Municipalities exercise "decisive and permanent control" in relation to their direction or administration). *Id*., pp. 5-6. Decision No. 01209 assigned the competencies on the basis of quantum as follows: (1) Regional Superior Administrative Courts (*Juzgados Superiores de lo Contencioso Administrativo Regionales*) for disputes with a quantum that does no exceed 10.000 UT; 2) Administrative Courts (*Cortes de lo Contencioso Admnistrativo*) for disputes exceeding 10.000 up until 70.001 UT; 3) the Politico-Administrative Chamber for disputes in excess of 70.001 UT.

Decree-Law contemplates, within the limits that it establishes." The 1999 Investment Law thus protects all international investments, in accordance with its own terms. It is improper to distort the meaning of the 1999 Investment Law by interpreting it in the light of the Andean Pact Regime.

133. I declare that the foregoing reflects my true opinion on the questions addressed.

Executed this 10th of April, 2009.

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Allan R. Brewer-Carías

2.

ICSID Case No. ARB/08/3: *BRANDES INVESTMENT PARTNERS, LP* (Claimant) *v. THE BOLIVARIAN REPUBLIC OF VENEZUELA* (Respondent)

INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES

DECLARATION OF ALLAN R. BREWER-CARIAS

26 JUNE 2009

I, Allan R. Brewer-Carías, hereby declare that the following is true and correct:

1. I have been a member in good standing of the Venezuelan Federal District Bar since 1963. Since 1973, I have been a partner of Baumeister & Brewer, a law firm located at *Torre América, PH, Avenida Venezuela, Urbanización Bello Monte, Caracas 1050, Venezuela.* I specialize in public law, particularly constitutional, administrative, and public economic law, which includes mining and hydrocarbons law. Currently, I am a resident in the United States of America, in the city of New York, NY.

Qualifications

2. In 1962, I received my law degree from *Universidad Central de Venezuela* (Central University of Venezuela). I performed post graduate studies in France, at the then University of Paris (1962-1963), and in 1964 I received a Doctorate in Law (D. J.) from the Central University of Venezuela.

3. I have taught Administrative and Constitutional law in the Central University of Venezuela since 1963. During the academic years 1972-1974, I was Visiting Scholar at Cambridge University (Center of Latin American Studies), U.K., and during the academic year 1985-1986, I was a Professor at Cambridge University, where I held the *Simón Bolívar Chair,* teaching a course on *"Judicial Review in Comparative Law"* in the LL.M. Program of the Faculty of Law; being a Fellow of Trinity College. In 1990, I was an Associate Professor at the University of Paris II (Panthéon-Assas) in the 3º Cycle Course, where I taught a course on *"La Procedure Administrative Non Contentieuse en Droit Comparé"* (Principles of Administrative Procedure in Comparative Law). Since 1998, I have also taught in the Administrative Law Masters program at *El Rosario* University, and at *Externado de Colombia* University, both in Bogotá, Colombia, on the subject of *"Principios del Procedimiento Administrativo en América Latina"* (Principles of Administrative Procedure in Latin America), and of *"El Modelo Urbano de la Ciudad Colonial Hispanoamericana"* (The Urban Model of the Hispanic American Colonial Cities). In 1998, I gave a series of lectures at the University of París X (Nantèrre) on *"Droit économique au Vénézuéla"* (Economic Law in Venezuela) as an Invited Professor.

4. Between 2002 and 2004, I was a Visiting Scholar at Columbia University in the City of New York. In 2006, I was appointed Adjunct Professor of Law at Columbia University Law School, where I taught a Seminar on *Judicial Protection of Human Rights in Latin America, A Constitutional Comparative Law Study on the Amparo Proceeding* during the Fall 2006 and Spring 2007 Semesters.

5. Since 1982, I have acted as Vice-President of the International Academy of Comparative Law, The Hague, and have been a Professor at the International Faculty for Teaching of Comparative Law of Strasbourg. I am a member of the Venezuelan Academy of Social and Political Sciences, and served as its President from 1997 to 1999. I am a member of the *Société de Legislation Comparée* (Society of Comparative Legislation) in Paris. In 1981, I was awarded the Venezuelan Social Sciences National Prize.

6. During the past decades, I have participated in numerous academic programs – including congresses, seminars and courses – giving lectures in universities and public institutions in Europe, the U.S. and Latin America on matters of public law.

7. I have published the following books on matters of public law:

-My books in **English** include: *Judicial Review in Comparative Law,* Cambridge University Press, 1989; *Constitutional Protection of Human Rights in Latin America, A Constitutional Comparative Law Study on the Amparo Proceeding,* Cambridge University Press, New York 2008.

-My books in **French** include: *Les enterprises publiques en droit comparé (Public Enterprises in Comparative Law),* París 1968; *Les principles de la procedure administrative non contentieuse en droit comparé (The Principles of Administrative Procedure in Comparative Law),* Económica, París 1992; *Études de droit public comparé (Studies on Comparative Public Law),* Ed. Bruylant, Bruxelles, 2000.

-My books in **Spanish** include: *Las Instituciones Fundamentales del Derecho Administrativo y la Jurisprudencia Venezolana (The Fundamental Institutions of Venezuelan Administrative Law and Jurisprudence),* UCV, Caracas 1964; *Las empresas públicas en el derecho comparado (Public Enterprises in Comparative Law),* UCV, Caracas 1968; *Jurisprudencia de la Corte Suprema 1930-74 y Estudios de Derecho Administrativo (Supreme Court Jurisprudence 1930 -1974, and Studies on Administrative Law), 7* Vols., UCV, Caracas 1975-1979; *Principios de la Organización Administrativa* Venezolana (Principies of Administrative Organization in Venezuela), 1979; *Estado de Derecho y Control Judicial (Rule of Law and Judicial Review),* INAP, Madrid 1978; *El Régimen Jurídico de las Empresas Públicas en Venezuela (Legal Regime of Public Enterprises in Venezuela),* CLAD, Caracas 1980; *Régimen Legal de la Economía (Legal Regime of the Economy),* Valencia 1982; *El Derecho Administrativo y la Ley Orgánica de Procedimientos Administrativos (Administrative Law and the Organic Law of Administrative Procedures),* EJV, Caracas 1982; *Contratos Administrativos (Administrative Contracts),* EJV, Caracas 1992; *Nuevas tendencias en el contencioso administrativo en Venezuela (New trends on the contentious administrative in Venezuela),* EJV, Caracas 1993; *Estudios de Derecho Administrativo (Administrative Law Studies),* Bogotá 1994; *Instituciones Políticas y Constitucionales (Political and Constitutional Institutions),* 7 Vols. EJV, Caracas 1996; *La Constitución de 1999 (The 1999 Constitution),* EJV, Caracas 2000; *Principios del Procedimiento Administrativo en América Latina (The Principles of Administrative Procedure in Latin America),* Bogotá 2003; *La Constitución de 1999. Derecho Constitucional Venezolano (The 1999 Constitution. Venezuelan Constitutional Law),* 2 Vols., EJV, Caracas 2004;

Ley Orgánica del Tribunal Supremo de Justicia (Organic Law of the Supreme Tribunal of Justice), EJV, Caracas 2004; *Régimen Legal de la Nacionalidad, Ciudadanía y Extranjería (Legal Regime on Nationality, Citizenship and Immigration),* EJV, Caracas 2005; *Mecanismos Nacionales de protección de los Derechos (Internal Means for the Protection of Human Rights),* IIDH, San José 2005; *Derecho Administrativo (Administrative Law),* 2 Vols., Bogotá 2005; *Estudios sobre el Estado Constitucional 2005-2006 (Studies on the Constitucional State 2005-2006),* Caracas 2007; *Crónica sobre la "In" Justicia Constitucional (Chronicle on the Constitucional "Un" Justice),* Caracas 2007; *La Justicia Constitucional (Procesos y Procedimientos Constitucionales) (Constitucional Justice. Constitutional Processes and Proceedings),* Ed. Porrúa, México 2007; *La Reforma Constitucional de 2007 (The 2007 Constitutional Reform),* Caracas 2007; *Estudios de Derecho Administrativo (2005-2007) (Studies on Administrative Law 2005-2007),* Caracas 2007; *Reflexiones sobre la Revolución Norteamericana (1776), la revolución Francesa (1789) y la Revolución Hispanoamericana (1810-1830) y sus aportes al constitucionalismo moderno (Reflexions on the American Revolution 1776, the French Revolution 1789 and the Hispanic American Revolution 1810-1830 and their contribution to Modern Constitutionalism),* Bogotá 2008; *Historia Constitucional de Venezuela (Constitutional History of Venezuela),* 2 vols., Ed. Alfa, Caracas 2008.

8. From 1978 to 1987, I was Director of the Public Law Institute at the *Universidad Central de Venezuela* (Central University of Venezuela). During my tenure, I directed the Seminars on the Andean Pact Process of Economic Integration (since 1967) and on the Venezuelan Nationalization Process of the Oil Industry (since 1975). Since 1980, I have been the Editor and Director of the *Revista de Derecho Público* (Public Law Journal), Fundación Editorial Jurídica Venezolana, Caracas.

9. In 1999, I was elected Member of the *Asamblea Nacional Constituyente* (National Constituent Assembly) in Venezuela. Although I was an opposition member (one of only four, out of 131 Members), I contributed to the drafting of many provisions of the 1999 Constitution. All my proposals and dissenting votes are collected in Allan R. Brewer-Carías, *Debate Constituyente (Aportes a la Asamblea Nacional Constituyente)*, 3 Vols., Fundación de Derecho Público, Editorial Jurídica Venezolana, Caracas 1999.

10. I am the author of numerous articles addressed to the functioning of the Constitutional Chamber of the Supreme Tribunal of Justice, mat-

ters of the judicial review system, the sovereign immunity of the State, and arbitration in public law and public contracts in Venezuela. I have published the following recent articles:

- **On judicial review**: "Judicial Review in Venezuela" in *Duquesne Law Review*, Volume 45, Number 3, Spring 2007, pp. 439-465; "Principios del método concentrado de justicia constitucional" in José de Jesús Navaja Macías y Víctor Bazán (Coordinadores), *Derecho Procesal Constitucional*, Vol. I, Orlando Cárdenas Editor, Irapuato, GTO, México, 2007, pp. 251-272; "Instrumentos de justicia constitucional en Venezuela (acción de inconstitucionalidad, controversia constitucional, protección constitucional frente a particulares)" in Juan Vega Gómez y Edgar Corzo Sosa (Coordinadores) *Instrumentos de tutela y justicia constitucional Memoria del VII Congreso Iberoamericano de Derecho Constitucional*, Instituto de Investigaciones Jurídicas, Serie Doctrina Jurídica, Nº 99, México 2002, pp. 75-99; "La justicia constitucional en la Constitución de 1999" in *Derecho Procesal Constitucional*, Colegio de Secretarios de la Suprema Corte de Justicia de la Nación, A.C., Editorial Porrúa, México 2001, pp. 931-961; "La Justicia Constitucional en la Nueva Constitución," in *Revista de Derecho Constitucional No. 1*, September-December 1999, Editorial Sherwood, Caracas 1999, pp. 35-44; "El sistema mixto o integral de control de la constitucionalidad en Colombia y Venezuela" in G. J. Bidart Campos y J. F. Palomino Manchego (Coordinadores)*, Jurisdicción Militar y Constitución en Iberoamérica, Libro Homenaje a Domingo García Belaúnde*, Instituto Iberoamericano de Derecho Constitucional (Sección Peruana), Lima 1997, pp. 483-560, and in *Anuario de Derecho Constitucional Latinoamericano*, Fundación Konrad Adenauer, Medellín-Colombia 1996, pp. 163-246; "La Justicia Constitucional en América Latina" in *Revista de la Academia Colombiana de Jurisprudencia Nº 309*, Santa Fe de Bogotá, Colombia, July 1997, pp. 81-133; "Control de la constitucionalidad. La justicia constitucional" in *El Derecho Público de Finales de Siglo. Una perspectiva iberoamericana*, Fundación BBV, Editorial Civitas, Madrid 1996, pp. 517-570; and "La Justicia Constitucional" in *Revista Jurídica del Perú*, Year XLV No. 3, Lima, July-September 1995, pp. 121-180.

- **On the Judicial system:** "La justicia sometida al poder [La ausencia de independencia y autonomía de los jueces en Venezuela por la interminable emergencia del Poder Judicial (1999-2006)]" en

Cuestiones Internacionales. Anuario Jurídico Villanueva 2007, Centro Universitario Villanueva, Marcial Pons, Madrid 2007, pp. 25-57; "La justicia sometida al poder y la interminable emergencia del poder judicial (1999-2006)", en *Derecho y democracia. Cuadernos Universitarios*, Órgano de Divulgación Académica, Vicerrectorado Académico, Universidad Metropolitana, Año II, No. 11, Caracas, septiembre 2007, pp. 122-138; "El constitucionalismo y la emergencia en Venezuela: Entre la emergencia formal excepcional y la emergencia anormal permanente del Poder Judicial" (Córdoba, Argentina, junio 2005), in Allan R. Brewer-Carías, *Estudios sobre el Estado Constitucional (2005-2006),* , EJ V, Caracas, 2007, pp. 245-269; "La progresiva y sistemática demolición institucional de la autonomía e independencia del Poder Judicial en Venezuela 1999-2004", en *XXX Jornadas J.M Domínguez Escovar, Estado de derecho, Administración de justicia y derechos humanos,* Instituto de Estudios Jurídicos del Estado Lara, Barquisimeto, 2005, pp. 33-174.

-On sovereign immunity: "Comentarios sobre la doctrina del acto de gobierno, del acto político, del acto de Estado y de las cuestiones políticas como motivo de inmunidad jurisdiccional de los Estados en sus Tribunales nacionales" in *Revista de Derecho Público Nº 26*, Editorial Jurídica Venezolana, Caracas, April-June 1986, pp. 65-68; "Algunos aspectos de la inmunidad jurisdiccional de los Estados y la cuestión de los actos de Estado (*act of state*) en la jurisprudencia norteamericana" in *Revista de Derecho Público*, Nº 24, Editorial Jurídica Venezolana, Caracas, October-December 1985, pp. 29-42.

-On arbitration in public law: "Algunos comentarios a la Ley de Promoción y Protección de Inversiones: contratos públicos y jurisdicción" in *Arbitraje Comercial Interno e Internacional. Reflexiones Teóricas y Experiencias Prácticas,* Serie Eventos 18, Academia de Ciencias Políticas y Sociales, Caracas 2005, pp. 279-288; "El arbitraje y los contratos de interés nacional," in *Seminario sobre la Ley de Arbitraje Comercial*, Biblioteca de la Academia de Ciencias Políticas y Sociales, Serie Eventos, N° 13, Caracas 1999, pp. 169-204.

Scope of the Opinion

11. This opinion is rendered in connection with ICSID Case No. ARB/08/3, which is being pursued by Brandes Investment Partners, LP. (the **Claimant**), against the Republic of Venezuela (the **Respondent**). *Milbank,*

Tweed, Hadley & McCloy LLP, counsel to the Claimant, have asked me to render an opinion on the following issues:

- The meaning of Article 22 of the 1999 Investment Law (**Article 22**) and whether it contains the Republic of Venezuela's consent to submit disputes to international arbitration in the International Centre for Settlement of Investment Disputes (ICSID).
- The various efforts to obtain a judicial interpretation of Article 22 before the Constitutional Chamber and the Politico-Administrative Chamber of the Supreme Tribunal of Justice prior to 2008.
- The interpretation of Article 22 by the Constitutional Chamber of the Supreme Tribunal of Justice in Decision No. 1.541 of October 17, 2008.
- A general description of the composition and functioning of the Supreme Tribunal of Justice under the 1999 Constitution; and a general description of the situation of the Judiciary in Venezuela.

12. As a practicing lawyer, specialized in constitutional and administrative law, I offer this declaration and opinion based on my experience and knowledge of Venezuelan law, accumulated during more than forty-five years of academic activity and practice of the legal profession, the latter mainly in Venezuela.

Documents Considered

13. For the purpose of this opinion, I have reviewed and considered the following documents:

A. The "Request for Arbitration" filed by the Claimant before the International Centre for Settlement of Investment Disputes (ICSID) on February 14, 2008, and its relevant exhibits, including Decree-Law No. 356 of October 3, 1999, on the Law on the Promotion and Protection of Investments (*Official Gazette* No 5.390 (Extra) of October 22, 1999) (**1999 Investment Law**) (**Exh. C-2**).

B. The "Memorial of the Bolivarian Republic of Venezuela on Objections to Jurisdiction" filed on April 15, 2009 (**Respondent Memorial**), and its relevant exhibits.

D. The "Legal Expert Opinion of Enrique Urdaneta Fontiveros" dated April 13, 2009 (**Urdaneta Opinion**), and its relevant exhibits, including in particular: Decree No. 1.867 of July 11, 2002 on the Regulation

of the 1999 Investment Law (*Official Gazette* No. 37.489 of July 22, 2002) (**2002 Investment Law Regulation**) (**Ex. RL-2**); Organic Law Authorizing the President of the republic to issue Extrordinary Measures in Economic and Financial matters of Public Interest (*Official Gazette* No. 36.0687 of April 26, 1999) (**Ex. RL-4**); Supreme Tribunal of Justice, Politico-Administrative Chamber, Decision No. 1.209 of June 20, 2001 (Case: *Hoteles Doral C.A. v. Corporación L. Hoteles C.A.*) (Exp. No. 2000-0775) (**Ex. RL-6**); Decision No. 00098 of January 29, 2002 (Case: *Banco Venezolano de Credito, S.A.C.A. v. Venezolana de Relojería, S.A. (Venrelosa) y Henrique Pfeffer C.A.*) (Exp. No. 2000-1255) (**Ex. RL-7**); Decision No. 00476 of March 25, 2003 (Case: *Consorcio Barr, S.A. v. Four Seasons Caracas, C.A.*) (Exp. No. 2003-0044) (**Ex. RL-8**); Decision No. 00038 of January 28, 2004 (Case: *Banco Venezolano de Crédito, S.A. Banco Universa vs. Armando Días Guía y Marisela Riera de Guía*) (Exp. No. 2003-1296) (**Ex. RL-9**); Supreme Tribunal of Justice, Constitutional Chamber, Decision No. 186 of February 14, 2001 (**Ex. RL-16);** Supreme Tribunal of Justice, Politico Administrative Chamber, Decision No. 927 of June 5, 2007 (**Ex. RL-17);** Supreme Tribunal of Justice, Constitutional Chamber, Decision No. 1.541 of October 17, 2008 (*Official Gazette* No. 39.055 of November 10, 2008) (**2008 Decision No. 1.541**) (**Ex. RL-18).**

E. Such other documents, mentioned in this statement, as I have considered necessary for the purpose of rendering an opinion on the questions presented.

14. For the purposes of this opinion and to the extent here indicated, I rely on the accuracy of the statements of fact by the Claimant in their Request for Arbitration.

Summary of Conclusions

15. My analysis reaches the following conclusions:

- This expert witness shares the view that the interpretation and effects of Article 22 in relation to the ICSID Convention are properly governed by principles of international law. Nevertheless, he has been asked to address the issue from the point of view of Venezuelan law and this opinion is rendered from that standpoint.
- Venezuelan rules of statutory interpretation lead to the conclusion that Article 22 of the 1999 Investment Law expresses a unilateral open offer of consent of the Republic of Venezuela to ICSID arbitration. This is the

sense that appears from the meaning of the words used in their context and from the intention of the legislator. Notably, the language "shall be submitted to international arbitration" (*serán sometidas al arbitraje internacional*) is an expression of command that conveys the mandatory nature of Article 22. The provision "if it so establishes" (*si así éste lo establece*) means that the command of Article 22 applies if the respective treaty or agreement (Article 22 refers to other treaties alongside the ICSID Convention) contains provisions establishing arbitration. This condition is satisfied by the ICSID Convention.

- The conclusion that Article 22 is a unilateral open offer of consent is confirmed by a publication of the high ranking official entrusted with directing the drafting of the 1999 Investment Law. It is also consistent with the Constitutional mandate in Article 258 of the 1999 Constitution to promote arbitration.

- The interpretation of Article 22 proposed by the Republic of Venezuela, the **Urdaneta Opinion** and the **2008 Decision No. 1.541** is fundamentally flawed. It is incorrect to interpret "if it so establishes" as a requirement that the State's consent be incorporated in the ICSID Convention, because "so" cannot refer to a term ("consent") that is not used in the preceding sentence ("shall be submitted to international arbitration according to the terms of the respective treaty or agreement"). Moreover, interpreting "if it so establishes" as an equivalent of "if the ICSID Convention establishes consent" would turn this phrase into an impossible condition (a condition that cannot be fulfilled), depriving Article 22 of any meaningful effect.

- The additional arguments offered by the **2008 Decision No. 1.541** to support its conclusion that Article 22 cannot be interpreted as an expression of consent are legally unsound and inherently contradictory. Moreover, the conclusion of the **2008 Decision No. 1.541** regarding Article 22 contrasts with a 2001 ruling of the same Constitutional Chamber on the constitutionality of Article 22, the reasoning of which presupposes that Article 22 is an expression of consent to ICSID arbitration.

- The **2008 Decision No. 1.541** is the product of a politically influenced judiciary that was called upon to bolster the Republic of Venezuela's position in pending ICSID cases. The Constitutional Chamber acted *ultra vires* when it undertook to interpret Article 22 of the 1999 Investment Law at the request of the Government of the Republic of Venezuela, because the Politico-Administrative Chamber has exclusive competence (*competencia*) to interpret statutes. This is a conclusion that the same

Constitutional Chamber endorsed in 2007 when it ruled that it had no competence to hear a petition for interpretation of Article 22 filed by three Venezuelan lawyers.

I. ARTICLE 22 OF THE 1999 INVESTMENT LAW AND CONSENT TO ICSID JURISDICTION

1. The origin and intent of the 1999 Investment Law

16. As explained in detail in this Part I, Article 22 of the 1999 Investment Law expresses the written consent of the Republic of Venezuela to ICSID arbitration, under Article 25,1 of the ICSID Convention.[1] This consent is in the form of an open offer of arbitration (*oferta abierta de arbitraje*), which is subject to acceptance by the other party to a relevant dispute.[2] As discussed below, Article 22 reflects a pro-arbitration trend that had developed in Venezuela over the past few decades, which crystallized in Article 258 of the 1999 Constitution.

17. President Hugo Chávez was first elected in December 1998 and took office on February 2, 1999. The stated economic policy of the new government at that time included encouraging foreign investment in the country. In April 1999, the Congress enacted an Enabling Law, authorizing the National Executive to "[e]nact provisions in order to promote the protection and promotion of national and foreign investments with the purpose of establishing a legal framework for investments and to give them greater legal security." (Article 1,4,f).[3] A few months later, on October 3, 1999, the Pres-

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1 For the reasons stated in this Part, the conclusion to the contrary in the **Respondent Memorial** (par. 5, 91) and in the **Urdaneta Opinion** (par. 13-18, 26) is incorrect.

2 For a reference to the various forms of written consent by ICSID Contracting States, which include domestic legislation see "Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of other States" dated March 18, 1965 in *1 ICSID Reports 28*, par. 24 ("[…] a host state might in its investment promotion legislation offer to submit disputes arising out of certain classes of investments to the jurisdiction of the Centre, and the investor might give his consent by accepting the offer in writing.")

3 See *Ley Orgánica que Autoriza al Presidente de la República Para Dictar Medidas Extraordinarias en Materia Económica y Financiera Requeridas por el Interés Público* (Organic Law Authorizing the President of the Republic to Issue Extraordinary Measures in Economic and Financial Matters Required by the Public Interest), in *Official Gazette* Nº 36.687 of April 26, 1999.

ident of the Republic issued Decree-Law No. 356 on the Law on the Promotion and Protection of Investments (**1999 Investment Law**), in the exercise of the legislative powers delegated by the Enabling Law.

18. It is a matter of public knowledge that the 1999 Investment Law was drafted under the direction of the then Ambassador Werner Corrales-Leal, Head of the Permanent Representation of Venezuela before the WTO and the UN entities headquartered in Geneva. Ambassador Corrales, who since 1998 had had an important role in the formulation of Venezuelan policy toward investments, was entrusted with that task by the new Chávez administration. As Head of that Permanent Representation, Ambassador Corrales prepared reports and opinions for the Government.

19. One of those reports, dated April 1999 and written by Ambassador Corrales with Marta Rivera Colomina, an official at the Permanent Representation, contains ideas for the design of the legal regime of promotion and protection of investments in Venezuela.[4] The document explains that "a regime applicable to foreign investments, must leave open the possibility to resort to international arbitration, which today is accepted almost everywhere in the world, either by means of the mechanism provided for in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) or by means of the submission of the dispute to an international arbitrator or an *ad hoc* arbitral tribunal like the one proposed by UNCITRAL."[5] This view was made even more explicit in an article by the same authors, published shortly after the 1999 Investment Law came into effect. That article stated that "a regime applicable to foreign investments, must leave open the possibility to **unilaterally** resort to international arbitration, which today is accepted almost everywhere in the world, either by

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4 See Werner Corrales-Leal and Martha Rivera Colomina, "Algunas ideas relativas al diseño de un régimen legal de promoción y protección de inversiones en Venezuela," April 30, 1999. Document prepared at the request of the Minister of CORDIPLAN.

5 *Id*., pp. 10-11 ("[…] *un régimen aplicable a las inversiones extranjeras, debe dejar abierta la posibilidad de recurrir al arbitraje internacional, lo cual hoy es aceptado en casi todo el mundo, bien sea a través del mecanismo consagrado en la Convención sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de otros Estados (CIADI) o mediante el sometimiento de la disputa a un árbitro internacional o a un tribunal de arbitraje ad hoc como el que propone UNCITRAL.*")

means of the mechanism provided for in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) or by means of the submission of the dispute to an international arbitrator or an *ad hoc* arbitral tribunal like the one proposed by UNCITRAL."[6] The reference to **unilateral** resort to international arbitration makes it clear that the person entrusted with drafting the 1999 Investment Law intended Article 22 to express the State's consent to ICSID arbitration, which is the only way the investor could have **unilateral** resort to such arbitration. Put differently, speaking of unilateral resort to arbitration in connection with the 1999 Investment Law presupposes that said law provides the State's consent that is necessary for the investor to have the right to unilaterally resort to arbitration.

20. The 1999 Investment Law was sanctioned by the Government as evidence of its commitment to develop and promote private (foreign and domestic) investment in Venezuela, and was contemporaneous with the mandate in the 1999 Constitution to promote alternative mechanisms for dispute resolution, such as arbitration.[7] As we shall see, it was the Government's

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6 See Werner Corrales-Leal and Marta Rivera Colomina, "Algunas ideas sobre el nuevo régimen de promoción y protección de inversiones en Venezuela" in Luis Tineo and Julia Barragán (Compilators), *La OMC Como Espacio Normativo,* Asociación Venezolana de Derecho y Economía, Caracas, 2000, p. 185 (emphasis added) ("[…] *un régimen aplicable a las inversiones extranjeras, debe dejar abierta la posibilidad de recurrir unilateralmente al arbitraje internacional, lo cual hoy es aceptado en casi todo el mundo, bien sea a través del mecanismo consagrado en la Convención sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de otros Estados (CIADI) o mediante el sometimiento de la disputa a un árbitro internacional o a un tribunal de arbitraje ad hoc como el que propone UNCITRAL.*")

7 See, for instance, website of the Venezuelan Embassy in Switzerland, "CONOZCA NUESTRO PAÍS. INVERSIONES. ¿POR QUÉ INVERTIR EN VENEZUELA?" *available at* www.embavenez-suiza.com/inversiones.html, cached version recorded February 8, 2008 *available at* http://web.archive.org/web/20080205011315/http://www. embavenez-suiza.com/inversiones.html (last visited March 24, 2009) ("*La política sobre tratamiento de la inversión privada en Venezuela se basa en la igualdad de trato y garantías de seguridad jurídica para inversionistas nacionales y extranjeros. Evidencias del compromiso del gobierno nacional para el fomento, protección y abaratamiento de las inversiones privadas en Venezuela son el Decreto Ley de Promoción y Protección de Inversiones […] La política de promoción de inversiones es el reflejo de la programación constitucional en materia económica. La Constitución de 1999 prevé la inversión privada como instrumento de desarrollo, al tiempo que consagra expresamente principios de libre competencia; garan-*

official policy at that time to offer resolution of disputes by arbitration as a means of promoting investment. The **Urdaneta Opinion** (par. 20) asserts that Article 22 is a non-binding "declaration of principles," and that at the time of the 1999 Investment Law the "prevailing culture in Venezuela" was "traditionally hostile to arbitration." That is simply untrue. The prevailing culture and official policy at that time were to offer arbitration to investors in order to attract investments.

21. The supposed "hostility" to arbitration that the **Urdaneta Opinion** attributes to 1999 is premised on events that had occurred one hundred years earlier and had been long superseded. At the turn of the 20th Century, arbitration was rejected in Venezuela on matters of public law by application of the "Calvo Clause,"[8] and as a result of events of 1902 that gave rise

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tías del derecho de propiedad; favorecimiento de mecanismos alternativos de resolución de disputas, como el arbitraje, la conciliación y mediación; y la ya referida igualdad de tratamiento para inversiones nacionales y extranjeras […].") ("The policy on treatment of private investment in Venezuela is based on equal treatment and guaranties of legal security for national and foreign investors. Evidence of the national government's commitment to the promotion, protection and cost reduction of private investment in Venezuela are the Decree Law on the Promotion and Protection of Investments […] The policy on the promotion of investments is a reflection of the constitutional program on economic matters. The 1999 Constitution provides that private investment is an instrument for development, and at the same time it provides expressly for the principles of free competition; guaranties of the right to property; favors alternative mechanisms of dispute resolution, such as arbitration, conciliation and mediation; and the already mentioned equality in treatment for national and foreign investments […].)

8 The Calvo Clause had its origin in the work of Carlos Calvo, who formulated the doctrine in his book *Tratado de Derecho Internacional*, initially published in 1868, after studying the Franco-British intervention in Rio de a Plata and the French intervention in Mexico. The Calvo Clause was first adopted in Venezuela in the 1893 Constitution as a response to diplomatic claims brought by European countries against Venezuela as a consequence of contracts signed by the country and foreign citizens. See Tatiana Bogdanowsky de Maekelt, "Inmunidad de Jurisdicción de los Estados" in *Libro Homenaje a José Melich Orsini,* Vol. 1, Caracas 1982, pp. 213 ff.; Allan R. Brewer-Carías, "Principios especiales y estipulaciones obligatorias en la contratación administrativa" in *El Derecho Administrativo en Latinoamérica*, Vol. II, Ediciones Rosaristas, Colegio Mayor Nuestra Señora del Rosario, Bogotá 1986, pp. 345-378; Allan R. Brewer-Carías, "Algunos aspectos de la inmunidad jurisdiccional de los Estados y la cuestión de los actos de Estado (*act of state*) en la jurisprudencia norteamericana" in *Revista de Derecho Público Nº 24*, Editorial Jurídica Venezolana, Caracas October-December 1985, pp. 29-42.

in Venezuela to the "Drago Doctrine."[9] On matters of private law, even though binding arbitration had been authorized in the 19th Century in the civil procedure regulations as a means of alternative dispute resolution, the 1916 Code of Civil Procedure established arbitration only as a non-binding method of dispute resolution, that is, without making the arbitration agreement mandatory (Articles 502-522).

22. That attitude of suspicion or hostility to arbitration changed steadily from the middle of the 20th Century. After the 1961 Constitution adopted the principle of relative sovereign immunity (based on a similar provision contained in Article 108 of the 1947 Constitution), the insertion of binding arbitration clauses in public contracts became a generally accepted practice, recognized as valid.[10] In addition, Venezuela ratified the 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards,[11] the 1975 Inter-American Convention on International Commercial Arbitration,[12] and the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).[13]

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9 The Drago Doctrine was conceived in 1902 by the then Argentinean Minister of Foreign Relations, Luis María Drago, who – in response to threats of military force made by Germany, Great Britain and Italy against Venezuela – formulated his thesis condemning the compulsory collection of public debts by the States. See *generally* Victorino Jiménez y Núñez, *La Doctrina Drago y la Política Internacional,* Madrid 1927.

10 See Alfredo Morles, "La inmunidad de Jurisdicción y las operaciones de Crédito Público" in *Estudios Sobre la Constitución, Libro Homenaje a Rafael Caldera,* Vol. III, Caracas, 1979, pp. 1.701 ff; Allan R. Brewer-Carías, *Contratos Administrativos*, Colección Estudios Jurídicos N° 44, Editorial Jurídica Venezolana, Caracas 1992, pp. 262-265. The same provision established in the 1961 Constitution was incorporated in the 1999 Constitution. See Beatrice Sansó de Ramírez, "La inmunidad de jurisdicción en el Artículo 151 de la Constitución de 1999" in *Libro Homenaje a Enrique Tejera París, Temas sobre la Constitución de 1999,* Centro de Investigaciones Jurídicas (CEIN), Caracas 2001, pp. 333-368.

11 *Official Gazette* No. 33.144 of January 15, 1985.

12 *Official Gazette* No. 33.170 of February 22, 1985.

13 *Official Gazette* (Extra) No. 4832 of December 29, 1994. For an account of international instruments relevant to Venezuela's recognition of international arbitration, *see* **2008 Decision No. 1.541**, p. 365.485.

23. In 1986, the Code of Civil Procedure was amended to allow parties to make a binding agreement to submit controversies to arbitral tribunals, and to exclude the jurisdiction of ordinary courts (Articles 608-629). In addition, special statutes allowed for arbitration in areas related to copyright, insurance, consumer protection, labor, and agrarian reform.[14]

24. In 1995, Venezuela ratified the ICSID Convention and,[15] between 1993 and 1998, it signed many bilateral treaties on investments (BITs) providing for international arbitration.[16] In 1998, Venezuela adopted the Commercial Arbitration Law,[17] which is based on the Model Law on International Commercial Arbitration of UNCITRAL.[18]

25. In August 1999, the Supreme Court of Justice dismissed a challenge to the constitutionality of the parliamentary act (*Acuerdo*) that authorized the Framework of Conditions for the "Association Agreements for the Exploration at Risk of New Areas and the Production of Hydrocarbons

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14 See laws listed in Francisco Hung Vaillant, *Reflexiones Sobre el Arbitraje en el Sistema Venezolano*, Caracas, 2001, pp. 90-101; Paolo Longo F., *Arbitraje y Sistema Constitucional de Justicia*, Editorial Frónesis S.A., Caracas, 2004, pp. 53-77 and **2008 Decision No. 1.541**, p. 365.485.

15 *Official Gazette* No. 35.685 of April 3, 1995.

16 See list of Venezuelan bilateral treaties on the promotion and protection of investments at Venezuelan Ministry of for Foreign Relations *available at* http://www.mre.gov.ve /metadot/index.pl?id=4617;isa=Category;op=show; ICSID Database of Bilateral Investment Treaties *available at* http://icsid.worldbank.org/ICSID/FrontServlet; UNCTAD, Investment Instruments On-line Database, Venezuela Country-List of BITs as of June 2008 *available at* http://www.unctad.org/Templates/Page.asp?intItemID= 2344&lang=1. See also, José Antonio Muci Borjas, *El Derecho Administrativo Global y Los Tratados Bilaterales de Inversión (BITs),* Caracas 2007, pp. 101-102; Tatiana B. de Maekel, "Arbitraje Comercial Internacional en el sistema venezolano" in Allan R. Brewer-Carías (Editor), *Seminario Sobre la Ley de Arbitraje Comercial*, Academia de Ciencias Políticas y Sociales, Caracas 1999, pp. 282-283; Francisco Hung Vaillant, *Reflexiones Sobre el Arbitraje en el Sistema Venezolano*, Caracas 2001, pp. 104-105; and **2008 Decision No. 1.541**, pp. 365.485-365.486.

17 *Official Gazette* No. 36.430 of April 7, 1998.

18 See *generally* Arístides Rengel Romberg, "El arbitraje comercial en el Código de Procedimiento Civil y en la nueva Ley de Arbitraje Comercial (1998)" in Allan R. Brewer-Carías (Editor), *Seminario sobre la Ley de Arbitraje Comercial*, Academia de Ciencias Políticas y Sociales, Caracas 1999, pp. 47 ff.

under the Shared-Profit Scheme" ("*Convenios de Asociación Para la Exploración a Riesgo de Nuevas Areas y la Producción de Hidrocarburos Bajo el Esquema de Ganancias Compartidas*"), dated July 4, 1995.[19] The Supreme Court of Justice held that the Congressional authorization and, in particular, the inclusion of arbitration clauses in public law contracts, were valid under the 1961 Constitution in force at the time.[20]

26. Finally, at the time that the 1999 Investment Law was adopted through a Decree Law (October 1999), the National Constituent Assembly was drafting the 1999 Constitution (September-November 1999).[21] The 1999 Constitution incorporates arbitration as an alternative means of adjudication and as a component of the judicial system (Article 253).[22] The Constitution

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19 *Official Gazette* No. 35.754 of July 17, 1995.

20 See decision in Allan R. Brewer-Carías (Compilator), *Documentos del Juicio de la Apertura Petrolera (1996-1999),* Caracas, 2004 *available at* www.allanbrewercarias.com (Biblioteca Virtual, I.2. Documentos, No. 22, 2004), pp. 280-328. I acted as counsel to PDVSA in that proceeding, defending the constitutionality of that *Acuerdo.* The Constitutional Chamber of the Supreme Tribunal of Justice recently confirmed the ruling made under the 1961 Constitution, holding that Article 151 of the 1999 Constitution allows the incorporation of arbitration provisions in contracts of "public interest" (*interés público*). See **2008 Decision No. 1.541**, p. 365.488.

21 As previously stated, I was a Member of the National Constituent Assembly in 1999. In that capacity, I contributed to the drafting of the 1999 Constitution, and in particular of Article 151 which establishes the possibility for arbitration in public contracts.

22 1999 Constitution, Article 253. (*"**Artículo 253**. La potestad de administrar justicia emana de los ciudadanos o ciudadanas y se imparte en nombre de la República por autoridad de la ley. / Corresponde a los órganos del Poder Judicial conocer de las causas y asuntos de su competencia mediante los procedimientos que determinen las leyes, y ejecutar o hacer ejecutar sus sentencias. / El sistema de justicia está constituido por el Tribunal Supremo de Justicia, los demás tribunales que determine la ley, el Ministerio Público, la Defensoría Pública, los órganos de investigación penal, los o las auxiliares y funcionarios o funcionarias de justicia, el sistema penitenciario, los medios alternativos de justicia, los ciudadanos que participan en la administración de justicia conforme a la ley y los abogados autorizados para el ejercicio."*) ("**Article 253**. The authority to administer justice emanates from the citizens and is granted in the name of the Republic by authority of law. / It corresponds to the organs of the Judicial Power to take cognizance of suits and matters of their competence through the procedures that the laws determine, as well as to enforce their decisions or to have them enforced. / The system of justice is consti-

not only embraces arbitration; it requires the State to promote it,[23] in particular through legislation (Article 258).[24]

27. These milestones show that in 1999 there was no prevailing culture of hostility to arbitration. On the contrary, the 1999 Constitution, the legal system as a whole, and the international instruments to which Venezuela was a party embraced and promoted arbitration.[25]

2. The text and structure of Article 22 of the 1999 Investment Law

28. In accord with the policy defined by the State in 1999 to promote and protect international investments, Article 22 expressed the consent of the Venezuelan State to submit to international arbitration controversies regarding international investment. The article provides as follows:

> "Article 22. Controversies that may arise between an international investor, whose country of origin has in effect with Venezuela a treaty

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tuted by the Supreme Tribunal of Justice, the other courts that the law determines, the Public Ministry, the Public Ombudsman, the organs of criminal investigation, the auxiliaries or officials of justice, the penitentiary system, the alternative means of justice, the citizens who participate in the administration of justice in accordance with the law and the lawyers authorized for practice.")

[23] 1999 Constitution, Article 258. (*"**Artículo 258**. […] La ley promoverá el arbitraje, la conciliación, la mediación y cualesquiera otros medios alternativos para la solución de conflictos."*) ("**Article 258**. […] The law shall promote arbitration, conciliation, mediation and any other alternative means of dispute resolution.") Article 258 appeared with similar language in the October 12, 1999 bill of the Constitution (Article 292). See *Constitutional Convention Gazette, Book of Debates*, Printing House of the Congress of the Republic of Venezuela, October-November 1999, Session No. 21, p. 1 ff. and Session No. 37, p. 15 ff.

[24] The promotion of arbitration is an obligation of all organs of the State. See **2008 No 1.541 Decision,** p. 365.485. On the recognition of arbitration as an alternative means of adjudication by the 1999 Constitution, see *generally* Paolo Longo F., *Arbitraje y Sistema Constitucional de Justicia*, Editorial Frónesis S.A., Caracas, 2004; Supreme Tribunal of Justice, Constitutional Chamber, Decision No. 186 of February 14, 2001 (Case: Constitutional Challenge of Articles 17, 22 and 23 of the 1999 Investment Law).

[25] ICSID arbitration continued to be incorporated in the bilateral treaties for promotion and protection of investments signed and ratified after 1999. See Venezuela-France Bilateral Investment Treaty in *Official Gazette* No. 37.896 of March 11, 2004.

> or agreement on the promotion and protection of investments, or controversies **in respect of which the provisions of** the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA) or **the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID) are applicable, shall be submitted to international arbitration according to the terms of the respective treaty or agreement, if it so establishes,** without prejudice to the possibility of using, as appropriate, the contentious means contemplated by the Venezuelan legislation in effect."[26]

29. This article is a compound provision that contains a number of parts: the first one, concerning bilateral or multilateral treaties or agreements on the promotion and protection of investments; the second one, dealing with the MIGA Convention; and the third one, dealing with the ICSID Convention. Because Article 22 addresses three different sets of treaties or agreements, it is hardly surprising that it does not follow any particular model or pattern of national legislation which address only consent to ICSID jurisdiction.

30. This is one reason why it makes no sense for the **Respondent Memorial** (par. 91-117) and the **Urdaneta Opinion** (par. 18) to draw inferences from a comparison between Article 22 and expressions of consent to ICSID arbitration in other national laws or in the ICSID "model" clauses, designed to provide consent only to ICSID jurisdiction.[27] Article 22 must be interpreted not by reference to any pattern or model, but in accordance with its own structure and terms, taking into account its compound nature.

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[26] 1999 Investment Law, Article 22 (emphasis added). The original text in Spanish is as follows: "*Artículo 22. Las controversias que surjan entre un inversionista internacional, cuyo país de origen tenga vigente con Venezuela un tratado o acuerdo sobre promoción y protección de inversiones, o las controversias respecto de las cuales sean aplicables las disposiciones del Convenio Constitutivo del Organismo Multilateral de Garantía de Inversiones (OMGI – MIGA) o del Convenio sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de Otros Estados (CIADI), serán sometidas al arbitraje internacional en los términos del respectivo tratado o acuerdo, si así éste lo establece, sin perjuicio de la posibilidad de hacer uso, cuando proceda, de las vías contenciosas contempladas en la legislación venezolana vigente.*"

[27] **Respondent Memorial** (par. 93-97; 112-116); **Urdaneta Opinion** (par. 16). See also, **2008 Decision No. 1.541** (pp. 365.494-365.495).

3. The rules of interpretation of statutes under Venezuelan Law

31. Article 22 is an instrument of national law that purports to express consent to international arbitration by reference to international treaties and agreements. For the reasons stated by Professor Caron in his Opinion, I concur that the interpretation and effects of Article 22 in relation to the ICSID Convention are properly governed by principles of international law. Without prejudice to the foregoing, I have been asked to analyze Article 22 from the standpoint of Venezuelan Law and I proceed to do so, starting with the text and then moving from there to resolve possible ambiguities that could remain after a textual reading by reference to context, purpose and intent.

32. In Venezuela, the main rules on statutory interpretation are set forth in Article 4 of the Civil Code. This article provides that the interpreter must attribute to the law "the sense that appears evident from the **proper meaning of the words**, according to **their connection** among themselves and the **intention of the Legislator**." The article goes on to state that, "when there is no precise provision of the Law, the provisions regulating similar cases or analogous matters shall be taken into account; and should doubts persist, general principles of law shall be applied."[28]

33. In Decision No. 895 of July 30, 2008, the Politico-Administrative Chamber of the Supreme Tribunal of Justice referred to four relevant elements to be taken into account in the interpretation of legal provisions.[29] The first element is the **literal, grammatical or philological** one, which must always be the starting point of any interpretation. The second element of interpretation is the **logical, rational or reasonable** one, which aims at determining the *raison d'être* of the provision within the legal order. The third element is the **historical** one, through which a legal provision is to be analyzed in the context of the factual and legal situation at the time it was adopted or amended and in light of its historical evolution. The fourth ele-

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[28] Civil Code, Article 4 (emphasis added). ("*Artículo 4: A la Ley debe atribuírsele el sentido que aparece evidente del significado propio de las palabras, según la conexión de ellas entre sí y la intención del legislador. Cuando no hubiere disposición precisa de la Ley, se tendrán en consideración las disposiciones que regulan casos semejantes o materias análogas; y, si hubiere todavía dudas, se aplicarán los principios generales del derecho*.")

[29] *Revista de Derecho Público No 115*, Editorial Jurídica Venezolana, Caracas 2008, pp. 468 ff.

ment is the **systematic** one, which requires the interpreter to analyze the provision as an integral part of the relevant system. The Politico-Administrative Chamber noted that interpretation is not a matter of choosing among the four elements, but of applying them together, even if not all of the elements are of equal importance. In addition, the Supreme Tribunal of Justice has identified two other elements of interpretation: the **teleological** one – that is, the need to identify and understand the social goals or aims that led to the law being adopted – and the **sociological** one, which helps to understand the provision within the context of the social, economical, political and cultural reality where the text is going to be applied.[30]

4. Analysis of Article 22 of the 1999 Investment Law

34. The portion of Article 22 referring to the ICSID Convention provides that "[…] controversies in respect of which the provisions of […] the Convention on the Settlement of Investment Disputes Between States and the Nationals of Other States (ICSID) are applicable, **shall be submitted to international arbitration** according to the terms of the respective treaty or agreement, if it so establishes, […]."[31] As discussed below, when this text is interpreted according to the rules of interpretation set forth in Article 4 of the Civil Code, the **sense** that **evidently appears** from the **proper meaning of the words used**, in accordance with **their connection** and with the **intention of the legislator** is the following: Article 22 states the unilateral consent of the Republic of Venezuela to the submission of disputes to ICSID arbitration, leaving to qualified investors the decision whether to give their own consent or to resort to the Venezuelan courts.[32]

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30 *Id*.

31 (Emphasis added) ("[…] *las controversias respecto de las cuales sean aplicables las disposiciones del … Convenio sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de Otros Estados (CIADI), serán sometidas al arbitraje internacional en los términos del respectivo tratado o acuerdo, si así éste lo establece*.")

32 I expressed the same opinion more than three years ago in an article written for a seminar organized by the Venezuelan Academy of Political and Social Sciences and the Venezuelan Arbitration Committee. See Allan R. Brewer-Carías, "Algunos comentarios a la Ley de promoción y protección de Inversiones: contratos públicos y jurisdicción" in Irene Valera (Coordinadora), *Arbitraje Comercial Interno e Internacional. Reflexiones Teóricas y Experiencias Prácticas*, Academia de Ciencias Políticas y Sociales, Comité Venezolano de Arbitraje, Caracas 2005, pp. 286-287;

35. In the Spanish phrase "*serán sometidas a arbitraje internacional*" (shall be submitted to international arbitration), the tense of the verb indicates that it is an expression of command. The phrase conveys the sense that international arbitration of disputes is a mandatory system, in the sense that, once properly invoked by the other party to a dispute, the Republic of Venezuela has **a duty** or **obligation to comply** with the applicable procedural rules and **to abide** by the decision of the arbitral tribunal. In this regard, the English translation "shall be submitted" for "*serán sometidas*," which is common ground between the parties, shows that the translators correctly understood the Spanish original as conveying the mandatory sense just described.[33] Consequently, the text of this provision ("*shall be submitted to international arbitration*") is a **unilateral express statement of consent to ICSID arbitration freely given in advance by the Republic of Venezuela**.[34] As discussed below, none of the other aspects of the text or the other elements of interpretation leads to a different conclusion.

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also published in *Estudios de Derecho Administrativo 2005-2007*, Editorial Jurídica Venezolana, Caracas 2007, pp. 453-462; also *available at* www.allanbrewercarias.com, (Biblioteca Virtual, II.4. Artículos y Estudios No. 473, 2005) pp. 7-9.

[33] "**Shall** can express (A) the subject's *intention to perform a certain action* or cause it to be performed, and (B) *a command.*" The use of **shall** to express *a command* "is chiefly used in regulations or legal documents. In less formal English **must** or **are to** would be used instead of **shall** in the above sentences." See A. J. Thomson and A. V. Martinet, *A Practical English Grammar*, Fourth Edition, Oxford University Press 2001, pp. 208, 246.

[34] In the same sense, see, e.g., Gabriela Álvarez Ávila, "Las características del arbitraje del CIADI" in *Anuario Mexicano de Derecho Internacional*, Vol. II, Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México, UNAM, México 2002, pp. 4-5, 17 footnote 23, *available at* http://juridicas.unam.mx/publica/rev/derint/cont /2/cm/ (last consulted on December 4, 2007); Andrés A. Mezgravis, "Las inversiones petroleras en Venezuela y el arbitraje ante el CIADI", in Irene Valera (Coordinadora), *Arbitraje Comercial Interno e Internacional. Reflexiones teóricas y experiencias prácticas*, Academia de Ciencias Políticas y Sociales, Comité Venezolano de Arbitraje, Caracas 2005, p 388; Eugenio Hernández Bretón, "Protección de inversiones en Venezuela" in *Revista DeCITA, Derecho del Comercio Internacional, Temas de Actualidad,* (*Inversiones Extranjeras*), No 3, Zavalía, 2005, pp. 283-284; Guillaume Lemenez de Kerdelleau, "State Consent to ICSID Arbitration: Article 22 of the Venezuelan Investment Law" in *TDM*, Vol. 4, Issue 3, June 2007; M.D. Nolan and F.G. Sourgens, "The Interplay Between State Consent to ICSID Arbitration and denunciation of the ICSID

36. The mandate to submit disputes to ICSID arbitration refers to "controversies in respect of which the provisions of the [ICSID Convention] are applicable." As an initial observation, the term "controversies" appears for a second time in Article 22, in parallel to the first reference to "controversies" between an international investor whose country of origin has in effect a treaty or agreement for the promotion and protection of investments and the Republic of Venezuela. Grammatically, this duplicate and parallel reference indicates that the second category of "controversies" related to the ICSID Convention is not necessarily subsumed within the first category of "controversies" related to investment treaties or agreements, and that the consent to the contrary applies to both types of controversies equally. Therefore, when Article 22 refers to the "controversies" related to the ICSID Convention no reference is made to "international investor," as this term is defined in the 1999 Investment Law.

37. The second category of "controversies" includes those in respect of which the provisions of the ICSID Convention are applicable. According to Article 25,1 of the ICSID Convention, ICSID jurisdiction "shall extend to any legal dispute arising directly out of an investment, between a Contracting State […] and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre." As the ICSID Convention does not itself supply consent, it is unreasonable to interpret Article 22, which expressly provides that disputes shall be submitted to arbitration, as looking to the ICSID Convention to supply the consent that Article 22 itself purports to supply. Consequently, the only way to give effect to the mandate in Article 22 that disputes "shall be submitted" to ICSID arbitration is to interpret the phrase "controversies in respect of which the provisions of the [ICSID Convention] are applicable" as referring to any disputes that meet all the requirements for ICSID jurisdiction **other than consent**, which is supplied by Article 22 itself. Any other interpretation would render this portion of Article 22 circular and would deprive it of any effect, in violation of the principle of effective interpretation or *effect utile*.

Convention: The (Possible) Venezuela Case Study" in *TDM*, Provisional Issue, September 2007; José Antonio Muci Borjas, *El Derecho Administrativo Global y los Tratados Bilaterales de Inversión (BITs),* Caracas 2007, pp. 214-215; José Gregorio Torrealba R, *Promoción y Protección de las Inversiones Extranjeras en Venezuela*, Funeda, Caracas 2008. pp. 56-58, 125-127.

38. The portion of Article 22 referring to the ICSID Convention ends with the phrase "if it so establishes" ("*si así éste lo establece"*) (translated in the **Respondent Memorial** (par. 78) as "if it so provides"). This phrase, interpreted according to the **sense** that **evidently appears** from the **proper meaning of the words** used, in accordance with **their connection** among themselves and with the **intention of the Legislator,** refers to the need for the "respective treaty or agreement" **to contain provisions establishing international arbitration** in order for the preceding express command (shall be submitted) to be capable of being executed. As the ICSID Convention paradigmatically establishes a system of international arbitration for the settlement of investment disputes, the condition "if it so establishes" is clearly satisfied in the case of the portion of Article 22 that refers to the ICSID Convention. As we shall see, the phrase "if it so establishes" refers primarily to the possibility that treaties or agreements for the promotion and protection of investments might not provide for international arbitration of disputes to which they apply.

39. As already mentioned, Article 22 is a compound provision that combines (excluding domestic courts) three rules concerning three different kinds of international instruments: first, treaties or agreements on the promotion and protection of investments; second, the MIGA Convention; and third, the ICSID Convention. Although the phrase "if it so establishes" applies to each of the three rules, the condition that it embodies (that the treaty or agreement establish international arbitration) is satisfied in the case of the ICSID and MIGA Conventions,[35] which clearly provide for arbitration, and is

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[35] The arbitration consent in Article 22 in the MIGA context concerns only disputes between MIGA itself and Venezuela, rather than disputes between investors and MIGA. Because the second type of controversies in Article applicable to ICSID and MIGA -in contrast to the first dealing with investment protection treaties- is not limited to investor-state disputes, Article 22 can contain such a limited MIGA consent. The MIGA Convention contemplates two kinds of disputes: (a) disputes between the Agency and a Member country (Article 57), which shall be settled in accordance with the procedures set out in Annex II to the Convention, and (b) disputes involving MIGA and a holder of a guarantee or reinsurance (Article 58), which shall be submitted to arbitration in accordance with such rules as shall be provided for or referred to in the contract of guarantee or reinsurance. Article 22 of the 1999 Investment Law can refer only to disputes of the first kind (those that could arise between MIGA and a Member State), because disputes of the second type do not involve the Venezuelan State or any other Venezuelan instrumentality. In the case of disputes that could arise between MIGA and a Member State, Annex

also satisfied in the case of those treaties or agreements for the promotion and protection of investments that do provide for international arbitration.[36] On the contrary, the condition is not satisfied in the case of treaties or agreements for the promotion and protection of investments that do not provide for international arbitration of disputes between the host State and foreign investors. Accordingly, "if it so establishes" reflects a contingency only in the case of treaties or agreements for the promotion and protection of investments, which may or may not provide for international arbitration of such disputes.

40. The final part of Article 22 ("without prejudice to the possibility of using, as appropriate, the contentious means contemplated by the Venezuelan legislation in effect") further confirms that Article 22 is an expression of consent to arbitration. That statement indicates that Article 22 does not have the effect of preventing the investor from using domestic litigation remedies. If Article 22 were a mere declaration of the State's willingness to agree to arbitration in a separate document as opposed to a firm expression of consent to arbitration by the State, there would have been no need to disclaim that Article 22 did not prevent the investor from resorting to domestic remedies.

41. The interpretation of Article 22 as containing an open offer by the State to submit investment disputes to ICSID arbitration not only results from the **literal or grammatical** element of statutory interpretation, but also from applying the **logical, rational or reasonable** element of interpretation.

II of the Convention provides a procedure for settlement that calls for negotiation followed by arbitration, with conciliation as a permissible alternative. According to Article 57(b)(ii) of the MIGA Convention, this procedure may be superseded by an agreement between the State and MIGA concerning an alternative method for the settlement of such disputes, but such an agreement must be based on Annex II, which means that it must also contain resort to arbitration. As the MIGA Convention provides for international arbitration in either situation, the condition "if it so establishes" is satisfied and Article 22 requires submission of such disputes to international arbitration according to the terms of the MIGA Convention.

[36] The Spanish text, which uses the subjunctive mood, makes clear that it refers not only to treaties or agreements of this kind to which the Republic of Venezuela was a party at the time the 1999 Investment Law was adopted, but also treaties or agreements to which it may become a party at any time in the future. Historically, while most agreements of this kind concluded by States around the world provide for international arbitration of investor-State disputes, some agreements do not. The Republic of Venezuela may become a party to treaties or agreements of this kind that do not provide for the resolution of controversies through arbitration.

According to Ambassador Corrales' published account, the State's offering unilateral consent to arbitration in order to promote investment was part of the *raison d'être* of the 1999 Investment Law.[37] Considering Article 22 **systematically** and in a **historical** perspective, expressing consent to international arbitration was in accord with the trend in favor of international arbitration described above, including the State's ratification between 1993 and 1998 of treaties for the protection and promotion of investments that accepted international arbitration, as well as the other legal provisions regarding arbitration adopted at the time.

42. Furthermore, using the **teleological** and **sociological** element of statutory interpretation, the economic and social situation prevailing at the time the 1999 Investment Law was enacted explains the legislator's intent to promote investments and the offering of consent to international arbitration as a means to do so. The economic policy and the whole legal order existing in 1999[38] tended to promote foreign investment and international arbitration.

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[37] *Supra*, par. 19. The Constitutional Chamber of the Supreme Tribunal of Justice has held that the determination of the intention of the Legislator must "start from the will of the drafter of the provision, as it results from the debates prior to its promulgation." See Supreme Tribunal of Justice, Constitutional Chamber, Decision No. 1.173 of June 15, 2004 (Case*: Interpretación del Artículo 72 de la Constitución de la República Bolivariana de Venezuela*) (Exp. 02-3.215), in *Revista de Derecho Público N° 97-98*, Editorial Jurídica Venezolana, Caracas 2004, pp. 429 ff.

[38] In 2008, Domingo Maza Zavala, member of the Board of Directors of the Venezuelan Central Bank until 2007 reported that "*Los ingresos fiscales en el período 1964–1998 (gobiernos J. Lusinchi, C.A. Pérez y R. Caldera) fueron de Bs. 91.109 MM; y sólo en el período 1999–2006 fueron de Bs 99.242 MM. Los ingresos petroleros que en 1998 fueron de US$ 16.735 MM; en los años subsiguientes ascendieron así: 1999: US$ 16.735 MM; 2000: US$27.874 MM; 2001: US$ 21.745 MM; 2002: US$ 21.532 MM; 2003: US$ 22.029 MM; 2004: US$ 32.871 MM; 2005: US$ 48.143 MM; 2006: US$ 56.438 MM; 2007 US$62.555 MM.*" Regarding *gasto público* he added that "*Al comienzo del mandato de Chávez el gasto público era de 15.000 millones de dólares anuales, ahora es de unos 80.000 millones.*" See *Joaquim Ibarz,* "Ahora, en Venezuela, hay más pobreza que antes de Chávez" in *La Vanguardia*, Edición impresa, Barcelona, España, February 11, 2008 *available at* http://www.lavanguardia.es/free/edicionimpresa/res/ 20080211/53. (The fiscal income in the 1964–1998 period (governments of J. Lusinchi, C.A. Pérez y R. Caldera) were Bs. 91.109 MM; and only in the 1999–2006 period were Bs 99.242 MM. The oil income that was US$ 16.735 MM in 1998; increased in the subsequent years as follows: 1999: US$ 16.735 MM; 2000: US$27.874 MM; 2001: US$ 21.745 MM; 2002: US$ 21.532 MM; 2003: US$ 22.029 MM; 2004: US$ 32.871

This general intent is clearly reflected in the 1999 Investment Law as a whole, which is primarily devoted to promoting and protecting foreign investment by regulating the actions of the State in the treatment of such investment. Submission of disputes to international arbitration is precisely one of the principal means of protecting foreign investors and investments.[39]

43. From the standpoint of Venezuelan law, only the principles that govern the **interpretation of statutes** may have some bearing on the interpretation of Article 22. Article 4 of the Civil Code, which establishes the rules for such interpretation of statutes, provides that in the absence of a precise provision of the Law, the provisions regulating similar cases or analogous matters shall be taken into account. Consequently, regarding the way consent for arbitration must be given, in the absence of a general and precise provision of the Law, the Venezuelan Commercial Arbitration Law, which is inspired by the UNCITRAL Model Law, must be applied, requiring only, as the ICSID Convention, that the arbitration consent or agreement be evidenced in writing.[40] The Respondent has argued that according to the Venezuelan legal principles consent for arbitration must be "clear and unequivocal." There is no legal provision in Venezuelan law requiring the consent for arbitration or the arbitration agreement to be clear and unequivocal. Even in

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MM; 2005: US$ 48.143 MM; 2006: US$ 56.438 MM; 2007 US$62.555 MM. Regarding public expenditure he added that: "At the beginning of the Chávez' administration public expenditure was of 15.000 millions of dollars per year, now is of around 80.000 million.")

39 Even 2008 Decision No. 1.541 (p. 365.490) recognizes that one of the ways States attract foreign investment is to make a unilateral promise to submit disputes to arbitration ("It is not possible to ignore that States seeking to attract investments must in their sovereignty decide to grant certain guarantees to investors, in order for such relationship to take place. Within the variables used to achieve said investments, it is common to include an arbitration agreement, which in the investors' judgment provides them with security in relation to the — already mentioned — fear of a possible partiality of State tribunals in favor of [the tribunals'] own nationals.")

40 Article 6 of the Commercial Arbitration Law: "The arbitration agreement must be evidenced in writing in any document or group of documents placing on record the will of the parties to submit themselves to arbitration. A reference in a contract to a document containing an arbitration clause shall constitute an arbitration agreement, provided that said contract is evidenced in writing and the reference implies that said clause is a part of the contract. In adhesion contracts and standard-form contracts, the manifestation of the will to submit the contract to arbitration must be made in an express and independent manner".

cases of commercial arbitration establishing arbitration clauses, following the pro-arbitration trend of the Venezuelan legal system, in case of doubts according to article 12 of the Civil Procedure Code, the Judge must abide by the intention of the parties or the executing parties taking into account the **good faith.**[41]

44. The Respondent's reliance on certain decisions of the Politico-Administrative Chamber of the Supreme Tribunal of Justice is misplaced,[42] because those decisions deal with alleged substantive requirements for the validity of bilateral expressions of consent to arbitration (*cláusula compromisoria*) in the internal legal order. There is a basic conceptual distinction between Venezuelan principles of statutory interpretation and alleged substan-

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[41] In this sense, for instance, and contrary to an alleged stringent Venezuelan law standard of "clear" and "unequivocal" language (**Urdaneta Opinion**, par. 19, Footnote 16), Professor Francisco Hung Vaillant states that, according to the pro-arbitration principle in Article 258 of the Constitution, "one should try to sustain its validity [of Arbitration] in all those cases of doubt, as long as such admission does not lead to a violation of norms of public order or impairs good customs. In sum, in case of doubt, one should pronounce in favor of the existence of Arbitration. ("*se debe tratar de sostener la validez en todos aquellos casos de duda, siempre que tal admission no conduzca a una violación de normas de orden público ni atente contra las buenas costumbres. En resumen, en caso de duda, se deberá pronunciar a favor de la existencia del Arbitraje."* Francisco Hung Vaillant, *Reflexiones Sobre el Arbitraje en el Sistema Venezolano*, Caracas 2001, p. 66. See also pp. 63-69, in which Professor Hung Vaillant addresses those principles that should serve "to provide for an adequate solution each time that there is an antinomy or a legal gap; as well as in those cases in which it is necessary to interpret an obscure text of an arbitration clause or of an arbitration agreement." **(***"establecer la solución adecuada cada vez que existe una antinomia o una laguna legal; asi como también en aquellos casos en los cuales es necesario interpretar un texto oscuro de una cláusula o de un pacto arbitral."*) *Id*. p. 63

[42] **Respondent Memorial** (par. 44) and **Urdaneta Opinion** (par. 19, footnote 15). Citing Politico-Administrative Chamber of the Supreme Tribunal of Justice, Decision No. 1209 of June 20, 2001 (Case: *Hoteles Doral C.A. v. Corporación L. Hoteles C.A*) (Exp. No. 2000-0775) (**Ex. RL-6**); Decision No. 00098 of January 29, 2002 (Case: *Banco Venezolano de Credito, S.A.C.A. v. Venezolana de Relojeria, S.A. (Venrelosa) y Henrique Pfeffer C.A*) (Exp. No. 2000-1255) (**Ex. RL-7**); Decision N° 00476 of March 25, 2003 (Case: *Consorcio Barr, S.A v. Four Seasons Caracas, C.A.*) (Exp. No. 2003-0044) (**Ex. RL-8**); Decision N° 00038 of January 28, 2004 (Case: *Banco Venezolano de Crédito, S.A. Banco Universal v. Armando Díaz Egu y Marisela Riera de Díaz*) (Exp. No. 2003-1296) (**Ex. RL-9**).

tive requirements for the validity or enforceability of a certain type of contractual agreement to arbitrate under the domestic legal order preventing recourse by a party to the Venezuelan courts The latter have no application in a case like this, where the matter at stake is whether the State's expression of consent embodied in a statute meets the requirements of an international treaty (the ICSID Convention) to set in motion the jurisdiction of international tribunals operating under that treaty.

45. On the other hand, the aforementioned jurisprudence of the Political-Administrative Chamber quoted by the Respondent, analyzing cases of conflict of jurisdiction, has nothing to do with the present case. The issue in those cases was whether the parties had unequivocally chosen a single mechanism of dispute resolution, entirely ousting or waiving the option to resort to the jurisdiction of the ordinary courts. In all four cases cited by the Respondent, the plaintiff had filed suit in a domestic court and the defendant applied to have it removed to arbitration. The Politico-Administrative Chamber ultimately concluded that, although the contract provided for arbitration as an option that the parties could choose, it had also left recourse to local courts as an open option for either party, or precisely to the party who had chosen to resort to court. The procedural setting of the present case is entirely different. The parties are not in a Venezuelan court debating whether the court must be deprived of jurisdiction by a contractual arbitration clause. On the contrary, Article 22 does not have the effect of preventing investors from resorting to litigation remedies that may be available under Venezuelan law. Article 22 expressly permits recourse to local courts as another option for the investors when adding: "Without prejudice to the possibility of using, whenever it should be appropriate, the contentious means contemplated by the Venezuelan legislation in effect." As the language of Article 22 contains no option for the Republic of Venezuela to resort to court, the premise of those decisions is not present in this case. Article 22 does not preclude resort to "the contentious means contemplated by the Venezuelan legislation in effect" but that is an option only for the investor, because the Republic of Venezuela has already expressed its unilateral consent to arbitration. The very purpose of arbitration provisions is to give the investor the option to resort to arbitration instead of being required to litigate the dispute in the courts of the host-State. Article 23 of the 1999 Investment Law gives the investor the possibility of submitting disputes regarding the application of the 1999 Investment Law to a domestic court or a local arbitral tribunal, but again, the option is only for the investor. Accordingly, the Republic of Venezuela's expression of consent to arbitration remains unaffected by those options.

46. The Politico Administrative Chamber of the Supreme Tribunal is competent to settle conflicts of jurisdiction and not to determine the validity or nullity of arbitration clauses, much less in civil or mercantile matters, the competence over which belongs to the Civil Chamber of the Supreme Tribunal.[43] Therefore, such judicial decisions, which have also been criticized by a sector of the Venezuelan doctrine because the Commercial Arbitration Law (Article 6) only requires that the consent be in writing,[44] may not be considered to have established a general rule of the Venezuelan Law on the matter. On the contrary, such jurisprudence – which, again, is not binding – not only contradicts the principles of international law, but also the principles of Venezuelan law, specially the *pro arbitration* principle contained in article 258 of the Constitution, as well as principles regarding acts or contracts governed by article 12 of the Civil Procedure Code, which indicates what the Judge is obligated to do when the "acts" or "contracts" show obscurity, ambiguity or deficiency, namely that he or she must abide by the intention of the parties or the executing parties taking into account the **good faith**.

47. In Hoteles Doral C.A. v. Corporación de L'Hoteles C.A (**Ex. RL-6**), Banco Venezolano de Crédito v. Venrelosa et al. (**Ex. RL-7**) and Consorcio Barr v. Four Seasons Caracas (**Ex. RL-8**), the Political and Administrative Chamber ultimately concluded that, while the clause at issue referred to arbitration as an available option, recourse to local courts was also left as an option for either party (**Ex. RL-6** and **RL-8**), or for the party that had chosen to go to court (**Ex. RL-7**). The Chamber concluded that, in those cases, the courts had jurisdiction, because the ousting of court jurisdiction was not sufficiently clear in the arbitration clauses. The decision in Banco Venezolano de Crédito S.A., Banco Universal v. Armando Diaz Egui y Marisela Riera de Díaz. (**Ex. RL-**) turns on an issue entirely irrelevant to this arbitration. In that case, the Politico-Administrative Chamber held that the arbitration provision at issue established that in enforcement actions (ejecución

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[43] According to Venezuelan law the decisions of the Politico-Administrative Chamber are not binding. The other Venezuelan judges may depart from such decisions. According to Article 321 of the Code of Civil Procedure, Judges shall try to follow the "**cassation** doctrine established in analogous cases, in order to defend the integrity of the legislation and the uniformity of the jurisprudence,"but it is not established as a mandate.

[44] See Andres Mezgravis "*La Promoción del Arbitraje: un deber constitucional reconocido y vulnerado por la jurisprudencia*", in *Revista de Derecho Constitucional* N° 5, Diciembre 2001, Editorial Sherwood, caracas 2001, pp. 133-135.

de garantías) as the one at issue in that case, arbitration applied "only in cases where there is opposition from the defendants." The Chamber refused to remove the case to arbitration on the ground that the defendant had failed to allege the existence and effectiveness of an arbitration agreement as a preliminary objection at the first procedural opportunity it had in the proceeding.

5. The interpretation of Article 22 proposed by the Republic of Venezuela

48. The interpretation of Article 22 put forward in the **Respondent Memorial**, as well as the interpretations made in the **2008 Decision No. 1.541** and the **Urdaneta Opinion,** to which the Respondent refers for support, are either not consistent with principles of statutory interpretation under Venezuelan law or depend upon arguments that are flawed and logically incorrect.[45]

49. To begin with, it is an error to suppose (as the Respondent and the opinion on which it relies do) that the phrase "if it so establishes" refers to the State's **consent** to arbitration. First, there is nothing in the text of Article 22 suggesting or supporting such an interpretation. The antecedent sentence ("shall be submitted to international arbitration according to the terms of the respective treaty or agreement") makes no reference to consent; it refers to international arbitration. As the "so" in "if it so establishes" cannot refer to a concept that is not included in the antecedent sentence, the Respondent's interpretation is unfounded. Second, it should be remembered that the "it" in "if it so establishes" refers, in the context we are addressing in this case, to the ICSID Convention. Therefore, interpreting "if it so establishes" as though it meant "if the ICSID Convention establishes consent to arbitration" would turn this phrase into an impossible condition (one that cannot be fulfilled), because the ICSID Convention does not itself provide for a Contracting State's consent to ICSID arbitration. It is precisely because the ICSID Convention requires consent by a separate written instrument, such as a piece of national legislation like Article 22,[46] that it cannot be presumed –

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[45] See analysis of **2008 Decision No. 1.541** and its historical context as a political decision at *infra* par. 90 *et seq*.

[46] It is settled that under Article 25,1 of the ICSID Convention an ICSID Contracting State may express its written consent to submit to the jurisdiction of the Centre by way of the Contracting State's legislation for the promotion of investments. See *supra,* footnote 2.

as the **Respondent Memorial** and the **Urdaneta Opinion** do – that the drafters of Article 22 intended the absurdity of subjecting the mandate relating to ICSID arbitration to a condition that was not and could not be fulfilled. Under Venezuelan law, any interpretation of a statute that leads to absurdity or that would deprive a statutory provision of any effect must be rejected.[47] The principle of effective interpretation (*effet utile*) has been recognized to be a critical canon for the interpretation of statutes. For example, the Civil Cassation Chamber of the Supreme Tribunal of Justice has declared that "it would be absurd to suppose that the Legislator does not try to use the most precise and adequate terms in order to express the purpose and scope of its provisions, or deliberately omits elements that are essential for their complete understanding."[48]

50. Furthermore, the **2008 Decision No. 1.541** (pp. 365.495-365.496) attempts to show that interpreting Article 22 as expressing the State's consent to international arbitration would be "unacceptable" in any legal order. Those attempts miss the mark, and show an internal contradiction in the decision. While on the one hand the Constitutional Chamber concedes that a State can express its consent unilaterally and generically in investment legislation (pp. 365.491-365.492) a method of consent that is clearly allowed in the ICSID Convention and is firmly established in international practice,[49] on the other hand, the Chamber offers arguments that amount to denying that very same point. In particular, **2008 Decision No. 1.541** argues that, if Article 22 were interpreted as a general offer of consent and that offer were accepted by an investor, a wide range of matters within the scope of the statute would automatically (*de pleno derecho*) be submitted to arbitration, without the State being able to assess the benefits or disadvantages of arbitration in each case, in violation of an alleged principle of "informed" consent (p. 365.494). Yet this is precisely what happens, as the intended consequence, whenever a State chooses to consent to arbitration, generically, by means of a national statute or a treaty. In the same vein, the **2008 Decision**

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47 See Supreme Tribunal of Justice, Constitutional Chamber, Decision No. 1.173 of June 15, 2004 (Case: Interpretación del Artículo 72 de la Constitución de la República Bolivariana de Venezuela) (Exp. 02-3.215), in *Revista de Derecho Público N° 97-98*, Editorial Jurídica Venezolana, Caracas 2004, pp. 429 ff.

48 Supreme Tribunal of Justice, Civil Cassation Chamber, Decision No. 4 of November 15, 2001 (Case: *Carmen Cecilia López Lugo v. Miguel Angel Capriles Ayala et al.*), p. 7.

49 See *supra*, footnote 2.

No. 1.541 argues that interpreting Article 22 as containing a generic offer of arbitration would lead to the "absurdity of considering that the State may not choose a forum or jurisdiction of convenience or more favorable to its interests (*Forum Shopping*)" (p. 365.496). This is not an absurdity at all; it is the normal effect of a generic expression of consent, which is uniformly accepted under the ICSID Convention. A State that gives generic consent to arbitration in treaties or in statutes has given up the right to assess the benefits or disadvantages of international arbitration on a case-by-case basis, in exchange for the investment promotion benefits derived from a generic offer of international arbitration to foreign investors.

51. The **2008 Decision No. 1.541** also argues that interpreting Article 22 as a generic offer of consent would in effect abrogate bilateral and multilateral investment treaties that provide for different dispute resolution methods, because investors protected by those treaties could invoke the most-favored-nation clause (MFN) contained in them to take advantage of ICSID arbitration, thereby avoiding the dispute resolution mechanisms provided for in the treaty (p. 365.496). This argument has no basis. Assuming that an investment treaty to which Venezuela is a party has an MFN clause that covers dispute settlement, and assuming that ICSID arbitration is more favorable than the dispute-settlement method contemplated in such treaty, an investor claiming under that treaty would already have the right to invoke ICSID arbitration, because the MFN clause of that treaty would incorporate by reference the dispute-settlement provisions of other investment treaties to which Venezuela is a party, which provide for ICSID arbitration. Under the logic of the **2008 Decision No. 1.541**, the treaty of the example would have been "abrogated" by the other treaties, independently of how Article 22 is interpreted, a conclusion that shows that the argument proves nothing. Besides, the argument in the **2008 Decision No. 1.541** amounts to asserting that a State cannot consent to ICSID jurisdiction by statute if it has entered into investment treaties that provide for different methods of dispute resolution, a conclusion that has no basis.

52. Furthermore, there is no basis for the argument in the **2008 Decision No. 1.541** (pp. 365.496-365-497), that interpreting Article 22 as an open offer of consent would create an inconsistency with Articles 5, 7, 8 and 9 of the 1999 Investment Law. There is, in fact, no contradiction between the open offer of consent in Article 22 and any of those other provisions.

53. Article 5 guarantees that the provisions of the 1999 Investment Law shall not derogate from any higher level of protection under international treaties or agreements for the promotion and protection of investments. This means that the level of protection under the 1999 Investment Law was intended to be a floor, leaving room for higher levels of protection under treaties. Article 5 also provides that, in the absence of any such treaty or agreement, and notwithstanding the MFN clause in the 1999 Investment Law, an investor will benefit only from the protection established in that Law (the 1999 Investment Law) until such time as the investor is covered by a treaty or agreement containing an MFN clause (in which case the investor will benefit from that particular treaty and any other more favorable treatment required by other treaties, as well as from the 1999 Investment Law). Article 5 also requires the State to seek, in the negotiation of such treaties, the greatest level of protection for Venezuelan investors and to ensure that, in any case, such level of protection is not inferior to that granted to the investors of the other contracting State in Venezuela. There is nothing in these provisions that contradict giving consent to ICSID jurisdiction in Article 22.

54. Article 7 of the 1999 Investment Law establishes a basic principle of national treatment. International investments and investors are to have the same rights and obligations as national investments and investors, except as otherwise provided in special statutes and in the 1999 Investment Law itself. There is no contradiction between this principle and an open offer of consent to ICSID jurisdiction in Article 22 because, even though such offer necessarily benefits only foreign investors,[50] the offer of consent is an exception provided for in the 1999 Investment Law itself.

55. Article 8 of the 1999 Investment Law prohibits discrimination against international investors based on the country of origin of their capital, subject to exceptions for agreements on economic integration or tax matters. There is no contradiction between this provision and the open offer of consent to ICSID jurisdiction in Article 22, which applies to foreign investors in general, without regard to the origin of their capital. Any investor that is a

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[50] Under Article 25 of the ICSID Convention the investor must be a national of a State other than the State party to the dispute (Venezuela in the situation at issue), except when for reasons of foreign control the parties have agreed that a national of the Contracting State party to the dispute "should be treated as a national of another Contracting State for the purposes of this Convention."

national of a State that is or becomes a party to ICSID can accept the offer of consent. If Article 8 were inconsistent with Article 22, it would also be inconsistent with Article 5, because Article 5 presupposes the existence of different legal regimes for international investors, depending on whether they are nationals of countries having treaties or agreements for the promotion or protection of investments with Venezuela, or are protected only by the 1999 Investment Law.

56. Article 9 of the 1999 Investment Law establishes the principle that international investments and investors will have the right to the most favorable treatment under Articles 7 and 8 of the same Law. This means that they are entitled to the better of national treatment under Article 7 or most-favored-nation treatment (non-discrimination on the basis of the country of origin of their capital) under Article 8, with the exceptions authorized by those provisions. Since, as already discussed, the open offer of consent in Article 22 is not inconsistent with either Article 7 or 8, it cannot be inconsistent with Article 9.

57. The two hypothetical examples posed by the **2008 Decision No. 1.541** (p. 365.497) do not show any contradiction between the open offer of consent in Article 22 and any of the other provisions just discussed. In the first hypothetical example, the Constitutional Chamber argues that, if Article 22 is interpreted as containing an open offer of consent, a State member of ICSID that does not have a treaty on investments with Venezuela (and has not consented to ICSID jurisdiction in an investment law of its own) would be in a better position *vis-à-vis* a State member of ICSID that has such a treaty, because the first State would not be subject to ICSID claims by Venezuelan investors, while the second State would. Once again, this argument proves nothing. The 1999 Investment Law does not guarantee equal treatment for States; it guarantees certain levels of treatment for investors, primarily international investors. Nor does any provision of the 1999 Investment Law require reciprocity, that is, that Venezuelan investors must have the right to submit controversies to ICSID against States whose nationals may benefit from the open offer of consent in Article 22. Since consent to ICSID jurisdiction by statute is by nature a unilateral act, to challenge such consent on grounds of lack of reciprocity amounts to denying, contrary to uniform practice, the possibility of any consent by statute.

58. In the second example, the **2008 Decision No. 1.541** argues that, if Article 22 is interpreted as an expression of consent, an investor of a

country that is a party to the ICSID Convention but does not have a treaty on investments with Venezuela would be in a better position than an investor of a country that is not a party to the ICSID Convention but has a treaty with Venezuela providing for non-ICSID arbitration. The "better position" would result from ICSID arbitration being supposedly more favorable to an investor than the non-ICSID arbitration provided in the treaty. In fact, ICSID arbitration may or may not be more favorable to an investor than another arbitration regime that may be established in a treaty. But even assuming that, in a particular case, ICSID arbitration is more favorable than the arbitration regime in a treaty, the hypothesis is not inconsistent with any provision of the 1999 Investment Law, which does contemplate the possibility of parallel regimes under treaties and under the 1999 Investment Law. Under the same logic, the State could not become a party to a treaty that does provide for ICSID arbitration, because investors protected by such treaty would receive better treatment than investors protected by a treaty that provides for a different arbitration regime.

59. Not only is the **2008 No. 1541 Decision** legally unsound, but it is internally contradictory. The following examples serve to illustrate the point:

- First, while **2008 Decision No. 1.541** concedes and pays lip service to the proposition that international law applies to the interpretation of Article 22 (p. 365.493), it later advocates an interpretation entirely based on alleged principles of "national order." Later, the decision undermines the merits of its own analysis by stating that there is little value ("utility") in an analysis limited to considerations of "internal order." (p. 365.493.)
- Second, as already noted, the **2008 Decision No. 1.541** concedes that a State can express its consent to arbitration unilaterally and generically through its investment legislation (pp. 365.491-365.492), but it then argues that Article 22 cannot be interpreted as an expression of consent on the ground that it would deprive the Republic of Venezuela from analyzing the advantages of arbitration "in each case" (p. 365.494) and from choosing "a forum or jurisdiction of convenience or more favorable to its interests ("*Forum Shopping*")" (p. 365.496).[51] Put differently, for the Constitutional Chamber, the problem with interpreting Article 22 as an

[51] *Supra*, par. 50.

expression of consent is that it would prevent the State from forum shopping on a case by case basis.

- Finally, although **2008 Decision No. 1.541** devotes several paragraphs to reiterating the existence of a constitutional mandate to promote arbitration (Article 258 of the Constitution) (pp. 365.484-365.486), it ultimately reaches an interpretation of Article 22 that does nothing of the kind.

60. The lack of a coherent and logical legal analysis contrasts with various statements in **2008 Decision No. 1.541** that make it evident that this ruling was the product of a political agenda that the Constitutional Chamber was called upon to defend. By its own admission, the Constitutional Chamber was operating on the understanding that it was bound to further the interests of the State. Most notably, the Chamber stated:

> "[A]lthough the Republic and the government[,] in conformity with prevailing Constitution and laws[,] are limited in the reach of their powers against other subjects of international law due to fundamental principles of the legal order — […] it is also [true] that **national sovereignty and self-determination allow and oblige the organs of the Government to establish the most favorable conditions for the achievement of the interests and purposes of the State** established in the Constitution […]."[52]

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[52] **2008 Decision No. 1.541,** p. 365.493 (emphasis added). The protection of national sovereignty and self-determination were a constant theme informing various statements in this decision. For example, when holding that the interpretation of all laws must be made in accordance with the Constitution, the Court went on to explain that this meant "*to protect the Constitution itself from any deviation of principles and from any separation from the political project that it embodies by the will of the people*" adding that *"part of the protection and guarantee of the Constitution of the Bolivarian Republic of Venezuela is rooted, then, in a political perspective in fieri*, ***disinclined toward ideological linkages to theories that may limit, under the pretext of universal validity, the national sovereignty and self-determination****, as required by article 1° eiusdem* (…)." *Id.*, p. 365.493 (emphasis added). Earlier, **2008 Decision No. 1.541** had expressed some skepticism about a generalized perception of impartiality of arbitral jurisdiction, noting that "the displacement of the jurisdiction from State tribunals to those of arbitration frequently occurs because the settlement of disputes will be made by arbitrators who[,] in [a] considerable [number of] cases[,] are related to and **tend to favor the interests of multinational corporations, thus becoming an additional instrument of domination and control of**

II. THE ATTEMPTS, BETWEEN 2000 AND 2008, TO OBTAIN A JUDICIAL INTERPRETATION OF ARTICLE 22 OF THE 1999 INVESTMENT LAW IN A SENSE CONTRARY TO ARBITRATION

61. Since the **1999 Investment Law** was adopted, and precisely because Article 22 expresses the State's consent to submit disputes to international arbitration, various unsuccessful attempts have been made by individuals opponents of that policy, to obtain a different interpretation from the Venezuelan courts. After those failed efforts and in the context of several ICSID arbitration proceedings that had been initiated by investors against the Republic of Venezuela on the basis of Article 22, the Venezuelan Government obtained, in record time, a decision of the Constitutional Chamber of the Supreme Tribunal of Justice on the interpretation of Article 22 (**2008 Decision No. 1.541** of October 17, 2008). In this section, I explain the circumstances of the **2008 Decision No. 1.541** in the context of the earlier failed attempts to obtain a judicial interpretation of Article 22 and the current political control to which the Constitutional Chamber is subject.

1. General considerations on the system of judicial review in Venezuela and the judicial interpretation of the Constitution

62. The Supreme Tribunal has issued decisions concerning the 1999 Investment Law in the context of proceedings of judicial review or petitions (*recursos*) of interpretation of the Constitution and statutes in the abstract.

63. Following a long tradition,[53] the Venezuelan system of judicial review is a mixed system,[54] which combines the classical diffuse method

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national economies […]" and adding that "it is somewhat unrealistic simply to make an argument of the impartiality of arbitral justice in detriment of the justice provided by the judicial authorities of the Judiciary, to justify the applicability of the jurisdiction of contracts of general interest." *Id*., p. 365.488 (emphasis added).

53 See *generally* Allan R. Brewer-Carías, *Instituciones Políticas y Constitucionales*, Vol. VI, La Justicia Constitucional, Universidad Católica del Táchira, Editorial Jurídica Venezolana, San Cristóbal-Caracas, 1998; Allan R. Brewer-Carías, *Estado de Derecho y Control Judicial*, Instituto de Administración Pública, Madrid 1985; Allan R. Brewer-Carías, *Justicia Constitucional. Procesos y Procedimienos Constitucionales*, Ed. Porrúa, México 2006; Allan R. Brewer-Carías, *El Sistema Mixto o Integral de Control de Constitucionalidad en Colombia y Venezuela,* Bogotá 1995.

of judicial review (American model) established in Article 334 of the Constitution,[55] with the concentrated method of control of constitutionality of statutes (European model), established in Articles 335 and 336 of the Constitution. According to Articles 335 and 336 in the Venezuelan legal order, the Supreme Tribunal is the "highest and final interpreter" of the Constitution. Its role is to assure a "uniform interpretation and application" of the Constitution and "the supremacy and effectiveness of constitutional norms and principles." For such purpose, the Constitution created a Constitutional Chamber within the Supreme Tribunal, whose role is to exercise "constitutional jurisdiction." (Articles 266,1 and 262). That Chamber has the exclusive power to declare the nullity of statutes and other State acts issued in direct and immediate execution of the Constitution or having the force of law (statute) (Article 334).[56]

64. To implement the concentrated method of judicial review, the Constitution provides for different means of recourse to the courts, including the action for unconstitutionality of statutes (*acción de inconstitucionalidad*), which any citizen can file directly before the Constitutional Chamber.

65. In addition to the means of judicial review established in the Constitution, the Constitutional Chamber of the Supreme Tribunal of Justice has created a petition (*recurso*) for abstract interpretation of the Constitution (petition for **constitutional interpretation**), which has been extensively used.[57] The petition for **constitutional interpretation** was created by the

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[54] See Allan R. Brewer-Carías, *Judicial Review in Comparative Law,* Cambridge University Press, Cambridge 1989, pp. 275-277.

[55] 1999 Constitution, Article 334. ("***Articulo 334***. […] *En caso de incompatibilidad entre esta Constitución y una ley u otra norma jurídica, se aplicarán las disposiciones constitucionales, correspondiendo a los tribunales en cualquier causa, aún de oficio, decidir lo conducente.* […]") ("**Article 334**. […] In the event of an incompatibility between this Constitution and a law or any other legal norm, the Constitutional provisions shall be applied, corresponding to the courts in any case, even *sua sponte*, to decide what is needed. […]")

[56] These include "acts of government," internal acts of the National Assembly, and executive decrees having the rank of statutes.

[57] See Supreme Tribunal of Justice, Constitutional Chamber, Decision No. 1077 of September 22, 2000 (Case: *Servio Tulio León Briceño*) in *Revista de Derecho Público Nº 83*, Caracas, 2000, pp. 247 ff. See Allan R. Brewer-Carías, "*Quis Custodiet Ipsos Custodes*: De la interpretación constitucional a la inconstitucionalidad de la interpretación" in *VIII Congreso Nacional de Derecho Constitucional, Peru*,

Constitutional Chamber without any constitutional or legal support. The Constitutional Chamber attributed to itself the sole power to decide it.[58]

66. In cases dealing with interpretations **of the Constitution**, the Constitutional Chamber is empowered to give binding effect to its decisions (Article 335). According to Decision No. 1.309 of June 19, 2001 (Case: *Hermann Escarrá*),[59] the decisions of the Constitutional Chamber on petitions of abstract interpretation of the Constitution have effects *erga omnes*, that is to say, they are binding on all courts of the Republic of Venezuela, but they apply only prospectively (*pro futuro*, *ex nunc*), that is, they do not have retroactive effects.

67. There is a second type of petition of interpretation in Venezuela: the petition (*recurso*) of **interpretation of statutes**. Unlike the prior one, this type is provided for in the Constitution (Article 266,6) and in the 2004 Organic Law of the Supreme Tribunal of Justice (Article 5, paragraph 1,52). The competence to decide these petitions corresponds to the Chamber of the Supreme Tribunal (Politico-Administrative, Civil, Criminal, Social or Electoral Chamber) that has competence over the subject-matter of the statute.[60]

Fondo Editorial 2005, Colegio de Abogados de Arequipa. Arequipa, September 2005, pp. 463-489, also a*vailable at* www.allanbrewercarias.com, (Biblioteca Virtual, II.4. Artículos y Estudios No. 475, 2005) pp. 1-33; Allan R. Brewer-Carías, "Le recours d'interprétation abstrait de la Constitution au Vénézuéla" in *Renouveau Du Droit Constitutionnel, Mélanges en L'honneur de Louis Favoreu*, Dalloz, Paris, 2007, pp. 61-70.

58 No provision of the 2004 Organic Law of the Supreme Tribunal of Justice attributes this power to the Constitutional Chamber of the Supreme Tribunal of Justice. See Allan R. Brewer-Carías, *Ley Orgánica del Tribunal Supremo de Justicia*, Editorial Jurídica Venezolana, Caracas 2004, pp. 103-109.

59 Ratified in Supreme Tribunal of Justice, Constitutional Chamber, Decision No. 1.684 of November 4, 2008 (Case: *Carlos Eduardo Giménez Colmenárez*) (Exp. No. 08-1016), pp. 9-10.

60 Before 2000, the only petition (*recurso*) of interpretation existing in the Venezuelan legal order was the petition of interpretation of statutes in cases expressly provided by them. It was established in Article 42,24 of the 1976 Organic Law of the Supreme Court of Justice, and exclusively attributed to the Politico-Administrative Chamber of that court. This changed in the 1999 Constitution.

When a petition for interpretation results in the interpretation of a statute, such interpretation applies only prospectively.[61]

68. A petition (*recurso*) of interpretation has the purpose of obtaining from the Supreme Tribunal a declarative ruling to clarify the content of legal or constitutional provisions. To have standing to file a petition of interpretation, a petitioner must invoke an actual, legitimate and juridical interest in the interpretation based on a particular and specific situation in which he stands, which requires interpretation of the legal or constitutional provision in question. The Constitutional Chamber has held that in a petition for constitutional interpretation, the petitioner must always point to "the obscurity, the ambiguity or contradiction between constitutional provisions."[62] In Decision No. 2.651 of October 2, 2003, the Constitutional Chamber ruled that the proceeding did not have an adversarial nature, and left it to the court's discretion whether to call to the proceeding those that could have something to say on the matter.[63]

69. When deciding a petition of statutory interpretation, chambers of the Supreme Tribunal (other than the Constitutional Chamber) are not empowered to establish a binding interpretation of constitutional provisions. Conversely, when the Constitutional Chamber decides a petition of interpretation of the Constitution, it is not empowered to establish binding interpretations of statutory provisions. Accordingly, a petition of statutory interpretation regarding the 1999 Investment Law can be filed only before the Politico-Administrative Chamber of the Supreme Tribunal, as the Constitutional Chamber indeed decided when it declined to assume jurisdiction to resolve a

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61 See also *infra* par. 89.

62 Allan R. Brewer-Carías, "*Quis Custodiet Ipsos Custodes*: De la interpretación constitucional a la inconstitucionalidad de la interpretación" in *VIII Congreso Nacional de Derecho Constitucional, Peru*, Fondo Editorial 2005, Colegio de Abogados de Arequipa. Arequipa, September 2005. pp. 463-489, also a*vailable at* www.allanbrewercarias.com, (Biblioteca Virtual, II.4. Artículos y Estudios No. 475, 2005) pp.1-33.; Allan R. Brewer-Carías, "Le recours d'interprétation abstrait de la Constitution au Vénézuéla" in *Renouveau Du Droit Constitutionnel, Mélanges en L'honneur de Louis Favoreu*, Dalloz, Paris, 2007, pp. 61-70.

63 Supreme Tribunal of Justice, Constitutional Chamber, Decision No. 2.651 of October 2, 2003 (Case: *Ricardo Delgado,* Interpretation of Article 174 of the Constitution), pp. 30-32.

petition of interpretation of Article 22 of the 1999 Investment Law filed by three Venezuelan lawyers in 2007.[64]

2. The 2001 decision upholding the constitutionality of Article 22 of the 1999 Investment Law

70. The first case filed before the Supreme Tribunal in connection with Article 22 of the 1999 Investment Law was an action of unconstitutionality filed by two individuals challenging Articles 17, 22 and 23 of the 1999 Investment Law. The Constitutional Chamber upheld the constitutionality of the challenged provisions in Decision No. 186 of February 14, 2001.[65]

71. The petitioners argued *inter alia* that Article 22 was contrary to Articles 157,31 (*sic*) and 253 of the Constitution, because it "attempt[s] to authorize private parties [*los particulares*] to leave aside the application of Venezuelan public law provisions, in favor of arbitral organs, which as it is known, apply equity criteria without necessarily complying with positive law provisions."[66] This statement implies that the petitioners understood Article 22 as an open offer by the State to submit controversies on international investments to international arbitration. Only on that understanding could the petitioners complain that Article 22 made it possible for "private parties [*los particulares*] to leave aside the application of Venezuelan public law provisions in favor of arbitral organs […]."

72. In rejecting the petition as it concerned Article 22, the Constitutional Chamber reasoned that:

> "the plaintiffs incur in the mistake of considering that by virtue of the challenged provisions previously quoted [Articles 22 and 23 of the 1999 Investment Law], there is an attempt to give an authorization to leave aside public law provisions in favor of arbitral organs, taking away from national courts their power to decide the potential disputes that may arise in connection with the application of the Decree Law

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64 Supreme Tribunal of Justice, Constitutional Chamber, Decision No. 609 of April 9, 2007 (Case: Interpretation of Article 22 of the 1999 Investment Law).

65 Supreme Tribunal of Justice, Constitutional Chamber, Decision No. 186 of February 14, 2001 (Case: Challenge Constitutionality Articles 17, 22 and 23 of the 1999 Investment Law).

66 *Id.,* p. 4.

> on the Promotion and Protection of Investments. In fact, this Chamber considers that the prior statement is an error because it is the Constitution itself which incorporates within the system of justice the alternative means of justice, among which, the arbitration is obviously placed.
>
> […]
>
> The Chamber notices that the plaintiffs seeking the nullity have not noticed, from the constitutional provision they claim as violated, that the alternative means of justice are also part of the Venezuelan system of justice and that the quotation of the cited article 253 in their pleading does not contain the last part of this provision."[67]

73. The Constitutional Chamber noted that the Constitution incorporates alternative means of adjudication, including arbitration, within the Venezuelan system of justice. It highlighted that arbitration – national and international – has a constitutional basis in Article 258 of the 1999 Constitution, and specifically concluded that "**the arbitral settlement of disputes, provided for in** the impugned **articles 22** and 23[] does not conflict in any manner with the Fundamental Text."[68]

74. The Constitutional Chamber referred to the mandate to promote arbitration in Article 258 of the Constitution ("The law shall promote arbitration, conciliation, mediation and any other alternative means of dispute resolution") and explained that:

> "[...] the law, in this case an act with rank and force of such, promoted and developed the referred constitutional mandate, **by providing for arbitration as an integral part of the mechanisms for settlement of controversies** that may arise between an international investor, whose country of origin has in effect with Venezuela a treaty or agreement on the promotion and protection of investments, or **controversies with respect to which the provisions of** the Convention Establishing the Multilateral Investment Guarantee Agency (OMGI-MIGA) or **the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) are applicable**. It

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67 *Id.*, pp. 25-26.

68 *Id.,* p. 28 (emphasis added).

> must be made clear that in accordance with the challenged norm itself, the possibility of resorting to the contentious means established under the Venezuelan legislation in effect remains open, when the potential dispute arises and these avenues are appropriate.
>
> This Chamber considers that **the provision for arbitration** under the terms developed in the challenged norm[] does not violate the sovereign power of national courts to administer justice […]."[69]

75. In this decision, the Constitutional Chamber tacitly acknowledged that Article 22 contains the express consent of the State to submit to international arbitration controversies regarding investment. The reasoning quoted in the preceding paragraphs would make no sense unless the Constitutional Chamber understood Article 22 as expressing the State's consent to international arbitration.

3. The 2007 decision of the Constitutional Chamber declaring its lack of jurisdiction to interpret Article 22 of the 1999 Investment Law

76. On February 6, 2007, a group of lawyers filed a petition (*recurso*) for statutory interpretation of Article 22 of the 1999 Investment Law before the Constitutional Chamber of the Supreme Tribunal.[70] The stated purpose of the petition was to obtain an interpretation of Article 22 "to determine whether [Article 22] established or not the arbitral consent necessary to allow foreign investors to initiate international arbitrations against the Venezuelan State."[71]

77. The petitioners added that they were not asking the Constitutional Chamber to declare Article 22 unconstitutional, a matter that had been resolved in 2001. They argued instead that "one thing is that the article at issue be constitutional and another very different is that such article establish a general and universal consent to allow any foreign investor to request that its disputes with the Venezuelan State be resolved by means of international arbitration, a matter with respect to which the wording of the article is not

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69 *Id.,* p. 27 (emphasis added).

70 Supreme Tribunal of Justice, Constitutional Chamber, Decision No. 609 of April 9, 2007.

71 *Id.*, p. 3

clear."[72] (The petitioners in that case failed to recognize that the Constitutional Chamber had implicitly resolved that question of statutory interpretation when upholding the constitutionality of the challenged article.) The petitioners formulated the following specific questions:

> "Does article 22 of the Law on the Promotion and Protection of Investments contain the arbitral consent by the Venezuelan State in order for all the disputes that may arise with foreign investors to be submitted to arbitration before ICSID?
>
> In case of a negative [answer] (sic), what is the purpose and use of article 22 of the Law on the Promotion and Protection of Investments?"[73]

78. In Decision No. 609 of April 9, 2007, which the **Respondent** and the **Urdaneta Opinion** omit to comment, the Constitutional Chamber ruled that it had *no* competence to decide on the interpretation of Article 22.[74] It explained that the matter was within the competence of the Politico-Administrative Chamber of the Supreme Tribunal.[75] This was a ratification of the Constitutional Chamber's position that it had no competence to decide petitions of interpretation of statutes; its competence being limited to petitions of interpretation of the Constitution and of instruments within the "block of constitutionality."[76] The Constitutional Chamber concluded that this was "a matter of Public Law, on the relations (in this case, the solution of controversies) derived from foreign investments in the Venezuelan State, which means that competence, according to the subject-matter, corresponds to the Politico-Administrative Chamber of this Supreme Tribunal, on the basis of number 6 of article 266 of the Constitution and number 52 of article 5

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72 *Id.*, p. 3.

73 *Id.*, pp. 3-4.

74 *Id.*, p. 7.

75 *Id.*, p. 7.

76 The Constitutional Chamber pointed out that the petition referred to a "legal provision that regulates arbitration in relation to foreign investments, with respect to which the petitioners have doubts as to whether it contains a declaration of general (legal) consent by the Venezuelan State to be always submitted to such means of dispute resolution or if, on the contrary, it is only a provision that requires such consent in each opportunity in which it is necessary." *Id.*, p. 6.

of the Organic Law of the Supreme Tribunal of Justice."[77] Accordingly, the Constitutional Chamber ordered that the file be transferred to the Politico-Administrative Chamber.

4. The 2007 decision of the Politico-Administrative Chamber declaring the inadmissibility of a petition of interpretation of Article 22 of the 1999 Investment Law

79. The Politico-Administrative Chamber decided the aforementioned petition in Decision No. 927 of June 5, 2007, declaring the request inadmissible because the petitioners lacked standing.[78]

80. The Politico-Administrative Chamber reasoned that the petitioners had failed to demonstrate the existence of a particular juridical situation affecting them in a personal and direct way that could justify a judicial decision on the scope and application of Article 22.[79] The Politico-Administrative Chamber noted that the petitioners had based their interest only on their activities as lawyers, and had not referred expressly to any personal and direct interest in the requested interpretation.[80] The Chamber also emphasized that a petition of interpretation must not be used for mere academic purposes.[81]

5. The 2008 Decision No. 1.541 of the Constitutional Chamber interpreting Article 22 of the 1999 Investment Law and the problems of independence and autonomy the Venezuelan Judiciary

81. After the aforementioned failed attempts by various individuals to obtain judicial decisions interpreting Article 22 of the 1999 Investment Law, the Government of Venezuela did succeed in obtaining a judicial decision by the Constitutional Chamber (**2008 Decision No. 1.541** of October 17, 2008).

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77 *Id*., p. 6.

78 Supreme Tribunal of Justice, Politico-Administrative Chamber, Decision No. 927 of June 5, 2007.

79 *Id*., p. 14.

80 *Id*.

81 *Id*.

82. The **2008 Decision No. 1.541** was issued in response to a petition of interpretation of Article 258 of the Constitution filed on June 12, 2008, by the Republic of Venezuela represented by a number of attorneys designated by the *Procurador General de la República* (Attorney General). The petition states expressly that the request was prompted by the ICSID cases against the Republic of Venezuela pending at the time the petition was filed.[82]

83. Although the **2008 Decision No. 1.541** ostensibly resolved a petition labeled as a request of constitutional interpretation of Article 258 of the Constitution, the Constitutional Chamber went on to issue a statutory interpretation of Article 22 of the 1999 Investment Law. As already discussed, this was a matter that the Constitutional Chamber itself had acknowledged to be within the exclusive competence of the Politico-Administrative Chamber.[83]

84. The **2008 Decision No. 1.541** states that it is possible for a State to express its consent to submit the resolution of disputes to international arbitration in a statute (p. 365.492), but it accepts the Government's position that Article 22 does not have that effect.

85. The Constitutional Chamber decided the matter in a very unusual abbreviated proceeding within only 120 days (including 30 days of judicial vacation) and without any adversarial hearings. The petition was filed on June 12, 2008, and it was notified to the Constitutional Chamber on June 17, 2008. Only one month later, on July 18, 2008, the Chamber issued a decision admitting the petition, after omitting the oral hearing on the ground that it was a "merely legal" matter.[84] The Constitutional Chamber set a maximum

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82 Supreme Tribunal of Justice, Constitutional Chamber, Petition for Interpretation filed by Hildegard Rondón de Sansó, Alvaro Silva Calderón, Beatrice Sansó de Ramírez *et al*., on behalf of the Bolivarian Republic of Venezuela, concerning the last section of Article 258 of the Constitution of the Bolivarian Republic of Venezuela, of June 12, 2008, p. 10.

83 *Supra*, par. 78.

84 Supreme Tribunal of Justice, Constitutional Chamber, Decision of July 18, 2008. Magistrate Pedro Rafael Rondón dissented from the decision to admit the petition. He explained that Article 258 was not obscure, and added that the petition was being used to obtain a legal opinion from the Constitutional Chamber, contravening prior decisions of the same Chamber. Finally, he noted that the petition included a request for interpretation of a statutory provision (Article 22) which exceeded the competence of the Constitutional Chamber. Dissent, Decision of July 18, 2008.

term of 30 days to decide the case, which would begin to count five days after a newspaper notice giving interested parties five days to file their arguments.[85] The newspaper notice was published on July 29, 2008. On September 16, 2008, three individuals filed arguments as third parties (*escrito de coadyuvancia*), but their participation was denied by the Constitutional Chamber on grounds of lack of standing.[86] The final decision in the case was issued one month later, on October 17, 2008.

86. As aforementioned, the petition of constitutional interpretation was established by the jurisprudence of the Constitutional Chamber for the sole purpose of interpreting obscure, ambiguous or inoperative constitutional provisions.[87] Article 258 requires no such interpretation. It states that:

> "The law shall promote arbitration, conciliation, mediation and any other alternative means of dispute resolution."

As there is nothing obscure, ambiguous or inoperative in this provision, it is obvious that the real purpose of the petition of constitutional interpretation filed by the representatives of the Republic of Venezuela was not to obtain a clarifying interpretation of Article 258. Instead, they used this petition as a vehicle for obtaining an interpretation of Article 22 of the 1999 Investment Law in the sense that it does not contain the State's unilateral consent to arbitration. In particular, the Republic of Venezuela requested a declaration that "article 22 of the 'Investment Law' may not be interpreted in the sense that it constitutes the consent of the State to be subjected to international arbitration" and "that article 22 of the 'Investment Law' does not contain a unilateral offer of arbitration, that is, it does not make up for the lack of an express declaration granted by the Venezuelan authorities in writing in order to be subjected to international arbitration, nor through a bilateral agreement or treaty explicitly establishing it […]."[88]

87. The Constitutional Chamber noted that the 1999 Constitution allows the Republic of Venezuela to give its unilateral consent to have disputes, particularly disputes regarding foreign investments, resolved by inter-

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85 *Id*., p. 8.

86 **2008 Decision No. 1.541**, p. 365.483.

87 *Supra*, par. 68.

88 **2008 Decision No. 1.541**, p. 365.483.

national arbitration.[89] However, the Constitutional Chamber then went on to interpret Article 22 of the 1999 Investment Law and concluded, as the Representatives of the Republic of Venezuela had requested, that this provision did not constitute such an expression of unilateral consent.[90]

88. Magistrate Pedro Rafael Rondón Haaz, who had dissented from the Constitutional Chamber decision to admit the petition (*recurso*),[91] also dissented from **2008 Decision No. 1.541**. Magistrate Rondón stressed that the Constitutional Chamber had acted *ultra-vires* when engaging in the interpretation of a statutory provision (Article 22).[92] He reiterated his earlier dissent and stated that:

- Article 258 does not raise any reasonable doubt. It does not require a clarifying interpretation because it only contains a request directed to the Legislator in order to promote arbitration.
- The petition of interpretation at issue had the purpose of obtaining from the Constitutional Chamber a "legal opinion" by means of an *a priori* judicial review process that does not exists in Venezuela. It sought the exercise of a legislative function by the Constitutional Chamber.
- The decision of the majority does not interpret or clarify Article 258 of the Constitution because this clear provision does not give rise to any doubts.
- The Constitutional Chamber exceeded its competence when it engaged in the interpretation of Article 22 of the 1999 Investment Law. The interpretation of statutory provisions is of the exclusive competence of the Politico-Administrative Chamber of the Supreme Tribunal of Justice.
- The Constitutional Chamber contradicted its own jurisprudence and exceeded its powers of constitutional interpretation, as well as its powers of judicial review concerning international treaties.

89. The dissenting Magistrate correctly notes that the Constitutional Chamber in interpreting Article 22 exercised a "legislative function"

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89 **2008 Decision No. 1.541**, pp. 365.486 and 365.492.

90 *Id.*, pp. 365.495-365.497. The flaws in the Constitutional Chamber's reasoning are addressed elsewhere in this Opinion.

91 *Supra*, footnote 81.

92 Dissenting Opinion, **2008 Decision No. 1.541**, p. 365.498.

by providing, through an *a priori* judicial review procedure, rules that the Legislature must follow in the future in order to express the State's consent to international arbitration through a statute.[93] One consequence of this legislative exercise is that, under Venezuelan law, the Constitutional Chamber's interpretation of Article 22 can only have effects *ex nunc*, *pro futuro*, as acts of "legislative" nature cannot have retroactive effects.[94] Consequently, the **2008 Decision No. 1.541** cannot affect cases in which investors accepted, before October 17, 2008, the State's open offer to submit disputes to ICSID arbitration. Moreover, those effects are limited to the Venezuelan courts, that is, the effects of **2008 Decision No. 1.541** under Venezuelan law do not affect the powers of an ICSID tribunal to interpret Article 22 independently in ruling on its own jurisdiction.

III. COMMENTS ON THE SITUATION OF THE JUDICIARY IN VENEZUELA AND THE SUBJECTION OF THE CONSTITUTIONAL CHAMBER TO POLITICAL CONTROL

90. The **2008 Decision No. 1.541** can only be fully understood by taking into account that the Judicial Branch in Venezuela and in particular, the Constitutional Chamber of the Supreme Tribunal are subject to political interference in politically sensitive cases. In this section, I explain the principles that ought to inform the functioning of the Judicial Branch under the 1999 Constitution and contrast them with the very different reality that prevails in Venezuela at the present time, and that influenced the **2008 Decision No. 1.541**.

1. The 1999 National Constituent Assembly and the 1999 Constitution

91. The Constitution of the Bolivarian Republic of Venezuela (the 1999 Constitution) was drafted and sanctioned by a National Constituent Assembly (*Asamblea Nacional Constituyente*) and came into effect on December 30, 1999, after being approved by referendum held on December 15, 1999.

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93 Dissenting Opinion, **2008 Decision No. 1.541**, p. 365.498.

94 See Supreme Tribunal of Justice, Constitutional Chamber, Decision No. 1.309 of June 19, 2001 (Case: *Hermann Escarrá*). See also, Decision N° 1.684 of November 4, 2008 (Case: *Carlos Eduardo Giménez Colmenárez*).

92. The Constituent Assembly was elected in July 1999 in an electoral process that took place without the active participation of the traditional political parties. As a result, President Hugo Chávez's supporters ended up holding more than 95% of the seats. Before the Constituent Assembly embarked on drafting a new constitution, it dissolved and seized control (*intervino*) of all branches of the national and state governments and dismissed all the public officials elected just a few months before (1998), namely the representatives to the former National Congress, the Legislative Assemblies of the States and the Municipal Councils as well as the State Governors and Municipal Mayors.[95] The sole public office that was exempted from this intervention was the office of the President of the Republic.

93. In particular, the Constituent Assembly expressly declared the Judicial Branch to be "in emergency" and interfered with its autonomy. Since then, the independence of the Venezuelan Judiciary has been progressively and systematically dismantled.[96] The Supreme Court of Justice was abolished in December 1999.[97] The result of this process has been the tight

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[95] See the decrees of intervention of the branches of Government, in Allan R. Brewer-Carías, *Debate Constituyente (Aportes a la Asamblea Nacional Constituyente)*, Vol. I (August-September 1999), Fundación de Derecho Publico-Editorial Jurídica Venezolana, Caracas 1999. This amounted to a *coup d'Etat.* See *generally* Allan R. Brewer-Carias*, Golpe de Estado y Proceso Constituyente en Venezuela*, Universidad Nacional Autónoma de México, Mexico 2002; Guayaquil, 2006.

[96] See *generally* Allan R. Brewer-Carías, "La progresiva y sistemática demolición de la autonomía e independencia del Poder Judicial en Venezuela (1999-2004)" in *XXX Jornadas J.M Dominguez Escovar, Estado de Derecho, Administración de Justicia y Derechos Humanos*, Instituto de Estudios Jurídicos del Estado Lara, Barquisimeto 2005, pp. 33-174; Allan R. Brewer-Carías, "El constitucionalismo y la emergencia en Venezuela: entre la emergencia formal y la emergencia anormal del Poder Judicial" in Allan R. Brewer-Carías, *Estudios Sobre el Estado Constitucional (2005-2006)*, Editorial Jurídica Venezolana, Caracas 2007, pp. 245-269; and Allan R. Brewer-Carías "La justicia sometida al poder. La ausencia de independencia y autonomía de los jueces en Venezuela por la interminable emergencia del Poder Judicial (1999-2006)" in *Cuestiones Internacionales. Anuario Jurídico Villanueva 2007,* Centro Universitario Villanueva, Marcial Pons, Madrid 2007, pp. 25-57, *available at* www.allanbrewercarias.com, (Biblioteca Virtual, II.4. Artículos y Estudios No. 550, 2007) pp. 1-37. See also Allan R. Brewer-Carías, *Historia Constitucional de Venezuela*, Editorial Alfa, Tomo II, Caracas 2008, pp. 402-454.

[97] The Supreme Court of Justice was abolished by the December 22, 1999 transitory regime established by the Constituent Assembly after the approval of the 1999 Constitution by popular referendum. On the transitory regime, see *generally* Allan

Executive control over the Judiciary, especially the Constitutional Chamber of the newly created Supreme Tribunal of Justice.[98]

94. The National Constituent Assembly drafted the new Constitution and submitted the draft to two debates in October and November 1999. The new Constitution was sanctioned and signed on November 19, 1999, approved in a popular referendum held on December 15, 1999, and duly proclaimed by the National Constituent Assembly on December 20, 1999. It entered into force on the thirtieth of that month and year, the day of its publication in the *Official Gazette.*[99]

95. Article 7 of the 1999 Constitution expressly declares the Constitution to be the supreme law of the land and the foundation of the entire legal order. Consequently, all persons and organs of the State are subject to it

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R. Brewer-Carias, *La Constitucion de 1999. Derecho Constitucional Venezolano*, Vol. II, Editorial Jurídica Venezolana, Caracas 2004, pp. 1150 ff.

98 See Allan R. Brewer-Carias, "*Quis Custodiet ipsos Custodes*: De la interpretación constitucional a la inconstitucionalidad de la interpretación" in *VIII Congreso Nacional de derecho Constitucional*, Peru, Fondo Editorial 2005, Colegio de Abogados de Arequipa, Arequipa, September 2005, pp. 463-489, also *available at* www.allanbrewercarias.com, (Biblioteca Virtual, II.4. Artículos y Estudios No. 475, 2005) pp. 1-33; and in Allan R. Brewer-Carías, *Crónica de la "In" Justicia Constitucional. La Sala Constitucional y el Autoritarismo en Venezuela*, Caracas 2007.

99 *Official Gazette* Nº 36.860 of December 30, 1999. In 2007, President Chávez proposed a constitutional reform that was sanctioned by the National Assembly but rejected by the people through referendum held in December 2007. Through this failed reform, President Chávez intended to reinforce the system of centralization and concentration of power that he had managed to develop. See *generally* Manuel Rachadell, *Socialismo del Siglo XXI. Análisis de la Reforma Constitucional Propuesta por el Presidente Chávez en Agosto de 2007*, FUNEDA, Editorial Jurídica Venezolana, Caracas 2008; Héctor Turuhpial Carriello, *El Texto Oculto de la Reforma*, FUNEDA, Caracas 2008; Allan R. Brewer-Carías, *Hacia la Consolidación de un Estado Socialista, Centralizado, Policial y Militarista. Comentarios sobre el Sentido y Alcance de Las Propuestas de Reforma Constitucional 2007,* Editorial Jurídica Venezolana, Caracas 2007. In February 2009, at the request of President Chávez, the National Assembly took the initiative of a new Constitutional Reform which purpose was to eliminate the constitutional limits that the 1999 Constitution established for the reelection of elected officials. The reform was approved by referendum held on February 14, 2009, and allows the President of the Republic of Venezuela to be elected in a continual and indefinite way.

and have a constitutional duty to fulfill and respect its provisions (Article 131). The Constitution provides for means designed to protect its own supremacy. The most important of these safeguards are related to the Judiciary and to the judicial system. In this regard, Article 253 of the Constitution proclaims that the power to render justice emanates from the citizenry and is exercised in the name of the Republic and by the authority of the law. For such purposes, Article 26 of the Constitution provides that the State must guarantee a "cost-free, accessible, impartial, adequate, transparent, autonomous, independent, responsible, equitable, and expeditious [system of] justice." The same Article 253 provides that the system of justice is composed not only by the organs of the Judicial Branch, comprising the Supreme Tribunal of Justice and all the other courts established by law, but also by the Public Ministry (Public Prosecutor), the Peoples' Defendant, the organs of criminal investigation, judicial staff and assistants, the penitentiary system, the alternative means of adjudication, the citizens who participate in the administration of justice according to the law, and the attorneys authorized to practice law. Article 258 imposes on the Legislator the duty to promote arbitration, conciliation, mediation, and other alternative means of conflicts resolution.

2. The theoretical constitutional rules regarding the appointment, stability and dismissal of judges

96. Article 254 of the Constitution declares the principle of the independence of the Judicial Branch and establishes that the Supreme Tribunal of Justice shall have "functional, financial, and administrative autonomy." In order to guarantee the independence and autonomy of courts and judges, Article 255 provides for a specific mechanism to ensure the independent appointment of judges and to guaranty their stability. In this regard, the judicial office is considered as a career, in which the admission, as well as the promotion of judges within it, must be the result of a public competition or examinations to ensure that the candidates are adequately qualified. The candidates are to be chosen by panels from the judicial circuits, and the judges are to be designated by the Supreme Tribunal of Justice. The Constitution also creates a Judicial Nominations Committee (Article 270) to assist the Judicial Branch in selecting the Magistrates for the Supreme Tribunal of Justice (Article 264) and to assist judicial colleges in selecting of judges for the lower courts. This Judicial Nominations Committee is to be composed of representatives from different sectors of society, as determined by law. The Constitution also guarantees the stability of all judges, prescribing that they can only be re-

moved or suspended from office through the procedures expressly provided under the law (Article 255).

97. As of the date of this opinion, none of the constitutional provisions regarding the appointment and stability of judges has been implemented. On the contrary, since 1999, the Venezuelan Judiciary has been almost exclusively made up of temporary and provisional judges,[100] and the public competition processes for the appointment of judges with citizens participation has not been implemented. Consequently, in general, judges lack stability, and since the constitutional provisions creating the Judicial Disciplinary jurisdiction have not been implemented by legislation, matters of judicial discipline are currently in the hands of the "Functioning and Restructuring Commission of the Judiciary"[101] (not established in the Constitution but created by the National Constituent Assembly in 1999) which has the power to remove temporary judges without due process guarantees,[102] and in those of a

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[100] A provisional judge is one appointed pending a public competition. A temporal judge is one appointed to perform a specific task or for a specific period of time. In 2003, the Inter-American Commission on Human Rights explained that: "The Commission has been informed that only 250 judges have been appointed through competitive professional examinations as provided for in the Constitution. Of a total of 1772 judges in Venezuela, the Supreme Court of Justice reports that only 183 are tenured, 1331 are provisional, and 258 are temporary." *Report on the Situation of Human Rights in Venezuela*; OAS/Ser.L/V/II.118. doc.4rev.2; December 29, 2003, par. 174, *available at* http://www.cidh.oas.org/countryrep/Venezuela2003eng/toc.htm. The Commission also added that "one issue with an impact on the autonomy and independence of the judiciary is the provisional nature of judges within the Venezuelan legal system. Information from different sources indicates that at present, more than 80% of Venezuela's judges are 'provisional.'" *Id.*, par. 161.

[101] The Politico-Administrative Chamber of the Supreme Tribunal of Justice has ruled that the dismissal of temporary judges is a discretional power of the Functioning and Restructuring Commission of the Judiciary. This Commission was created after 1999 and adopts its decisions without following any administrative procedure. See Decision No. 00463-2007 of March 20, 2007; Decision No. 00673-2008 of April 24, 2008 (quoted in Decision No. 1.939 of December 18, 2008, p. 42). The same position has been established by the Constitutional Chamber in Decisions No. 2414 of December 20, 2007; and Decision No. 280 of February 23, 2007.

[102] See Allan R. Brewer-Carías, "La justicia sometida al poder y la interminable emergencia del poder judicial (1999-2006)" in *Derecho y Democracia. Cuadernos Universitarios*, Órgano de Divulgación Académica, Vicerrectorado Académico, Universidad Metropolitana, Año II, No. 11, Caracas, September 2007, pp. 122-138, al-

Judicial Commission of the Supreme Tribunal of Justice, which has also discretionary powers to remove all temporary judges.[103]

3. The reality concerning the appointment and removal of the current Supreme Tribunal of Justice

98. The Constitution of 1999 created the Supreme Tribunal of Justice, as the highest court in the country, in substitution of the former Supreme Court of Justice established under the previous 1961 Constitution. The Supreme Tribunal is composed of six Chambers: Constitutional, Politico-Administrative, Electoral, Civil Cassation, Criminal Cassation and Social, and may also sit in Plenary Session (*en banc; Sala Plena*). The 1999 Constitution regulates in detail the qualifications to be met by the Magistrates of the Supreme Tribunal but leaves to the Organic Law of the Supreme Tribunal of Justice to determine the number of Magistrates sitting in each Chamber and the competence of each Chamber (Article 262). In addition, the Supreme Tribunal is in charge of the "governance and administration of the Judiciary" (Article 267), replacing the former "Council of the Judiciary" as head of the Judicial Branch. In order to accomplish these functions, the Supreme Tribunal acting in Plenary Session, has created an Executive Board of the Judiciary.

99. The Constitution assigns to the National Assembly the power to elect the Magistrates of the Supreme Tribunal, for a single term of 12 years (Article 264). Candidates must be nominated at their own initiative or by organizations related to judicial activities, to a "Judicial Nominations Committee" integrated only by "representatives of the different sectors of society" (Article 270). This Committee, having heard the opinion of the community, must pre-select a group of nominees to be presented to the "Citizen" Branch of Government Power (Prosecutor General, Comptroller General, Peoples' Defendant) which must make a second pre-selection of nominees, which is the one to be submitted to the National Assembly (Article 264). The Consti-

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so published as Allan R. Brewer-Carías, "La justicia sometida al poder (La ausencia de independencia y autonomía de los jueces en Venezuela por la interminable emergencia del Poder Judicial (1999-2006))" in *Cuestiones Internacionales. Anuario Jurídico Villanueva 2007,* Centro Universitario Villanueva, Marcial Pons, Madrid, 2007, pp. 25–57, *available at* www.allanbrewercarias.com, (Biblioteca Virtual, II.4. Artículos y Estudios No. 550, 2007) pp. 1-37.

[103] See Supreme Tribunal of Justice, Constitutional Chamber, Decision No. 1.939 of December 18, 2008 (Case: *Gustavo Álvarez Arias et al*.)

tution also provides that citizens have the right to file well founded objections to any of the nominees before the Judicial Nominations Committee or before the National Assembly. The main purpose of this constitutional procedure was to limit the discretionary power that the former Congress had in appointing Magistrates to the Supreme Court of Justice, which was often exercised on the basis of political agreements and without any sort of citizen or society control.

100. Ignoring these constitutional provisions (and without waiting for the regular legislature to enact the Organic Law of the Supreme Tribunal of Justice as contemplated by the Constitution), the Constituent Assembly issued "Decree on the Regime for the Transition of Public Powers," on December 22, 1999,[104] this is, a week after the referendum that approved the Constitution. This decree dismissed the fifteen Justices of the former Supreme Court of Justice that were still in office, and appointed, on a transitory basis, twenty new Magistrates for the new Supreme Tribunal of Justice. In the absence of constitutional or legal provisions specifying the number of Magistrates for each Chamber, the Constituent Assembly appointed five Magistrates for the Constitutional Chamber and three Magistrates for each of the other five Chambers. These appointments were made without complying with the constitutional provisions regarding the nomination of candidates by a Judicial Nomination Committee integrated by representatives of the different sectors of society.[105] This appointment procedure had no basis in the Constitution or in any statute, nor could this decree be justified as the exercise of a constituent power, because the Constituent Assembly had no power

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104 *Official Gazette* No. 36.859 of December 29, 1999. On the transitory regime, see Allan R. Brewer-Carias, *La Constitucion de 1999. Derecho Constitucional Venezolano*, Vol. II, Editorial Jurídica Venezolana, Caracas 2004, pp. 1013-1025.

105 See Allan R. Brewer-Carías, "La participación ciudadana en la designación de los titulares de los órganos no electos de los Poderes Públicos en Venezuela y sus vicisitudes políticas" in *Revista Iberoamericana de Derecho Publico y Administrativo*, Year 5 N° 5-2005, San José, Costa Rica 2005, pp. 76-95, *available at* www.allanbrewercarias.com, (Biblioteca Virtual, II.4. Artículos y Estudios No. 469, 2005) pp. 1-48.

to enact constitutional provisions without popular approval by referendum, and no referendum was held on this matter.[106]

101. After the new National Assembly was elected in 2000, it had to comply with the constitutional mandate to enact the Organic Law of the Supreme Tribunal of Justice in order to determine the number of Magistrates of each of its Chambers, and to provide for the composition, organization and functioning of the Judicial Nominating Committee so as to elect, in a definitive way, the Magistrates of the Supreme Tribunal of Justice. But instead of enacting such Organic Law, on November 14, 2000, the National Assembly adopted a "Special Law for the Ratification or Election of the High Officials of the Citizens Power and of the Magistrates of the Supreme Tribunal of Justice for the First Constitutional Term."[107] This law created a Parliamentary Commission composed of a majority of representatives as a "Nominating Committee" to select the Justices, by-passing the constitutional provision imposing the need to create and regulate the Judicial Nominating Committee composed exclusively by representatives of different sectors of society. The National Assembly, in fact, appointed "a Commission integrated by 15 representatives, which shall act as the Committee for the Evaluation of Nominations" (Article 3), to select "a list of twelve (12) persons representing the different sectors of society by means of mechanisms of consultation," and present the list to the National Assembly so that it may choose, by an absolute majority, six (6) persons to sit on the Commission (Article 4).

102. The Peoples' Defendant at the time (which had been one of the High Officials provisionally appointed in December 1999), filed an action of unconstitutionality (*acción de inconstitucionalidad*) with an *amparo* petition against the "Special Law," in order to protect the citizens' rights of political participation.[108] The Supreme Tribunal has not ruled on that petition to this date. In a preliminary ruling, however, the Magistrates of the Constitutional Chamber, instead of recusing themselves, decided that the constitutional provisions for the appointment of Magistrates of the Supreme Tribunal did not apply to them, that is, to the same individuals who were deciding the

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106 The Decree on the Regime for the Transition of Public Powers was issued after the referendum of December 15, 1999, that approved the 1999 Constitution. It was not submitted to a separate referendum.

107 *Official Gazette* Nº 37.077 of November 14, 2000.

108 See *El Universal,* December 14, 2000, pp. 1-2.

matter. They reasoned that they were to be "ratified" and not "appointed."[109] The Peoples' Defendant who challenged the Special Law was not confirmed in his position. The "Special Law" thus consolidated the earlier political appointment of Magistrates of the Supreme Tribunal and the political control of the Judiciary through an extra-constitutional appointments process.

103. The National Assembly finally enacted the Organic Law of the Supreme Tribunal of Justice in 2004.[110] However, the Judicial Nominating Committee regulated by the law was not composed by representatives of the different sectors of society, as required by the Constitution. It was integrated by eleven (11) members, from which five (5) were elected from the representatives to the National Assembly, and the other six (6) from the other sectors of society, elected in a public proceeding (Article 13, paragraph 2). In practice, this Committee acts as a Parliamentary Commission with additional non-parliamentary members, operating within the National Assembly (Article 13).

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[109] The Constitutional Chamber took the view that they could be "ratified" by the Special Law without complying with the Constitution, because the Constitution provided only for the "nomination" of Magistrates and did not contemplate the "ratification" of those already in office. The Chamber ruled: "Consequence of the necessary application of the Regime for the Transition of the Public Powers which – as this Chamber has pointed out – has constitutional rank, is that it is only with respect to the Magistrates of the Supreme Tribunal of Justice that the concept of ratification shall be applied, [a concept] that is not provided for in the Constitution, as a result of which the phrase in Article 21 of the Regime for the Transition of Public Powers, according to which definitive ratifications shall be done according to the Constitution, is inapplicable, since as this Chamber has previously stated, the current Constitution did not provide (*sic*) norms on ratification of Magistrates to the Supreme Tribunal of Justice." See Supreme Tribunal of Justice, Constitutional Chamber, Decision of December 12, 2000 in *Revista de Derecho Público Nº 84*, Editorial Jurídica Venezolana, Caracas, 2000, p. 109. See comments in Allan R. Brewer-Carías, "La participación ciudadana en la designación de los titulares de los órganos no electos de los Poderes Públicos en Venezuela y sus vicisitudes políticas" in *Revista Iberoamericana de Derecho Público y Administrativo*, Year 5, Nº 5-2005, San José, Costa Rica 2005, pp. 76-95, *available at* www.allanbrewercarias.com, (Biblioteca Virtual, II.4. Artículos y Estudios No. 469, 2005) pp. 1-48.

[110] *Official Gazette* Nº 37.942 of May 20, 2004. For comments on this law, see *generally* Allan R. Brewer-Carías, *Ley Orgánica del Tribunal Supremo de Justicia. Procesos y Procedimientos Constitucionales y Contencioso-Administrativos*, Caracas, 2004.

104. For the first time since the approval of the 1999 Constitution, the 2004 Organic Law of the Supreme Tribunal of Justice established the number of the Magistrates of the Supreme Tribunal, increasing it to a total of 32 Magistrates. The nomination and appointment by means of the new "Nominating Committee" was completely controlled by the political organs of the Government. This was publicly acknowledged by the President of the Parliamentary Nominating Commission in charge of selecting the candidates for Magistrates of the Supreme Tribunal (who a few months later was appointed Ministry of the Interior and Justice). In December 2004, he stated to the press:

> "Although we, the representatives, have the authority for this selection, the President of the Republic was consulted and his opinion was very much taken into consideration." He added: "Let's be clear, we are not going to score own-goals. On the list, there were people from the opposition who comply with all the requirements. The opposition could have used them in order to reach an agreement during the last sessions, but they did not want to. We are not going to do it for them. There is no one in the group of candidates that could act against us […]."[111]

105. The President's influence on the Supreme Tribunal was admitted by himself, when he publicly complained that the Supreme Tribunal had issued an important ruling in which it "modified" the Income Tax Law, without previously consulting the "leader of the Revolution," and warning courts against decisions that would be "treason to the People" and "the Revolution." That was a very controversial case, decided by the Constitutional Chamber of the Supreme Tribunal in Decision No. 301 of February 27, 2007.[112] The President of the Republic said:

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[111] See *El Nacional*, Caracas December 13, 2004. The Inter-American Commission on Human Rights suggested in its Report to the General Assembly of the OAS for 2004 that "These provisions of the Organic Law of the Supreme Court of Justice also appear to have helped the executive manipulate the election of judges during 2004." See Inter-American Commission on Human Rights, *2004 Report on Venezuela*, par. 180.

[112] Supreme Tribunal of Justice, Constitutional Chamber, Decision No. 301 of February 27, 2007 (Case: *Adriana Vigilanza y Carlos A. Vecchio*) (Exp. No. 01-2862) in *Official Gazette* No. 38.635 of March 1, 2007. See comments in Allan R. Brewer-Carías, "El juez constitucional en Venezuela como legislador positivo de oficio en

> "Many times they come, the National Revolutionary Government comes and wants to make a decision against something that, for instance, deals with or has to pass through judicial decisions, and then they begin to move against it in the shadows, and many times they succeed in neutralizing decisions of the Revolution through a judge, or a court, and even through the very same Supreme Tribunal of Justice, behind the **backs of the Leader of the Revolution**, acting from within against the Revolution. This is, I insist, **treason to the people, treason to the Revolution**."[113]

106. More recently, the President of the Republic has publicly threatened the Magistrates of the Supreme Tribunal and the Head of the Pubic Prosecutor Office to act according to his whished against a TV Channel (Globovisión), saying, on May 28, 2009:

> "Mrs. Prosecutor, I am publicly summoning you in order for you, with your prosecutors, to fulfill with your obligation before the people, because it is for that that you are there. Mrs. President of the STJ [Supreme Tribunal of Justice] (Luisa Estella Morales), with all the Magis-

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materia tributaria" in *Revista de Derecho Público No. 109*, Editorial Jurídica Venezolana, Caracas 2007, pp. 193-212, *available at* www.allanbrewercarias.com, (Biblioteca Virtual, II.4. Artículos y Estudios No. 508, 2007) pp. 1-36; and Allan R. Brewer-Carías, "De cómo la Jurisdicción constitucional en Venezuela, no sólo legisla de oficio, sino subrepticiamente modifica las reformas legales que "sanciona", a espaldas de las partes en el proceso: el caso de la aclaratoria de la sentencia de Reforma de la Ley de Impuesto sobre la Renta de 2007**"** in *Revista de Derecho Público No. 114*, Editorial Jurídica Venezolana, Caracas 2008, pp. 267-276, *available at* http://www.brewercarias.com/Content/449725d9-f1cb-474b-8ab2-41efb849fea8/Content/II.4.575.pdf.

[113] (Emphasis added.) (*"Muchas veces llegan, viene el Gobierno Nacional Revolucionario y quiere tomar una decisión contra algo por ejemplo que tiene que ver o que tiene que pasar por decisiones judiciales y ellos empiezan a moverse en contrario a la sombra, y muchas veces logran neutralizar decisiones de la Revolución a través de un juez, o de un tribunal, o hasta en el mismísimo Tribunal Supremo de Justicia,* ***a espaldas del líder de la Revolución****, actuando por dentro contra la Revolución. Eso es, repito, traición al pueblo, traición a la Revolución."* (Emphasis added.)) *Discurso en el Primer Encuentro con Propulsores del Partido Socialista Unido de Venezuela desde el teatro Teresa Carreño* (Speech in the First Event with Supporters of the Venezuela United Socialist Party at the Teresa Carreno Theatre), March 24, 2007, *available at* http://www.minci.gob.ve/alocuciones/4/13788/primer_encuentro_con.html, p. 45.

> trates and courts, fulfill your obligation, it is for that that you are there and, if not, resign, so persons with courage [could] assume… He also warned that he will wait for "what must be performed be performed, and if what must occur does not occur in the corresponding levels [of government]" he himself would act against the Television Station. "I will have to act myself as I have done in other occasions facing the deficiencies and voids that we still have in some levels of the State."[114]

107. Another important aspect of the 2004 Organic Law of the Supreme Tribunal of Justice concerned dismissal of the Magistrates of the Supreme Tribunal. According to Article 265 of the 1999 Constitution, a Magistrate can be dismissed only by the vote of a qualified majority of two-thirds of the National Assembly, following a hearing, in cases of "grave faults" (*faltas graves*) committed by the accused, following a prior qualification by the Citizens Power. The Organic Law of the Supreme Tribunal of Justice defines "grave faults" very broadly, leaving open the possibility of dismissal

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[114] "Señora Fiscal, le hago un emplazamiento público para que usted, con sus fiscales, cumpla con su obligación ante el pueblo que para eso están allí. Señora presidenta del TSJ (Luisa Estella Morales), con todos los magistrados y tribunales, cumplan con su obligación que para eso están allí y, si no, renuncien y que gente con coraje asuma…" Seguidamente advirtió que esperará "que se cumpla lo que tiene que cumplirse y si no ocurriera lo que tiene que ocurrir en las instancias correspondientes" él mismo actuaría contra la televisora. "Voy tener que actuar yo mismo (&) como he tenido que hacerlo en algunas ocasiones ante las deficiencias y los vacíos que todavía tenemos en algunas instancias del Estado." See in *El Universal*, Caracas, May 29, 2009. See in http://www. eluniversal.com/2009/05/29/pol_art_chavez-exige-renunci_1409179.shtml. Nonetheless, regarding this direct threat from the Executive to other autonomous and independent branches of government, the Head of the General Prosecutor Office just replied: "The Constitution imposes to the President of the Republic the duty of guaranteeing the citizens' rights, consequently in order to fulfill that obligation he can perfectly summon the other representatives of branches of government, he can demand and summon all the citizens because he is oblige to fulfill that right, that guaranty that we the Venezuelans have". "La Constitución le impone al Presidente de la República la obligación de garantizar los derechos de los ciudadanos, en consecuencia para él cumplir con la obligación él puede emplazar perfectamente a los demás representantes de los poderes, puede exigir y emplazar al resto de los ciudadanos porque él está obligado a cumplir ese derecho esa garantía que tenemos los venezolanos." See in *El Universal*, Caracas May 29, 2009. See in www.eluniversal.com/2009/05/29/pol_ava_luisa-ortega-diaz-di_29a2355731. html

based exclusively on political motives.[115] Furthermore, the qualified two-thirds majority was required by the Constitution in order to avoid leaving the tenure of the Magistrates in the hands of a simple majority of Legislators. The Organic Law of the Supreme Tribunal of Justice circumvented this requirement by authorizing the dismissal of Magistrates by a simple majority vote that revokes the "administrative act of their appointment" (Article 23,4).[116] The National Assembly has already used its power to dismiss Magistrates who have ruled on sensitive issues against the Government's wishes.[117]

4. The subjection of the Venezuelan Judiciary to political control

108. As described above, the constitutional principles tending to assure the autonomy and independence of judges at all levels of the Judiciary are yet to be applied, particularly regarding the admission of candidates to the judicial career through "public competition" processes, with citizen participation in the procedure of selection and appointment, and regarding the prohibition of removal or suspension of judges except through disciplinary trials before a disciplinary courts and judges (Articles 254 and 267). In reality, since 1999 the Venezuelan Judiciary has been composed primarily of temporary and provisional judges, without career or stability, appointed without the public competition process of selection established in the Constitution, and dismissed without due process of law, for political reasons.[118]

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115 See Allan R. Brewer-Carías, *Ley Orgánica del Tribunal Supremo de Justicia*, Editorial Jurídica venezolana, Caracas 2004, p. 41.

116 *Id.,* pp. 39-41.

117 That was the fate of Franklin Arrieche, Vice-President of the Supreme Tribunal of Justice, who delivered a decision dated August 14, 2002, regarding the criminal proceedings against the military generals who acted on April 12, 2002. The decision ruled that there were no grounds to prosecute the generals because no military coup had taken place. This was also the fate of Alberto Martini Urdaneta, President of the Electoral Court, and Rafael Hernandez and Orlando Gravina, Judges of the same court who signed Decision N° 24 of March 15, 2004 (Case: *Julio Borges, Cesar Perez Vivas, Henry Ramos Allup, Jorge Sucre Castillo, Ramón Jose Medina and Gerardo Blyde vs. the National Electoral Council*), a ruling that suspended the effects of Resolution N° 040302-131 of the National Electoral Council dated March 2, 2004, which stopped the recall of the presidential referendum at that time.

118 See Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Venezuela*, OEA/Ser.L/V/II.118, doc. 4 rev. 2, December 29, 2003,

109. This reality amounts to political control of the Judiciary, as demonstrated by the dismissal of judges who have adopted decisions contrary to the policies of the governing political authorities. Another example will serve to illustrate this point. In summary, when a contentious-administrative court ruled against the government in a politically charged case, the government responded by intervening (taking over) the court and dismissing its judges and, after the Inter-American Court of Human Rights ruled that the dismissal had violated the American Convention of Human Rights and Venezuela's international obligations, the Constitutional Chamber upheld the government's argument that the decision of the Inter-American Court cannot be enforced in Venezuela.

110. On July 17, 2003, the Venezuelan National Federation of Doctors brought an *amparo* action in the First Court on Contentious-Administrative Matters in Caracas,[119] against the Mayor of Caracas, the Ministry of Health and the Caracas Metropolitan Board of Doctors (*Colegio de Médicos*). The petitioners asked for a declaration of the nullity of certain measures of the defendant Officials through which Cuban doctors were hired for a much publicized governmental health program in the Caracas slums, without complying with the legal requirements for foreign doctors to practice the medical profession in Venezuela. The National Federation of Doctors argued that, by allowing foreign doctors to exercise the medical profession without complying with applicable regulations, the program was discriminatory and violated the constitutional rights of Venezuelan doctors.[120] One month later, in August 21, 2003, the First Court issued a preliminary protective *amparo* measure, on the ground that there were sufficient elements to consider that the constitutional guaranty of equality before the law was being violated in the case. The Court ordered, in a preliminary way, the suspension of the Cuban doctors' hiring program and ordered the Metropolitan Board of Doctors to replace the Cuban doctors already hired with Venezuelan ones or for-

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par. 174, *available at* http://www.cidh.oas.org/countryrep/Venezuela2003eng/toc.htm.

[119] Contentious-administrative courts have competence to review administrative decisions.

[120] See Claudia Nikken, "El caso "Barrio Adentro: La Corte Primera de lo Contencioso Administrativo ante la Sala Constitucional del Tribunal Supremo de Justicia o el avocamiento como medio de amparo de derechos e intereses colectivos y difusos" in *Revista de Derecho Público No. 93-96*, Editorial Jurídica Venezolana, Caracas, 2003, pp. 5 ff.

eign doctors who had fulfilled the legal requirements to exercise the medical profession in the country.[121]

111. In response to that preliminary judicial *amparo* decision, the Minister of Health, the Mayor of Caracas, and even the President of the Republic made public statements to the effect that the decision was not going to be respected or enforced.[122] Following these statements, the government-controlled Constitutional Chamber of the Supreme Tribunal of Justice adopted a decision, without any appeal being filed, assuming jurisdiction over the case and annulling the preliminary *amparo* ordered by the First Court; a group of Secret Service police officials seized the First Court's premises; and the President of the Republic, among other expressions he used, publicly called the President of the First Court a "bandit."[123] A few weeks later, in response to the First Court's decision in an unrelated case challenging a local registrar's refusal to record a land sale, a Special Commission for the Intervention of the Judiciary, which in spite of being unconstitutional continued to exist, dismissed all five judges of the First Court.[124] In spite of the protests of all the Bar Associations of the country and also of the International Commission of Jurists;[125] the First Court remained suspended without judges, and its premises remained

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121 See Decision of August, 21 2003, in *id.,* pp. 445 ff.

122 The President of the Republic said: "*Váyanse con su decisión no sé para donde, la cumplirán ustedes en su casa si quieren* […]" (You can go with your decision, I don't know where; you will enforce it in your house if you want […]). See *El Universal,* Caracas, August 25, 2003, and *El Universal*, Caracas, August 28, 2003.

123 See Inter-American Court of Human Rights, *Apitz Barbera et al. (Corte Primera de lo Contencioso Administrativo) v. Venezuela* (Judgment of August 5, 2008), *available at* www.corteidh.or.cr, par. 239. See also, *El Universal,* Caracas, October 16, 2003; and *El Universal*, Caracas, September 22, 2003.

124 See *El Nacional*, Caracas, November 5, 2003, p. A2. The dismissed President of the First Court said: "*La justicia venezolana vive un momento tenebroso, pues el tribunal que constituye un último resquicio de esperanza ha sido clausurado.*" (The Venezuelan judiciary lives a dark moment, because the court that was a last glimmer of hope has been shut down.") *Id*. The Commission for the Intervention of the Judiciary had also massively dismissed almost all judges of the country without due disciplinary process, and had replaced them with provisionally appointed judges beholden to the ruling power.

125 See in *El Nacional*, Caracas, October 10, 2003, p. A-6; *El Nacional*, Caracas, October 15, 2003, p. A-2; *El Nacional*, Caracas, September 24, 2003, p. A-4; *and El Nacional*, Caracas, February 14, 2004, p. A-7.

closed for about nine months,[126]period during which simply no judicial review of administrative action could be sought in the country.[127]

112. The dismissed judges of the First Court brought a complaint to the Inter-American Commission of Human Rights for the government's unlawful removal of them and for violation of their constitutional rights. The Commission in turn brought the case, captioned *Apitz Barbera et al.* (*Corte Primera de lo Contencioso Administrativo vs. Venezuela*) before the Inter-American Court of Human Rights. On August 5, 2008, the Inter-American Court ruled that the Republic of Venezuela had violated the rights of the dismissed judges established in the American Convention of Human Rights, and ordered the State to pay them due compensation, to reinstate them to a similar position in the Judiciary, and to publish part of the decision in Venezuelan newspapers.[128] Nonetheless, on December 12, 2008, the Constitutional Chamber of the Supreme Tribunal issued Decision No. 1.939, declaring that the August 5, 2008 decision of the Inter-American Court of Human Rights was non-enforceable (*inejecutable*) in Venezuela. The Constitutional Chamber also accused the Inter-American Court of having usurped powers of the Supreme Tribunal of Justice, and asked the Executive Branch to denounce the American Convention of Human Rights.[129]

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[126] See *El Nacional*, Caracas, October 24, 2003, p. A-2; and *El Nacional*, Caracas, July 16, 2004, p. A-6.

[127] See *generally* Allan R. Brewer-Carías, "La progresiva y sistemática demolición institucional de la autonomía e independencia del Poder Judicial en Venezuela 1999–2004" in *XXX Jornadas J.M Domínguez Escovar, Estado de derecho, Administración de justicia y derechos humanos,* Instituto de Estudios Jurídicos del Estado Lara, Barquisimeto, 2005, pp. 33–174; Allan R. Brewer-Carías, "La justicia sometida al poder (La ausencia de independencia y autonomía de los jueces en Venezuela por la interminable emergencia del Poder Judicial (1999-2006))" in *Cuestiones Internacionales. Anuario Jurídico Villanueva 2007,* Centro Universitario Villanueva, Marcial Pons, Madrid, 2007, pp. 25–57, *available at* www.allanbrewercarias.com, (Biblioteca Virtual, II.4. Artículos y Estudios No. 550, 2007) pp. 1-37.

[128] Inter-American Court of Human Rights, *Apitz Barbera et al. (Corte Primera de lo Contencioso Administrativo) v. Venezuela* (Judgment of August 5, 2008), *available at* www.corteidh.or.cr.

[129] Supreme Tribunal of Justice, Constitutional Chamber, Decision No. 1.939 of December 18, 2008 (Case: *Abogados Gustavo Álvarez Arias et al.*) (Exp. No. 08-1572).

113. The case just discussed, including in particular the *ad hoc* response of the Constitutional Chamber to the decision of the Inter-American Court of Human Rights, shows clearly the present subordination of the Venezuelan Judiciary to the policies, wishes and dictates of the President of the Republic.[130] The Constitutional Chamber has in fact become a most effective tool for the existing consolidation of power in the person of President Chávez.[131]

114. It is within the aforementioned context of subjection of the Judiciary to political control that, at the Government's request, the Constitutional Chamber purported to interpret Article 258 of the Constitution, which needed no interpretation, and went further, acting beyond the scope of its competence and contradicting its own prior decisions, and "interpreted" Article 22 of the 1999 Investment Law according to the Government's position, with an eye to the various international arbitration cases pending against the State at the time of the request.

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[130] This situation has been recently summarized by Teodoro Petkoff, editor and founder of *Tal Cual*, one of the important newspapers in Caracas, as follows: "Chavez controls all the political powers. More that 90% of the Parliament obey his commands; the Venezuelan Supreme Court, whose number were raised from 20 to 32 by the parliament to ensure an overwhelming officialist majority, has become an extension of the legal office of the Presidency… The Attorney General's Office, the Comptroller's Office and the Public Defender are all offices held by 'yes persons' absolutely obedient to the orders of the autocrat. In the National Electoral Council, four of five members are identified with the government. The Venezuelan Armed Forces are tightly controlled by Chávez. Therefore, form a conceptual point of view, the Venezuelan political system is autocratic. All political power is concentrated in the hands of the President. There is no real separation of Powers." See Teodoro Petkoff, "Election and Political Power. Challenges for the Opposition" in *Harvard Review of Latin America*, David Rockefeller Center for Latin American Studies, Harvard University, Fall 2008, pp. 12, *available at* http://www.drclas.harvard.edu/revista/articles/view/1125. See Allan R. Brewer-Carías, "Los problemas de la gobernabilidad democrática en Venezuela: el autoritarismo consttucional y la concentración y centralización del poder" in Diego Valadés (Coord.), *Gobernabilidad y Constitucionalismo en América Latina*, Universidad Nacional Autónoma de México, México 2005, pp. 73-96.

[131] In 2001, when approving more than 48 decree laws issued via delegate legislation, President Chávez stated: "*La ley soy yo. El Estado soy yo."* ("The law is me. The State is me.") See *El Universal,* Caracas December 4, 2001, pp. 1,1 and 2,1.

I declare that the foregoing reflects my true opinion on the questions addressed.

Executed this 26th of June, 2009.

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Allan R. Brewer-Carías

3.

ICSID Case No. ARB/07/30*: ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V., ConocoPhillips Gulf of Paria B.V., ConocoPhillips Company (Claimants) v. The Bolivarian Republic of Venezuela (Respondent)*

INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES

DECLARATION OF ALLAN R. BREWER-CARIAS

29 OCTOBER 2009

I, Allan R. Brewer-Carías, hereby declare that the following is true and correct:

1. I have been a member in good standing of the Venezuelan Federal District Bar since 1963. Since 1973, I have been a partner of Baumeister & Brewer, a law firm located at *Torre América, PH, Avenida Venezuela, Urbanización Bello Monte, Caracas 1050, Venezuela.* I specialize in public law, particularly constitutional, administrative, and public economic law, which includes mining and hydrocarbons law. Currently, I am a resident in the United States of America, in the city of New York, NY.

Qualifications

2. In 1962, I received my law degree from *Universidad Central de Venezuela* (Central University of Venezuela). I performed postgraduate studies in France, at the then University of Paris (1962-1963),

and in 1964 I received a Doctorate in Law (D. J.) from the Central University of Venezuela.

3. I have taught Administrative and Constitutional law in the Central University of Venezuela since 1963. During the academic years 1972-1974, I was Visiting Scholar at Cambridge University (Center of Latin American Studies), U.K., and during the academic year 1985-1986, I was a Professor at Cambridge University, where I held the *Simón Bolívar Chair,* teaching a course entitled *"Judicial Review in Comparative Law"* in the LL.M. Program of the Faculty of Law, while a Fellow of Trinity College. In 1990, I was an Associate Professor at the University of Paris II (Panthéon-Assas) in the 3º Cycle Course, where I taught a course entitled *"La Procedure Administrative Non Contentieuse en Droit Comparé"* (Principles of Administrative Procedure in Comparative Law). Since 1998, I have also taught in the Administrative Law Masters program at *El Rosario* University, and at *Externado de Colombia* University, both in Bogotá, Colombia, on the subject of *"Principios del Procedimiento Administrativo en América Latina"* (Principles of Administrative Procedure in Latin America), and of *"El Modelo Urbano de la Ciudad Colonial Hispanoamericana"* (The Urban Model of the Hispanic American Colonial Cities). In 1998, I gave a series of lectures at the University of París X (Nantèrre), the subject of which was entitled *"Droit économique au Vénézuéla"* (Economic Law in Venezuela) as an Invited Professor.

4. Between 2002 and 2004, I was a Visiting Scholar at Columbia University in the City of New York. In 2006, I was appointed Adjunct Professor of Law at Columbia University Law School, where I taught seminars on *Judicial Protection of Human Rights in Latin America* and *Constitutional Comparative Law Study on the Amparo Proceeding* during the Fall 2006 and Spring 2007 Semesters.

5. Since 1982, I have acted as Vice-President of the International Academy of Comparative Law, The Hague, and have been a Professor at the International Faculty for Teaching of Comparative Law of Strasbourg. I am a member of the Venezuelan Academy of Social and Political Sciences, and served as its President from 1997 to 1999. I am a member of the *Société de Legislation Comparée* (Society of Comparative Legislation) in Paris. In 1981, I was awarded the Venezuelan Social Sciences National Prize.

6. During the past decades, I have participated in numerous academic programs – including congresses, seminars and courses – giving lectures in universities and public institutions in Europe, the U.S. and Latin America on matters of public law.

7. I have published numerous books on matters of public law, in English, French and Spanish. These publications are identified in **Appendix A** to this Declaration.

8. From 1978 to 1987, I was Director of the Public Law Institute at the *Universidad Central de Venezuela* (Central University of Venezuela). During my tenure, I directed the Seminars on the Andean Pact Process of Economic Integration (since 1967) and on the Venezuelan Nationalization Process of the Oil Industry (since 1975). Since 1980, I have been the Editor and Director of the *Revista de Derecho Público* (Public Law Journal), Fundación Editorial Jurídica Venezolana, Caracas.

9. In 1999, I was elected Member of the *Asamblea Nacional Constituyente* (National Constituent Assembly) in Venezuela. Although I was an opposition member (one of only four, out of 131 Members), I contributed to the drafting of many provisions of The Constitution of the Bolivarian Republic of Venezuela (the ***1999 Constitution***). All my proposals and dissenting votes are collected in Allan R. Brewer-Carías, *Debate Constituyente (Aportes a la Asamblea Nacional Constituyente)*, 3 Vols., Fundación de Derecho Público, Editorial Jurídica Venezolana, Caracas 1999.

10. I am the author of numerous articles addressed to the functioning of the Constitutional Chamber of the Supreme Tribunal of Justice, matters of the judicial review system, the sovereign immunity of the State, and arbitration in public law and public contracts in Venezuela. Recent articles that warrant mention are identified in **Appendix B** to this Declaration.

Scope of the Opinion

11. This opinion is rendered in connection with ICSID Case No. ARB/07/30, which is being pursued by ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V., ConocoPhillips Gulf of Paria B.V. and ConocoPhillips Company (collectively, the ***Claimants***), against the Republic of Venezuela (the ***Respondent***). Freshfields Bruckhaus Deringer

US LLP, counsel to the Claimants, have asked me to render an opinion on the following issues:

- The meaning of Article 22 of the Decree Having the Rank and Force of Law on Promotion and Protection of Investments, Decree No. 356, Extraordinary Official Gazette No. 5,390, published October 22, 1999 (the ***Investment Law***)[1] and whether it contains the Republic of Venezuela's consent to submit disputes to international arbitration at the International Centre for Settlement of Investment Disputes (***ICSID***).
- The various efforts to obtain a judicial interpretation of Article 22 before the Constitutional Chamber and the Politico-Administrative Chamber of the Supreme Tribunal of Justice prior to 2008.
- The interpretation of Article 22 by the Constitutional Chamber of the Supreme Tribunal of Justice in Decision No. 1.541 of October 17, 2008 (the ***Venezeula Ruling***).
- A general description of the composition and functioning of the Supreme Tribunal of Justice under the 1999 Constitution.
- A general description of the situation of the Judiciary in Venezuela.
- The notions of "investment," "international investment," and "international investor" in the Investment Law.

12. As a practicing lawyer, specialized in constitutional and administrative law, I offer this declaration and opinion based on my experience and knowledge of Venezuelan law, accumulated during more than

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[1] **Exhibit C-1. In the Claimant's Request for Arbitration, the Investment Law has been named as "Foreign Investment Law."**

forty-five years of academic activity and practice of the legal profession, the latter mainly in Venezuela.

Documents Considered

13. For the purpose of this opinion, I have reviewed and considered the following documents:

a. The **Request for Arbitration** filed by the Claimants before the International Centre for Settlement of Investment Disputes (ICSID) on November 2, 2007, and its relevant exhibits, in particular, the Investment Law at **Exhibit C-1**;

b. The **Memorial** filed by the Claimants on September 16, 2008, and its relevant exhibits, legal authorities, witness statements and expert report;

c. The **Memorial of the Bolivarian Republic of Venezuela on Objections to Jurisdiction** filed on December 1, 2008 and its relevant exhibits (***Jurisdiction Objections***), including in particular:

- Decree No. 1.867 of July 11, 2002 on the Regulation of the Investment Law (*Official Gazette* No. 37.489 of July 22, 2002) (***Regulation***) (**Ex. RL-2**);

- Supreme Tribunal of Justice, Politico-Administrative Chamber, Decision No. 1.209 of June 20, 2001 (Case: *Hoteles Doral C.A. v. Corporación L. Hoteles C.A.*) (Exp. No. 2000-0775) (**Ex. RL-8**);

- Decision No. 00098 of January 29, 2002 (Case: *Banco Venezolano de Credito, S.A.C.A. v. Venezolana de Relojería, S.A. (Venrelosa) y Henrique Pfeffer C.A.*) (Exp. No. 2000-1255) (**Ex. RL-9**);

- Decision No. 00476 of March 25, 2003 (Case: *Consorcio Barr, S.A. v. Four Seasons Caracas, C.A.*) (Exp. No. 2003-0044) (**Ex. RL-10**);

- Decision No. 00038 of January 28, 2004 (Case: *Banco Venezolano de Crédito, S.A. Banco Universal*) (Exp. No. 2003-1296) (**Ex. RL-11**);

- Decision No. 291 of the Andean Community, Regime for the Common Treatment of Foreign Capital and Trademarks, Patents, Licensing Agreements and Royalties, dated March 21, 1991 (**Ex. RL-23**);

- Decree No. 2095 on the Regulation of the Regime for the Common Treatment of Foreign Capital and Trademarks, Patents, Licenses and Royalties (*Official Gazette* No 34.930 of March 25, 1992) (**Ex. RL-24**).

d. The **Legal Expert Opinion of Enrique Urdaneta Fontiveros** dated November 28, 2008;

e. Decision No. 1.541 of October 17, 2008 of the Supreme Tribunal of Justice, Constitutional Chamber, (*Official Gazette* No. 39.055 of November 10, 2008) (***Venezuela Ruling***) (exhibited at **CL-[x]** and **Ex. RL-21**);

f. The **Counter-Memorial of the Bolivarian Republic of Venezuela** dated July 27, 2009 and its relevant exhibits, expert reports and witness statements (***Counter-Memorial***); and

g. Such other documents, mentioned in this statement, as I have considered necessary for the purpose of rendering an opinion on the questions presented.

14. For the purposes of this opinion and to the extent here indicated, I rely on the accuracy of the statements of fact by the Claimants in their Request for Arbitration and Memorial.

Summary of Conclusions

15. Based on my analysis, I have reached the following conclusions:

a. I share the view that the interpretation and effects of Article 22 in relation to the ICSID Convention are properly governed by principles of international law. Nevertheless, I have been asked to address the issue from the point of view of Venezuelan law and this opinion is rendered from that standpoint.

b. Venezuelan rules of statutory interpretation lead to the conclusion that Article 22 of the Investment Law expresses a unilateral open offer of consent of the Republic of Venezuela to ICSID arbitration. This is the sense that appears from the meaning of the words used in their context and from the intention of the legislator. Notably, the language "shall be submitted to international arbitration" (*serán sometidas al arbitraje internacional*) is an expression of command that conveys the mandatory nature of Article 22. The provision "should it so provide" (*si así éste lo establece*) means that the command of Article 22 applies if the respective treaty or agreement (Article 22 refers to other treaties alongside the ICSID Convention) contains provisions establishing arbitration. This condition is satisfied by the ICSID Convention.[2]

c. The conclusion that Article 22 is a unilateral open offer of consent is confirmed by public statements and contemporaneous publications of the high-ranking official, Ambassador Werner Corrales-Leal, who was entrusted with directing the drafting of the Investment Law. It is also consistent with the Constitutional mandate in Article 258 of the 1999 Constitution to promote arbitration.

d. The interpretation of Article 22 proposed by the Republic of Venezuela, the Urdaneta Opinion, and the Venezuela Ruling is fundamentally flawed. It is incorrect to interpret "should it so provides" as a requirement that the State's consent be incorporated

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[2] While it is true that the phrase could be translated as "if it so establishes," for the purposes of this opinion, I have adopted the translation used in Article 22 of Claimants' **Exhibit C-1**.

in the ICSID Convention, because "so" cannot refer to a term ("consent") that is not used in the preceding sentence ("shall be submitted to international arbitration under the terms provided for in the respective treaty or agreement"). Moreover, interpreting "should it so provides" as an equivalent of "if the ICSID Convention provides consent" would turn this phrase into an impossible condition (a condition that cannot be fulfilled), depriving Article 22 of any meaningful effect.

e. The additional arguments offered by the Venezuela Ruling to support its conclusion that Article 22 cannot be interpreted as an expression of consent are legally unsound and inherently contradictory. Moreover, the conclusion of the Venezuelan Supreme Court in the Venezuela Ruling regarding Article 22 contrasts with a 2001 ruling of the same Constitutional Chamber on the constitutionality of Article 22, the reasoning of which presupposes that Article 22 is an expression of consent to ICSID arbitration.

f. The Venezuela Ruling is the product of a politically influenced judiciary that was called upon by the Attorney General of the Republic to bolster the Republic of Venezuela's position in pending ICSID cases. The Constitutional Chamber acted *ultra vires* when it undertook to interpret Article 22 of the Investment Law at the request of the Government of the Republic of Venezuela, because the Politico-Administrative Chamber has exclusive competence (*competencia*) to interpret statutes when deciding autonomous petitions for their interpretation. This is a conclusion that the same Constitutional Chamber endorsed in 2007 when it ruled that it had no competence to hear a petition for interpretation of Article 22 filed by three Venezuelan lawyers.

g. The Republic of Venezuela's proposed interpretation of the notions of "international investment" and "international investor" in the Investment Law is incorrect. Neither the Investment Law nor the Regulation require *direct* ownership or *direct* effective control of an international investment.

I. ARTICLE 22 OF THE INVESTMENT LAW AND CONSENT TO ICSID JURISDICTION

1. The origin and intent of the Investment Law

16. Article 22 of the Investment Law expresses the written consent of the Republic of Venezuela to ICSID arbitration as required by Article 25,1 of the ICSID Convention.[3] This consent is in the form of an open offer of arbitration (*oferta abierta de arbitraje*), which is subject to acceptance by the other party to a relevant dispute.[4] As discussed below, Article 22 reflects a pro-arbitration trend that had developed in Venezuela over the past few decades, which crystallized in Article 258 of the 1999 Constitution.

17. President Hugo Chávez was first elected in December 1998 and took office on February 2, 1999. The stated economic policy of the new government at that time included encouraging foreign investment in the country. In April 1999, at the request of the Executive, the Congress enacted an Enabling Law, authorizing the National Executive to "[e]nact provisions in order to promote the protection and promotion of national and foreign investments with the purpose of establishing a legal framework for investments and to give them greater legal security." (Article 1,4,f).[5] In the exercise of the legislative powers delegated by the Enabling Law, a few months later, the President of the Republic issued the Investment Law (October 3, 1999); and the Organic Law on the Promo-

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[3] For the reasons stated in this Section I, the conclusion to the contrary in the **Jurisdiction Objections** (¶¶5, 96, 125) and in the **Urdaneta Opinion** (¶¶12-16, 25) is incorrect.

[4] For a reference to the various forms of written consent by ICSID Contracting States, which include domestic legislation *see Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of other States* dated March 18, 1965 in 1 ICSID REPORTS 28, ¶24 ("[...] a host state might in its investment promotion legislation offer to submit disputes arising out of certain classes of investments to the jurisdiction of the Centre, and the investor might give his consent by accepting the offer in writing.")

[5] **Exhibit C-169**, Organic Law That Authorizes the President of the Republic to Decree Extraordinary Measures for Economic and Financial Matters Required for the Public Interest, *Official Gazette* No. 36,687 of April 26, 1999.

tion of Private Investments under the Concessions Regime (October 25, 1999).[6]

18. It is a matter of public knowledge that the Investment Law was drafted under the direction of the then Ambassador Werner Corrales-Leal, Head of the Permanent Representation of Venezuela before the World Trade Organization (WTO) and the United Nations entities headquartered in Geneva.[7] Ambassador Corrales, who since 1998 had had an important role in the formulation of Venezuelan policy toward investments, was entrusted with that task by the new Chávez administration. As Head of that Permanent Representation, Ambassador Corrales prepared reports and opinions for the Government.

19. One of those reports, dated April 1999 and written by Ambassador Corrales with Marta Rivera Colomina, an official at the Permanent Representation, contains ideas for the design of the legal regime of promotion and protection of investments in Venezuela.[8] The document explains that "a regime applicable to foreign investments, must leave open the possibility to resort to international arbitration, which today is accepted almost everywhere in the world, either by means of the mechanism provided for in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) or by means of the submission of the dispute to an international arbitrator or an *ad hoc* arbitral tribunal like the one proposed by UNCITRAL."[9] This view was made even more explicit in an article by the same authors, published

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6 Official Gazette, No. 5.394 Extra., October 25, 1999

7 See El

8 *See* **Exhibit C-[x]**, Werner Corrales-Leal and Marta Rivera Colomina, *Algunas ideas relativas al diseño de un régimen legal de promoción y protección de inversiones en Venezuela*, April 30, 1999, Document prepared at the request of the Minister of CORDIPLAN.

9 *Id., pp.* 10-11 ("[...] *un régimen aplicable a las inversiones extranj eras, debe dejar abierta la posibilidad de recurrir al arbitraje internacional, lo cual hoy es aceptado en casi todo el mundo, bien sea a través del mecanismo consagrado en la Convención sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de otros Estados (CIADI) o mediante el sometimiento de la disputa a un árbitro internacional o a un tribunal de arbitraje ad hoc como el que propone UNCITRAL."*)

shortly after the Investment Law came into effect. That article stated that "a regime applicable to foreign investments, must leave open the possibility to *unilaterally* resort to international arbitration, which today is accepted almost everywhere in the world, either by means of the mechanism provided for in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) or by means of the submission of the dispute to an international arbitrator or an *ad hoc* arbitral tribunal like the one proposed by UNCITRAL."[10] The reference to *unilateral* resort to international arbitration makes it clear that the person entrusted with drafting the Investment Law intended Article 22 to express the State's consent to ICSID arbitration, which is the only way the investor could have *unilateral* resort to such arbitration. Put differently, speaking of unilateral resort to arbitration in connection with the Investment Law presupposes that said law provides the State's consent that is necessary for the investor to have the right to unilaterally resort to arbitration.

The intention of Ambassador Corrales as a co-drafter of the Investment Law regarding the unilateral expression of consent for Arbitration of the Venezuelan State contained in Article 22 of the Law, was clarify by himself in a speach given in March 28, 2009, at a Conference organized in Caracas by the *Centro Empresarial de Conciliación y Arbitraje (CEDCA)* on "Investment Arbitration in Comparative Law," where he explained the following:

> "Today this forum is discussing whether article 22 of the official version of the Investments law really includes a unilateral or open offer of arbitration. As I stated at the beginning of my intervention I am not a lawyer but I am contributing to clarify the doubts on the vision with which I participated in the project with respect to which

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[10] *See* **Exhibit C-[--]**, Werner Corrales Leal and Marta Rivera Colomina, *Some Ideas About the New Regime of Promotion and Protection of Investments in Venezuela*, in THE WTO AS A NORMATIVE BODY: A CHALLENGE FOR VENEZUELA 165, 185 to 186 (2000) (emphasis added) ("[...] *un régimen aplicable a las inversiones extranjeras, debe dejar abierta la posibilidad de recurrir unilateralmente al arbitraje internacional, lo cual hoy es aceptado en casi todo elmundo, bien sea a través del mecanismo consagrado en la Convención sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de otros Estados (CIADI) o mediante el sometimiento de la disputa a un árbitro internacional o a un tribunal de arbitraje ad hoc como el que propone UNCITRAL.*")

there were no differences among the co-authors of the draft project. I am merely providing information which could be useful to evaluate the "drafters´ intention".

In my scope of competence at least, I can state the intention of offering the possibility of open unilateral arbitration and this can be verified in several articles on the matter which we published in international journals and which we also took to international congresses. I particularly recommend reading two successive articles published by me, one which we took to an investments congress in the Andean Community of Investors held in Lima in October or November 1998, and another one is a revised version of this first article which was published in a book compiled by Julia Barragán, entitled "The WTO as a regulatory space, a challenge for Venezuela", published by Velea in 1999. Referring to the protection of investors, after dealing with contributions to development, in the first article of 1998, it states more or less something like "the possibility to arbitration must be opened", and in the second article it states "the unilateral possibility of arbitration must be opened to foreign investors".

With this, I hope to leave sufficiently clear that my purpose as co-drafter was to offer in the broadest and most transparent manner the possibility of the investors resorting to international arbitration as a unilateral offer made by the Venezuelan state. And I add that whoever participates in public policies -including those who participate in the drafting or administration of a law or any legal policy instrument- must act with very clear objectives and be always respectful of the principles therein created. At that time we thought –as I continue to believe- that it was absolutely necessary for a public policy closely linked to promoting development such as the case of an investment policy, must aid in the investments acting in pro of development and we thought – as I think today that it is absolutely indispensable for legal instruments to protect the investments from the possibility that the justice system of the country receiving the investment not be independent, as is unfortunately the case we are seeing in Venezuela today."[11]

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[11] See in CEDCA, BUSINESS MAGAZINE (June 2009), Legal Report, Caracas 2009, pp. 77-82.

20. The Investment Law was sanctioned by the Government as evidence of its commitment to develop and promote private (foreign and domestic) investment in Venezuela, and was contemporaneous with the mandate in the 1999 Constitution to promote alternative mechanisms for dispute resolution, such as arbitration.[12] As we shall see, it was the Government's official policy at that time to offer resolution of disputes by arbitration as a means of promoting investment. The Urdaneta Opinion asserts that Article 22 is a non-binding "declaration of principles," and that at the time of the Investment Law the "prevailing culture in Venezuela" was "traditionally hostile to arbitration."[13] That is simply untrue. The prevailing culture and official policy at that time were to offer arbitration to investors in order to attract investments.

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12 *See*,i for instance, website of the Venezuelan Embassy in Switzerland, "*C*ONOZCA NUESTRO PAÍ S. INVERSIONES. ¿POR QUÉ INVERTIR EN VENEZUELA?" *available at* www.embavenezsuiza.com/inversiones.html, cached version recorded February 8, 2008 available at http://web.archive.org/web/20080205011315 /http://www.embavenezsuiza.com/inversiones.html (last visited October 25, 2009) (*"La política sobre tratamiento de la inversión privada en Venezuela se basa en la igualdad de trato y garantías de seguridad jurídica para inversionistas nacionales y extranjeros. Evidencias del compromiso del gobierno nacional para el fomento, protección y abaratamiento de las inversiones privadas en Venezuela son el Decreto Ley de Promoción y Protección de Inversiones [...] La política de promoción de inversiones es el reflejo de la programación constitucional en materia económica. La Constitución de 1999 prevé la inversión privada como instrumento de desarrollo, al tiempo que consagra expresamente principios de libre competencia; garantías del derecho de propiedad; favorecimiento de mecanismos alternativos de resolución de disputas, como el arbitraje, la conciliación y mediación; y la ya referida igualdad de tratamiento para inversiones nacionales y extranjeras [...]. "*) ("The policy on treatment of private investment in Venezuela is based on equal treatment and guaranties of legal security for national and foreign investors. Evidence of the national government's commitment to the promotion, protection and cost reduction of private investment in Venezuela are the Decree Law on the Promotion and Protection of Investments [...] The policy on the promotion of investments is a reflection of the constitutional program on economic matters. The 1999 Constitution provides that private investment is an instrument for development, and at the same time it provides expressly for the principles of free competition; guaranties of the right to property; favors alternative mechanisms of dispute resolution, such as arbitration, conciliation and mediation; and the already mentioned equality in treatment for national and foreign investments [...].)

13 **Urdaneta Opinion** at ¶18.

21. The supposed "hostility" to arbitration that the Urdaneta Opinion attributes to 1999 is premised on events that had occurred one hundred years earlier and had been long superseded. At the turn of the 20th Century, arbitration was rejected in Venezuela on matters of public law by application of the "Calvo Clause,"[14] and as a result of events of 1902 that gave rise in Venezuela to the "Drago Doctrine."[15] On matters of private law, even though binding arbitration had been authorized in the 19th Century in the civil procedure regulations as a means of alternative dispute resolution, the 1916 Code of Civil Procedure established arbitration only as a non-binding method of dispute resolution, that is, without making the arbitration agreement mandatory (Articles 502-522).

22. That attitude of suspicion or hostility to arbitration changed steadily from the middle of the 20th Century. After the 1961 Constitution adopted the principle of relative sovereign immunity (based on a similar provision contained in Article 108 of the 1947 Constitution), the insertion of binding arbitration clauses in public contracts became a generally ac-

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[14] The Calvo Clause had its origin in the work of Carlos Calvo, who formulated the doctrine in his book *Tratado de Derecho Internacional*, initially published in 1868, after studying the Franco-British intervention in Rio de la Plata and the French intervention in Mexico. The Calvo Clause was first adopted in Venezuela in the 1893 Constitution as a response to diplomatic claims brought by European countries against Venezuela as a consequence of contracts signed by the country and foreign citizens. *See* Tatiana B. de Maekelt, *Inmunidad de Jurisdicción de los Estados* in LIBRO HOMENAJE A JOSÉ MELICH ORSINI, Vol. 1, Caracas 1982, pp. 213 ff.; Allan R. Brewer-Carías, *Principios especiales y estipulaciones obligatorias en la contratación administrativa* in EL DERECHO ADMINISTRATIVO EN LATINOAMÉRICA, Vol. II, Ediciones Rosaristas, Colegio Mayor Nuestra Señora del Rosario, Bogotá 1986, pp. 345-378; Allan R. Brewer-Carías, *Algunos aspectos de la inmunidad jurisdiccional de los Estados y la cuestión de los actos de Estado (act of state) en la jurisprudencia norteamericana* in REVISTA DE DERECHO PÚBLICO Nº 24, Editorial Jurídica Venezolana, Caracas October-December 1985, pp. 29-42.

[15] The Drago Doctrine was conceived in 1902 by the then Argentinean Minister of Foreign Relations, Luis María Drago, who – in response to threats of military force made by Germany, Great Britain and Italy against Venezuela – formulated his thesis condemning the compulsory collection *of* public debts by the States. *See generally* Victorino Jiménez y Núñez, LA DOCTRINA DRAGO Y LA POLÍTICA INTERNACIONAL, Madrid 1927.

cepted practice, recognized as valid.[16] In addition, Venezuela ratified the 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards,[17] the 1975 Inter-American Convention on International Commercial Arbitration,[18] and the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).[19]

23. In 1986, the Code of Civil Procedure was amended to allow parties to make a binding agreement to submit controversies to arbitral tribunals, and to exclude the jurisdiction of ordinary courts (Articles 608-629). In addition, special statutes allowed for arbitration in areas related to copyright, insurance, consumer protection, labor, and agrarian reform.[20]

24. In 1995, Venezuela ratified the ICSID Convention[21] and, between 1993 and 1998, it signed many bilateral investment treaties providing for international arbitration.[22] In 1998, Venezuela adopted the Com-

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16 *See* Alfredo Morles, *La inmunidad de Jurisdicción y las operaciones de Crédito Público* in ESTUDIOS SOBRE LA CONSTITUCIÓN, LIBRO HOMENAJE A RAFAEL *Caldera*, Vol. III, Caracas, 1979, pp. 1.701 ff; Allan R. Brewer-Carías, CONTRATOS ADMINISTRATIVOS, Editorial Jurídica Venezolana, Caracas 1992, pp. 262-265. The same provision established in the 1961 Constitution was incorporated in the 1999 Constitution. *See* Beatrice Sansó de Ramírez, *La inmunidad de jurisdicción en el Artículo 151 de la Constitución de 1999* in LIBRO HOMENAJE A ENRIQUE TEJERA PARÍS, TEMAS SOBRE LA CONSTITUCIÓN DE 1999, CENTRO DE INVESTIGACIONES JURÍDICAS (CEIN), Caracas 2001, pp. 333-368.

17 *Official Gazette* No. 33.144 of January 15, 1985.

18 *Official Gazette* No. 33.170 of February 22, 1985.

19 *Official Gazette* (Extra) No. 4832 of December 29, 1994. For an account of international instruments relevant to Venezuela's recognition of international arbitration, *see Venezuela* Ruling, **Exhibit C-[x]**, pp. 13-14.

20 *See* laws *listed* in Francisco Hung Vaillant, REFLEXIONES SOBRE EL ARBITRAJE EN EL SISTEMA VENEZOLANO, Caracas, 2001, pp. 90-101; Paolo Longo F., ARBITRAJE Y SISTEMA CONSTITUCIONAL DE JUSTICIA, Editorial Frónesis S.A., Caracas, 2004, pp. 53-77; and Venezuela Ruling, **Exhibit C-[x]**, pp. 12-13.

21 *Official Gazette* No. 35.685 of April 3, 1995.

22 *See* list of Venezuelan bilateral treaties on the promotion and protection of investments at Venezuelan Ministry of for Foreign Relations *available at* http://www.mre.gov.ve/metadot/index.pl?id=4617;isa=Category;op=show; ICSID Database of Bilateral Investment Treaties available at http://icsid.worldbank.org/

mercial Arbitration Law,[23] which is based on the Model Law on International Commercial Arbitration of UNCITRAL.[24]

25. In August 1999, the Supreme Court of Justice dismissed a challenge to the constitutionality of the parliamentary act (*Acuerdo*) that authorized the Framework of Conditions for the "Association Agreements for the Exploration at Risk of New Areas and the Production of Hydrocarbons under the Shared-Profit Scheme" ("*Convenios de Asociación Para la Exploración a Riesgo de Nuevas Areas y la Producción de Hidrocarburos Bajo el Esquema de Ganancias Compartidas*"), dated July 4, 1995.[25] The Supreme Court of Justice held that the Congressional authorization and, in particular, the inclusion of arbitration clauses in public law contracts, were valid under the 1961 Constitution in force at the time.[26]

ICSID/FrontServlet; UNCTAD, Investment Instruments On-line Database, Venezuela Country-List of BITs as of June 2008 available at http://www.unctad.org/Templates/Page.asp?intItemID=2344&lang=1. *See also*, José Antonio Muci Borjas, EL DERECHO ADMINISTRATIVO GLOBAL Y LOS TRATADOS BILATERALES DE INVERSIÓN (BITS), Caracas 2007, pp. 101-102; Tatiana B. de Maekelt, *Arbitraje Comercial Internacional en el sistema venezolano* in Allan R. Brewer-Carías (Editor), SEMINARIO SOBRE LA LEY DE ARBITRAJE COMERCIAL, Academia de Ciencias Políticas y Sociales, Caracas 1999, pp. 282-283; Francisco Hung Vaillant, REFLEXIONES SOBRE EL ARBITRAJE EN EL SISTEMA VENEZOLANO, Caracas 2001, pp. 104-105; and Venezuela Ruling, **Exhibit C-[x]**, pp. 13-14.

23 *Official Gazette* No. 36.430 of April 7, 1998.

24 *See generally* Arístides Rengel Romberg, *El arbitraje comercial en el Código de Procedimiento Civil y en la nueva Ley de Arbitraje Comercial* (1998) in Allan R. Brewer-Carías (Editor), SEMINARIO SOBRE LA LEY DE ARBITRAJE COMERCIAL, Academia de Ciencias Políticas y Sociales, Caracas 1999, pp. 47 ff.

25 **Exhibit C-18** (Spanish) and **Exhibit C-18A** (English) *Official Gazette* No. 35.754 *of* July 17, 1995.

26 **Exhibit C-100**, *La Corte Suprema de Justicia, En Sala Plena Accidental* (The Supreme Court of Justice, in Temporary Plenary Session), Expediente Nº 812-829, August 17, 1999. I acted as counsel to PdVSA in that proceeding, defending the constitutionality of that Acuerdo. The Constitutional *Chamber* of the Supreme Tribunal of Justice recently confirmed the ruling made under the 1961 Constitution, holding that Article 151 of the 1999 Constitution allows the incorporation of arbitration provisions in contracts of "public interest" (*interés público*). *See* Venezuela Ruling, **Exhibit C-[x]**, p. 23.

26. Finally, at the time that the Investment Law was adopted through a Decree Law (October 1999), the National Constituent Assembly was drafting the 1999 Constitution (September-November 1999).[27] The 1999 Constitution incorporates arbitration as an alternative means of adjudication and as a component of the judicial system (Article 253).[28] The Constitution not only embraces arbitration; it requires the State to promote it,[29] in particular through legislation (Article 258).[30]

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[27] As previously stated, I was a Member of the National Constituent Assembly in 1999. In that capacity, I contributed to the drafting of the 1999 Constitution, *and* in particular of Article 151, which establishes the possibility for arbitration in public contracts.

[28] 1999 Constitution, **Article 253**. ("***Artículo 253***. *La potestad de administrar justicia emana de los ciudadanos o ciudadanas y se imparte en nombre de la República por autoridad de la ley. / Corresponde a los órganos del Poder Judicial conocer de las causas y asuntos de su competencia mediante los procedimientos que determinen las leyes, y ejecutar o hacer ejecutar sus sentencias. / El sistema de justicia está constituido por el Tribunal Supremo de Justicia, los demás tribunales que determine la ley, el Ministerio Público, la Defensoría Pública, los órganos de investigación penal, los o las auxiliares y funcionarios o funcionarias de justicia, el sistema penitenciario, los medios alternativos de justicia, los ciudadanos que participan en la administración de justicia conforme a la ley y los abogados autorizados para el ejercicio*.") ("**Article 253**. The authority to administer justice emanates from the citizens and is granted in the name of the Republic by authority of law. / It corresponds to the organs of the Judicial Power to take cognizance of suits and matters of their competence through the procedures that the laws determine, as well as to enforce their decisions or to have them enforced. / The system of justice is constituted by the Supreme Tribunal of Justice, the other courts that the law determines, the Public Ministry, the Public Ombudsman, the organs of criminal investigation, the auxiliaries or officials of justice, the penitentiary system, the alternative means of justice, the citizens who participate in the administration of justice in accordance with the law and the lawyers authorized for practice.")

[29] 1999 Constitution, Article 258 ("***Artículo 258***. *[...] La ley promoverá el arbitraje, la conciliación, la mediación y cualesquiera otros medios alternativos para la solución de conflictos*. ") ("**Article 258**. [...] The law shall promote arbitration, conciliation, mediation and any other alternative means of dispute resolution."). Article 258 appeared with similar language in the October 12, 1999 Pre-Draft of the Constitution (Article 292). *See Constitutional Convention Gazette, Book of Debates*, Printing House of the Congress of the Republic of Venezuela, October-November 1999, Session No. 21, p. 1 ff. and Session No. 37, p. 15 ff.

27. These milestones show that in 1999 there was no prevailing culture of hostility to arbitration. On the contrary, the 1999 Constitution, the legal system as a whole, and the international instruments to which Venezuela was a party embraced and promoted arbitration.[31]

2. The text and structure of Article 22 of the Investment Law

28. In accord with the policy defined by the State in 1999 to promote and protect international investments, Article 22 expressed the consent of the Venezuelan State to submit to international arbitration controversies regarding international investment. The article provides as follows:

> Article 22. Disputes arising between an international investor whose country of origin has in effect a treaty or agreement for the promotion and protection of investments with Venezuela, or any disputes to which apply the provisions of the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA) or the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID), shall be submitted to international arbitration under the terms provided for in the respective treaty or agreement, should it so provide, without prejudice to the possibility of using, when applicable, the systems of litigation provided for in the Venezuelan laws in force.[32]

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30 The promotion of arbitration is an obligation of all organs of the State. *See* Venezuela Ruling, **Exhibit C-[x]**, pp. 9-11. On the recognition of arbitration as an alternative means of adjudication by the 1999 Constitution, *see generally* Paolo Longo F., ARBITRAJE Y SISTEMA CONSTITUCIONAL DE JUSTICIA, Editorial Frónesis S.A., Caracas, 2004; Supreme Tribunal of Justice, Constitutional Chamber, Decision No. 186 of February 14, 2001 (Case: Constitutional Challenge of Articles 17, 22 and 23 of the Investment Law).

31 ICSID arbitration continued to be incorporated in the bilateral treaties for promotion and protection of investments signed and ratified after 1999. *See* Venezuela-France Bilateral Investment Treaty in *Official Gazette* No. 37.896 of *March* 11, 2004 (**Exhibit C-[x]**).

32 **Exhibit C-1**, Investment Law, Article 22 (emphasis added). The original text in Spanish is as follows: "*Artículo 22*. *Las controversias que surjan entre un inversionista internacional, cuyo país de origen tenga vigente con Venezuela un tratado o acuerdo sobre promoción y protección de inversiones, o las controversias respecto de las cuales sean aplicables las disposiciones del*

29. This article is a compound provision that contains three parts: the first one, concerning bilateral or multilateral treaties or agreements on the promotion and protection of investments; the second one, dealing with the MIGA Convention; and the last one, dealing with the ICSID Convention. Because Article 22 addresses three different sets of treaties or agreements, it is hardly surprising that it does not follow any particular model or pattern of national legislation which address only consent to ICSID jurisdiction.

30. This is one reason why it makes no sense for the Jurisdiction Objections and the Urdaneta Opinion to draw inferences from a comparison between Article 22 and expressions of consent to ICSID arbitration in other national laws or in the ICSID "model" clauses, designed to provide consent only to ICSID jurisdiction.[33] Article 22 must be interpreted not by reference to any pattern or model, but in accordance with its own structure and terms, taking into account its compound nature.

Convenio Constitutivo del Organismo Multilateral de Garantía de Inversiones (OMGI – MIGA) o del Convenio sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de Otros Estados (CIADI), serán sometidas al arbitraje internacional en los términos del respectivo tratado o acuerdo, si así éste lo establece, sin perjuicio de la posibilidad de hacer uso, cuando proceda, de las vías contenciosas contempladas en la legislación venezolana vigente." In my opinión, Article 22 can also be translated as follows: "Article 22. Controversies that may arise between an international investor, whose country of origin has in effect with Venezuela a treaty or agreement on the promotion and protection of investments, or controversies in respect of which the provisions of the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA) or the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID) are applicable, shall be submitted to international arbitration according to the terms of the respective treaty or agreement, if it so establishes, without prejudice to the possibility of using, as appropriate, the contentious means contemplated by the Venezuelan legislation in effect."

33 **Jurisdiction Objections** (¶¶97-119; 120-125); **Urdaneta Opinion** (¶16). *See also*, Venezuela Ruling (**Exhibit C-[x]** at pp. 42-44).

3. The rules of interpretation of statutes under Venezuelan Law

31. Article 22 is an instrument of national law that purports to express consent to international arbitration by reference to international treaties and agreements. In my opinion, the interpretation and effects of Article 22 in relation to the ICSID Convention are properly governed by principles of international law. Without prejudice to the foregoing, I have been asked to analyze Article 22 from the standpoint of Venezuelan Law and I proceed to do so.

32. In Venezuela, the main rules on statutory interpretation are set forth in Article 4 of the Civil Code. This article provides that the interpreter must attribute to the law "the sense that appears evident from the *proper meaning of the words*, according to *their connection* among themselves and the *intention of the Legislator*." The article goes on to state that, "when there is no precise provision of the Law, the provisions regulating similar cases or analogous matters shall be taken into account; and should doubts persist, general principles of law shall be applied."[34]

33. In Decision No. 895 of July 30, 2008, the Politico-Administrative Chamber of the Supreme Tribunal of Justice referred to four relevant elements to be taken into account in the interpretation of legal provisions.[35] The first element is the **literal, grammatical or philological** one, which must always be the starting point of any interpretation. The second element of interpretation is the **logical, rational or reasonable** one, which aims at determining the *raison d'être* of the provision within the legal order. The third element is the **historical** one, through which a legal provision is to be analyzed in the context of the factual and

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[34] **CL-[x]**, Civil Code, Article 4 (emphasis added). ("*Artículo 4: A la Ley debe atribuírsele el sentido que aparece evidente del significado propio de las palabras, según la conexión de ellas entre sí y la intención del legislador. Cuando no hubiere disposición precisa de la Ley, se tendrán en consideración las disposiciones que regulan casos semejantes o materias análogas; y, si hubiere todavía dudas, se aplicarán los principios generales del derecho*.")

[35] REVISTA DE DERECHO PÚBLICO, No 115, Editorial Jurídica Venezolana, Caracas *2008*, pp. 468 ff.

legal situation at the time it was adopted or amended and in light of its historical evolution. The fourth element is the **systematic** one, which requires the interpreter to analyze the provision as an integral part of the relevant system. The Politico-Administrative Chamber noted that interpretation is not a matter of choosing among the four elements, but of applying them together, even if not all of the elements are of equal importance. In addition, the Supreme Tribunal of Justice has identified two other elements of interpretation: the **teleological** one – that is, the need to identify and understand the social goals or aims that led to the law being adopted – and the **sociological** one, which helps to understand the provision within the context of the social, economical, political and cultural reality where the text is going to be applied.[36]

34. From the standpoint of Venezuelan law, only the principles that govern the *interpretation of statutes* may have some bearing on the interpretation of Article 22. The Respondent's reliance on certain decisions of the Politico-Administrative Chamber of the Supreme Tribunal of Justice is misplaced,[37] because those decisions deal with alleged substantive requirements for the validity of bilateral expressions of consent to arbitration (*cláusula compromisoria*) in the internal legal order. There is a basic conceptual distinction between Venezuelan principles of statutory interpretation and alleged substantive requirements for the validity or enforceability of a contractual agreement to arbitrate under the domestic legal order. The latter have no application in a case like this, where the matter at stake is whether the State's expression of consent embodied in a statute meets the requirements of an international treaty (the ICSID Con-

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[36] *Id*.

[37] **Jurisdiction Objections** (¶88) and **Urdaneta Opinion** (¶17, footnote 13) (citing *Politico*- Administrative Chamber of the Supreme Tribunal of Justice, Decision No. 1209 of June 20, 2001 (Case: *Hoteles Doral C.A. v. Corporación L. Hoteles C.A*) (Exp. No. 2000-0775) (**Ex. RL-8**); Decision No. 00098 of January 29, 2002 (Case: *Banco Venezolano de Credito, S.A.C.A. v. Venezolana de Relojeria, S.A. (Venrelosa) y Henrique Pfeffer C.A*) (Exp. No. 2000-125 5) (**Ex. RL-9**); Decision N° 00476 of March 25, 2003 (Case: *Consorcio Barr, S.A v. Four Seasons Caracas, C.A.*) (Exp. No. 2003-0044) (**Ex. RL-10**); Decision N° 00038 of January 28, 2004 (Case: *Banco Venezolano de Crédito, S.A. Banco Universal*) (Exp. No. 2003-1296) (**Ex. RL-11**)).

vention) to set in motion the jurisdiction of international tribunals operating under that treaty.[38]

35. Moreover, the underlying circumstances of those cases – which the Respondent fails to discuss – differ from the present case. In all of those proceedings, the Politico- Administrative Chamber was called upon to resolve a conflict of jurisdiction between the ordinary courts and arbitral tribunals, arising out of the parties' disagreement over the dispute resolution mechanism agreed in the underlying contract. The plaintiffs filed suit in a domestic court and the defendant applied to have it removed to arbitration. In the final analysis the decisive question for the Politico-Administrative Chamber was whether the parties had unequivocally chosen a single mechanism of dispute resolution in their contracts, entirely ousting or waiving the option to resort to the jurisdiction of the ordinary courts. In *Hoteles Doral C.A. v. Corporación de L 'Hoteles C.A.* (**Ex. RL-8**), *Banco Venezolano de Crédito v. Venrelosa et al.* (**Ex. RL-9**), and *Consorcio Barr v. Four Seasons Caracas* (**Ex. RL-10**), the Politico-

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[38] It should also be *noted* that the Urdaneta Opinion's reliance on Professor Hung Vaillant's publication (**Urdaneta Opinion**, ¶17, footnote 14) is also misleading. Instead of subscribing to an alleged stringent Venezuelan law standard of "clear" and "unequivocal" language, Professor Vaillant states that, according to the pro-arbitration principle in Article 258 of the Constitution, "[...] *se debe tratar de sostener la validez en to- dos aquellos casos de duda, siempre que tal admission no conduzca a una violación de normas de orden público ni atente contra las buenas costumbres. En resumen, en caso de duda, se deberá pronunciar a favor de la existencia del Arbitraje.* [...]*"* ("[...] one should try to sustain its validity [of Arbitration] in all those cases of doubt, as long as such admission does not lead to a violation of norms of public order or impairs good customs. In sum, in case of doubt, one should pronounce in favor of the existence of Arbitration. [...]"). Francisco Hung Vaillant, REFLEXIONES SOBRE EL ARBITRAJE EN EL SISTEMA VENEZOLANO, Caracas 2001, p. 66. Professor Vaillant makes this statement in the context of discussing the general principles that govern arbitration under Venezuelan Law, a section that Professor Urdaneta omits. *See id*. pp. 63-69. In that section, Professor Vaillant addresses those principles that should serve to "*establecer la solución adecuada cada vez que existe una antinomia o una laguna legal; así como también en aquellos casos en los cuales es necesario interpretar un texto oscuro de una cláusula o de un pacto arbitral.*" ("to provide for an adequate solution each time that there is an antinomy or a legal gap; as well as in those cases in which it is necessary to interpret an obscure text of an arbitration clause or of an arbitration agreement"). *Id*. p. 63.

Administrative Chamber ultimately concluded that, although the contract provided for arbitration as an option that the parties could choose, it had also left recourse to local courts as an open option for either party (**Ex. RL-8** and **RL-10**), or precisely to the party who had chosen to resort to court (**Ex. RL-9**).

36. As the language of Article 22 contains no option for the Republic of Venezuela to resort to court, the premise of those decisions is not present in this case. Article 22 does not preclude resort to "the systems of litigation provided for in the Venezuelan laws in force," but that is an option only for the investor, because the Republic of Venezuela has already expressed its unilateral consent to arbitration. The very purpose of arbitration provisions is to give the investor the option to resort to arbitration instead of being required to litigate the dispute in the courts of the host-State.

37. Article 23 of the Investment Law gives **the investor** the possibility of submitting disputes regarding the application of the Investment Law to a domestic court or a local arbitral tribunal, but again, the option is only for the investor. Accordingly, the Republic of Venezuela's expression of consent to arbitration remains unaffected by those options.

38. The decision in *Banco Venezolano de Crédito S.A., Banco Universal v. Armando Diaz Egui et al.* (**Ex. RL-11**) turns on an issue entirely irrelevant to this arbitration. In that case, the Politico-Administrative Chamber held that the arbitration provision at issue established that in enforcement actions (*ejecución de garantías*) as the one at issue in that case, arbitration applied "only in cases where there is opposition from the defendants." The Chamber refused to remove the case to arbitration on the ground that the defendant had failed to allege the existence and effectiveness of an arbitration agreement as a preliminary objection at the first procedural opportunity it had in the proceeding.

4. Analysis of Article 22 of the Investment Law

39. The portion of Article 22 referring to the ICSID Convention provides that "[...] any disputes to which apply the provisions of […] the Convention on the Sttlement of Investment Disputes between the States and Nationals of other States (ICSID), shall be submitted to international arbitration under the terms provided for in the respective treaty of agree-

ment, should it so provide [...].”[39] As discussed below, when this text is interpreted according to the rules of interpretation set forth in Article 4 of the Civil Code, the sense that evidently appears from the proper meaning of the words used, in accordance with their connection and with the intention of the legislator is the following: Article 22 states the unilateral consent of the Republic of Venezuela to the submission of disputes to ICSID arbitration, leaving to qualified investors the decision whether to give their own consent or to resort to the Venezuelan courts.[40]

40. In the Spanish phrase “*serán sometidas a arbitraje internacional*” (shall be submitted to international arbitration), the tense of the verb indicates that it is an expression of command. The phrase conveys the sense that international arbitration of disputes is a mandatory system, in the sense that, once properly invoked by the other party to a dispute, the Republic of Venezuela has a **duty or obligation to comply** with the applicable procedural rules and **to abide** by the decision of the arbitral tribunal. In this regard, the English translation “shall be submitted” for “*serán sometidas*,” which is common ground between the parties, shows that the translators correctly understood the Spanish original as conveying the mandatory sense just described.[41] Consequently, the text of this pro-

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39 (Emphasis added) (“[...] *las controversias respecto de las cuales sean aplicables las disposiciones del ... Convenio sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de Otros Estados (CIADI), serán sometidas al arbitraje internacional en los términos del respectivo tratado o acuerdo, si así éste lo establece*.”)

40 I expressed the same opinion more than four years ago in an article written for a seminar organized by the Venezuelan Academy of Political and Social Sciences and the Venezuelan Arbitration Committee. *See* Allan R. Brewer-Carías, *Algunos comentarios a la Ley de promoción y protección de Inversiones: contratos públicos y jurisdicción* in Irene Valera (Coordinadora), ARBITRAJE COMERCIAL INTERNO E INTERNACIONAL. REFLEXIONES TEÓRICAS Y EXPERIENCIAS PRÁCTICAS, Academia de Ciencias Políticas y Sociales, Comité Venezolano de Arbitraje, *Caracas* 2005, pp. 286-287; also published in ESTUDIOS DE DERECHO ADMINISTRATIVO 2005-2007, Editorial Jurídica Venezolana, Caracas 2007, pp. 453-462; also *available at* www.allanbrewercarias.com, (Biblioteca Virtual, II.4. Artículos y Estudios No. 473, 2005) pp. 7-9.

41 “**Shall** can express (A) the subject’s *intention to perform a certain action* or cause it to be performed, and (B) *a command*.” The use of **shall** to *express a command* “is chiefly used in regulations or legal documents. In less formal English **must** or **are to** would be used instead of **shall** in the above sentences.”

vision ("*shall be submitted to international arbitration*") is a **unilateral express statement of consent to ICSID arbitration freely given in advance by the Republic of Venezuela**.[42] As discussed below, none of the other aspects of the text or the other elements of interpretation leads to a different conclusion.

41. The mandate to submit disputes to ICSID arbitration refers to "disputes to which apply the provisions of the [ICSID Convention]." As an initial observation, the term "disputes" appears for a second time in Article 22, in parallel to the first reference to "disputes" between an international investor whose country of origin has in effect a treaty or agreement for the promotion and protection of investments and the Republic of Venezuela. Grammatically, this duplicate and parallel reference indicates that the second category of "disputes" related to the ICSID Convention is not necessarily subsumed within the first category of "disputes" related to investment treaties or agreements. Therefore, when Article 22 refers to the "disputes" related to the ICSID Convention no reference is made to "international investor," as this term is defined in the Investment Law.

42. The second category of "disputes" comprises those in respect of which the provisions of the ICSID Convention are applicable. According to Article 25,1 of the ICSID Convention, ICSID jurisdiction "shall extend to any legal dispute arising directly out of an investment, between a Contracting State [...] and a national of another Contracting State, which

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See A. J. Thomson and A. V. Martinet, A PRACTICAL ENGLISH GRAMMAR, Fourth Edition, Oxford University Press 2001, pp. 208, 246.

42 In the same sense, *see e.g*., Gabriela Álvarez Ávila, *Las características del arbitraje del CIADI* in ANUARIO MEXICANO DE DERECHO INTERNACIONAL, Vol. II, Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de *México*, UNAM, México 2002, pp. 4-5, 17 footnote 23, *available at* http://juridicas.unam.mx/publica/rev/derint/cont/2/cm/ (last consulted on December 4, 2007); **CL-1**, Eugenio Hernández Bretón, *Protección de inversiones en Venezuela* in REVISTA DECITA, DERECHO DEL COMERCIO INTERNACIONAL, TEMAS DE ACTUALIDAD, (INVERSIONES EXTRANJ ERAS), No 3, Zavalía, 2005, pp. 283-284; José Antonio Muci Borjas, EL DERECHO ADMINISTRATIVO GLOBAL Y LOS TRATADOS BILATERALES DE INVERSIÓN (BITS), Caracas 2007, pp. 214-215; José Gregorio Torrealba R, PROMOCIÓN Y PROTECCIÓN DE LAS INVERSIONES EXTRANJ ERAS EN VENEZUELA, Funeda, Caracas 2008. pp. 56-58, 125-127.

the parties to the dispute consent in writing to submit to the Centre." As the ICSID Convention does not itself supply consent, it is unreasonable to interpret Article 22, which expressly provides that disputes shall be submitted to arbitration, as looking to the ICSID Convention to supply the consent that Article 22 itself purports to supply. Consequently, the only way to give effect to the mandate in Article 22 that disputes "shall be submitted" to ICSID arbitration is to interpret the phrase "disputes to which apply the provisions of the [ICSID Convention]" as referring to any disputes that meet all the requirements for ICSID jurisdiction **other than consent**, which is supplied by Article 22 itself. Any other interpretation would render this portion of Article 22 circular and would deprive it of any effect, in violation of the principle of effective interpretation or *effect utile*.

43. The portion of Article 22 referring to the ICSID Convention ends with the phrase "should it so provide" ("*si así éste lo establece "*) (translated by Respondent as "if it so provides"[43]). This phrase, interpreted according to the sense that **evidently appears from the proper meaning of the words** used, in accordance with **their connection** among themselves and with the **intention of the Legislator,** refers to the need for the "respective treaty or agreement" **to contain provisions establishing international arbitration** in order for the preceding express command (shall be submitted) to be capable of being executed. As the ICSID Convention paradigmatically establishes a system of international arbitration for the settlement of investment disputes, the condition "should it so provide" is clearly satisfied in the case of the portion of Article 22 that refers to the ICSID Convention. As we shall see, the phrase "should it so provide" refers primarily to the possibility that treaties or agreements for the promotion and protection of investments might not provide for international arbitration of disputes to which they apply.

44. As already mentioned, Article 22 is a compound provision that combines three rules concerning three different kinds of international instruments: first, treaties or agreements on the promotion and protection of investments; second, the MIGA Convention; and third, the ICSID Convention. Although the phrase "should it so provide" applies to each of the three rules, the condition that it embodies (that the treaty or agreement

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[43] **Jurisdiction Objections** at ¶78.

establish international arbitration) is satisfied in the case of the ICSID and MIGA Conventions,[44] which clearly provide for arbitration, and is also satisfied in the case of those treaties or agreements for the promotion and protection of investments that do provide for international arbitration.[45] On the contrary, the condition is not satisfied in the case of treaties or agreements for the promotion and protection of investments that do not provide for international arbitration of disputes between the host State and foreign investors. Accordingly, "should it so provide" (if it so establishes) reflects a contingency only in the case of treaties or agreements for the promotion and protection of investments, which may or may not provide for international arbitration of such disputes.

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[44] The MIGA Convention contemplates two kinds of disputes: (a) disputes between the Agency and a Member country (Article 57), which shall be settled in accordance with the procedures set out in Annex II to the Convention and (b) disputes involving MIGA and a holder of a guarantee or *reinsurance* (Article 58), which shall be submitted to arbitration in accordance with such rules as shall be provided for or referred to in the contract of guarantee or reinsurance. *See* **Exhibit CL-[x]**. Article 22 of the Investment Law can refer only to disputes of the first kind (those that could arise between MIGA and a Member State), because disputes of the second type do not involve the Venezuelan State or any other Venezuelan instrumentality. In the case of disputes that could arise between MIGA and a Member State, Annex II of the Convention provides a procedure for settlement that calls for negotiation followed by arbitration, with conciliation as a permissible alternative. According to Article 57(b)(ii) of the MIGA Convention, this procedure may be superseded by an agreement between the State and MIGA concerning an alternative method for the settlement of such disputes, but such an agreement must be based on Annex II, which means that it must also contain resort to arbitration. As the MIGA Convention provides for international arbitration in either situation, the condition "should it so provides" is satisfied and Article 22 requires submission of such disputes to international arbitration according to the terms of the MIGA Convention.

[45] The Spanish text, which uses the subjunctive mood, makes clear that it refers not only to treaties or agreements of this kind to which the Republic of Venezuela was a party at the time the Investment Law was adopted, but also treaties or agreements to which it may become a party at any time in the future. Historically, while most agreements of this kind concluded by States around the world provide for international arbitration of investor-State disputes, some agreements do not. The Republic of Venezuela may become a party to treaties or agreements of this kind that do not provide for the resolution of controversies through arbitration.

45. The final part of Article 22 ("without prejudice to the possibility of using, when applicable the systems of litigation provided for in the Venezuelan laws in force") further confirms that Article 22 is an expression of consent to arbitration. That statement indicates that Article 22 does not have the effect of preventing the investor from using domestic litigation remedies. If Article 22 were a mere declaration of the State's willingness to agree to arbitration in a separate document as opposed to a firm expression of consent to arbitration by the State, there would have been no need to disclaim that Article 22 did not prevent the investor from resorting to domestic remedies.

46. The interpretation of Article 22 as containing an open offer by the State to submit investment disputes to ICSID arbitration not only results from the **literal or grammatical** element of statutory interpretation, but also from applying the **logical, rational or reasonable** element of interpretation. According to Ambassador Corrales' published account, the State's offering of unilateral consent to arbitration in order to promote investment was part of the *raison d'être* of the Investment Law.[46] Considering Article 22 **systematically** and in a **historical** perspective, expressing consent to international arbitration was in accord with the trend in favor of international arbitration described above, including the State's ratification between 1993 and 1998 of treaties for the protection and promotion of investments that accepted international arbitration, as well as the other legal provisions regarding arbitration adopted at the time.

47. Furthermore, using the **teleological** and **sociological** element of statutory interpretation, the economic and social situation prevailing at the time the Investment Law was enacted explains the legislator's intent to promote investments and the offering of consent to international arbi-

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[46] *Supra*, ¶19. The Constitutional Chamber of the Supreme Tribunal of Justice has held that the *determination* of the intention of the Legislator must "start from the will of the drafter of the provision, as it results from the debates prior to its promulgation." *See* Supreme Tribunal of Justice, Constitutional Chamber, Decision No. 1.173 of June 15, 2004 (Case: Interpretación del Artículo 72 de la Constitución de la República Bolivariana de Venezuela) (Exp. 02-3.215), in REVISTA DE DERECHO PÚBLICO N° 97-98, Editorial Jurídica Venezolana, Caracas 2004, pp. 429 ff.

tration as a means to do so.[47] The economic policy and the whole legal order existing in 1999 tended to promote foreign investment and international arbitration. This general intent is clearly reflected in the Investment Law as a whole, which is primarily devoted to promoting and protecting foreign investment by regulating the actions of the State in the treatment of such investment. Submission of disputes to international arbitration is precisely one of the principal means of protecting foreign investors and investments.[48]

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[47] In 2008, Domingo Maza Zavala, member of the Board of Directors of the Venezuelan *Central* Bank until 2007 reported that "*Los ingresos fiscales en el período 1964–1998 (gobiernos J. Lusinchi, C.A. Pérez y R. Caldera) fueron de Bs. 91.109 MM; y sólo en el período 1999–2006 fueron de Bs 99.242 MM. Los ingresos petroleros que en 1998 fueron de US$ 16.735 MM; en los años subsiguientes ascendieron así: 1999: US$ 16.735 MM; 2000: US$27.874 MM; 2001: US$ 21.745 MM; 2002: US$ 21.532 MM; 2003: US$ 22.029 MM; 2004: US$ 32.871 MM; 2005: US$ 48.143 MM; 2006: US$ 56.438 MM; 2007 US$62.555 MM.*" Regarding *gasto público* he added that "*Al comienzo del mandato de Chávez el gasto público era de 15.000 millones de dólares anuales, ahora es de unos 80.000 millones.*" ("The fiscal income in the 1964–1998 period (governments of J. Lusinchi, C.A. Pérez y R. Caldera) were Bs. 91.109 MM; and only in the 1999–2006 period were Bs 99.242 MM. The oil income that was US$16.735 MM in 1998; increased in the subsequent years as follows: 1999: US$16.735 MM; 2000: US$27.874 MM; 2001: US$21.745 MM; 2002: US$21.532 MM; 2003: US$22.029 MM; 2004: US$32.871 MM; 2005: US$48.143 MM; 2006: US$56.438 MM; 2007 US$62.555 MM." Regarding public expenditure he added that: "At the beginning of the Chávez' administration public expenditure was of 15.000 millions of dollars per year, now is of around 80.000 million."). *See* Joaquim Ibarz*, Ahora, en Venezuela, hay más pobreza que antes de Chávez* in LA VANGUARDIA, Edición impresa, Barcelona, España, February 11, 2008 *available at* http://www.lavanguardia.es/free/edicionimpresa/res/ 20080211/53.

[48] Even the Venezuela Ruling (**Exhibit C-[x]**, p. 28) recognizes that one of the ways States attract foreign investment is to make a unilateral promise to submit disputes to arbitration ("It is impossible to be unaware that States which attempt to attract investment must, on a national sovereignty level, decide to grant *certain* guarantees to investors, in order to ensure that the relationship materializes and, within the variables used to encourage these investments, it is common to include an arbitration agreement which, in the opinion of the investors, provides them with security to mitigate the fear of possible partiality by State courts in favor of nationals of their own country...").

5. The interpretation of Article 22 proposed by the Republic of Venezuela

48. The interpretation of Article 22 put forward in the Jurisdiction Objections, as well as the interpretations made in the Venezuela Ruling and the Urdaneta Opinion**,** to which the Respondent refers for support, are either not consistent with principles of statutory interpretation under Venezuelan law or depend upon arguments that are flawed and logically incorrect.[49]

49. To begin with, it is an error to suppose (as the Respondent and the opinion on which it relies do) that the phrase "should it so provide" refers to the State's **consent** to arbitration. First, there is nothing in the text of Article 22 suggesting or supporting such an interpretation. The antecedent sentence ("shall be submitted to international arbitration under the terms of the respective treaty or agreement") makes no reference to consent; it refers to international arbitration. The "so" in "should it so provide" refers to "international arbitration" and cannot refer to a concept ("consent") that is not included in the antecedent sentence. The Respondent's interpretation, that the "so" refers to the act of consent, is unfounded. Second, it should be remembered that the "it" in "should it so provide" refers, in the context we are addressing in this case, to the ICSID Convention. Therefore, interpreting "should it so provide" as though it meant "should the ICSID Convention provide consent to arbitration" would turn this phrase into an impossible condition (one that cannot be fulfilled), because the ICSID Convention does not itself provide for a Contracting State's consent to ICSID arbitration. It is precisely because the ICSID Convention requires consent by a separate written instrument, such as a piece of national legislation like Article 22,[50] that it cannot be presumed – as the Jurisdiction Objections and the Urdaneta Opinion do – that the drafters of Article 22 intended the absurdity of subjecting the mandate relating to ICSID arbitration to a condition that was not and

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[49] *See* analysis of the Venezuela Ruling and its historical context as a political *decision* at *infra* ¶90 *et seq*.

[50] It is settled that under Article 25,1 of the ICSID Convention an ICSID Contracting State may express its written consent to submit to the jurisdiction of the *Centre* by way of the Contracting State's legislation for the promotion of investments. *See supra,* footnote 4.

could not be fulfilled. Under Venezuelan law, any interpretation of a statute that leads to absurdity or that would deprive a statutory provision of any effect must be rejected.[51] The principle of effective interpretation (*effet utile*) has been recognized to be a critical canon for the interpretation of statutes. For example, the Civil Cassation Chamber of the Supreme Tribunal of Justice has declared that "it would be absurd to suppose that the Legislator does not try to use the most precise and adequate terms in order to express the purpose and scope of its provisions, or deliberately omits elements that are essential for their complete understanding."[52]

50. Furthermore, the Venezuela Ruling (**Exhibit C-[x]**, p. 48) attempts to show that interpreting Article 22 as expressing the State's consent to international arbitration would be "unacceptable" in any legal order. Those attempts miss the mark, and show an internal contradiction in the decision. While on the one hand the Constitutional Chamber concedes that a State can express its consent unilaterally and generically in investment legislation (**Exhibit C-[x]**, p. 44) a method of consent that is clearly allowed in the ICSID Convention and is firmly established in international practice,[53] on the other hand, the Chamber offers arguments that amount to denying that very same point. In particular, the Venezuela Ruling argues that, if Article 22 were interpreted as a general offer of consent and that offer were accepted by an investor, a wide range of matters within the scope of the statute would automatically (*de pleno derecho*) be submitted to arbitration, without the State being able to assess the benefits or disadvantages of arbitration in each case, in violation of an alleged principle of "informed" consent (**Exhibit C-[x]**, p. 41). Yet this is precisely what happens, as the intended consequence, whenever a State chooses to consent to arbitration, generically, by means of a national statute or a treaty. In the same vein, the Venezuela Ruling argues that interpreting Article 22 as containing "[…]a general offer to submit dis-

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51 *See* Supreme Tribunal of Justice, Constitutional Chamber, Decision No. 1.173 of June 15, 2004 (Case: Interpretación del Artículo 72 de la Constitución de la República Bolivariana de Venezuela) (Exp. 02- 3.215), in REVISTA DE *Derecho* PÚBLICO N° 97-98, Editorial Jurídica Venezolana, Caracas 2004, pp. 429 ff.

52 Supreme Tribunal of Justice, Civil Cassation Chamber, Decision No. 4 of November 15, *2001* (Case: *Carmen Cecilia López Lugo v. Miguel Angel Capriles Ayala et al.*), p. 7.

53 *See supra*, *footnote* 4.

putes to the Convention on Settlement of Investment Disputes between States and Nationals of Other States in matters related to foreign investment would absurdly imply that the State cannot select a forum or jurisdiction which is more convenient or favorable to its interests (Forum Shopping) […].” (**Exhibit C-[x]**, p. 49). This is not an absurdity at all; it is the normal effect of a generic expression of consent, which is uniformly accepted under the ICSID Convention. A State that gives generic consent to arbitration in treaties or in statutes has given up the right to assess the benefits or disadvantages of international arbitration on a case-by-case basis, in exchange for the investment promotion benefits derived from a generic offer of international arbitration to foreign investors.

51. The Venezuela Ruling also argues that interpreting Article 22 as a generic offer of consent would in effect abrogate bilateral and multilateral investment treaties that provide for different dispute resolution methods, because investors protected by those treaties could invoke the most-favored-nation clause (MFN) contained in them to take advantage of ICSID arbitration, thereby avoiding the dispute resolution mechanisms provided for in the treaty (**Exhibit C-[x]**, p. 49). This argument has no basis. Assuming that an investment treaty to which Venezuela is a party has an MFN clause that covers dispute settlement, and assuming that ICSID arbitration is more favorable than the dispute-settlement method contemplated in such treaty, an investor claiming under that treaty would already have the right to invoke ICSID arbitration, because the MFN clause of that treaty would incorporate by reference the dispute-settlement provisions of other investment treaties to which Venezuela is a party, which provide for ICSID arbitration. Under the logic of the Venezuela Ruling, the treaty of the example would have been “abrogated” by the other treaties, independently of how Article 22 is interpreted, a conclusion that shows that the argument proves nothing. Besides, the argument in the Venezuela Ruling amounts to asserting that a State cannot consent to ICSID jurisdiction by statute if it has entered into investment treaties that provide for different methods of dispute resolution, a conclusion that has no basis.

52. Furthermore, there is no basis for the argument in the Venezuela Ruling (**Exhibit C-[x]**, pp. 51-52), that interpreting Article 22 as an open offer of consent would create an inconsistency with Articles 5, 7, 8 and 9 of the Investment Law. There is, in fact, no contradiction between the open offer of consent in Article 22 and any of those other provisions.

53. Article 5 guarantees that the provisions of the Investment Law shall not derogate from any higher level of protection under international treaties or agreements for the promotion and protection of investments. This means that the level of protection under the Investment Law was intended to be a floor, leaving room for higher levels of protection under treaties. Article 5 also provides that, in the absence of any such treaty or agreement, and notwithstanding the MFN clause in the Investment Law, an investor will benefit only from the protection established in that Law (the Investment Law) until such time as the investor is covered by a treaty or agreement containing an MFN clause (in which case the investor will benefit from that particular treaty and any other more favorable treatment required by other treaties, as well as from the Investment Law). Article 5 also requires the State to seek, in the negotiation of such treaties, the greatest level of protection for Venezuelan investors and to ensure that, in any case, such level of protection is not inferior to that granted to the investors of the other contracting State in Venezuela. There is nothing in these provisions that contradict giving consent to ICSID jurisdiction in Article 22.

54. Article 7 of the Investment Law establishes a basic principle of national treatment. International investments and investors are to have the same rights and obligations as national investments and investors, except as otherwise provided in special statutes and in the Investment Law itself. There is no contradiction between this principle and an open offer of consent to ICSID jurisdiction in Article 22 because, even though such offer necessarily benefits only foreign investors,[54] the offer of consent is an exception provided for in the Investment Law itself.

55. Article 8 of the Investment Law prohibits discrimination against international investors based on the country of origin of their capital, subject to exceptions for agreements on economic integration or tax matters. There is no contradiction between this provision and the open offer of consent to ICSID jurisdiction in Article 22, which applies to for-

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[54] Under Article 25 of the ICSID Convention the investor must be a national of a State other than the State party to the dispute (Venezuela in the situation at issue), except when for reasons of foreign control the parties have agreed that a national of the Contracting *State* party to the dispute "should be treated as a national of another Contracting State for the purposes of this Convention."

eign investors in general, without regard to the origin of their capital. Any investor that is a national of a State that is or becomes a party to ICSID can accept the offer of consent. If Article 8 were inconsistent with Article 22, it would also be inconsistent with Article 5, because Article 5 presupposes the existence of different legal regimes for international investors, depending on whether they are nationals of countries having treaties or agreements for the promotion or protection of investments with Venezuela, or are protected only by the Investment Law.

56. Article 9 of the Investment Law establishes the principle that international investments and investors will have the right to the most favorable treatment under Articles 7 and 8 of the same Law. This means that they are entitled to the better of national treatment under Article 7 or most-favored-nation treatment (non-discrimination on the basis of the country of origin of their capital) under Article 8, with the exceptions authorized by those provisions. Since, as already discussed, the open offer of consent in Article 22 is not inconsistent with either Article 7 or 8, it cannot be inconsistent with Article 9.

57. The two hypothetical examples posed by the Venezuela Ruling (**Exhibit C-[x]**, p. 52) do not show any contradiction between the open offer of consent in Article 22 and any of the other provisions just discussed. In the first hypothetical example, the Constitutional Chamber argues that, if Article 22 is interpreted as containing an open offer of consent, a State member of ICSID that does not have a treaty on investments with Venezuela (and has not consented to ICSID jurisdiction in an investment law of its own) would be in a better position *vis-à-vis* a State member of ICSID that has such a treaty, because the first State would not be subject to ICSID claims by Venezuelan investors, while the second State would. Once again, this argument proves nothing. The Investment Law does not guarantee equal treatment for States; it guarantees certain levels of treatment for investors, primarily international investors. Nor does any provision of the Investment Law require reciprocity, that is, that Venezuelan investors must have the right to submit controversies to IC SID against States whose nationals may benefit from the open offer of consent in Article 22. Since consent to ICSID jurisdiction by statute is by nature a unilateral act, to challenge such consent on grounds of lack of reciprocity amounts to denying, contrary to uniform practice, the possibility of any consent by statute.

58. In the second example, the Venezuela Ruling argues that, if Article 22 is interpreted as an expression of consent, an investor of a country that is a party to the ICSID Convention but does not have a treaty on investments with Venezuela would be in a better position than an investor of a country that is not a party to the ICSID Convention but has a treaty with Venezuela providing for non-IC SID arbitration. The "better position" would result from ICSID arbitration being supposedly more favorable to an investor than the non-ICSID arbitration provided in the treaty. In fact, ICSID arbitration may or may not be more favorable to an investor than another arbitration regime that may be established in a treaty. But even assuming that, in a particular case, ICSID arbitration is more favorable than the arbitration regime in a treaty, the hypothesis is not inconsistent with any provision of the Investment Law, which does contemplate the possibility of parallel regimes under treaties and under the Investment Law. Under the same logic, the State could not become a party to a treaty that does provide for ICSID arbitration, because investors protected by such treaty would receive better treatment than investors protected by a treaty that provides for a different arbitration regime.

59. Not only is the Venezuela Ruling legally unsound, but it is internally contradictory. The following examples serve to illustrate the point:

- First, while the Venezuela Ruling concedes and pays lip service to the proposition that international law applies to the interpretation of Article 22 (**Exhibit C-[x]**, p. 38), it later advocates an interpretation entirely based on alleged principles of "national order." Later, the decision undermines the merits of its own analysis by stating that there is little value ("utility") in an analysis limited to considerations of "internal order." (**Exhibit C-[x]**, p. 39)

- Second, as already noted, the Venezuela Ruling concedes that a State can express its consent to arbitration unilaterally and generically through its investment legislation (**Exhibit C-[x]**, p. 44), but it then argues that Article 22 cannot be interpreted as an expression of consent on the ground that it would deprive the Republic of Venezuela from analyzing the advantages of arbitration "in each case" (**Exhibit C-[x]**, p. 41) and from choosing "a forum or jurisdiction

that is most convenient or advantageous to their interests" ("Forum Shopping")" (**Exhibit C-[x]**, p. 49).[55] Put differently, for the Constitutional Chamber, the problem with interpreting Article 22 as an expression of consent is that it would prevent the State from forum shopping on a case by case basis.

- Finally, although the Venezuela Ruling devotes several paragraphs to reiterating the existence of a constitutional mandate to promote arbitration (Article 258 of the Constitution) (**Exhibit C-[x]**, pp. 9-11), it ultimately reaches an interpretation of Article 22 that does nothing of the kind.

60. The lack of a coherent and logical legal analysis contrasts with various statements in the Venezuela Ruling that make it evident that this ruling was the product of a political agenda that the Constitutional Chamber was called upon to defend. By its own admission, the Constitutional Chamber was operating on the understanding that it was bound to further the interests of the State. Most notably, the Chamber stated:

> [A]lthough the Republic and the government, in accordance with the Constitution and current law, are limited in the scope of their authority before other international law provisions based on jurisprudential principles, such as the limitations set forth in Article 13 of the Constitution of the Bolivarian Republic of Venezuela "[…] territory may not be assigned, transferred, leased or in any way conveyed, even temporarily or partially, to foreign governments or other parties subject to international law […]," also that **national sovereignty and self determination allow and obligate the Federal Government to establish conditions which are most favorable to the interests and purposes of the State** as set forth in the Constitution.[56]

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55 *Supra*, ¶50.

56 Venezuela Ruling, **Exhibit C-[x]**, p. 40-41 (emphasis added). The protection of national sovereignty and self- determination were a constant theme *informing* various statements in this decision. For example, when holding that the interpretation of all laws must be made in accordance with the Constitution, the Court went on to explain that this meant "*safeguarding the Constitution from all*

II. THE ATTEMPTS, BETWEEN 2000 AND 2008, TO OBTAIN A JUDICIAL INTERPRETATION OF ARTICLE 22 OF THE INVESTMENT LAW IN A SENSE CONTRARY TO ARBITRATION

61. Since the Investment Law was adopted, and precisely because Article 22 expresses the State's consent to submit disputes to international arbitration, various unsuccessful attempts have been made by individual opponents of that policy, to obtain a different interpretation from the Venezuelan courts. After those failed efforts and in the context of several ICSID arbitration proceedings that had been initiated by investors against the Republic of Venezuela on the basis of Article 22, the Venezuelan Government obtained, in record time, a decision of the Constitutional Chamber of the Supreme Tribunal of Justice on the interpretation of Article 22 – the Venezuela Ruling. In this section, I explain the circumstances of the Venezuela Ruling in the context of the earlier failed attempts to obtain a judicial interpretation of Article 22 and the current political control to which the Constitutional Chamber is subject.

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deviations in principles and separation from the political plan which is the will of the people incarnate" adding that *"part of the protection and guarantee of the Constitution of the Bolivarian Republic of Venezuela therefore rests on an* in fieri*, political perspective* ***resistant to the ideological connections with theories which could restrict it, under the pretext of universal truths, sovereignty and national self determination****, as required by Article 1° eiusdem* (...)." *Id.*, p. 40 (emphasis added). Earlier, the Venezuela Ruling had expressed some skepticism about a generalized perception of impartiality of arbitral jurisdiction, noting that "moving the jurisdiction of the state courts to arbitration courts, in many situations, is due to the fact that dispute resolution is conducted by arbiters which, in a number of cases, are connected to and **tend to favor the interests of transnational corporations, and thus become an additional instrument of domination and control of national economies**" and adding that "it is not very realistic to simply use the argument of the impartiality of arbitral justice to the detriment of justice administered by the jurisdictional branches of the Judiciary to justify the admissibility of the jurisdiction of general interest contracts." *Id*., p. 24 (emphasis added).

1. General considerations on the system of judicial review in Venezuela and the judicial interpretation of the Constitution

62. The Supreme Tribunal has issued decisions concerning the Investment Law in the context of proceedings of judicial review or petitions (*recursos*) of interpretation of the Constitution and statutes in the abstract.

63. Following a long tradition,[57] the Venezuelan system of judicial review is a mixed system,[58] which combines the classical diffuse method of judicial review (American model) established in Article 334 of the Constitution,[59] with the concentrated method of control of constitutionality of statutes (European model), established in Articles 335 and 336 of the Constitution. According to Articles 335 and 336, in the Venezuelan legal order, the Supreme Tribunal is the "highest and final interpreter" of the Constitution.[60] Its role is to assure a "uniform interpretation and application" of the Constitution and "the supremacy and effectiveness

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57 *See generally* Allan R. Brewer-Carías, INSTITUCIONES POLÍTICAS Y CONSTITUCIONALES, Vol. VI, La Justicia *Constitucional*, Universidad Católica del Táchira, Editorial Jurídica Venezolana, San Cristóbal-Caracas, 1998; Allan R. Brewer-Carías, ESTADO DE DERECHO Y CONTROL JUDICIAL, Instituto de Administración Pública, Madrid 1985; Allan R. Brewer-Carías, JUSTICIA CONSTITUCIONAL. PROCESOS Y PROCEDIMIENOS CONSTITUCIONALES, Ed. Porrúa, México 2006..

58 *See* Allan R. Brewer-Carías, JUDICIAL REVIEW IN COMPARATIVE LAW*,* Cambridge University Press, Cambridge 1989, pp. 275-277; Allan R. Brewer-Carías, *El* SISTEMA MIXTO O INTEGRAL DE CONTROL DE CONSTITUCIONALIDAD EN COLOMBIA Y VENEZUELA*,* Bogotá 1995..

59 1999 Constitution, Article 334. ("***Articulo 334***. [...] *En caso de incompatibilidad entre esta Constitución y una ley u otra norma jurídica, se aplicarán las disposiciones constitucionales, correspondiendo a los tribunales en cualquier causa, aún de oficio, decidir lo conducente.* [...]") ("**Article 334**. [...] In the event of an incompatibility between this Constitution and a law or any other legal norm, the Constitutional provisions shall be applied, corresponding to the courts in any case, even *sua sponte*, to decide what is needed. [...]").

60 **Ex. RL-22,** Constitution of The Bolivarian Republic of Venezuela (1999), *Official Gazette* No. 36.860, published December 30, 1999, Article 335 *Constitución de la República Bolivariana de Venezuela (1999), Artículo 335.*

of constitutional norms and principles." For such purpose, the Constitution created a Constitutional Chamber within the Supreme Tribunal, whose role is to exercise "constitutional jurisdiction." (Articles 266,1 and 262). That Chamber has the exclusive power to declare the nullity of statutes and other State acts issued in direct and immediate execution of the Constitution, or having the force of law (statute) (Article 334).[61]

64. To implement the concentrated method of judicial review, the Constitution provides for different means of recourse to the courts, including the action for unconstitutionality of statutes (*acción de inconstitucionalidad*), which any citizen can file directly before the Constitutional Chamber.

65. In addition to the means of judicial review established in the Constitution, the Constitutional Chamber of the Supreme Tribunal of Justice has created a petition (*recurso*) for abstract interpretation of the Constitution (petition for **constitutional interpretation**), which has been extensively used.[62] The petition for **constitutional interpretation** was created by the Constitutional Chamber without any constitutional or legal support. The Constitutional Chamber attributed to itself the sole power to decide it.[63]

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61 These include "acts of government," internal acts of the National Assembly, and *executive* decrees having the rank of statutes.

62 *See* Supreme Tribunal of Justice, Constitutional Chamber, Decision No. 1077 of September 22, 2000 (Case: *Servio Tulio León Briceño*) in REVISTA DE DERECHO PÚBLICO Nº 83, Caracas, 2000, pp. 247 ff. *See* Allan R. Brewer-Carías, *Quis Custodiet Ipsos Custodes: De la interpretación constitucional a la inconstitucionalidad de la interpretación* in VIII CONGRESO NACIONAL DE DERECHO CONSTITUCIONAL, PERU, Fondo Editorial 2005, Colegio de Abogados de Arequipa. Arequipa, September 2005, pp. 463-489, also a*vailable at* www.allanbrewercarias.com, (Biblioteca Virtual, II.4. Artículos y Estudios No. 475, 2005) pp. 1- 33; Allan R. Brewer-Carías, *Le recours d'interprétation abstrait de la Constitution au Vénézuéla* in RENOUVEAU DU DROIT *Constitutionnel*, MÉLANGES EN L 'HONNEUR DE LOUIS FAVOREU, Dalloz, Paris, 2007, pp. 61-70.

63 No provision of the 2004 Organic Law of the Supreme Tribunal of Justice attributes this power to the Constitutional Chamber of the Supreme Tribunal of Justice. *See* Allan R. Brewer-Carías, LEY ORGÁNICA DEL TRIBUNAL SUPREMO DE JUSTICIA. PROCESOS Y PROCEDIMIENTOS CONSTITUCIONALES Y CONTENCIO-

66. In cases dealing with interpretations **of the Constitution**, the Constitutional Chamber is empowered to give binding effect to its decisions (Article 335). According to Decision No. 1.309 of June 19, 2001 (Case: *Hermann Escarrá*),[64] the decisions of the Constitutional Chamber on petitions of abstract interpretation of the Constitution have effects *erga omnes*, that is to say, they are binding on all courts of the Republic of Venezuela, but they apply only prospectively (*pro futuro*, *ex nunc*), that is, they do not have retroactive effects.

67. There is a second type of petition of interpretation in Venezuela: the petition (*recurso*) of **interpretation of statutes**. Unlike the prior one, this type is provided for in the Constitution (Article 266,6) and in the 2004 Organic Law of the Supreme Tribunal of Justice (Article 5, paragraph 1,52). The competence to decide these petitions corresponds to the Chamber of the Supreme Tribunal (Politico-Administrative, Civil, Criminal, Social or Electoral Chamber) that has competence over the subject-matter of the statute.[65] When a petition for interpretation results in the interpretation of a statute, such interpretation applies only prospectively.[66]

68. A petition (*recurso*) of interpretation has the purpose of obtaining from the Supreme Tribunal a declarative ruling to clarify the content of legal or constitutional provisions. To have standing to file a petition of interpretation, a petitioner must invoke an actual, legitimate and juridical interest in the interpretation based on a particular and specific situation in which he stands, which requires interpretation of the legal or constitutional provision in question. The Constitutional Chamber has held that in a petition for constitutional interpretation, the petitioner must

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SO-ADMINISTRATIVOS, Editorial Jurídica Venezolana, Caracas 2004, pp. 103-109.

64 Ratified in Supreme Tribunal of Justice, Constitutional Chamber, Decision No. 1.684 of November 4, 2008 (Case: *Carlos Eduardo Giménez Colmenárez*) (Exp. No. 08-1016), pp. 9-10.

65 Before 2000, the only petition (*recurso*) of interpretation existing in the Venezuelan legal order was the petition of interpretation of statutes in cases expressly provided by them. It was established in Article 42,24 of the 1976 Organic Law of the *Supreme* Court of Justice, and exclusively attributed to the Politico-Administrative Chamber of that court. This changed in the 1999 Constitution.

66 *See also infra* ¶89.

always point to "the obscurity, the ambiguity or contradiction between constitutional provisions."[67] In Decision No. 2.651 of October 2, 2003, the Constitutional Chamber ruled that the proceeding did not have an adversarial nature, and left it to the court's discretion whether to call to the proceeding those that could have something to say on the matter.[68]

69. When deciding a petition of statutory interpretation, chambers of the Supreme Tribunal (other than the Constitutional Chamber) are not empowered to establish a binding interpretation of constitutional provisions. Conversely, when the Constitutional Chamber decides a petition of interpretation of the Constitution, it is not empowered to establish binding interpretations of statutory provisions. Accordingly, a petition of statutory interpretation regarding the Investment Law can be filed only before the Politico- Administrative Chamber of the Supreme Tribunal, as the Constitutional Chamber indeed decided when it declined to assume jurisdiction to resolve a petition of interpretation of Article 22 of the Investment Law filed by three Venezuelan lawyers in 2007.[69]

2. The 2001 Decision No 186 upholding the constitutionality of Article 22 of the Investment Law

70. The first case filed before the Supreme Tribunal in connection with Article 22 of the Investment Law was an action of unconstitutionality filed by two individuals challenging Articles 17, 22 and 23 of the In-

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67 Allan R. Brewer-Carías, "*Quis Custodiet Ipsos Custodes*: *De la interpretación constitucional a la inconstitucionalidad de la interpretación*" in VIII CONGRESO NACIONAL DE DERECHO CONSTITUCIONAL, PERU, Fondo Editorial 2005, Colegio de Abogados de Arequipa. Arequipa, September 2005. pp. 463-489, also a*vailable at* www.allanbrewercarias.com, (Biblioteca Virtual, II.4. Artículos y Estudios No. 475, 2005) pp.1- 33.; Allan R. Brewer-Carías, *Le recours d'interprétation abstrait de la Constitution au Vénézuéla* in RENOUVEAU DU DROIT CONSTITUTIONNEL, MÉLANGES EN L 'HONNEUR DE LOUIS FAVOREU, Dalloz, Paris, 2007, pp. 61-70.

68 Supreme Tribunal of Justice, Constitutional Chamber, Decision No. 2.651 of October 2, 2003 (Case: *Ricardo Delgado,* Interpretation of Article 174 of the Constitution), pp. 30-32.

69 Supreme Tribunal of Justice, Constitutional Chamber, Decision No. 609 of April 9, 2007 (Case: Interpretation of Article 22 of the Investment Law) . See comments in Paragraphs 76-78..

vestment Law. The Constitutional Chamber upheld the constitutionality of the challenged provisions in Decision No. 186 of February 14, 2001.[70]

71. The petitioners argued *inter alia* that Article 22 was contrary to Articles 157,31 [*sic*] and 253 of the Constitution, because it "attempt[s] to authorize private parties [*los particulares*] to leave aside the application of Venezuelan public law provisions, in favor of arbitral organs, which as it is known, apply equity criteria without necessarily complying with positive law provisions."[71] This statement implies that the petitioners understood Article 22 as an open offer by the State to submit controversies on international investments to international arbitration. Only on that understanding could the petitioners complain that Article 22 made it possible for "private parties [*los particulares*] to leave aside the application of Venezuelan public law provisions in favor of arbitral organs [...]."

72. In rejecting the petition as it concerned Article 22, the Constitutional Chamber reasoned that:

> "[...] the plaintiffs incur in the mistake of considering that by virtue of the challenged provisions previously quoted [Articles 22 and 23 of the Investment Law], there is an attempt to give an authorization to leave aside public law provisions in favor of arbitral organs, taking away from national courts their power to decide the potential disputes that may arise in connection with the application of the Decree Law on the Promotion and Protection of Investments. In fact, this Chamber considers that the prior statement is an error because it is the Constitution itself which incorporates within the system of justice the alternative means of justice, among which, the arbitration is obviously placed.
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> [...]
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> The Chamber notices that the plaintiffs seeking the nullity have not noticed, from the constitutional provision they claim as violated, that the alternative means of justice are also part of the Venezuelan

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70 **Ex. RL- 18**, Supreme Tribunal of Justice, Constitutional Chamber, Decision No. 186 of February 14, 2001 (Case: *Challenge* Constitutionality Articles 17, 22 and 23 of the Investment Law).

71 *Id.,* p. 4.

> system of justice and that the quotation of the cited article 253 in their pleading does not contain the last part of this provision."[72]

73. The Constitutional Chamber noted that the Constitution incorporates alternative means of adjudication, including arbitration, within the Venezuelan system of justice. It highlighted that arbitration – national and international – has a constitutional basis in Article 258 of the 1999 Constitution, and specifically concluded that "**the arbitral settlement of disputes, provided for in** the impugned **articles 22** and 23 [] does not conflict in any manner with the Fundamental Text."[73]

74. The Constitutional Chamber referred to the mandate to promote arbitration in Article 258 of the Constitution ("The law shall promote arbitration, conciliation, mediation and any other alternative means of dispute resolution") and explained that:

> "[...] the law, in this case an act with rank and force of such, promoted and developed the referred constitutional mandate, **by providing for arbitration as an integral part of the mechanisms for settlement of controversies** that may arise between an international investor, whose country of origin has in effect with Venezuela a treaty or agreement on the promotion and protection of investments, or **controversies with respect to which the provisions of** the Convention Establishing the Multilateral Investment Guarantee Agency (OMGI-MIGA) or **the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) are applicable**. It must be made clear that in accordance with the challenged norm itself, the possibility of resorting to the contentious means established under the Venezuelan legislation in effect remains open, when the potential dispute arises and these avenues are appropriate.
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> > This Chamber considers that **the provision for arbitration** under the terms developed in the chal-

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72 *Id.*, pp. 25-26.

73 *Id.,* p. 28 (*emphasis* added).

> lenged norm[] does not violate the sovereign power of national courts to administer justice [...].”[74]

75. In this decision, the Constitutional Chamber tacitly acknowledged that Article 22 contains the express consent of the State to submit to international arbitration controversies regarding investment. The reasoning quoted in the preceding paragraphs would make no sense unless the Constitutional Chamber understood Article 22 as expressing the State’s consent to international arbitration.

3. The 2007 Decision No. 609 of the Constitutional Chamber declaring its lack of jurisdiction to interpret Article 22 of the Investment Law

76. On February 6, 2007, a group of lawyers filed a petition (*recurso*) for statutory interpretation of Article 22 of the Investment Law before the Constitutional Chamber of the Supreme Tribunal.[75] The stated purpose of the petition was to obtain an interpretation of Article 22 “to determine whether [Article 22] established or not the arbitral consent necessary to allow foreign investors to initiate international arbitrations against the Venezuelan State.”[76]

77. The petitioners added that they were not asking the Constitutional Chamber to declare Article 22 unconstitutional, a matter that had been resolved in 2001. They argued instead that “one thing is that the article at issue be constitutional and another very different is that such article establish a general and universal consent to allow any foreign investor to request that its disputes with the Venezuelan State be resolved by means of international arbitration, a matter with respect to which the wording of the article is not clear.”[77] (The petitioners in that case failed to recognize that the Constitutional Chamber had implicitly resolved that question of statutory interpretation when upholding the constitutionality

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74 *Id.,* p. 27 (emphasis *added*).

75 Supreme Tribunal of Justice, Constitutional Chamber, Decision No. 609 of April 9, 2007.

76 *Id.*, p. 3

77 *Id.*, p. 3.

of the challenged article.) The petitioners formulated the following specific questions:

> "Does article 22 of the Law on the Promotion and Protection of Investments contain the arbitral consent by the Venezuelan State in order for all the disputes that may arise with foreign investors to be submitted to arbitration before ICSID?
>
> In case of a negative [answer] (sic), what is the purpose and use of article 22 of the Law on the Promotion and Protection of Investments?"[78]

78. In Decision No. 609 of April 9, 2007, the Constitutional Chamber ruled that it had *no* competence to decide on the interpretation of Article 22.[79] It explained that the matter was within the competence of the Politico-Administrative Chamber of the Supreme Tribunal.[80] This was a ratification of the Constitutional Chamber's position that it had no competence to decide petitions of interpretation of statutes; its competence being limited to petitions of interpretation of the Constitution and of instruments within the "block of constitutionality."[81] The Constitutional Chamber concluded that this was "a matter of Public Law, on the relations (in this case, the solution of controversies) derived from foreign investments in the Venezuelan State, which means that competence, according to the subject- matter, corresponds to the Politico-Administrative Chamber of this Supreme Tribunal, on the basis of number 6 of article 266 of the Constitution and number 52 of article 5 of the Organic Law of the Supreme Tribunal of Justice."[82] Accordingly, the Constitutional

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78 *Id.*, pp. 3-4.

79 *Id*., p. 7.

80 *Id.*, p. 7.

81 The Constitutional Chamber pointed out that the petition referred to a "legal provision *that* regulates arbitration in relation to foreign investments, with respect to which the petitioners have doubts as to whether it contains a declaration of general (legal) consent by the Venezuelan State to be always submitted to such means of dispute resolution or if, on the contrary, it is only a provision that requires such consent in each opportunity in which it is necessary." *Id*., p. 6.

82 *Id*., p. 6.

Chamber ordered that the file be transferred to the Politico-Administrative Chamber.

4. The 2007 Decision No. 927 of the Politico-Administrative Chamber declaring the in-admissibility of a petition of interpretation of Article 22 of the Investment Law

79. The Politico-Administrative Chamber decided the aforementioned petition in Decision No. 927 of June 5, 2007, declaring the request inadmissible because the petitioners lacked standing.[83]

80. The Politico-Administrative Chamber reasoned that the petitioners had failed to demonstrate the existence of a particular juridical situation affecting them in a personal and direct way that could justify a judicial decision on the scope and application of Article 22.[84] The Politico-Administrative Chamber noted that the petitioners had based their interest only on their activities as lawyers, and had not referred expressly to any personal and direct interest in the requested interpretation.[85] The Chamber also emphasized that a petition of interpretation must not be used for mere academic purposes.[86]

5. The Venezuela Ruling (No. 1.541) of the Constitutional Chamber interpreting Article 22 of the Investment Law and the problems of independence and autonomy the Venezuelan Judiciary

81. After the aforementioned failed attempts by various individuals to obtain judicial decisions interpreting Article 22 of the Investment Law, the Government of Venezuela did succeed in obtaining a judicial decision by the Constitutional Chamber (Venezuela Ruling No. 1.541 of October 17, 2008).

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83 *See* **Ex. RL-19**, Supreme Tribunal of Justice, Politico-Administrative Chamber, Decision *No*. 927 of June 5, 2007

84 *Id*., p. 14.

85 *Id*.

86 *Id*.

82. The Venezuela Ruling was issued in response to a petition of interpretation of Article 258 of the Constitution filed on June 12, 2008 by the Republic of Venezuela represented by a number of attorneys designated by the *Procurador General de la República* (Attorney General).[87] The petition states expressly that the request was prompted by the ICSID cases against the Republic of Venezuela pending at the time the petition was filed.[88]

83. Although the Venezuela Ruling ostensibly resolved a petition labeled as a request of constitutional interpretation of Article 258 of the Constitution, the Constitutional Chamber went on to issue a statutory interpretation of Article 22 of the Investment Law. As already discussed, this was a matter that the Constitutional Chamber itself had acknowledged to be within the exclusive competence of the Politico-Administrative Chamber.[89]

84. The Venezuela Ruling states that it is possible for a State to express its consent to submit the resolution of disputes to international arbitration in a statute (**Exhibit C-[x]**, p. 41-44), but it accepts the Government's position that Article 22 does not have that effect.

85. The Constitutional Chamber decided the matter in a very unusual abbreviated proceeding within only 120 days (including 30 days of judicial vacation) and without any adversarial hearings. The petition was filed on June 12, 2008 and it was notified to the Constitutional Chamber on June 17, 2008. Only one month later, on July 18, 2008, the Chamber

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87 **Exhibit C-255**, Supreme Court of Justice, Constitutional Chamber: Petition for Interpretation Initiated by Attorneys Hildegard Rondón de Sanso, Alvaro Silva Calderón, Beatrice Sanso de Ramírez and Others, Acting *on* Behalf of the Bolivarian Republic of Venezuela, in Relation to the Last Section of Article 258 of the Constitution of the Bolivarian Republic of Venezuela, No. AA50-T-2008-000763, June 12, 2008, filed with the Court on June 17, 2008.

88 **Exhibit C-255**, Supreme Court of Justice, Constitutional Chamber: Petition for Interpretation Initiated by Attorneys *Hildegard* Rondón de Sanso, Alvaro Silva Calderón, Beatrice Sanso de Ramírez and Others, Acting on Behalf of the Bolivarian Republic of Venezuela, in Relation to the Last Section of Article 258 of the Constitution of the Bolivarian Republic of Venezuela, No. AA50-T-2008-000763, June 12, 2008, filed with the Court on June 17, 2008, pp. 11-12.

89 *Supra*, ¶78.

issued a decision admitting the petition, after omitting the oral hearing on the ground that it was a "merely legal" matter.[90] The Constitutional Chamber set a maximum term of 30 days to decide the case, which would begin to count five days after a newspaper notice giving interested parties five days to file their arguments.[91] The newspaper notice was published on July 29, 2008. On September 16, 2008, three individuals filed arguments as third parties (*escrito de coadyuvancia*), but their participation was denied by the Constitutional Chamber on grounds of lack of standing.[92] The final decision in the case was issued one month later, on October 17, 2008.

86. As aforementioned, the petition of constitutional interpretation was established by the jurisprudence of the Constitutional Chamber for the sole purpose of interpreting obscure, ambiguous or inoperative constitutional provisions.[93] Article 258 requires no such interpretation. It states that:

> "The law shall promote arbitration, conciliation, mediation and any other alternative means of dispute resolution."

As there is nothing obscure, ambiguous or inoperative in this provision, it is obvious that the real purpose of the petition of constitutional interpretation filed by the representatives of the Republic of Venezuela was not to obtain a clarifying interpretation of Article 258. Instead, they used this petition as a vehicle for obtaining an interpretation of Article 22 of the

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90 **Exhibit C-256**, Supreme Court of Justice, Constitutional Chamber: Ruling Related to the Admissibility of the Autonomous Petition for Constitutional Interpretation of the Norm Contained in the Sole Paragraph of Article 258 of the Constitution, Expediente N° 08-0763, July 18, 2008. Magistrate Pedro Rafael *Rondón* dissented from the decision to admit the petition. He explained that Article 258 was not obscure, and added that the petition was being used to obtain a legal opinion from the Constitutional Chamber, contravening prior decisions of the same Chamber. Finally, he noted that the petition included a request for interpretation of a statutory provision (Article 22) which exceeded the competence of the Constitutional Chamber. Dissent, Decision of July 18, 2008.

91 *Id*., p. 8.

92 Venezuela *Ruling*, **Exhibit C-[x]**, p. 5-7.

93 *Supra*, ¶68.

Investment Law in the sense that it does not contain the State's unilateral consent to arbitration. In particular, the Republic of Venezuela requested a declaration that "article 22 of the 'Investment Law' may not be interpreted in the sense that it constitutes the consent of the State to be subjected to international arbitration" and "that Article 22 of the Investment Law does not contain a unilateral arbitration offer, in other words, it does not overrule the absence of an express declaration made in writing by the Venezuelan authorities to submit to international arbitration, nor has this declaration been made in any bilateral agreement expressly containing such a provision […]."[94]

87. The Constitutional Chamber noted that the 1999 Constitution allows the Republic of Venezuela to give its unilateral consent to have disputes, particularly disputes regarding foreign investments, resolved by international arbitration.[95] However, the Constitutional Chamber then went on to interpret Article 22 of the Investment Law and concluded, as the Representatives of the Republic of Venezuela had requested, that this provision did not constitute such an expression of unilateral consent.[96]

88. Magistrate Pedro Rafael Rondón Haaz, who had dissented from the Constitutional Chamber decision to admit the petition (*recurso*),[97] also dissented from Venezuela Ruling. Magistrate Rondón stressed that the Constitutional Chamber had acted *ultra-vires* when engaging in the interpretation of a statutory provision (Article 22).[98] He reiterated his earlier dissent and stated that:

- Article 258 does not raise any reasonable doubt. It does not require a clarifying interpretation because it only contains a request directed to the Legislator in order to promote arbitration.

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94 Venezuela Ruling, **Exhibit C-[x]**, p. 9.

95 Venezuela Ruling, **Exhibit C-[x]**, pp. 32, 40.

96 Venezuela Ruling, **Exhibit C-[x]**, pp. 48-53. The flaws in the Constitutional Chamber's reasoning are addressed elsewhere in this Opinion.

97 *Supra*, footnote 85.

98 Dissenting Opinion, Venezuela Ruling, **Exhibit C-[x]**, p. 56-58.

- The petition of interpretation at issue had the purpose of obtaining from the Constitutional Chamber a "legal opinion" by means of an *a priori* judicial review process that does not exists in Venezuela. It sought the exercise of a legislative function by the Constitutional Chamber.

- The decision of the majority does not interpret or clarify Article 258 of the Constitution because this clear provision does not give rise to any doubts.

- The Constitutional Chamber exceeded its competence when it engaged in the interpretation of Article 22 of the Investment Law. The interpretation of statutory provisions is of the exclusive competence of the Politico-Administrative Chamber of the Supreme Tribunal of Justice when requested thruogh recourses for interpretation of statutes.

- The Constitutional Chamber contradicted its own jurisprudence and exceeded its powers of constitutional interpretation, as well as its powers of judicial review concerning international treaties.

89. The dissenting Magistrate correctly notes that the Constitutional Chamber in interpreting Article 22 exercised a "legislative function" by providing, through an *a priori* judicial review procedure, rules that the Legislature must follow in the future in order to express the State's consent to international arbitration through a statute.[99] One consequence of this legislative exercise is that, under Venezuelan law, the Constitutional Chamber's interpretation of Article 22 can only have effects *ex nunc*, *pro futuro*, as acts of "legislative" nature cannot have retroactive effects.[100] Consequently, the Venezuela Ruling cannot affect cases in which investors accepted, before October 17, 2008, the State's open offer to submit disputes to ICSID arbitration. Moreover, those effects are

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99 *Dissenting* Opinion, Venezuela Ruling, **Exhibit C-[x]**, p. 56-57.

100 *See Supreme* Tribunal of Justice, Constitutional Chamber, Decision No. 1.309 of June 19, 2001 (Case: *Hermann Escarrá*). *See also*, Decision N° 1.684 of November 4, 2008 (Case: *Carlos Eduardo Giménez Colmenárez*).

limited to the Venezuelan courts, that is, the effects of Venezuela Ruling under Venezuelan law do not affect the powers of an ICSID tribunal to interpret Article 22 independently in ruling on its own jurisdiction.

6. Comments on the situation of the judiciary in Venezuela and the subjection of the Constitutional Chamber to political control

90. The Venezuela Ruling can only be fully understood by taking into account that the Judicial Branch in Venezuela and in particular, the Constitutional Chamber of the Supreme Tribunal, are subject to political interference in politically sensitive cases. In this section, I explain the principles that ought to inform the functioning of the Judicial Branch under the 1999 Constitution and contrast them with the very different reality that prevails in Venezuela at the present time, and that influenced the Venezuela Ruling.

A. The 1999 National Constituent Assembly and the 1999 Constitution

91. The 1999 Constitution was drafted and sanctioned by a National Constituent Assembly (*Asamblea Nacional Constituyente*) and came into effect on December 30, 1999, after being approved by referendum held on December 15, 1999.

92. The Constituent Assembly was elected in July 1999 in an electoral process that took place without the active participation of the traditional political parties. As a result, President Hugo Chávez's supporters ended up holding more than 95% of the seats. Before the Constituent Assembly embarked on drafting a new constitution, it dissolved and seized control (*intervino*) of all branches of the national and state governments and dismissed all the public officials elected just a few months before (1998), namely the representatives to the former National Congress, the Legislative Assemblies of the States and the Municipal Councils as well as the State Governors and Municipal Mayors.[101] The sole

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[101] *See* the decrees of intervention of the branches of Government, in Allan R. Brewer-Carías, DEBATE *Constituyente* (APORTES A LA ASAMBLEA NACIONAL CONSTITUYENTE), Vol. I (August-September 1999), Fundación de Derecho Publico-Editorial Jurídica Venezolana, Caracas 1999. This amounted to a *coup*

public office that was exempted from this intervention was the office of the President of the Republic.

93. In particular, the Constituent Assembly expressly declared the Judicial Branch to be "in emergency" and interfered with its autonomy. Since then, the independence of the Venezuelan Judiciary has been progressively and systematically dismantled.[102] The Supreme Court of Justice was abolished in December 1999.[103] The result of this process has been the tight Executive control over the Judiciary, especially the Constitutional Chamber of the newly created Supreme Tribunal of Justice.[104]

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d'Etat. See generally Allan R. Brewer-Carias, GOLPE DE ESTADO Y PROCESO CONSTITUYENTE EN VENEZUELA, *Universidad* Nacional Autónoma de México, Mexico 2002; Guayaquil, 2006.

[102] *See generally* Allan R. Brewer-Carías, *La progresiva y sistemática demolición de la autonomía e independencia del Poder Judicial en Venezuela (1999-2004)* in XXX JORNADAS J.M DOMINGUEZ ESCOVAR, *Estado* DE DERECHO, ADMINISTRACIÓN DE JUSTICIA Y DERECHOS HUMANOS, Instituto de Estudios Jurídicos del Estado Lara, Barquisimeto 2005, pp. 33-174; Allan R. Brewer-Carías, *El constitucionalismo y la emergencia en Venezuela: entre la emergencia formal y la emergencia anormal del Poder Judicial* in Allan R. Brewer-Carías, ESTUDIOS SOBRE EL ESTADO CONSTITUCIONAL (2005-2006), Editorial Jurídica Venezolana, Caracas 2007, pp. 245-269; and Allan R. Brewer-Carías, *La justicia sometida al poder. La ausencia de independencia y autonomía de los jueces en Venezuela por la interminable emergencia del Poder Judicial (1999-2006)* in CUESTIONES INTERNACIONALES. ANUARIO JURÍDICO VILLANUEVA 2007, Centro Universitario Villanueva, Marcial Pons, Madrid 2007, pp. 25-57, *available at* www.allanbrewercarias.com, (Biblioteca Virtual, II.4. Artículos y Estudios No. 550, 2007) pp. 1-37. *See also* Allan R. Brewer-Carías, HISTORIA CONSTITUCIONAL DE VENEZUELA, Editorial Alfa, Tomo II, Caracas 2008, pp. 402-454.

[103] The Supreme Court of Justice was abolished by the December 22, 1999 transitory regime established by the Constituent Assembly after the *approval* of the 1999 Constitution by popular referendum. On the transitory regime, *see generally* Allan R. Brewer-Carias, LA CONSTITUCIÓN DE 1999. DERECHO CONSTITUCIONAL VENEZOLANO, Vol. II, Editorial Jurídica Venezolana, Caracas 2004, pp. 1150 ff.

[104] *See Allan* R. Brewer-Carias, *Quis Custodiet ipsos Custodes: De la interpretación constitucional a la inconstitucionalidad de la interpretación* in VIII CONGRESO NACIONAL DE DERECHO CONSTITUCIONAL, Peru, Fondo Editorial 2005, Colegio de Abogados de Arequipa, Arequipa, September 2005, pp. 463-

94. The National Constituent Assembly drafted the new Constitution and submitted the draft to two debates in October and November 1999. The new Constitution was sanctioned and signed on November 19, 1999, approved in a popular referendum held on December 15, 1999, and duly proclaimed by the National Constituent Assembly on December 20, 1999. It entered into force on the thirtieth of that month and year, the day of its publication in the *Official Gazette.*[105]

95. Article 7 of the 1999 Constitution expressly declares the Constitution to be the supreme law of the land and the foundation of the entire legal order. Consequently, all persons and organs of the State are subject to it and have a constitutional duty to fulfill and respect its provisions (Article 131). The Constitution provides for means designed to protect its own supremacy. The most important of these safeguards are related to the Judiciary and to the judicial system. In this regard, Article 253 of the Constitution proclaims that the power to render justice emanates from the

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489, also *available at* www.allanbrewercarias.com, (Biblioteca Virtual, II.4. Artículos y Estudios No. 475, 2005) pp. 1-33; and in Allan R. Brewer-Carías, CRÓNICA SOBRE LA "IN "JUSTICIA CONSTITUCIONAL. LA SALA CONSTITUCIONAL Y EL AUTORITARISMO EN VENEZUELA, Editorial Jurídica Venezolana, Caracas 2007.

105 *See e.g.,* **Ex. R-16**, *Official Gazette* No. 36.860 of December 30, 1999. In 2007, President Chávez proposed a constitutional reform that was sanctioned by the National Assembly but rejected by the people through referendum held in *December* 2007. Through this failed reform, President Chávez intended to reinforce the system of centralization and concentration of power that he had managed to develop. *See generally* Manuel Rachadell, SOCIALISMO DEL SIGLO XXI. ANÁLISIS DE LA REFORMA CONSTITUCIONAL PROPUESTA POR EL PRESIDENTE CHÁVEZ EN AGOSTO DE 2007, FUNEDA, Editorial Jurídica Venezolana, Caracas 2008; Héctor Turuhpial Carriello, EL TEXTO OCULTO DE LA REFORMA, FUNEDA, Caracas 2008; Allan R. Brewer-Carías, HACIA LA CONSOLIDACIÓN DE UN ESTADO SOCIALISTA, CENTRALIZADO, POLICIAL Y MILITARISTA. COMENTARIOS SOBRE EL SENTIDO Y ALCANCE DE LAS PROPUESTAS DE REFORMA CONSTITUCIONAL 2007, Editorial Jurídica Venezolana, Caracas 2007. In February 2009, at the request of President Chávez, the National Assembly took the initiative of a new Constitutional Reform which purpose was to eliminate the constitutional limits that the 1999 Constitution established for the reelection of elected officials. The reform was approved by referendum held on February 14, 2009, and allows the President of the Republic of Venezuela to be elected in a continual and indefinite way.

citizenry and is exercised in the name of the Republic and by the authority of the law. For such purposes, Article 26 of the Constitution provides that the State must guarantee a "cost-free, accessible, impartial, adequate, transparent, autonomous, independent, responsible, equitable, and expeditious [system of] justice." The same Article 253 provides that the system of justice is composed not only by the organs of the Judicial Branch, comprising the Supreme Tribunal of Justice and all the other courts established by law, but also by the Public Ministry (Public Prosecutor), the Peoples' Defendant, the organs of criminal investigation, judicial staff and assistants, the penitentiary system, the alternative means of adjudication, the citizens who participate in the administration of justice according to the law, and the attorneys authorized to practice law. Article 258 imposes on the Legislator the duty to promote arbitration, conciliation, mediation, and other alternative means of conflicts resolution.

B. ***The theoretical constitutional rules regarding the appointment,*** *stability and dismissal of judges*

96. Article 254 of the Constitution declares the principle of the independence of the Judicial Branch and establishes that the Supreme Tribunal of Justice shall have "functional, financial, and administrative autonomy." In order to guarantee the independence and autonomy of courts and judges, Article 255 provides for a specific mechanism to ensure the independent appointment of judges and to guaranty their stability. In this regard, the judicial office is considered as a career, in which the admission, as well as the promotion of judges within it, must be the result of a public competition or examinations to ensure that the candidates are adequately qualified. The candidates are to be chosen by panels from the judicial circuits, and the judges are to be designated by the Supreme Tribunal of Justice. The Constitution also creates a Judicial Nominations Committee (Article 270) to assist the Judicial Branch in selecting the Magistrates for the Supreme Tribunal of Justice (Article 264) and to assist judicial colleges in selecting of judges for the lower courts. This Judicial Nominations Committee is to be composed of representatives from different sectors of society, as determined by law. The Constitution also guarantees the stability of all judges, prescribing that they can only be removed or suspended from office through the procedures expressly provided under the law (Article 255).

97. As of the date of this opinion, none of the constitutional provisions regarding the appointment and stability of judges has been implemented, during the past ten years the Judiciary has been in a permanent situation of reorganization,[106] and on March 2009, the Supreme Tribunal of Justice has again declared the Judiciary in situation of "integral reorganization."[107] The result of this situation is that, since 1999, the Venezuelan Judiciary has been almost exclusively made up of temporary and provisional judges,[108] and the public competition processes for the appointment of judges with citizen participation has not been implemented. Consequently, in general, judges lack stability, and since the constitutional provisions creating the Judicial Disciplinary jurisdiction have not been

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[106] The Inter-American Court on Human Rights in its recent decision of June 30, 2009 (Case Reverón Trujillo vs. Venezuela) has concluded that "the reorganization of the Judicial *Power* in Venezuela, which can be considered that began with the approval of the convening of the Constituent Assembly on April 1999, has endured for more that 10 years." Paragraph 99, available at http://www.corteidh.or.cr/docs/casos /articulos/seriec_197_esp.pdf.

[107] Supreme Tribunal of Justice, Resolution No. 2009-0008 of March 18, 2009, *Official Gazette* No 5.915 Extra. of April 2, 2009

[108] A provisional judge is one appointed pending a public competition. A temporal judge is one appointed to perform a specific task or for a specific period of time. In 2003, the Inter-American Commission on Human Rights explained that: "The Commission has been informed that only 250 judges have been appointed through competitive professional examinations as provided for in the Constitution. Of a total of 1772 judges in Venezuela, the Supreme Court of Justice reports that only 183 are tenured, 1331 are provisional, and 258 are temporary." *Report on the Situation of Human Rights in Venezuela*; OAS/Ser.L/V/II.118. doc.4rev.2; December 29, 2003, ¶174, *available at* http://www.cidh.oas.org/countryrep/Venezuela2003eng/toc.htm. The Commission also added that "one issue with an impact on the autonomy and independence of the judiciary is the provisional nature of judges within the Venezuelan legal system. Information from different sources indicates that at present, more than 80% of Venezuela's judges are 'provisional.'" *Id.*, ¶161. The Inter-American Court on Human Rights in the decision issued on June 30, 2009 (Case Reverón Trujillo vs. Venezuela) has ruled that "in Venezuela, since August 1999 up to now, provisional judges have no stability in their tenure, are discretionally appointed and can be dismissed without any pre-established procedure. Also, when the facts of the case took place, the percentage of provisional judges in the country approximately was up to 80%."Paragraph 106, available at http://www.corteidh. or.cr/docs/casos/articulos/seriec_197_esp.pdf

implemented by legislation, matters of judicial discipline are currently in the hands of the "Functioning and Restructuring Commission of the Judiciary"[109] (not established in the Constitution but created by the National Constituent Assembly in 1999), which has the power to remove temporary judges without due process guarantees,[110] and in those of a Judicial Commission of the Supreme Tribunal of Justice, which has also discretionary powers to remove all temporary judges.[111]

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[109] The Politico-Administrative Chamber of the Supreme Tribunal of Justice has ruled that the dismissal of temporary judges is a discretional power of the Functioning and Restructuring Commission of the Judiciary. This Commission was created after 1999 and adopts its decisions without following any administrative procedure. *See* Decision No. 00463-2007 of March 20, 2007; Decision No. 00673-2008 of April 24, 2008 (quoted in Decision No. 1.939 of December 18, 2008, p. 42). The same *position* has been established by the Constitutional Chamber in Decisions No. 2414 of December 20, 2007; and Decision No. 280 of February 23, 2007.

[110] *See* Allan R. Brewer-Carías, *La justicia sometida al poder y la interminable emergencia del poder judicial (1999-2006)* in DERECHO Y DEMOCRACIA. CUADERNOS UNIVERSITARIOS, Órgano de Divulgación Académica, Vicerrectorado Académico, Universidad Metropolitana, Año II, No. 11, *Caracas*, September 2007, pp. 122-138, also published as Allan R. Brewer-Carías, *La justicia sometida al poder (La ausencia de independencia y autonomía de los jueces en Venezuela por la interminable emergencia del Poder Judicial (1999-2006))* in CUESTIONES INTERNACIONALES. ANUARIO JURÍDICO VILLANUEVA 2007, Centro Universitario Villanueva, Marcial Pons, Madrid, 2007, pp. 25–57, *available at* www.allanbrewercarias.com, (Biblioteca Virtual, II.4. Artículos y Estudios No. 550, 2007) pp. 1-37.

[111] *See* Supreme Tribunal of Justice, Constitutional Chamber, Decision No. 1.939 of December 18, 2008 (Case: *Gustavo Álvarez Arias et al*.)

C. The reality concerning the appointment and removal of the current Supreme Tribunal of Justice

98. The 1999 Constitution created the Supreme Tribunal of Justice, as the highest court in the country, in substitution of the former Supreme Court of Justice established under the previous 1961 Constitution. The Supreme Tribunal is composed of six Chambers: Constitutional, Politico-Administrative, Electoral, Civil Cassation, Criminal Cassation and Social, and may also sit in Plenary Session (*en banc; Sala Plena*). The 1999 Constitution regulates in detail the qualifications to be met by the Magistrates of the Supreme Tribunal, but leaves to the Organic Law of the Supreme Tribunal of Justice to determine the number of Magistrates sitting in each Chamber and the competence of each Chamber (Article 262). In addition, the Supreme Tribunal is in charge of the "governance and administration of the Judiciary" (Article 267), replacing the former "Council of the Judiciary" as head of the Judicial Branch. In order to accomplish these functions, the Supreme Tribunal acting in Plenary Session, has created an Executive Board of the Judiciary.

99. The Constitution assigns to the National Assembly the power to elect the Magistrates of the Supreme Tribunal, for a single term of 12 years (Article 264). Candidates must be nominated at their own initiative or by organizations related to judicial activities, to a "Judicial Nominations Committee" integrated only by "representatives of the different sectors of society" (Article 270). This Committee, having heard the opinion of the community, must pre-select a group of nominees to be presented to the "Citizen" Branch of Government Power (Prosecutor General, Comptroller General, Peoples' Defendant) that must make a second preselection of nominees, which is the one to be submitted to the National Assembly (Article 264). The Constitution also provides that citizens have the right to file well founded objections to any of the nominees before the Judicial Nominations Committee or before the National Assembly. The main purpose of this constitutional procedure was to limit the discretionary power that the former Congress had in appointing Magistrates to the Supreme Court of Justice, which was often exercised on the basis of political agreements and without any sort of citizen or society control.

100. Ignoring these constitutional provisions (and without waiting for the regular legislature to enact the Organic Law of the Su-

preme Tribunal of Justice as contemplated by the Constitution), the Constituent Assembly issued "Decree on the Regime for the Transition of Public Powers," on December 22, 1999,[112] this is, a week after the referendum that approved the Constitution. This decree dismissed the fifteen Justices of the former Supreme Court of Justice that were still in office, and appointed, on a transitory basis, twenty new Magistrates for the new Supreme Tribunal of Justice. In the absence of constitutional or legal provisions specifying the number of Magistrates for each Chamber, the Constituent Assembly appointed five Magistrates for the Constitutional Chamber and three Magistrates for each of the other five Chambers. These appointments were made without complying with the constitutional provisions regarding the nomination of candidates by a Judicial Nomination Committee integrated by representatives of the different sectors of society.[113] This appointment procedure had no basis in the Constitution or in any statute, nor could this decree be justified as the exercise of a constituent power, because the Constituent Assembly had no power to enact constitutional provisions without popular approval by referendum, and no referendum was held on this matter.[114]

101. After the new National Assembly was elected in 2000, it had to comply with the constitutional mandate to enact the Organic Law of the Supreme Tribunal of Justice in order to determine the number of Magistrates of each of its Chambers, and to provide for the composition, organization and functioning of the Judicial Nominating Committee so as to elect, in a definitive way, the Magistrates of the Supreme Tribunal of Justice. But instead of enacting such Organic Law, on November 14,

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112 *Official Gazette* No. 36.859 of December 29, 1999. On the transitory regime, *see Allan* R. Brewer-Carías, LA CONSTITUCIÓN DE 1999. DERECHO CONSTITUCIONAL VENEZOLANO, Vol. II, Editorial Jurídica Venezolana, Caracas 2004, pp. 1013-1025.

113 *See* Allan R. Brewer-Carías, *La participación ciudadana en la designación de los titulares de los órganos no electos de los Poderes Públicos en Venezuela y sus vicisitudes políticas* in REVISTA IBEROAMERICANA DE DERECHO PUBLICO Y ADMINISTRATIVO, Year 5 N° 5-2005, San Jose, Costa Rica 2005, pp. 76-95, *available at* www.allanbrewercarias.com, (Biblioteca Virtual, II.4. Artículos y Estudios No. 469, 2005) pp. 1-48.

114 The Decree on the Regime for the Transition of Public Powers was issued after the referendum of December 15, 1999, that approved the 1999 Constitution. It was not submitted to a separate referendum.

2000, the National Assembly adopted a "Special Law for the Ratification or Election of the High Officials of the Citizens Power and of the Magistrates of the Supreme Tribunal of Justice for the First Constitutional Term."[115] This law created a Parliamentary Commission composed of a majority of representatives as a "Nominating Committee" to select the Justices, by-passing the constitutional provision imposing the need to create and regulate the Judicial Nominating Committee composed exclusively by representatives of different sectors of society. The National Assembly, in fact, appointed "a Commission integrated by 15 representatives, which shall act as the Committee for the Evaluation of Nominations" (Article 3), to select "a list of twelve (12) persons representing the different sectors of society by means of mechanisms of consultation," and present the list to the National Assembly so that it may choose, by an absolute majority, six (6) persons to sit on the Commission (Article 4).

102. The Peoples' Defendant at the time (which had been one of the High Officials provisionally appointed in December 1999), filed an action of unconstitutionality (*acción de inconstitucionalidad*) with an *amparo* petition against the "Special Law," in order to protect the citizens' rights of political participation.[116] The Supreme Tribunal has not ruled on that petition to this date. In a preliminary ruling, however, the Magistrates of the Constitutional Chamber, instead of recusing themselves, decided that the constitutional provisions for the appointment of Magistrates of the Supreme Tribunal did not apply to them, that is, to the same individuals who were deciding the matter. They reasoned that they were to be "ratified" and not "appointed."[117] The Peoples' Defendant who chal-

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[115] *Official Gazette* No. 37.077 of November 14, 2000.

[116] *See* EL UNIVERSAL, December 14, 2000, pp. 1-2.

[117] The Constitutional Chamber took the view that they could be "ratified" by the Special Law without complying with the Constitution, because the Constitution provided only for the "nomination" of Magistrates and did not contemplate the "ratification" of those already in office. The Chamber ruled: "Consequence of the necessary application of the Regime for the Transition of the Public Powers which – as this Chamber has pointed out – has constitutional rank, is that it is only with respect to the Magistrates of the Supreme Tribunal of Justice that the concept of ratification shall be applied, [a concept] that is not provided for in the Constitution, as a result of which the phrase in Article 21 of the Regime for the Transition of Public Powers, according to which definitive ratifications shall be done according to the Constitution, is inapplicable, since as this Chamber

lenged the Special Law was not confirmed in his position. The "Special Law" thus consolidated the earlier political appointment of Magistrates of the Supreme Tribunal and the political control of the Judiciary through an extra-constitutional appointments process.

103. The National Assembly finally enacted the Organic Law of the Supreme Tribunal of Justice in 2004.[118] However, the Judicial Nominating Committee regulated by the law was not composed by representatives of the different sectors of society, as required by the Constitution. It was integrated by eleven (11) members, from which five (5) were elected from the representatives to the National Assembly, and the other six (6) from the other sectors of society, elected in a public proceeding (Article 13, paragraph 2). In practice, this Committee acts as a Parliamentary Commission with additional non-parliamentary members, operating within the National Assembly (Article 13).

104. For the first time since the approval of the 1999 Constitution, the 2004 Organic Law of the Supreme Tribunal of Justice established the number of the Magistrates of the Supreme Tribunal, increasing it to a total of 32 Magistrates. The nomination and appointment by means of the new "Nominating Committee" was completely controlled by the political organs of the Government. This was publicly acknowledged by the President of the Parliamentary Nominating Commission in charge of selecting the candidates for Magistrates of the Supreme Tribunal (who a

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has previously stated, the current Constitution did not provide [*sic*] norms on ratification of Magistrates to the Supreme Tribunal of Justice." *See* Supreme Tribunal of Justice, Constitutional Chamber, Decision of December 12, 2000 in REVISTA DE DERECHO PÚBLICO Nº 84, Editorial Jurídica Venezolana, Caracas, 2000, p. 109. *See* comments in Allan R. Brewer-Carías, *La participación ciudadana en la designación de los titulares de los órganos no electos de los Poderes Públicos en Venezuela y sus vicisitudes políticas* in REVISTA IBEROAMERICANA DE DERECHO PÚBLICO Y ADMINISTRATIVO, Year 5, Nº 5-2005, San José, Costa Rica 2005, pp. 76-95, *available at* www.allanbrewercarias.com, (Biblioteca Virtual, II.4. Artículos y Estudios No. 469, 2005) pp. 1-48.

[118] *See e.g.,* **Ex. R-106**, *Official Gazette* No. 37.942 of May 20, 2004. For comments on this law, *see generally* Allan R. Brewer-Carías, LEY ORGÁNICA DEL *Tribunal* SUPREMO DE JUSTICIA. PROCESOS Y PROCEDIMIENTOS CONSTITUCIONALES Y CONTENCIOSO-ADMINISTRATIVOS, Editorial Jurídica Venezolana, Caracas, 2004.

few months later was appointed Ministry of the Interior and Justice). In December 2004, he stated to the press:

> Although we, the representatives, have the authority for this selection, the President of the Republic was consulted and his opinion was very much taken into consideration. […] Let's be clear, we are not going to score own-goals. On the list, there were people from the opposition who comply with all the requirements. The opposition could have used them in order to reach an agreement during the last sessions, but they did not want to. We are not going to do it for them. There is no one in the group of candidates that could act against us [...].[119]

105. The President's influence on the Supreme Tribunal was admitted by himself, when he publicly complained that the Supreme Tribunal had issued an important ruling in which it "modified" the Income Tax Law, without previously consulting the "leader of the Revolution," and warning courts against decisions that would be "treason to the People" and "the Revolution." That was a very controversial case, decided by the Constitutional Chamber of the Supreme Tribunal in Decision No. 301 of February 27, 2007.[120] The President of the Republic said:

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[119] *See* EL NACIONAL, Caracas December 13, 2004. The Inter-American Commission on Human Rights suggested in its Report to the General Assembly of the OAS for 2004 that "These provisions of the Organic Law of the Supreme Court of Justice also *appear* to have helped the executive manipulate the election of judges during 2004." *See* Inter-American Commission on Human Rights, *2004 Report on Venezuela*, ¶180.

[120] Supreme Tribunal of Justice, Constitutional Chamber, Decision No. 301 of February 27, 2007 (Case: *Adriana Vigilanza y Carlos A. Vecchio*) (Exp. No. 01-2862) in *Official Gazette No*. 38.635 of March 1, 2007. *See* comments in Allan R. Brewer-Carías, *El juez constitucional en Venezuela como legislador positivo de oficio en materia tributaria* in REVISTA DE DERECHO PÚBLICO NO. 109, Editorial Jurídica Venezolana, Caracas 2007, pp. 193-212, *available at* www.allanbrewercarias.com, (Biblioteca Virtual, II.4. Artículos y Estudios No. 508, 2007) pp. 1-36; and Allan R. Brewer-Carías, *De cómo la Jurisdicción constitucional en Venezuela, no sólo legisla de oficio, sino subrepticiamente modifica las reformas le- gales que "sanciona", a espaldas de las partes en el proceso: el caso de la aclaratoria de la sentencia de Reforma de la Ley de Impuesto sobre la Renta de 2007* in REVISTA DE DERECHO PÚBLICO NO. 114, Editorial Jurídica Venezolana, Caracas 2008, pp. 267-276, *available at*

> Many times they come, the National Revolutionary Government comes and wants to make a decision against something that, for instance, deals with or has to pass through judicial decisions, and then they begin to move against it in the shadows, and many times they succeed in neutralizing decisions of the Revolution through a judge, or a court, and even through the very same Supreme Tribunal of Justice, behind the **backs of the Leader of the Revolution**, acting from within against the Revolution. This is, I insist, **treason to the people, treason to the Revolution**.[121]

106. Another important aspect of the new Organic Law of the Supreme Tribunal of Justice concerned dismissal of the Magistrates of the Supreme Tribunal. According to Article 265 of the 1999 Constitution, a Magistrate can be dismissed only by the vote of a qualified majority of two-thirds of the National Assembly, following a hearing, in cases of "grave faults" (*faltas graves*) committed by the accused, following a prior qualification by the Citizens Power. The Organic Law of the Supreme Tribunal of Justice defines "grave faults" very broadly, leaving open the possibility of dismissal based exclusively on political motives.[122] Furthermore, the qualified two-thirds majority was required by the Constitution in order to avoid leaving the tenure of the Magistrates in the hands of

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http://www.brewercarias.com/Content/449725d9-f1cb-474b-8ab2-41efb849fea8/Content/II.4.575.pdf.

121 (Emphasis added.) (*"Muchas veces llegan, viene el Gobierno Nacional Revolucionario y quiere tomar una decisión contra algo por ejemplo que tiene que ver o que tiene que pasar por decisiones judiciales y ellos empiezan a moverse en contrario a la sombra, y muchas veces logran neutralizar decisiones de la Revolución a través de un juez, o de un tribunal, o hasta en el mismísimo Tribunal Supremo de Justicia, **a espaldas del líder de la Revolución**, actuando por dentro contra la Revolución. Eso es, repito, traición al pueblo, traición a la Revolución."* (Emphasis added.)) *Discurso en el Primer Encuentro con Propulsores del Partido Socialista Unido de Venezuela desde el teatro Teresa Carreño* (Speech in the First Event with Supporters of the Venezuela United Socialist Party at the Teresa Carreno Theatre), March 24, 2007, *available at* http://www.minci.gob.ve/alocuciones/4/13788/primer_encuentro_con.html, p. 45.

122 *See* Allan R. Brewer-Carías, LEY *Orgánica* DEL TRIBUNAL SUPREMO DE JUSTICIA. PROCESOS Y PROCEDIMIENTOS CONSTITUCIONALES Y CONTENCIOSO-ADMINISTRATIVOS, Editorial Jurídica venezolana, Caracas 2004, p. 41.

a simple majority of Legislators. The Organic Law of the Supreme Tribunal of Justice circumvented this requirement by authorizing the dismissal of Magistrates by a simple majority vote that revokes the "administrative act of their appointment" (Article 23,4).[123] The National Assembly has already used its power to dismiss Magistrates who have ruled on sensitive issues against the Government's wishes.[124]

D. *The subjection of the Venezuelan Judiciary to political control*

107. As described above, the constitutional principles tending to assure the autonomy and independence of judges at all levels of the Judiciary are yet to be applied, particularly regarding the admission of candidates to the judicial career through "public competition" processes, with citizen participation in the procedure of selection and appointment, and regarding the prohibition of removal or suspension of judges except through disciplinary trials before a disciplinary courts and judges (Articles 254 and 267). In reality, since 1999 the Venezuelan Judiciary has been composed primarily of temporary and provisional judges, without career or stability, appointed without the public competition process of selection established in the Constitution, and dismissed without due process of law, for political reasons.[125]

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[123] *Id.,* pp. 39-41.

[124] That was the fate of *Franklin* Arrieche, Vice-President of the Supreme Tribunal of Justice, who delivered a decision dated August 14, 2002 regarding the criminal proceedings against the military generals who acted on April 12, 2002. The decision ruled that there were no grounds to prosecute the generals because no military coup had taken place. This was also the fate of Alberto Martini Urdaneta, President of the Electoral Court, and Rafael Hernandez and Orlando Gravina, Judges of the same court who signed Decision N° 24 of March 15, 2004 (Case: *Julio Borges, Cesar Perez Vivas, Henry Ramos Allup, Jorge Sucre Castillo, Ramón Jose Medina and Gerardo Blyde vs. the National Electoral Council*), a ruling that suspended the effects of Resolution N° 040302-131 of the National Electoral Council dated March 2, 2004, which stopped the recall of the presidential referendum at that time.

[125] *See* Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Venezuela*, OEA/Ser.L/V/II.118, doc. 4 rev. 2, December 29, 2003, ¶174, *available at* http://www.cidh.oas.org/countryrep/ Venezuela 2003eng/toc.htm. The Inter-American Court on Human Rights, decision of June

108. This reality amounts to political control of the Judiciary, as demonstrated by the dismissal of judges who have adopted decisions contrary to the policies of the governing political authorities. Another example will serve to illustrate this point. In summary, when a contentious-administrative court ruled against the government in a politically charged case, the government responded by intervening (taking over) the court and dismissing its judges and, after the Inter-American Court of Human Rights ruled that the dismissal had violated the American Convention of Human Rights and Venezuela's international obligations, the Constitutional Chamber upheld the government's argument that the decision of the Inter-American Court cannot be enforced in Venezuela.

109. On July 17, 2003, the Venezuelan National Federation of Doctors brought an *amparo* action in the First Court on Contentious-Administrative Matters in Caracas,[126] against the Mayor of Caracas, the Ministry of Health and the Caracas Metropolitan Board of Doctors (*Colegio de Médicos*). The petitioners asked for a declaration of the nullity of certain measures of the defendant Officials through which Cuban doctors were hired for a much publicized governmental health program in the Caracas slums, without complying with the legal requirements for foreign doctors to practice the medical profession in Venezuela. The National Federation of Doctors argued that, by allowing foreign doctors to exercise the medical profession without complying with applicable regulations, the program was discriminatory and violated the constitutional rights of Venezuelan doctors.[127] One month later, in August 21, 2003, the First Court issued a preliminary protective *amparo* measure, on the ground that there

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30, 2009 (Case Reverón Trujillo vs. Venezuela), has also concluded that "Venezuela does not offer to said [provisional] judges the inamobility guaranty (supra par. 101, 102, aand 113). As was established, the inamobility is one of the basic guaranties of judicial *independence* that the State is obligated to give both to the titular and provisional judges in equal form." Paragraph 121, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_197_esp.pdf

126 Contentious-administrative courts have competence to review administrative decisions.

127 *See* Claudia Nikken, *El caso Barrio Adentro: La Corte Primera de lo Contencioso Administrativo ante la Sala Constitucional del Tribunal Supremo de Justicia o el avocamiento como medio de amparo de derechos e intereses colectivos y difusos* in REVISTA DE DERECHO PÚBLICO NO. 93-96, Editorial Jurídica Venezolana, Caracas, 2003, pp. 5 ff.

were sufficient elements to consider that the constitutional guaranty of equality before the law was being violated in the case. The Court ordered, in a preliminary way, the suspension of the Cuban doctors' hiring program and ordered the Metropolitan Board of Doctors to replace the Cuban doctors already hired with Venezuelan ones or foreign doctors who had fulfilled the legal requirements to exercise the medical profession in the country.[128]

110. In response to that preliminary judicial *amparo* decision, the Minister of Health, the Mayor of Caracas, and even the President of the Republic made public statements to the effect that the decision was not going to be respected or enforced.[129] Following these statements, the government-controlled Constitutional Chamber of the Supreme Tribunal of Justice adopted a decision, without any appeal being filed, assuming jurisdiction over the case and annulling the preliminary *amparo* ordered by the First Court; a group of Secret Service police officials seized the First Court's premises; and the President of the Republic, among other expressions he used, publicly called the President of the First Court a "bandit."[130] A few weeks later, in response to the First Court's decision in an unrelated case challenging a local registrar's refusal to record a land sale, a Special Commission for the Intervention of the Judiciary, which in spite of being unconstitutional continued to exist, dismissed all five judges of the First Court.[131] In spite of the protests of all the Bar Associations

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128 *See* Decision of August, 21 2003, in *id.,* pp. 445 ff.

129 The *President* of the Republic said: "*Váyanse con su decisión no sé para donde, la cumplirán ustedes en su casa si quieren* [...]" (You can go with your decision, I don't know where; you will enforce it in your house if you want [...]). *See* EL UNIVERSAL*,* Caracas, August 25, 2003 and EL UNIVERSAL, Caracas, August 28, 2003.

130 *See* Inter-American Court of Human Rights, *Apitz Barbera et al. (Corte Primera de lo Contencioso Administrativo) v. Venezuela* (Judgment of August 5, 2008), *available at* www.corteidh.or.cr, ¶239. *See also*, EL UNIVERSAL*,* Caracas, October 16, 2003; and EL UNIVERSAL, Caracas, September 22, 2003.

131 *See* EL NACIONAL, Caracas, November 5, 2003, p. A2. The dismissed President of the First Court said: "*La justicia venezolana vive un momento tenebroso, pues el tribunal que constituye un último resquicio de esperanza ha sido clausurado.*" ("The Venezuelan judiciary lives a dark moment, because the court that was a last glimmer of hope has been shut down.") *Id*. The Commission for the Intervention of the Judiciary had also massively dismissed al-

of the country and also of the International Commission of Jurists;[132] the First Court remained suspended without judges, and its premises remained closed for about nine months,[133] period during which simply no judicial review of administrative action could be sought in the country.[134]

111. The dismissed judges of the First Court brought a complaint to the Inter- American Commission of Human Rights for the government's unlawful removal of them and for violation of their constitutional rights. The Commission in turn brought the case, captioned *Apitz Barbera et al.* (*Corte Primera de lo Contencioso Administrativo vs. Venezuela*) before the Inter-American Court of Human Rights. On August 5, 2008, the Inter-American Court ruled that the Republic of Venezuela had violated the rights of the dismissed judges established in the American Convention of Human Rights, and ordered the State to pay them due compensation, to reinstate them to a similar position in the Judiciary, and to publish part of the decision in Venezuelan newspapers.[135] Nonetheless, on December 12, 2008, the Constitutional Chamber of the Supreme Tribunal issued Decision No. 1.939, declaring that the August 5, 2008 deci-

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most all judges of the country without due disciplinary process, and had replaced them with provisionally appointed judges beholden to the ruling power.

132 *See* in EL NACIONAL, Caracas, October 10, 2003, p. A-6; EL NACIONAL, Caracas, October 15, 2003, p. A-2; EL NACIONAL, Caracas, September 24, 2003, p. A-4; and EL NACIONAL, Caracas, February 14, 2004, p. A-7.

133 *See* EL NACIONAL, Caracas, October 24, 2003, p. A-2; and EL NACIONAL, Caracas, July 16, 2004, p. A-6.

134 *See generally* Allan R. Brewer-Carías, *La progresiva y sistemática demolición institucional de la autonomía e independencia del Poder Judicial en Venezuela 1999–2004* in XXX JORNADAS J.M DOMÍNGUEZ ESCOVAR, ESTADO DE DERECHO, ADMINISTRACIÓN DE JUSTICIA Y DERECHOS HUMANOS, Instituto de Estudios Jurídicos del Estado Lara, Barquisimeto, 2005, pp. 33–174; Allan R. Brewer-Carías, *La justicia sometida al poder (La ausencia de independencia y autonomía de los jueces en Venezuela por la interminable emergencia del Poder Judicial (1999-2006))* in CUESTIONES INTERNACIONALES. ANUARIO JURÍDICO VILLANUEVA 2007, Centro Universitario Villanueva, Marcial Pons, Madrid, 2007, pp. 25–57, *available at* www.allanbrewercarias.com, (Biblioteca Virtual, II.4. Artículos y Estudios No. 550, 2007) pp. 1-37.

135 Inter-American Court of Human Rights, *Apitz Barbera et al. (Corte Primera de lo Contencioso Administrativo) v. Venezuela* (Judgment of August 5, 2008), *available at* www.corteidh.or.cr.

sion of the Inter-American Court of Human Rights was non-enforceable (*inejecutable*) in Venezuela. The Constitutional Chamber also accused the Inter-American Court of having usurped powers of the Supreme Tribunal of Justice, and asked the Executive Branch to denounce the American Convention of Human Rights.[136]

112. The case just discussed, including in particular the *ad hoc* response of the Constitutional Chamber to the decision of the Inter-American Court of Human Rights, shows clearly the present subordination of the Venezuelan Judiciary to the policies, wishes and dictates of the President of the Republic.[137] The Constitutional Chamber has in fact become a most effective tool for the existing consolidation of power in the person of President Chávez.[138]

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[136] Supreme Tribunal of Justice, Constitutional Chamber, Decision No. 1.939 of December 18, 2008 (Case: *Abogados Gustavo Álvarez Arias et al.*) (Exp. No. 08-1572).

[137] This *situation* has been recently summarized by Teodoro Petkoff, editor and founder of TAL CUAL, one of the important newspapers in Caracas, as follows: "Chavez controls all the political powers. More that 90% of the Parliament obey his commands; the Venezuelan Supreme Court, whose number were raised from 20 to 32 by the parliament to ensure an overwhelming officialist majority, has become an extension of the legal office of the Presidency... The Attorney General's Office, the Comptroller's Office and the Public Defender are all offices held by 'yes persons' absolutely obedient to the orders of the autocrat. In the National Electoral Council, four of five members are identified with the government. The Venezuelan Armed Forces are tightly controlled by Chávez. Therefore, form a conceptual point of view, the Venezuelan political system is autocratic. All political power is concentrated in the hands of the President. There is no real separation of Powers." *See* Teodoro Petkoff, *Election and Political Power. Challenges for the Opposition* in HARVARD REVIEW OF LATIN AMERICA, David Rockefeller Center for Latin American Studies, Harvard University, Fall 2008, pp. 12, *available at* http://www.drclas.harvard.edu/revista/articles/view/1125. *See* Allan R. Brewer-Carías, *Los problemas de la gobernabilidad democrática en Venezuela: el autoritarismo consttucional y la concentración y centralización del poder* in Diego Valadés (Coord.), GOBERNABILIDAD Y CONSTITUCIONALISMO EN AMÉRICA LATINA, Universidad Nacional Autónoma de México, México 2005, pp. 73-96.

[138] In 2001, when approving more than 48 decree laws issued via delegate legislation, President Chávez stated: "*La ley soy yo. El Estado soy yo."* ("The law is

113. It is within the aforementioned context of subjection of the Judiciary to political control that, at the Government's request, the Constitutional Chamber purported to interpret Article 258 of the Constitution, which needed no interpretation, and went further, acting beyond the scope of its competence and contradicting its own prior decisions, and "interpreted" Article 22 of the Investment Law according to the Government's position, with an eye to the various international arbitration cases pending against the State at the time of the request.

III. THE NOTIONS OF "INVESTMENT," "INTERNATIONAL INVESTMENT," AND RELATED NOTIONS IN THE INVESTMENT LAW

114. The **Jurisdiction Objections** (¶¶126-135) and the **Urdaneta Opinion** (¶¶26-40) elaborate an objection to jurisdiction based on a purported application of the notions of "international investment," "international investor," "foreign direct investment," "owner," "ownership," and "effective control," as these terms are used in the Investment Law. As demonstrated in this Part, the proposed interpretation of these terms in the Jurisdiction Objections and the Urdaneta Opinion is incorrect and the reasoning on which such interpretation is based is logically flawed.

115. In order to fully understand the way in which the aforementioned terms are used and defined in the Investment Law, it is necessary to take into account the legal regime governing foreign investment that preceded, and was generally superseded, by that Law. At the time of the enactment of the Investment Law, Venezuela was a member of the Andean Community of Nations, which resulted from the transformation of the original 1969 Andean Pact Integration Agreement.[139] For that rea-

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me. The State is me.") *See* EL UNIVERSAL, Caracas December 4, 2001, pp. 1,1 and 2,1.

[139] The Andean Pact was later transformed into the Andean Community of Nations, from which Venezuela withdrew in 2006. The announcement was made by the President of the Republic of Venezuela in a meeting with the Presidents of Bolivia, Paraguay and Uruguay held in Asunción on April 20, 2006. *See* EL UNIVERSAL, Caracas, April 21, 2006; EL UNIVERSAL, Caracas, April 24, 2006; EL UNIVERSAL, Caracas, April 20, 2006. The decision was formally notified by the *Venezuelan* Foreign Minister to the General Secretary of the Andean Community on April 22, 2006.

son, at that time the Venezuelan legal order included Decision 291 of the Andean Community (Regime for the Common Treatment of Foreign Capital and Trademarks, Patents, Licensing Agreements and Royalties) of March 21, 1991 (**Ex. RL-23)**, and the implementing Regulation, adopted by Decree No. 2.095 of March 25, 1992 (**Ex. RL-24**) (collectively, the ***Andean Pact Regime***).[140] The Andean Pact Regime was the only legal regime concerning foreign investment that existed in Venezuela at the time the Investment Law was adopted.

116. The Andean Pact Regime, although less restrictive than its predecessor regime under the Andean Pact, was still primarily concerned with the registration and strict regulation of foreign investment and did not contain provisions for the promotion or protection of such investments, other than a general principle of national treatment, subject to certain exceptions regarding economic sectors reserved to national enterprises.[141] In contrast, the Investment Law explicitly provides for the promotion and protection of investments (as its title indicates) and does so by establishing broad standards of protection, similar to those found in typical bilateral or multilateral treaties or agreements on investments. The aims of the Investment Law are clearly stated in its Article 1, which states:

> "This Decree-Law is intended to provide investments and investors, both domestic and foreign, with a stable and foreseeable legal framework in which they may operate in an environment of security, through the **regulation of the State's action** towards such investments and investors, with a view towards achieving the increase, diversification and harmonious integration of investments in favor of domestic development objectives."[142]

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[140] *See* **Ex. RL-23** and *Official Gazette* No. 34.930 of March 25, 1992 (**Ex. RL-24**).

[141] *Decision 291, Article 2 (Ex. RL-23); Decree* No. *2095*, Articles 13, 26-28 (**Ex. RL-24**).

[142] **Exhibit C-1**, Investment Law, Article 1 (emphasis added.) ("*Este Decreto-Ley tiene por objeto proveer a las inversiones y a los inversionistas, tanto nacionales como extranjeros, de un marco jurídico estable y previsible, en el cual aquéllas y éstos puedan desenvolverse en un ambiente de seguridad, mediante la regulación de la actuación del Estado frente a tales inversiones e inversionistas, con miras a lograr el incremento, la diversificación y la*

117. While the primary focus of the Andean Pact Regime was to regulate foreign investment and the status of foreign enterprises in contrast to national enterprises,[143] the primary focus of the Investment Law is to regulate the conduct of the State toward national and foreign investment and investors, in order to protect and promote investment. Indeed, even a superficial comparison between the two regimes shows that it was a fundamental objective of the Investment Law to complement the existing legal regime for the treatment of foreign investment and for foreign and national enterprises with a new regime better aimed at the promotion and protection of investments. This is a key point to be borne in mind if the interpreter is to reach a correct understanding of the provisions of the Investment Law.

1. The notion of "Investment"

118. Article 3,1 of the Investment Law defines "investment" as "**every kind of asset to be used in producing revenue**, under any of the corporate or contractual forms allowed under Venezuelan law."[144] By way of illustration, the same provision indicates that "investment" includes:

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complementación armónica de las inversiones en favor de los objetivos del desarrollo nacional.")

143 This conclusion is based on the text of the relevant documents and my personal experience. Starting in 1968, I was involved in the Venezuelan *negotiations* regarding the Andean Pact. I was the Legal Counsel to the Venezuelan Ministerial Delegation to the Signing Meeting of the Cartagena Agreement in Cartagena, Colombia in 1969 and was the Venezuelan Observer to the First Meeting of Foreign Minister of the Andean Pact, held in Lima on 1970. As President of the Presidential Commission of Public Administration during 1969-1972, due to my legal and academic expertise on the legal aspects of economic integration processes, I advised the Government on matters related to the Andean Economic Integration process and, as Head of the Administrative Reform Agency, I was the official in charge of promoting the organization of the Institute of Foreign Trade (*Instituto de Comercio Exterior*) created by the *Ley que Crea el Instituto de Comercio Exterior* (Law Creating the Institute of Foreign Trade), *Official Gazette* No. 29.294 of August 17, 1970.

144 Investment Law, Article 3,1. ("*Inversión: Todo activo destinado a la producción de una renta, bajo cualquiera de las formas empresariales o contractuales permitidas por la legislación venezolana, incluyendo bienes muebles e inmuebles, materiales o inmateriales, sobre los cuales se ejerzan derechos*

> "personal and real property, both tangible or intangible, over which property rights or other rights *in rem* are held; credit instruments; rights to benefits having an economic value; intellectual property rights, including technical know-how, good will and clients; and rights obtained in accordance with public law, including concessions for the exploration, extraction or exploitation of natural resources, and those for construction, exploitation, conservation and maintenance of national public works and for the rendering of national public services, as well as any other right granted by law or by administrative decision adopted in pursuant to law."[145]

119. Under this definition, every asset destined to the production of income under any entrepreneurial or contractual form permitted by Venezuelan legislation is an "investment" for the purposes of the Investment Law. In contrast, the Andean Pact Regime did not contain any definition of "investment;" it defined particular **types** of investment, as discussed below.

2. The notion of "International Investment"

120. Article 3,2 of the Investment Law defines "international investment" as "the investment that is owned or actually controlled by foreign individuals or corporate entities."[146] It follows from this defini-

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de propiedad u otros derechos reales; títulos de crédito; derechos a prestaciones que tengan valor económico; derechos de propiedad intelectual, incluyendo los conocimientos técnicos, el prestigio y la clientela; y los derechos obtenidos conforme al derecho público, incluyendo las concesiones de exploración, de extracción o de explotación de recursos naturales y las de construcción, explotación, conservación y mantenimiento de obras públicas nacionales y para la prestación de servicios públicos nacionales, así como cualquier otro derecho conferido por ley, o por decisión administrativa adoptada en conformidad con la ley.") The first phrase of the Article can also be translated as "every asset destined to the production of income, under any of the entrepreneurial or contractual forms permitted by Venezuelan legislation…."

145 *Id.*

146 *Id.*, *Article* 3,2 ("*Inversión internacional: La inversión que es propiedad de, o que es efectivamente controlada por personas naturales o jurídicas extranjeras.* [...]") The Article can also be translated as "The investment that is the property of, or is effectively controlled by foreign natural or legal persons."

tion, together with the definition of "investment" in Article 3,1, that an "international investment" is "every kind of asset to be used in producing revenue, under any of the corporate or contractual forms allowed under Venezuelan law," that is "the investment that is owned or actually (effectively) controlled by foreign individuals or corporate entities."

121. At the time the Investment Law was adopted, there were investments in Venezuela made under the Andean Pact Regime, which did not use the term "international investment." The Andean Pact Regime used an entirely different conceptual framework, based on the concepts of "foreign direct investment," "national investment," "subregional investment," "neutral capital investment" (based on a definition of "neutral capital"), and "investment of a mixed enterprise" (based on a definition of "mixed enterprise").[147] Given this situation, it was necessary for the drafters of the Investment Law to determine how the conceptual structure of the preexisting Andean Pact Regime would fit within the new conceptual structure of the Investment Law.

122. This was accomplished by establishing that the new concept of "international investment" included the various types of investment that, under the Andean Pact Regime, presupposed ownership or control by foreign natural or juridical persons. Article 3,2 of the Investment Law thus provides:

> The term "international investment" includes foreign direct investment, sub-regional investment, neutral capital investment and the investment of an Andean Multinational Corporation."[148]

123. In turn, Article 3,3 clarifies that "[f]oreign direct investment, sub-regional investment, neutral capital investment and investment of an Andean Multinational Enterprise" are "those defined as such in the approved decisions of the Andean Community of Nations, and in their

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147 Decree No. 2095, Article 2 **(Ex. RL-24)**; and Decision 291, Article 1 **(Ex. RL-23)**.

148 Investment Law, Article 3,2. ("[...] *La inversión internacional abarca a la inversión extranj era directa, a la inversión subregional, a la inversión de capital neutro y a la inversión de una Empresa Multinacional Andina*.")

regulation in Venezuela."[149] Therefore, the concept of "international investment" in the Investment Law **includes** those earlier concepts defined in the Andean Pact Regime, but is **not limited to** those concepts,[150] because the concept of "international investment" as defined in the Investment Law, is more comprehensive, as discussed below, than those old concepts of the Andean Pact Regime put together.[151]

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[149] *Id.*, Article 3,3 ("*Inversión extranjera directa, inversión subregional, inversión de capital neutro e inversión de una Empresa Multinacional Andina: Las definidas como tales en las Decisiones aprobadas por la Comunidad Andina de Naciones, y en su reglamentación en Venezuela*.")

[150] This conclusion is further confirmed by Ambassador Werner Corrales' public account on the Investment Law. Ambassador Werner Corrales explains: "*La ley Venezolana en su Art. 3 consagra un criterio amplio al considerar inversión a '...todo activo destinado a la producción de una venta (sic), bajo cualquiera de las formas empresariales o contractuales permitidas en la legislación venezolana ...' pu-diendo asumir las modalidades de inversión internacional, inversión extranjera directa e inversión venezolana. Al referirse a la inversión extranjera directa se alude también a inversión subregional, inversión de capital neutron e inversión de Empresa Multinacional Andina.*") ("[...] Article 3 provides for a broad criteria as it considers as an investment '... every asset destined to the production of income, under any of the entrepreneurial or contractual forms permitted by the Venezuelan legislation [...]' which may assume **the modality of international investment, foreign direct investment or Venezuelan investment**. When it refers to foreign direct investment, it refers also to sub-regional investment, investment of neutral capital and investment of a Multinational Andean Company.") **Exhibit C-[x]**, Werner Corrales-Leal and Marta Rivera Colomina, *Algunas Ideas Sobre el Nuevo Régimen de Promoción y Protección de Inversiones en Venezuela* in Luis Tineo and Julia Barragán (Compilators), LA OMC COMO ESPACIO NORMATIVO, UN RETO PARA VENEZUELA, Asociación Venezolana de Derecho y Economía, Caracas, 2000, p. 176 (emphasis added). Ambassador Corrales' statement makes it clear that international investment is a separate "modality" from foreign direct investment.

[151] The concept of "international investment" in the Investment Law is more comprehensive than the aggregate of "foreign direct investment," "subregional investment," "investment of neutral capital" and "investment of an Andean Multinational Enterprise" because "international investment" is based on a broader concept of "investment" than that presupposed by the Andean Pact Regime. *See infra*, ¶128.

3. The notion of "International Investor"

124. Article 3,4 of the Investment Law defines "international investor" as "[t]he owner of an international investment or whoever effectively controls it."[152] This definition is based on the definition of "international investment," which is in turn based on the definition of "investment." Notice that the definition of "international investor" does not require **direct** ownership or **direct** effective control of an international investment. The provision does not distinguish between different forms of ownership or effective control.

125. The Sole Paragraph of Article 3 states that "the regulations to this Law-Decree shall determine the conditions under which an investment will be deemed to be owned by or under the actual control of a (effectively controlled by a) Venezuelan or foreign individual or corporate entity."[153] This provision was necessary because "international investment" and "Venezuelan investment" are defined in Article 3 in parallel terms, and in both cases the application of the concept depends on ownership or effective control by either a Venezuelan or foreign person. Since "international investment" and "Venezuelan investment" are mutually exclusive concepts, the legislator left to the regulator the task of avoiding conflicts by clarifying the operation of ownership and effective control.

126. The Regulation addresses ownership in Article 3 and effective control in Article 4.[154] Both articles states that "it is understood

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[152] Investment Law**,** Article 3,4 ("*Inversionista internacional: El propietario de una* inversión *internacional, o quien efectivamente la controle*.")

[153] Investment Law, Article 3. ("*Parágrafo Único: El Reglamento de este Decreto-Ley establecerá las condiciones en las cuales se considerará que una inversión es propiedad de, o es controlada efectivamente por una persona natural o jurídica venezolana o extranjera*.")

[154] Regulation**,** Article 3 (*"A los efectos del Parágrafo Unico del artículo 3 del Decreto con Rango y Fuerza de Ley de Promoción y Protección de Inversiones,* se *entiende que una inversión es propiedad de inversionistas internacionales, cuando su participación en la empresa receptora de la inversión sea del cien por ciento (100%) del capital social, patrimonio o activos de la misma, según la forma juridical que esta empresa adopte. "*) ("Article 3. For purposes of the Sole Paragraph of Article 3 of the Decree with the

that an investment is" owned (or effectively controlled) by international investors when their participation in the company receiving the investment is a certain percentage of the capital, equity or assets, depending on

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Rank and Force of Law to Promote and Protect Investments, it is understood that an investment is the property of international investors when their ownership interest in the company receiving the investment is one hundred percent (100%) of the capital stock, equity or assets of the company, according to the legal form the company adopts."); Article 4 (*"A los efectos del Parágrafo Unico del artículo 3 del Decreto con Rango y Fuerza de Ley de Promoción y Protección de Inversiones, se entiende que una inversión es controlada efectivamente por inversionistas internacionales: 1. Cuando su participación en la empresa receptora de la inversión sea igual o superior al cincuenta y uno por ciento (51%) del capital social, patrimonio o activos de la misma, según la forma jurídica que esta empresa adopte; o 2. Cuando, a juicio del organismo correspondiente conforme al artículo 6 de este Reglamento, con independencia del porcentaje de participación de inversionistas internacionales en la empresa receptora de la inversión estos inversionistas estén en capacidad de decidir sobre las actividades de la misma, sea mediante: a) El ejercicio de los derechos de propiedad o uso de la totalidad o de una parte de los activos de la empresa receptora de la inversión; o, b) El control igual o superior a la tercera parte de los votos de sus órganos de dirección o administración; o, c) El control sobre las decisiones de sus órganos de dirección y administración, mediante cláusulas contractuales, estatutarias o por cualquier otra modalidad; o, d) El ejercicio de una influencia decisiva sobre la dirección técnica, comercial, administrativa y financiera de la empresa receptora de la inversión. "*) ("Article 4. For purposes of the Sole Paragraph of Article 3 of the Decree with the Rank and Force of Law to Promote and Protect Investments, it is understood that an investment is effectively controlled by international investors: 1) When their ownership interest in the company receiving the investment is equal to or greater than fifty-one percent (51%) of the capital stock, equity or assets of the company, according to the legal form adopted by the company; or 2) When, in the opinion of the appropriate agency in accordance with Article 6 of this Regulation, regardless of the ownership interest of foreign investors in the company receiving the investment, these investors have the capacity to decide on the company's activities, whether by: a) exercising property rights or using all or a part of the assets of the company receiving the investment; or b) Controlling a third or more of the votes of the company's direction or administrative bodies; or c) Controlling the decisions of the cmopany's direction or ad,ministrative bodies, through contractual clauses, bylaws or any other way; or d) Exercising a decisive influence on the technical, commercial, administrative, and financial direction of the company receiving the investment.")

the legal form of the enterprise. The percentage of participation in the enterprise receiving the investment is 100% for ownership and at least 51% for effective control, although the Regulation provides for alternative criteria of effective control of the company receiving the investment based on the investors' capacity to decide on the activities of the receiving enterprise, in the judgment of the *Superintendencia de Inversiones Extranjeras*. In these provisions, the expression "international investment" is refered to "foreign investment" in the sense of the former Andean Pact Regime.

127. The Regulation does not deal with ownership or effective control of the investment. The Regulation deals only with ownership and effective control of the company receiving the investment, but it does not require **direct** ownership or **direct** effective control of such enterprise. If the Regulation was interpreted as restricting the definition of "investment" in the statute by requiring ownership or effective control of an company receiving the investment (a requirement that does not appear in the definition), the Regulation would be unconstitutional, because a norm of inferior rank (in this case, a regulation) cannot validly restrict the scope of a norm of superior rank (in this case, a decree having the rank and force of a statute). According to the Venezuelan constitutional system, regulations cannot introduce changes in the law or distort the spirit, purpose or reason of the law.[155]

4. "International investment" and "direct investment"

128. For the reasons explained in the foregoing paragraphs, it is incorrect to argue, as the Respondent does (**Jurisdiction Objections**, ¶129), that "in order to establish its status as an 'international investor' under the [Foreign] Investment Law, ConocoPhillips must have been the 'owner' of the **direct investments** in Venezuela or the one who 'actually controlled' them."[156] An earlier sentence in the same paragraph makes

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[155] 1999 Constitution, Article 236 (*"Son* atribuciones *y obligaciones del Presidente o Presidenta de la República: [...] (10) Reglamentar total o parcialmente las leyes sin alterar su espíritu, propósito y razón*.) ("The attributions and obligations of the President of the Republic are: [...] (10) To regulate the laws totally or partially, without altering their spirit, purpose and reason.").

[156] (Emphasis added).

clear that the Respondent was referring to the Andean Pact Regime concept of "foreign direct investment." In any event, there is nothing in the Investment Law suggesting that an "international investment" is limited, if made by foreign investors like the Claimants, to a "foreign direct investment" under the Andean Pact Regime or that an "international investor" must be the owner of a "direct" investment, in the sense of an investment owned or controlled directly rather than through subsidiaries. The Respondent's argument confuses the issues in several ways.

129. First, it is not necessary for an investor in the position of the Claimants to have a "foreign direct investment" (in the sense of the Andean Pact Regime) in order to hold an "international investment," as this term is defined in the Investment Law. It should be recalled that the concept of "international investment" is defined as "every kind of asset to be used in producing revenue, under any of the corporate or contractual forms allowed under Venezuelan law" that is "the property of, or is effectively controlled by foreign natural or legal persons." In contrast, the concept of "foreign direct investment" is defined merely in terms of **contributions** made by foreign natural or juridical persons to the **capital** of an enterprise.[157] In other words, the concept of "international investment" in the Investment Law is based on a much broader concept of "investment" than is "foreign direct investment" under the Andean Pact Regime. Furthermore, under the Andean Pact Regime, the contributions that constitute "foreign direct investment" must be **owned** by the foreign investor,[158] while an "international investment" under the Investment Law may be either **owned or effectively controlled** by a international investor (Article 3,2). Therefore, the Respondent's argument that the Claimants must hold "foreign direct investments" in order to hold "international invest-

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[157] Under the Andean Pact Regime, "Direct Foreign Investment" is defined as "contributions from abroad owned by foreign individuals or legal entities, to the capital of an enterprise, in freely convertible currency or in physical tangible assets, such as industrial plants, new and overhauled machinery, and new and overhauled equipment, spare parts, parts and pieces, raw materials and intermediate products. Also considered as direct foreign investments are investments made in local currency from resources that are entitled to be remitted abroad and such reinvestments as may be made in accordance with this Regime. [...]".) Decision 291, Article 1 (**Ex. RL-23**). *See also,* Decree No. 2.095, Article 2 (**Ex**. **RL-24**).

[158] *Id.*

ments" contradicts the very definition of "international investment" in the Investment Law. On the contrary, an investor may hold an "international investment" for the purposes of the Investment Law, whether or not it holds a "foreign direct investment" (or any other type of investment) under the Andean Pact Regime.[159]

130. Second, it is not necessary for an investor to hold an "international investment" **directly**, as opposed to holding it through subsidiaries. Once again, the Investment Law and the Regulation require only that an international investment be owned or effectively controlled by foreign natural or juridical persons; it does not require that the ownership (or more precisely the effective control) be **direct**, that is, without intermediate companies. As aforesaid, the definition of "foreign direct investment" in the Andean Pact Regime does not limit the scope of "international investment" in the Investment Law. It does not matter that the 1999 legislator did not include the phrase "direct or indirect" as a qualification to ownership or effective control. The **Jurisdiction Objections** (¶¶129-132) and the **Urdaneta Opinion** (¶¶33-39) interpret paragraphs 2 and 4 of Article 3 as if the references to ownership and effective control were limited by the non-existent word "direct." This amounts to introducing a distinction that the Legislator has not made, in violation of a classical rule of statutory interpretation, **when the Law does not distinguish the interpreter is not allowed to distinguish**.[160]

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[159] Consequently, the statement in the Urdaneta Opinion that, in his experience with foreign investment matters in Venezuela, "the concept of **registered foreign investment in shares of companies always refers to the direct and immediate owner,** and not to other entities in the corporate chain" (**Urdaneta Opinion**, ¶32 (emphasis added)), must refer to the concepts of "foreign direct investment" and "foreign enterprise" according to the Andean Pact Regime, where the need for the "registration" of investments constitutes an essential part of it. That experience is irrelevant to determining the meaning of the concept of "international investment" in the Investment Law.

[160] This classical aphorism is commonly applied by Venezuelan courts. *See, e.g.*, Supreme Tribunal of Justice, Civil Cassation Chamber, Decision No. RC.00089 of March 13, 2003, p. 4, a decision recently cited with approval in Supreme Tribunal of Justice, Civil Cassation Chamber, Decision No. RC.00029 of February 11, 2009, p. 2.

131. The **Urdaneta Opinion** (¶32) and the **Jurisdiction Objections** (¶130, footnote 184) contend that the absence of the words "direct or indirect" in the Investment Law and the Regulation is significant because "such terms are commonly used in other regulatory schemes in Venezuela." Whether other statutes in Venezuela use the language "direct or indirect" is irrelevant to the interpretation of the Investment Law and the Regulation. The suggestion that Venezuelan common practice is to include the word "indirect" whenever indirect ownership or control are to be covered is incorrect. For example, Article 5,24 of the Organic Law of the Supreme Tribunal of Justice,[161] another Venezuelan provision that uses the expression "control" without the direct or indirect qualification has been interpreted by the Supreme Tribunal as referring to "indirect" control.[162]

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[161] Article 5,24 of the Organic Law on the Supreme Tribunal of Justice provides: *"Es de la competencia del Tribunal Supremo de Justicia como más alto Tribunal de la República [...] 24.) Conocer de las demandas que se propongan contra la República, los Estados, los Municipios, o algún Instituto Autónomo, ente público o empresa, en la cual la República ejerza un control decisivo y permanente, en cuanto a su dirección o administración se refiere, si su cuantía excede de setenta mil una unidades tributarias (70.001 U.T.)."* ("It is competence of the Supreme Tribunal of Justice as the highest Tribunal of the Republic to: [...] 24. Hear claims filed against the Republic, the States, Municipalities, or any Autonomous Institute, public entity or enterprise, upon which the Republic exercises ***decisive and permanent control***, regarding their management or administration, if its quantum exceeds seventy thousand and one tributary units (70.001 T.U.).") (Emphasis added.)

[162] Supreme Tribunal of Justice, Decision No. 1.551 of September 18, 2007 (Case: *Administradora Onnis, C.A., v. Informática, Negocios and Tecnología S.A.*) (Exp. No. 2007-0786). In this case, the Politico- Administrative Chamber acknowledged that the expression "decisive and permanent control" from Article 5,24 of the Organic Law of the Supreme Tribunal of Justice covers indirect control. The issue was whether the defendant Informática, Negocios y Tecnología S.A (INTESA) was an enterprise in which the Republic of Venezuela, a State or Municipality exercised "decisive and permanent control" to grant competence over the dispute to the administrative courts (*juzgado contencioso admnistrativo*). INTESA was a company incorporated in Venezuela, owned by SAIC Bermuda (60% shareholding) and PDV Informática y Telecomunicaciones, S.A. (PDV-IFT) (40% shareholding). PDV-IFT was in turn wholly owned by Petróleos de Venezuela, S.A. (PDVSA), and PDVSA is in turn wholly owned by the Republic of Venezuela. *Id.*, pp. 2, 4-5. The Politico-

132. Third, the requirement that control be "effective" itself indicates that what matters is not a particular legal form of control, but the way an investment is controlled in the reality of international business. In order to have "effective control" over an investment, the controlling person must in fact have the power to appoint those who manage the investment. Such power can be possessed either directly or indirectly, for instance, through ownership of a sufficient percentage of stock in a chain of companies established for the purpose of owning and controlling the investment in Venezuela.

133. Fourth, for the purposes of applying the regime of the Investment Law, the status of an investment under the Andean Pact Regime does not matter. Article 4 of the Investment Law makes it clear that, while investments made under the Andean Pact Regime continue to be subject to that

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Administrative Chamber decided that "while **the Republic through PDVSA is owner of** only a **40% of the shares of [INTESA**] [...] such percentage although it does not represent a majority shareholding, it does represent an important contribution by the Republic [...]" and concluded that "**the Republic has a decisive participation** in the defendant company [...]." *Id.*, p. 5 (emphasis added). Put differently, the Politico-Admnistrative Chamber recognized that **indirect** holding of shares of INTESA by the Republic of Venezuela was enough to satisfy the "decisive and permanent control" requirement, needed to grant to the administrative courts competence over the case against INTESA. Given its quantum, the case was assigned to the relevant Regional Superior Administrative Court (*Juzgado Superior de lo Contencioso Administrativo Regional*). *Id.*, p. 6. *Strictu sensu*, Article 5,24 of the Organic Law on the Supreme Tribunal of Justice refers to the competence of the Supreme Tribunal of Justice over disputes over 70,001 U.T. While the dispute at issue did not reach that quantum, Decision No. 1.551 explained that it was applying the criteria established on Decision No. 01209 of September 2, 2004, which distributed competence among the various administrative courts according to the quantum, for cases against the entities identified in Article 5,24 of the Organic Law of the Supreme Tribunal of Justice (that is, the Republic, States or Municipalities, or Autonomous Institutes, public entities or enterprises in which the Republic, the States or Municipalities exercise "decisive and permanent control" in relation to their direction or administration). *Id*., pp. 5-6. Decision No. 01209 assigned the competencies on the basis of quantum as follows: (1) Regional Superior Administrative Courts *(Juzgados Superiores de lo Contencioso Administrativo Regionales)* for disputes with a quantum that does no exceed 10.000 UT; 2) Administrative Courts *(Cortes de lo Contencioso Admnistrativo)* for disputes exceeding 10.000 up until 70.001 UT; 3) the Politico-Administrative Chamber for disputes in excess of 70.001 UT.

regime, they "shall also be entitled to the protection established in this Law-Decree and may enjoy the benefits and incentives provided for herein subject to the limits herein stipulated in this regard." The Investment Law thus protects all international investments, in accordance with its own terms. It is improper to distort the meaning of the Investment Law by interpreting it in the light of the Andean Pact Regime.

134.I declare that the foregoing reflects my true opinion on the questions addressed.

Executed this 26th of October, 2009.

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Allan R. Brewer-Carías

4.

ICSID Case No. ARB/10/14: *OPIC KARIMUN CORPORATION* (Claimant) *v. BOLIVARIAN REPUBLIC OF VENEZUELA* (Respondent)

INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES

LEGAL EXPERT OPINION OF ALLAN R. BREWER-CARIAS

29 OCTOBER 2011

I, Allan R. Brewer-Carías, hereby declare that the following is true and correct:

1. I have been a member in good standing of the Venezuelan Federal District Bar since 1963. Since 1973, I have been a partner of Baumeister & Brewer, a law firm located in Caracas, Venezuela. I specialize in public law, particularly constitutional, administrative, and public economic law, which includes mining and hydrocarbons law. Currently, I am a resident in the United States of America, in the city of New York, NY. A copy of my curriculum vitae is attached as Appendix A to this declaration.

I. QUALIFICATIONS AND BACKGROUND

2. In 1962, I received my law degree from *Universidad Central de Venezuela* (Central University of Venezuela). I performed post graduate studies in France, at the then University of Paris (1962-1963), and in 1964 I received a Doctorate in Law (D. J.) from the Central University of Venezuela.I have taught Administrative and Constitutional law in the Central University of Venezuela since 1963. As reflected in my curriculum vitae, since the 1970's and continuing to the present, I have been a Professor, lecturer and Visiting Scholar on comparative and administrative law, with a particular

focus on Venezuela, at a number of prestigious universities, including Cambridge University (*Simón Bolívar Chair,* Fellow of Trinity College), University of Paris II (Panthéon-Assas), *El Rosario* University, *Externado de Colombia* University, University of París X (Nantèrre), and Columbia University.

3. From 1982 to 2010, I served as Vice-President of the International Academy of Comparative Law, The Hague, and have been a Professor at the International Faculty for Teaching of Comparative Law of Strasbourg. I am a member of the Venezuelan Academy of Social and Political Sciences, and served as its President from 1997 to 1999. I am a member of the *Société de Legislation Comparée* (Society of Comparative Legislation) in Paris. In 1981, I was awarded the Venezuelan Social Sciences National Prize.

4. During the past decades, I have participated in numerous academic programs – including congresses, seminars and courses – giving lectures in universities and public institutions in Europe, the U.S. and Latin America on matters of public law.

5. I have published over 130 books on matters of public law in English, French and Spanish. The titles and in many cases the text are available at http://allanbrewercarias.com/.

6. From 1978 to 1987, I was Director of the Public Law Institute at the *Universidad Central de Venezuela* (Central University of Venezuela). During my tenure, I directed the Seminars on the Andean Pact Process of Economic Integration (since 1967) and on the Venezuelan Nationalization Process of the Oil Industry (since 1975). Since 1980, I have been the Editor and Director of the *Revista de Derecho Público* (Public Law Journal), Fundación de Derecho Público/Fundación Editorial Jurídica Venezolana, Caracas.

7. In 1999, I was elected Member of the *Asamblea Nacional Constituyente* (National Constituent Assembly) in Venezuela. Although I was an opposition member (one of only four, out of 131 Members), I contributed to the drafting of many provisions of the 1999 Constitution. All my proposals and dissenting votes are collected in Allan R. Brewer-Carías, *Debate Constituyente (Aportes a la Asamblea Nacional Constituyente)*, 3 Vols., Fundación de Derecho Público, Editorial Jurídica Venezolana, Caracas 1999.

8. I am the author of over 690 articles on matters of public law in English, French and Spanish, among them 85 recent articles addressing the functioning of the Constitutional Chamber of the Supreme Tribunal of Justice, matters of the judicial review system, the sovereign immunity of the State, and arbitration in public law and public contracts in Venezuela. The titles and the text of almost all are available at http://allanbrewercarias.com/.

Scope of the Opinion

9. This opinion is rendered in connection with ICSID Case No. ARB/10/14, which is being pursued by OPIC KARIMUN CORPORATION (the **Claimant** or **OPIC**), against the Bolivarian Republic of Venezuela (the **Respondent** or **Republic**). *K&L Gates LLP*, counsel to the Claimant, have asked me to render an opinion from the stand point of Venezuelan Law on the following issues:

- The meaning of Article 22 of the Law on the Promotion and Protection of Investments issued by means of Decree-Law No. 356 of October 3, 1999 (*Official Gazette* No 5.390 (Extra) of October 22, 1999) (**Investment Law**) (**Ex. C-1a**) and whether it contains the Republic of Venezuela's consent to submit disputes to international arbitration at the International Centre for Settlement of Investment Disputes (ICSID).

- The general institutional and legal situation in Venezuela and the availability of arbitration as a means for the solution of controversies prior to and after the enactment of the 1999 Investment Law.

- The intention of the Government of Venezuela when enacting the Investment Law.

- The various efforts to obtain a judicial interpretation of Article 22 before the Constitutional Chamber and the Politico-Administrative Chamber of the Supreme Tribunal of Justice within the general situation of the Judiciary in Venezuela (**Ex. EU- 27, EU-28, EU-29**).

- An analysis of the ICSID decisions in the *Mobil, Cemex* (**Ex. RL-1, RL-2**), and *Brandes* cases (**Ex. RL-033**), regarding the interpretation of Article 22 of the Investment Law.

10. As a practicing lawyer, specialized in Venezuelan Public Law, and in particular in constitutional and administrative law, I offer this declara-

tion and opinion based on my experience and knowledge of Venezuelan law, accumulated during almost fifty years of academic activity and practice of the legal profession, the latter mainly in Venezuela.

Documents Considered

11. For the purpose of this opinion, I have reviewed and considered the following documents:

A. The "Request for Arbitration" filed by the Claimant before the International Centre for Settlement of Investment Disputes (ICSID) on May 28, 2010, and its relevant Exhibits.

B. The "Memorial of the Bolivarian Republic of Venezuela on Objections to Jurisdiction" filed on August 1, 2011 (**Respondent's Memorial**), and its relevant Exhibits.

C. The "Legal Expert Opinion of Professor Enrique Urdaneta Fontiveros dated July 29, 2011 (**Urdaneta Opinion**), and its relevant exhibits.

D. The "Request for Production of Documents" filed by the Claimant on August 22, 2011.

E. The "Respondent's Reply to Claimant's Request for Production of Documents," dated August 29, 2011, and its Exhibits.

F. The Tribunal's Order of September 19, 2011 and the Respondent's and Claimant's further submissions of September 26 and October 6, 2011.

G. Such other documents, mentioned in this statement, as I have considered necessary for the purpose of rendering an opinion on the questions presented.

12. For the purposes of this opinion and to the extent here indicated, I rely on the accuracy of the statements of fact by the Claimant in their Request for Arbitration.

II. OVERVIEW OF ARTICLE 22 OF THE 1999 INVESTMENT LAW AS CONTAINING THE VENEZUELAN STATE'S EXPRESSION OF CONSENT TO ICSID JURISDICTION

13. For all of the reasons set forth in this opinion, Article 22 of the Investment Law contains a **unilateral written expression of consent, in the**

form of an open offer by the Republic of Venezuela, for international investors to submit investment disputes to international arbitration, including ICSID arbitration. This has been my opinion since 2005, when I first examined the provision in a *Seminar* organized by the *Academy of Political and Social Sciences* sponsored by the *Venezuelan Arbitration Committee* in Caracas, Venezuela.

14. On that occasion, I analyzed Article 22 of the Investment Law in a very general way and from the stand point of Venezuelan Administrative Law, referring in particular to the content of the Law in relation to the different ways in which it provided for the solution of controversies and the matter of public contracts.[1] In particular, it came to my attention from the constitutional and administrative law point of view, that the matter of the State expression of consent to ICSID arbitration through a national law was previously considered in a case brought before an ICSID Tribunal. In the *Seminar*, I quoted the ICSID decision on Jurisdiction issued in the *Southern Pacific Properties (Middle East) v. Arab Republic of Egypt* case.

15. Article 8 of the Egyptian No. 43 Law, established the following: "Investment Disputes in respect of the implementation of the provisions of this Law shall be settled in a manner to be agreed upon with the investor, or within the framework of the agreements in force between the Arab Republic of Egypt and the investor's home country, **or within the framework of the Convention for the Settlement of Investment Disputes** between the State and the nationals of other countries to which Egypt has adhered by virtue of Law 90 of 1971, **where such Convention applies**."[2]

16. The tribunal in that case determined that Article 8 of the Egyptian Law No. 43 constituted "an express 'consent in writing' to the Centre's jurisdiction within the meaning of Article 25(1) of the Washington Con-

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1 See Allan R. Brewer-Carías, "Algunos comentarios a la Ley de promoción y protección de Inversiones: contratos públicos y jurisdicción", in Irene Valera (Coordinadora), *Arbitraje Comercial Interno e Internacional. Reflexiones teóricas y experiencias prácticas*, Academia de Ciencias Políticas y Sociales, Comité Venezolano de Arbitraje, Caracas 2005, pp. 279-288 (**Ex. AB-1**).

2 *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt,* ICSID Case No. ARB/84/3, Decision on Jurisdiction of April 14, 1988, para. 71 **(Ex. R-19)**.

vention even in those cases where there is no other agreed-upon method of dispute settlement and no applicable bilateral treaty."[3]

17. I considered, at that time, that Article 22 of the Investment Law had similarities to the Egyptian law and that the *Southern Pacific* case provided support for the idea that consent may be given through a statute as opposed to a BIT.[4] In my opinion, the last expression of the Egyptian law is identical in its meaning to the provision Article 22 of the Venezuelan Law concerning "disputes to which the provision [of the ICSID Convention] are applicable." This means that, according to the jurisprudence of ICSID, when an internal law has a provision which refers to ICSID jurisdiction, the condition of Article 25(1) of the ICSID Convention is fulfilled. For Article 25(1) to be applicable, it is only required that the dispute arose directly from an investment between the Contracting State and a national of another Contracting State in the Convention, and no "further or ad hoc manifestation of consent of the Center's jurisdiction" is necessary.[5]

18. While, in general, consent of the States to ICSID arbitration is less commonly given through statutes than through BITs, the *Southern Pacific* case provides an example of a statute providing such consent.[6] Article 22

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3 *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt,* ICSID Case No. ARB/84/3, Decision on Jurisdiction of April 14, 1988, para. 116 **(Ex. R-19)**.

4 In its Decision on Jurisdiction of 14 April 1988, the Tribunal held that "[t]he ordinary grammatical meaning of the words in Article 8, taken together with other Laws and Decrees enacted in Egypt, showed that Article 8 *mandated the submission* of disputes to the various methods described therein, in hierarchical order, where such methods were applicable" and concluded that "Article 8 was legally sufficient manifestation of written consent to the jurisdiction of the Centre, and that no separate *ad hoc* written consent was required." *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt,* ICSID Case No. ARB/84/3, Summary of Decision on Jurisdiction of April 14, 1988, 3 ICSID Reports 106.

5 Allan R. Brewer-Carías, "Algunos comentarios a la Ley de promoción y protección de Inversiones: contratos públicos y jurisdicción," pp. 286-287 (**Ex. AB-1**).

6 It is therefore not surprising that similar legislations passed in other States have "received less attention from practitioners, academics and international organizations responsible for legal and policy issues related to foreign investments." See Ignacio Suarez Ansorena, "Consent to Arbitration in Foreign Investment Laws," in I. Laird and T. Weiler (Eds.), *Investment Treaty Arbitration and International Law*, Vol 2, JurisNet LLC 2009, p. 63, 79 **(Ex. RL-20)**. In Venezuela, the first general academic discussion of the 1999 Investment Law was promoted by the National

of the Investment Law is no different. Other commentators have agreed with this conclusion.[7]

19. This interpretation is consistent with the actual wording of Article 22. In accordance with the policy defined by Congress and the National Executive of Venezuela in 1999 and in order to promote and protect international investments, Article 22 of the Investment Law expressed the consent of the Venezuelan State to submit to international arbitration controversies regarding international investment, as follows:

> "Article 22. Controversies that may arise between an international investor, whose country of origin has in effect with Venezuela a treaty or agreement on the promotion and protection of investments, or **controversies in respect of which the provisions of** the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA) or **the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID) are applicable, *shall be submitted to international arbitration*** according to the terms of the respective treaty **or agreement, if it so establishes, *without prejudice to the possibility of using, as appropriate, the contentious means contemplated by the Venezuelan legislation in effect***."

Academy of Political and Social Sciences, in the aforementioned *Seminar* held in 2005. It is important to note that the constitutionality of the law was upheld in 2001 by the Constitutional Chamber of the Supreme Tribunal of Justice (See the text in **Ex. EU-27**; and the comments to the decision ***infra*** in ¶¶ 153-159). The various judicial challenges of the law are discussed ***infra*** in ¶¶ 150 ff. of this Legal Opinion.

7 See, e.g., Andrés A. Mezgravis, "Las inversiones petroleras en Venezuela y el arbitraje ante el CIADI," in Irene Valera (Coordinadora), *Arbitraje Comercial Interno e Internacional. Reflexiones teóricas y experiencias prácticas*, Academia de Ciencias Políticas y Sociales, Comité Venezolano de Arbitraje, Caracas 2005, p. 392 (**Ex. AB-2**). Other commentators also have reached the same conclusion about the similarity between Article 8 of the Egyptian No. 43 Law and Article 22 of the 1999 Venezuelan Investment Law. *See, e.g.*, Victorino Tejera Pérez, "Do Municipal Investment Laws Always Constitute a Unilateral Offer to Arbitrate? The Venezuelan Investment Law: A Case Study," in Ian A. Laird and Todd J. Weiler (Ed.), *Investment Treaty Arbitration and International Law*, Vol 2, JurisNet LLC 2009, pp. 104-105 (**Ex. AB-3**)**;** Victorino Tejera Pérez, *Arbitraje de Inversiones*, Magister Thesis, Universidad Central de Venezuela, Caracas 2010, p. 175 (**Ex. AB-4**)**.**

20. The Republic has translated this provision (**Respondent's Memorial, ¶ 14**) similarly. The primary substantive differences are that it replaces the term "controversies" with "disputes" and the expression "if its so establishes" with "if its so provides".

21. Claimant's translation of this provision (**Request for Arbitration, ¶ 28**) also is similar to my translation. The primary substantive differences are that the version used by Claimant replaces the term "controversies" with "disputes" and the expression "if its so establishes" with "should it so provide". In addition, Claimant's translation also replaces the term "the contentious means contemplated by the Venezuelan legislation in effect" with "the systems of litigation provided for in Venezuelan laws in force".

22. The three prior arbitral tribunal decisions on Article 22 have considered relevant a consideration of international law **along with** national law. See *Mobil* case (**Ex. RL-1, ¶¶ 85, 95**) *Cemex* case (**Ex. RL-2, ¶¶ 79, 88**), and *Brandes* case (**Ex. RL-033, ¶ 36**). I agree that both Venezuelan law and international law are relevant in interpreting the Investment Law and also agree with the conclusion of the Tribunals in those cases that Venezuelan law does not conflict with international law.

23. The general principles of interpretation in all three cases can be considered very similar. All three considered the text of the Article in totality and not only in its separate parts. Consistent with this conclusion that the wording of the law and the connection of the words used is central, and considering the general pro-arbitration content of the Venezuelan legislation issued at the same time by the Government, the only reasonable conclusion in **this case** is that Article 22 is an expression of a general offer of consent by the Venezuelan State to submit investment disputes by international investors to international arbitration, giving the international investor, at his will, the option to resort before the national courts. This legal conclusion, is similar to the one that can be drawn from the expression of State consent contained in Article 23 of the same Investment Law and results from the application of the rules of interpretation for statutes established in Venezuelan law. Article 23, in effect, also contains an expression of a general offer of consent by the Venezuelan State to submit disputes related to the application of the Investment Law, by investors (national or international) to national arbitration, also providing the option, in that case, for any investor – whether national or international – at his will, to elect between going before national arbitral tribunals or to resort before national courts.

24. The necessity of viewing the wording in context is an established principle of Venezuelan law. According to Article 4 of the Civil Code (**Ex. EU-4**), the expression of consent to international arbitration contained in Article 22 of the Investment Law results from the meaning of the words used in the provision, considered within the general context of the whole text, and not from only one part of it. Notably, the language "**shall be submitted to international arbitration**" ("*serán sometidas al arbitraje internacional"*) used in the provision, is an expression of command that conveys the mandatory nature of Article 22. The phrase "**if it so establishes**" ("*si así éste lo establece"*) means that such command of Article 22 is subjected to a condition in the sense that it applies if the respective treaty or agreement (Article 22 refers to other treaties alongside the ICSID Convention) contains provisions establishing a framework for international arbitration, that is, "establishes arbitration."[8]

25. This condition is satisfied by the ICSID Convention, being the open offer of consent expressed in Article 22 confirmed in its last phrase which is a disclaimer: "without prejudice to the possibility of using, as appropriate, the contentious means contemplated by the Venezuelan legislation in effect" *("sin perjuicio de la posibilidad de hacer uso, cuando proceda, de las vías contenciosas contempladas en la legislación venezolana vigente"*). All of these factors in combination give the international investor the possibility to unilaterally decide, at his will, to submit the particular dispute to international arbitration or to submit the dispute before the national courts. Given the command included in the first part of the Article, the option that the investor has can only exist and make sense if the State has already given its consent to international arbitration by virtue of the State's ratification of the ICSID Convention.

26. Article 22 of the Investment Law's expression of a unilateral consent by the State to submit disputes with international investors to the jurisdiction of ICSID arbitration intentionally was included by the National Executive, acting as a Legislator, when it enacted the Decree Law No. 356 of October 3, 1999 (See ***infra*** ¶¶ 135 ff**.**). This intention of the National Executive was also consistent with the general policy defined by the Government at

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[8] See Victorino Tejera Pérez, "Do Municipal Investment Laws Always Constitute a Unilateral Offer to Arbitrate? The Venezuelan Investment Law: A Case Study," pp. 95 (**Ex. AB-3);** Victorino Tejera Pérez, *Arbitraje de Inversiones*, Magister Thesis (**Ex. AB-4).**

the time of its enactment for the purpose of attracting and promoting international investments in the country, which also lead, at the same time, to the drafting of the constitutional mandate of Article 258 of the 1999 Constitution (See ***infra*** ¶¶ 83, 121). Article 258 imposed on all organs of the State (not only the legislative organs but also the Judiciary)[9] the task to promote arbitration. Other pieces of legislation, from which the pro-arbitration principle is derived also were issued at the time.[10] (See ***infra*** ¶¶ 112 ff.).

27. What is absolutely clear from the aforementioned, regarding the content of Article 22 of the Investment Law, is that the reference it contains regarding ICSID international arbitration is not a mere declaration of principles, or a "mere reference in a national law to ICSID" as suggested by the Supreme Tribunal of Justice Decision No. 1541 of 2008[11] (**Ex. EU-29, p. 49**) (**Respondent's Memorial, ¶ 23**). Nor was Article 22 of the Investment Law "intended as simply an acknowledgment of the possibility of dispute resolution in that forum" as asserted in the Respondent's Memorial (**Respondent's Memorial**, **¶ 12**). On the contrary, Article 22 of the Investment Law "amounts to the binding consent of the host state to arbitral jurisdiction" (**Respondent's Memorial**, **¶ 12**), in this case, of the Republic of Venezuela.

28. Arbitration as a means for dispute resolution was included in many other statutes adopted by the Government at the same time (See ***infra*** ¶¶ 112-120; 128-130**),** and there are other references to the availability of arbitration in the same 1999 Investment law. Beside Article 22, arbitration is also provided in Article 18.4 of the Law regarding the contracts for legal stabilization. Following the 1998 Commercial Arbitration Law regulations (**Ex. EU-22**), the State and an international investor could establish arbitration, in a bilateral act – the contract for legal stabilization – as the means to resolve contractual controversies. Arbitration is also provided for in Article 21 of the

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9 See Eugenio Hernández Bretón, "Arbitraje y Constitución. El arbitraje como derecho fundamental," in Irene Valera (Coordinadora), *Arbitraje Comercial Interno e Internacional. Reflexiones teóricas y experiencias prácticas*, Academia de Ciencias Políticas y Sociales, Comité Venezolano de Arbitraje, Caracas 2005, p. 27 (**Ex. AB-5**).

10 *Id*. p. 31. See also Francisco Hung Vaillant, *Reflexiones sobre el arbitraje en el derecho venezolano,* Editorial Jurídica Venezolana, Caracas 2001, pp. 66-67 (E**x. AB-6; Ex. EU-16**).

11 Other commentators have expressed the same criticism of this decision. See, e.g., Eugenio Hernández Bretón, "El arbitraje internacional con entes del Estado venezolano," in *Boletín de la Academia de Ciencias Políticas y Sociales*, No. 147, Caracas 2009, p. 156 (**Ex. AB-7**).

Investment Law regarding the solution of controversies relating to the Investment law that may arise between the Venezuelan State and the country of origin of the international investor. When the diplomatic means fail, the Law imposes the obligation on the State to seek for the submission of the dispute to an Arbitral Tribunal whose composition, mechanism of designation, procedure and cost regime has to be negotiated in a bilateral act with the other State. In these two first cases, in order to proceed to arbitration, the Law is clear in providing for the need of a separate bilateral act to be negotiated between the parties.

29. On the contrary, in the other two provisions of the Investment Law which provide for arbitration, Articles 22 and 23, the State gives **in advance** its consent for arbitration, as an open offer in the same way as it is provided in almost all BITs.[12] Article 22 also uses similar wording that the dispute "shall be submitted" to international arbitration that was used in many of the pre-1999 BITs. Both the Investment Law and BITs provide that investors, at their will, may unilaterally choose to go to arbitration or to resort to the national courts.[13] In the case of Article 22, as aforementioned, the State expressed in advance, an open offer, its consent to go to international arbitration subject to the only condition that the treaties or agreements provide mechanisms or a framework for international arbitration. Similarly, Article 23 of the Investment Law regarding controversies that may arise from the application of the Law provides that once the administrative channels have been exhausted, national and international investors have also the right to unilaterally opt, at their will, between going to the national courts or resorting to arbitration before Venezuelan arbitral tribunals.[14] This later provision of the law is not applicable in cases of investments disputes to be resolved in international arbitration.

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12 The important differences between the Venezuelan BITs and Investment Law are discussed in more detail in infra ¶¶ 36, 43, 44, 63, 64.

13 See in this regard, Tatiana B. de Maekelt, "Tratados Bilaterales de Protección de Inversiones. Análisis de las cláusulas arbitrales y su aplicación," in Irene Valera (Coord.), *Arbitraje Comercial Interno e Internacional. Reflexiones teóricas y experiencias prácticas*, Academia de Ciencias Políticas y Sociales, Comité Venezolano de Arbitraje, Caracas 2005, pp. 340-341 (**Ex. AB-8**)

14 See regarding the various arbitrations means of dispute resolution in the 1999 Investment Law, Eugenio Hernández Bretón, "Protección de inversiones en Venezuela," in *Boletín de la Academia de Ciencias Políticas y Sociales*, No. 142, Caracas 2004 (**Ex. AB-9**); Allan R. Brewer-Carías, "Algunos comentarios a la Ley de promoción y protección de Inversiones: contratos públicos y jurisdicción" (**Ex. AB-1**)

30. This interpretation of Article 22 of the Investment Law as containing a unilateral written expression of consent of the Republic of Venezuela to submit disputes with international investors to the jurisdiction of ICSID arbitration is shared by the majority of the Venezuelan legal commentators[15] as well as many foreign authors.[16] For example, one commentator stated in 2007 that the Investment Law leaves "no doubt at all on the viability of arbitration to resolve controversies between States and foreign investors …. [because it] establishes in a very clear way that the investor, in case of controversy, has the possibility to opt between resort to the ordinary judicial mean or to ICSID, provided that (i) Venezuela and the country from which the investors is a national have signed a treaty on promotion and protection of investments, **or** (ii) the provisions of the Constitutive Convention of MIGA or of ICSID Convention are applicable, in which case – in our opinion – the country of nationality of the investor must also have signed and ratified at least one of such Conventions."[17]

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15 See for instance Andrés A. Mezgravis, "Las inversiones petroleras en Venezuela y el arbitraje ante el CIADI", in Irene Valera (Coordinadora), *Arbitraje Comercial Interno e Internacional. Reflexiones teóricas y experiencias prácticas*, Academia de Ciencias Políticas y Sociales, Comité Venezolano de Arbitraje, Caracas 2005, p. 388 (**Ex. AB-2**); Eugenio Hernández Bretón, "Protección de inversiones en Venezuela" in *Revista DeCITA, Derecho del Comercio Internacional, Temas de Actualidad,* (*Inversiones Extranjeras*)*,* No 3, Zavalía, 2005, pp. 283-284 (**Ex. AB-10**); José Antonio Muci Borjas, *El Derecho Administrativo Global y los Tratados Bilaterales de Inversión (BITs),* Caracas 2007, pp. 214-215 (**Ex. AB-11**); José Gregorio Torrealba R, *Promoción y Protección de las Inversiones Extranjeras en Venezuela*, Funeda, Caracas 2008. pp. 56-58, 125-127 (**Ex. AB-12**); Victorino Tejera Pérez, "Do Municipal Investment Laws Always Constitute a Unilateral Offer to Arbitrate? The Venezuelan Investment Law: A Case Study," pp. 90, 101, 109 (**Ax. AB-3**); Victorino Tejera Pérez, *Arbitraje de Inversiones*, Magister Thesis, pp. 162, 171, 173, 177, 193 (**Ex. AB-4**).

16 See for instance Gabriela Álvarez Ávila, "Las características del arbitraje del CIADI", en *Anuario Mexicano de Derecho Internacion*al, Vol. II 2002, Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México, UNAM, México 2002 (**Ex. AB-13**); Guillaume Lemenez de Kerdelleau, "State Consent to ICSID Arbitration: Article 22 of the Venezuelan Investment Law" in *TDM*, Vol. 4, Issue 3, June 2007 (**Ex. AB-14**).

17 See Juan C. Bracho Ghersi, "Algunos Aspectos fundamentales del Arbitraje Internacional," in *Cuestiones actuales del Derecho de la empresa en Venezuela,* Grau, García, Hernández, Mónaco, Ed. --, Caracas 2007, pp. 18 (emphasis added) (**Ex. AB-15**).

31. Nonetheless, the State in its Memorial misinterpreting "two ICSID tribunals" decisions (in the *Mobil* and *Cemex* cases), erroneously affirms that "Article 22 of the Investment Law does not constitute a standing, general consent of the Republic to arbitrate all investments disputes before ICSID" (**Respondent's Memorial, ¶¶ 6, 18; 22**).[18] This opinion is shared only by a few authors, including the Legal Expert of the Republic, Enrique Urdaneta Fontiveros, who concludes "that Article 22 does not constitute a standing general consent by the Republic to submit all investment disputes to international arbitration before ICSID" (**Urdaneta Opinion**, ¶¶ 6, 13).

32. Mr. Urdaneta argues that since the ICSID Convention "does not provide for a consent to ICSID arbitration, but instead requires a separate instrument of consent, the condition expressly set forth in Article 22 is not fulfilled" (**Urdaneta Opinion**, **¶ 12**). This is of course a misrepresentation of the wording of Article 22, because the condition established in it only refers to the need for mechanisms of arbitration to be provided in the treaties or agreements, not for a separate consent as it is required for instance in Article 21 of the same 1999 Investment Law. To adopt his interpretation would amount to accepting, in an inadmissible tautological way, that the right given to the investor to opt between going to arbitration or before the national court, does not actually allow the investor to choose between those options, which would make the disclaimer of the last phrase of Article 22 completely meaningless.[19]

33. The opinions of the Republic and its Legal Expert fail to analyze the content of Article 22 as a whole, in the general context of the Law, particularly the last part of the provision, which has been generally and conveniently ignored by the Republic and its Legal Expert[20] (and not even mentioned or analyzed in the referred ICSID cases). They fail to acknowledge that the provision gives the investor the right, as an absolute option, to unilat-

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[18] Besides, as it is analyzed below, this is not what the ICSID tribunals decided in these cases. (**See *infra* ¶¶ 57-67**).

[19] See Victorino Tejera Pérez, *Arbitraje de Inversiones*, Magister Thesis, p. 190 (**Ex. AB-4);** Victorino Tejera Pérez, "Do Municipal Investment Laws Always Constitute a Unilateral Offer to Arbitrate? The Venezuelan Investment Law: A Case Study," pp. 107 (**Ex. AB-3).** See also Eugenio Hernández Bretón, "El arbitraje internacional con entes del Estado venezolano," pp. 141-168 (**Ex. AB-7**).

[20] Urdaneta only mentions the disclaimer of last part of Article 22 "without prejudice to the right to utilize legal remedies provided for under Venezuelan Law" when describing the general content of the 1999 Investment Law" (**Urdaneta Opinion, ¶ 4**).

erally resort (or not) at his will, to international arbitration. This is a right that could only possibly be granted if the first part of the Article, is a unilateral expression of consent, that acts as an open offer, given by the State. This means that contrary to what is expressed by Urdaneta in his Opinion (**Urdaneta Opinion, Footnote 10, ¶ 12**), when the words of Article 22 (including those used in the last phrase of Article 22: "without prejudice to the possibility of using, as appropriate, the contentious means contemplated by the Venezuelan legislation in effect") are contrasted with those of Article 23 of the same Law, the result is that both Articles, and not only Article 23 as is wrongly affirmed by Urdaneta, contain a unilateral consent to arbitration on the part of the Republic. Both give investors the option to submit disputes arising under the Investment Law to arbitration. In the case of Article 22, to international arbitration or to Venezuelan courts, and in the case of Article 23, to Venezuelan courts or Venezuelan arbitral tribunals. In both cases, the decision is made **at the election of the investors**.

34. The contrast that the Republic and its Legal Expert seek to make between Article 22 and Article 23 of the Investment Law are flawed. As the Republic and its Legal Expert acknowledge, Article 23 contains an "arbitration clause" or "an unilateral consent to arbitration on the part of the Republic by giving investors the option to submit disputes under the investment Law to Venezuelan courts or Venezuelan arbitral tribunals". (**Respondent's Memorial, Footnote 21, ¶ 17; Urdaneta Opinion, Footnote 10, ¶ 12)** Nonetheless, they deny that Article 22 provides the same option, ignoring the choice offered in that provision between international arbitration and the Venezuelan courts. In a similar way, when referring to clauses for arbitration in BITs executed by Venezuela, Urdaneta is precise in affirming that "each clause defines the scope of the dispute to be resolved, gives the foreign investor the option to initiate arbitration before ICSID or in another forum, and leaves no doubt that Venezuela is consenting to arbitration of that dispute before ICSID" (**Urdaneta Opinion, ¶ 14**). Urdaneta again simply ignores that Article 22 of the Investment Law is also an express consent to arbitration given by the State, leaving also to the international investor the option to initiate arbitration before ICSID or in Venezuelan courts, leaving "no doubt that Venezuela is consenting to arbitration of that dispute before ICSID."

35. This is what has precisely been decided in the "two ICSID tribunals" decisions referred to by the Republic of Venezuela (**Respondent's Memorial**, **Footnote 5, ¶ 6**), that is, the *Mobil* case and *Cemex* case (**Ex. RL-1** and **Ex. RL-2**). The Tribunals in these cases determined that Article 22 contains a unilateral declaration, although as already noted, subjected to a

condition. Consequently, contrary to what has been argued by the Republic (**Respondent Memorial, ¶ 6**), Article 22 of the Investment Law has been considered in both ICSID tribunals decisions as a unilateral expression of consent given by the Venezuelan State to submit disputes to international arbitration. This also is true of the *Brandes* decision that was rendered after the Republic filed its Memorial. The reason why these Tribunals nevertheless determined that this did not provide consent for the international investor to resort to ICSID arbitration will be discussed below.

36. The sanctioning of the Investment Law by the Government in 1999 had the clear intention to serve as an instrument for the development and promotion of private (foreign and domestic) investment in Venezuela, in accordance with the mandate included in parallel in the 1999 Constitution to promote alternative mechanisms for dispute resolution. For such purpose, Article 22 of the Investment Law offered assurance that the resolution of investment disputes by arbitration was a means for their promotion, leaving the option for the investor to go to international arbitration or to resort to the national courts. That is why the National Council for the Promotion of Investment (CONAPRI), a mixed public-private association for the promotion of private investment in the country, incorporated by the Attorney General of the Republic in 1990[21] in its March 2000 *Report* on the "Legal Regime of the Foreign Investments in Venezuela" devoted an entire Chapter to examine the various types of arbitration established in the legal system, that were offered to investors for the resolution of investment disputes, repeating the same terms and words used in the Law.[22]

37. In this context, the *Mobil* and *Cemex* ICSID tribunals ruled on whether Article 22 provided consent in those cases, but not as a universal ruling applicable to all circumstances. That is why I consider that the assertion made by the Republic that the ICSID Tribunal decisions in the cases *Mobil* and *Cemex* supposedly had found, in general, "that Article 22, claimant's only basis for jurisdiction, does ***not*** provide a basis for ICSID jurisdiction" (**Respondent's Memorial, ¶¶ 45, 46**) is simply not true because the conclusion of the Tribunals was that Article 22 "*does not provide basis for jurisdiction of the Tribunal* ***in the present case***".

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21 Decree No. 1102 published in *Official Gazette* No. 34.549 of 1990.

22 See Consejo Nacional de Promoción de Inversiones (CONAPRI), *Régimen Legal para la Inversión Extranjera en Venezuela,* Caracas marzo 2000, pp. 29-36 (**Ex. AB-16**)

38. In this regard, the ICSID tribunal decision in the *Brandes* case must also be mentioned because, without any reasoning, arguments or motivation, and without explaining any "findings in the paragraphs" of its decision, it not only copied and ratified the aforementioned conclusion of the ICSID tribunals in the *Mobil* and *Cemex* cases, but went further, proclaiming in a general and universal way, and not only for the "present case," that "it is obvious that Article 22 of the Law on Promotion and Protection of Investments does not contain the consent of the Bolivarian Republic of Venezuela to ICSID jurisdiction" (**Ex. RL-033, ¶ 118**). Given the failure to provide any explanation for this expansion, the *Brandes* decision is irrelevant to a decision on the actual content of the Investment Law, as described in more detail below.

39. In summary, after having studied the matter in detail and from the stand point of Venezuelan public law, and after having read the ICSID tribunals' decisions interpreting Article 22 of the Investment Law (*i.e.,* the *Mobil*, *Cemex*, *Brandes* cases), I remain convinced and ratify my prior opinion that from the stand point of national Venezuelan law, Article 22 of the Investment Law contains **an expression of consent of the State given as an open offer to submit investment disputes to international arbitration, and in particular to ICSID arbitration, leaving in the hands of the international investor the right to unilaterally decide to go to arbitration or to resort to the national courts**.[23]

III. ARTICLE 22 OF THE INVESTMENT LAW IS A UNILATERAL DECLARATION OF THE STATE ACCORDING TO THE PRINCIPLES OF STATUTORY INTERPRETATION IN VENEZUELAN LAW

40. Article 22 of the Investment Law, as is evident from its wording, and as admitted by the Republic (**Respondent's Memorial**, **¶ 15**) and by the ICSID tribunal in the *Mobil* case (**Ex. RL-1, ¶** 103), is a "compound" provision that contains a number of parts: the first one, concerning bilateral or multilateral treaties or agreements on the promotion and protection of investments; the second one, dealing with the MIGA Convention; and the third

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[23] This opinion is consistent with my testimony in prior cases. See ICSID Arbitration Case No. ARB/07/27 (*Mobil Corporation et al. v. Bolivarian Republic of Venezuela*); ICSID Arbitration Case No. ARB/07/30 (*Conocco Philips et al. v. Bolivarian Republic of Venezuela*); ICSID Arbitration Case No. ARB/08/3 (*Brandes Investment Partners, LP v. Bolivarian Republic of Venezuela*).

one, dealing with the ICSID Convention.[24] Because Article 22 addresses three different sets of treaties or agreements, providing for all of them at the same time, it needs to be interpreted in the same way as other legal provisions.

41. It is hardly surprising, however. that it does not follow any particular model or pattern of other national legislations that address only consent to ICSID jurisdiction. It makes no sense to draw inferences from a comparison between Article 22 and expressions of consent to arbitration in "bilateral investment treaties executed by Venezuela" as Mr. Urdaneta argues (**Urdaneta Opinion,** ¶ 13). Bilateral contracts, constructed by two parties, are the product of an interchange of proposals that are negotiated between them. While the Republic "knew how to draft an obligatory consent to international arbitration when that was the intention" (**Respondent's Memorial, ¶ 43**), it chose not to use that language in the Investment Law. That choice does not mean there is no consent. Article 22 of the 1999 Investment Law is not a bilateral treaty nor was it the product of a negotiation with another State. It is a piece of national legislation, unique because it was the first time in Venezuelan recent legislative history that the State, in an internal law, discussed unilateral consent to international arbitration. Definitively, in that perspective, the Republic had no previous experience in drafting this type of statute.

42. That is why Article 22 of the Investment Law cannot, as a principle, be interpreted by just comparing its content with any sort of bilateral established and negotiated clauses for arbitration included in BITs or in "model clauses" that are to be negotiated by two Contracting States as "consent clauses" as proposed by the Republic (**Respondent's Memorial, ¶ 33-36**). Nonetheless, because the aims expressed in Article 1 of the Investment Law "are in general comparable to those of the treaties on promotion and reciprocal protection of investments and are reflected in the text of the law itself" which contains provisions "which are comparable to those incorporated in BITs" (as expressed in the *Mobil* ICSID case, **Ex. RL-1, ¶¶ 121, 122;** and in the *Cemex* case, **Ex. RL-2, ¶ 119**), the unilateral open offer of consent by the State to arbitration contained in both BITs and the Investment Law are of paramount importance. Although the *Mobil* case failed to men-

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[24] See on the various alternatives of application of Article 22 of the Investment Law, Victorino Tejera Pérez, "Do Municipal Investment Laws Always Constitute a Unilateral Offer to Arbitrate? The Venezuelan Investment Law: A Case Study," pp. 92-94 (**Ex. AB-3);** Victorino Tejera Pérez, *Arbitraje de Inversiones*, Magister Thesis, pp. 166-170 (**Ex. AB-4)**

tion this feature of the Investment Law, Article 22 unquestionably represents such an expression which leaves to the international investors the option to accept or reject the State's offer.[25]

43. In the *Cemex* case, the ICSID Tribunal noted that in all of the BITs concluded by Venezuela before 1999, a "compulsory arbitration clause" was always incorporated (**Ex. RL-2, ¶ 120),** but failed to compare such solution with the one included in Article 22 of the Investment Law. The Republic and its Legal Expert also fail to make this comparison. More importantly, both the Investment Law and BITs also provide for the right of the international investor to unilaterally accept the arbitration offer or to resort to the national courts in order to resolve investments disputes. This is valid in the terms of Article 4 of the Civil Code. Even if you do not apply the analogy between BITs and the Investment Law, contrary to was asserted in the *Mobil* and *Cemex* ICSID case, it is perfectly possible – using the same words of such decisions (**Ex. RL-I, ¶ 123; Ex. RL-2, ¶ 120**) – to "draw[] from the law as a whole the conclusion that Article 22 must be interpreted as establishing consent by Venezuela to submit ICSID disputes to arbitration" particularly if the disclaimer of the last part of Article 22 ("without prejudice to the possibility of using, as appropriate, the contentious means contemplated by the Venezuelan legislation in effect") is not ignored. Both decisions of the ICSID Tribunals, in an incomprehensible way ignore it, and therefore consider the disclaimer as meaningless. The fact that the *Mobil* and *Cemex* decisions did not consider this when interpreting Article 22 or give the last part of the provision a meaningful interpretation, renders its text "meaningless," which cannot be accepted under Venezuelan law.

44. On the other hand, contrary to the Republic's assertion, the fact that another State or States in the world have written national laws containing the expression of consent in a way that is different to the way chosen by the Republic, cannot "demonstrate" that "the Republic did not manifest its clear and unequivocal consent to arbitrate in the provision" (**Respondent's Memorial, ¶ 38**). The Republic's assertions now, in 2011, cannot replace what it expressed in a Law in 1999. In addition, for purposes of comparing itself to other States, the Republic needs to compare its own way of enacting laws

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[25] As it is pointed out by Tatiana B. de Maekelt, "Tratados Bilaterales de Protección de Inversiones. Análisis de las cláusulas arbitrales y su aplicación," pp. 340-344 (**Ex. AB-8**); Andrés A. Mezgravis, "Las inversiones petroleras en Venezuela y el arbitraje ante el CIADI", p. 357 (**Ex. AB-2**); José Gregorio Torrealba, *Promoción y protección de las inversions extranjeras en Venezuela*, pp. 128-129 (**Ex. AB-12)**.

with the way used in Albania, in the Central African Republic or in Côte d'Ivoire (**Respondent's Memorial, ¶ 39-41**). The way legislation is made in other States cannot "demonstrate" anything regarding Venezuela's drafting of its own statutes. Nonetheless, in order to interpret correctly compound provisions such as Article 22 of the Investment Law, one must use the rules and tools established in the legal order of the relevant State – here, Venezuela. Even if you do compare the Investment Law to laws of other States, however, the Republic has failed to identify one law that actually is similar to the Investment Law, the Egyptian law summarized in ***supra*** ¶¶ 16-19. As explained above, there is an ICSID decision discussing this Egyptian law in which consent to international arbitration was found to exist.

45. Consequently, according to Venezuelan law, Article 22 must be interpreted not by reference to any international pattern or model, but in accordance with its own structure and terms, taking into account its compound nature, and the purpose for its enactment. It is also, as all statutes, to be interpreted in harmony or in conformity with the Constitution[26] and with the pro-arbitration trend existing in Venezuela in 1999, when it was enacted, which had been extensively developed and promoted by the then new Government.

46. Because it is an instrument of national law that expresses consent of the State to international arbitration, it may also be interpreted according to the applicable international conventions and to the rules of international law governing unilateral declarations of the State, which is a subject that goes beyond the scope of this opinion.

47. That is, from the stand point of being a national law it must also be interpreted following the rules of statutory interpretation and construction in Venezuelan Law. According to Article 4 of the Civil Code (See **Ex EU-4**), it must be read in all its content, taking into account its context, purpose and intent.[27] Article 4 of the Civil Code provides that the interpreter must attrib-

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[26] This is a general principle accepted in Venezuelan judicial review system. See José Peña Solís, "La interpretación conforme a la Constitución," Libro Homenaje a fernando Parra Aranguren, Tomo II, Universidad central de Venezuela, Caracas 2001 (**Ex. AB-17**). On the application of this principle regarding arbitration matters, see Eugenio Hernández Bretón, "Arbitraje y Constitución. El arbitraje como derecho fundamental," pp. 31 (**Ex. AB-5**); Andrés A. Mezgravis, "Las inversiones petroleras en Venezuela y el arbitraje ante el CIADI," p. 390 (**Ex. AB-2**).

[27] As already mentioned (**See *supra* ¶¶ 36-38**), the Tribunal in the *ICSID Mobil* case interpreted Article 22 on the basis of the "rules of international law governing the interpretation of unilateral acts formulated within the framework and on the basis of

ute to the law "the sense that appears evident from the **proper meaning of the words**, according to **their connection among themselves** and the **intention of the Legislator**." The Article goes on to state that, "when there is no precise provision of the Law, the provisions regulating similar cases or analogous matters shall be taken into account; and should doubts persist, general principles of law shall be applied."[28]

48. These elements of interpretation of statutes enumerated in Article 4 of the Civil Code, according to Decision No. 895 of July 30, 2008 of the Politico-Administrative Chamber of the Supreme Tribunal of Justice, can be reduced to four relevant elements that are the ones to be taken into account in the interpretation of legal provisions:[29] The first element is the **literal, grammatical or philological** one, which must always be the starting point of any interpretation. The second element of interpretation is the **logical, rational or reasonable** one, which aims at determining the *raison d'être* of the provision within the legal order. The third element is the **historical** one, through which a legal provision is to be analyzed in the context of the factual and legal situation at the time it was adopted or amended and in light of its historical evolution. The fourth element is the **systematic** one, which requires the interpreter to analyze the provision as an integral part of the relevant system.

49. The Politico-Administrative Chamber noted that interpretation of statutes according to Article 4 of the Civil Code is not a matter of choosing among the four elements, but of applying them together, even if not all of the elements are of equal importance.[30] In addition, the Supreme Tribunal of Jus-

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a treaty" (**Ex. RL-1, ¶ 95**), although considering that the national law should not "be completely ignored" being called to "play a useful role" regarding "the intention of the State having formulated such acts" (**Ex. RL-1, ¶ 96**) See also ICSID *Cemex* case (**Ex. RL-1, ¶¶ 88, 89**) and ICSID *Brandes* case (**Ex. RL-033, ¶ 36**).

28 Civil Code, Article 4 (emphasis added).

29 See in *Revista de Derecho Público,* No 115, Editorial Jurídica Venezolana, Caracas 2008, pp. 468 ff. (**Ex. AB-18**).

30 Contrary to what is established in Article 4 of the Civil Code of Venezuela, and to the rules indicated by the Supreme Tribunal, the ICSID tribunal in the *Brandes* case supposedly interpreted Article 22 of the Investment Law "according to the parameters set by the Republic's legal system" (**Ex. RL-033, ¶ 36**. However, the tribunal, followed a different approach, applying what it referred to as an "initial analysis" of the elements mentioned in Article 4 of the Civil Code: first the "purely grammatical analysis" and "if this initial analysis fails to define clearly the meaning of the provision, it then becomes necessary to examine the contents…" (**Ex. RL-033, ¶ 35**). This approach is not in accordance with the principles of statutory interpretation

tice has identified two other elements of interpretation: the **teleological** one – that is, the need to identify and understand the social goals or aims that led to the law being adopted – and the **sociological** one, which helps to understand the provision within the context of the social, economical, political and cultural reality where the text is going to be applied.[31]

IV. THE CORRECT INTERPRETATION OF ARTICLE 22 OF THE 1999 INVESTMENT LAW, AND THE INCORRECT AND INSUFFICIENT INTERPRETATIONS BY THE REPUBLIC, AND SOME ICSID TRIBUNALS

1. The correct interpretation of the words of Article 22 of the Investment Law

50. As discussed below, when the text of Article 22 is interpreted according to the rules of interpretation set forth in Article 4 of the Civil Code, the sense that evidently appears from the proper meaning of the words used, in accordance with their connection and with the **intention of the legislator** is the following: **Article 22 states the unilateral consent of the Republic of Venezuela to the submission of disputes to ICSID arbitration, leaving to qualified investors the right to decide whether to give their own consent or to resort to the Venezuelan courts**.

51. In the Spanish phrase "*serán sometidas a arbitraje internacional*" (shall be submitted to international arbitration), the tense of the verb indicates that it is an expression of command. The phrase conveys the fact that international arbitration of disputes is a mandatory system, in the sense that, once properly invoked by the other party to a dispute, the Republic of Venezuela has **a duty** or **obligation to comply** with the applicable procedural rules and **to abide** by the decision of the arbitral tribunal. In this regard, the English translation "shall be submitted" for "*serán sometidas*," which is common

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that must be always applied together. In this sense, the Constitutional Chamber of the Supreme Tribunal in a more recent decision No. 1067 of November 3, 2010 (Case *Astivenca Astilleros de Venezuela C.A*,), has ruled regarding he elements for interpretation derived from Article 4 of the Civil Code, that "the normative elements must be harmonized as a whole, in the sense that it one must not ignore the other, but all must be kept in mind in order to make a correct valuation of the content of the legal text." (**Ex. AB-19, p. 39 of 60**)

31 See in *Revista de Derecho Público No 115*, Editorial Jurídica Venezolana, Caracas 2008, pp. 468 ff. (**Ex. AB-18**).

ground between the parties, shows that the translators correctly understood the Spanish original as conveying this mandatory obligation.[32] Consequently, the text of this provision ("*shall be submitted to international arbitration*") is a **unilateral express statement of consent to ICSID arbitration freely given in advance by the Republic of Venezuela;** or in the words of the ICSID Tribunal in the *Mobil* case, Article 22 "creates a conditional obligation" to go to arbitration **(Ex. RL-1, ¶ 102)**. As discussed below, none of the other aspects of the text or the other elements of interpretation lead to a different conclusion.

52. The portion of Article 22 referring to the ICSID Convention ends with the phrase "if it so establishes" ("*si así éste lo establece"*) (translated in the **Respondent's Memorial, ¶** 14, as "if it so provides"). This phrase, interpreted according to the **proper meaning of the words** used, in accordance with **their connection** with the entirety of that section and consistent with the **intention of the Legislator,** refers to the need for the "respective treaty or agreement" **to contain provisions establishing international arbitration[33]** in order for the preceding express command (shall be submitted) to be capable of being executed; and for the last part of the Article that leaves the option to the international investor to decide whether or not to resort to international arbitration, to be effective. As the ICSID Convention paradigmatically establishes a framework or system of international arbitration for the settlement of investment disputes, the condition "if it so establishes" is clearly satisfied in the case of the portion of Article 22 that refers to the ICSID Convention.

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32 "**Shall** can express (A) the subject's *intention to perform a certain action* or cause it to be performed, and (B) *a command.*" The use of **shall** to express *a command* "is chiefly used in regulations or legal documents. In less formal English **must** or **are to** would be used instead of **shall** in the above sentences." See A. J. Thomson and A. V. Martinet, *A Practical English Grammar*, Fourth Edition, Oxford University Press 2001, pp. 208, 246 (**Ex. AB-17**).

33 In this sense, Victorino Tejera Pérez considers that the expression "if it so establishes" means "if it [respective treaty or agreement] establishes arbitration." See Victorino Tejera Pérez, "Do Municipal Investment Laws Always Constitute a Unilateral Offer to Arbitrate? The Venezuelan Investment Law: A Case Study,", p. 95 (**Ex. AB-3);** Victorino Tejera Pérez, *Arbitraje de Inversiones*, Magister Thesis, p. 170 **(Ex. AB-4)**

2. The incorrect interpretation proposed by the Republic

53. The Republic proposes that Article 22 "only recognizes international arbitration where the treaty or agreement itself contains an obligatory submission to arbitration" arguing that "while the ICSID Convention provides a mechanism for international arbitration, it does not itself provide for the arbitration of any dispute without the separate instrument of consent" (**Respondent's Memorial, ¶ 16**). This is contrary to the wording of the Article, the connection of the words used in the Article, considering the whole of its text, and the intention of the National Executive when enacting the Law. In particular, to interpret the expression "if so provides" in Article 22, in the sense "if the respective treaty or agreement provides according to its terms, that the dispute shall be submitted to international arbitration" (**Urdaneta Opinion, ¶ 11; Respondent's Memorial, ¶ 21**), would mean to ignore the final provision of the Article in which a right is given to the international investor to unilaterally opt for international arbitration of to resort before the national courts. The disclaimer of the last phrase of the Article would have no meaning whatsoever, if the condition set forth in the provision were to refer to the need for a consent to be necessarily established in the respective treaty or agreement. This is particularly so because interpreting "if it so establishes" as an equivalent of "if the ICSID Convention establishes consent" would turn this phrase into an impossible condition (a condition that cannot be fulfilled), depriving Article 22 of any meaningful effect. In addition, the interpretation of the condition included in Article 22 of the Investment Law proposed by the Republic and in the **Urdaneta Opinion** is fundamentally flawed. It is incorrect to interpret "if it so establishes" as a requirement that the State's consent that is already given in the Law needs to be incorporated in the ICSID Convention, because "so" cannot refer to a term ("consent") that is not used in the preceding sentence containing the command ("shall be submitted to international arbitration according to the terms of the respective treaty or agreement"). It is unreasonable to interpret Article 22, as looking to the ICSID Convention to supply the consent that Article 22 itself purports to supply.

54. The final part of Article 22 ("without prejudice to the possibility of using, as appropriate, the contentious means contemplated by the Venezuelan legislation in effect") is a confirmation that Article 22 is an expression of consent to arbitration, in the sense that it indicates that the unilateral expression of consent of Article 22 does not have the effect of preventing the investor from using domestic litigation remedies. On the contrary, it confirms the unilateral consent given by the State as an open offer that can be accepted

or not, at his will, by the investor. If Article 22 were a mere declaration of the State's **willingness** to agree to arbitration in a separate document as opposed to a firm expression of consent to arbitration by the State, there would have been no need to disclaim that Article 22 did not prevent the investor from resorting to domestic remedies.

55. Consequently, the Republic's proposed reading of Article 22 and that of its Legal Expert requires doing exactly what Republic accuses the Claimant of doing "ignoring or reading out of the statute" the condition included by the Legislator, and most important, the very right given to the international investor to make a choice which is "a result clearly impermissible under either Venezuelan or international legal principles" (**Respondent Memorial, ¶ 17**)[34]

3. The insufficient interpretation of Article 22 of the 1999 Investment Law made by the ICSID Tribunals in the Mobil and Cemex Cases

56. The matter of the interpretation of Article 22 has also been considered by the ICSID Tribunals in the *Mobil* and *Cemex* cases, in which the tribunals have not decided, as it has been incorrectly asserted in the Respondent's Memorial, that Article 22 "does not constitute a standing, general consent of the Republic to arbitrate all investments dispute before ICSID" (**Respondent's Memorial, ¶ 6**). This has not been the decision of such ICSID Tribunals. On the contrary, in the *Mobil* case, the ICSID Tribunal decided that Article 22 effectively "creates an obligation to go to arbitration," although it refers to it as "a conditional obligation" (**Ex. RL-1, ¶ 102**). This condition to which the obligation is subjected according to the decisions, results from the phrase "if it so provides" or "establishes". The ICSID Tribunals in these two cases completely ignore the existence of the disclaimer included in the last phrase of Article 22 holding that it can be interpreted in two ways, in the sense that the treaty, agreement or convention can (i) provide "for international arbitration," or (ii) "for mandatory submission of disputes to international arbitration" (*Mobil* case, **Ex. RL-1, ¶ 109**) ("creates an obligation for the State to submit disputes to international obligation," *Cemex* case, **Ex. RL-2, ¶ 101**). The ICSID Tribunals then concluded that "both interpretations are grammatically possible" (**Ex. RL-1, ¶ 110; Ex. RL-2, ¶**

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[34] This incorrect interpretation also is contained in the "custom-made" decision of the Supreme Tribunal of Justice of Venezuela in 2008 as described in ***infra*** ¶¶ 165 ff.

102). This assertion cannot be correct because the second option is a denial in itself not only of the premise that the Article effectively contains a "conditional obligation," but of the disclaimer included in the last phrase of the provision that gives the investor the right to go to arbitration or to resort to the national courts. That is, if it is true that in the first option, the existence in Article 22 of a "conditional obligation" to go to arbitration remains subject only to the condition that the treaties or agreements provide for international arbitration, the second option denies the "conditional obligation" given its requirement of "mandatory submission". This second interpretation would result in a tautology which is grammatically incorrect.

57. As aforementioned, the tribunals also fail in their grammatical analysis to consider and analyze the last part of the Article. By ignoring it, they erase the part of the Article that precisely confirms the existence in the Article of the "conditional obligation" to go to arbitration. This is improper under Venezuelan law because it leaves the last part of the provision to be interpreted as "meaningless".[35]

58. As quoted in the Respondent's Memorial, "it would be absurd to assume that the legislator would not try to use the most precise and adequate terms to express the purpose and scope of its provisions, or deliberately omit elements that are essential for their complete understanding"[36] (**Respondent's Memorial, Footnote 18, ¶ 14**). This means, from the stand point of the interpreter and according to a well established principles of interpretation of statutes, that one must assume that the legislator did not deliberately draft the provision in an ambiguous way or omit elements that are essential for the complete understanding of the provision. However, one cannot ignore the words, phrases or elements that the legislator used in the provision (*Uni lex voluit dixit, ubi noluit, tacuit*).

59. On the other hand, it also is a well established principle of statutory interpretation that the interpreter, when interpreting a statute, must reject and avoid all absurd interpretations.[37] As mentioned, each and every

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35 The same is true, of course, for the *Brandes* decision which also did not ascribe meaning to the disclaimer.

36 Decision No. 4 of November 15, 2001 (*Carmen Cecilia López Lugo v. Miguel Ángel Carpiles Ayala et al*. case). See in (**Respondent's Memorial**, **Footnote 18, ¶ 14**).

37 See Supreme Tribunal of Justice, Constitutional Chamber, Decision No. 1.173 of June 15, 2004 (Case: Interpretación del Artículo 72 de la Constitución de la Repú-

part of Article 22 has a meaning and purpose, and when interpreting it, no part can be just ignored, as occurred in the ICSID Tribunal decisions which ignores the last part of Article 22. Given the failure of the *Mobil* and *Cemex* tribunals to consider and to give any meaning to a crucial part of Article 22 that is essential for its interpretation, without interpreting the provision "in a manner compatible with the effect sought" by the State making the Law (**Ex. RL-1, ¶ 118**), these decisions failed to properly interpret the provision in accordance with Venezuelan or international law. In the end, the tribunals' conclusions are for the purpose **of those cases** (and only those cases), and the Tribunal in this case must make an independent decision for itself.

4. The absence of interpretation of Article 22 of the 1999 Investment Law in the ICSID tribunal Brandes Case

60. The ICSID tribunal *Brandes* case, in an astonishing way and in contrast with the *Mobil* and *Cemex* cases, reached the same conclusion, but without making any effort to interpret Article 22 of the 1999 Investment Law. Instead, the ICSID tribunal limited itself only to refer to the tools and principles for interpretation of the Article, without applying them in the case. It pointed out in its decision: (i) that Article 22 was to be interpreted beginning with the principles of the Venezuelan legal system "starting with the Political Constitution" (**Ex. RL-033, ¶ 36, 81**) but also in accordance with the principles of international law (**Ex. RL-033, ¶¶ 36, 81**); (ii) that nonetheless, when applying the principles of Venezuelan law the elements of Article 4 of the Civil Code, were not to be applied together as imposed by the Venezuelan Article 4 of the Civil Code, but in a lineal way, beginning with the grammatical analysis (**Ex. RL-033, ¶ 35**); (iii) that Article 22 of the Investment Law was required to be interpreted taking into account its relationship with "other legal norms of the Republic" (**Ex. RL-033, ¶ 30, 35, 97**); and (iv) that it was essential for the Tribunal to analyze other Articles of the Investment Law constituting the immediate context for Article 22 (**Ex. RL-033, ¶ 88**).

61. After announcing all these tools and principles of interpretation, but without applying any one of them to the case, the Tribunal issued its decision without analyzing the text of the Article, the words it contains, and the relationship of the words used in it to each other. The Tribunal also does not establish the relationship between the words used in the Article within the

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blica Bolivariana de Venezuela) (Exp. 02-3.215), in *Revista de Derecho Público N° 97-98*, Editorial Jurídica Venezolana, Caracas 2004, pp. 429 ff (**Ex. AB-21**).

content of its entire text, including the last phrase of the disclaimer. That is, the Tribunal, without making any effort to even apply the first step announced in the decision, defined as the "purely grammatical analysis" (**Ex. RL-033, ¶ 35**), and without any reasoning and motivation, just concludes that "the wording of Article 22 of the LPPI is confusing and imprecise, and that it is not possible to affirm, based on a grammatical interpretation, whether or not it contains the consent of the Bolivarian Republic of Venezuela to ICSID jurisdiction" (**Ex. RL-033, ¶ 86**). The astonishing aspect of this conclusion is that the same Tribunal concluded that it was "unnecessary to summarize" the "laborious and thorough efforts of the parties to scrutinize the meaning of Article 22" (**Ex. RL-033, ¶ 85**). Within the parameters of any judicial decision in the Venezuelan legal system, this decision would be an unmotivated judicial one, susceptible to being annulled. It is not possible to reach a conclusion like the one expressed by the tribunal under Venezuelan law without explaining which part of the provision is "confusing," which other part is "imprecise," and as any tribunal of justice must do when deciding cases of justice, to make its best effort to try to explain what is imprecise in a provision, and to explain what is confusing in it. This is precisely the role that any tribunal has, not being allowed just to issue a decision without stating the reasons on which it is based.

62. The only minor and indirect interpretative effort the *Brandes* Tribunal makes regarding Article 22 of the Investment Law is to its "context" (**Ex. RL-033, ¶ 87**), pointing out that the Investment Law has similarities in its structure and contents with many BITs (**Ex. RL-033, ¶ 89**). The tribunal fails to refer to the most important similarity for the purpose of interpreting Article 22 of the Investment Law, which is the open offer as expression of consent made by the State in all BITs to date leaving in the hands of the international investor the right to go to arbitration or to resort to national courts. Instead, it asks only why the consent formula of the BITs is not used (**Ex. RL-033, ¶ 90**).

63. As explained in ***supra*** ¶ 27, a law containing an unilateral offer as expression of consent to go to arbitration is not a bilateral treaty on investments, and despite the similarities in the structure or content of the Law with the BITs, the Law must be examined and interpreted as a unilateral effort by a Government seeking to attract investments without negotiating anything with another State (**Ex. RL-033, ¶ 94**). In this way it differs from BITs that are negotiated between two parties. It is this distinction that the ICSID tribunal in the *Brandes* case failed to consider. It is only because it ignored the essential part of Article 22 that gives the investor the choice to resort to arbi-

tration or to a Venezuelan court that the ICSID tribunal in the *Brandes* case then arrived to the conclusion that "Despite the similarities between the content of the LPPI and that of a BIT, the Tribunal does not find in the Article that it has analyzed (sic) nor in any other Article of the LPPI (sic), any provision that would allow it to assert that it provides for Venezuela's consent to ICSID jurisdiction" (**Ex. RL-033, ¶ 92**). Of course the Tribunal cannot find the consent of the State if it ignores the right given to the investor to make a choice. The only way to understand this unfounded conclusion is then to recognize that the Tribunal, in its decision, did not actually "analyze" in any way Article 22, or other relevant Articles of the Investment Law (such as Articles 21 and 23).

64. The *Brandes* tribunal also decides that it is "unnecessary, for the purpose of resolving this dispute, to establish the actual role played by Mr. Corrales in the drafting of the LPPI, his knowledge of the issue under discussion and the relevance of his publications about this issue" because "Mr. Corrales' opinion cannot provide the basis for finding that Article 22 of the LPPI contains the consent of the Bolivarian Republic of Venezuela to submit to ICSID arbitration" (**Ex. RL-033, ¶ 103**). Again, it is astonishing how the tribunal can simply and abruptly arrive at these "conclusions," without any reasoning, analysis, and worst of all, without expressing any reason to disqualify in a general and universal way one of the two key people involved in the drafting of the Investment Law, who was put in charge of that task at the request and direction of the Government.

65. I will comment in more detail about Mr. Corrales' role in the drafting of the Investment Law and of the importance of his input later in this report. I would note in this regard that I have known Mr. Corrales for many years, both professionally and personally. Given my interest in and scholarly writings on the Investment Law and its importance in Venezuelan law, I have had occasion to discuss with Mr. Corrales his participation in drafting the Investment Law, including his intention in drafting the law as derived from his understanding of the instructions that he received from the Republic. The opinions expressed in this Legal Opinion – while independent of my discussions with Mr. Corrales – are entirely consistent with the intentions of the Republic revealed to me in those discussions.

66. In the end, after extensively copying and enumerating – without analyzing them – the "valid arguments" of the parties, the ICSID Tribunal in the *Brandes* case just concludes without addressing at all the "fundamental" issue, that it "has not found anything that may lead it to depart from the con-

clusions arrived at by those tribunals [in the *Cemex* and *Mobil* cases] with respect to the specific matter at issue here" (**Ex. RL-033, ¶ 114**). In the following Paragraph the Tribunal copied the final ruling in those cases (**Ex. RL-033, ¶ 115)**, in which those Tribunals have concluded that Article 22 "does not provide a basis for the jurisdiction of the Tribunal **in the present case**" (**Ex. RL-1, ¶ 140; Ex. RL-2, ¶ 138**) (**See *supra*** ¶ 38), without pretending to preclude or prejudice other cases. Nonetheless, the ICSID Tribunal in the *Brandes* case, without any reasoning, arguments, and without explaining any "findings in the paragraphs" of its decision, went further, proclaiming in a general and universal way, and not only for the "present case," that "it is obvious that Article 22 of the Law on Promotion and protection of Investments does not contain the consent of the Bolivarian Republic of Venezuela to ICSID jurisdiction" (**Ex. RL-033, ¶ 118**). This decision, at least from the point of view of the general standard rules governing judicial decisions in internal law, fails to state the reasons on which it is based, that is, it lacks foundation.

V. THE PRINCIPLE THAT CONSENT FOR ARBITRATION IN VENEZUELAN LAW HAS TO BE EXPRESSED IN WRITING, AND THE ABSENCE OF ANY SO-CALLED "WELL-STABLISHED DOCTRINE" THAT IT MUST ALSO BE "CLEAR AND UNEQUIVOCAL"

67. Given the generalized confusion created by the Republic in its Memorial and by its Legal Expert in his Legal Opinion, another matter that must be clarified is the matter of the "form" or condition that according to Venezuelan Law is required in order for the Republic to express consent for arbitration.

68. Contrary to the Republic's assertion, the written expression of consent need not be "clear", "express" or "unequivocal" (**Respondent's Memorial, ¶ 9**). This is not a rule in international law regarding unilateral acts of the State giving consent, as demonstrated in the same judicial cases quoted by the Republic, all of which refer to consent given in a treaty, *i.e.*, where there is an inter-state promise to extend an offer to an investor, that is, an agreement for the benefit of a third party (*Plama v. Bulgaria*, **Respondent's Memorial, ¶¶ 9, 11** and *Wintershall v. Argetina*, **Respondent's Memorial, ¶ 10**).

69. In addition, the ICSID Tribunals in the *Mobil* and *Cemex* cases, concluded that there were only two possible grammatical interpretations of Article 22 (**Ex. RL-1, ¶¶ 109, 111).** Consequently, if the ICSID tribunals

considered that the condition set forth in Article 22 is set forth in an equivocal way in the sense that it allows for two possible interpretations then, according to the same authority quoted by the Republic (Dugan, Wallace Jr., Rubins and Sabahi), the next step is "to ascertain the additional steps required to permit the investor to initiate arbitration proceedings"[38] (**Respondent's Memorial, ¶ 12**). This is precisely what has been done interpreting Article 22 as expressing an open offer for arbitration, or in the words of the ICSID tribunal in the *Mobil* case, a "conditional obligation to go to arbitration" (**Ex. RL-1, ¶ 102**).[39]

1. The only general principle of Venezuelan law regarding the form of the consent to arbitration is the need to be expressed in writing as is the case of Article 22 of the Investment Law

70. As it has been expressed by the Republic, on these matters "Venezuelan law is perfectly consistent with international principles" (**Respondent's Memorial, ¶ 18**), which means that an expression of consent for arbitration, need only to be expressed in writing in order to comply with the Commercial Arbitration Law. This is what has been definitively decided by the Constitucional Chamber of the Supreme Tribunal in a decision issued on November 3, 2010 (Case *Astivenca Astilleros de Venezuela C.A*,), affirming that in any judicial decision regarding the verification of "the validity, efficacy and applicability of the arbitral clause it must be limited to verify the written character of the arbitration agreement."[40]

71. On the other hand, as aforementioned, Article 4 of the Civil Code, which establishes the rules for the interpretation of statutes, provides that in the absence of a precise provision of the Law, the provisions regulat-

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38 See C. Dugan, D. Wallace Jr., N. Rubins and B. Sabahi, *Investor-State Arbitration,* Oxford University Press 2008, at. 244 ff. (**Ex. RL-8**).

39 What is clear from the aforementioned is that the provision related to ICSID arbitration in Article 22, is not at all "a mere reference in a law" to ICSID, nor a "superfluous … list of options" without any effect, as is suggested by the Republic (**Respondent's Memorial, Footnote 12, ¶ 13**).

40 The Constitutional Chamber has established an obligatory interpretation in the sense of ruling that the judicial "verification of arbitral clauses must be limited to verify the written character of the arbitration agreement, excluding any analysis related to the consent devices that could derived from the written clause." See decision No. 1067 of November 3, 2010 (Case *Astivenca Astilleros de Venezuela C.A*,), (**Ex. AB-19, pp. 35 of 60 and 38 of 60**)

ing similar cases or analogous matters shall be taken into account. Consequently, regarding the way consent for arbitration must be given, in the absence of a general and precise provision, the Venezuelan 1998 Commercial Arbitration Law, which is inspired by the UNCITRAL Model Law, must be applied. Like the ICSID Convention, that Law requires only that the consent or agreement to arbitration be evidenced "in writing."[41]

72. The Republic has erroneously argued that according to supposedly "well-settled Venezuelan legal principles" (**Respondent's Memorial, ¶ 19)** or "well-established principles" (**Urdaneta Opinion, ¶ 15**), in addition to being in writing, consent for arbitration must be "clear and unequivocal." On the contrary, there is no legal provision in Venezuelan law requiring the consent for arbitration to be clear and unequivocal. Even in cases of commercial arbitration establishing arbitration clauses, following the pro-arbitration trend

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[41] Article 6 of the Commercial Arbitration Law: "The arbitration agreement must be evidenced **in writing** in any document or group of documents placing on record the will of the parties to submit themselves to arbitration. A reference in a contract to a document containing an arbitration clause shall constitute an arbitration agreement, provided that said contract is evidenced in writing and the reference implies that said clause is a part of the contract. In adhesion contracts and standard-form contracts, the manifestation of the will to submit the contract to arbitration must be made in an express and independent manner." In this regard, and according to this Law, as Alberto Baumeister has pointed out when analyzing the "form of the arbitral clause" that it is only required to be in writing in the contract or in any document assuring that the parties have agreed to submit disputes to arbitration. See Alberto Baumeister, "Algunos tópicos sobre el procedimiento en la Ley de Arbitraje Comercial,", in Irene Valera (Coord), *Arbitraje comercial interno e internacional. Reflexiones teóricas y experiencias prácticas*, Academia de Ciencias Políticas y Sociales, Caracas 2005, pp. 140-141 (**Ex. AB-22**). For additional support for the contention that the arbitration clause need only be in writing, see Francisco Hung Vaillant, *Reflexiones Sobre el Arbitraje en el Sistema Venezolano*, pp**.** 203-204 **(Ex. EU-16; Ex. AB-6);** Alfredo De Jesús O., "Validez y eficacia del acuerdo de arbitraje en el derecho venezolano," in Irene Valera (Coordinadora), *Arbitraje Comercial Interno e Internacional. Reflexiones teóricas y experiencias prácticas*, Academia de Ciencias Políticas y Sociales, Comité Venezolano de Arbitraje, Caracas 2005, pp. 73, 94-97, 130 (**Ex. AB-23);** Andrés A. Mezgravis, "La promoción del arbitraje: un deber constitucional reconocido y vulnerado por la jurisprudencia," in *Revista de Derecho Constitucional*, No. 5, Editorial Sherwood, Caracas 2001, p. 133 (**Ex. AB-24**).

of the Venezuelan legal system (**See *infra* ¶¶** 112 ff.), in case of doubt, one must find in favor of arbitration.[42]

73. For example, as Francisco Hung, one of the authors quoted by the Legal Expert of the Republic (**Urdaneta Opinion, ¶ 15, Footnote 13**) has argued that "in all those cases in which doubts can rise regarding the interpretation of the will to submit to arbitration in an arbitral clauses or agreements, those called to decide must prefer the application of the '*favor arbitri*' principle, and declare the arbitral [tribunal] competent," that is "in cases of doubt, the decision must be in favor of arbitration."[43] This is based on the **intention** of the parties, taking into account the **good faith** intention**.**[44]

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[42] The "pro-arbitration" principle of interpretation regarding arbitration in the Venezuelan legal system has been established as an obligatory doctrine of interpretation by the Constitutional Chamber of the Supreme Tribunal in decision in decision No.1067 of November 3, 2010 (Case *Astivenca Astilleros de Venezuela C.A*,) (**Ex. AB-19, pp. 34 of 60 and 40 of 60**), ,

[43] See Francisco Hung Vaillant, "Apostillas a cinco sentencias en materia arbitra dictadas por el Tribunal Supremo de Justicia," in *Derecho privado y procesal en Venezuela. Homenaje a Gustavo Planchart Manrique*, Tomo II, UCAB, Escritorio Tinoco, Caracas 2003, pp. 654 (**Ex. AB-25**). See the comments on the pro-arbitration trend of the Venezuelan legal system in Andrés A. Mezgravis, "La promoción del arbitraje: un deber constitucional reconocido y vulnerado por la jurisprudencia," in *Revista de Derecho Constitucional*, No. 5, Editorial Sherwood, Caracas 2001, p. 133 (**Ex. AB-24**); Andrés Mezgravis, "El principio pro arbitraje en el ordenamiento jurídico venezolano", in *Ámbito Jurídico* Año IV, No 55, abril 2002 (**Ex. AB-26**); Carlos Alberto Urdaneta Sandoval, "Aspectos del arbitraje en la contratación administrativa," in *VIII Jornadas Internacionales de Derecho Administrativo "Allan Randolph Brewer-Carías," Los contratos administrativos. Contratos del Estado*, Fundación de Estudios de Derecho Administrativo, FUNEDA, Vol. I, Caracas 2005, p. 359 (**Ex. AB-27**); Eugenio Hernández Bretón, "Arbitraje y Constitución. El arbitraje como derecho fundamental,", p. 30 (**Ex. AB-5**). As mentioned this has been the obligatory principle established by the Constitutional Chamber of the Supreme Tribunal in decision No.1067 of November 3, 2010 (Case *Astivenca Astilleros de Venezuela C.A*,) (**Ex. AB-19, pp. 34 of 60 and 40 of 60**),

[44] See Andrés A. Mezgravis, "La promoción del arbitraje: un deber constitucional reconocido y vulnerado por la jurisprudencia," p. 133 (**Ex. AB-24**); Francisco Hung Vaillant, *Reflexiones Sobre el Arbitraje en el Sistema Venezolano*, Editorial Jurídica Venezolana, Caracas 2001, pp. 63-69, 341 (**Ex. EU-16; Ex. AB-6)**.

2. The absence of any so-called but inexistent "well-established doctrine" for consent on arbitration to be clear and unequivocal

74. In Venezuelan law there is no and there has been no "well-settled" (**Respondent's Memorial, ¶ 19)** or "well-established" (**Urdaneta Opinion, ¶ 15**) principle requiring that **consent for arbitration** to be "clear and unequivocal."

75. This is no more than just an invention of the Republic and its Legal Expert. (**Urdaneta Opinion, ¶ 15**; **Respondent's Memorial, ¶ 19** and **Footnote 23**). The assertions of in the Respondent's Memorial and in the Opinion of its Legal Expert have no basis. First, in Venezuela, the decisions of the Supreme Tribunal of Justice in Politico Administrative Chamber in these matters of arbitration do not refer to the substance of arbitration or to the consent for arbitration, being the Chamber only is called upon to decide conflict of jurisdiction between courts or between arbitral tribunals and the courts. Here, there is no conflict of jurisdiction because no case has been filed in a Venezuelan court. Second, in Venezuela the decisions of the Politico Administrative Chamber of the Supreme Tribunal, notwithstanding their importance, cannot be qualified as "precedents" because they do not have an obligatory character. Only the Constitutional Chamber of the Supreme Tribunal, acting as Constitutional Court when exercising its competencies on judicial review, can issue obligatory decisions on constitutional matters (*decisions vinculantes*) when interpreting the Constitution (Article 335 of the Constitution).[45] Third, as aforementioned, there is no "well settled" principle in international law requiring that unilateral declarations of the State to arbitrate to be "clear and unequivocal." Fourth, in a Constitution like the Venezuelan one that establishes arbitration as integral part of the judicial system (Article 253) and that imposes an obligation on the State to promote arbitration (Article 258), arbitration cannot be considered as "an exception" to a supposed "constitutional mandate of jurisdiction in national courts."[46] And fifth, there

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45 See on this obligatory decisions (*decisiones vinculantes*) Allan R. Brewer-Carías, "La potestad de la Jurisdicción Constitucional de interpretar la Constitución con efectos vinculantes," in Jhonny Tupayachi Sotomayor, (Coord.), *El precedente constitucional vinculante en el Perú (Análisis, comentarios y doctrina comparada)*, Editorial Adrus, Arequipa 2009, pp. 791-817 (**Ex. AB-28**).

46 On the contrary, in Venezuela arbitration is considered an integral part of the "system of justice" (Article 253). The Constitutional Chamber of the Supreme Tribunal, in its decision No. 1067 of November 3, 2010 (Case *Astivenca Astilleros de Vene-*

are not Venezuelan judicial "precedents" that have "developed" on matters of commercial arbitration that the consent for arbitration must be "clear, express and unequivocal," contrary to the Republic's assertion.

76. None of the four decisions of the Politico-Administrative Chamber of the Supreme Tribunal of Justice mentioned by the Republic (**Respondent's Memorial, ¶ 19**) and its Legal Expert (**Urdaneta Opinion, ¶ 15, Footnote 12)** sustain such assertions. It is absolutely improper and misleading to pick isolated phrases out of context of the decisions, in order to arrive to false conclusions, as is the case in the Respondent's Memorial (**Respondent's Memorial, ¶ 19**). The four decisions cited (**Ex. EU-8, EU-9, EU-10 and EU-11)** have been highly criticized in Venezuela due to their incongruence and confusing arguments, which prevent them from even being considered as a "pacific doctrinal opinion."[47]

77. All these decisions, as mentioned, do not deal in the internal legal order with the substantive requirements for the validity of arbitration, for consent to arbitration, or for the validity of bilateral expressions of consent to arbitration (*cláusula compromisoria*). The decisions deal, only and exclusively with the issue of the parties' ability to exclude **in a total an absolute way** the possibility for one of the parties to resort to national courts, The fact that the Politico Administrative Chamber of the Supreme Tribunal when deciding jurisdictional conflicts, used to impose a rule that there must be "clear, express and unequivocal" expression in excluding the availability of an option

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zuela C.A,) has ruled establishing an obligagtory doctrine excluding the consideration of arbitration as an exception regarding ordinary jurisdiction, considering that arbitration is an integral part of the judicial system (**Ex. AB-19, pp. 19 of 60 to 26 of 60; 29 of 60**),

47 See the critical comments on these decisions, in Alfredo de Jesús O., "Validez y eficacia del acuerdo de arbitraje en el derecho venezolano," pp. 73-75, 78 (**Ex. AB-23);** Andrés Mezgravis, "El principio pro arbitraje en el ordenamiento jurídico venezolano", in *Ámbito Jurídico* Año IV, No 55, abril 2002, p. 16 (**Ex. AB-26);** Andrés A. Mezgravis, "La promoción del arbitraje: un deber constitucional reconocido y vulnerado por la jurisprudencia," pp. 133-134 (**Ex. AB-24**); Francisco Hung Vaillant, "Apostillas a cinco sentencias en materia arbitra dictadas por el Tribunal Supremo de Justicia," in *Derecho privado y procesal en Venezuela. Homenaje a Gustavo Planchart Manrique*, Tomo II, UCAB, Escritorio Tinoco, Caracas 2003, pp. 654 (**Ex. AB-25**); J. Eloy Anzola, "El fatigoso camino que transita el arbitraje," in Irene Valera (Coordinadora), *Arbitraje Comercial Interno e Internacional. Reflexiones teóricas y experiencias prácticas*, Academia de Ciencias Políticas y Sociales, Comité Venezolano de Arbitraje, Caracas 2005, pp.425-426 (**Ex. AB-29).**

is a completely different matter than an expression that provides **for** the consent to arbitration. But in any case, regarding such "doctrine" and in the context that the Politico Administrative Chamber of the Supreme Tribunal used to apply it, the Constitucional Chamber of the Supreme Tribunal in its decision No. 1067 of November 3, 2010 (Case *Astivenca Astilleros de Venezuela C.A*,) has formally decided, in an obligatory way for all courts that from the moment of the publication of the decision, that is November 3, 2010,

> "the jurisprudence criteria sustained on these matters by the Politico Administrative Chamber of the Supreme Tribunal up to this date, are not applicable" (Vid. Among others, the decisions Numbers 1209 and 832, of June 20, 2001 and June 12, 2002, Cases: "*Hoteles Doral, C.A".* and "*Inversiones San Ciprian, C.A*.")".[48]

78. In addition, the procedural setting of the present case is entirely different. The parties are not in a Venezuelan court debating whether a national court must be deprived of jurisdiction by a contractual arbitration clause. On the contrary, Article 22 does not have the effect of preventing investors from resorting to litigation remedies that may be available under Venezuelan law. Article 22 expressly permits recourse to local courts as an option for the investors when expressing in its last phrase: "[…] without prejudice to the possibility of using, whenever it should be appropriate, the contentious means contemplated by the Venezuelan legislation in effect." As the language of Article 22 contains no option for the Republic of Venezuela to resort to the national court, the premise of those decisions – that no longer can be applied by the courts – is not present in this case. Article 22 does not preclude resort to "the contentious means contemplated by the Venezuelan legislation in effect," being that, on the contrary, an option only for the international investor, because the Republic of Venezuela has already expressed its unilateral consent to arbitration. The very purpose of arbitration provisions is to give the investor the option to resort to arbitration instead of being required to litigate the dispute in the courts of the host-State. In fact, one might argue that if the Republic wanted for there to be the option for an international investor to have recourse **only** to national courts (if there was no applicable treaty) it would need to be expressed in a "clear, express and unequivocal" way. As explained above, this has since been overruled. What is clear, express and unequivocal is that in Article 22 of the Investment Law, it is expressly, unequivocally and clearly provided that, because it contains the con-

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[48] See **Ex AB-19, p. 43 of 60**)

sent of the State for international arbitration, it is possible for the international investor to opt between going to international arbitration of to resort to national courts.

3. The real content of the Politico Administrative Chamber of the Supreme Tribunal decisions when resolving conflicts of jurisdiction between arbitral tribunals and the courts

79. In addition, and despite its inapplicability since November 3, 2010, the cases decided by the Politico Administrative Chamber of the Supreme Tribunal, were not and are not binding. The other Venezuelan judges could and may depart from such decisions. According to Article 321 of the Code of Civil Procedure, Judges shall try to follow the "**cassation** doctrine established in analogous cases, in order to defend the integrity of the legislation and the uniformity of the jurisprudence," but even in this case, it is not established as a mandate. Therefore, such judicial decisions could not and can not be considered to have established a general rule of the Venezuelan Law on matters of resolving conflicts of jurisdiction, and much less on matters of consent for arbitration which was not their purpose. The reading of such decisions in the Respondent's Memorial (**Respondent's Memorial, ¶ 19**) is an absolute misreading and misconception, conducting to a distortion of the sense and the contents of such decisions.[49] In any case, as mentioned ***supra*** ¶ 78, the Constitutional Chamber of the Supreme Tribunal has ruled in an obligatory way that such doctrine could no longer be applied by the courts, establishing on the contrary that the only condition of validity of arbitral clauses is to be in writing.

80. In any case, and because the Respondent and its Legal Expert gave so much importance to the now inapplicable decisions, it must be said that a reading of the full text of these four cases (and not just the excerpts cited by the Republic) reveals that all that they decided was that in the specif-

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[49] The decisions have also been criticized because the Commercial Arbitration Law (Article 6) only requires that the consent be in writing. See Andres Mezgravis "La Promoción del Arbitraje: un deber constitucional reconocido y vulnerado por la jurisprudencia", in *Revista de Derecho Constitucional* N° 5, Diciembre 2001, Editorial Sherwood, Caracas 2001, pp. 133-135 (**Ex. AB-24**); Francisco Hung Vaillant, "Apostillas a cinco sentencias en materia arbitra dictadas por el Tribunal Supremo de Justicia," in *Derecho privado y procesal en Venezuela. Homenaje a Gustavo Planchart Manrique*, Tomo II, UCAB, Escritorio Tinoco, Caracas 2003, pp. 654 (**Ex. AB-25; Ex. EU-16**).

ic commercial contracts on which the cases were based, the arbitral clauses included an option for one of the parties to resort to the courts. The court concluded that such a clause "doesn't present a manifest and unequivocal will to submit to the jurisdiction of private arbiters, that is, it does not exists an **undoubted disposition to renounce to the free access to the judicial** organs of the ordinary jurisdiction" (See, e.g., **Ex. EU-9, p. 16**). The Politico Administrative Chamber of the Supreme Tribunal determined that the specific arbitral clause in the cases was conceived as an "optional arbitration" in the sense of "submission to arbitration in a optional and partial way, that is, always leaving open the possibility that either parties could opt to resort to the judicial mean" (**Ex. EU-9, p. 16**). But the fact was that on the contrary, the validity of the consent for arbitration was not in question in those cases; what was in question was that the consent for arbitration did not completely and absolutely exclude the option to resort to the national courts.

81. Contrary to the so-called and no longer applicable "fundamental requirement of 'clear, express and unequivocal' consent to arbitrate" asserted by the Republic and by its Legal Expert (**Respondent's Memorial, ¶ 20; Urdaneta Opinion, ¶ 15),** the general opinion in Venezuelan legal doctrine is to the contrary, as has been definitively established by the Constitutional Chamber of the Supreme Tribunal of Justice in its decision No. 1067 of November 3, 2010 (Case *Astivenca Astilleros de Venezuela C.A*,).[50] For example, regarding also authorities, Professor Francisco Hung Vaillant, one of the distinguished authors cited in the Urdaneta Opinion (**Urdaneta Opinion, ¶ 15, Footnote 13**), has stated that, according to the pro-arbitration principle in Article 258 of the Constitution, now adopted in an obligatory way by the Constitutional Chamber, "one should try to sustain [the] validity [of arbitration clauses] in all those cases of doubt, as long as such admission does not lead to a violation of norms of public order or impairs good customs. In sum, in case of doubt, one should pronounce in favor of the existence of arbitration . … [which should] provide for an adequate solution each time that there is an antinomy or a legal gap; as well as in those cases in which it is necessary to interpret an obscure text of an arbitration clause or of an arbitration agreement."[51]

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[50] **Ex. AB-19.**

[51] See Francisco Hung Vaillant, *Reflexiones sobre el Arbitraje en el Sistema Venezolano*, Caracas 2001, p. 63, 66 (**Ex. EU-16**). Regarding the other authors quoted in the Respondent's Memorial, none of them support the Republic's contentions. José Luis Bonnemaison only copied one of the decisions of the Politico Administrative

VI. SOME COMMENTS ON THE VENEZUELAN LEGAL REGIME IN THE YEARS BEFORE THE 1999 INVESTMENT LAW WAS ENACTED

82. Contrary to the Republic's assertion, Article 22 of the 1999 Investment Law expresses the written consent of the Republic of Venezuela to ICSID arbitration, under Article 25(1) of the ICSID Convention. This consent is in the form of an open offer of arbitration (*oferta abierta de arbitraje*) subject to acceptance by the claimant to a relevant dispute[52] to accept the offer to go to international arbitration or to resort to national courts. As discussed below, Article 22 reflects a pro-arbitration trend that had developed in Venezuela over the past few decades, which crystallized in Article 258 of the 1999 Constitution, and in a number of other statutes. Therefore, at the moment at which the Investment Law was enacted, the so-called "traditional hostility towards arbitration" (**Respondent's Memorial, ¶ 24**) or the "unfavorable historical attitude in Venezuela toward arbitration" (**Urdaneta Opinion, ¶ 17**) had been completely overcome. The 1999 Investment Law was therefore a piece of legislation completely "reconcilable" with its historical background, including the State's ratification between 1993 and 1998 of numerous treaties for the protection and promotion of investments (that also

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Chamber of the Supreme Tribunal, but does not give his personal opinion. See José Luis Bonnemaison, *Aspectos fundamentals del arbitraje commercial, Tribunal Supremo de Justicia*, Caracas 2006 (**Ex. EU-12, p. 24).** Ivor D Mogollón-Rojas, bases his assertion on the need for a "written" and "documented" agreements to arbitrate that must be included in contracts as a proof that an "express and unequivocal consent to submit to arbitration" has been made, basically in order to stress the core of his statement which is that no "tacit [or implicit] acceptance for arbitration" is acceptable. See Ivor D. Mogollón, *El arbitraje comercial venezolano*, Vadell Hermanos Editores, Caracas 2004 (**Ex. EU-13, pp. 61-62**). Carlos J. Sarmiento Sosa**,** also refers to the written consent for arbitration only to stress that there cannot be a "presumed or implicit arbitral agreement." Carlos J. sarmiento Sosa, *Ley de arbitraje comercial*, Livrosca, Caracas 1999, p. 12 (**Ex. EU-15, p.12**).

52 On the various forms of written consent by ICSID Contracting States, which include domestic legislation, see the "Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of other States" dated March 18, 1965 ("[…] a host state might in its investment promotion legislation offer to submit disputes arising out of certain classes of investments to the jurisdiction of the Centre, and the investor might give his consent by accepting the offer in writing.") (**Ex. EU-5).**

provided for international arbitration), as well as the other legal provisions regarding arbitration adopted at the time.

83. Considering Article 22 of the Investment Law **systematically** and in its **historical** perspective, the State's offering unilateral consent to arbitration in order to promote investment makes sense. This offer was an essential part of the *raison d'être* of the 1999 Investment Law which was in complete accord with the trend in favor of international arbitration existing in 1999,.

84. Furthermore, using the **teleological** and **sociological** element of statutory interpretation, the economic and social situation prevailing at the time the 1999 Investment Law was enacted, explains that the former Congress and the National Executive, acting as legislators, intended to promote investments. Offering consent to international arbitration was a means to do so. The economic policy and the whole legal order existing in 1999 also tended to promote foreign investment and international arbitration.[53] This general intent is clearly reflected in the 1999 Investment Law as a whole, which is primarily devoted to promoting and protecting foreign investment by regulating the actions of the State in the treatment of such investment. Submission of disputes to international arbitration is precisely one of the principal means of protecting foreign investors and investments.[54]

1. The historical background of the matter of arbitration: from hostility towards acceptance

85. Respondent and its Legal Expert give great importance to what they have called the "historical background" of the Investment Law (**Re-**

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[53] See Victorino Tejera Pérez, "Do Municipal Investment Laws Always Constitute a Unilateral Offer to Arbitrate? The Venezuelan Investment Law: A Case Study," p. 113 (**Ex. AB-3**); Victorino Tejera Pérez, *Arbitraje de Inversiones*, Magister Thesis, Universidad Central de Venezuela, Caracas 2010, p. 154 (**Ex. AB-4**).

[54] Even the 2008 Decision No. 1.541 of the Supreme Tribunal**,** recognizes that one of the ways States attract foreign investment is to make a unilateral promise to submit disputes to arbitration ("It is not possible to ignore that States seeking to attract investments must in their sovereignty decide to grant certain guarantees to investors, in order for such relationship to take place. Within the variables used to achieve said investments, it is common to include an arbitration agreement, which in the investors' judgment provides them with security in relation to the — already mentioned — fear of a possible partiality of State tribunals in favor of [the tribunals'] own nationals.") (**Ex. EU-29, p. 29**).

spondent's Memorial, ¶ 24; Urdaneta Opinion, ¶ 17) and to a summary of such background made by Professor Alfredo Morles Hernández in 2005 (**Respondent's Memorial, ¶ 25; Urdaneta Opinion, ¶ 18**).

86. Contrary to what the Republic and its Legal Expert assert, Professor Alfredo Morles' opening statement in the Seminar convened by the Academy of Political and Social Sciences in Caracas, in 2005,[55] only serves to confirm that by 1999, the prevailing attitude towards arbitration in the Government, was a favorable one, despite the voices that still existed that opposed to State arbitration as a principle. The statements of Professor Morles also confirm his own favorable attitude towards arbitration. It is precisely in the last part of the statement of Morles that follows the Paragraphs that were copied in the Respondent's Memorial (**Respondent's Memorial, ¶ 25**) and its Legal Expert opinion (**Urdaneta Opinion, ¶ 18**), where Professor Morles says:

> "Now, all this hostile culture towards arbitration in general, and all the suspicious and prejudicial attitude of the legal community regarding the its use, **has been giving way to a new situation, favored in the international field by the equalitarian treatment between Nations and because the action of international organizations like UNCITRAL in which a wide participation of the Nations of all Regions exists** […]." (Emphasis added) (**Ex. EU-19, p. 12**).

87. After reviewing all the elements of this "new trend" favoring international arbitration, particularly the ratification during the past decades of all the most important international conventions on the matter, making particular emphasis on the ICSID Convention which Professor Morles considered as being "the object of a practically universal acceptance," he clarifies that if it is true that "during a length of time the Latin American counties showed reticence in adhering" "this tendency from some time on has reverted" (**Ex. EU-19, pp. 12-13).**

88. Professor Morles ended his statement by pointing out that "lawyers and judges have to abandon, that is, forget the reticence towards arbitration; and learn the convenience of its use, for the simple reason that as well as

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[55] See Alfredo Morles Herández, "Presentación," in Irene Valera (Coord.), *Arbitraje comercial interno e internacional. Reflexiones teóricas y experiencias prácticas*, Academia de Ciencias Políticas y Sociales, Caracas 2005, pp. 7-14 (**Ex. EU-19**).

the majority of citizens lack the resources to pay for expensive justice, they also don't have the patience to tolerate justice that is even more slow and suspicious" (**Ex. EU-19, pp. 13-14).**

89. From what Professor Morles said in his Presentation, when read in totality, what is clear is that its "central theme" was not "the traditional hostility towards arbitration of the Venezuelan legal community" as incorrectly pointed out by the Republic (**Respondent's Memorial, ¶ 25**) and its Legal Expert (**Urdaneta Opinion, ¶ 18)**, but on the contrary, to stress the "new situation" in favor of international arbitration that substituted the former "hostile culture," and to express the need for the legal community to overcome, that is to "abandon" and "forget," all "reticence towards arbitration" which he considers as an "ideal, rapid and transparent system of conflict resolution." (**Ex. EU-19, p. 14**).

90. Professor Morles' position related to the possibility of the renunciation of jurisdictional immunity in public contracts entered by the Republic referring to external public debt (*emprésito público*) was very different. (**Ex. EU-19, pp. 13-14).** Since 1970, Professor Morles has criticized the legal opinion of the General Attorney's Office (expressed in 1977) that it was permissible to incorporate in external public debt contracts clauses renouncing the State's jurisdictional immunity which at the time was extensively incorporated in public contracts.[56] Therefore, it is an historical fact that, particularly after the sanctioning of the 1961 Constitution and well before 1999, the Republic had accepted in a very extensive way, specifically with respect to public contracts, its ability to renounce its jurisdictional immunity.

2. The constitutional evolution on jurisdictional immunity of the State and the sealing of old diplomatic wounds

91. In any case, it is useful to recall the evolution of the constitutional provisions in Venezuela on matters of international arbitration and jurisdictional immunity. It must be said that during the 19th century and the first two decades of the 20th century, international arbitration was the general rule that the Constitutions imposed to be established in a clause that had to be incorporated in all international treaties for the solution of all differences between the

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[56] See Alfredo Morles Hernández, "La inmunidad de jurisdicción y las operaciones de crédito público," in *Estudios sobre la Constitución, Libro Homenaje a Rafael Caldera*, Universidad Central de Venezuela, Caracas 1979, Vol. III, p. 1717. (**Ex. AB-30**).

Contracting parties.[57] A clause was reestablished in 1947, although with a wider scope, referring to all international compromises (and not only treaties) and to the solution of controversies by pacific means (and not only arbitration) recognized in international law.

92. The Constitution has included, since 1893, an important Article with three specific clauses: first, the prohibition for public interest contracts (public interest contracts) to be transferred to foreign States; second, the absolute immunity for jurisdiction clause establishing the obligation of its incorporation in all public contracts; and third, the so called "Calvo clause" excluding any diplomatic claims regarding such public contracts. All such clauses have remained up to date in the Constitution, although the second one was transformed in 1947 and since 1961, into a relative immunity for jurisdiction clause. Ten years after the 1893 constitutional reform, a hostile action took place in 1902, with the military blockade of the Venezuelan ports by forces of Germany, Great Britain and Italy made seeking for the compulsory collection of public debts giving rise to the application in Venezuela of the so called "Drago Doctrine."

93. In any case, after all the previous experiences, particularly at those occurred at the turn of the 20th century, since the 1961 Constitution was adopted, and in particular, due to the reestablishment of the principle of relative sovereign immunity, based on a similar provision contained in Article 108 of the 1947 Constitution, the insertion of binding arbitration clauses in public contracts became a generally accepted practice, recognized as valid.[58] In addition, in 1995, Venezuela ratified the ICSID Convention and,[59]

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57 In the 1864 (Article 112), 1874 (Article 112), 1881 (Article 109), 1891 (Article 109), 1893 (Article 141), 1901 (Article 133), 1904 (Article 120), 1909 (Article 138), 1914 (Article 120), and 1922 (Article 120) Constitutions, an Article was included establishing that in international treaties a clause was to be incorporated with the following text: "All the differences between the contracting parties must be decided, without recurring to war, by arbitration of friendly State or States." See in Allan R. Brewer-Carías, *Las Constituciones de Venezuela*, Academia de Ciencias Políticas y Sociales, Caracas 2008 (**Ex. AB-31**). See J. Eloy Anzola, "El fatigoso camino que transita el arbitraje," in Irene Valera (Coordinadora), *Arbitraje Comercial Interno e Internacional. Reflexiones teóricas y experiencias prácticas*, Academia de Ciencias Políticas y Sociales, Comité Venezolano de Arbitraje, Caracas 2005, p. 410 (**Ex. AB-29**).

58 See Allan R. Brewer-Carías, *Contratos Administrativos*, Colección Estudios Jurídicos N° 44, Editorial Jurídica Venezolana, Caracas 1992, pp. 262-265 (**Ex. AB-32**).

between 1993 and 1998, many bilateral treaties on investments (BITs) were signed providing for international arbitration.[60]

3. The general acceptance of arbitration on matters of private law

94. On matters of private law, after arbitration was initially established as a constitutional right in the 1830 Constitution (Art. 140),[61] and was authorized as binding in the 19th Century in the civil procedure regulations as a means of alternative dispute resolution, at the beginning of the 20th century, in the 1916 Civil Procedure Code, arbitration was established only as a non-binding method of dispute resolution, that is, without making the arbitration agreement mandatory (Articles 502-522). In 1986, the Civil Procedure Code was amended to allow parties to make a binding agreement to submit controversies to arbitral tribunals, and to exclude the jurisdiction of ordinary courts (Articles 608-629).[62] In addition, special statutes allowed for arbitra-

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The possibility for arbitration clauses to be incorporated in public contracts was first examined in Venezuela in 1960 even before the 1961 Constitution was enacted. See Antonio Moles Caubet, "El arbitraje en la contratación administrativa," in *Revista de la Facultad de Derecho*, No. 20, Universidad central de Venezuela, Caracas 1960, p. 22 (**Ex. AB-33**). See also Alberto Baumeister Toledo, ""Algunas consideraciones sobre el procedimiento aplicable en los casos de arbitrajes regidos por la ley de Arbitraje Comercial," in Allan R. Brewer-Carías (Ed.), *Seminario sobre la Ley de Arbitraje Comercial*, Academia de Ciencias Políticas y Sociales, Caracas 1999, pp. 95-98 **(Ex. AB-34);** Allan R. Brewer-Carías, "El arbitraje y los contratos de interés públicos," in Allan R. Brewer-Carías (Ed.), *Seminario sobre la Ley de Arbitraje Comercial*, Academia de Ciencias Políticas y Sociales, Caracas 1999, pp 167-186 (**Ex. AB-35**); Francisco Hung Vaillant, *Reflexiones Sobre el Arbitraje en el Sistema Venezolano*, Editorial Jurídica Venezolana, Caracas 2001, pp. 125-130 (**Ex. AB-6).**

59 *Official Gazette* No. 35.685 of April 3, 1995.

60 See list of Venezuelan bilateral treaties on the promotion and protection of investments in **Ex. EU-5, Ex. EU-6**.

61 See J. Eloy Anzola. "Luces desde Venezuela: La administración de justicia no es monopolio exclusivo del Estado," in *Spanish Arbitration Review, Revista del Club Español de Arbitraje*, No. 4, 2009, p. 62. (**Ex. RL-23,** p. 62).

62 On the importance and impact of the 1986 Civil Procedure Code reform on matters of arbitration, see Víctor Hugo Guerra Hernández. "Evolución del arbitraje commercial interno e internacional," in Irene Valera (Coordinadora), *Arbitraje Comercial Interno e Internacional. Reflexiones teóricas y experiencias prácticas*, Academia de Ciencias Políticas y Sociales, Comité Venezolano de Arbitraje, Caracas

tion in areas related to copyright, insurance, consumer protection, labor, and agrarian reform.[63] Later, Venezuela ratified the 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards,[64] the 1975 Inter-American Convention on International Commercial Arbitration,[65] and the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).[66] In 1998, Venezuela adopted the Commercial Arbitration Law,[67] which is based on the Model Law on International Commercial Arbitration of UNCITRAL.[68]

95. On the other hand, and specifically on maters of foreign investments, and according to the regime existing at the time, the Executive Decree 2.095 of February 13, 1992 containing the Regulation on the "Common Regime on the Treatment of Foreign Capitals and on Trademarks, patents, Licenses and Royalties, approved in Decisions Nos. 291 and 292 of the Commission of the Cartagena Agreement," established in a general way that "the solution of controversies or conflicts derived from direct foreign investments

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2005, pp. 42-44 (**Ex. AB-36**); Arístides Rengel Romberg, "El arbitraje comercial en el Código de Procedimiento Civil y en la nueva Ley de Arbitraje Comercial (1998)," in Allan R. Brewer-Carías (Ed.), *Seminario sobre la Ley de Arbitraje Comercial*, Academia de Ciencias Políticas y Sociales, Caracas 1999 (**Ex. AB-37**); J. Eloy Anzola, "El fatigoso camino que transita el arbitraje," in Irene Valera (Coordinadora), *Arbitraje Comercial Interno e Internacional. Reflexiones teóricas y experiencias prácticas*, Academia de Ciencias Políticas y Sociales, Comité Venezolano de Arbitraje, Caracas 2005, p.408 (**Ex. AB-29**).

63 See the laws listed, including the Copyright Law (1993), Insurance Companies Law (1994), Consumer Protection Law (1995), Organic Labor Law (1990), in Francisco Hung Vaillant, *Reflexiones Sobre el Arbitraje en el Sistema Venezolano*, pp. 90-101 (**Ex. EU-16; Ex. AB-6**); Paolo Longo F., *Arbitraje y Sistema Constitucional de Justicia*, Editorial Frónesis S.A., Caracas, 2004, pp. 52-77 (**Ex. AB-38**); Víctor Hugo Guerra Hernández. "Evolución del arbitraje commercial interno e internacional," pp. 44-46 (**Ex. AB-36**); and in 2008 Decision No. 1.541 **(Ex. EU-29, pp. 12-13)**.

64 *Official Gazette* No. 33.144 of January 15, 1985.

65 *Official Gazette* No. 33.170 of February 22, 1985.

66 *Official Gazette* (Extra) No. 4832 of December 29, 1994. For an account of international instruments relevant to Venezuela's recognition of international arbitration, see 2008 Decision No. 1.541 **(Ex. EU-29, pp. 12-13**).

67 *Official Gazette* No. 36.430 of April 7, 1998.

68 See *generally* Arístides Rengel Romberg, "El arbitraje comercial en el Código de Procedimiento Civil y en la nueva Ley de Arbitraje Comercial (1998)," pp. 47 ff. (**Ex. AB-37**)

or sub-regional investors or from the transfer of foreign technology, the jurisdictional or conciliation and arbitration mechanisms established in the law can be used."[69] Consequently, it was a generalized practice to provide for arbitration for the possible solution of investments disputes.

4. The general acceptance of arbitration on matters of public contracts and the sense of the provisions of Article 4 of the Commercial Arbitration Law and of Article 151 of the Constitution

96. Specifically regarding the extensive use of the mechanisms of arbitration according to the relative jurisdictional immunity clause in public contracts, due to the constitutional provision in the 1961 Constitution that was highlighted by Professor Morles,[70] as pointed out by the ICSID tribunals in the *Mobil* and *Cemex* case, shows that in 1993 "the environment in Venezuela had become more favorable to international arbitration" (**Ex. RL-1, ¶ 130; Ex. RL-2, ¶ 125**) in the sense that "the traditional hostility towards international arbitration had receded in the 1990s in favor of a more positive attitude" (**Ex. RL-1, ¶ 131**). Nonetheless, the ICSID Tribunal in the *Mobil* case adds, in an incomprehensible way, that: "**However**, Venezuela remained reluctant *vis-à-vis* contractual arbitration in the public sphere, as demonstrated by [Article 4 of] the 1998 Arbitration Law and Article 151 of the 1999 Constitution" (Emphasis added) (**Ex. RL-1, ¶¶ 131; 127, 128).** The same is asserted in the *Cemex* case, **Ex. RL-2, ¶ 125**). These Tribunals have not really understood the content of both provisions from which no "reluctant" attitude towards arbitration can be drawn.

97. Article 4 of the Commercial Arbitration Law is an elemental administrative procedural provision. It imposes only that an arbitration agreement be entered into by decentralized entities in the public sector, according to their by-laws, and that the Ministry in charge of controlling the specific decentralized entity (*Ministro de tutela*) provide its approval.[71] This provision

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69 *Official Gazette* No. 34.930 of March 25, 1992 (**Ex. AB-39**)

70 See Alfredo Morles Hernández, "La inmunidad de jurisdicción y las operaciones de crédito público," p. 1717 (**Ex. AB-30**).

71 There is no "Ministry of Legal Protection" in the Venezuelan Public Administration. This is an erroneous translation of the expression "*Ministerio de tutela*" that the ICSID Tribunal decision in the *Mobil* case (**Ex. RL-1, ¶ 128**) has made. The same error can also be found in the Urdaneta Opinion Exhibits (**Ex. EU-22).** In this

therefore only establishes administrative procedural requirements (**See *infra* ¶ 109)**.[72] It is therefore incomprehensible to find a "reluctant attitude" of Venezuela towards arbitration or that such provision establishes that the country "remained reluctant" towards contractual arbitration (**Ex. RL-1, ¶¶ 129, 131; Ex. RL-2, ¶ 125)**.

98. More incomprehensible is the reference to Article 151 in order to prove the "reluctance" of Venezuela towards contractual arbitration. Such provision establishes, as it is generally admitted in international law, on the one hand, the principle of relative immunity for jurisdiction on matters of public contracts; and on the other hand, the principle that foreign States cannot initiate diplomatic claims against the Venezuelan State as a consequence of public contracts entered with foreign corporations ("Calvo clause").[73] Therefore, there is nothing extraordinary or unusual.

5. The legal doctrine of the Attorney General's Office on acceptance of arbitration on matters of public contracts

99. Since the 1970s, it has been a generally accepted practice to include in public contracts the relative immunity clause, as was pointed out

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Article of the Commercial Arbitration Law, the expression *Ministerio de tutela*, following the well established sense of the administrative law French expression "*contrôle de tutelle*" in order to differentiate it from the "hierarchical control," refers to the Ministry of the National Executive to which a decentralized entity is assigned or attached. In Venezuela, all public enterprises or public corporations must be assigned or attached to a Ministry, which is called *Ministerio de tutela* or *Ministerio de adscripción*. See for instance the expression as has been used in the Organic Law of Public Administration, Articles 78, 97.5, and 120-122. Decree Law No. 6217 of July 15, 2008, in *Official Gazette* No. 5890 Extra. of July 31, 2008 (**Ex. RL-31)**. See the comments in Allan R. Brewer-Carías *et al*., *Ley Orgánica de la Administración Pública*, Editorial Jurídica venezolana, Caracas 2008, pp. 77-79 (**Ex. AB-40)**.

[72] See on this Article, the comments in Allan R. Brewer-Carías, "El arbitraje y los contratos de interés nacional," pp. 169-204 (**Ex. AB-35)**.

[73] See on this Article, our proposal before the National Constituent Assembly, in Allan R. Brewer-Carías, "Propuesta sobre la cláusula de inmunidad relativa de jurisdicción y sobre la cláusula Calvo en los contratos de interés público," in *Debate Constituyente (Aportes a la Asamblea Nacional Constituyente)*, Vol. I (8-Agosto-8 Septiembre 1999), Fundación de Derecho Público/Editorial Jurídica Venezolana, Caracas 1999, pp. 209-233. (**Ex. EU-24**)

by Professor Morles (See ***supra*** ¶¶ 87 ff.).[74] Almost two decades later, the Office of the Attorney General of the Republic, as the constitutionally-appointed entity responsible for advising the National Executive on legal matters, reviewed the issue of judicial immunity included in public external debt contracts (*contratos de emprestitos públicos*) entered into by the Republic.

100. A so called "expression of concern" was published in an Article in September 1996, containing the personal opinion of Jesús Petit Da Costa, the Attorney General of the Republic at the time. This Article rejected the possibility of subjecting the Republic, not to the jurisdiction of arbitral tribunals generally, but only to the jurisdiction of "foreign tribunals." The Article titled "*Blindar con la Constitución*" (**Ex. EU-20**) had nothing to do with arbitration. Nonetheless, Republic erroneous contends that this is a sign of the "accentuation" of the "cautious and restrictive attitude in Venezuela toward international arbitration" (**Respondent's Memorial, ¶ 26**). Its Legal Expert, also misquotes the Article as a sign of a more "restrictive" attitude "towards arbitration" by the State (**Urdaneta Opinion, ¶ 19**). These misinterpretations are based on an incomplete and inaccurate reading of the Article. The Article does not refer to international arbitration at all ("arbitration" is a word that is not even used in the Article), and only refers to "foreign tribunals" (*tribunal extranjero*) meaning courts of other foreign States.

101. The same can be said regarding the formal Legal Opinion given by the Attorney General's Office that same year, on December 19, 1996, directed to the Minister of Finance. In that Opinion, the legal advisor of the Republic reviewed the previous criteria expressed by the Office in the 1970's regarding the "commercial" nature of the external public debt contracts and its proposal that the Republic cease renouncing its entitlement to jurisdictional immunity in such contracts (**Ex. EU-21**). This Opinion of the Attorney General's Office is also mentioned in by the Republic and its Legal Expert, also as a "sign" of a "cautious and restrictive attitude in Venezuela toward international arbitration" (**Respondent's Memorial, ¶ 26**); or of a more "restrictive" attitude "towards arbitration" by the State (**Urdaneta Opinion, ¶ 19**). Nonetheless, they fail to mention that the Opinion, was unsuccessful in changing the legal principles that have been well-established since 1970's, and was, in any event, abandoned four months later, in April 1997.

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[74] See Alfredo Morles Hernández, "La inmunidad de jurisdicción y las operaciones de crédito público," p. 1717 (**Ex. AB-30**).

102. Again, however, the subject matter is jurisdictional immunity in public debt contracts and not the availability or constitutionality of international arbitration. In addition, in the Opinion, the Attorney General, only ratified his personal assertion made in the Article published three months before (**Ex. EU-20**), expressing the same concerns. (**Ex. EU-21, p. 1**).

103. On April 21, 1997,[75] the Attorney General recognized the relevance of the immunity clause contained in Article 127 of the Constitution to public contracts, and provided that the security of the Republic or its internal sovereignty is not compromised, admitting that 'the submission to a foreign jurisdiction cannot signify a violation of Article 127 of the Constitution."[76]

6. The inclusion of arbitration clauses in public contracts since the 1990's with the knowledge and consent of the Attorney General's Office

104. Moreover, even before the quickly defunct Opinion of 1996, the Attorney General's Office consistently gave its acceptance for the inclusion of arbitration clauses in many State acts. First, in 1994, in the Decree Law No. 138 of April 20, 1994 containing the Organic Law on Concessions of Public Works and National Public utilities,[77] issued by the President of the Republic with the legal consent of the General Attorney Office. This law includes an Article expressly establishing that "the National Executive and the concessionaire could agree that the doubts and controversies that may arise resulting from the interpretation and execution of the concession contract would be decided

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75 See excerpt of the Opinion in Margot Y. Huen Rivas, "El arbitraje internacional en los contratos administrativos," in *VIII Jornadas Internacionales de Derecho Administrativo "Allan Randolph Brewer-Carías," Los contratos administrativos. Contratos del Estado*, Fundación de Estudios de Derecho Administrativo, FUNEDA, Vol. I, Caracas 2005, pp. 434-435 (**Ex. AB-41);** and Juan Carlos Balzán, "El arbitraje en los contratos de interés a la luz de la cláusula de inmunidad de jurisdicción prevista en el artículo 151 de la Constitución," in *VIII Jornadas Internacionales de Derecho Administrativo "Allan Randolph Brewer-Carías," Los contratos administrativos. Contratos del Estado*, Fundación de Estudios de Derecho Administrativo, FUNEDA, Vol. II, Caracas 2006, pp. 345 (**Ex. AB-42**).

76 *Id*. This was later included even more expressly in the 2005 Law on the Financial Administration of the Public Sector, Article 104. *See Offical Gazette* No. 37.978 of July 13, 2004.

77 See *Official Gazette* No. 4719 Extra. of April 26, 1994 (**Ex. AB-43**).

by an arbitral tribunal whose composition, competency, procedure and applicable law shall be determined by the parties" (Article 10).[78]

105. Second, in 1995, the Attorney General's Office also accepted an international arbitration clause that was included in the Congressional Resolution (*Acuerdo*) establishing the Framework of Conditions for the "Association Agreements for the Exploration at Risk of New Areas and the Production of Hydrocarbons under the Shared-Profit Scheme" ("*Convenios de Asociación Para la Exploración a Riesgo de Nuevas Areas y la Producción de Hidrocarburos Bajo el Esquema de Ganancias Compartidas*"), dated July 4, 1995.[79]

106. This provision was challenged on the grounds of its supposed unconstitutionality before the Supreme Courts of Justice through a popular action brought by Ali Rodríguez Araque. At the time, Rodríguez Araque was a member of Congress, who opposed, together with his other co-claimants, inclusion of the arbitration clause in the Congressional Resolution and in the Association Agreements. Based on these antecedents, I assume that in 1999, Rodríguez Araque, acting as the Minister of Energy and Mines, opposed the inclusion of Article 22 of the Investment Law because providing it provided the State's consent to arbitration (**See *infra* ¶** 147**)**.

107. In August 1999, the Supreme Court of Justice dismissed the action upholding the constitutionality of the Congressional Resolution authorizing the Framework of Conditions for the "Association Agreements for the Exploration at Risk of New Areas and the Production of Hydrocarbons under the Shared-Profit Scheme," holding that such authorization and, in particular, the inclusion of arbitration clauses in public law contracts, were valid under Article 127 of the 1961 Constitution in force at the time (equivalent to Article 151 of the 1999 Constitution).[80] This decision of the Supreme Court

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78 (unofficial tranlation) in Luis Fraga Pittaluga, "El arbitraje y la transacción como métodos alternativos de Resolución de conflictos administrativos," in *IV Jornadas Internacionales de Derecho Administrativo Allan Randolph Brewer Carías, La relación jurídico-administrativa y el procedimiento administrativo*, Fundación de Estudios de Derecho Administrativo, FUNEDA, Caracas 1998, p. 178 (**Ex. AB-44**). This author stated in 1998 that "the admission of arbitration in administrative field is an irreversibly tendency," *Id*. p. 177 (**Ex. AB-44**).

79 *Official Gazette* No. 35.754 of July 17, 1995. (**Ex. C-11**).

80 See decision in Allan R. Brewer-Carías (Compilator), *Documentos del Juicio de la Apertura Petrolera (1996-1999),* Caracas, 2004 *available at* http://allanbrewercarias.

of Justice has been considered as the leading judicial precedent on the matter of arbitration in public contracts and the sense of the relative immunity clause in the country.[81]

108. During the same time period, Article 4 was included in the Commercial Arbitration Law of 1998 (**Ex. EU-22**) (**See *supra* ¶ 98**). As previously mentioned, Article 4 expressly admits the inclusion of arbitral clauses in public contracts, upon approval by the competent organ according to the by-laws of the entity and written authorization by the Ministry in charge of the activities of the specific decentralized entity.[82] Contrary to the assertions by the Republic and its Legal Expert, the provision is no more that the express ratification and express acceptance by Congress of the possibility to include arbitration clauses in public contracts. It does not deal with the competence of public entities to include arbitration clauses in public contracts, which is accepted, being only a procedural provision establishing one of the most elemental rule of management in Public Administration, which is control.

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com/Content/449725d9-f1cb-474b-8ab2-41efb849fea3/Content/I,%202,%2022.%20%20APERTURA%20PETROLERA.%20DOCUMENTOS%20DEL%20JUICIO.pdf (Biblioteca Virtual, I.2. Documentos, No. 22, 2004), pp. 280-328 (**Ex. AB-45**). I acted as counsel to PDVSA in that judicial proceeding, defending the constitutionality of that *Acuerdo*, and in particular, the constitutionality of the arbitration clause included in the Association Agreements. The Constitutional Chamber of the Supreme Tribunal of Justice has confirmed the ruling made under the 1961 Constitution, holding that Article 151 of the 1999 Constitution allows the incorporation of arbitration provisions in contracts of public interest. See 2008 Decision No. 1.541 **(Ex. EU-29, pp. 23-24**) and Decision No. 97 of February 11, 2009 (*Interpretation of Articles 1 and 151 of the Constitution. Fermín Toro Jiménez, Luis Brito García et al*.) (**Ex. EU-30**). See the comments on the August 1999 upholding the Congress Resolution approving the Framework of the Association Agreement I made when rejecting the constitucional proposal of President Chávez regarding Article 151 of the Constitution, in Allan R. Brewer-Carías, "Propuesta sobre la cláusula de inmunidad relativa de jurisdicción y sobre la cláusula Calvo en los contratos de interés público," in *Debate Constituyente (Aportes a la Asamblea Nacional Constituyente)*, Vol. I (8-Agosto-8 Septiembre 1999), Fundación de Derecho Público/Editorial Jurídica Venezolana, Caracas 1999, pp. 220-229 (**Ex. EU-24**).

81 See Juan Carlos Balzán, "El arbitraje en los contratos de interés a la luz de la cláusula de inmunidad de jurisdicción prevista en el artículo 151 de la Constitución," pp. 349-357 (**Ex. AB-42**); Margot Y. Huen Rivas, "El arbitraje internacional en los contratos administrativos," pp. 438-39 (**Ex. AB-41**).

82 Article 4. (**Ex. EU-22**).

109. The availability of arbitration as a remedy has been recognized in a number of subsequent judicial decisions, a number of which were issued before the Investment Law was enacted in 1999.[83] For example, in January 15, of the same year 1998, the Supreme Court of Justice in Politico Administrative Chamber issued another decision (*Industrias Metalúrgicas Van Dam, C.A. vs. República de Venezuela. Ministerio de la Defensa* case), in which an arbitration clause were recognized in public contracts, although because the military object of the contract in the specific case, in a reduced way regarding the "technical aspects" of the contract excluding matters of matters of national security and defense.[84]

110. In any case, what is important to highlight is that the general situation during the decades (and not only years) prior to 1999, shows a clear tendency of surpassing the historic "reticence" that could have existed regarding arbitration clauses and State jurisdictional immunity in public law contracts before the 1961 Constitution was enacted and before the Civil Procedure Code was reformed in 1986. This reticence was supplanted by a general acceptance of the possibility for public entities to include in public contracts arbitral clauses, as was expressly ratified in the 1998 Commercial Arbitration Law. At that time, the official doctrine of the Attorney General's Office, the general constitutional, administrative and international law legal doctrine, and the jurisprudence of the Supreme Court of Justice were clearly in favor of these principles.

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83 See the cases quoted in Juan Carlos Balzán, "El arbitraje en los contratos de interés a la luz de la cláusula de inmunidad de jurisdicción prevista en el artículo 151 de la Constitución," pp. 333-335, 349 (**Ex. AB-42**) and in José G. Villafranca, "Precisión jurisprudencial en torno a la inmunidad de jurisdicción en demandas por responsabilidad patrimonial (Comentario a la sentencia de la CSJ-SPA de fecha 30-07-1998)," in *Revista de Derecho Administrativo*, No. 4, Editorial Sherwood, Caracas 1998, p. 347-360 (**Ex. AB-46**).

84 See excerpt quoted in Juan Carlos Balzán, "El arbitraje en los contratos de interés a la luz de la cláusula de inmunidad de jurisdicción prevista en el artículo 151 de la Constitución,", pp. 349-350 (**Ex. AB-42**)

VII. THE PRO-ARBITRATION PUBLIC POLICY ENACTED BY PRESIDENT HUGO CHAVEZ IN 1999 AND IN THE 1999 CONSTITUTION

1. The pro-arbitration trend of all the legislation enacted in 1999

111. The enactment of the 1999 Investment Law was the result of a defined economic policy of the new government that began in February that year. It was intended to attract investments, and particularly, foreign investments. In effect, President Hugo Chávez, who was first elected in December 1998 and took office on February 2, 1999, requested the Congress to sanction an Organic Law enabling him (the President of the Republic) to enact a group of statutes on matters related to Public Administration, Finance, Taxation and the Economy. The last of which mainly was devoted to promote, protect and encourage investment in the country.

112. Consequently, following the draft submitted by same National Executive, a few weeks later, on April 1999, the Congress sanctioned the enabling Organic Law of April of that year 1999.[85] This law authorized the President of the Republic not only to "enact provisions in order to promote the protection and promotion of national and foreign investments with the purpose of establishing a legal framework for investments and to give them greater legal security" (Article 1.4.f); but also to "reform the decree-Law on Public Works and National Public Utilities Concessions to stimulate private investments" for both existing and prospective projects (Art. 1.4.h) and to issue the necessary measures for the exploitation of gas, modernizing the legislation on the matter (Art. 1.4.i) (See in **Ex. EU-3**).

113. It was the National Executive that defined the economic policy of the country focused on the promotion and protection of investments in general, and on matters of public works and public utilities, hydrocarbons, gas and mines, for which purpose it received a very wide and comprehensive legal authorization to enact statutes by means of delegate legislation. It was

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[85] See *Ley Orgánica que Autoriza al Presidente de la República Para Dictar Medidas Extraordinarias en Materia Económica y Financiera Requeridas por el Interés Público* (Organic Law Authorizing the President of the Republic to Issue Extraordinary Measures in Economic and Financial Matters Required by the Public Interest), in *Official Gazette* Nº 36.687 of April 26, 1999. (**Ex. EU-3**)

precisely within this legislative authorization that the Executive Power issued the Decree Law containing the 1999 Investment Law, as well as many other Decree Laws all of which were not issued by the President of the Republic "exercising the power vested in him by the new Political Constitution", as erroneously asserted in the *Brandes* case decision (**Ex. RL-033, ¶ 25**). The "new" Constitution was sanctioned after the April 1999 Enabling Law and after the Investment Law was approved.

114. A month after the August 1999 Supreme Court of Justice decision rejecting the challenge to the Hydrocarbons Association Agreements was published, the President of the Republic proceeded to enact four important Decree Laws executing the provisions of the Enabling Law already mentioned, containing statutes on matters of investments (Articles 1.4.f,; 1.4.h; 1.4.i; and 1.4.j), and in all of them, providing for arbitration as a means for the solution of disputes between the State and private persons.[86] Of these four authorizations, three Decree Laws – those regarding Gassed Hydrocarbons, Promotion and Protection of Investments through Concessions and the Investment Law – are of particular importance.

115. In the Law on Gassed Hydrocarbons,[87] Article 127 of the 1961 Constitution that provides that in all the licenses given to private persons in order to execute activities of exploration and exploitation of gassed hydrocarbons, a clause shall be deemed to be included (even if not expressed in writing), establishing that "the doubts and controversies of any kind that may arise resulting from the license, and that could not be resolved amicably by the parties, *including by arbitration*, shall be decided by the competent courts of the Republic, in accordance with its laws, not being able to give rise by any motive or cause to foreign claims" (Article 25.6.b). This Law expressly recognizes the possibility to submit to arbitration disputes on matters relating to licenses given by the State for the exploration or exploitation of non-gas hydrocarbons.[88]

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86 See *Official Gazette* No. 5.382 Extra of September 28, 1999 (**Ex. AB-47**) (controversies concerning mining titles may be arbitrated). The other three laws are the laws concerning Gassed Hydrocarbons, the Promotion and Protection of Investments through Concessions and the Investment Law.

87 Decree Law No. 310 of September 12, 1999, *Official Gazette* No. 36.793 of September 23, 1999 (**Ex. AB-48**).

88 Other commentators have agreed with this interpretation of the Law. *See, e.g.*, J. Eloy Anzola, "El fatigoso camino que transita el arbitraje," in Irene Valera (Coor-

116. In the Law on the Promotion of Private Investments through the Regime of Concessions, [89] the President provided that the parties, in public concessions contracts:

> "can agree in the respective contract to submit their differences to the decision of an Arbitral Tribunal, whose composition, competence, procedure and applicable law shall be determined by mutual agreement, in conformity with the provisions applicable on the matter."

117. This pro-arbitration disposition of the government in the sensitive area of public contracts of concessions for public works and public utilities has been subsequently re-affirmed by a number of Venezuelan court decisions.[90]

118. The third statute establishing arbitration enacted by the President of the Republic using the delegated legislation powers was precisely the Decree-Law No. 356 of October 13, 1999 on the Law on the Promotion and Protection of Investments **(1999 Investment Law)**. This law contains consent to arbitration in a number of places in the text: first, Article 21 (state-to-

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dinadora), *Arbitraje Comercial Interno e Internacional. Reflexiones teóricas y experiencias prácticas*, Academia de Ciencias Políticas y Sociales, Comité Venezolano de Arbitraje, Caracas 2005, p.419 (**Ex. AB-29**) ("We must presume that it was made with the clear intention of admitting arbitration as a mean of solution of conflicts in the exploration and exploitation contracts according to the constitutional text ….in order to incentivize private participation that without doubt will be more comfortable seeking justice before an arbitral tribunal without the need to resort to local tribunals.")

89 Ley Orgánica sobre promoción de la inversión privada bajo el régimen de concesiones, *Official Gazette* No. 5.394 Extra. of October 25, 1999 (**Ex. AB-49**). See Diego Moya-Ocampos Pancera and Maria del Sol Moya-Ocampos Pancera, "Comentarios relativos a la procedencia de las cláusulas arbitrales en los contratos de interés público nacional, en particular: especial las concesiones mineras," en *Revista de Derecho Administrativo*, No. 19, Editorial Sherwood, Caracas 2006, p. 174 (**Ex. AB-50**). See *in general* on this Law, Alfredo Romero Mendoza "Concesiones y otros mecanismos no tradicionales para el financiamiento de obras públicas", in Alfredo Romero Mendoza (Coord.), *Régimen Legal de las Concesiones Públicas. Aspectos Jurídicos, Financieros y Técnicos*, Editorial Jurídica Venezolana, Caracas 2000, pp. 28-29 (**Ex. AB-61**).

90 See for example the summary in Alfredo Romero Mendoza (Coord.), *Régimen Legal de las Concesiones Públicas. Aspectos Jurídicos, Financieros y Técnicos*, pp. 12, 28, 29, 155. (**Ex. AB-51**).

state arbitration); second, in Article 22 (international arbitration or national litigation with an international investor); and third, Article 23 (national litigation or arbitration with a national or international investor). In these last two cases, the consent of the State to submit disputes to arbitration is expressed in the Law, and it is for the investor – as its right – to decide to go to arbitration or to the national courts.

119.The prevailing attitude of the Government in 1999 regarding the solution of disputes on matter of investments was, without doubt, a pro-arbitration one, as demonstrated in the aforementioned legislation. Contrary to what is erroneously concluded by the Republic (**Respondent's Memorial, ¶¶ 28, 29**) and its legal Expert (**Urdaneta Opinion, ¶¶ 21, 22**), this pro-arbitration attitude was confirmed not only by the parallel discussion on the matter of the State's obligation to promote arbitration contained in the new Constitution in August-November 1999, but also by the text submitted by the President of the Republic himself to be included in the new Constitution. [91]

2. The pro-arbitration trend of the 1999 Constitution and the bizarre proposal submitted to the Constituent Assembly by President Chávez in 1999

120. The 1999 Constitution incorporates arbitration as an alternative means of adjudication and as a component of the judicial system (Article 253), requiring the State to promote it,[92] in particular through legislation (Article 258);[93] and guarantying arbitration as a fundamental right.[94] The text

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[91] I was a Member of the National Constituent Assembly that was responsible for drafting many aspects of the new Constitution in 1999. In that capacity, I contributed to the drafting of the 1999 Constitution, and in particular, the drafting of Article 151 which establishes the possibility for arbitration in public contracts, rejecting the project proposed by the President of the Republic. See on the discussion of my contributions to the National Constituent Assembly's drafting of the 1999 Constitution in Allan R. Brewer-Carías, *Debate Constituyente (Aportes a la Asamblea Nacional Constituyente),* 3 Vols., Fundación de Derecho Público/Editorial Jurídica Venezolana, Caracas 1999. Available at http://allanbrewercarias.com/

[92] 1999 Constitution, **Article 258**. ("[…] The law shall promote arbitration, conciliation, mediation and any other alternative means of dispute resolution.").

[93] On the recognition of arbitration as an alternative means of adjudication in the 1999 Constitution, and the promotion of arbitration as a constitutional obligation of all organs of the State, see Eugenio Hernández Bretón, "Arbitraje y Constitución. El arbitraje como derecho fundamental," p. 27 (**Ex. AB-5**); 2008 No 1.541 Decision**,** (**Ex. EU-29, p. 11);** Supreme Tribunal of Justice, Constitutional Chamber, Decision

of the Constitution itself imposes upon all the organs of the State the duty to promote arbitration, establishing as a constitutional (fundamental) right of the citizens the ability to submit disputes to arbitration. All of this confirms that, at the time, there was no prevailing "culture of hostility" to arbitration. On the contrary, the 1999 Constitution, the laws sanctioned by the new Government in 1999, the legal system as a whole, and the international instruments to which Venezuela was a party, embraced and promoted arbitration.[95]

121. The proposal submitted by President Chávez to the National Constituent Assembly in August 1999 proposing the text of an Article to replace Article 127 (current Article 151 of the 1999 Constitution), to which the Republic an its Legal Expert give so much importance, contrary to the assumed "restrictive" character regarding arbitration they suggest (**Respondent's Memorial, ¶¶ 28, 29; Urdaneta Opinion, ¶¶ 21, 22)**, the presidential proposal was excessively permissive towards international arbitration. That was precisely the reason for me to oppose firmly such proposal, and instead to propose to include in the new Constitution the same text of Article 127 of the 1961 Constitution. Fortunately my proposal prevailed in the current Article 151 of the 1999 Constitution, which in any case was not at all "one of the most debated provisions" of the Constitution, as erroneously argued by the Republic (**Respondent's Memorial, ¶ 28).**

122. Because it was coherent with the pro-arbitration trend of the various Decree Laws issued by President Chávez in September 1999, including the Investment Law provisions of Articles 21, 22 and 23 (**See *supra* ¶ 112**

No. 186 of February 14, 2001 (Case: Constitutional Challenge of Articles 17, 22 and 23 of the 1999 Investment Law, Fermín Toro Jiménez and Luis Brito García), (**Ex. EU-27**).

94 On arbitration as a fundamental right, see Eugenio Herández Bretón, "Arbitraje y Constitución. El arbitraje como derecho fundamental," pp. 25, 27-28 (**Ex. AB-5**) (noting the 1830 Constitution provides that arbitration is a citizens' fundamental right). In the same sense, J. Eloy Anzola, "El fatigoso camino que transita el arbitraje," in Irene Valera (Coord.), *Arbitraje Comercial Interno e Internacional. Reflexiones teóricas y experiencias prácticas*, Academia de Ciencias Políticas y Sociales, Comité Venezolano de Arbitraje, Caracas 2005, p.409-410 (**Ex. AB-29**).

95 ICSID arbitration continued to be incorporated in the bilateral treaties for promotion and protection of investments signed and ratified after 1999. See for instance Venezuela-France Bilateral Investment Treaty in *Official Gazette* No. 37.896 of March 11, 2004.

ff.), President Chávez was at the same time proposing to reduce the jurisdictional immunity principle only to be applied in contracts entered by the "Republic." (and not by the States, Municipalities and decentralized public entities) Such contracts are almost inexistent (almost all public contracts are entered by decentralized public entities), except on matters of public external debt. It was only regarding those contracts that the Republic, and only the Republic (not the states, the municipalities, the public corporations or the public enterprises), as proposed by Chávez, "would never agree to submit to foreign jurisdictions in a contract of public interest'" (**Respondent's Memorial, ¶ 29**). Nonetheless, regarding public contracts entered by other entities of the State (that are the overwhelming majority of public contracts) and regarding international treaties or agreements and national laws providing for international arbitration, the President "significantly" proposed to eliminate all limits to arbitration, allowing arbitration without even the consideration of the "nature" of the contract or the matter involved. From this, and contrary to what the Republic has asserted in the Respondent's Memorial (**Respondent's Memorial, ¶ 29**), the proposal of President Chávez "makes clear that Venezuela" had all the "intention to make an open and unlimited offer to arbitrate disputes in an international forum." Contrary to the assertion of the Republic's Legal Expert (**Urdaneta Opinion, ¶ 22)**, the Government at the time effectively "intended to provide a general, open-ended consent to submit to arbitration in all investments disputes."

123. In order to realize these assertions and the baseless character of the conclusions drawn by the Republic and its Legal Expert, it is important to really understand the consequences that President Chávez's proposal would have had, by comparing the text of Article 127 of the 1961 Constitution (maintained as Article 151 of the 1999 Constitution), with the proposal of Chávez:

> **Article 127. 1961 Constitution**: "In contracts of public interest, unless inappropriate according with their nature, a clause shall be deemed included even if not been expressed, according to which the doubts and controversies that may arise on such contracts and that could not be resolved amicably by the contracting parties, shall be decided by the competent courts of the Republic, in accordance with its laws and could not give rise by any motive or cause to foreign claims."[96]

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[96] (**Ex. EU-2**).

> **Article proposed by President Chávez**: "In contracts entered into by the Republic that are of public interest, a clause shall be deemed included even if not expressed, according to which the doubts and controversies that may arise on such contracts, shall be decided by the competent courts of the Republic in accordance with the laws."[97]

124. The proposal submitted by President Chávez was extremely bizarre and inappropriate regarding the principle of immunity jurisdiction of the State, The proposal meant that in contracts entered by all other public entities or juridical persons (as distinct from the Republic), such as the states, the municipalities, the autonomous institutions and other juridical persons of public law as well as by any public enterprises, no limit would exist regarding any matter related to the principle of immunity jurisdiction. President Chávez proposed provision was more liberal than the provision in the 1961 Constitution, only including those contracts entered by the "Republic" itself, and not by decentralized public entities.

125. Second, the proposal of President Chávez implied the complete elimination from the Constitution of the more than a century old "Calvo clause," admitting the possibility that public interest contracts could gave rise to foreign diplomatic claims against the Republic. From his proposals one cannot conclude that President Chávez was "opposed" to international arbitration. On the contrary, with such proposal, as I argued in the debate in the National Constituent Assembly in September 1999,[98] he attempted to eliminate from the Constitution the restrictions on the matters of relative jurisdictional immunity.

126. Far from being "inconceivable" as expressed by Enrique Urdaneta – and contrary to what Urdaneta expressed (**Urdaneta Opinion, ¶ 22**) – the constitutional proposal of President Chávez was completely coherent with the intention "to provide a general, open-ended consent to submit to arbitration in all investments disputes". By making his constitutional proposal

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97 See Hugo Chávez Frías, *Ideas Fundamentales para la Constitución bolivariana de Venezuela*, August 5, 1999 (**Ex. EU-23**).

98 See Allan R. Brewer-Carías, "Propuesta sobre la cláusula de inmunidad relativa de jurisdicción y sobre la cláusula Calvo en los contratos de interés público," in *Debate Constituyente (Aportes a la Asamblea Nacional Constituyente)*, Vol. I (8-Agosto-8 Septiembre 1999), Fundación de Derecho Público/Editorial Jurídica Venezolana, Caracas 1999, pp. 209 233. (**Ex. EU-24**).

"at the same time that he enacted the Investment Law," contrary to what was concluded by the representatives of the Republic, President Chávez without doubt had the "intention to make an open and unlimited offer to arbitrate disputes in an international forum." (**Respondent's Memorial, ¶ 29**).

3. The ratification of the pro-arbitration trend in the legislation enacted by President Chávez in 1999

127. The extremely favorable trend regarding arbitration resulting from all the aforementioned Decree Laws issued by President Chávez in 1999 on matters of investments, in general, and in particular, regarding investments in administrative concessions and licenses for public works and public utilities, and in the field of gassed hydrocarbons and mines, was ratified two years later, in 2001, in a new set of Legislation that included the general admission of arbitration as a means for the solution of disputes. For example, the Organic Taxation Code of October 2001, included a general admission of arbitration as a means for the solution of disputes between taxpayers and the State.[99]

128. Subsequently, also in 2001, arbitration was generally admitted by establishing it as a means for the solution of disputes between the State and private parties in the very important nationalized oil public sector, in cases related to the constitution of mixed companies for the exploitation of primary hydrocarbons activities. President Chávez, through the Decree Law No. 1.510 of November 2, 2001, issued the Organic Hydrocarbons Law[100] in execution of a new Organic Enabling Law approved by the newly elected National Assembly in November 2000,[101] in which the provision of Article 151 of the 1999 Constitution was ratified. This Law provided that contracts establishing mixed companies for the exploitation of hydrocarbons, "shall be deemed [to] include[] even if not … expressed," a clause establishing that "the doubts and controversies of any kind that may arise resulting from the execution of activities and that could not be resolved amicably by the parties, ***including arbitration*** …." will be resolved by the courts (Article 34.3.b).

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99 Articles 312-326. Organic Code on Taxation, *Official Gazette* No. 37.305 of October 17, 2001 **(Ex. AB-52)**.

100 *Ley Orgánica de Hidrocarburos, Official Gazette* No. 37.323 of November 13, 2001 (**Ex. AB-53**)

101 *Ley Orgánica Habilitante* of November 2000, *Official Gazette* No. 37.076 of November 13, 2000 **(Ex. AB-54)**.

This provision expressly recognized in the Law the possibility to submit to arbitration the solution of disputes resulting from activities in the hydrocarbon sector when mixed companies are constituted with private investors.[102]

129. All of these Decree Laws and acts of the National Assembly between 1999 and up to 2001, confirm that in Venezuela, "without doubt, a clear legislative tendency existed in order to admit arbitration in contract related to the commercial activity of Public Administration."[103]

4. The elemental procedural administrative provisions assuring the correct legal opinion to be issued on matters of arbitral clauses in public contracts

130. It was within this pro-arbitration trend of the Government on maters of investments, that President Chavez approved through Decree Laws an Instruction No 4 in March 12, 2001 establishing elemental rules for the "internal review" of drafts of public contracts containing arbitration clauses.[104] Far from being a an expression of any "trepidation concerning arbitration clauses for the State" that had supposedly "to be continued manifested immediately after the promulgation of the Investment Law," as has been very erroneously asserted in the Respondent's Memorial (**Respondent's Memorial, ¶ 30**), this Presidential instruction is no more that the correct administrative response to the extension of arbitration clauses included in public contracts entered into only by the "Republic" encouraged as a general policy of the same Government.

131. Contrary to the contention by the Republic and its Legal Expert, further Articles enacted by the President regarding rules of manage-

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[102] The same occurred with the reform of the Organic Statute of the Development of Guayana, also sanctioned by means of Decree Law No. 1531 of November 7, 2001, *Official Gazette* No. 5561 Extra. of November 28, 2001 (**Ex. AB-55**) and the Organic Law on Drinking Water Services and Sanitation enacted by the National Assembly in December 2001. See *Ley Orgánica para le prestación de los servicios de agua potable y de saneamiento*, *Official Gazette*, N° 5.568 Extra. of December 31, 2001 (**Ex. AB-56**).

[103] See Juan Carlos Balzán, "El arbitraje en los contratos de interés a la luz de la cláusula de inmunidad de jurisdicción prevista en el artículo 151 de la Constitución," p. 299 (**Ex. AB-42**).

[104] *Official Gazette* No. 37.158 of March 14, 2001 (**Ex. EU-25**).

ment in public administration, assigning to the Attorney General's office the function of reviewing any contracts containing submission to arbitration on public interests, is perfectly and completely reconcilable with the attitude reflected in "laws, decrees and statements made both before and after the Investment Law with the notion that Article 22 of the Investment Law intended to constitute a standing, general consent of the Republic to arbitrate all investments disputes before ICSID."

132. Regarding public debt contracts which were a matter of discussion in the previous years (See ***supra* ¶¶ 91, 103**), in an Opinion given on March 14, 2003, the same Attorney General's Office reiterated the opinion of the relative character of the clause of jurisdictional immunity in lending agreements, and suggested that

> "in future contracts in which the Republic is a party, in lieu of the ordinary jurisdictional means, arbitral clauses should be incorporated, due to the fact that currently the arbitral means constitute an expedited, efficient and economic form for the resolution of conflicts that could arise from contractual relationships."[105]

133. This attitude and opinion of the Attorney General's Office is far from "reticent" regarding arbitration in public contracts, and is completely coherent with the general pro-arbitration policy of the Government, particularly since 1999, when the Investment Law was enacted.

VIII. THE INTENTION OF THE GOVERNMENT IN 1999 TO EXPRESS THE STATE CONSENT FOR INTERNATIONAL ARBITRATION IN ARTICLE 22 OF THE INVESTMENT LAW

134. And that was precisely the intention of the drafters of the Investment law and of the National Executive when considering it and approving it in September 1999: to express in Article 22 the consent of the Republic to submit disputes to international arbitration, particularly before the ICSID. This offer was an open offer, subject only to the condition that the respective treaties or agreements, like the ICSID Convention, establish a

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[105] Quoted in Margot Y. Huen Rivas, "El arbitraje internacional en los contratos administrativos," pp. 435-436 (**Ex. AB-41);** and in Juan Carlos Balzán, "El arbitraje en los contratos de interés a la luz de la cláusula de inmunidad de jurisdicción prevista en el artículo 151 de la Constitución," p. 346-347 (**Ex. AB-42**).

framework or mechanism for international arbitration. It created a right for the investors to go at their will to international arbitration or to resort to the national courts.

1. The absence of a formal "Statement of Purposes" and the motives of the Investment Law as exposed by its drafters

135. It is true that the Decree Law on the Investment Law, contrary to the practice observed in almost all other Decree Laws issued by the President of the Republic at the time, does not have a "Statement of Purposes" (*Exposición de Motivos*) (**Respondent's Memorial, ¶ 32, Footnote 53; Urdaneta Opinion, ¶ 3**). This does not mean that the Law itself had no "motives" or purposes, or that the National Executive had no specific intention by issuing the Decree law. The Investment Law had precise motives, not only to promote and protect investments but to promote arbitration, to guarantee arbitral resolution of disputes, thus, limiting the scope of the national courts on the matter. The intention of the Investment Law is in this sense expressed in its first Article, in which is clear that its provisions are "directed to regulate the action of the State regarding investments and investors, whether nationals or foreign," that is, the Law:

> "comes to fix the extension of the competencies of the State in a way such as to assure such investments and investors the stable legal cadre that guarantees the enough security, devoted to achieve the harmonic increase, the diversification and complementation of investments in favor of the objectives of national development"(Article 1).[106]

136. And this is what the Law precisely works out in Article 22: to limit – not to exclude – the jurisdiction of the national courts on matters of investments by providing for international arbitration; but always leaving in the hands of the investors the choice of venue.

137. In this regard, in the absence of a published "Statement of Purposes" for the Decree Law on the Investment Law, and being the product of a bureaucratic drafting process and not of a parliamentary process with recorded debates in a legislative body, the intention of the drafters are a valid

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[106] See Eugenio Hernández Bretón, "Protección de Inversiones en Venezuela," pp. 221-222 (**Ex. AB-9**).

source to determine the intention of the "legislator."[107] This is particularly so of the "preparatory work" of the text of the Decree.[108] In this sense, it is a matter of public knowledge that the 1999 Investment Law was drafted under the direction of the then Ambassador Werner Corrales-Leal, Head of the Permanent Representation of Venezuela before the WTO and the UN entities headquartered in Geneva.[109] Ambassador Corrales, who since 1998 had an important role in the formulation of Venezuelan policy toward investments, including the negotiations of a failed bilateral investment treaty with the U.S.[110] was entrusted with the task of drafting the Investment law[111] being

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[107] The Constitutional Chamber of the Supreme Tribunal of Justice has held that the determination of the intention of the Legislator must "**start from the will of the drafter of the provision**, as it results from the debates prior to its promulgation." See Supreme Tribunal of Justice, Constitutional Chamber, Decision No. 1.173 of June 15, 2004 (Case*: Interpretación del Artículo 72 de la Constitución de la República Bolivariana de Venezuela*) (Exp. 02-3.215), in *Revista de Derecho Público N° 97-98*, Editorial Jurídica Venezolana, Caracas 2004, pp. 429 ff. (**Ex. AB-57**).

[108] It is what in the Vienna Convention on the law of treaties of 1969 is called as "supplementary means of interpretation" which includes referring to treaties, its "preparatory work" and the "circumstances of its conclusion" (Article 32). (**Ex. RL-13**).

[109] See in Eduardo Camel A., "Ley de promoción de Inversiones viola acuerdos suscritos por Venezuela", *El Nacional*, Caracas September 15, 1999. (**Ex. AB-58)** The character of Corrales as drafter was officially recognized, for instance, in a press released of the Ministry of Foreign Affairs, *Ofîcina de Comunicaciones y Relaciones Institutionales*, "Resúmen de Medios nacionales e Internacionales", April 29, 2009, p. 23 (**Ex. AB-59**). See also, in Alberto Cova, "Venezuela incumple Ley de Promoción de Inversiones,' in *El Nacional*, April 24, 2009 (**Ex. AB-60**).

[110] For instance see Gioconda Soto, "Cancillería llama a consultas a Corrales y Echeverría,"in *El Nacional*, June 10, 1998 (**Ex. AB-61**); Fabiola Zerpa, "Venezuela rechaza presiones para firmar Acuerdo con EEUU," *El Nacional*, Caracas June 12, 1998 (**Ex. AB-62**); Alfredo Carquez Saavedra, "Tratado de inversiones con EE.UU. divide a negociadores venezolanos," in *El Nacional*, Caracas June 16, 1998 (**Ex. AB-63**).

[111] In January 1999 Ambassador Corrales as head of the Permanent Representation of Venezuela before the WTO and the UN entities headquartered in Geneva, filed before the Government a document titled *"Formulación de un Anteproyecto de ley de promoción y Protección de Inversiones (Términos de referencia)*, *enero 1999*." This document is cited in Werner Corrales Leal and Marta Rivera Colomina, "Algunas ideas sobre el Nuevo régimen de promoción y protección de inversiones en Venezuela," in Luis Tineo and Julia Barragán (Comp.), *La OMC como espacio normativo. Un reto para Venezuela,* Asociación Venezolana de Derecho y Economía, Caracas, p. 195 (**Ex. AB-64**); also in Victorino Tejera Pérez, "Do Municipal Investment

ratified in such task by the then new Chávez administration.[112] As Head of that Permanent Representation, Ambassador Corrales prepared reports and opinions for the Government.

138. One of those reports, dated April 1999 and written by Ambassador Corrales with Marta Rivera Colomina, an official at the Permanent Representation, contains ideas for the design of the legal regime of promotion and protection of investments in Venezuela.[113] The document explains that "a regime applicable to foreign investments, must leave open the possibility to resort to international arbitration, which today is accepted almost everywhere in the world, either by means of the mechanism provided for in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) or by means of the submission of the dispute to an international arbitrator or an *ad hoc* arbitral tribunal like the one proposed by UNCITRAL."[114]

139. This view was made even more explicit in an essay written by the same authors explaining "Some ideas on the New regime on the promotion and protection of Investments in Venezuela" ("*Algunas ideas sobre el Nuevo régimen de promoción y protección de inversiones en Venezuela*") published shortly after the 1999 Investment Law came into effect. The authors and co-drafters of the Investment Law in that essay, stated that "a regime applicable to foreign investments, must leave open the possibility to **unilaterally** resort to international arbitration, which today is accepted almost everywhere in the world, either by means of the mechanism provided for in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) or by means of the submission

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Laws Always Constitute a Unilateral Offer to Arbitrate? The Venezuelan Investment Law: A Case Study," p. 116 (**Ex. AB-3);** Victorino Tejera Pérez, *Arbitraje de Inversiones*, pp. 155-156 (**Ex. AB-4**). I have seen references to this document, but never actually seen a version of it. My referentes to it are based on what the other two documents say and on the basis of my conversations with Mr. Corrales.

112 The Republic has inexplicably "doubt[ed]" the character of Corrales as the drafter of the Law (**Ex. RL-1, ¶ 133**).

113 See Werner Corrales-Leal and Martha Rivera Colomina, "Algunas ideas relativas al diseño de un régimen legal de promoción y protección de inversiones en Venezuela," April 30, 1999. Document prepared at the request of the Minister of CORDIPLAN (**Ex. AB-65**).

114 *Id*., pp. 10-11.

of the dispute to an international arbitrator or an *ad hoc* arbitral tribunal like the one proposed by UNCITRAL."[115] The reference to **unilateral** resort to international arbitration makes it clear, without doubt, that the persons entrusted with drafting the 1999 Investment Law intended Article 22 to express the State's consent to ICSID arbitration, which is the only way for the investor to have the option to unilaterally resort to such international arbitration, or to decide to go before the national courts. Given that the State through the Government (the Executive) was the one giving the instructions to the drafters and also was involved (through the Executive Cabinet) in approving the Investment Law once it was drafted, this was therefore an expression of intent on behalf of the State. Put differently, providing for unilateral resort to arbitration in connection with the 1999 Investment Law presupposes that said law provides the State's consent that is necessary for the investor to have the right to unilaterally resort to international arbitration.

140. The ICSID tribunal in its Decisions in the *Mobil* and *Cemex* cases, referring to these contemporaneous works of Corrales when the Law was being drafted, said that Corrales "did not say that the drafters or Article 22 intended to provide for consent in ICSID arbitration in the absence of any BITs" (**Ex. RL-1, ¶ 136; Ex. RL-2, ¶ 132**), which is an erroneous way to read those essays. Corrales and his colleague wrote in their own words, and with the authorization of the Republic for them to conceive of an Investment Law, that they considered necessary, in the benefit of the investors, to "leave open the possibility to **unilaterally** resort to international arbitration," this being possible only if the State has provided in the same text of Article 22 of the Investment Law for consent to ICSID arbitration in the absence of any BITs.

141. As was correctly noted by the ICSID tribunal in the *Cemex* case the "the word 'unilaterally' did not appear in the first article of 30 April, 1999. It was added to the second article in 2000" (**Ex. RL-2, ¶ 131, Footnote**

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[115] See Werner Corrales-Leal and Marta Rivera Colomina, "Algunas ideas sobre el nuevo régimen de promoción y protección de inversiones en Venezuela" p. 185 (**Ex. AB-64**) (emphasis added) In the absence of "legislative history" of the decree Law, Victorino Tejera Pérez considers that this article of Corrales and Rivera "could even be assimilated to a supplementary means of interpretation, as established in Article 32 of the Vienna Convention on Treaty Law." See Victorino Tejera Pérez, *Arbitraje de Inversiones*, p. 187 (**Ex. AB-4)**; Victorino Tejera Pérez, "Do Municipal Investment Laws Always Constitute a Unilateral Offer to Arbitrate? The Venezuelan Investment Law: A Case Study," p. 115 (**Ex. AB-3**).

118), precisely because the second article was published **after** the Investment Law was approved and published (while the first article was published **before** the Investment Law was approved by the Republic). With the adding of that word, the authors and co-drafters of the Law, emphasized the inclusion of this word, in order to stress that the only way for the investor to have that possibility to "unilaterally resort to arbitration," is if he has the right, as an option, to go to arbitration or to resort to national courts. This, in its turn, can only occur when the State has expressed its consent to go to arbitration, also unilaterally, and as an open offer in the same text of Article 22. Consequently, the only way to understand the reason for the erroneous assertion of the ICSID tribunals in the *Mobil* and *Cemex* cases, is to realize that when reading Article 22, the tribunals simply ignored the disclaimer included in the last phrase of the provision, which is not even considered in the whole text of the decisions, as discussed in detail above.

2. The discussion of the Draft of the Investment Law in the Council of Ministers in 1999

142. The Draft of the 1999 Investment Law was coordinated in Venezuela by the Central Office of Coordination and Planning, and not by a particular Ministry. It was considered in meetings of the Economic Cabinet of the Council of Ministers, particularly in the meeting held on August 24, 1999 with the assistance of Ambassador Werner Corrales presenting the text.[116] The specific matter of Article 22 as expression of the State consent for arbitration was discussed. Specifically, in that meeting, as was reported to the press by the General Director of Central Office of Coordination and Planning (Cordiplán) that "the possibility for arbitration is maintained."[117]

143. In the press it was reported that:

> "The Director General of Cordiplán Fernando Hernández, as the spokesman of the economic group of President Chávez, assured that

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[116] In the press it was reported as a consequence of this Meeting and in relation to the discussions of the Draft, that "In the Draft, international arbitration is provided as an option for the resolution of conflicts." See "El proyecto prevé el arbitraje internacional como opción para resolver conflictos. Evalúan Ley de Inversiones," in *El Universal*, August 25, 1999. (**Ex. AB-66**).

[117] See Andrés Rojas Ramírez, "Decreto para la protección de Inversions contradice Constitución de Chávez", *El Nacional*, Caracas August 25, 1999 (**Ex. AB-67**).

> this legal draft 'will offer national and foreign investors legal and fiscal security, in order to create confidence.' One of the aspects regarding this law regarding which Hernández was asked is the one related to the resolution of controversies. Specifically, he was asked about the judicial body before which investors entering into contracts with the Republic would have to go. 'International arbitration is maintained,' Hernández said without giving details."[118]

144. The Ministry of Production and Commerce replaced the previous Ministry of Industry and Commerce in August 1999. Juan de Jesús Montilla, who was appointed as Minister in substitution of the former Minister of Industry and Commerce (Gustavo Márquez) commented a few months later in mid 2000 on the provisions of the 1999 Law Investment Law without mentioning the unilateral offer expressed by the Republic for arbitration. No conclusion can be legitimately drawn from the Minister's silence as proposed by the Republic and its Legal Experts (**Respondent's Memorial, ¶ 32**, **Footnote 53**, and in **Urdaneta Opinion, ¶ 14)**, particularly since the drafters of the Law have expressed the contrary**.** Nonetheless, as mentioned, Minister Montilla was not a member of the National Executive or Council of Ministers during the months in 1999 when the Law was drafted (before September 1999). Therefore, although he signed the Decree Law on October 3, 1999, as the new Minister of Production and Commerce, he did not participate in the conception of the Investment Law and was not involved in its Drafting, and not even his Office was involved (given it succeeded the previous Ministry of Industry and Commerce).[119] Consequently, the fact that this Minister Montilla a year after the approval of the Investment Law "did not mention that the Investment Law included unilateral offer by the Republic permitting foreign investors to resort to arbitration" (**Respondent's Memorial, ¶ 32**, **Footnote 53**) cannot lead to the conclusion that it does not contain consent to arbitration.[120]

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118 *Id.*

119 See in Victorino Tejera Pérez, *Arbitraje de Inversiones*, Magister Thesis, p. 158 (**Ex. AB-4**. As is mentioned by Tejera Pérez, even the predecessor of Montilla, the Minister of Industry and Commerce, Gustavo Marquez, who attended the meetings where the Decree Law was considered, declined to comment on the drafting of the Law, explaining that his **Ministry was not involved in the drafting of it**. *Id*., p. 158 Footnote 557 (**Ex. AB-4**).

120 On this particular point, the *Cemex* tribunal is simply incorrect.

145. In the meetings of the Economic Cabinet of the Council of Ministers in which the draft of the Investment Law were considered, one of the High Officials who attended was Alvaro Silva Calderón, then Vice Minister of Energy and Mines.[121] In that meeting, I understand that Vice Minister Calderón opposed the inclusion in Article 22 of the open offer of expression of consent by the State to go to international arbitration. This was a position that was coherent with his well known personal opinion opposing the idea of the State subjection to international investment arbitration.[122] Nonetheless, and despite his opposition, in the meeting, Vice Minister Calderón's personal opinion and opposition did not prevail, and instead, the proposal made by Werner Corrales and his legal adviser Gonzalo Capriles in favor of the State expressing consent in Article 22 for international arbitration, was the one accepted by the Cabinet[123] According to the Organic Law on Central Administration of 1995,[124] in force when the Investment Law was being discussed in the Economic Cabinet, the documents considered and the opinions expressed in the meetings of the Economic Cabinet (acting as a Sector Cabinet with respect to the Investment Law) were not secret. Only "the deliberations of the Council of Ministers" themselves were secret.[125]

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121 As it is referred to in Victorino Tejera Pérez, *Arbitraje de Inversiones*, Magister Thesis, p. 158 (**Ex. AB-4**).

122 See for instance, Alvaro Silva Calderón, "Apreciaciones sobre el arbitraje jurídico en Venezuela," available at http://www.pdvsa.com/interface.sp/database/fichero /free/5000/639.PDF, pp. 14-16 (**Ex. AB-68**). Alvaro Silva Calderón was one of the representatives of the Republic in the recourse of interpretation on Article 22 of the 1999 Investment Law ending with the Supreme Tribunal 2008 Decision No 1.541 (**Ex. EU-29**). He also participated in 1995 challenge of the constitutionality of the arbitration clause of the Association Agreements of the *Apertura petrolera*. See in Allan R. Brewer-Carías (Compilator), *Documentos del Juicio de la Apertura Petrolera (1996-1999),* Caracas, 2004, p. 125 (**Ex. AB-69**).

123 See the information in Victorino Tejera Pérez, *Arbitraje de Inversiones*, Magister Thesis, pp. 155-158, who personally interviewed Corrales and Capriles (Footnote 558) (**Ex. AB-4**).

124 See *Official Gazette* No. 5.025 Extra of December 20, 1995 (E**x. AB-70**).

125 The 1999 Organic Law of Central Administration established the same principles regarding the Sector Cabinets, as bodies different from the Council of Ministers (**Ex. AB-71**). In the 2008 Organic Law on Public Administration, the Sector Cabinets were transformed into Sector Boards with the same functions, but with power of only advisory bodies for the study of matters to be consider in the Council of Ministers (Articles 67, 68) (**Ex RL-31**).

146. Ambassador Corrales was also publicly reported to have been the one who made the presentation of the Draft of the Investment Law in another meeting of the Economic Cabinet of the Government, held on September 14, 1999.[126] The Law eventually was approved by President Chavez in the Council of Ministers session held on October 3, 1999,[127] with the assistance of the acting Minister of Energy and Mines, Alí Rodríguez. Based on Minister Rodríguez's prior strong and public objections to international investment arbitration, I assume that he issued a dissenting vote and opposition to the inclusion in Article 22 of the express consent of the State of an open offer to investors to go to international arbitration. His personal and political opinion opposing the idea of the *Apertura Petrolera* in general, and in particular of the State subjection to international investment arbitration, was well known and expressed in 1996 when he was a Member of the Congress[128] and opposed the inclusion of arbitration clauses in the Congress resolution on the General Conditions regarding the Association Agreements of the *Apertura Petrolera*[129] (See ***supra*** ¶ 106). At the same time, he also was the leading person who filed the popular action brought before the Supreme Court challenging the constitutionality of the arbitration clause authorized by the former Congress to be included in such Association Agreements for oil exploitation.[130] In that regard, if Rodríguez opposed the Investment Law (as I assume he must have given his position on international arbitration), President Chavez overruled any such opposition and signed into law the Investment Law containing consent to international arbitration. It is perhaps due to potential disagreements in the Council of Ministers, presumably manifested by Alí Rodríguez as Acting Minister of Energy and Mines, that the Decree Law No 356 of October 3, 1999 was only published twenty days later in the *Offi-*

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126 See Eduardo Camel Anderson, "Ley de promoción de inversiones viola acuerdos suscritos por Venezuela," in *El Nacional*, Caracas September 15, 1999 (**Ex. AB-58**).

127 This is the date of the decree Law. Nonetheless, on September 29, 1999, the Vice Minister of Production and Commerce, Eduardo Ortíz Bucarán, informed the press that the Law had been approved in Council of Ministers ten days earlier. See in Maribel Osorio, "Ley de Inversiones otorga al Presidente facultad para otorgar incentivos," in *El Nacional*, September 29, 1999 (**Ex. AB-72).**

128 See the Dissenting Vote in the Congress approval of the Conditions for Association Agreements of the *Apertura Petrolera*, in the Bi-cameral Report of the Energy and Mines Commissions (Senate and Chamber of Representatives) of June 19, 1996, in http://www.minci.gob.ve/doc/convasociacion19061996.pdf (**Ex. AB-73**)

129 *Official Gazette* No. 35.754 of July 17, 1995. (**Ex. C-11**)

130 See ***supra*****, ¶¶** 106-108**, Footnote 81**.

cial Gazette of October 22, 1999[131] without its corresponding "*Exposición de Motivos*" (Statement of Purposes), although a Draft of such Statement of Purpose was reportedly written.[132] Finally, it must be mentioned that Ambassador Corrales continued his official activities related to the promotion of investments from his position in Geneva until 2002.[133]

147. From all the elements aforementioned, it can be said, contrary to what was concluded in the ICSID tribunals in the *Mobil* and *Cemex* cases, that "the legislative history of Article 22 in this respect" effectively provides very important "information on the intention of the drafters in the Investment Law," and that, in those cases, as in this case, the Tribunal had, indeed, "direct information" on the preparation of the Law as it was discussed in the Executive Council of Ministers. The intention of Ambassador Corrales, who was operating at the specific instance and direction of the Republic as a co-drafter of the Investment Law regarding the unilateral expression of consent for Arbitration given by the Venezuelan State contained in Article 22 of the Law, was clarified in a speech he gave on March 28, 2009 at a Conference organized in Caracas by the *Centro Empresarial de Conciliación y Arbitraje (CEDCA)* on "Investment Arbitration in Comparative Law." At that conference, he explained the following:

> "Today this forum is discussing whether Article 22 of the official version of the Investments law really includes a **unilateral or open offer of arbitration**. ….
>
> In my scope of competence at least, I can state the **intention of offering the possibility of open unilateral arbitration and this can be verified** in several articles on the matter which we published in international journals and which we also took to international congresses. ….Referring to the protection of investors, after dealing with contributions to development, in the first article of 1998, it states more or

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131 *Official Gazette* No. 5.390 Extra. of October 22, 1999 (**Ex. EU-1**).

132 A Draft of the "Statement of Purpose" of the Investment Law was prepared by Gonzalo Capriles, Legal Expert hired by Cordiplán to work with Ambassador Corrales, with the title: "*Borrador de Exposición de Motivos de la Ley de promoción y protección de Inversiones,*" 1999. See the reference in Victorino Tejera Pérez, *Arbitraje de Inversiones en Venezuela,* Master Thesis, p. 154, Footnote 154 (**Ex. AB-4**).

133 See for instance Adriana Cortes, "Venezuela oficializó restricciones a la importación de productos agrícolas," in *El Nacional*, Caracas March 13, 2000 (**Ex. AB-74**).

> less something like "the possibility to arbitration must be opened", and in the second article it states "the unilateral possibility of arbitration must be opened to foreign investors".
>
> With this, I hope to leave sufficiently clear that **my purpose as co-drafter was to offer in the broadest and most transparent manner the possibility of the investors resorting to international arbitration as a unilateral offer made by the Venezuelan state**. And I add that whoever participates in public policies -including those who participate in the drafting or administration of a law or any legal policy instrument- must act with very clear objectives and be always respectful of the principles therein created. At that time we thought –as I continue to believe- that it was absolutely necessary for a public policy closely linked to promoting development such as the case of an investment policy, must aid in the investments acting in pro of development and we thought – as I think today that it is absolutely indispensable for legal instruments to protect the investments from the possibility that the justice system of the country receiving the investment not be independent, as is unfortunately the case we are seeing in Venezuela today."[134]

148. This statement of Corrales, contrary to what the ICSID tribunals said in the *Mobil* and *Cemex* cases, is fully supported "by the contemporaneous written documents" already discussed, as well as by the "contemporaneous" references published in the press regarding the discussions of the draft in the Council of Ministers.[135] As revealed in these documents, Corrales and Capriles, acting with the express permission of the Republic, **intended** to include an open, unilateral offer to arbitration in the Investment Law.

IX. THE EFFORTS MADE SINCE 2000 IN ORDER TO CHANGE THE MEANING OF ARTICLE 22 OF THE INVESTMENT LAW BY MEANS OF JUDICIAL INTERPRETATION WITHOUT REFORMING THE STATUTE

149. Since the 1999 Investment Law was adopted, various attempts have been made by individual opponents of the pro-arbitration policy of the

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[134] See in CEDCA, BUSINESS MAGAZINE (June 2009), *Legal Report*, Caracas 2009, pp. 77-82 (**Ex. AB-75**).

[135] See, e.g., ***supra*, ¶¶** 144 ff.**,** Footnote 127.

Government and to the principle of relative jurisdictional immunity, to obtain a different interpretation from the Venezuelan courts. Eventually, after various failed efforts, the Venezuelan Government itself filed before the Constitutional Chamber of the Supreme Tribunal of Justice a petition for the interpretation of the provision, and obtained, in record time, the Decision No. 1.541 of October 17, 2008 on the supposed interpretation of Article 258 of the Constitution and effectively on the interpretation of Article 22 (**Ex. EU-29).**

150.Nonetheless, prior to that decision, the same Supreme Tribunal issued other previous decisions concerning Article 22 of the 1999 Investment Law that must be also analyzed in order to understand how the interested legal community reacted to the content of Article 22 of the Investment Law. Only a few months after the approval of the Law, judicial review actions began to be filed before the Supreme Tribunal, seeking the annulment of the provision or seeking for its new interpretation. For such purpose, and following a long tradition, the Venezuelan mixed system of judicial review contained all the necessary judicial tools, combining the classical diffuse method of judicial review (American model) established in Article 334 of the Constitution,[136] with the concentrated method of control of constitutionality of statutes (European model), established in Articles 335 and 336 of the Constitution (**Ex. EU-31**). According to those constitutional Articles, the Supreme Tribunal is the "highest and final interpreter" of the Constitution, having within its role to assure its "uniform interpretation and application" and to guarantee the "supremacy and effectiveness of constitutional norms and principles." For such purpose, the Constitution created the Constitutional Chamber within the Supreme Tribunal, whose role is to exercise "Constitutional Jurisdiction." (Articles 266,1 and 262), having the exclusive power to declare the nullity of statutes and other State acts issued in direct and immediate execution of the Constitution, or having the force of law (statute) (Article 334).[137]

151. As a matter of principle, when deciding a petition of statutory interpretation, the Chambers of the Supreme Tribunal (other than the Constitutional Chamber) are not empowered to establish a binding interpreta-

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136 1999 Constitution, Article 334 ([…] In the event of an incompatibility between this Constitution and a law or any other legal norm, the Constitutional provisions shall be applied, corresponding to the courts in any case, even *sua sponte*, to decide what is needed. […]")

137 These include "acts of government," internal acts of the National Assembly, and executive decrees having the rank of statutes.

tion of constitutional provisions. Conversely, when the Constitutional Chamber decides a petition of interpretation of the Constitution, it is not empowered to establish binding interpretations of statutory provisions except when it is as a consequence of the interpretation of the Constitution. Accordingly, a petition of statutory interpretation for instance of an Article of the 1999 Investment Law could only be filed before the Politico-Administrative Chamber of the Supreme Tribunal. Consistent with this, the Constitutional Chamber declined to assume jurisdiction to resolve a petition of interpretation of Article 22 of the 1999 Investment Law filed by three Venezuelan lawyers in 2007.[138] It was within this judicial review system that various attempts were made in order to obtain a judicial interpretation of Article 22 of the Investment Law different to the one expressed in that Article and to the sense of what was intended by be expressed by the Government when the Law was sanctioned. These intents were the following:

1. The first attempt, in 2000, to change the meaning of Article 22 of the 1999 Investment Law through a popular action challenging its constitutionality and seeking its annulment

152. The first case filed before the Supreme Tribunal in connection with Article 22 of the 1999 Investment Law was an action of unconstitutionality brought before the Constitutional Chamber by two very well known lawyers, Fermín Toro Jiménez and Luis Brito García. This action challenged Articles 17, 22 and 23 of the 1999 Investment Law. The Constitutional Chamber eventually upheld the constitutionality of the challenged provisions in Decision No. 186 of February 14, 2001 (**Ex. EU-27**).[139]

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[138] Supreme Tribunal of Justice, Constitutional Chamber, Decision No. 609 of April 9, 2007 (Case: *Interpretation of Article 22 of the 1999 Investment Law*) (**Ex. AB-76**).

[139] See Supreme Tribunal of Justice, Constitutional Chamber, Decision No. 186 of February 14, 2001 (Case: Challenging the constitutionality Articles 17, 22 and 23 of the 1999 Investment Law, Fermín Toro Jiménez, Luis Brito García) (**Ex. EU-27**). Also in *Revista de Derecho Público*, No. 85-88, Editorial Jurídica Venezolana, Caracas 2001, pp. 166-169 (**Ex. AB-91).** See the comments on this decision in José Gregorio Torrealba, *Promoción y protección de las inversions extranjeras en Venezuela*, pp. 123-124 (**Ex. AB-12**); in Eloy Anzola, "El fatigoso camino que transita el arbitraje," in Irene Valera (Coordinadora), *Arbitraje Comercial Interno e Internacional. Reflexiones teóricas y experiencias prácticas*, Academia de Ciencias Políticas y Sociales, Comité Venezolano de Arbitraje, Caracas 2005, p. 413 (**Ex. AB-29**); Diego Moya-Ocampos Pancera and Maria del Sol Moya-Ocampos Pancera, "Co-

153. Based on the summary and quotations of the text of the popular action including the Decision of the Supreme Tribunal No. 186 of February 14, 2001 rejecting the petitioners request, and also the recently produced file by the Republic (**Ex. LA C 16)**, the petitioners based their request on the argument that Article 22 being a provision of "obligatory application" was contrary to Articles 157 and 253 of the Constitution, because it "attempts to authorize private parties [*los particulares*] to put aside the application of Venezuelan public law provisions, in favor of arbitral organs, which as it is known, freely apply equity criteria without necessarily following positive law provisions." (**Ex. EU-27, pp. 3, 4, 5, 21**). The petition also was based on the fact that Article 23 of the Investment Law also was an "obligatory application," which "also is unconstitutional because it attempts to authorize to put aside the administration of justice, which is obligated to the precise application of public order provisions, in favor of resort to 'Arbitral Tribunals,' which in its condition as arbitrators would put aside non-negotiable and sovereign order public provisions […]." (**Ex. EU-27, pp. 3, 4, 5, 21**).

154. From these statements, it is evident that the petitioners understood both, Article 22 and Article 23 of the Law, as open offers of consent made unilaterally by the State to submit controversies on investments to arbitration (international arbitration in the case of Article 22, and national arbitration in the case of Article 23), giving the investors the right - in the words of the petitioners - "to put aside the application of Venezuelan public law provisions in favor of arbitral organs" or "Arbitral Tribunals." The only way to understand the petitioners complain of the unconstitutionality of Articles 22 and 23 is based on the fact that they made possible for "private parties" to decide by themselves to leave aside the application of Venezuelan public law provisions in favor of arbitral organs. This is only possible if the State in such provisions gave already its consent to submit disputes to arbitration. On the contrary, if the State would not have expressed its consent to go for arbitration in such provisions of "obligatory application" - as qualified by the petitioners -, if would have been impossible to say that the provisions (unilaterally) authorizes private parties to go to arbitration, that is "to put aside the application of Venezuelan public law provisions in favor of arbitral organs" or "Arbitral Tribunals."

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mentarios relativos a la procedencia de las cláusulas arbitrales en los contratos de interés público nacional, en particular: especial las concesiones mineras," en *Revista de Derecho Administrativo*, No. 19, Editorial Sherwood, Caracas 2006, p. 173 (**Ex. AB-50**).

155. The Constitutional Chamber, of course, denied the petition, finding that these provisions were consistent with the Constitutional right to arbitration as an "alternative means of justice." (**Ex. EU-27, p. 22-23**).

156. The Constitutional Chamber highlighted that arbitration – national and international – has a constitutional basis in Article 258 of the 1999 Constitution, and specifically concluded that "**the arbitral settlement of disputes, provided for in** the impugned **Articles 22** and 23, does not conflict in any manner with the Fundamental Text." (**Ex. EU-27, p. 25**). The Constitutional Chamber also referred to the mandate to promote arbitration in Article 258 of the Constitution ("The law shall promote arbitration, conciliation, mediation and any other alternative means of dispute resolution") and pointed to the various circumstances under which an investor could resort to arbitration (including under the ICSID Convention) promotes the Constitutional mandate in Article 259. (**Ex. EU-27, p. 24**)

157. The Constitutional Chamber, when referring to Article 22 of the Investment Law and confirming that arbitration was "an integral part of the mechanisms" for settlement of investments disputes, refers simply to "controversies with respect to which the provisions of the ICSID Convention "**are applicable"** (**Ex. EU-27, p. 24**). It does not copy, use or refer to any other phrases of the Article, assuming, with that assertion, that the ICISD Convention applies by virtue of the same provision and because of the consent the State gave in it:

> "It must be made clear that in accordance with the challenged norm itself, the possibility of using the contentious means established under the Venezuelan legislation in effect remains **open**, when the potential dispute arises and these avenues are appropriate" (**Ex. EU-27, p. 24**).[140]

158. In this context, consequently, and contrary to what the Legal Expert of the Republic has expressed (**Urdaneta Opinion, ¶ 27**), the Constitutional Chamber by upholding the constitutionality of Article 22 did address the "meaning and scope of the provision".

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[140] See the comments in this same sense in Victorino Tejera Pérez, "Do Municipal Investment Laws Always Constitute a Unilateral Offer to Arbitrate? The Venezuelan Investment Law: A Case Study," p. 94 (**Ex. AB-3);** Victorino Tejera Pérez, *Arbitraje de Inversiones*, Magister Thesis, p. 168-169 (**Ex. AB-4)**.

2. The second attempt, in 2007, to obtain a different interpretation of Article 22 of the Investment Law

159. On February 6, 2007, a group of lawyers (Omar Enrique Valentier, Omar Enrique García and Emilio Enrique García Bolívar) filed a petition or recourse for statutory interpretation of Article 22 of the 1999 Investment Law before the Constitutional Chamber of the Supreme Tribunal, which was rejected by Decision No. 609 of April 9, 2007 because the Chamber lacked competence to decide on the matter.[141] The stated purpose of the petition was to obtain an interpretation of Article 22 "to determine whether [Article 22] established or not the consent necessary to allow foreign investors to initiate international arbitrations against the Venezuelan State" (**p. 2**).

160.The petitioners expressed that they were not asking for the Constitutional Chamber to declare Article 22 unconstitutional, a matter that they said, had been resolved in Decision No. 186 of February 14, 2001 (**Ex. EU-27**). Instead they argued that "one thing is that the Article at issue is constitutional and another very different is that such Article establish a general and universal consent to allow any foreign investor to request that its disputes with the Venezuelan State be resolved by means of international arbitration, a matter with respect to which the wording of the Article is not clear" (**Ex. AB-76**, **p. 2**). The petitioners formulated before the Court the following specific questions:

> "Does Article 22 of the Law on the Promotion and Protection of Investments contain the arbitral consent by the Venezuelan State in order for all the disputes that may arise with foreign investors to be submitted to arbitration before ICSID?
>
> In case of a negative [answer] (sic), what is the purpose and use of Article 22 of the Law on the Promotion and Protection of Investments?" (**Ex. AB-76, p. 2**).

161. In Decision No. 609 of April 9, 2007, a decision which the Republic and its Legal Expert make no mention, the Constitutional Chamber ruled that it had *no* competence to decide on the interpretation of Article 22 of the Investment Law, which corresponded to the attributions of the Politico Administrative Chamber of the Tribunal (**Ex. AB-76, p. 12-13).** Accordingly,

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141 **Ex AB-76**.

the Constitutional Chamber ordered that the file be transferred to the Politico-Administrative Chamber of the same Supreme Tribunal of Justice.

3. The third attempt, in 2007, to obtain a different interpretation of Article 22 of the Investment Law

162. After the case was rejected by the Constitutional Chamber of the Supreme Tribunal of Justice, it was sent to the Politico Administrative Chamber which, on June 5, 2007, declared the request inadmissible because the petitioners lacked standing (**Ex. EU-28**).

163. The Politico-Administrative Chamber reasoned that the petitioners had failed to demonstrate the existence of a particular juridical situation affecting them in a personal and direct way that could justify a judicial decision on the scope and application of Article 22 (**Ex. EU-28, p. 14**).

4. The fourth and final attempt, in 2008, to obtain a different interpretation of Article 22 of the Investment Law

164. After the aforementioned failed attempts by various individuals to obtain judicial decisions interpreting Article 22 of the 1999 Investment Law, the Republic itself, succeeded in obtaining a "custom made" judicial decision issued by the Constitutional Chamber of the Supreme Tribunal of Justice. This was Decision No. 1.541 of October 17, 2008 **(Ex. EU-29),** issued in response to a petition of interpretation of Article 258 of the Constitution filed on June 12, 2008 by representatives of the Attorney General of the Republic (Hildegard Rondón de Sansó, Alvaro Silva Calderón, Beatrice Sansó de Ramírez *et al)*. As mentioned in the petition, this request was prompted by the ICSID cases against the Republic of Venezuela pending at the time the petition was filed (**Ex. EU-29, p. 10).** Although labeled as a request for constitutional interpretation of Article 258 of the Constitution, the Constitutional Chamber, contradicted its previous ruling (**Ex. AB-76)**, and went on to issue a statutory interpretation of Article 22 of the 1999 Investment Law. As already discussed, this was a matter that the Constitutional Chamber itself had acknowledged to be within the exclusive competence of the Politico-Administrative Chamber (See ***Supra*** ¶ 162).

165. The Constitutional Chamber's 2008 "custom made" decision has been highly criticized.[142] It was issued as an "obligatory interpretation" (*interpretación vinculante*) of Article 258 of the Constitution, although ostensibly it was an interpretation of Article 22 of the Investment Law, as pointed out by the Legal Expert of the Republic (**Urdaneta Opinion, ¶ 30**). In any case, contrary to what he stated, the Constitutional Chamber did not "confirmed that Article, by itself, does not constitute a general offer to submit disputes to international arbitration before ICSID" (**Urdaneta Opinion, ¶ 29**). In fact, it changed the sense of the provision, depriving it of its content in a certain way pretending to "revoke" the unilateral expression of consent of the State to go to international arbitration it contained, without a formal reform of the statute – which of course has no legal effect.[143] This left without meaning the last part of the provision, the one that allows the investors to opt to go to arbitration or to resort to the national courts.

166. In effect, in the 2008 Decision No. 1.541[144] the Supreme Tribunal admitted that it is possible for a State to express its consent to submit the resolution of disputes to international arbitration in a statute (**Ex. EU-29, pp 34-38**), but it adopted, in a judicial process developed without input from

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[142] See for example Tatiana B. de Maekelt; Román Duque Corredor; Eugenio Hernández-Bretón, "Comentarios a la sentencia de la Sala Constitucional del Tribunal Supremo de Justicia, de fecha 17 de octubre de 2008, que fija la interpretación vinculante del único aparte del art. 258 de la Constitución de la República," in *Boletín de la Academia de Ciencias Políticas y Sociales*, No. 147, Caracas 2009, pp. 347-368 (**Ex. AB-77);** Eugenio Herández Bretón, "El arbitraje internacional con entes del Estado venezolano," in *Boletín de la Academia de Ciencias Políticas y Sociales*, No. 147, Caracas 2009, pp. 148-161 (**Ex. AB-7**); Victorino Tejera Pérez, "Do Municipal Investment Laws Always Constitute a Unilateral Offer to Arbitrate? The Venezuelan Investment Law: A Case Study," pp. 92-109 (**Ex. AB-3);** Victorino Tejera Pérez, *Arbitraje de Inversiones*, Magister Thesis, pp. 180-193 (**Ex. AB-4).**

[143] See the comments on the inefficacy of such revocation without reforming the Law regarding international arbitration, in Andrés A. Mezgravis, "El estándar de interpretación aplicable al consentimiento y a su revocatoria en el arbitraje de inversiones," in Carlos Alberto Soto Coaguila (Director), *Tratado de Derecho Arbitral*, Universidad Pontificia Javeriana, Instituto peruano de Arbitraje, Bogotá 2011, Vol. II, pp. 858-859 (**Ex. AB-78**).

[144] See in general, the comments on this Decision in Tatiana B. de Maekelt; Román Duque Corredor; Eugenio Hernández-Bretón, "Comentarios a la sentencia de la Sala Constitucional del Tribunal Supremo de Justicia, de fecha 17 de octubre de 2008, que fija la interpretación vinculante del único aparte del art. 258 de la Constitución de la República," pp. 347-368 (**Ex. AB-77**).

any parties other than the Government, the Government's opinion that Article 22 does not have that effect. The Constitutional Chamber decided the matter in a very unusual abbreviated proceeding within only 120 days (including 30 days of judicial vacation) and without any adversarial hearings. The petition was filed on June 12, 2008 and it was notified to the Constitutional Chamber on June 17, 2008. Only one month later, on July 18, 2008, the Chamber issued a decision admitting the petition, after omitting the oral hearing on the ground that it was a "merely legal" matter. The Constitutional Chamber set a maximum term of 30 days to decide the case, which would begin to count five days after a newspaper notice giving interested parties five days to file their arguments. The newspaper notice was published on July 29, 2008. On September 16, 2008, three individuals filed arguments as third parties (*escrito de coadyuvancia*), but their participation was denied by the Constitutional Chamber on grounds of lack of standing (**Ex. EU-29, pp. 1-4**). The final decision in the case was issued one month later, on October 17, 2008.

167. In the Venezuelan judicial review system the recourse of constitutional interpretation was established without any constitutional support by the jurisprudence of the same Constitutional Chamber for the sole purpose of interpreting obscure, ambiguous or inoperative constitutional provisions. As aforementioned, Article 258 requires no such interpretation, as it can be confirmed from its own text in which there is nothing obscure, ambiguous or inoperative. As has been pointed out by Professor J. Eloy Anzola, one of the Venezuelan leading experts on arbitration matters in his comments on the decision who also is quoted in the Respondent's Memorial (**Ex. RL-23**), it was obvious that the representatives of the Republic when filing its request for interpretation, "did not hide the real intention of the recourse" that was to obtain "the interpretation of legal norm instead of a constitutional one,"[145] in the sense "that Article 22 of the Investment Law does not contain such consent. It is there where the decision is heading."[146]

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[145] See J. Eloy Anzola, "Luces desde Venezuela: La Administración de la Justicia no es monopolio exclusivo del Estrado,"in *Spain Arbitration Review, Revista del Club Español de Arbitraje*, No. 4, 2009, **Ex. RL-23,** pp. 64, 64.

[146] *Id.* **Ex. RL-23,** p. 73-74.

168. There have been numerous critics of this decision that agree with my interpretation that it did not concern Article 258 of the Constitution but an improper request to interpret Article 22.[147]

169. In addition, Magistrate Pedro Rafael Rondón Haaz, who dissented from the Constitutional Chamber decision to admit the petition (*recurso*), also dissented from 2008 Decision No. 1.541, stressing that the Constitutional Chamber **had acted *ultra-vires* when engaging in the interpretation of a statutory provision** (Article 22) (**Ex. EU-29, pp. 56-59**). He reiterated his earlier dissent and stated that:

- Article 258 does not raise any reasonable doubt. It does not require a clarifying interpretation because it only contains a request directed to the Legislator in order to promote arbitration.
- The petition of interpretation at issue had the purpose of obtaining from the Constitutional Chamber a "legal opinion" by means of an *a priori* judicial review process that does not exists in Venezuela. It sought the exercise of a legislative function by the Constitutional Chamber.
- The decision of the majority does not interpret or clarify Article 258 of the Constitution because this clear provision does not give rise to any doubts.
- The Constitutional Chamber exceeded its competence when it engaged in the interpretation of Article 22 of the 1999 Investment Law. The interpretation of statutory provisions is of the exclusive competence of the Politico-Administrative Chamber of the Supreme Tribunal of Justice.
- The Constitutional Chamber contradicted its own jurisprudence and exceeded its powers of constitutional interpretation, as well as its powers of judicial review concerning international treaties.

170. The dissenting Magistrate correctly noted that the Constitutional Chamber in interpreting Article 22 exercised a "legislative function" by providing, through an *a priori* judicial review procedure, rules that the

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147 See the critics mentioned in Eugenio Herández Bretón, "El arbitraje internacional con entes del Estado venezolano," in *Boletín de la Academia de Ciencias Políticas y Sociales*, No. 147, Caracas 2009, pp. 148-161 (**Ex. AB-7**); Victorino Tejera Pérez, "Do Municipal Investment Laws Always Constitute a Unilateral Offer to Arbitrate? The Venezuelan Investment Law: A Case Study," pp. 92-109 (**Ex. AB-3);** Victorino Tejera Pérez, *Arbitraje de Inversiones*, Magister Thesis, pp. 180-193 (**Ex. AB-4).**

Legislature must follow in the future in order to express the State's consent to international arbitration through a statute (**Ex. EU-29, pp. 56-59**). Of course those effects are limited to the Venezuelan courts, that is, the effects of 2008 Decision No. 1.541 under Venezuelan law **do not affect the powers of an ICSID tribunal to interpret Article 22 independently in ruling on its own jurisdiction**.

171. The political purpose of 2008 Decision No. 1.541, perhaps is the only factor that can explain its arbitrariness and lack of coherence and logical legal analysis. By its own admission, the Constitutional Chamber was operating on the understanding that it was bound to further the interests of the State. (**EU-29, p. 41**) ("national sovereignty and self-determination …oblige the organs of the Government to establish the most favorable conditions for the achievement of the interests and purposes of the State"). The Court betrayed its prejudice against the impartiality of arbitral jurisdiction, noting that "settlement of disputes will be made by arbitrators who[,] in [a] considerable [number of] cases[,] are related to and **tend to favor the interests of multinational corporations, thus becoming an additional instrument of domination and control of national economies** […]" and adding that "it is somewhat unrealistic simply to make an argument of the impartiality of arbitral justice." (**EU-29**, p. 24) (emphasis added). Given these statements, this decision is neither objectively reasonable or neutral nor is it in any way reliable.

172. The following year, the Supreme Tribunal of Justice officially "responding" to criticisms formulated by Luis Brito García[148] against the Constitutional Chamber of the Supreme Tribunal decision No. 97 of February 11, 2009 in which the Tribunal dismissed a recourse for the interpretation of Articles 1 and 151 of the Constitution filed by Fermín Toro Jiménez and the same Luis Brito García (**Ex. EU-30; Urdaneta Opinion, ¶ 30, Footnote 35)**, published a "Press Communiqué (*Boletín de Prensa*) on its web site on June 15, 2009 ("*Author*: Prensa TSJ").[149] In this Press Communiqué the Supreme Tribunal decided to express some conclusions on the scope of previous decisions adopted by the Constitutional Chamber, without any sort of request

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[148] See Carlos Díaz, interview to Luis Britto García, "Perdimos el derecho a ser juzgados según nuestras leyes, nunca las juntas arbitrales foráneas han favorecido a nuestro país," *La Razón*, Caracas 14-06-2009, published on June 20, 2009 by Luis Britto García in http://luisbrittogarcia.blogspot.com/2009/06/tsj-lesiono-soberania.html (**Ex. AB-79**)

[149] See in http://www.tsj.gov.ve/informacion/notasdeprensa/notasdeprensa.asp?Codigo =6941 (**Ex. AB-80)**.

made by anybody, without any constitutional process and without any parties or contradictory procedure. It was then a "decision by means of a Press Communiqué,"[150] in which the Supreme Tribunal referred, among other issues, precisely to Article 22 of the Investment Law "declaring" that:

> "The [Supreme Tribunal] decisions eliminate the risk that signified to interpret Article 22 of the Investment Law as an open offer or invitation of Venezuela to be submitted to the jurisdiction of other countries, as it has been tried to argue in the International Forum, by subjects with interests contrary to the Bolivarian Republic of Venezuela, as is the case of the big energy transnational."

173. This "Press Communiqué" is not a proper judicial decision and does not have force of law.[151] In addition, it confuses submission to an international tribunal with submitting a dispute to "the jurisdiction of other countries."

174. The "custom-made" 2008 Decision No. 1.541 can only be fully understood by taking into account that unfortunately the Judicial Branch in Venezuela and in particular, the Constitutional Chamber of the Supreme Tribunal, are subject to political interference in all politically sensitive cases. Since 1999, the independence of the Venezuelan Judiciary has been progressively and systematically dismantled, resulting from the tight Executive control over the Judiciary, and especially of the Constitutional Chamber of the Supreme Tribunal of Justice.[152]

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150 See Luis Britto García, "¡Venezuela será condenada y embargada por jueces y árbitros extranjeros!," in http://www.aporrea.org/actualidad/a80479.html. Publication date: June 21, 2009 (**Ex. AB-81)**.

151 See, e.g.,Víctor Raúl Díaz Chirino, "El mecanismo de arbitraje en la contratación pública," in Allan R. Brewer-Carías (Coord.), *Ley de Contrataciones Públicas*, 2d. ed. Editorial Jurídica Venezolana, Caracas 2011, pp. 356-357 (**Ex. AB-82**).

152 Since 2004, and from the academic point of view, I have systematically studied this situation. See for instance, "La progresiva y sistemática demolición de la autonomía e independencia del Poder Judicial en Venezuela (1999-2004)" in *XXX Jornadas J.M Dominguez Escovar, Estado de Derecho, Administración de Justicia y Derechos Humanos*, Instituto de Estudios Jurídicos del Estado Lara, Barquisimeto 2005, pp. 33-174 (**Ex. AB-83**); "La justicia sometida al poder. La ausencia de independencia y autonomía de los jueces en Venezuela por la interminable emergencia del Poder Judicial (1999-2006)" in *Cuestiones Internacionales. Anuario Jurídico Villanueva 2007,* Centro Universitario Villanueva, Marcial Pons, Madrid 2007, pp. 25-

175. For example, since 2000, the appointment of Magistrates to the Supreme Court of Justice have been conducted in an unconstitutional manner and in a way that violates the citizens' right to political participation.[153]

176. In fact, the President admitted his own influence on the Supreme Tribunal, when he publicly complained that the Supreme Tribunal had issued an important ruling in which it "modified" the Income Tax Law in 2007, without previously consulting the "leader of the Revolution," and warning courts against decisions that would be "treason to the People" and "the Revolution."[154]

177. More recently, President Chavez has publicly threatened the Magistrates of the Supreme Tribunal and the Head of the Pubic Prosecu-

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57 (**Ex. AB-84**), *available at* www.allanbrewercarias.com, (Biblioteca Virtual, II.4. Artículos y Estudios No. 550, 2007) pp. 1-37; Allan R. Brewer-Carías, *Dismantling Democracy. The Chávez Authoritarian Experiment*, Cambridge University Press, 2010, pp. 226-244 (**Ex. AB-85**).

153 See for instance, what was publicly expressed by the Representative head of the Nomination Committee of magistrates in *El Nacional*, Caracas December 13, 2004 (**Ex. AB-86**). The Inter-American Commission on Human Rights suggested in its Report to the General Assembly of the OAS for 2004 that "These provisions of the Organic Law of the Supreme Court of Justice also appear to have helped the Executive manipulate the election of judges during 2004." See Inter-American Commission on Human Rights, *2004 Report on Venezuela*, par. 180 (**Ex. AB-87**). Available at http://www.cidh.oas.org/annualrep/2004sp/cap.5d.htm. See Allan R. Brewer-Carías, "La participación ciudadana en la designación de los titulares de los órganos no electos de los Poderes Públicos en Venezuela y sus vicisitudes políticas" in *Revista Iberoamericana de Derecho Publico y Administrativo*, Year 5, N° 5-2005, San Jose, Costa Rica 2005, pp. 76-95 (**Ex. AB-88**), *available at* www.allanbrewercarias.com, (Biblioteca Virtual, II.4. Artículos y Estudios No. 469, 2005) pp. 1-48

154 See the President's speech identifying the alleged "treason" of judicial decisions taken "behind the back of the Leader of the Revolution" in *Discurso en el Primer Encuentro con Propulsores del Partido Socialista Unido de Venezuela desde el teatro Teresa Carreño* (Speech in the First Event with Supporters of the Venezuela United Socialist Party at the Teresa Carreno Theatre), March 24, 2007 (**Ex. AB-89**), *available at* http://www.minci.gob.ve/alocuciones/4/13788/primer_encuentro_con.html, p. 45. The decision to which he is referring specifically is the Supreme Tribunal of Justice, Constitutional Chamber, Decision No. 301 of February 27, 2007 (Case: *Adriana Vigilanza y Carlos A. Vecchio*) (Exp. No. 01-2862) (*Official Gazette* No. 38.635 of March 1, 2007) in *Revista de Derecho Público,* No. 101, Editorial Jurídica Venezolana, Caracas 2007, pp. 170-177 (**Ex. AB-90**).

tor Office to act according to his whished against a TV Channel (Globovisión), saying that in the absence of judicial action in accordance with his instructions:

> "I will have to act myself as I have done in other occasions facing the deficiencies and voids that we still have in some levels of the State."[155]

178. The last expression of this executive control on the Supreme Tribunal of Justice occurred in 2010, after an illegitimate "reform" of Organic Law of the Supreme Tribunal of Justice by means of its "reprinting" due to a supposed printing error,[156] allowing the appointment of new Magistrates of the Tribunal without the input of the Nominating Committee established in the Constitution, before the new National Assembly elected in September 2010 convene in January 2011.[157] With this legal "reform," the National Assembly proceeded to fill the Supreme Tribunal of Magistrates with individuals who did not comply with the constitutional conditions to be Magistrate.[158]

179. Unfortunately, the political control over the Supreme Tribunal of Justice has permeated to all the judiciary, due mainly to the fact that in Venezuela, it is the Supreme Tribunal that is in charge of the government and administration of the Judiciary. This has affected gravely the autonomy and independence of judges at all levels of the Judiciary, which has been aggravated by the fact that during the past decade the Venezuelan Judiciary has been composed primarily of temporary and provisional judges, without career or stability, appointed without the public competition process of selection

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155 See in *El Universal*, Caracas, June 29, 2009 (**Ex. AB-91**). See in http://www.eluniversal.com/2009/05/29/pol_art_chavez-exige-renunci_1409179.shtml

156 See the comments of Víctor Hernández Mendible, "Sobre la nueva reimpresión por "supuestos errores" materiales de la Ley Orgánica del Tribunal Supremo, octubre de 2010," y Antonio Silva Aranguren, "Tras el rastro del engaño, en la web de la Asamblea Nacional," in *Revista de Derecho Público*, No. 124, Editorial Jurídica Venezolana, Caracas 2010, pp. 110-113 (**Ex. AB-92; AB-93**).

157 Hildegard Rondón de Sansó, who was Magistrate of the former Supreme Court of Justice, regarding such reform, has said that "the Nomination Judicial Committee was unconstitutionally converted into an appendix of the Legislative Power." See Hildegard Rondón de Sansó, "*Obiter Dicta*. En torno a una elección," in *La Voce d'Italia*, Caracas, December 14, 2010 (**Ex. AB-94**).

158 See Hildegard Rondón de Sansó, "*Obiter Dicta*. En torno a una elección," in *La Voce d'Italia*, 14-12-2010 (**Ex. AB-94**).

established in the Constitution, and dismissed without due process of law, for political reasons.[159] This reality amounts to political control of the Judiciary, as demonstrated by the dismissal of judges who have adopted decisions contrary to the policies of the governing political authorities.

180. Indeed, there are many examples of judges that have been removed, or their appointments voided, after adopting cases with major political impact. There even are examples of judges that have been detained for indeterminate periods of time because they have issued decisions that were unpopular with the reigning political power of the State.[160] The fact is that, in Venezuela, no judge can adopt any decision that could affect the government policies, or the President's wishes, the state's interest, or public servants' will, without previous authorization from the same government,[161] a fact

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159 See Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Venezuela*, OEA/Ser.L/V/II.118, doc. 4 rev. 2, December 29, 2003, par. 174 (**Ex. AB-95**), *available at* http://www.cidh.oas.org/countryrep/Venezuela 2003eng/toc.htm.

160 Just to mention one case, evidencing this subjection of the Judiciary to the political power of the State, in December 2009, a criminal judge (María Lourdes Afiuni Mora) was detained for having ordered, based on a previous recommendation of the UN Working Group on Arbitrary Detention, the release of an individual in order for him to face criminal trial while in freedom, as guaranteed in the Constitution. The same day of the decision, the President of the Republic himself publicly asked for the judge to be incarcerated asking to give her a 30–year prison term, which is the maximum punishment in Venezuelan law for horrendous or grave crimes. The fact is that judge has remained to this day in detention without trial. The UN Working Group described these facts as "a blow by President Hugo Chávez to the independence of judges and lawyers in the country," demanding "the immediate release of the judge," concluding that "reprisals for exercising their constitutionally guaranteed functions and creating a climate of fear among the judiciary and lawyers' profession, serve no purpose except to undermine the rule of law and obstruct justice. See the text of the UN Working Group in http://www.unog.ch/unog/website/news_media.nsf/%28httpNewsByYear_en%29/93687E8429BD53A1C125768E00529DB6?OpenDocument&cntxt=B35C3&cookielang=fr (**Ex. AB-96**). On October 14, 2010, the same Working Group asked the Venezuelan Government to subject the Judge to a trial guaranteeing his due process rights "in freedom." See *in El Universal*, October 14, 2010 (**Ex. AB-97)**, available at http://www.eluniversal.com/2010/10/14/pol_ava_instancia-de-la-onu_14A4608051.shtml

161 See Antonio Canova González, *La realidad del contencioso administrativo venezolano (Un llamado de atención frente a las desoladoras estadísticas de la Sala Político Administrativa en 2007 y primer semestre de 2008)*, Funeda, Caracas 2008, p. 14 (**Ex. AB-98**).

acknowledged by the Inter-American Commission on Human Rights in its *2009 Annual Report*: "The lack of judicial independence and autonomy vis-à-vis political power is, in the Commission's opinion, one of the weakest points in Venezuelan democracy."[162]

181. It was within the aforementioned context that the Government's 2008 request to the Constitutional Chamber of the Supreme Tribunal must be viewed.

182. Without doubt, the 2008 Decision No. 1.541 was the product of a politically influenced judiciary that was called upon by the Republic of Venezuela to try to bolster its position in pending ICSID cases. The Constitutional Chamber acted *ultra vires* when it undertook to interpret Article 22 of the 1999 Investment Law at the request of the Government of the Republic,[163] because the Politico-Administrative Chamber has exclusive competence (*competencia*) to interpret statutes by means of a recourse of interpretation of statutes; and to interpret such article with the excuse of interpreting Article 258 of the Constitution that needs no interpretation at all.

I declare that the foregoing reflects my true opinion on the questions addressed.

Executed this 29th of October, 2011.

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Allan R. Brewer-Carías

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[162] See in ICHR, *Annual Report 2009*, paragraph 483, available at http://www.cidh.oas.org/annualrep/2009eng/Chap.IV.f.eng.htm (**Ex. AB-99**).

[163] See Allan R. Brewer-Carías, "La Sala Constitucional vs. La competencia judicial en materia de interpretación de las leyes," in *Revista de Derecho Público*, No. 123, Editorial Jurídica Venezolana, Caracas 2010, pp. 187-196 (**Ex. AB-100**).

5.

ICSID Case No. ARB/10/14: *OPIC KARIMUN CORPORATION* (Claimant) *v. BOLIVARIAN REPUBLIC OF VENEZUELA* (Respondent)

INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES

SECOND LEGAL EXPERT OPINION OF ALLAN R. BREWER-CARIAS

26 APRIL 2012

1. I, Allan R. Brewer-Carías, hereby declare that the following is true and correct, which I express supplementing my Legal Expert Opinion dated October 29, 2012, rendered in connection with the ICSID Case No. ARB/10/14, which is being pursued by OPIC KARIMUN CORPORATION (the ***Claimant*** or ***OPIC***), against the Bolivarian Republic of Venezuela (the ***Respondent*** or ***Republic***).

2. *K&L Gates LLP*, counsel to the Claimant, have asked me to comment from the standpoint of Venezuelan Law, on the Reply Memorial of the Bolivarian Republic of Venezuela on Objections to Jurisdiction of January 31, 2012 (***Respondent's Reply Memorial***) and on the Supplemental Legal Expert Opinion of Professor Enrique Urdaneta Fontiveros of January 30, 2012 (***Urdaneta's Supplemental Opinion***).

3. In general terms, from a Venezuelan law point of view, I consider that the ***Respondent's Reply Memorial*** as well as ***Urdaneta's Supplemental Opinion*** are largely a repetition of the arguments contained in the ***Memorial of the Republic of Venezuela on Objections to Jurisdiction*** dated

August 1, 2011, and in the ***Legal Expert Opinion of Professor Enrique Urdaneta Fontiveros*** dated July 29, 2012, to which I extensively referred in my ***Legal Expert Opinion*** dated October 29, 2012 (***ARBC First Legal Expert Opinion*** or ***First Legal Opinion)***).

4. Consequently, after confirming and ratifying in all its part what I expressed and explained in such ***First Legal Opinion*** dated October 29, 2012, I will address only a few legal points that I think should be clarified.

I. ON THE INTENTION OF THE LEGISLATOR IN THE 1999 PRO-ARBITRATION LEGISLATIVE TREND

5. I have affirmed that the National Executive, acting as a Legislator, when it enacted the Decree Law No. 356 of October 3, 1999 containing the Investment Law, had the intention of expressing a unilateral consent by the State to submit disputes with international investors to the jurisdiction of ICSID arbitration in its Article 22 (see ***ARBC First Legal Expert Opinion*** ¶¶ 27, 135 ff**.**). This intention of the National Executive was consistent with the general policy defined by the Government at the time of its enactment, to attract and promote international investments in the country (***ARBC First Legal Expert Opinion,*** ¶¶ 37, 83, 121), and was also reflected in other legislation enacted by the Executive at the same time, all based on the pro-arbitration policy that prevailed in 1999 (***ARBC First Legal Expert Opinion,*** ¶¶ 112 ff.).

6. It is undisputed that, according to Article 4 of the Civil Code, in order to interpret statutes, the interpreter must attribute to the law "the sense that appears evident from the proper meaning of the words, according to their connection among themselves and the **intention of the legislator**." Consequently, the intention of the "legislator" is one of the key elements in the interpretation of statutes, as was confirmed in the decision No. 1173 of June 15, 2004 of the Constitutional Chamber of the Supreme Tribunal decision that I commented on in footnote 106 of my ***First Opinion*** (Ex. AB-57). My comments have raised intense, but ultimately unsustainable and meritless arguments in ***Urdaneta's Supplemental Opinion*** (¶¶ 56, 57), which are repeated in the ***Respondent's Reply Memorial*** (¶¶ 60, 61).

7. In paragraph 137 of my ***First Opinion*** I expressed what I now confirm, namely that:

8. In the absence of a published 'Statement of Purposes' for the Decree Law on the Investment Law, and being the product of a bureaucratic drafting process and not of a parliamentary process with recorded debates in a legislative body, the intention of the drafters are a valid source to determine the intention of the "legislator."

9. It was at that point that I referred to the aforementioned Supreme Tribunal decision. The reference and comment on it were made only regarding the particular situation I was dealing with, namely the case of a decree law, that is, a law that was not the product of a diffuse "creator" (Parliament, Congress, Legislative Assembly) composed of representatives, parliamentary commissions, legislative assistance, interacting in closed or open debates that are normally part of the legislative process, but the product of an executive bureaucratic process, that in that case allows to identify a "drafter" of the law. It was in that sense that, using the phrase of the Tribunal's decision that refers to "**the will of the creator of the provision**", I referred to "**the will of the drafter of the provision**." That is to say, whenever the drafter of a statute, even when the statute is approved by a Congress, can be identified (and that is why so many statutes and laws have or take the name of its drafters), it is instructive for the interpreter to seek for the intention of the "drafter" in order to establish the intention of the legislator. In such cases, where the "creator" has delegated its authority to create the law to the drafter, the intention of the "creator" of the Law does not differ from that of its drafter. And this is the case, in general, with decree laws or executive regulations, which normally are approved without a debate. Commonly, it is the respective Minister of the Executive who is in charge of drafting and proposing of the text, the one who can eventually express the will or the intention of the body approving the text. But it can also be a public official, specialized in the subject or matter of the text, who is, by assignment or delegation by the President, the one in charge of drafting a proposal of a statute or regulation. This was the case with respect to the 1999 Investment Law, in which the then Ambassador and Permanent Representative of Venezuela to the UN Office and the World Trade Organization (WTO) in Geneva, Werner Corrales, was charged by the Executive with drafting the Law. Under the unique circumstances relating to the Investment Law (that is, a law drafted by a public official at the request and by delegation of the President), the opinion or the intention of the drafter is essential to identify the intention of the legislator. This is particularly so because the Venezuelan government refuses to present any evidence concerning the President's intention. For example, the government has not

presented him for examination. Consequently, the "intention of the drafter" is absolutely relevant to determine the intention of the legislator in this case. Contrary to the contention by the Government and Mr. Urdaneta, it is not at all inappropriate to look to the intention of the drafter.

10. In each case, and according to its circumstances, in order to determine the intention of the legislator, the interpreter has the obligation to identify the sometimes diffuse "creator" of the text. And that is what must be done in a case like the one of the Decree Law on the Investment Law, in the absence of any "Statements of Purposes" or other official documents, like for instance the Minutes (*Acta*) of the Council of Ministers (which are different than the deliberations, which are the only reserved part of the Council of Ministers' actions). Here, the Government did not submit the *Acta* or other similar documents. According to the available information, Mr. Corrales and Mr. Capriles were the drafters of the Law, acting by delegation of the President of the Republic. As the only way to determine the will of the legislator or of the Council of Ministers as "creator" of the law is to determine the intention the drafters, the intention of Mr. Corrales and Mr. Capriles are crucial in establishing the creator's intention. In the absence of any official information and even of the *Acta* of the Council of Ministers with the list of those participating in the approval of the draft statute, Mr. Corrales' testimony and the documents that he prepared as part of the process of drafting the statute are the only available sources in order to determine the "intention of the legislator."

11. Consequently, in the case of the 1999 Investment Law, the intention of the legislator (the Executive) is not different from the intention expressed by the drafters of such law. With regard to its Article 22, the expressed intention is to express a unilateral consent by the State to submit disputes with international investors to the jurisdiction of ICSID arbitration, as a means to attract and promote international investments in the country, as mentioned in my ***First Opinion*** (***ARBC First Legal Expert Opinion,*** ¶¶ 112 ff.; 127 ff.). This intention was completely consistent with the pro-arbitration trend that characterized the legislation enacted by the Congress and the Executive at the same time the Investment Law was enacted, particularly by means of decree laws, in execution of the Enabling Organic Law of April of 1999 authorizing the President of the Republic to "enact provisions in order to promote the protection and promotion of national and foreign investments with the purpose of establishing a legal framework for investments and to give them greater legal security," as well as in the 2000 Enabling Law with a similar purpose. Examples of legislation in which the pro-arbitration ap-

proach manifests itself include the *1999 Law on Gassed Hydrocarbons* (which recognizes the possibility to submit to arbitration disputes on matters relating to licenses given by the State for the exploration or exploitation of non-gas hydrocarbons); the *1999 Law on the Promotion of Private Investments through the Regime of Concessions* (which provides that the parties, in public concession contracts, could agree to submit their differences to the decision of an arbitral tribunal); the *2001 Organic Taxation Code* (which provides for the possibility of arbitration as a means for the solution of disputes between taxpayers and the State), and the *2001 Organic Hydrocarbons Law* (which expressly recognizes the possibility of arbitration for the solution of disputes resulting from activities in the hydrocarbon sector when mixed companies are constituted with private investors).

12. All these laws – concerning key sectors of the economy – demonstrate there was a clear legislative tendency providing for the possibility of arbitration. This fact is completely ignored in the Memorial Reply, and is only indirectly mentioned in ***Urdaneta's Supplemental Opinion*** expressing that "none of these statutes provides for compulsory arbitration" (***Urdaneta's Supplemental Opinion*** ¶¶ 112). While only Article 22 (and under certain circumstances Article 21) of the 1999 Investment Law provides for <u>*compulsory*</u> arbitration, the pro-arbitration trend that characterizes legislation enacted between 1999 and 2001 providing for the possibility of arbitration as a means for conflict resolution contradicts the contention that there was "resistance to arbitration".

II. ON THE INEXISTENT REQUIREMENT OF "CLEAR AND UNEQUIVOCAL" CONSENT FOR ARBITRATION IN VENEZUELAN LAW

13. I have extensively argued in my ***First Opinion*** on the inexistent requirement in Venezuelan Law for the consent for arbitration to be "clear and unequivocal," and on the confusion generated on the matter based on the jurisprudence of the Politico Administrative Chamber of the Supreme Tribunal of Justice. The Chamber's decisions were exclusively concerned with the question of the *negative effect* of an arbitration agreement. That is, whether an arbitration agreement, the existence of which was not in dispute, excluded courts from hearing a case.[1] The Chamber was therefore dealing

[1] *See, e.g.*, Gaillard / Savage (eds.), Fouchard Gaillard Goldmann on International Commercial Arbitration, Kluwer Law International 1999, pp. 401 (**Ex. AB-102**).

with a conflict of jurisdiction between national courts and national arbitral tribunals, giving always jurisdiction to the national courts when the clause providing for arbitration was not clear and unequivocal, excluding any sort of jurisdiction of national courts (***ARBC First Legal Expert Opinion,*** ¶¶ 70 ff). These cases therefore did not consider the validity or the efficacy of the expression of consent, the question of *positive effect* that is in dispute here, namely that of the validity or the efficacy of the expression of consent. In other words, whether there is an arbitration agreement that confers jurisdiction to the ICSID Tribunal. Instead, when the arbitral clause provided for the possibility for the parties to resort to national courts, and there was no clear and unequivocal expression of absolute rejection of the jurisdiction of national courts, the Supreme Tribunal gave always jurisdiction to the national courts.

14. This line of jurisprudence of the Politico Administrative Chamber of the Supreme Tribunal of Justice does not discuss the requirements for the validity of consent to arbitration clauses. Rather, the Tribunal considered only the question of negative effect of an arbitration agreement. It is in this context that it discussed valid arbitration clauses which it held required rejection of the jurisdiction of national courts in an absolute clear and unequivocal manner if such rejection was to be valid and the clause was to have such a negative effect. Without analyzing the precise text of the Politico Administrative Chamber decisions, the Respondent, following its Legal Expert (***Urdaneta's Supplemental Opinion,*** ¶¶ 84 ff; ***Respondent's Reply Memorial*** (¶¶ 67, 76), has repeatedly referred to this case law that has no relevance to the present case while dismissing decision No. 1067 adopted by the Constitutional Chamber of the Supreme Tribunal of November 3, 2010 (Case *Astivenca Astilleros de Venezuela C.A*, (**Ex. AB-19**), merely by claiming that I have "mischaracterized" it in my analysis (***Urdaneta's Supplemental Opinion,*** ¶¶ 87 ff; ***Respondent's Reply Memorial*** (¶¶ 76).

15. A close reading of the decision reveals that the Chamber imposes on all courts established according to Article 335 of the Constitution the obligation to interpret (*interpetación vinculante*) arbitration clauses under the rule that the judicial "verification of arbitral clauses must be limited to verify the written character of the arbitration agreement, excluding any analysis related to the consent devices that could be derived from the written clause." What this means is that in order to be an effective expression of consent to arbitration, the arbitration provision need only be in writing. Regarding the already mentioned "doctrine" applied by the Politico Administrative Chamber of the Supreme Tribunal of Justice in order to resolve conflicts of jurisdiction, the Constitutional Chamber added that "the jurisprudence crite-

ria sustained on these matters by the Politico Administrative Chamber of the Supreme Tribunal up to this date are not applicable" (See, among others, the decisions Numbers 1209 and 832, of June 20, 2001 and June 12, 2002, cases "*Hoteles Doral, C.A".* and "*Inversiones San Ciprian, C.A*."). It reaffirmed that any judicial decision regarding the verification of "the validity, efficacy and applicability of the arbitral clause must be limited to verify the written character of the arbitration agreement" (***ARBC First Legal Expert Opinion,*** ¶¶ 70, 77, 81). The *Hoteles Doral C.A*. Case was the leading case of the "doctrine" overruled by the Constitutional Chamber, on which the Respondent and its Legal Expert base the alleged "doctrine" of "clear and unequivocal" consent. However, as noted above, the decision concerned a completely different matter, namely the question of validity of a clause rejecting jurisdiction of national courts, and not the validity of consent to arbitration. Even if these two questions could be considered comparable, the Constitutional Chamber has overruled this line of jurisprudence.

16. The Politico Administrative Chamber, in effect, in order to establish the aforementioned "doctrine," considered arbitration as an "exception" regarding the constitutional competences of ordinary courts to resolve controversies submitted by citizens to their decision (the Constitutional Camber made reference, among others, to the decision No 1.209/01 of the Politico Administrative Chamber). By contrast, the Constitutional Chamber, in the decision adopted in the 2010 *Astivenca* Case (**Ex. AB-19**), issued in a procedure for constitutional revision of a decision of the Politico Administrative Chamber of the Supreme Tribunal (No. 687 of May 21, 2009) precisely deciding on a conflict of jurisdiction, argued that arbitration was a "fundamental right," considered as a "part of the judicial system" and of "jurisdiction," and as an effective means for obtaining justice (*tutela judicial efectiva*). Consequently, the Constitutional Chamber considered arbitration as an effective institution for jurisdictional protection that cannot be considered as an "exceptional" institution regarding the jurisdiction exercised by the Judiciary. The Chamber ruled, based on the considerations it made "on the principle of competence-competence and in the relationships of coordination and subsidiary relations of the Judiciary's organs with the arbitration system," that the organs of the Judiciary can only make a "formal, preliminary or summary 'prima facie' examination or verification of the conditions of validity, effectiveness and applicability of the arbitral clause, which … must be limited to: (i) verification the written character of the arbitral agreement, and (ii) exclusion of any analysis related to the defects of the consent that derive from the written agreement."

17. In other words, the Chamber ruled that, due to the fact that Article 258 of the Constitution provides for the promotion of arbitration (as decided by the same Chamber quoting decision No. 1.541/08), "any legal provision or judicial interpretation that could contradict it, must be considered contrary to the fundamental text, and thus, unconstitutional;" and consequently, "the organs of the Judiciary when they have not noticed a manifest nullity, inefficacy or inapplicability, must send the disputes submitted to their consideration to arbitration" (**Ex. AB-19**).

18. The result of this new doctrine is that the courts must rule in principle in favor of arbitration ("*in dubio pro* arbitration"); arbitration being considered part of the judicial system and of jurisdiction. This represents a substantive change to the jurisprudence, by which the Constitutional Chamber overruled the Politico Administrative Chamber doctrine that was based on the consideration of arbitration as an exemption to jurisdiction. The consequence of this change is that arbitration cannot be considered any more by the courts as an exemption to jurisdiction. That is why the rule imposed by the Constitutional Chamber on the courts analyzing arbitral clauses is to verify only the written character of the arbitral clause without any other consideration regarding the validity or efficacy in order to reject arbitration. The result of this new doctrine has been the pro-arbitration trend adopted even by the Politico Administrative Chamber, which precisely can be appreciated in many of the decisions it has adopted after the *Astivenca* Case ruling, which are mentioned by Urdaneta in his Second Opinion (***Urdaneta's Supplemental Opinion,* ¶ 97; footnote 136**), in which, in many cases, the Chamber ruled to maintain the cases in the arbitral jurisdiction. In those cases, the argument of the Politico Administrative Chamber was not that in order to submit dispute resolution to arbitral tribunals, the consent for arbitration was supposedly to be "clear and unequivocal." On the contrary, in many of the cases the decision of the Chamber was only to consider that there were not enough "inaccurate, or incomplete" statements or "unambiguous" intent to remove the decisions from the arbitral tribunals, leaving the matter for their decision.

III. ON THE SENSE OF THE DISCLAIMER CONTAINED IN THE LAST PART OF ARTICLE 22 OF THE 1999 INVESTMENT LAW

19. In my First Opinion, I affirmed that the open offer of consent expressed by the State in Article 22 of the Investment Law is confirmed in its last phrase, which is a disclaimer, in which it is expressed that such consent is given by the State "without prejudice to the possibility of using, as appropri-

ate, the contentious means contemplated by the Venezuelan legislation in effect" (***ARBC First Legal Expert Opinion,* ¶¶ 25, 33**). It is well known that the expression "*sin perjuicio de*", in the Spanish Grammar known as a "*locución adverbial*" (adverbial expression or diction), is mainly used in legal texts, is equivalent to the expressions "*dejando a salvo,*" "*sin detrimento de*" or "*sin menoscabo de*", and used to specify that when a particular conduct is provided for in the specific legal provision, it does not exclude or affect the other possible conduct. Consequently, by excluding the negative effect of the arbitration clause, *i.e.* by leaving Venezuelan courts as an option, Article 22 confirms that there is an arbitration clause. This means in this context that the State's consent for international arbitration is given without excluding the possibility for the investor to resort to national courts, when not accepting the open offer made by the State. In other words, this disclaimer contained in the last part of the provision means that despite the consent given by the Republic, as an open offer for international arbitration, the investor has the option to unilaterally accept the offer to submit the dispute to international arbitration, or to use, at his/her will, the contentious means contemplated by the Venezuelan legislation. This option established in the last part of the article makes only sense if the first part of the article is interpreted as a unilateral expression of consent that acts as an open offer, given by the State.

20. What the Republic and its Legal Expert consider as a "new argument" or a "new explanation" regarding the second part of Article 22 of the Investment Law (***Urdaneta's Supplemental Opinion,* ¶** 22; ***Respondent's Reply Memorial* ¶** 165) is, in fact, as old as the language used in the article. For a provision to expressly disclaim, explain or clarify that the investor has always the possibility to resort to national courts, means that after the State has expressed its consent to international arbitration, the investor has the option of accepting the offer given by the State or to submit the dispute to national courts. Otherwise, if one considers that no consent for arbitration was given by the State in the first part of the article, then the disclaimer would have no meaning, because according to the Venezuelan Constitution the possibility to resort to national courts is always possible.

21. Respondent's explanation of the "without prejudice" clause is to interpret it in the sense that it has no meaning or purpose, that is to say, that it only has relevance "when the parties have already proceeded to arbitration" or when the international arbitration has "already commenced" (***Respondent's Reply Memorial* ¶** 165; ***Urdaneta's Supplemental Opinion,* ¶ 23**). If it were for such purpose, of course, the disclaimer of Article 22 would be redundant, without any need to be expressed. Contrary to what Respond-

ent and its Legal Expert argue, the final part of Article 22 makes sense only when considered as a provision giving the investor the right, as an absolute option, to unilaterally resort (or not) at his will, to international arbitration, since the State gives its consent in the first part of the article. That is, the right provided in the disclaimer could only possibly be granted, if the first part of the Article is a unilateral expression of consent that acts as an open offer, given by the State.

IV. ON THE GENERAL ACADEMIC COMMENTS I MADE IN 2005 ON THE 1999 INVESTMENT LAW, AND MY REFERAL IN 2001 TO THE SUPREME TRIBUNAL DECISION NO. 186 OF 2001

22. The first general academic attempt to discuss the 1999 Investment Law in Venezuela was organized by the Academy of Political and Social Sciences, which held a Seminar in June 2005, for which it convened a group of scholars in order to study the different aspects of the Law from the point of view of the different branches of law (seminar on "Arbitraje commercial interno e internacional. Reflexiones teóricas y experiencias prácticas"). The Seminar was inaugurated by the then President of the Academy Professor Alfredo Morles Hernández, with a "Presentación" that has been many times quoted in this case, and all the papers submitted to it were published in the book Irene Valera (Coord.), *Arbitraje commercial interno e internacional. Reflexiones teóricas y experiencias prácticas,* Academia de Ciencias Políticas y Sociales, Caracas 2005. Many, if not all the articles included in the book have been quoted or mentioned in this case. That academic event followed a previous one, also organized by the Academy in 1998, on the "*Ley de Arbitraje Commercial,*" in which it was my duty to make the "Presentation," as I was at that time the President of the Academy. All the papers submitted to that Seminar, many of which have also been quoted in this case, were also published in the book Allan R. Brewer-Carías (Coord.), *Seminario sobre la Ley de Arbitraje Comercial*, Academia de Ciencias Políticas y Sociales, 1999. In both Seminars, all the Papers submitted were academic papers given by Law Professors. As a Member of the Academy, having served as its President, I must emphasize that those were exclusively academic efforts serving no other purpose than academic discussion.

23. It was in the context of the Second Seminar on arbitration organized by the Academy in 2005 that I was asked by the Coordinator of the Seminar to present a paper from the exclusive point of view of public internal law regarding the 1999 Investment Law, which I did, writing the paper on "*Algunos comentarios a la ley de promoción y protección de Inversiones:*

Contratos Públicos y Jurisdicción" ("Some Comments on the Law of promotion and Protection of Investments: Public Contracts and Jurisdiction"), also quoted many times in this case. A reading of these comments demonstrates that what I wrote, in fact, were "Some Comments" on the Law, with specific emphasis on the legal stabilization intention of the Law (I); the general legal guarantees given for the protection of investments (II); the contribution of public contracts for legal stabilization for investments (III); and the provisions of the Law for the solution of controversies (IV). All such comments were expressed in a brief paper of 8 pages (Ex. **AB-1**), without footnotes, and only based on the text of the Law. Its purpose was merely to explain the institutions provided for in the Law, as its text, up to that moment, had received very little attention in the legal academic world. Those "Some Comments," consequently, were just general comments made regarding the text of the Law from the internal public law point of view.

24. It must be remembered that perhaps the only specific and partial comment on the Law that had been made in the previous years before this seminar took place was the one written by Fermín Toro and Luis Brito when they filed an action of unconstitutionality of Articles 17, 22 and 23 of the Investment Law, which the Constitutional Chamber of the Court dismissed, upholding the constitutionality of the challenged provisions in Decision No. 186 of February 14, 2001 (**Ex. EU-27**). Professors Toro and Brito did not publish their comments on the Law after challenging it, and their written arguments are not available to the public, particularly because the Supreme Tribunal of Justice decision in the case was one upholding the Law and dismissing the arguments challenging it, and not a decision that was annulling the texts. Had the challenge been successful and the law been annulled, without doubt, the legal comments would have been made publicly available.

25. From my part, as Director of the Public Law Journal (*Revista de Derecho Público)* that same year, 2001, after analyzing the Constitutional Chamber Decision No. 186 (but not the arguments filed by Toro and Brito), I arrived at the conclusion that the more elaborated and interesting parts of the decision from the point of view of internal public law were those concerning, on the one hand, the challenge of the provision establishing "public contacts for legal stabilization" (art. 17); and on the other hand, the challenge of the article providing for the "admission of international arbitration" (art. 22). The corresponding excerpt of the decision was brought to my attention and published after my review and under my direction (as I have always done since 1980) in the Section of *Jurisprudencia Administrativa y Constitutional* (Constitutional and Administrative Jurisprudence) prepared by Secretary General

of the *Journal*, Ms. Maria Ramos Fernández and published in the *Revista de Derecho Público* (Public Law Journal), in the issue No. 85-86/87-88 (enero diciembre 2001, Caracas 2001, pp. 220-225 and pp. 166-169) (**Ex.AB-101**).

26. I was the founder of that *Public Law Journal* in 1980, and since then, I have been its Director, a role that I continue to have. Consequently, contrary to what is suggested by the Respondent and its Legal Expert (***Respondent's Reply Memorial* ¶ 38**; ***Urdaneta's Supplemental Opinion,* ¶ 140**), as Director of the *Public Law Journal***,** I personally took note of the Decision No. 186 of the Constitutional Chamber in the year of its publication (2001). Thus, I did not read it only in 2009, but already in 2001, when at the occasion of publishing in the *Revista de Derecho Público* the excerpts dealing with the aspects that at that time and from the internal public law perspective were considered the most relevant, were highlighted, particularly after the sanctioning of the 1999 Constitution. That is why the excerpt dealing with Article 22 was preceded by the phrase: "International Arbitration is admitted in the Constitution as part of the system of justice, and thus, the solution of controversies established in articles 22 and 23 of the Decree law of Promotion and Protection of Investments is not contrary in any way to the Fundamental Text [i.e., the Constitution]."[2]

27. Four years later, in 2005, when I analyzed the 1999 Investment Law and prepared the already mentioned "Some Comments" for the Seminar organized by the Venezuelan Academy, from the public law point of view, since I was not quoting for such purpose any decisions of national courts on the matter, and I was only referring to the text of the Law in itself and to its content, I considered it was not necessary to even mention the Decision No. 186 of the Supreme Tribunal of 2001, particularly because the discussion about the incorporation in the Constitution of arbitration as part of the judicial system was a matter I considered uncontroversial. Instead, on that occasion, in 2005, in the Seminar organized by the Academy, when studying in particular Article 22 of the Law and realizing that it contained a general expression of consent given by the Venezuelan State for international arbitration, researching for antecedents of such consent through a national law I

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[2] Spanish Text: "El arbitraje nacional e internacional está admitido en nuestra Constitución como parte integrante del sistema de justicia, por lo tanto, la solución arbitral de controversias prevista en los artículos 22 y 23 del Decreto-Ley de Promoción y Protección de Inversionistas no colide en forma alguna con el Texto Fundamental," see in *Revista de Derecho Público*, No. 85-88, Caracas 2001, p. 166 (**Ex. AB-101**).

only referred to an ICSID tribunal decision (*Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt,* ICSID Case No. ARB/84/3, Decision on Jurisdiction of April 14, 1988) **(Ex. R-19).**

28. The issue that Article 22 of the Law raises and the solution given in the aforementioned ICSID case decision, for myself, as an academic and law researcher, was one of the most interesting points, from the internal public law point of view, being in fact a novelty in Venezuelan law. It was the first time that I found in the text of a statute in Venezuela that the State was unilaterally giving its consent for jurisdiction on matters of international arbitration, a matter that I considered most interesting. Never before had I seen a law in which Venezuela assumed in a unilaterally way an obligation to submit controversies to international arbitration. This was the aspect that at that time called my attention, and after some research for antecedents of such unilateral expressions of consent, I found the *SPP Egypt* case, which I mentioned in my "Some Comments."

29. Consequently, it has not been only in the past years (2009), and on the occasion of specifically studying the scope and meaning of Article 22 of the Investment Law with more detail for the purpose of writing independent Legal Opinions for international arbitral proceedings, that I have analyzed the Decision No. 186 of the Constitutional Chamber. As mentioned, I studied it already in 2001, although only for the purpose of reporting its text in the Law Journal, in its section on Jurisprudence. That 2001 approach I took to the Constitutional Chamber Decision No. 186 for the purpose of reporting its contents in the *Journal*, of course, did not prevent me from analyzing again that decision, and to place emphasis on other aspects, for example to try to determine its specific meaning when considering the constitutionality of Article 22. From such decision, I have arrived at the conclusion that there was eventually an acceptance by the Tribunal, in an implicit way, of the constitutionality of the open offer of consent that the State gave in Article 22 for international arbitration. In effect, when the Constitutional Chamber rejected the allegations of Fermin Toro and Luis Brito regarding the alleged violation of the Constitution through Article 22 of the Investment Law, because the norm contained an order or a command that compelled the State to submit to international arbitration, that meant, in my opinion, the acceptance by the Supreme Tribunal of the text of the Article 22 as it was written with all its consequences: the open offer given by the State for international arbitration, and the disclaimer contained in its last part, giving the investor the option to accept or not to accept the open offer, and to resort at his will to national courts.

30. Fortunately, as a legal researcher and author, I have always written in an independent way. I study the matters, according to my own conscience, when I consider them appropriate at the moment, and write in the way I decide, in each case. To mention or not to mention a particular aspect in my writings, at a certain moment of time, is and has been my particular choice made on the basis of my academic interest at that time, and nothing strange can be deducted from it. If something can be deducted from all my half century academic life, as it is reflected in all the books and articles that I have published since 1960, in fact as a "prolific" author (***Respondent's Reply Memorial* ¶ 142**), is that I generally do not keep papers in my drawers, and on the contrary I tend to publish them for the benefit of students, researchers and lawyers. But basically I have written and I still write with complete freedom, not subjected to instructions about which position or positions I should adopt or defend.

V. THE SENSE AND MEANING OF ARTICLE 151 OF THE CONSTITTUION

31. Article 151 of the 1999 Constitution is basically a reproduction of the content of Article 127 of the 1961 Constitution (***ARBC, First Legal Opinion,* ¶¶ 123 ff**), which was kept in the Constitution due to my personal proposal which I filed before the National Constituent Assembly (**Ex. EU-24**), in particular, in order to contradict the controversial proposal contained in a document submitted by the President of the Republic, Hugo Chávez before the Assembly (**Respondent's Memorial, ¶¶ 28, 29; Urdaneta First Legal Opinion, ¶¶ 21, 22**). Chávez, in his proposal**,** not only pretended to eliminate from the Constitution the "Calvo Clause," but he pretended, by proposing to incorporate the principle of absolute sovereign jurisdictional immunity exclusively for contracts entered by the Republic (but not subentities of the State), to eliminate any jurisdictional restriction regarding other public interest contracts signed by other public entities. That is why I consider the presidential proposal as "excessively permissive towards international arbitration" (***ARBC, First Legal Opinion,* ¶¶ 121 - 125**).

32. The two clauses contained in the text of Article 151 of the Constitution, as I have argued in my First Opinion, have been in the text of all Venezuelan Constitutions since 1893 (***ARBC, First Legal Opinion,* ¶ 92**). The first clause is the one referring to the principle of sovereign jurisdictional immunity regarding public contracts entered into by the Republic and the States. If it is true that this clause was initially established in 1893 as an "absolute" jurisdictional immunity clause, it was changed in 1947, providing for

a "relative" sovereign jurisdictional immunity clause, following a general trend prevailing in comparative constitutional law. The clause was also modified in 1901, expanding its initial scope in order to include not only the "national" and "states" public interest contracts, but also the "municipal" contracts and any other public contract entered by other organs ("public powers") of the State.

33. The proposal of Mr. Chávez in 1999 regarding this constitutional clause was to reestablish the absolute sovereign jurisdictional immunity principle abandoned in 1947, but in a limited way only regarding "national" public interest contracts, that is, only those entered by the Republic (but not sub-entities of the State), eliminating any kind of restriction on jurisdictional matters regarding public interest contracts entered by the states, the municipalities and other public entities. This presidential proposal, as I argued, was excessive and inconveniently permissive, particularly due to the fact that commonly public interest contracts are entered precisely by other entities different to the Republic, and particularly by public corporations and public enterprises (***ARBC, First Legal Opinion,* ¶ 122**).

34. In any case, leaving aside that failed proposal made by the President of the Republic in 1999, the way the clause has been in the Constitution since 1947, that is, following the principle of "relative" sovereign jurisdictional immunity, cannot be considered as something extraordinary or unusual (***ARBC, First Legal Opinion,* ¶ 98**), particularly because it followed the general principle of relative immunity prevailing in the contemporary world. According to this clause, the State is authorized in the Constitution to submit to international arbitration matters of public interest contracts except if the "nature" of their object prevents it. That is why I considered in my First Opinion that when the ICSID tribunals in the *Mobil* and *Cemex* case argued that "Venezuela remained reluctant *vis-à-vis* contractual arbitration in the public sphere, as demonstrated by [Article 4 of] the 1998 Arbitration Law and Article 151 of the 1999 Constitution" (**Ex. RL-1, ¶¶ 131; 127, 128; Ex. RL-2, ¶ 125**), these Tribunals simply did not fully understand the content of the provision of Article 151 from which no "reluctant" attitude towards arbitration can be deducted (***ARBC, First Legal Opinion,* ¶ 96)**. On the contrary, the constitutional provision of Article 151 is precisely the one that allows for international arbitration involving the Venezuelan State according to the principle of relative sovereign jurisdictional immunity. Consequently, nothing in the Venezuelan legal and constitutional order authorizes the Respondent to say that an expression of consent for international arbitration such as the one contained in Article 22 of the Investment Law would be "inconceivable in light of article 151 of the Constitution" (***Respondent's Reply Memorial* ¶ 118; *Urdaneta's Supplemental***

***Opinion,* ¶ 130).** On the contrary, it is the trend set forth in the article that authorizes the State to go to international arbitration.

35. The second clause contained in Article 151 of the Constitution, inserted in the constitutional text also in 1893, and that has remained without change, is the so-called "Calvo Clause," according to which in Venezuela any diplomatic claims regarding public interest contracts signed between the different organs of the State and foreign entities or persons are excluded and inadmissible. The President of the Republic in his incomprehensible 1999 proposal before the Constituent Assembly, pretended to completely eliminate from the Constitution this centenary "clause," and consequently to admit the possibility that in public interest contracts, their execution could give rise to foreign diplomatic claims against the Republic (based on the conduct of sub-entities). From this proposal, it is impossible to "deduct" any restrictive approach of the President toward arbitration matters (***ARBC, First Legal Opinion,* ¶¶ 125, 126**). On the contrary, his proposals were inadmissible, because they attempted to eliminate from the Constitution the restrictions on the matters of relative jurisdictional immunity.

36. Finally, it must be mentioned that Article 151 of the Constitution establishing the relative sovereign jurisdictional immunity clause and the Calvo Clause is a provision concerning "public interest contracts," that is, basically, those entered by the three territorial divisions of the State (Republic, States, Municipalities), allowing the possibility for the State to give its consent to submit to international arbitration, for instance, disputes related to commercial matters and arising from such public interest contracts. In this ICSID arbitration case, the Tribunal is not dealing with public interest contracts regulated in Article 151 of the Constitution. The Tribunal is dealing with the consent given by the Venezuelan State in a statute (Article 22 of the 1999 Investment Law) to submit matters related to investment, generally of industrial, commercial or financial nature, to international arbitration. Nonetheless, the common aspect of both situations is that in Article 151 of the Constitution and in Article 22 of the Investment Law, consent to arbitration is provided for particularly with respect to commercial matters.

37. I declare that the foregoing reflects my true opinion on the questions addressed, being correct to the best of my knowledge and belief.

38. Executed this 26th day of April, 2012

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Allan R. Brewer-Carías

PART TWO

ON THE PRINCIPLES OF ADMINISTRATIVE PROCEDURE, THE EFFECTS OF ADMINISTRATIVE SILENCE AND THE REVOCATION OF ADMINISTRATIVE ACTS IN THE FIELD OF MINNING ACTIVITIES

6.

ICSID Case No. ARB(AF)/09/1: *GOLD RESERVE INC.* (Claimant) *v.* *THE BOLIVARIAN REPUBLIC OF VENEZUELA* (Respondent)

INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES

EXPERT LEGAL OPINION OF ALLAN R. BREWER-CARÍAS[1]

15 SEPTEMBER 2015

INTRODUCTION

I, Allan R. Brewer-Carías, hereby declare that the opinions set forth below are in accordance with my sincere belief:

1. I have been a member in good standing of the Venezuelan Federal District Bar since 1963. Since 1973, I have been a partner of Baumeister & Brewer, a law firm located at *Torre América, PH-B, Avenida Venezuela, Urbanización Bello Monte, Caracas 1050, Venezuela*. I specialize in public law, particularly constitutional, administrative, and public economic law, which includes mining and hydrocarbons law. Currently, I am a resident in the United States of America, in the City of New York, NY.

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[1] All legal authorities cited in support of this Opinion have been submitted electronically with Claimant's Memorial.

Qualifications

2. In 1962, I received my law degree from *Universidad Central de Venezuela* (Central University of Venezuela). I performed post graduate studies in France, at the then University of Paris (1962-1963), and in 1964 I received a Doctorate in Law (D.J.) from the Central University of Venezuela.

3. I have taught Administrative and Constitutional law in the Central University of Venezuela since 1963. During the academic years 1972-1974, I was Visiting Scholar at Cambridge University (Center of Latin American Studies), U.K., and during the academic year 1985-1986, I was a Professor at Cambridge University, where I held the *Simón Bolívar Chair,* teaching a course on "*Judicial Review in Comparative Law*" in the LL.M. Program of the Faculty of Law; being a Fellow of Trinity College. In 1990, I was an Associate Professor at the University of Paris II (Panthéon-Assas) in the 3rd Cycle Course, where I taught a course on "*La Procedure Administrative Non Contentieuse en Droit Comparé*" (Principles of Administrative Procedure in Comparative Law). Since 1998, I have also taught in the Administrative Law Masters program at *El Rosario* University, and at *Externado de Colombia* University, both in Bogotá, Colombia, on the subject of "*Principios del Procedimiento Administrativo en América Latina*" (Principles of Administrative Procedure in Latin America), and of "*El Modelo Urbano de la Ciudad Colonial Hispanoamericana*" (The Urban Model of the Hispanic American Colonial Cities). In 1998, I gave a series of lectures at the University of París X (Nantèrre) on "*Droit économique au Vénézuéla*" (Economic Law in Venezuela) as an Invited Professor.

4. Between 2002 and 2004, I was a Visiting Scholar at Columbia University in the City of New York, NY. In 2006, I was appointed Adjunct Professor of Law at Columbia University Law School, where I taught a Seminar on *Judicial Protection of Human Rights in Latin America, A Constitutional Comparative Law Study on the Amparo Proceeding* during the Fall 2006 and Spring 2007 Semesters.

5. I am a Titular Member of the International Academy of Comparative Law, The Hague, and have been a Professor at the International Faculty for Teaching of Comparative Law, Strasbourg. From 1982 to 2010, I acted as Vice-President of the International Academy of Comparative Law, and I have been the *General Reporter* of the Academy in the following subjects for the International Congress of Comparative Law: *Le régime des ac-*

tivités industrielles et commerciales des pouvoirs publiques, VII International Congress of Comparative Law, Uppsala, Sweden, August 1966; *Les limites a la liberté d'information (presse, radio, cinema et télévisión)*; VIII International Congress of Comparative Law, Pescara, Italy, August-September 1970; *Regionalization in Economic Matters*, IX International Congress of Comparative Law, Teherán, August-September 1974; *La décentralization territoriale, autonomie territoriale et régionalization politique*, XI International Congress of Comparative Law, Caracas, August-September 1982; *Les limitations constitutionnelles et légales contre les impositions confiscatoires*, XIII International Congress of Comparative Law, Montreal, Canada, August 1990; *Constitutional Implications of Regional Economic Integration*, XV International Congress of Comparative Law, Montreal, Bristol, United Kingdom, July-August 1998; and *Constitutional Courts as Positive Legislators,* XVIII International Congress of Comparative Law, Washington, DC, USA, July 2010.

6. I am a member of the Venezuelan Academy of Social and Political Sciences, and served as its President from 1997 to 1999. I am a member of the *Société de Legislation Comparée* (Society of Comparative Legislation) in Paris. In 1981, I was awarded the Venezuelan *Social Sciences National Prize*, granted by the National Council on Sciences and Technology.

7. During the past decades, I have participated in numerous academic programs – including congresses, seminars and courses – giving lectures in universities and public institutions in Europe, the U.S. and Latin America on matters of public law.

8. I have published the following books on matters of public law:

-My books in **English** include: *Judicial Review in Comparative Law,* Cambridge University Press, 1989; *Constitutional Protection of Human Rights in Latin America, A* Constitutional *Comparative Law Study on the Amparo Proceeding,* Cambridge University Press, New York 2008; *Constitutional Law. Venezuela, International Encyclopaedia of Laws*, Suppl. 83 (October 2009), Kluwer Law International BV, The Netherlands 2009; *Dismantling Democracy in Venezuela. The Chávez Authoritarian Experiment*, Cambridge University Press, New York 2010.

-My books in **French** include: *Les enterprises publiques en droit comparé*, París 1968; *Les principes de la procedure administrative*

non contentieuse en droit compare, Económica, París 1992; *Études de droit public comparé*, Ed. Bruylant, Bruxelles, 2000.

-My books in **Spanish** include: *Las Instituciones Fundamentales del Derecho Administrativo y la Jurisprudencia Venezolana*, Caracas 1964; *El Régimen Jurídico Administrativo de la Nacionalidad y Ciudadanía Venezolanas,* Caracas 1965; *La Expropiación por causa de utilidad pública o interés social (Jurisprudencia, Doctrina, Administrativa, Legislación)***,** Caracas 1966; *Las empresas públicas en el derecho comparado*, Caracas 1968; *Los problemas constitucionales de la* integración *económica latinoamericana,* Caracas 1968; *El control de las actividades económicas del Estado en el derecho venezolano*, Caracas 1969; *El estatuto del funcionario público en la Ley de Carrera Administrativa***,** Caracas 1971; *Jurisprudencia de la Corte Suprema 1930-74 y Estudios de Derecho Administrativo,* 7 Vols., UCV, Caracas 1975-1979; *Cambio político y reforma del Estado en Venezuela*, Madrid 1975; *Derecho Administrativo*, Vol. I, Caracas, 1975 *Principios de la Organización Administrativa Venezolana,* Caracas 1979; *Derecho y administración de las aguas y otros recursos naturales renovables*, Caracas 1976; *Garantías constitucionales de los derechos del hombre,* Caracas 1976; *El control de la constitucionalidad de los actos estatales,* Caracas 1977; *Política, Estado y Administración Pública,* Caracas, 1979; *El Régimen Jurídico de las Empresas Públicas en Venezuela*, CLAD, Caracas 1980; *Urbanismo y Propiedad Privada*, Caracas 1980; *Fundamentos de la Administración Pública*, Vol. I, Caracas 1980; *Estudios sobre la reforma administrativa*, Caracas 1980; *Régimen legal de la Economía*, Valencia 1980; *El Estado, Crisis y Reforma***,** Caracas 1982; *El Derecho Administrativo y la Ley Orgánica de Procedimientos Administrativos*, Caracas 1982; *Sumario de la Constitución de 1961*, Caracas-San Cristóbal 1983; *Estudios de Derecho Público. Labor en el Senado*, Caracas 1983-1989; *La Jurisdicción Contencioso Administrativa en Venezuela*, Caracas 1983; *Ley Orgánica para la Ordenación del Territorio*, Caracas 1984; *El Régimen Municipal en Venezuela*, Caracas 1984; *Las Constituciones de Venezuela*, Madrid 1985; *Estudios de Derecho Administrativo*, Bogotá 1986; *Reflexiones en España*, Caracas 1987; *Estado de Derecho y Control Judicial (Justicia Constitucional, Contencioso Administrativo y Amparo en Venezuela*), Madrid 1987; *Ley Orgánica de Régimen Municipal*, Caracas 1988; *Problemas del Estado de Partidos*, Caracas 1988; *Principios del Procedimiento Administrativo*, Madrid 1990; *Los Dere-*

chos Humanos en Venezuela: Casi 200 años de Historia, Caracas 1990; *La Constitución y sus Enmiendas*, Caracas 1991; *Principios del Régimen Jurídico de la Organización Administrativa Venezolana*, Caracas 199l; *Contratos Administrativos*, Caracas 1992; *Nuevas tendencias en el contencioso administrativo en Venezuela*, Caracas 1993; *El Amparo a los derechos y libertades constitucionales*. *Una Aproximación Comparativa*, San Cristóbal 1993; *Ley Orgánica del Sufragio*, Caracas 1993; *El control concentrado de la constitucionalidad de las leyes. Estudio de derecho comparado*, Caracas-San Cristóbal 1994; *Régimen Cambiario*, Caracas, 1994; *El sistema mixto o integral de control de la constitucionalidad en Colombia y Venezuela,* Bogotá 1995; *Estudios de Derecho Administrativo*, Bogotá 1994; *Instituciones Políticas y Constitucionales,* 7 Vols. EJV, Caracas 1996; *Las implicaciones constitucionales de la* integración *económica regional,* Caracas 1998; *Asamblea Constituyente y Ordenamiento Constitucional*, Caracas 1999; *Poder Constituyente Originario y Asamblea Nacional Constituyente (Comentarios sobre la interpretación jurisprudencial relativa a la naturaleza, la misión y los límites de la Asamblea Nacional Constituyente),* Caracas 1999; *Debate Constituyente (Aportes a la Asamblea Nacional Constituyente)*, 3 Vols., Caracas 1999; *El sistema de justicia constitucional en la constitución de 1999,* Caracas 2000; *La Constitución de 1999*, Caracas 2000; *Reflexiones sobre el constitucionalismo en América,* Caracas 2001; *Federalismo y Municipalismo en la Constitución de 1999. Alcance de una reforma insuficiente y regresiva,* Caracas-San Cristóbal 2001; *Golpe de Estado y proceso constituyente en Venezuela,* México 2002; *La crisis de la democracia venezolana. La Carta Democrática Interamericana y los sucesos de abril de 2002*, Caracas 2002; *Principios del Procedimiento Administrativo en América Latina*, Bogotá 2003; *La Constitución de 1999. Derecho Constitucional Venezolano*, 2 Vols., Caracas 2004; *Ley Orgánica del Tribunal Supremo de Justicia*, Caracas 2004; *Constitución, Democracia y control del Poder,* Mérida, 2004; *La Sala Constitucional Versus el Estado Democrático de Derecho. El secuestro del Poder Electoral y de la Sala Electoral del Tribunal Supremo y la confiscación del derecho a la participación política,* Caracas 2004; *Régimen legal de la Nacionalidad, Ciudadanía y Extranjería*, Caracas 2005; *Derecho Administrativo*, 2 Vols., Bogotá 2005; *Principios fundamentales del derecho público (Constitucional y Administrativo)*, Caracas, 2005; *Mecanismos nacionales de protección de los derechos humanos (Garantías judiciales de los derechos humanos en el dere-*

cho constitucional comparado latinoamericano), San José Costa Rica 2005, *Régimen legal de la Nacionalidad, Ciudadanía y Extranjería. Ley de Nacionalidad y Ciudadanía, Ley de Extranjería y Migración, Ley Orgánica sobre Refugiados y Asilados*, Caracas 2005; *Estudios sobre el Estado Constitucional 2005-2006*, Caracas 2007; *Crónica sobre la "In" Justicia Constitucional,* Caracas 2007; La *Justicia Constitucional (Procesos y Procedimientos Constitucionales),* México 2007; *La Reforma Constitucional de 2007,* Caracas 2007; *Estudios de Derecho Administrativo (2005-2007)*, Caracas 2007; *Hacia la consolidación de un Estado Socialista, Centralizado, Policial y Militarista***.** *Comentarios sobre el sentido y alcance de las propuestas de reforma constitucional 2007,* Caracas 2007; *Ley de Aguas***,** Caracas 2007; *Reflexiones sobre la Revolución Norteamericana (1776), la Revolución Francesa (1789) y la Revolución Hispanoamericana (1810-1830) y sus aportes al constitucionalismo moderno,* Bogotá 2008; *Historia Constitucional de Venezuela,* 2 Vols., Caracas 2008; *Leyes de amparo de América Latina,* Guadalajara, Mexico 2009; *Reforma constitucional, Asamblea Constituyente, y Control Judicial: Honduras (2009), Ecuador (2007) y Venezuela (1999),* Bogotá 2009; *Reforma constitucional y fraude a la Constitución* Venezuela 1999-2009, Caracas 2009; *Ley Orgánica de Consejos Comunales*, Caracas 2010.

9. I am the author of more than 600 articles on public law matters, particularly on administrative law, constitutional law, municipal law, land use law, urban law, environmental law, mines law, and on Public Administration matters. The texts of almost all these articles, and of the aforementioned books, are posted in my website www.allanbrewercarias.com, from where they can be downloaded.

10. From 1978 to 1987, I was Director of the Public Law Institute at the *Universidad Central de Venezuela* (Central University of Venezuela). During my tenure, I directed the Seminars on the Andean Pact Process of Economic Integration (since 1967); on the Venezuelan Nationalization Process of the Oil Industry (since 1975); on the Administrative Procedures Law (1982-1983); and on Urban and Land Use Planning Laws (1980-1984). Since 1980, I have been the Editor and Director of the *Revista de Derecho Público* (Public Law Journal), Fundación de Derecho Público and Fundación Editorial Jurídica Venezolana, Caracas.

11. In 1999, I was elected Member of the *Asamblea Nacional Constituyente* (National Constituent Assembly) in Venezuela. Although I was an opposition member (one of only four, out of 131 Members), I contributed to the drafting of many provisions of the 1999 Constitution. All my proposals and dissenting votes are collected in Allan R. Brewer-Carías, *Debate Constituyente (Aportes a la Asamblea Nacional Constituyente)*, 3 Vols., Fundación de Derecho Público, Editorial Jurídica Venezolana, Caracas 1999.

SCOPE OF THE OPINION

12. This opinion is rendered in connection with ICSID Case No. ARB(AF)/09/1, which is being pursued by Gold Reserve Inc. (the **Claimant**), against the Republic of Venezuela (the **Respondent**). *White & Case LLP*, counsel to the Claimant, have asked me to render an opinion on the following issues:

- The general principles of administrative law and administrative procedure in Venezuela (I).
- The general principles regarding the validity of administrative acts in Venezuelan administrative law and their possible revocation (II).
- The general principles regarding the effects of administrative silence in administrative procedures, and in particular on matters of extensions of mining concessions (III).
- The basic legal provisions regarding mining activities in Venezuela, in particular administrative procedure principles and mining concessions (IV).
- The principal environmental and land use planning laws and regulations applicable to mining projects (V).
- The environmental authorizations given to Brisas del Cuyuní Project, the Imataca Forestry Reservation regime, and the 2006 disaster management emergency situation in the State of Bolívar (VI).
- The revocation of the environmental authorization to affect natural resources given to the Brisas Project (Resolution No. 1.080 of March 27, 2007) (VII).

- The administrative procedure followed regarding the extension of the Gold Reserve's Project concessions (VIII).
- The termination of the Unicornio Hard Rock Concession (IX).
- Observations regarding the reasonable expectations of the concessionaire to develop the Brisas Project (X).

13. As a practicing lawyer, specialized in constitutional and administrative law, I offer this legal opinion based on my experience and knowledge of Venezuelan law, accumulated during more than forty-five years of academic activity and practice of the legal profession, the latter mainly in Venezuela.

DOCUMENTS CONSIDERED

14. For the purpose of this opinion, I have reviewed and considered, among others, the following documents:

A. The "**Request for Arbitration**" filed by the Claimant before the International Centre for Settlement of Investment Disputes (ICSID) on October 21, 2009, and its relevant Exhs.

B. The Decree No. 3.110 of September 7, 2004 published in *Official Gazette* No. 38.028 of September 22, 2004, on the Imataca Forestry Reserve in Bolivar State **(Exh**. C-877**)**.

C. The Decree No. 4.633 of June 26, 2006 published in *Official Gazette* No. 38.466 of June 26, 2006, declaring a temporal emergency area in Bolivar State based on the Law of Disasters and Emergency Situations Management **(Exh**. C-137**)**.

D. The Brisas del Cuyuní Gold Alluvial Concession granted to Brisas del Cuyuní C.A. on April 18, 1988, through Resolution No. 75 of May 27, 1987 of the Ministry of Mines[2] (*Official Gazette* No. 33.728 of May 29, 1987) (C-

[2] For the purpose of this Opinion, due to the fact that during the past years the name of the Ministry of the National Executive in charge of the mining sector has changed, the general name "Ministry of Mines" will be used in order to refer to

898), its Mining Title published in *Official Gazette* No. 33.947 of April 18, 1988 **(Exh. C-3).**

E. The Unicornio Gold, Molybdenum and Copper Hard Rock Concession granted to Brisas del Cuyuní C.A. through Resolution No. 452 of December 3, 1997 of the Ministry of Mines (*Official Gazette* No. 5.190 Extra. of December 11, 1997) (C-580)., its Mining Title published in *Official Gazette* No. 36.405 dated March 3, 1998 **(Exh. C-5)**.

F. The El Paují Alluvial Gold and Diamonds Concession granted to Arapco Administración de Proyectos C.A, through Resolution No. 282 of November 11, 1992 of the Ministry of Mines (Exploitation Certificate, *Official Gazette* No. 4.492 Extra. of November 20, 1992) **(Exh. C-17)**.

G. The Administrative Act No. 1.080 dated March 27, 2007 of the Ministry of the Environment,[3] authorizing and granting to Gold Reserve de Venezuela, C.A. - Compañía Aurífera Brisas del Cuyuní, C.A. rights to affect natural resources for the Construction of Infrastructure and Services Phase of the Brisas Project to Operate and Process Gold and Copper Minerals **(Exh. C-44)**.

H. The Administrative Act No. 088-08 of the Ministry of the Environment of April 14, 2008 revoking the previous Administrative Act No. 1.080 **(Exh. C-121)**.

I. The Resolution of the Ministry of Mines No. 050-2009 of May 25, 2009, supposedly "answering" the petition for the

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such Ministry, currently called "Ministry of the Popular Power for Basic Industies and Mining."

3 For the purpose of this Opinion, due to the fact that during the past years the name of the Ministry of the National Executive in charge of the environment has changed, the general name "Ministry of Environment" will be used in order to refer to such Ministry, currently called "Ministry of the Popular Power for the Environment."

extension of the Brisas del Cuyuní Gold Alluvial Concession (*Official Gazette* No. 39.186 of May 26, 2009) **(Exh. C-91)**.

J. The Resolution of the Ministry of Mines No. 48-2009 of May 22, 2009, supposedly "answering" the petition for the extension of the El Paují Alluvial Gold Concession (*Official Gazette* No. 39.184 of May 22, 2009) (**Exh. C-105).**

K. The Act No. MIBAM-DGFCM-ITRG No. 1-IFMLC-001-09 of March 18, 2009, issued by the Las Claritas Fiscal Inspector of Mines, ordering the "immediate suspension of all mining activities in the Brisas Project" **(Exh. C-94).**

L. The Administrative Acts No. 693 and No. 694 of April-June 2008 of the Ministry of Mines, issuing tax payment calculations (*Planillas de Liquidación*) for Brisas del Cuyuní Concession **(Exh. C-100).**

M. The "Reception Act" of October 20, 2009 issued by the Ministry of Mines Inspectors, regarding the take over of the properties and assets of the Brisas Project **(Exh. C-128).**

N. The Resolution No. 032-2010 of June 17, 2010 of the Ministry of Mines declaring the termination of the Unicornio Hard Rock Concession **(Exh. C-129).**

Such other documents, mentioned in this statement, as I have considered necessary for the purpose of rendering an opinion on the questions presented.

15. For the purposes of this opinion and to the extent here indicated, I rely on the accuracy of the statements of fact by the Claimant in their Request for Arbitration and the other documents referenced herein.

SUMMARY OF CONCLUSIONS

16. My analysis reaches the following conclusions:

- The Administrative Act No. 088-08 of April 14, 2008 of the Ministry of the Environment, revoking without any prior proceeding, the previous valid and irrevocable Administrative Act No. 1.080 of March 27, 2007 of the same Ministry, authorizing and granting to Gold Reserve de Venezuela, C.A. - Compañía Aurífera Brisas del Cuyuní, C.A. rights to affect natural resources for the Construction of Infrastructure and Services Phase of the Brisas Project to Operate and Process Gold and Copper Minerals according to the concessions and contracts held by it; is an illegal administrative act that must be considered null and void by virtue of the provision of Article 19.4 of the Organic Law on Administrative Procedures (OLAP). In addition, the Act No. 088-08 dated April 14, 2008 is mistaken in its factual and legal basis, when referring to the powers attributed to the Ministry within the boundaries of the Imataca Forestry Reserve (Decree No. 3.110 of September 7, 2004, *Official Gazette* No. 38.028 of September 22, 2004), and to the temporary emergency declared through Executive Decree No. 4.633 of June 26, 2006 published in *Official Gazette* No. 38.466 of June 26, 2006, which only provided for the Administration's performance of works, actions and programs in the area in order to deal with unauthorized, non-industrial mining activities, without restricting or prohibiting in any way the performance of any private or public activity or the works inherent to the authorization legally granted to Gold Reserve.
- The Resolution No. 050-2009 of May 25, 2009 of the Ministry of Mines, supposedly "answering" the petition for the extension of the Alluvial Gold Concession initially granted for a period of twenty years to Brisas del Cuyuní C.A. on April 18, 1988 (published in *Official Gazette* No. 33.947), filed on October 17, 2007, in which the Ministry decided "not to grant the extension requested by the representatives of Compañía Aurífera Brisas del Cuyuní C.A.," because of a supposed non-compliance "with the condition of solvency set forth in the Single Paragraph of Article 25 of the Mines Law," and furthermore declared "the extinction" of the concession because of the exhaustion of its initial term of twenty years; is an illegal administrative act that must be considered null and void by virtue of the provision of Article 19.2 of the Organic Law on Administrative Procedures, because ignoring that the concession has already been *ex legge* extended the previous year for a period of ten years begin-

ning on April 18, 2008, by virtue of the application of the positive effects granted to administrative silence in Article 25 of the Mines Law regarding the petitions for extension of mining concessions, after the exhaustion of the term of six months following the original extension petition.

- The same situation previously explained regarding the Brisas del Cuyuní Concession also took place regarding the request for extension of the El Paují Alluvial gold and diamonds Concession granted for a period of twenty years to Arapco Administración de Proyectos C.A. (Resolution No. 282 of November 11, 1992, Exploitation Certificate, *Official Gazette* No. 4.492 Extra. of November 20, 1992). On January 17, 2008, within the term established in Article 25 of the Mines Law, Compañía Aurífera Brisas del Cuyuní C.A., on behalf of the company Arapco, formally requested the Ministry of Mines an extension of the concession, so in the absence of any decision on the matter by the Ministry of before July 20, 2008, according to the Single Paragraph of Article 25 of the Mines Law, tacitly produced the extension of the concession as requested, by virtue of the application of the same aforementioned legal principle of positive silence. In this case, the Ministry issued another Resolution No. 48-2009 dated May 22, 2009, supposedly "answering" the original petition for the extension of the concession, deciding "not to grant the extension requested" because a supposed non-compliance of "the condition of solvency set forth in the Single paragraph of Article 25 of the Mines Law," declaring "the extinction" of the concession "because of the exhaustion of the term of the mining rights." This decision, ignoring the extension of the concession already granted, and pretending not to grant such extension, in fact was an administrative act revoking a previous tacit one granting rights to the concessionaire, and as such, is an illegal administrative act that must be considered null and void according to Article 19.2 of the Organic Law on Administrative Procedures.
- The "denial" of the extension of the concessions already granted by the Ministry, based on the supposedly "non-compliance" of some of its mining obligations by the concessionaire, violated the basic principles that rule administrative action in Venezuela, and in particular the principle of bona fide and legitimate expectation and confidence

imposed for administrative actions in Article 12 of the Organic Law on Public Administration (OLPA), because it contradicted the content of the "compliance certificates" issued in a successive and constant way by the Mining supervisory authority, regarding all the concessionaire obligations established in the Mines Law, its Regulation and in the Mining Titles, in which the Ministry repeatedly declared with regard to the concessionaire "that consequently it is solvent regarding the Ministry." It was based on these certificates on its solvency that, according to Article 25 of the Mines Law, the concessionaire requested the extension of the concessions, which were not contradicted by the Ministry in the term imposed by the Law. In addition, the main non-compliance reasons mentioned by the Ministry in order to "deny" the renewal of the concessions (already tacitly renewed), were that the concessionaire did not initiate the exploitation of the concession, a fact that in no way can be attributed to the concessionaire because the absence of exploitation was the fault of the Administration and not of the concessionaire, due to the fact, among others, that the authorization to affect natural resources (Administrative Act No. 1.080 of March 27, 2007) was subjected in its own text, to the signing by the Ministry of the Environment of an "Initiation Act," which the Ministry, in spite of the multiple requests made by the concessionaire, never signed. Therefore, it is absurd, illegal, completely arbitrary and contrary to the bona fide principle from the part of the Public Administration to attribute to the concessionaire a supposed non-compliance with the obligation to start the extraction of minerals in the exploitation process when that process could only be commenced when the Administration signed an act, which it did not sign, signifying that the absence of exploitation, if any, was due to the omissions of the same Pubic Administration and not due to fault attributed to the concessionaire.

- The Act No. MIBAM-DGFCM-ITRG No. 1-IFMLC-001-09 dated March 18, 2009 issued by the Las Claritas Fiscal Inspector of Mines, ordering the "immediate suspension of all mining activities (exploration, development and exploitation)" in the area of the Brisas Project Concessions two years after the concessionaire re-

quested the extension of the alluvial concession (October 17, 2007), one year prior the illegal denial of such extension (May 25, 2009), and after the same Office previously granted the concessionaire successive "compliance certificates" regarding the mining duties and obligations referred to such concession, is an illegal administrative act that completely ignored that by means of Article 25 of the Mines Law, the extension of the concession had been already granted one year earlier (April 18, 2008) as a consequence of the principle of positive administrative silence established in that provision.

- The Administrative Acts No. 693 and No. 694 of April-June 2008 of the Ministry of Mines, issuing tax payment calculations (*Planillas de Liquidación*) for the Brisas del Cuyuní Concession for superficial mining taxes and special advantage payments, ignoring the tacit extension of the concessions by means of positive administrative silence pursuant to Article 25 of the Mines Law, is an illegal administrative act, contrary to such provision.
- The take-over without compensation of all assets, property and installations corresponding to the Brisas del Cuyuní Concession as well as necessarily the Unicornio mining concession without following the expropriation procedure through the previous payment of due compensation, executed through a "Reception Act" dated October 20, 2009 issued by the same Mines Inspectors that had controlled and supervised the concessions for years, as a consequence of the decision of the Ministry of Mines "not to renew" the Brisas del Cuyuní Concession, ignoring its already tacit renewal, violated the right to property of the concessionaire in particular regarding all assets and properties destined to the Unicornio Hard Rock concession, guaranteed by Article 115 of the Constitution, constituting a "confiscation" (or using the English expression: "expropriation without compensation"), which is prohibited in Article 116 of the Constitution.
- The administrative act of termination of the Unicornio Hard Rock Concession granted to Brisas del Cuyuní C.A. through Resolution No. 452 of December 3, 1997 (*Official Gazette* No. 5.190 Extra. of December 11, 1997), contained in the Ministry of Mines Resolution

No. 032-2010 of June 17, 2010, is an illegal act, lacking in legal basis, and issued in violation of the principles of legitimate expectation and proportionality provided in Article 12 of the Organic Law on Public Administration and in Article 12 of the Organic Law on Administrative Procedures.

- Regarding the Brisas Project, after all the approvals and authorizations required, it is possible to say that the concessionaire had very important legitimate and reasonable expectations under Venezuelan Law, regarding the manner the concessionaire was due to develop together the Brisas and Unicornio concessions and in addition to all the other mining contracts entered with, *inter alia*, *Corporación Venezolana de Guayana* that were comprised in the Project, as one and only Project, according to the principle of the unity of the concession established in the 1999 Mines Law. These legitimate expectations, among other aspects, included, *first*, to the right to convert, once the new 1999 Mines Law was enacted, the mining contracts signed with *Corporación Venezolana de Guayana*, into concessions; *second*, the mine life of the Brisas Project that was related to the terms of the concessions, given that the term of the Unicornio Hardrock concession was not due to expire until 2018, and that the approved Feasibility Study set out an expected mine life, that at least an extension of the Brisas concession would be granted when its initial term was due to expire in 2008, but also assuming all legal obligations were fulfilled, that both the Unicornio and Brisas Concessions would be extended as needed to achieve the mine operating plan set forth in the project Feasibility Study as approved; *third*, the need to use for mining purposes, parcels that were adjacent to the concessions, as was contemplated for project infrastructure as set forth in the various studies and reports submitted to the Ministry of Mines and the Ministry of Environment, and that the terms of a layback agreement, as agreed in fact with the holders of contract rights to develop the Las Cristinas parcels, and as also was consistent with the Mines Law; and *fourth,* the exercise by the Brisas del Cuyuní of its preferred right to exploit other minerals in the concessions, including silver, as was requested of and notified to the Ministry of Mines.

I. GENERAL PRINCIPLES OF ADMINISTRATIVE LAW AND PROCEDURE

1. General Principles of Venezuelan Law within a Civil Law Tradition

17. The Venezuelan legal system follows the general pattern and trends of the Romano-Germanic civil law traditions[4] that have influenced the development of the law in continental Europe and Latin America, among other parts of the world.

18. As in all Latin American countries, Venezuela's private law began to be codified in the nineteenth century under the influence of the European Codes, and particularly the French Civil Code, and has developed according to contemporary civil law tradition trends. For instance, the main legal provisions regarding obligations contained in the 1942 Civil Code were directly inspired by the "Franco Italian Project on Obligations," and the basic regime on commercial law was influenced by the Italian Code. In matters of public law, the influence of France and Italy has also been determinant in the shaping of the Venezuelan procedural and criminal law. In matters of administrative law, the Venezuelan legal system and principles are inspired by the French system of administrative law. Consequently, the Venezuelan legal framework follows the general trends of the civil law traditions, being the general principles of law applied in Venezuela similar to those applied and used for interpretation in all the continental European and Latin American countries.

19. In particular, regarding the general principles of administrative law and procedure,[5] that is, the legal regime governing administrative action and the legal standards applied to Public Administration, it can be said that they follow the same general rules and principles developed during the past century in continental Europe, and in particular, in Germany, France, Italy

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4 See Mary Ann Glendon, Michael W. Gordon and Paolo G. Carozza, *Comparative Legal Traditions*, West Group, St. Paul, Minn. 1999, p. 13 ff.

5 See Allan R. Brewer-Carías, "Panorama general del derecho administrativo en Venezuela (2004)," in Santiago González-Varas Ibáñez (Coordinator), *El Derecho Administrativo Iberoamericano*, No. 9, Ministerio de Administraciones Públicas (INAP)-Instituto de Investigación Urbana y Territorial, Granada, España 2005, pp. 745-791.

and Spain; principles that have been adopted in all Latin American countries, including Venezuela[6] **(see *infra* para. 48)**.

2. The Principle of Legality and the Rule of Law

20. Among these principles, the first that must be mentioned are the principles of supremacy of the Constitution and of legality. The 1999 Constitution,[7] in effect, expressly set forth that "[t]he Constitution is the supreme norm and the foundation of the legal order," to which all persons and public entities are subjected (Articles 7 and 131).[8] Only on matters of human rights is the principle of supremacy of the Constitution conditioned, because the same constitutional text gives prevalence to the provisions of international treaties on human rights over the internal legal system, if they contain a more favorable provision for their enjoyment and exercise (Article 23).

21. The supremacy of the Constitution is also confirmed through the declaration in the 1999 Constitution of the State as being a Democratic and Social Rule of Law State (*Estado Democrático y Social de Derecho*) following the model already adopted in the 1961 Constitution.[9] This implies that all the activities of all public entities must be subjected to the Constitution, statutes, regulations and all other applicable provisions adopted by the competent authorities; that is the principle of legality regarding administrative activities of the State implies the obligation of all Public Administration organs and entities to act subject to the law.[10] In this regard, Article 137 of the Constitu-

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6 See the recent publication of Víctor Hernández Mendible (Coordinator), *Desafíos del Derecho Administrativo Contempóráneo. Conmemoración International del Centenario de la Cátedra de Derecho Administrativo en Venezuela*, 2 Vols., Ediciones paredes, Caracas 2010, p. 1473.

7 See *Official Gazette* No. 5.453 of March 24, 2000. See in general on the 1999 Constitution, Allan R. Brewer-Carías, *La Constitución de 1999. Derecho Constitucional Venezolano*, 2 Vols., Editorial Jurídica Venezolana, Caracas 2004.

8 I was the drafter of this provision in the 1999 National Constituent Assembly. See Allan R. Brewer-Carías, *Debate Constituyente, (Aportes a la Asamblea Nacional Constituyente)*, Vol. II, (September 9-October 17, 1999), Fundación de Derecho Público-Editorial Jurídica Venezolana, Caracas 1999, p. 24.

9 See in general, Allan R. Brewer-Carías, *Cambio político y reforma del Estado en Venezuela. Contribución al estudio del Estado democrático y social de derecho*, Editorial Tecnos, Madrid 1975.

10 See Antonio Moles Caubet, "El principio de legalidad y sus implicaciones," ,in *Revista de la Facultad de Ciencias Jurídicas y Políticas*, Nº 82, Universidad Cen-

tion declares that "the Constitution and the law define the attributions of the organs of the State, to which they must conform;" and Article 141 of the same Constitution referring to the principles governing Public Administration establishes that it must act "fully subject to the statutes and the law" (*con sometimiento pleno a la ley y al derecho*). Consequently, all the activities of the State and in particular of the organs and entities of Public Administration must be performed according to what is provided in the law, and within the limits it establishes. In addition Article 4 of the Organic Law of Public Administration (OLPA)[11] expressly repeats the principle of legality regarding Public Administration by stating that:

> "Public Administration is organized and acts in conformity with the principle of legality, so the assignment, distribution and exercise of its attributions is subject to the Constitution, the statutes and administrative acts of general effects previously enacted in a formal way according to the law as a guaranty and protection of public freedoms established in the protagonist democratic and participative regime."

22. The consequence of these principles of constitutional supremacy and of legality is the provision in the Constitution of a whole system for their judicial control, on the one side, through a complete system of judicial review of a mixed character, combining the diffuse (Article 334) and the concentrated methods of judicial review, the latter attributed to the Constitutional Chamber of the Supreme Tribunal (Article 336) (*Jurisdicción Constitucional)*;[12] and on the other, through a complete system of judicial re-

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tral de Venezuela, Caracas 1991, pp. 49-115; Allan R. Brewer-Carías, *Principios Fundamentales del Derecho Público (Constitucional y Administrativo)*, Editorial Jurídica Venezolana, Caracas 2005, p. 33.

11 See *Official Gazette* No. 5.890 Extra. of July 31, 2008. See on the Organic Law on Public Administration, Allan R. Brewer-Carías, Rafael Chavero Gazdik and Jesús María Alvarado Andrade, *Ley Orgánica de la Administración Pública,* Editorial Jurídica Venezolana, Caracas 2009, p. 17.

12 See Allan R. Brewer-Carías, *Instituciones Políticas y Constitucionales, Vol. VI: La justicia constitucional,* Universidad Católica del Táchira-Editorial Jurídica Venezolana, Caracas-San Cristóbal 1996; *El sistema de justicia constitucional en la Constitución de 1999 (Comentarios sobre su desarrollo jurisprudencial y su explicación, a veces errada, en la Exposición de Motivos)*, Editorial Jurídica Venezolana, Caracas 2000; *La Justicia Constitucional. Procesos y procedimientos constitucionales*, Universidad Nacional Autónoma de México, México 2007; Allan R. Brewer-Carías

view of administrative action (*Jurisdicción Contencioso Administrativa*) (Articles 259 and 297).[13]

3. Powers of State Organs

23. One of the most important consequences of the principle of legality is that the powers and competencies assigned to all public entities and State organs must always be expressly provided in a statute, following the principle of territorial distribution of State Powers between the National State, the states of the federation and the municipalities, as a result of the federal form of government (Article 136).[14] In this matter, Venezuela is one of the countries that since the beginning of the nineteenth century adopted the federal form of government,[15] nonetheless giving progressively origin to a "centralized federation."[16] But notwithstanding this centralized tendency in the organization of the State, the legal consequence of the vertical distribution of Powers in a federal framework is the existence of three levels of Public Administration: National Public Administration, State Public Administration and Municipal Public Administration.[17] All three levels of Public Ad-

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and Víctor Herández Mendible, *Ley Orgánica del Tribunal Supremo de Justicia,* Editorial Jurídica Venezolana, Caracas 2010.

13 See Allan R. Brewer-Carías, *Instituciones Políticas y Constitucionales, Vol. VII: La justicia contencioso administrativa*, Universidad Católica del Táchira-Editorial Jurídica Venezolana, Caracas-San Cristóbal 1997; Allan R. Brewer-Carías and Víctor Herández Mendible, *Ley Orgánica de la Jurisdicción Contencioso Administrativa*, Editorial Jurídica Venezolana, Caracas 2010, p. 9 ff.

14 See my proposal in Allan R. Brewer-Carías, *Debate Constituyente (Aportes a la Asamblea Nacional Constituyente)*, Vol. II, September 9-October 17, 1999, Fundación de Derecho Público, Caracas 1999, pp. 161-164.

15 See Allan R. Brewer-Carías, *Instituciones Políticas y Constitucionales, Vol. II: El Poder Público: Nacional, Estadal y Municipal*, Universidad Católica del Táchira-Editorial Jurídica Venezolana, Caracas-San Cristóbal 1996, p. 111 ff.

16 See in general, on the federation, Allan R. Brewer-Carías, "La descentralización política en la Constitución de 1999: Federalismo y Municipalismo (una reforma insuficiente y regresiva)," in *Boletín de la Academia de Ciencias Políticas y Sociales*, No. 138, Year LXVIII, January-December 2001, Caracas 2002, pp. 313-359.

17 See in general, Allan R. Brewer-Carías, "Consideraciones sobre el régimen de distribución de competencias del Poder Público en la Constitución de 1999," in Fernando Parra Aranguren and Armando Rodríguez García (Eds.), *Estudios de Derecho Administrativo. Libro Homenaje a la Universidad Central de Venezuela*, Vol.

ministration are subjected to the general principles established in the Constitution regarding central public administration organization (Articles 236 and 20), and decentralized public administration (Articles 142 and 300); administrative action (Article 141); civil service (Articles 145 to 149) and their liability (Article 139); assets of the State (Articles 12, 181 and 304); access to public information (Article 143); public contracts (Articles 150 and 151); State liability (*responsabilidad patrimonial del Estado*) (Article 140); and control of administrative management (Articles 62, 66, 287 and 315).

24. As mentioned, one of the consequences of the principle of legality particularly regarding Public Administration is that in order to protect public liberties in a democratic State, the organs and entities of Public Administration must always be authorized in an express way through a statute (competency)[18] and when enacting administrative acts that could affect in any way the rights and interests of the individuals (Article 4 of OLPA), it must have a specific legal basis or cause.[19]

4. Principles governing administrative actions: Bona fide and legitimate expectation

25. Administrative acts, even when issued exercising discretionary powers (see *infra* para. 32), according to Article 12 of the Organic Law on Administrative Procedures (OLAP),[20] must always be issued according to their factual basis; must always correspond to the purposes of the legal provision authorizing the action; must always maintain the due proportionality (which implies the principles of reasonability, logic, coherence, equality,

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II, Tribunal Supremo de Justicia, Caracas 2001, pp. 107-136; Allan R. Brewer-Carías, "Consideraciones sobre el régimen constitucional de la organización y funcionamiento de los Poderes Públicos," in *Revista Derecho y Sociedad de la Universidad Monteávila*, No. 2 (April), Caracas 2001, pp. 135-150.

18 See Allan R. Brewer-Carías, *Principios del Régimen Jurídico de la Organización Administrativa Venezolana*, Editorial Jurídica Venezolana, Caracas 1991, p. 47 ff.

19 See Allan R. Brewer-Carías, *El Derecho Administrativo y la Ley Orgánica de Procedimientos Administrativos. Principios del Procedimiento Administrativo*, Editorial Jurídica Venezolana, Caracas 2009, pp. 169-175.

20 See Organic Law on Administrative Procedures in *Official Gazette* No. 2.818 Extra. of July 1, 1981. See on this Law, Allan R. Brewer-Carías et al., *Ley Orgánica de Procedimientos Administrativos*, Editorial Jurídica Venezolana, 12th Ed., Caracas 2001.

impartiality, bona fides, and legitimate expectation); and must always fulfill all the conditions and formalities established for their validity and efficacy.[21] All these principles are complemented in Article 1 of the Organic Law on Public Administration that provides that the activity of Public Administration will be based on the principles of economy, celerity, simplicity, accountability, efficacy, proportionality, opportunity, objectivity, impartiality, participation, accessibility, uniformity, modernity, honesty, transparence, bona fide, formal parallelism, responsibility, subjection to the law, and suppression of non essential formalities.

26. In particular, and deriving from the principle of bona fides, the principle of legitimate confidence or legitimate expectation (*confianza legítima*) has been recognized as one that governs administrative action, implying that when the Administration, through its action and relations with an individual, has created legitimate expectations, it must then respect such expectations.[22]

27. The legitimate confidence or legitimate expectation principle is connected with legal safety that governs State action, protecting the relations between state and individuals, and adjusting itself more harmoniously than other principles (such as bona fide, for instance) and informing its activity to bestow the functioning password to the society at large.[23]

28. About such principle the Political-Administrative Chamber of the Supreme Tribunal of Justice has stated that reiterative actions of Public Administration create legal expectations for individuals that have to be weighted by the judge, since administrative criteria, although susceptible to change from time to time, can create such expectations.[24] When setting its

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21 See Allan R. Brewer-Carías, *El Derecho Administrativo y la Ley Orgánica de Procedimientos Administrativos. Principios del Procedimiento Administrativo*, Editorial Jurídica Venezolana, Caracas 2009, pp. 176-178.

22 In general, on the principle of legitímate confidence see Caterina Balasso Tejera, "El principio de protección de la confianza legítima y su aplicabilidad respecto de los ámbitos de actuación del poder público," in *El Derecho Público a los 100 números de la Revista de Derecho Público 1980-2005*, Editorial Jurídica Venezolana, Caracas 2006, pp. 745 ff.

23 See Federico A. Castillo Blanco, *La protección de confianza en el Derecho Administrativo*, Marcial Pons Editores, Madrid 1998, pp. 273-274.

24 See Decision No. 514 of the Political-Administrative Chamber of the Supreme Tribunal of Justice of April 3, 2001 (Case of *The Coca-Cola Company v. Ministerio de*

criteria, the Political-Administrative Chamber based the conclusion on Article 11 of the Organic Law on Administrative Procedures, stating that such provision:

> "…is nothing more than the application of the principle of non-retroactivity of general provisions to situations created prior to their pronouncement. The provision also states that change of criteria is not a cause for review of final administrative acts. Article 11, briefly analyzed, is considered one of the most relevant examples of Venezuelan law of the legitimate confidence principle, based on which, reiterated actions of one subject in respect of another, in this case, the Public Administration, create legal expectations that have to be appreciated by the judges and, precisely, administrative criteria, although mutable, are capable of creating such expectations…."[25]

29. Consequently, if the Public Administration acts in such a way as to go against the logical deduction of its previous actions, there is a violation of the legitimate confidence principle, since "when referring to the conduct that generates the expectation the same encompasses not only actions, but also omissions and negative manifestations or voluntary omissions…."[26]

30. The basis of this principle lays, as the Electoral Chamber of the Supreme Tribunal of Justice has stated, in the confidence that the behavior of the Public Administration causes in the citizen, behavior that must follow the legal framework and be oriented to the protection of the general interest.[27]

31. In sum, the principle of protection of the legitimate confidence or legitimate expectation governs the relationship between the citizens and the State, and accordingly, the latter must recognize the legitimate nature of the expectations based in its previous reiterative behavior, as well as respect such

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la Producción y el Comercio), in *Revista de Derecho Público*, Nos. 85-88, Editorial Jurídica Venezolana, Caracas 2001, pp. 231-232.

25 *Idem*.

26 See Hildegard Rondón de Sansó, *El Principio de Confianza Legítima o Expectativa Plausible en el Derecho Venezolano*, Caracas 2002, p. 3.

27 See Decision No. 98 of the Electoral Chamber of the Supreme Tribunal of Justice of August 1, 2001 (Case of *Asociación Civil "Club Campestre Paracotos"*), in *Revista de Derecho Público*, Nos. 85-88, Editorial Jurídica Venezolana, Caracas 2001, pp. 232-238.

expectations, being banned from changing them irrationally, abruptly, suddenly and without warning as for the effects that such changes could cause.

5. Discretionary powers and their limits

32. On the other hand, regarding discretionary power, it can be exercised only when the law gives the public officer freedom to choose between different possibilities or measures, pursuant to an evaluation of the opportunity and convenience of the action to be adopted.[28] So in the cases of administrative discretionary actions, the law is what gives the Public Administration the possibility to evaluate the opportunity or convenience of its action, in harmony with the public interest, so it has been defined as "the freedom to choose between different alternatives all of them fair."[29] The discretionary actions must be distinguished from the application of what has been called the "undetermined legal concepts" in which public officials can only determine the sense of the corresponding provision containing the concept, which only allows for one correct and just solution, which is no other than the one derived according to its spirit, reason and purpose.[30] In any case, all discretionary action, when duly authorized by statute, has limits expressly established by Article 12 of the Organic Law on Administrative Procedures,[31] which states:

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[28] See Allan R. Brewer-Carías, "Los límites a la actividad discrecional de las autoridades administrativas," in *Ponencias Venezolanas al VII Congreso Internacional de Derecho Comparado* (*Uppsala, agosto 1966*), Instituto de Derecho Privado, Law School, Universidad Central de Venezuela, Caracas 1966, pp. 255-279, and in *Revista de la Facultad de Derecho*, No. 2, Universidad Católica Andrés Bello, Caracas 1966, pp. 9-35.

[29] See Decision No. 100 of the Political-Administrative Chamber of the Supreme Court of Justice of May 19, 1983, in *Revista de Derecho Público,* No. 34, Editorial Jurídica Venezolana, Caracas 1988, p. 69, as well as Rulling No. 177 of the Political-Administrative Chamber of the Supreme Court of Justice dated August 1st, 1991, in Caterina Balasso Tejera, *Jurisprudencia sobre los Actos Administrativos (1980-1993)*, Editorial Jurídica Venezolana, Caracas, 1998, pp. 209 ff.

[30] See *Idem*, Decision No. 100 of the Political-Administrative Chamber of the Supreme Court of Justice of May 19, 1983, in *Revista de Derecho Público,* No. 34, Editorial Jurídica Venezolana, Caracas 1988, p. 69.

[31] See Organic Law on Administrative Procedures in *Official Gazette* No. 2.818 Extra. of July 1, 1981; Allan R. Brewer-Carías et al., *Ley Orgánica de Procedimientos Administrativos*, Editorial Jurídica Venezolana, 12th Ed., Caracas 2001, pp. 175 and ss.;

> "When a statutory or regulatory provision leaves a measure to be adopted according to the judgment of the competent authority, the said measure must maintain due proportionality, be adjusted to the factual basis of the act, and be conformed to the purposes (but) of the provision, and it must also be issued following the procedure and formalities needed to support its validity and efficacy."

33. In effect, according to Venezuelan Administrative Law, administrative discretional activities can only exists when a statute expressly gives the Administration the power to evaluate the timing and convenience of its actions, which occurs when a statute gives a public officer the power – not the duty – to act following his evaluation of the given circumstances.[32] As was affirmed by the former federal Court of Venezuela in a judgment dated July 17, 1953:

> "…discretionary acts exist when the Administration is not subject to the accomplishment of special provisions regarding the opportunity to act, this not meaning that it could act without being subject to any rule, because administrative authorities must always observe the provisions regarding the formalities of administrative acts. On the contrary, regulated acts (*actos reglados*) are those compulsory acts that the public official is compelled to issue strictly subject to the law."[33]

Allan R. Brewer-Carías, *El Derecho Administrativo y la Ley Orgánica de Procedimientos Administrativos,* Editorial Jurídica Venezolana, Caracas 2009, pp. 45-48.

[32] See on discretionary power and its limits, Allan R. Brewer-Carías, *Las Instituciones Fundamentales del Derecho Administrativo y la Jurisprudencia Venezolana,* Caracas 1964, p. 52 ss.; *Fundamentos de la Administración Pública,* Vol. I, Caracas 1980, pp. 203-222; "Los límites del poder discrecional de las autoridades administrativas" in *Ponencias Venezolanas al Vll Congreso Internacional de Derecho Comparado,* Caracas 1966, pp. 255-278, and in *Revista de la Facultad de Derecho,* Universidad Catolica Andrés Bello*,* No. 2, Caracas 1966, pp. 9-35; "Sobre los límites al ejercicio del poder discrecional," in Carlos E. Delpiazzo (Coordinador), *Estudios Jurídicos en Homenaje al Prof. Mariano Brito*, Fundación de Cultura Universitaria, Montevideo 2008, pp. 609-629; "Algunos aspectos del control judicial de la discrecionalidad," in Jaime Rodríguez Arana Muñoz et al. (Eds.), *Derecho Administrativo Iberoamericano (Discrecionalidad, Justicia Administrativa y Entes Reguladores), Congreso Iberoamericano de Derecho Administrativo,* Vol. II, Congrex SA, Panamá 2009, pp. 475-512.

[33] See Decision of the former Federal Court of July 17, 1953, in *Gaceta Forense*, 2d Stage, No. 1, Caracas 1953, p. 151.

In another pronouncement the same Court stated that:

> "… in the regulated administrative acts, the law establishes if the administrative authority must act, which is it and how it must act, determining the conditions of the administrative conduct in a way not leaving margin to elect the procedure; instead, in discretionary administrative acts, bearing in mind the needs of Public Administration, the administrative authority, in many cases, will appreciate past facts or future consequences, and for such purpose, will have certain freedom of appreciation, this not meaning that it could act arbitrarily."[34]

34. From the aforementioned, what basically results in Venezuelan administrative law is that discretionary powers needs to be expressly provided in a specific statute. Consequently, as was established by the former Federal and Cassation Court in 1938, "[N]ever, in any case, can a public officer exercise discretionary powers, unless a statute in a direct and categorical way gives it such power."[35] And as aforementioned, even if a statute gives a public officer the power to decide matters in a discretionary way, according to Article 12 of the Organic Law of Administrative Procedures, it must act maintaining due proportionality, adjusting itself to the facts and to the purposes of the provision, and following the formalities, and the requirements needed for the validity and efficacy of the action. That is, discretionary actions when authorized by the law, can never be arbitrary or unjust actions ("*la discrecionalidad no implica arbitrariedad ni injusticia*"),[36] and must always conform to the principle of rationality (a discretionary decision can never be irrational or illogical); the principle of justice or equity (a discretionary decision can never be unjust, inequitable, evil); the principle of equality (a discretional decision cannot be discriminatory); the principle of proportionality (a discretionary decision cannot be disproportionate, and needs to be in con-

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[34] See Decision of the former Federal Court of November 26, 1959, in *Gaceta Forense*, 2d Stage, No. 26, Caracas 1959, p. 125.

[35] See Decision of the former Federal and Cassation Court in Federal Chamber of August 11, 1949, *Gaceta Forense*, 1ª etapa (2d Ed.), Year I, No. 2, Caracas 1949, p. 140 in Allan R. Brewer-Carías, *Jurisprudencia de la Corte Suprema de 1930-1974 y Estudios de Derecho Administrativo,* Vol. I, Caracas 1975, p. 615.

[36] *Gaceta Forense,* 2d Stage, Vol. I, No. 11, Caracas 1956, pp. 27-30; see Allan R. Brewer-Carías, *Jurisprudencia de la Corte Suprema de 1930-1974 y Estudios de Derecho Administrativo,* Vol. I, Caracas 1975, pp. 611-612.

formity with the facts and the decision); and the principle of good faith (a discretionary decision cannot be misleading)."[37]

6. Due process and administrative procedure

35. On the other hand, one of the main elements necessary in order to secure the respect of the rule of law by administrative action, is to compel administrative acts to be issued following the administrative procedure established by the law, which is set forth, not only to secure the efficacy of administrative actions, but to secure also individual rights before Public Administration. Administrative procedure is governed, as provided in Article 141 of the Constitution by "the principles of honesty, participation, celerity, efficacy, efficiency, transparency, accountability and liability in the exercise of public functions and with full subjection to the statute and the law;" and as indicated in Article 10 of the Organic Law on Public Administration by the principles of economy, celerity, simplicity, objectivity, impartiality, honesty, transparency and good faith (see *supra* para. 25).

36. In particular, in all cases in which an act of Public Administration can affect rights or interests of individuals, in order to be issued, the Administration is obliged to follow an administrative procedure in which the due process rules and rights must be respected, and in particular, the right to defense must be guaranteed.

37. This right to defense is part of the general due process clause found in Article 49 of the Constitution that is a guarantee not only before the courts but also regarding administrative actions, and is further completed, as mentioned, by the provision that declares administrative acts enacted in complete and absolute absence of any administrative procedure, as affected with absolute nullity, as seen in Article 19.4 of Organic Law on Administrative Procedures (see *infra* para. 107 ff.).

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[37] See Allan R. Brewer-Carías, "Los limites del poder discrecional de las autoridades administrativas," *loc. cit*., pp. 27-33. See the comments in Gustavo Urdaneta Troconis, "Notas sobre la distinción entre actos reglados y discrecionales y el control jurisdiccional sobre estos," in *Tendencias de la Jurisprudencia venezolana en materia contencioso administrativa*, Caracas 1986, pp. 395-399; Gabriel Ruan Santos*, El principio de la legalidad, la discrecionalidad.y las medidas administrativas*, Fundación de Estudios de Derecho Administrativo, FUNEDA, Caracas 1998.

38. The consequence of this constitutional principle, for instance, in an administrative procedure for reviewing an administrative act for its revocation, is that the previous hearing of the interested parties is a condition for the validity of the resulting revocation, inasmuch as it guarantees the fundamental right of the individual involved to defend himself and be heard. That is to say, the right to due process applies to all administrative action, and the Administration has always had a duty to initiate an administrative proceeding prior to issuing an act or measure that could affect rights or interests of an individual or corporation, so the latter is granted an opportunity to present his defense. The Political-Administrative Chamber of the Supreme Court of Justice, even prior to the 1999 Constitution, held in repeated rulings as follows:

> "Article 68 [equivalent to 49 of the Constitution of 1999] of our Constitution establishes that the right to a defense is an inalienable right in all stages and degrees of the proceeding, which has been interpreted by repeated rulings of this High Tribunal in its broadest form, extending to and including the right to be heard, to present allegations, to deny opposing arguments, to promote and present pertinent proofs, 'both in the proceeding constituting the administrative act as well as in administrative appeals allowed by Law to purge and cleanse such proceeding' (see ruling of the Political-Administrative Chamber of the Supreme Court of Justice dated May 8, 1991, '*Ganadería El Cantón'*)."
>
> In this context, the Administration has the duty to inform the interested parties of the opening of a proceeding – and especially so if it is a proceeding that could result in sanctions or encumbrances – so that before the final act is issued, the parties can have access to the file and therefore make the pertinent allegations and present appropriate evidence. This was established by the Political-Administrative Chamber in, among other decisions, the ruling dated Nov. 17, 1983, that provided: 'The right to a defense must be considered not just as the opportunity for the citizen who is sued or the assumed violator to make his allegations heard, but as the right to demand that the Government, before any sanctions are levied, complies with such acts and proceedings that allow him to know specifically the facts with which he is charged, the legal provisions applicable thereto, allow him to make, in a timely manner, the allegations discharging the same and to hear evidence in his favor. This perspective of the right to a defense is compa-

rable to that which in other States has been called as the principle of due process.'"[38]

39. In a ruling by the First Contentious Administrative Court dated May 15, 1996, it reads as follows:

> "[I]t must be affirmed that the right to a defense is inherent to any proceeding (either jurisdictional or administrative) where an individual is being judged. The rulings in this sense have been repeated, providing that the Administration must grant individuals whose subjective rights or legitimate interests may be harmed, a procedural opportunity to state their allegations and present the proofs that they deem pertinent; and the purpose of this duty on the part of the administrative bodies is to guarantee the individual's right to a defense, which is applicable not just to the judicial sphere, but also extends – as we have already stated – to the administrative sphere. Consequently, any administrative act whose effects are to extinguish, modify or vary any subjective right or qualified interest of individual parties, or those which levy sanctions or charges, *must have a previous proceeding* in order to be valid and effective, thereby allowing, even in an informal way, the exercise of the fundamental right to a defense which is held by all citizens as a civil right contained in the Constitution."[39]

40. These principles, as mentioned, have been restated by the provision of Article 49 of the 1999 Constitution, where the constitutional guaranty of due process of law and to self-defense was set as inviolable not only in all judicial processes but also in all administrative procedures; a guaranty that cannot be surpassed even by the Legislator itself.[40]

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[38] See Decision of the Political-Administrative Chamber of the Supreme Tribunal of Justice of October 8, 1996, in *Revista de Derecho Público*, Nos. 67-68, Editorial Jurídica Venezolana, Caracas 1996, p. 171.

[39] See *Revista de Derecho Público*, Nos. 65-66, Editorial Jurídica Venezolana, Caracas 1996, p. 156.

[40] For this reason, it has been because of the prevalence of the right to a defense that the Constitutional Chamber, following Constitutional doctrine established by the former Supreme Court, has no longer applied, for example, standards that allow the principle of *solve et repete* as a condition to have access to contentious-administrative courts, as it considers these to be unconstitutional. See Decision No. 321 of the Constitutional Chamber of the Supreme Tribunal of Justice of February

41. The Political and Administrative Chamber of the Supreme Tribunal of Justice set criteria on the interpretation and scope of Article 49 of the 1999 Constitution, stating:

> "[I]t is a complex right encompassing a group of guaranties that are expressed in a diversity of rights for the defendant, among which, the right to access justice, the right to be heard, the right to have an articulated proceeding, the right to the legal appeals, the right to a competent, independent and impartial Court, the right to obtain a resolution duly founded in law, the right to a process without groundless delays; the right to compulsory compliance with rulings, among others that the jurisprudence has been building. All these rights originate in the interpretation of the eight paragraphs of Article 49 of the Constitution. Such Article provides that due process of law is a right that applies to all actions either by the judiciary or the administration, provision that has its foundation in the principle of equality before the Law, since due process means that both parties to the administrative or judiciary act, must have equal opportunities both in the defense of their respective rights as in the production of those proofs to demonstrate them. In the same sense, the right to defense provided generally as a principle in Article 49 of the Constitution, adapted and accepted by repeated rulings in administrative matters, has been provided also multiple times in the Organic Law on Administrative Procedures, which, in various provisions, sets its sense and expressions. In this way there are other connected rights like the right to be heard, the right to be part of the proceeding, the right to be served, to access the file, to submit allegations and proofs and to be informed of the appeals and recourses available to exercise a proper defense."[41]

42. Similarly, the Constitutional Chamber, in its ruling No. 321 dated February 22, 2002 (Case of *Papeles Nacionales Flamingo, C.A. v. Dirección de Hacienda del Municipio Guacara del Estado Carabobo*), indicated that any restrictions on the right to a defense, being a fundamental

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22, 2002 (Case of *Papeles Nacionales Flamingo, C.A. v. Dirección de Hacienda del Municipio Guacara del Estado Carabobo*), in *Revista de Derecho Público*, Nos. 89-92, Editorial Jurídica Venezolana, Caracas 2002, pp. 142-143.

41 See Decision No. 2742 of the Political-Administrative Chamber of the Supreme Tribunal of Justice of November 20, 2001, available at http://www.tsj.gov.ve/decisiones/spa/Noviembre/02742-201101-15649.htm.

right, only come from the Constitution itself; and if the Legislator broadens the sphere of those restrictions, then they become illegitimate:

> "It must be noted that both Article 68 of the repealed Constitution as well as 49.1 of the current Constitution authorize the law to regulate the right to a defense, which regulation is found in the procedural code. This does not in any way mean that the scope of this right is available to the legislator, as this is clearly defined in the provisions noted; on the contrary, it implies a mandate to the legislative body to provide the adoption of mechanisms to assure the exercise of the right of defense by those who are charged, not just in the jurisdictional courts, but also in the governmental sphere, under the terms stated in our Constitution. As such, any limits on the right to a defense, as a fundamental right, come from the text of the Constitution, and if the Legislator extends or broadens the sphere of those limitations, then they become illegitimate; that is, the legal framework for restrictions of the exercise of a defense does not justify these limitations, but rather the degree to which they obey the Constitutional mandate."[42]

43. The right to a defense is therefore an absolute Constitutional right, stated by the Constitution as "uninfringeable" in all stages and degrees of the cause, both in judicial as well as in administrative proceedings, and it is a right held by every person, without distinction of any kind, individual or legal entity, and therefore cannot be subject to any exceptions or limitations.[43] This right "is a fundamental right protected by our Constitu-

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[42] See Decision No. 321 of the Constitutional Chamber of the Supreme Tribunal of Justice of February 22, 2002 (Case of *Papeles Nacionales Flamingo, C.A. v. Dirección de Hacienda del Municipio Guacara del Estado Carabobo*), in *Revista de Derecho Público*, Nos. 89-92, Editorial Jurídica Venezolana, Caracas 2002, pp. 142-143.

[43] The First Contentious-Administrative Court spoke to this in its Decision of August 15, 1997 (Case of *Telecomunicaciones Movilnet, C.A. v. Comisión Nacional de Telecomunicaciones (CONATEL)*), as follows: "The levying of sanctions, prohibitive measures or in general any kind of limitation or restriction on the subjective sphere of those administered without the opportunity to exercise their right to a defense, is inconceivable." See *Revista de Derecho Público,* Nos. 71-72, Caracas 1997, pp. 154-163.

tion, and as such cannot be suspended in the sphere of the rule of law, as it is one of the bases over which such concept is raised."[44]

44. Furthermore, the Constitutional Chamber of the Supreme Tribunal of Justice, after the 1999 Constitution became effective, has also insisted on the absolute and inviolable nature of the right to a defense. So, for example, we find Ruling No. 97 dated March 15, 2000 (*Agropecuaria Los Tres Rebeldes, C.A. v. Juzgado de Primera Instancia en lo Civil, Mercantil, Tránsito, Trabajo, Agrario, Penal, de Salvaguarda del Patrimonio Público de la Circunscripción Judicial del Estado Barinas*), in which the Chamber ruled:

> *"Due process* is the process that gathers all the indispensable guarantees that allow for effective judicial protection. This is the notion alluded to in Article 49 of the Constitution, when it declares that due process shall apply to all judicial and administrative actions.
>
> However, the Constitutional provision does not establish a specific type of process, but rather the need, regardless of the procedural venue selected for the defense of those rights or legitimate interests, for the procedural laws to guarantee the right of the defendant to a defense and the possibility for effective judicial protection."[45]

45. From this existence of due process rules derives the possibility for the parties to use the means or recourses provided in the legal framework to defend their rights and interests. Consequently, any failure to respect the rules of procedure which leads to the inability of the parties to use the mechanisms that guarantee their right to be heard results in a state of defenselessness and a violation of the right to due process and the right of the parties to a defense.

46. In administrative law, as a consequence of the general principle of due process, within the main principles governing administrative proce-

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[44] So established by the Political-Administrative Chamber of the former Supreme Court in its Sentence No. 572 of August 18, 1997 (Case of *Aerolíneas Venezolanas, S.A. (AVENSA) v. the Republic (Ministry of Transport and Communications)*), in *Revista de Derecho Público,* Nos. 71-72, Caracas 1997, p. 158 ss.

[45] See Decision No. 97 of the Constitutional Chamber of the Supreme Tribunal of Justice of March 15, 2000, available at http://www.tsj.gov.ve/decisiones/scon /Marzo/97-150300-00-0118.htm.

dures and the resulting administrative acts, is the principle of *audire alteram parte*, according to which no administrative act that may affect interests or rights of individuals can be ever issued in any way whatsoever without a previous hearing of the interested parties, allowing them to exercise their rights to be heard, to allege and produce proofs of its assertions. The right to be heard even on administrative procedures has a constitutional basis (Article 49.1), and has been imposed to be respected in all administrative procedures by precedents of the Supreme Tribunal. The Political Administrative Chamber of the Supreme Tribunal since 1985 has held on the subject as follows:

> "The right to be heard must be considered not only as the opportunity given to the individual who has presumably committed an infraction in order for its allegation to be heard, but as the right to request from the State to comply, before imposing a sanction, with a set of acts and procedures directed to allow the individual to know with precision the facts that are incriminated as well as the legal applicable provisions, to promptly allow him to allege in his defense and to present proofs in his favor. In this perspective, the right to be heard is equivalent to what is called in other Rule of Law States, as due process of law."[46]

47. To ensure such right to be heard, the Organic Law on Administrative Procedures provides for a series of correlated rights such as: to be served of any procedure that could affect subjective rights or legitimate, personal or direct interests of an individual (Article 48); to be heard and to have the opportunity to become a party at any moment in an administrative procedure (Article 23); to have access to the administrative files, and to inspect it and copy it (Article 59); to file proofs and to submit files (Articles 48 and 58); for the administrative act to formally have its motivation (Article 9); to be personally served of any act that could affect the rights and legitimate, personal and direct interests of the individual (Article 73); and to be informed of the legal means in order to exercise the right to appeal the act (Articles 73 and 77).

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[46] See Decision of Political-Administrative Chamber of the Supreme Court of Justice, Decision of November 17, 1983, in *Revista de Derecho Público*, No. 16, Caracas 1983, p. 151.

7. General Principles regarding Administrative Acts

48. Regarding Administrative Acts that are one of the results of administrative procedures, the main legal provisions regulating their formation, enactment and effects are contained in the Organic Law on Administrative Procedures was adopted in 1982 following the contemporary trends on the matter, which have been complemented with the provisions of the aforementioned the Organic Law on Public Administration, and those of the Law on Administrative Simplification Procedures of 1999.[47] The Organic Law on Administrative Procedures was mostly inspired in the 1958 Spanish Law on Administrative Procedure and, as in almost all Latin American countries,[48] contains a detailed regulation on administrative acts and their formal and substantive conditions of validity and efficacy; the process of their formation and enactment; the need to be formally and sufficiently motivated; and based on relevant facts that ought to be accredited and proved by the Administration, as well as correctly qualified by the Administration, without distorting them; the principle of irrevocability that governs their effects when declaring or creating rights in favor of individuals; the vices affecting them, and their review at administrative level by means of administrative appeal.[49]

49. The most important classification of administrative acts is according to their effects, basically referring to their addressees, between administrative acts of general effects and administrative acts of specific (particular) effects derived, which has even a constitutional basis (Article 259). The first category of administrative acts of general effects is referred to those acts of the Administration with normative contents that as such, are addressed to

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47 See Law on Administrative Simplification Procedures, *Official Gazette* No. 36.845 of December 7, 1999. See in Allan R. Brewer-Carías et al., *Ley Orgánica de Procedimiento Administrativos, loc cit.,* p. 199 ff.

48 See Allan R. Brewer-Carías, *Principios del Procedimiento Administrativo*, Editorial Civitas, Madrid 1990; Allan R. Brewer-Carías, *Principios del procedimiento Administrativo en América Latina*, Universidad del Rosario, Editorial Legis, Bogotá 2003, p. XL.I; "Principios Generales del Procedimiento Administrativo. Hacia un estándar continental," in Christian Steiner (Ed.), *Procedimiento y Justicia Administrativa en América Latina,* Konrad Adenauer Stiftung, n F. Konrad Adenauer, México 2009, pp. 163-199.

49 See Allan R. Brewer-Carías, *El derecho administrativo y la Ley Orgánica de Procedimientos Administrativos*, *Principios del Procedimiento Administrativo*, Editorial Jurídica Venezolana, Caracas 2009, p. 133 ff.

an undetermined and undeterminable group of persons. The most classical example of these administrative acts, are the Regulations that can be issued by Executive Decree or through Ministerial resolutions. The second category of administrative acts is referred to those of specific effects, addressed to one or a determinable group of people.[50]

50. In addition, according to their effects, administrative acts can be classified depending on their substantive contents, between those that contain a declaration, an ablation (*ablatorios*), a concession or an authorization.[51] Accordingly, declarative administrative acts are those that grant certitude to specific acts or facts, giving legal qualifications to facts, persons or legal relations. Within these acts are the registry acts, containing declarations of certainty or knowledge, and the certifications, through which the Administration certifies specific acts or facts accomplished by others. The ablation administrative acts are those through which the Administration deprives persons of some of their legal rights or interests, like those that deprive property rights (expropriations, confiscation) or the right to use property (requisitions); or deprive freedom (arrests, detentions); or those that impose obligations to give (fines) or to do (demolitions, for example). Administrative acts of concessions are, contrary to the ablation acts, those that amplify the subjective legal scope of individuals, so through them, a right is assigned to it as addressee, which it do not previously have. Generally, these acts are bilateral in nature, in the sense that they contain obligations that the concessionaire must accomplish (see *infra* paras. 150, 154). Finally, the Administrative acts of authorization are those allowing a person to exercise a pre-existent right he had, having the purpose of removing the existing legal obstacles preventing such exercise. This is the case of the administrative licenses, permits and authorizations, so common in contemporary administrative law, widely used by all Administrations according to the degree of intervention in private activities.

51. On the other hand, administrative acts can be classified according to the way in which the Administration expresses its will. The normal way to do it is in a formal express way, normally in writing, through a document that in some cases must even be published in the *Official Gazette*. But in other cases, the administrative act can be a tacit one, when a particular

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50 See Allan R. Brewer-Carías, *El control de la constitucionalidad de los actos estatales,* Editorial Jurídica Venezolana, Caracas 1977, p. 7 ff.

51 See, for example, Massimo Severo Giannini, *Diritto Amministrativo*, Giuffre, Milano 1970, Vol. II, p. 825 ff.

statute grants in an express way, specific effect to the administrative silence, or to the absence of express decision of the Administration in the legally prescribed term. Once the prescribed term elapses, the statutes can give to it positive effects, in the sense that it must be considered that what has been asked or petitioned has been granted; or negative effects, that is, to consider that once the term to decide has elapsed without a decision expressly adopted, the statute provides that the petition must be considered as rejected. This is generally established regarding petitions for authorizations.

52. In addition, as administrative acts are normally due to be expressed in writing (oral administrative acts are exceptional, like some police orders, for instance), being materialized in a signed Letter or a document, such texts, once signed by the competent public official, can also be considered as "public documents" in the terms of Article 1.357 of the Civil Code, provided that the public official signing them has the power to give public certainty (*fe pública*) to the facts or acts that he himself executes, or that he declares to have seen or to have heard, which normally occurs with the administrative acts of registry, or of certification; for instance, the Acts written to testify to some actions or facts, which on the other hand in such cases are the only means in order to prove the specific acts or facts. Regarding these administrative acts, the presumption of certitude that they have imposes on the Administration and the individuals the duty to sustain their content, unless it is proven that the declaration of the public official has been false or in error.

53. On the other hand, in particular, regarding the effects in time of administrative acts of specific effects, regarding their sustainability permanence in time or their irrevocability (firmness), the general principle set forth by the Organic Law on Administrative Procedures is that any administrative act of specific effects declaring or creating rights or interests in favor of individuals cannot be reviewed and revoked by the Administration, being the principle of revocation established only for administrative acts that do not create or declare rights (Article 82) **(see *infra* para. 59)**. The consequence of this principle of irrevocability of administrative acts that have created or declared rights or interests in favor of individuals is so firmly established by the Organic Law on Administrative Procedures that its Article 19.2 provides for the absolute nullity of administrative acts that decide on cases that have been previously decided in a definite way, creating individual rights, that is, that revoke previous administrative acts that have created rights or interests in favor of individuals. The consequence of an act affected of the sanction of absolute nullity, is that they are null and void pursuant to Article 83 of the

same the Organic Law on Administrative Procedures, and cannot produce any legal effect, allowing the Administration to recognize at any moment such absolute nullity.

54. On matters of administrative procedure, the Organic Law on Administrative Procedures provides for its duration, allowing the possibility of controlling the omissions or delays; the effects of administrative silence, whether originating from positive or negative tacit administrative acts **(see *infra* para. 120 ff.)**; the regulation of the different formal steps to be accomplished before the administrative act is enacted, safeguarding due process (access to administrative files, burden of proof, notices, appeals) **(see *supra* para. 35 ff.)**; the vices affecting administrative acts as null and void (manifest lack of attributions, absolute and total absence of a procedure, vices on the object, violation of the Constitution) **(see *infra* para. 98)**; and the means in order to execute administrative acts even in compulsory way, basically through fines.[52]

II. GENERAL PRINCIPLES REGARDING THE VALIDITY AND REVOCATION OF ADMINISTRATIVE ACTS

1. The "administrative res judicata" effects of administrative acts

55. Administrative acts produce effects, and are binding on the Public Administration upon due notice or publication thereof. If they create or declare subjective rights or interests in favor of individuals, and are final – namely, are not legally challengeable – they have the effects of administrative *res judicata* and cannot be revoked by the Administration, to the point that pursuant to Articley 19.2 of the Organic Law on Administrative Procedures, administrative acts are null and void "when they make a resolution on a case previously resolved as final that created individual rights."

56. Administrative acts are final when the periods legally provided for administrative or judicial challenge have elapsed and said acts have not been challenged.[53] Thus, there is no administrative *res judicata* if an admin-

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[52] See in general the jurisprudence about administrative acts in Caterina Balasso, *Jurisprudencia sobre Actos Administrativos (1980-1993)*, Editorial Jurídica Venezolana, Caracas 1998.

[53] See Allan R. Brewer-Carías, "Las condiciones de recurribilidad de los actos administrativos en la vía contencioso administrativa en el sistema venezolano," in *Pers-*

istrative act can still be challenged, since if there is still time to challenge it, an individual can bring out cause and the Administration can revoke the act. It is only after the periods provided for challenging a given act have elapsed that such an act is final, since it cannot be revoked and "causes *res judicata*," provided it is not affected by any vice that would bring about its absolute nullity and voidness.

57. Hence, pursuant to the aforementioned, for an administrative act to be final when it creates individual rights, and become administrative *res judicata*, namely, not being challengeable or revocable, the following conditions have to be met:

58. First, the administrative act ought to be specific – as opposed to general – since general administrative acts are essentially revisable and revocable. For general administrative acts (regulations), the Civil Code principle providing that laws are reversed by other laws applies (Article 7), so regulations are reversed by other regulations, without limitation. Hence a regulation, or a general administrative act, is never *final*.

59. Second, the administrative act must create or declare individual rights. If, in contrast, the act does not create or declare individual rights, it would never have the effect of *res judicata* and could always be reviewed and revoked by the Administration. As Article 82 of the Organic Law on Administrative Procedures provides:

> "Administrative acts that do not create subjective rights or legitimate and direct individual interests can be revoked at any time, in whole or in part, by the same authority who issued them, or by their respective hierarchal superior."

60. Third, the act ought to be final, namely, its lawfulness cannot be directly challenged either at the administrative or judicial level. The individual must be prohibited from bringing a challenge against it. It is from the moment that the act is final that it becomes administrative *res judicata* and non-revocable. If a challenge can still be brought against an administrative

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pectivas del Derecho Público en la segunda mitad del Siglo XX, Homenaje a Enrique Sayagüez Lazo, Vol. V, Instituto de Estudios de Administración Local, Madrid 1969, pp. 743-769, and in *Revista del Ministerio de Justicia*, No. 54, Year XIV, Caracas January-December 1966, pp. 83-112.

act, it is not possible to say there is *res judicata*; because if there is still time to bring a challenge, someone could do it and the act could be reviewed and revoked. It is only after the time legally given to challenge an act has elapsed that the act is final, cannot be reversed, and becomes *res judicata*.

61. Fourth, the act must be valid and effective, capable of creating or declaring individual rights, so that if the act is affected by absolute nullity, it is not capable of creating or declaring rights, being essentially revocable (Article 83 of the Organic Law on Administrative Procedures). That is to say, only acts that are legally valid and are not affected by vices that cause them to be absolutely null and void can be final, because if a given act has a vice of such magnitude, under Article 83 of the Organic Law on Administrative Procedures, the Administration can, at any time, either by request or by its own initiative, revoke it recognizing it to be null and void. That explains why *res judicata* only exists as for valid acts and, in any case, with respect of acts that are not affected by absolute nullity vices.

62. Like I have already said on other occasions:

> "[A] consequence of the non retroactivity of administrative acts principle is the general principle that the rights or subjective situations acquired or born from individual administrative acts cannot be later removed by other administrative acts. This is the general principle of intangibility of the situations born from individual acts, or of the irrevocability of administrative acts creating individual rights; a principle that has received legal receipt in administrative procedure acts throughout Latin America."[54]

63. In this sense, following the decision of the Political-Administrative Chamber of the Supreme Court issued on July 26, 1984, (Case of *Despachos Los Teques*), it results that:

> "… in first place, the final character (*firmeza*) of administrative acts is always traduced in the need of a finalist essence for the legal framework, both for the efficiency of the act and the legal protection of individuals; and in second place, that the Administration can and ought to declare the absolute nullity, by its own initiative, at any time, of

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[54] See Allan R. Brewer-Carías, *Principios del Procedimiento Administrativo*, Editorial Civitas, Madrid, 1990, p. 122.

> those acts that are against the law and are affected of absolute nullity; without prejudice that it can also do so regarding those acts with relative nullity vices that have not created vested rights."[55]

64. The consequence of the inclusion of these principles of *res judicata* in the Organic Law on Administrative Procedures, entailing the irrevocability of administrative acts creating individual rights, is that pursuant to its Article 19.2, those acts that resolve a situation previously decided by a final act that created individual rights, namely, those acts that revoke an irrevocable act, are absolutely null and void **(see *infra* para. 108 ff.)**.

65. These principles have been integrated into the precedents of the Supreme Court. In fact, in Judgment No. 154, pronounced on May 14, 1985 (Case of *Freddy Rojas Perez v. Unellez*), the Political-Administrative Chamber stated that:

> "One of such relevant exceptions concerns, precisely, to the case at hand. In fact, the administrative doctrine maintains, unanimously, that the Administration cannot go back on its steps and reverse its own acts when those have created some individual rights and that is because such reversal of acts creating individual rights would struggle with the intangibility of legal individual situations.
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> The irrevocability of acts declaring rights means – as Royo Villanova teaches – that the Administration, afterwards, cannot make another decision that contradicts the legal situation created by the first. Therefore, a pronouncement, even illegal, if not challenged in proper time and manner by the individuals or the own Administration, is final and not only cannot be revoked or reversed through an appeal, but cannot be so by another pronouncement issued by the Administration's initiative. "Such an act holds what has been called as formal and material force." (Antonio Royo Villanova: "Elementos de Derecho Administrativo," Librería Santarín, 1948, p. 119-121).

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[55] See *Revista de Derecho Público*, No. 19, Editorial Jurídica Venezolana, Caracas 1984, pp. 130-132. See also Allan R. Brewer-Carías and Luis Ortiz-Alvarez, *Las Grandes Decisiones de la Jurisprudencia Contencioso Administrativa (1961-1996),* Editorial Jurídica Venezolana, Caracas 1996, pp. 610-616; Caterina Balasso Tejera, *Jurisprudencia sobre los Actos Administrativos (1980-1993)*, Colección Jurisprudencia No. 7, Editorial Jurídica Venezolana, Caracas 1998, p. 853 ff.

> Likewise, the German administrative lawyer Fritz Fleiner, for whom the principles *quieta non movere* and good faith, are valid also for administrative authorities. "Sure enough – states – the possibility of having a pronouncement reversing the one that favors him, is a permanent threat for an individual. Consequently, the lawmaker had to think seriously on restraining the ability to reverse a pronouncement, taking into account those cases in which legal safety so required. So, then, the lawmaker has secured mostly the immutability of those pronouncements that create rights and duties" (Fritz Fleiner, "*Instituciones de Derecho Administrativo*," Editorial labor, Barcelona. p. 161. Similar opinion can be found in: Gascón y Marín, *Derecho Administrativo*, Edit. Bermejo, 1947, pp. 42-43; Jesús González Pérez, *Derecho Procesal Administrativo*, Instituto de Estudios Políticos, Madrid, 1960, pp. 858-862; and in domestic doctrine: Brewer-Carías, *Las Instituciones Fundamentales del Derecho Administrativo y la Jurisprudencia Venezolana*, Publicaciones de la Facultad de Derecho, U.C.V. 1964, p. 142).[56]

66. In another judgment, No. 1.033 dated May 11, 2000, the same Political-Administrative Chamber of the Supreme Tribunal stated that:

> "… administrative acts declaring individual rights, once final, because of elapsing of the terms for their challenge, become irrevocable even in those cases that they are affected by a vice that makes them subject to be annulled. Not so if they are absolutely null and void.
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> In this sense Margarita Beladiez Rojo, in her book "Validez y Eficacia de los Actos Administrativos," Editorial Marcial Pons, Madrid, 1994, asserting that the ideas of order and stability are in themselves incompatible, she considers convenient that a moment comes when situations that have been created, and for which some time has elapsed, consolidate and cannot be erased from the world of the Law, since otherwise the trust of citizens would be betrayed in a legal order that shows as certain and final situations that can be changed.

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[56] See *Revista de Derecho Público*, No. 23, Editorial Jurídica Venezolana, Caracas 1985, pp. 143-148. See also Caterina Balasso Tejera, *Jurisprudencia sobre los Actos Administrativos (1980-1993)*, Colección Jurisprudencia No. 7, Editorial Jurídica Venezolana, Caracas 1998, p. 813 and ss.

> So, in her words it is obvious that to allow indefinitely the possibility to declare acts unlawful, when these have created individual rights entails depriving the beneficiaries of the trust in certainty of situations declared by the Administration which, without doubt, encompasses an attack to the principle of legal safety and *res judicata* in the terms stated. Thus, as a way to harmonize the interest in keeping the effects produced by administrative acts with the interest in the lawfulness of administrative acts, the power to challenge them through proper appeals that allow the right to lawfulness to be effective has been restricted in timing, and once the terms for doing so have elapsed without anyone challenging the unlawful act, then the rest of the interested parties in the conservation of the act will have acquired the right for it to be preserved."[57]

67. The aforementioned principles, of course, condition the generally admitted Administration's review powers, which can only be exercised on individual administrative acts in those cases provided for by law and that satisfy legally established conditions.

2. Public Administrations auto control powers regarding administrative acts, its limits and the revocation of administrative acts

68. In fact, as a consequence of the legality principle ─ under which actions of the Administration must comply with the Law ─ the power of self review of the Administration is recognized in administrative law, which implies the power of the Public Administration not just to review and correct any errors it may have made in any of its administrative acts, but also ── in principle ── to revoke them when they are deemed illegal or contrary to the general interest. As the Political and Administrative Chamber has stated in the aforementioned decision No. 1033 dated May 11, 2000:

> "[A]mong the most important manifestations of self-tutelage of the Administration is, precisely, the power to revoke, which is no more than the ability to review and correct its administrative actions, and consequently, the power to extinguish administrative acts by adminis-

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[57] See Decision No. 01033 of the Political-Administrative Chamber of the Supreme Tribunal of Justice of May 11, 2000 (Case of *Aldo Ferro García v. la marca comercial KISS*), available at http://www.tsj.gov.ve/decisiones/spa/Mayo/01033-110500-13168.htm.

trative action."[58]

69. Thus, as a warranty arising from the duty the Administration has to further the general interest and the Law, this self-tutelage power implies that an unlawful pronouncement or a decision that is against the general interest could be – in principle – reviewed and revoked by the same administrative authority who adopted it. It can even be said that the most important outcome of the legality principle according to which administrative action ought to follow the Law, is the administrative ability to self-review and self-correct the mistakes it may have made.

70. However, since such power arises from what I have previously explained on the *res judicata* principle, that self-reviewing power is conditioned first by the intensity or seriousness of the alleged illegality as well as by the contents of the administrative act, specifically, whether it has created individual rights.[59]

71. Taking into account what has been said, as well as the provisions of the Organic Law on Administrative Procedures, this self-tutelage power has been widely treated by the judicial precedents, pointing out the intensity or seriousness of the illegality as a cause for its exercise. In this sense, the Political and Administrative Chamber of the former Supreme Court, in the aforementioned judgment pronounced on July 26, 1984 (*Despacho Los Teques, C.A* case) set forth the following criteria on the matter:

> "[F]or many years the pronouncements of this Court have recognized the existence of the so-called power of self-tutelage of the Public Administration, pursuant to which the competent bodies comprising it can and must revoke, ex officio and at any time, those acts which are contrary to the law and which are subject to absolute nullity; without prejudice to the fact that this is also applicable to acts issued by them which are subject to relative nullity and which have not led to the ac-

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[58] *Idem*, available at http://www.tsj.gov.ve/decisiones/spa/Mayo/01033-110500-13168.htm, also cited in Pronouncement No. 0072 by the same Political-Administrative Chamber of the Supreme Tribunal of Justice on January 22, 2009, File No. 1995-11643, available at http://www.tsj.gov.ve/decisiones/spa/Enero/00072-22109-2009-1995-11643.html.

[59] See in general, Allan R. Brewer-Carías, "Comentarios sobre la revocación de los actos administrativos," in *Revista de Derecho Público*, No. 4, Editorial Jurídica Venezolana, Caracas 1980, pp. 27-30.

> quisition of any rights. This power has been recognized as an attribute that is inherent to the Administration and not a "mere consequence" of the jurisdictional power, as noted in the judgment of this Court dated Nov. 2nd, 1967, where it was stated that 'the power of the administrative authority to act in this sense is part of the principle of self-tutelage of the Public Administration, which bestows it the power to revoke and amend administrative acts that in its opinion affect the merit or legality of cases heard by it ….'"[60]

72. Later, in Judgment No. 154 of the same Political and Administrative Chamber dated May 14, 1985 (Case of *Freddy Martin Rojas Perez v. Unellez*), it stated the following:

> "[T]he matter of the revocation powers of the Public Administration, its limitations and scope, has been studied abundantly by both domestic and international doctrine, and has been analyzed several times in the jurisdiction of this Supreme Tribunal. Both recognize, as a general principle the extinction of administrative acts, that the Administration has the ability to deprive administrative acts of their validity, either by its own initiative or by individual request of an interested party, and they point out, as the cause of such ability, reasons of legality when the act is affected by a vice that prevents it from been valid and lawful, and reasons of opportunity in the case of regulatory acts, since it is logical and convenient that the Administration is entitled to accommodate its actions to the changes and mutations of reality, taking in a given moment, those measures that it deems more appropriate for the general interest."[61]

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60 See *Revista de Derecho Público*, No. 19, Editorial Jurídica Venezolana, Caracas 1984, pp. 130-132. See also Allan R. Brewer-Carías and Luis Ortíz-Alvarez, *Las Grandes Decisiones de la Jurisprudencia Contencioso Administrativa (1961-1996),* Editorial Jurídica Venezolana, Caracas 1994, pp. 610-616; Caterina Balasso Tejera, *Jurisprudencia sobre los Actos Administrativos (1980-1993)*, *loc. cit*., p. 853 ff.

61 See *Revista de Derecho Público*, No. 23, Editorial Jurídica Venezolana, Caracas 1985, pp. 143-148. See also Allan R. Brewer-Carías and Luis Ortiz-Alvarez, *Las Grandes Decisiones de la Jurisprudencia Contencioso Administrativa*, Editorial Jurídica Venezolana, Caracas 1996, pp. 617-619; Decision No. 01033 of the Political-Administrative Chamber of the Supreme Tribunal of Justice of May 11, 2000 (Case of *Aldo Ferro Garcia v. la marca comercial Kiss*), available at http://www.tsj.gov.ve/decisiones/spa/Mayo/01033-110500-13168.htm.

73. In 2000, the Political and Administrative Chamber of the Supreme Tribunal also said about this subject the following:

> "Among the more important manifestations of the self review power of the Administration lies, precisely, in the revoking power, that is nothing more than the ability to review and correct its administrative actions and, as a way of consequence, the ability to extinguish its own acts by way of administrative action.
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> This power is regulated, in first place, in Article 82 of the Organic Law on Administrative Procedures, in the sense that administrative acts can be revoked at any time, in whole or in part, either by the same authority who adopted them or its hierarchal superior, if and when they do not create individual rights or legitimate, personal and direct interests, for a given person. In the latter cases the Law sanctioned with absolute nullity those acts resolving situations previously decided in a definitive way creating individual rights, unless expressly authorized by law.
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> However, if such express authorization does not exist, the general principle is that if an act creating individual rights is revoked, the revoking act is absolutely null and void; which implies the possibility of the Administration of recognizing — and of the individuals to request — at any point in time, for it to formally declare such nullity." [62]

74. More recently, in its decision of December 4, 2002, the Political-Administrative Chamber of the Supreme Tribunal of Justice provided that:

> "…the power of self-tutelage as a means to protect public interest and the principle of legality that governs administrative activity, includes both the possibility to review the factual and legal foundations of the administrative acts through a petition for administrative recourse, as well as ex officio at the initiative of the Administration itself.
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> This last possibility is provided in Chapter I of Title IV of the Organic

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[62] See Decision No. 01033 of the Political-Administrative Chamber of the Supreme Tribunal of Justice of May 11, 2000 (Case of *Aldo Ferro Garcia v. la marca comercial KISS*), available at http://www.tsj.gov.ve/decisiones/spa/Mayo/01033-110500-13168.htm.

Law of Administrative Procedures, '*Ex Officio Review*,' which establishes the form and the scope of the power of the Administration for the ex officio review of its acts.

Thus, pursuant to the law, the power to conduct ex officio reviews in turn includes several specific powers, recognized both by doctrine as well as by the country's jurisprudence, to wit: the power to validate, the power to rectify, the power to revoke and the power to annul, as provided in Articles 81 to 84 of the Organic Administrative Procedures Act – each of them with special requirements and different scopes.

The purpose of the first two is to preserve administrative acts that are affected by slight irregularities that do not make them subject to absolute nullity, and that can be cured, allowing the administrative act to stand and with it the completion of the public purpose for which it was issued as an act of this nature.

The purpose of the last two, which deal with the declaration of either the relative or absolute nullity of the act, with no need for the assistance of the courts, is to protect the principle of legality that governs all administrative activities.

Now then, these two powers, to revoke and to annul, are differentiated by the conditions for their application. The power to revoke is used in some cases for reason of merit or opportunity when required by the public interest, as well as in cases of acts that are affected by relative nullity, **if they have not created subjective rights or personal, legitimate and direct interests for an individual**; while the power to annul does not distinguish between acts that create rights and those that do not grant a personal right or interest, inasmuch as these apply only in cases of acts that are subject to absolute nullity.

This being the case, the Administration, when reviewing an act that generated rights or interests for any individual, must analyze and determine the irregularity with the greatest care possible, because any declaration annulling an act that is not subject to absolute nullity would be tantamount to sacrificing the stability of the legal situation created or recognized by the act, and therefore the principle of legal security – essential and necessary for any legal order – in exchange for a flaw that does not represent a major problem.

> As such, the stability of administrative acts and the principle of legal security that are part of the legal order, could be waived only in the face of grave threat to another principle that is not less important, the principle of legality, which would be affected by the permanence of a seriously flawed act" (underlining and bold print added).[63]

75. In yet another more recent decision, No. 72 dated January 22, 2009, the same Chamber of the Supreme Tribunal has ratified such principles, stating what follows:

> "Like this Chamber has stated in judgment No. 01033 dated May 11, 2000, among the more important manifestations of the self-review power of the Administration lies, precisely, in the revoking power, that is nothing more than the ability to review and correct its administrative actions and, as a way of consequence, the ability to extinguish its own administrative acts at administrative level.
>
> This power is regulated, in first place, in article 82 of Organic Law on Administrative Procedures, in the sense that administrative acts can be revoked at any time, in whole or in part, either by the same authority who adopted them or its hierarchal superior, if and when they do not create individual rights or legitimate, personal and direct interests, for a given person. In the latter cases the Law absolutely prohibited the possibility for the Administration to revoke such acts creating individual rights, unless expressly authorized by law. For such reason article 19, 2 of Organic Law on Administrative Procedures sanctioned with absolute nullity those acts deciding situations previously resolved as final and that have created individual rights in favor of individuals.
>
> On the other hand, the power to revoke is provided for by article 83 *ejusdem*, which authorizes the Administration, at any given time and either by its own initiative or through individual petition, to recognize absolute nullity of acts previously issued. The Law provides that those acts creating individual rights cannot be revoked, but an act that is affected be vices of absolute nullity — at an administrative level — is

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63 See Decision No. 01388 of the Political-Administrative Chamber of the Supreme Tribunal of Justice of December 4, 2002 (Case of *Iván Darío Badell v. Fiscal General de la República*), available at http://www.tsj.gov.ve/decisiones/spa/Diciembre/01388-041202-0516.htm.

not susceptible of creating rights.

Notwithstanding, although article 83 of Organic Law on Administrative Procedures provides for the possibility to review previously issued administrative acts at any given time, either by its own initiative or through individual petition, such review power must be exercised if and when some of the vices resulting in absolute nullity provided for by article 19 of Organic Law on Administrative Procedures, occurs."[64]

76. The scope of the power of self-tutelage varies, as it has been already said, principally pursuant to two criteria: the first, related to the intensity or seriousness of the illegality and the second, related to the content of the act, and in particular whether it has created individual rights. Consequently, like it results from the judgment cited above, regarding the different situations where the administrative power of self-tutelage may be exercised, this is allowed for reasons of merit as well as legality, and in this last case the difference between flaws that would cause absolute nullity and those that would cause relative nullity must be established, as well as whether or not there are any vested rights as proclaimed by or deriving from the administrative act.

3. Principles related to Public Administration revocation powers regarding administrative acts

A. The revocation of administrative acts due to reasons of merit

77. Article 82 of the Organic Law on Administrative Procedures provides for a broad power of the Administration to revoke administrative acts, both for merit reasons and legality, at any point in time, as long as they have not created individual rights. Conversely, when an administrative act creates individual rights, the same the Organic Law on Administrative Procedures is categorical in prohibiting their revocation. Such administrative acts cannot be revoked by the Administration for reasons of merit.

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64 See Decision No. 72 by the same Political-Administrative Chamber of the Supreme Tribunal of Justice of January 22, 2009 (Case of *Aldo Ferro García*), available at http://www.tsj.gov.ve/decisiones/spa/Enero/00072-22109-2009-1995-11643.html.

78. It has so been held by the Political and Administrative Chamber of the Supreme Tribunal of Justice in its Decision No. 01033 dated May 11, 2000, when it stated:

> "[T]he Administration's power to revoke is limited to acts that do not create or declare rights in favor of individuals: as acts that do create or declare rights, once final, cannot be revoked for reasons of merit to the detriment of those in favor of which were granted by the Administration."[65]

79. The same Chamber of the Supreme Tribunal of Justice, in its judgment No. 01388 dated Dec. 4, 2002, has held:

> "[T]he power to revoke is used in some cases for reasons of merit or opportunity when it is required for reasons of public interest, and also in cases of acts which are subject to relative nullity, if they have not created subjective rights or personal, legitimate and direct interests for an individual." [66]

80. In my comments on the Organic Law on Administrative Procedures published shortly after its enactment in 1992, I stated that:

> "If the act does not create rights in favor of individuals, it is essentially revocable; the Administration can revoke it at any time, for any reason, as established in Article 82 of the Law (of Administrative Procedures). However, if it is a permanent act that creates legitimate interests and rights in favor of individuals, the act cannot be revoked by the Administration, pursuant to Article 19.2 of the Law. Still, this principle has some mitigations: the Administration cannot revoke it for reasons of opportunity and convenience, i.e. for reasons of merit,

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65 See Decision No. 01033 of the Political-Administrative Chamber of the Supreme Tribunal of Justice of May 11, 2000 (Case of *Aldo Ferro Garcia v. la marca comercial KISS*), available at http://www.tsj.gov.ve/decisiones/spa/Mayo/01033-110500-13168.htm.

66 See Decision No. 01388 of the Political-Administrative Chamber of the Supreme Tribunal of Justice of December 4, 2002 (Case of *Iván Darío Badell v. Fiscal General de la República*), available at http://www.tsj.gov.ve/decisiones/spa/Diciembre/01388-041202-0516.htm.

at any time.…"[67]

81. On his part, Professor Eloy Lares Martínez on the same subject held that:

> "… individual administrative acts that grant rights and which are judicially regular, are intangible, except under express provisions of the Law. Therefore, in the case of a regular administrative act which creates or gives rights to certain parties, the Administration has no discretionary power to revoke it for reasons of merit, or opportunity, unless that power is expressly granted to it in the text of the law, in which case it can be exercised only subject to the procedural norms and forms provided in the legal text."[68]

82. The fundamental doctrine on the revocation of administrative acts and its limits can be found in the judgment of the Political and Administrative Chamber entered on May 14, 1985, (Case of *Freddy Martín Rojas Pérez v. UNELLEZ*) where, after interpreting the provisions of the Organic Law on Administrative Procedures, set the following principles:

> 1. It recognizes, as a general principle, the power of self-tutelage of the Public Administration, according to which the bodies comprising the Administration can revoke acts that they previously produced (Article 82).
>
> 2. It specifies that such revocation, ex officio or upon petition, is allowable at any time when its acts are affected by absolute nullity (Article 83).
>
> 3. It clearly and categorically states the flaws, in detail, which could cause the absolute nullity of the administrative act (Article 19).
>
> 4. It determines that, outside of the specific flaws indicated for absolutely nullity, all other irregularities which may be present in the administrative act affect only its relative nullity (Article 20).

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67 See Allan R. Brewer Carías, *El Derecho Administrativo y la Ley Orgánica de Procedimientos Administrativos, Principios del Procedimiento Administrativo*, Editorial Jurídica Venezolana, Caracas 2009, p. 223.

68 See Eloy Lares Martínez, *Manual de Derecho Administrativo,* Universidad Central de Venezuela, Caracas 1983, p. 216.

5. It establishes that acts affected by causes for relative nullity can also be revoked at any time by the Administration (Article 82).

6. It exempts from the possibility of revocation, administrative acts that are subject to relative nullity from which individual rights or legitimate, personal and direct interests arise (Article 82).

7. It clarifies that administrative acts that are affected by vices of relative nullity – namely, that can be annulled – if they create rights in favor of individuals and are final (as the periods of time allowed for executive action or jurisdictional appeal have lapsed), cannot be revoked by the Administration and if they are indeed revoked, then the act of revocation is affected of absolute nullity (Articles 11, 19.2 and 82)."[69]

B. Principles regarding compensation in cases of revocation of non revocable administrative acts

83. The consequence of the aforementioned principles is that if the Public Administration, for reasons of public order or interest, notwithstanding the prohibition to do so, revokes administrative acts creating individual rights, against res judicata, that would be the same as to expropriate the rights created by the act and would give rise to the obligation to pay just compensation for the damages caused to the interested individuals.

84. Therefore, even though the regulation in the Organic Law on Administrative Procedures is extreme, in the sense that it establishes an absolute prohibition against revoking those acts that create individual rights, punishing such revocation with absolute nullity, if the Administration nevertheless revokes for reasons of public order or public interest, it would have to pay compensation and damages caused by the revocation. Moreover this is the general trend in Latin American legislation, where revocation of administrative acts creating individual rights is admitted as an exception, when accompanied

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[69] See *Gaceta Forense*, No. 128, Vol. I, Caracas 1985, pp. 299-318. See also Allan R. Brewer-Carías and Luis Ortiz-Alvarez, *Las Grandes Decisiones de la Jurisprudencia Contencioso Administrativa (1961-1996)*, Editorial Jurídica Venezolana, Caracas 1996, pp. 617-619; See Decision No. 01033 of the Political-Administrative Chamber of the Supreme Tribunal of Justice of May 11, 2000 (Case of *Aldo Ferro García v. la marca comercial KISS*), available at http://www.tsj.gov.ve/decisiones/spa/Mayo/01033-110500-13168.htm.

by compensatory payment. It is so provided, for instance, in the Administrative Procedure Acts of Argentina, (Art. 18), Perú (Art. 205) and Costa Rica (Art. 155), the latter going even further stating that if the revocatory act does not recognize and calculate the total amount to be paid, then it would be absolutely null and void (Art. 155.1). In Honduras, the Administrative Procedure Act expressly provides that revocation of an administrative act only results in payment of compensation when it is so provided by law (Art. 123).[70]

85. In Venezuela, also, according to the general principle of absolute nullity affecting the administrative acts revoking others that had created or declared individual rights (Art. 19.2 of the Organic Law on Administrative Procedures), the only way in which such nullity would not occur would be if the former encompassed compensation for the extinction of the right and, evidently, with the proper reasoning related to public interest.

86. Thus, even when acts create individual rights they can be revoked by the Administration upon payment of compensation, because the Administration's power to make public interest prevail over private interest cannot be stopped. Likewise, the Administration can expropriate any kind of goods or rights if public interest so dictates, this can also by applied by analogy in these cases. The purpose of the legal provisions in Venezuela is to protect private individuals against arbitrary behavior of the Administration in revoking without proper motivation its acts, but this cannot be interpreted in the sense as to impair the Administration's power to revoke administrative acts even if they have created individual rights, substituting the individual's right created by the revoked acts, by the right to be compensated for the lost suffered with the revocation.

87. Spanish doctrine (García de Enterría and Fernandez) holds the same criteria regarding the revocation of acts that create individual rights for mere considerations of merit, stating as follows:

> "An act declaring individual rights in favor of an administered party that shows no flaws in its issuing, cannot be revoked ex officio by the Administration, under the pretext that the act has at a given time be-

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[70] See Allan R. Brewer-Carías, *Principios del Procedimiento Administrativo en América Latina*, Universidad del Rosario, Bogotá 2003, pp, XXXVIII-XLII.

come untimely or inconvenient."[71]

88. However, authors cited above hold that such principle might be too rigid, and therefore propose:

> "a balanced solution that would guarantee both the public interest as well as that of individuals, would be to allow revocation simply for reasons of timeliness or convenience, conditioned nonetheless on the recognition and payment of adequate compensation caused by the loss of the rights bestowed by the act revoked."[72]

89. Nevertheless, they point out that to be viable such solution requires a provision allowing revocation for merit reasons, which in any event shall recognize the rights of the affected individuals to receive compensation, pursuant to the principle of administrative responsibility for individual sacrifice or the loss of equality in the presence of public burdens.[73]

90. In conclusion, only administrative acts of general effects and individual administrative acts that do not create or declare subjective rights in favor of an individual are revocable for reasons of merit or convenience. Exceptionally, the Administration can revoke administrative acts that create rights, for reasons of merit or timeliness, only when expressly authorized by a provision of law, in which case the individual with the right shall be paid the corresponding compensation.

91. This has been expressly admitted by the Political-Administrative Chamber of the Supreme Tribunal of Justice in its pronouncement dated May 11, 2005, where it held that:

> "…the power to declare nullity is provided by Article 83 ejusdem, when authorizing the Administration, at any time, ex officio or upon petition, to recognize the absolute nullity of acts dictated by it. The Law provides for the irrevocability of administrative acts creating individual rights in favor of individuals, but an act which is absolutely null – in administrative level – cannot create rights.

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71 See Eduardo García de Enterría and Tomás-Ramón Fernández, *Curso de Derecho Administrativo*, Vol. I, 6th Ed., Editorial Civitas, Madrid 1993, p. 637.

72 *Idem* p. 637.

73 *Idem*.

> The fundamental consequence of this principle is that the revocation or suspension of effects of an administrative act creating or declaring individual rights in a way not authorized by the legal order, gives such individuals the right to be compensated for harm and damages caused by the revocation or suspension of the effects of the act."[74]

C. Principles on the revocation of administrative acts due to reasons of illegality

92. When an administrative act infringes the legal order but does not create individual rights, then it can be revoked at any time, regardless of the seriousness of the flaw that affects its validity. On the contrary, as stated above, administrative acts that are final and generate subjective rights or legitimate interests, can be revoked only if the illegality that affects them also makes it subject to absolute nullity.[75] And if the irregularity incurred by the Administration is a cause only for annulment (relative nullity) of the act, then when it becomes final, revocation cannot take place, because it would harm the rights of the individuals.

93. Thus, administrative acts that are final and create individual rights, can only be revoked if they are flawed by a cause of absolute nullity, upon compliance with the formalities of due process. As for the rest, the general principles of self tutelage pursuant to the Articles 81 to 83 of the Organic Law on Administrative Procedures that regulate the power of the Administration to review, amend and revoke its acts, apply:

94. First, administrative acts that do not create individual rights can be revoked at any time, in whole or in part, by the same authority issuing them or by the respective superior authority (Article 82). It is irrelevant

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[74] See Decision No. 01033 of the Political-Administrative Chamber of the Supreme Tribunal of Justice of May 11, 2000 (Case of *Aldo Ferro García v. la marca comercial KISS*), available at http://www.tsj.gov.ve/decisiones/spa/Mayo/01033-110500-13168.htm.

[75] See, in general, on the nullity of administrative acts, Allan R. Brewer-Carías, "Comentarios sobre las nulidades de los actos administrativos," in *Revista de Derecho Público*, No. 1, Caracas 1980, pp. 45-50. The jurisprudence on the matter can be consulted in Allan R. Brewer-Carías, *Jurisprudencia de la Corte Suprema 1930-1974 y Estudios de Derecho Administrativo*, Vol. III, Caracas 1976, p. 348 ff.; Caterina Balasso Tejera, *Jurisprudencia sobre Actos Administrativos (1980-1993)*, Caracas 1998, pp. 796-800.

whether the act is affected by any ground for relative or absolute nullity, and the Public Administration can exercise its power of self-tutelage to correct, validate or revoke it, because there is no direct effect on any individual rights or interests.

95. Second, as for acts that create individual rights, the power of self-tutelage is restricted, precisely to protect those subjective rights or legitimate interests already created; in those cases, the Public Administration would be able to revoke only administrative acts that are subject to absolute nullity (Article 83).

96. The Political-Administrative Chamber of the Supreme Tribunal of Justice has discussed the matter in judgment dated May 11, 2000, stating:

> "[A]lthough Article 83 of the Organic Law on Administrative Procedures provides the possibility to review any time by petition or its own initiative, administrative acts, such power must be exercised if and only if some of the flaws of absolute nullity pursuant to Article 19 of the Organic Law on Administrative Procedures are detected." [76]

97. And such Political-Administrative Chamber further concluded, in the same judgment that:

> "… in the first place, the stability of administrative acts is always traduced in a finalist essence to the legal framework, both for the validity of the act and legal safety of the individuals, and in the second place, the Administration can and must, at any time, declare null and void such acts that are contrary to law when affected by absolutely nullity; without prejudice that it may also do so with such acts that are relatively null but did not create individual rights."[77]

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[76] See Decision No. 01033 of the Political-Administrative Chamber of the Supreme Tribunal of Justice of May 11, 2000 of May 11, 2000 (Case of *Aldo Ferro García v. la marca comercial KISS*), available at http://www.tsj.gov.ve/decisiones/spa/Mayo/01033-110500-13168.htm.

[77] See Decision No. 01033 of the Political-Administrative Chamber of the Supreme Tribunal of Justice of May 11, 2000 (Case of *Aldo Ferro García v. la marca comercial KISS*), available at http://www.tsj.gov.ve/decisiones/spa/Mayo/01033-110500-13168.htm.

4. The absolute nullity vices of administrative acts

98. It results from the aforementioned that the distinction among flaws of absolute or relative nullity is essential to understanding the limitations of the Administration's self review powers. Like the Political-Administrative Chamber of the former Supreme Court of Justice use to point out (in the leading and already cited pronouncement dated July 26, 1984 (Case of *Despacho Los Teques*):

> "Long before the Organic Law on Administrative Procedures was sanctioned, the precedents of this Court had taken on the doctrinal thesis that distinguishes the cases of absolute or radical nullity from the cases of relative nullity or annulment, in relation to those situations of unlawfulness of administrative acts. In that sense we can mention a judgment of the former Federal and Cassation Court, in Federal Chamber, dated Dec-11-1935, in which the tribunal clearly assumed such distinction and … indicated that '…radical nullity or the inexistence of an act does not disappear with time, nor by any act of confirming, ratifying or willful completion, since inexistence amounts to nothing, not being, and over that there is no human possibility to create anything….'(omissis)
>
> This jurisprudential situation was reflected in the administrative law doctrine. Thus, we find that two qualified Venezuelan scholars of this discipline, as are Eloy Lares Martínez and Allan Brewer Carías, revealed with amplitude the difference among both situations and their legal consequences, in their works published prior to the passing of the cited Organic Law …."[78]

99. Now, in Venezuela, the principle is that absolute nullity of administrative acts only occurs in the events expressly listed by Article 19 of the Organic Law on Administrative Procedures. In all other situations the acts are only considered subject to annulment (Article 20). Those flaws of absolute nullity are described as the more serious consequences of flawed

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[78] See *Revista de Derecho Público*, No. 19, Editorial Jurídica Venezolana, Caracas 1984, pp. 130-132. See also Allan R. Brewer-Carías and Luis Ortiz-Alvarez, *Las Grandes Decisiones de la Jurisprudencia Contencioso Administrativa (1961-1996)*, Editorial Jurídica Venezolana, Caracas 1996, pp. 610-616; Caterina Balasso Tejera, *Jurisprudencia sobre Actos Administrativos (1980-1993), loc. cit*., p. 853 ff.

administrative acts, and prevent these acts from having any effects of any kind, as the act, deemed absolutely null, cannot be understood as ever issued. Consequently, doctrine speaks in these situations about flaws of public order, and sometimes qualifies administrative acts that absolutely null and void as non-existent.

100. In any event, since administrative acts that are absolutely null and void cannot validly create individual rights, Article 83 of the Organic Law on Administrative Procedures provides that "[t]he Administration can, at any time, ex officio or upon petition, recognize the absolute nullity of the acts issued by her." Therefore, administrative acts affected by a flaw of absolute nullity can be revoked at any time, even when their purpose was to create rights within the legal sphere of an individual, since such right is not considered to be validly acquired as it arises from an administrative act that is affected by one of the serious flaws for absolute nullity.

A. Absolute nullity cases in the Organic Law on Administrative Procedures

101. Following the trend of other Latin American administrative procure laws,[79] Venezuela's the Organic Law on Administrative Procedures also assumed the system of *numerus clausus* listing the set of circumstances under which administrative acts are to be considered absolutely null and void. Article 19 of the Law provides that "Acts by the Administration are absolutely null" in the following situations:

> 1. When it is so expressly determined by a constitutional or legal provision;
>
> 2. When they resolve a situation previously decided as final that created individual rights, except as expressly authorized by law.
>
> 3. When implementation of its content is illegal or impossible; and
>
> 4. When the authorities issuing the act were manifestly incom-

[79] See Allan R. Brewer-Carías, *Principios del Procedimiento Administrativo en América Latina*, Ed. Legis, Bogotá 2003, pp. 246-251.

petent, or when acting in the complete and absolute absence of established legal procedure.

102. Pursuant to such provision, then, absolute nullity accrues only in the circumstances listed, namely: In the *first place*, an act would be flawed with absolute nullity *when it so expressly provided by a constitutional* or legal provision (Article 19.1). As such, in the first situation listed, either the Constitution or a Statute must expressly and specifically provide that the consequence of the violation of a given provision is absolute nullity, as it happens for example, when acts violate constitutional rights and guarantees or when acts are dictated by a party usurping public authority or functions. In such situations, Articles 25 and 138 of the Constitution expressly provide that acts that violate or infringe constitutional rights or guarantees or that are dictated usurping public authority or functions, or issued as a result of the direct or indirect threat of force, are all null and void. This nullity prescribed in constitutional provisions is doubtless an absolute nullity, and the acts so affected are therefore without legal effect. Special laws, on the other hand, have similar provisions whereby they prescribe that certain acts contrary to them are null and void. This is the case, for instance, of the Organic Law on Land Use Planning, when providing that "authorizations for land use given in violation of the plans are null" (Article 66). The nullity established in these cases would also be an absolute nullity.

103. In the *second place*, another situation of absolute nullity, pursuant to Article 19.2 of the Organic Law on Administrative Procedures, is when a given administrative act violates administrative *res judicata*. As the provision states: "if and when they resolve a previous case that was decided as final and that created individual rights, unless expressly authorized by Law. As such, the act revoking a previous final administrative act that created or declared individual rights is absolutely null, except when that revocation is expressly authorized by law.

104. The *third* situation of absolute nullity provided for by Article 19.3 of the Law, is a flaw in the content, when completion or implementation of the content of a given administrative act is impossible or illegal.

105. And in the *fourth place,* Article 19.4 provides for the flaw of manifest incompetence, with respect to which the former Supreme Court of Justice, in a pronouncement issued on October 19, 1989, stated that it encompassed three situations, namely, "the so-called usurpation of authority,

usurpation of public functions, and exceeding one's powers,"[80] stating the following criteria:

> "Usurpation of authority occurs when a resolution is dictated by somebody who has not been invested with absolutely any powers of public office. This flaw is sanctioned by absolute nullity of the resolution, pursuant to Article 119 of the National Constitution.
>
> Usurpation of public functions includes the situation when a determined administrative body with public powers exercises public powers that are attributed to a different Branch of the Government.
>
> Finally exceeding one's authority basically consists of the performance by an administrative authority of an action for which it has no express legal jurisdiction.
>
> All resolutions dictated by an incompetent authority are flawed. However, the flaw of incompetence attached thereto does not necessarily cause the absolute nullity of the resolution, as pursuant to the terms of Ordinal No. 4 of Article 19, the incompetence must be manifest. Therefore, if the incompetence is 'manifest,' namely notorious and obvious, so that without an excessive interpretative effort it is possible to realize that another entity is the one authorized to issue it, or when it can be determined that the entity issuing the resolution was not authorized to do so, then that resolution would be absolutely null (Ordinal No. 4, Article 19 of the Organic Administrative Procedures Act). If the incompetence is not manifest, then it would be subject to relative nullity (Article 20, *ejusdem*).
>
> In summary, it can be said that usurpation of authority determines the absolute nullity of the resolution, pursuant to the terms of Article 119 of the National Constitution; however, usurpation of public functions and exceeding one's powers do not always cause absolute nullity of the issued act, since that will depend on the notoriety or obviousness

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80 See Allan R. Brewer-Carías, "Consideraciones sobre la ilegalidad de los actos administrativos en el derecho venezolano," in *Revista de Administración Pública*, Instituto de Estudios Políticos, No. 43, Madrid 1964, pp. 427-456, and in *Revista del Colegio de Abogados del Distrito Federal*, No. 127-128, Caracas January-December 1964, pp. 19-61.

of the impersonation of the action."[81.]

106. In the *fifth place*, we have the flaw of complete and absolute absence of the legally prescribed procedure (Art. 19.4 of the same the Organic Law on Administrative Procedures).

107. Only these five circumstances cited lead to absolute nullity and no other flaw of administrative acts can result in absolute nullity, and therefore, to the possibility of the act so flawed in being revoked. As the Political and Administrative Chamber of the Supreme Tribunal has stated:

> "[T]he revocatory powers of the administration are limited to those acts that do not create or declare rights in favor of individuals, since when the acts are final and create or declare individual rights, they cannot be revoked by the administration to their prejudice for reasons of merit or illegality and, exceptionally the Administration can declare their nullity but only for reasons of illegality, which is, if the act is flawed by absolute nullity, regardless if the individual benefited by it (by mistake) believes his rights have been infringed."[82]

B. The absolute nullity vice of administrative acts due to violation of administrative res judicata principle

108. As noted before, pursuant to Article 19.2 of the Organic Law on Administrative Procedures, an administrative act is null and void when it violates administrative *res judicata*, namely, "when it resolves on a case previously decided as final that created individual rights, unless otherwise expressly authorized by law."

109. Therefore, the administrative act that revokes a previous final act that created or declared rights in favor of individual parties is absolutely null and void. As the Supreme Court of Justice has recognized when referring to the power of administrative self-tutelage, although this is regu-

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81 See Decision of the Political-Administrative Chamber of October 19, 1989, in *Revista de Derecho Público*, No. 40, Caracas 1989, pp. 85-86, and in Caterina Balasso Tejera, *Jurisprudencia sobre Actos Administrativos*, *op cit.*, p. 656.

82 See Decision No. 01033 of the Political-Administrative Chamber of the Supreme Tribunal of Justice of May 11, 2000 (Case of *Aldo Ferro García v. la marca comercial KISS*), available at http://www.tsj.gov.ve/decisiones/spa/Mayo/01033-110500-13168.htm.

lated by Article 82 of the Organic Law on Administrative Procedures in the sense that administrative acts can be revoked at any time, in whole or in part, either by the same authority that issued the act or its superior, if and only if it does not create subjective rights or legitimate personal and direct interests for an individual, such Law:

> "… prohibited, in absolute terms, the possibility for the Administration to revoke administrative acts that created rights in favor of individuals, unless expressly authorized otherwise by law. For this reason ordinal 2 of Article 19 of the cited Law [OLAP] punished as absolutely null those acts that resolved situations that had previously been decided as final, and that created rights in favor of individuals, unless otherwise expressly authorized by Law.
>
> Now, if there is no such express authorization, then the governing principle will be the general principle that if an act creating subjective rights for an individual is revoked, that act of revocation will be flawed by absolute nullity, which would imply the possibility of the Administration recognizing, and of the interested parties requesting, at any time, that the act be declared as null."[83]

5. The revocation of administrative acts due to non-compliance of obligations regarding their execution

110. Pursuant to the provisions of the Law, the power to revoke can be exercised by the Public Administration as a mechanism to impose sanctions when there is a failure by the party benefitting from the act, to comply with the obligations deriving from it.

111. This is particularly relevant in cases where there are administrative acts whose execution involves obligations to do or to give, on the part of the individual person or entity to which the act is directed. Those duties must be expressly set in the administrative act at hand, or in the statute or regulation that governs the issuance of the act. In any event, the precedents of the contentious administrative courts have recognized the validity of revoca-

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[83] See Decision No. 01033 of the Political-Administrative Chamber of the Supreme Tribunal of Justice of May 11, 2000 (Case of *Aldo Ferro García v. la marca comercial KISS*), available at http://www.tsj.gov.ve/decisiones/spa/Mayo/01033-110500-13168.htm.

tion of administrative acts for failure to comply with an obligation deriving from said acts, if and when all formalities of due process have been met. The Political-Administrative Chamber of the Supreme Court referred to this in its ruling dated July 13, 2005, stating:

> "…the criteria of this Chamber, according to which the right to defense must be granted to the holder of a public service concession, through the initiation of an administrative proceeding, when there is an attempt to revoke that concession for reasons of serious breach or failure; notwithstanding, this decision also shows that the collective interest that causes this type of contracting is preeminent over the individual interest of the Administration's co-contractor."[84]

112. In these cases where the revoking act is issued as a penalty for the failure to comply with some duties, the need for a previous administrative procedure is equally a required condition for the validity of the revoking act. Failure to comply is a factual situation that must be presumably alleged as the fault of the individual, who has to be granted throughout the procedure his right to be heard and to be presumed innocent, with all the guarantees secured by Article 49 of the Constitution, allowing him to defend himself as he deems appropriate to protect his rights and interests.

113. In the cases, for instance, provided in Article 98 of the Mining Law referring to the powers of the Administration to declare the termination (*caducidad*) of mining concessions **(see *infra* para. 200 ff.)**, although not being a classical revocation of administrative acts due to the bilateral character of concessions, being analogous in its effect to the revocation of administrative acts due to non-compliance of obligations regarding their execution, it is also necessary, as aforementioned, to guarantee the due process rights of the concessionaire by means of an administrative procedure, and to assure the strict application by the Administration all the principles governing administrative actions **(see *supra* para. 35 ff.).**

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[84] See Decision No. 4911 of the Political-Administrative Chamber of the Supreme Tribunal of Justice of July 13, 2005 (Case of *Juan Serva Cammarano*), available at http://www.tsj.gov.ve/decisiones/spa/Julio/04911-130705-2000-1115.htm.

6. The revocation of administrative acts and due process principles on administrative procedure

114. In any event, when there are indeed reasons to believe that an individual administrative act could be revoked by the Public Administration though the exercise of its powers, it must initiate and follow due course of an administrative procedure, where those benefitting from the administrative act whose validity is questioned and revocation proposed, can fully exercise his right to be heard and to a defense **(see *supra* para. 35 ff.)**.

115. Administrative acts that revoke a previously issued administrative act even if the Administration considers it as null and void, is a decision that affects the subjective rights and interests of those that benefited from such administrative act, and therefore prior to such revocation an administrative proceeding must be followed in order to guarantee the right to a defense of such interested parties.

116. The jurisprudence in this matter has been uniform in demanding that cases regarding the revocation of administrative acts due to illegality must always have a previous administrative proceeding whereby the right of the interested parties to defend themselves is preserved. Only in cases of revocation of administrative acts and, in particular, mining concessions, due strictly to reasons of merit, i.e. for reasons of general interest, in which the interested party has the right to receive compensation, an administrative proceeding has been considered not to be mandatory due to the discretionary powers of the Administration in these matters. As such, for example, in cases of anticipated termination of concessions pursuant to Article 46(d) of the Organic Law on the Promotion of Private Investment through Concessions, since what has to be established is "…the early extinction of the concession by the Public Administration, for reasons of public interest…," the Political-Administrative Chamber in decision No. 1.447 of August 8, 2007 has stated that this "is and must be the result of an administrative act, duly founded (as expressly required by Article 53 of the abovementioned Organic Law on the Promotion of Private Investment through Concessions)." Therefore, their control corresponds exclusively to the contentious administrative jurisdiction, adding that:

> "…in cases such as these where self-tutelage rules applies, in principle there is no obligation to open an administrative proceeding (to guarantee the rights of the individual involved) (sic). Given the degree of

> discretion allowed in this type of administrative decision (act) which must be sufficiently founded on fair appraisal and balance that the Administration must make between a 'primary interest' (represented by the general interest) and some 'secondary interests' (represented by public or private interests), that sometimes must be set aside for reasons of convenience, in favor of the primary interest. That is, the question of discretion basically imposes the value to be given to the public interest facing other interests (heterogeneous), which are also protected by the legal order. This mechanism in itself constitutes the guarantee offered by the Administration to its citizens in these cases, and it is for this reason that in the absence of a previous administrative proceeding, these acts are controlled and the rights of the individuals involved guaranteed by the courts. It is precisely this control of the contentious administrative jurisdiction and the due proportionality and conformity to the public interest that the Administration must respect, that guarantees for the citizens, the limit and equilibrium that the Constitution establishes regarding the exercise of Public Power and that of rights and guarantees of individuals."[85]

117. The same criteria has been held by the Political-Administrative Chamber in all administrative decisions regarding mining concessions, when it has applied the principle of discretion, for example, to consider that they have expired (*caducado*), indicating that this occurs when the decision is adopted:

> "…based on a fair appraisal and balance between a primary interest – general interest – and a secondary interest – public or private –, which in some cases and for reasons of convenience must be set aside in favor of that primary interest. Therefore, the Chamber notes that in cases such as the one at hand, the Administration is not required to open an administrative proceedings for **purposes of declaring the expiration** of mining concessions due to the principle of discretion governing its actions, that must always be directed towards satisfying the general interest in achieving the common good as the first and overriding purpose of the social state of law and justice, provided in

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[85] See Decision No. 1447 of the Political-Administrative Chamber of the Supreme Tribunal of August 8, 2007, available at http://www.tsj.gov.ve/decisiones/spa/Agosto/01447-8807-2007-2004-0779.html.

Article 2 of the Constitution."[86]

118. In any event and except in those cases of revocation founded on reasons of merit, where the right of the act's beneficiary is guaranteed through his right to compensation[87] **(see *supra* para. 83 ff.)**, or in cases where the law grants a discretionary power to the Administration to make a decision, all other cases for revocation of an administrative act must be the result of a corresponding administrative proceeding, which implies that if this is not done, the act of revocation would be flawed for absolute nullity under the terms of Article 19.4 of the Organic Law on Administrative Procedures.

119. As the contentious administrative jurisprudence has affirmed even prior to the 1999 Constitution, due process, as described above,[88] constitutes an inviolable right in all degrees and stages of the proceeding, regardless of its nature, and expressly with regard to administrative proceedings.

III. GENERAL PRINCIPLES REGARDING THE EFFECTS GIVEN TO ADMINISTRATIVE SILENCE IN ADMINISTRATIVE PROCEDURES ORGANIC LAW

120. Administrative procedures are established and regulated in statutes in order to instruct the Public Administration in the passing of administrative acts. Consequently, once initiated an administrative procedure at

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86 See Decision No. 847 of the Political-Administrative Chamber of the Supreme Tribunal of Justice of July 17, 2008 (Case of *Minas de San Miguel C.A.*), available at http://www.tsj.gov.ve/decisiones/spa/Julio/00847-17708-2008-2005-5529.html. The same criteria was applied in Decision No 395 of the same Chamber of the Supreme Tribunal of Justice of March 25, 2009 (Case of *Unión Consolidada San Antonio*), available at http://www.tsj.gov.ve/decisiones/spa/Marzo/00395-25309-2009-2005-5526.html.

87 Article 53 of the Organic Private Investment Promotion Act under the Plan of Concessions (*Official Gazette* No. 5.394 Extra. of October 25, 1999), by consecrating the power of the Administration to cancel the concession early for reasons of public interest, recognizes the right of the concession holder to receive comprehensive compensation.

88 See Decision Nos. 207 and 208 of the Political-Administrative Chamber of the Supreme Court of Justice of October 8, 1996, and of the First Contentious Administrative Court of May 15, 1996, in *Revista de Derecho Público*, Nos. 67-68, Editorial Jurídica Venezolana, Caracas 1996, p. 171, and in *Revista de Derecho Público*, Nos. 65-66, Editorial Jurídica Venezolana, Caracas 1996, p. 156.

the initiative of the same Administration, or at the request of individual or private entity exercising their right to petition, the Administration is obliged to follow the procedure and to conclude it, by issuing the corresponding pronouncement. That is why Article 2 of the Venezuelan Organic Law on Administrative Procedures sets forth that all administrative authorities "must resolve the petitions filed before them, and in due case, express the motives not to resolve" (Article 2). That is, a decision or administrative act, in any event, must be issued.

121. In order to secure the accomplishment of this duty by the Administration, it has been a common trend in contemporary administrative law legislation and jurisprudence, to give some effects to the absence of a Public Administration pronouncement, namely, to the administrative silence, as a protection of the petitioner's rights, giving to the inaction of the Administration's specific legal effects, whether negative or positive.[89] The general trend on this matter in comparative law, for instance, can be considered as summarized in the provisions of the Law on Administrative Procedure of Peru, which establishes that in administrative procedures subject to positive administrative silence, the petitions are considered as automatically approved in the terms they were filed, once the term established for the decision to be taken in the procedure has elapsed without the petitioner receiving notification of the decision (Article 188.1). In these cases, administrative silence has for all purposes the character of a resolution that brings the procedure to an end, without prejudice of the possibility of the presumed act to be declared null and void (Article 188.2). In cases of administrative procedures subject to the formula of negative administrative silence, it has the purpose of granting the petitioner the possibility of challenging the presumed negative decision by means of the corresponding administrative or judicial means (Article 188.3). Nonetheless, in these cases and in spite of the negative administrative silence effect, the Administration continues with the obligation to decide, until the matter has been submitted to judicial or administrative review by means of the corresponding recourses (Article 188.4). In general terms, these general trends are followed in Venezuela.

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89 See Allan R. Brewer-Carías, *Principios del Procedimiento Administrativo en América Latina*, Legis, Bogotá 2003, pp. 171-176.

1. The right to petition and the effects of administrative silence as its guarantee

122. Pursuant to Article 51 of the 1999 Constitution, everyone has the right to make petitions or representations before any authority or public official concerning matters within their jurisdiction, and to obtain a timely and adequate response; adding that whoever violates this right shall be punished in accordance with the law, including the possibility of dismissal from office.[90] This right to petition has been developed by Article 9 of the Organic Law of Public Administration[91] and Article 2 of Organic Law on Administrative Procedures,[92] and also in an indirect way in Article 32 of the Organic Law on the Administrative Contentious Jurisdiction.[93] The latter provisions

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90 See Allan Brewer Carías, *La Constitución de 1999. Derecho Constitucional Venezolano, Tomo I, Editorial Jurídica Venezolana,* Caracas 2004, pp. 565.

91 *Official Gazette* No. 5.890 Extra. of July 31, 2008, Article 9: "Public Officials have the obligation of receiving and taking care, without exception, of petitions or requests filed by persons, through any written, oral, telephone, electronic or informatics mean; as well as of timely and adequately responding them, independently of the right that they have in order to file the corresponding administrative and judicial recourses, according to the law. In any case in which a public official abstain from receiving petitions of requests from persons, or do not adequately and timely respond to them, shall be sanctioned in conformity with the law." ("*Las funcionarias y funcionarios de la Administración Pública tienen la obligación de recibir y atender, sin excepción, las peticiones o solicitudes que les formulen las personas, por cualquier medio escrito, oral, telefónico, electrónico o informático; así como de responder oportuna y adecuadamente tales solicitudes, independientemente del derecho que tienen las personas de ejercer los recursos administrativos o judiciales correspondientes, de conformidad con la ley. En caso de que una funcionaria o funcionario público se abstenga de recibir las peticiones o solicitudes de las personas, o no de adecuada y oportuna respuesta a las mismas, serán sancionados de conformidad con la ley*.")

92 *Official Gazette* No. 2.818 Extra. of July 1, 1981, Article 2: "Every interested person, directly or through representative, Could file requests or petitions before any organ, entity or administrative authority. The latter must resolve the requests or petitions received, or declare, if is the case, the motives in order not to respond." ("*Toda persona interesada podrá, por sí o por medio de su representante, dirigir instancias o peticiones a cualquier organismo, entidad o autoridad administrativa. Estos deberán resolver las instancias o peticiones que se les dirijan o bien declarar, en su caso, los motivos que tuvieren para no hacerlo.*")

93 Article 32.1: "The legal term for the nullity action shall expire: In case of administrative acts of specific effects, 180 continuous days after its notification to the inter-

are meant to secure the people's right to file petitions before administrative authorities, and to obtain a prompt and due response, while the public officers are in charge of making a determination and giving a response, that is, they are "compelled to come to a decision on the matters submitted to them on the terms established,"[94] and incur liability when they do not accomplish it.

123. Among the specific legal remedies provided for the protection of this civil right to obtain a prompt and adequate response to petitions filed before administrative authorities, particularly in cases of absence of such response in the legally set term, as aforementioned, the most effective one has been to legally assign specific effects to the absence of the expected pronouncement, that is, to the silence of the Administration. This has been called in administrative procedural law the *administrative silence* principle which has been included in various statutes, either assigning negative (negative administrative silence) or positive (positive administrative silence) effects to the administrative abstention.[95]

124. The right to have a due and prompt response to petitions would not be really secured by punishing the public officers that violate it, since

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ested person, or when the Administration has not resolved the corresponding administrative recourse in the term of 90 workable days from the date of its filing. The illegality of an individual administrative act can always be opened as an exception, unless a special provision is provided." ("*En los casos de actos administrativos de efectos particulares, en el término de ciento ochenta días continuos, contados a partir de su notificación al interesado, o cuando la administración no haya decidido el correspondiente recurso administrativo en el lapso de noventa días hábiles, contados a partir de la fecha de su interposición. La ilegalidad del acto administrativo de efectos particulares podrá oponerse siempre por vía de excepción, salvo disposiciones especiales*.") See Organic Law of the Administrative Contentious Jurisdiction, *Official Gazette* No. 39.451 of June 22, 2010.

94 See Allan R. Brewer-Carías, *El Derecho Administrativo y la Ley Orgánica de Procedimientos Administrativos. Principios del Procedimiento Administrativo*, Editorial Jurídica Venezolana, Caracas, 2009, p. 93. See also José Martínez Lema, "El derecho de petición, el silencio administrativo y la acción de abstención o negativa a través de la jurisprudencia de la Corte Primera de lo Contencioso Administrativo," in *Revista de Derecho Público*, No. 45, Editorial Jurídica Venezolana, Caracas 1991, p. 186.

95 See Armando Rodríguez García, "El silencio administrativo como garantía de los administrados y los actos administrativos tácitos o presuntos" in Allan R. Brewer-Carías, *IV Jornadas Internacionales de Derecho Administrativo*, FUNEDA, Caracas 1998, p. 205.

eventually what the petitioner needs to know is what the determination of the Public Administration in charge would be, when considering the petition. Thus, the security provided by law has been to assign to the public officer's silence a specific effect, being legally understood that once the term for the Administration to issue its determination accrues, without the expected pronouncement being issued, a tacit administrative act is due to exist, either with positive or negative effects, according to the specific case,[96] providing the petitioner with a determination on the matter under consideration, either in an affirmative way, granting what was asked, or in a negative way, rejecting the petition:[97]

> "The mechanism of the administrative silence is justified to palliate, although partially, the absence of response and the legal uncertainty that such an omission implies, beyond being just a security of the right to petition and the possibility to file the subsequent appeals. Notwithstanding, the silence does not fully satisfy such right to petition and to obtain a prompt and proper answer, but only succeeds as a temporary remedy from the lack of an express pronouncement.
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> In such way, as the Constitutional Chamber set in ruling dated April 6, 2004 (case: *Ana Beatriz Madrid*):
>
> '…the administrative silence is, we insist, a security of the constitutional right of due process, since it prevents the petitioner from having his subsequent defense means –administrative and judicial–obstructed when facing the formal passiveness of the Administration, but does not secure the fundamental right to petition, since the implied pronouncement does not comply, altogether, with the requirements of a prompt and proper answer in the terms the precedents of this Chamber that have been previously referred to, and thus the Administration retains the duty to expressly make a decision even if the administrative silence has operated and thus, as well, this Chamber has deemed in previous occasions that, by the absence of a prompt and express

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96 See on the regime of administrative silence in comparative law, Allan R. Brewer-Carías, *Principios del Procedimiento Administrativo*, Civitas, Madrid 1990, pp. 159-169.

97 See Humberto Romero-Muci, "El efecto positivo del silencio administrativo en el Derecho Urbanístico venezolano," in Allan R. Brewer-Carías et al., *Ley Orgánica de Ordenación Urbanística*, Editorial Jurídica Venezolana, Caracas 1988, p. 141.

answer is possible to seek an injunction for the protection of the fundamental right to petition.'"[98]

125. The tacit administrative act produced as a consequence of administrative silence, is to be considered as a real administrative act, in the same sense as has been expressed in the Spanish Law 30/1992, dated November 26, 1992 on the Legal Regime of Public Administrations and the Common Administrative Procedure, reformed in 1999 (Law 4/1999), whose Article 43.5 sets forth that "Administrative acts produced by means of administrative silence can be used before the Administration and against any natural or artificial, public or private person" and Article 43.3 of the same Law that states, "The effects of administrative silence must be considered to all purposes as an administrative act that puts the procedure to an end." In such cases, as Eduardo García de Enterría and Tomás-Ramón Fernández mention, particularly regarding its positive effects, "…administrative silence is a presumed authentic administrative act, in all equivalent to the express act, so once the term to make a decision provided by a legal provision has elapsed, the 'subsequent resolution after the issuing of the act can only be adopted if it is confirmatory of the same'."[99]

2. The general rule regarding administrative silence as negative silence in the Organic Law of Administrative Procedures

126. The general rule established in the Organic Law on Administrative Procedures follows the principle of *negative* administrative silence, in the sense that if the Administration does not make a decision and responds to petitioner within the legally established term to do so, it is understood that it has decided to reject the petition, namely it has made a negative determination regarding the claim made. This rule is expressly provided by Article 4 of the Organic Law on Administrative Procedures, as follows[100]:

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98 See Daniela Urosa Maggi and José Ignacio Hernández G., "Vicisitudes del Silencio Administrativo de efectos negativos en el Derecho Venezolano," in Estudios de Derecho Constitucional y Administrativo, *, Libro Homenaje a Josefina Calcaño de Temeltas*, FUNEDA, Caracas 2010, p. 731.

99 See Eduardo García de Enterría and Tomás-Ramón Fernández, *Curso de Derecho Administrativo*, Vol. I, Décima Tercera Edición, Thomson Civitas, Madrid 2006, p. 607.

100 See on the presumption inserted in Article 4 of the Organic La won Administrative Procedures, Allan R. Brewer-Carías, *El Derecho Administrativo y la Ley Orgánica*

> "Article 4. When an entity of the Administration does not make a decision on a matter or recourse within the corresponding terms, it is understood that it has made a decision in a negative way, and the interested party may file the subsequent immediate appeal, except when an express provision establishes the contrary. This provision does not exempt the administrative entities, and their officials, from the liabilities that could result because of their omission or delay."
>
> Single Paragraph: The reiterative negligence by the officers responsible for resolving the matters or appeals that results in them to be deemed as being decided in a negative way as established in this provision, will cause written warnings according to the Estatuto del Funcionario Público (Civil Service Law), without prejudice to the fines that can be applied to them pursuant to article 100 of this Law."

127. Two general rules follow from this provision: First, the understanding that the Administration has adopted a decision in a negative sense with regard to what has been petitioned; and second, the interested party can exercise his right to defense through the subsequent appeal against such presumed decision of rejection. As I had written many years ago, this is the consequence of the rule imposed by the provision upon the Administration, implying that as a consequence of the exhaustion of the term established for the decision to be taken, if no decision is issued, it must be presumed that a tacit administrative act exists rejecting the petition or the recourse that has been filed.[101]

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de Procedimientos Administrativos. Principios del Procedimiento Administrativo, *loc. cit.*, pp. 225-227. See also Armando Rodríguez García, "El silencio administrativo como garantía de los administrados y los actos administrativos tácitos o presuntos," in Allan Brewer-Carías, *IV Jornadas Internacionales de Derecho Administrativo*, FUNEDA, Caracas 1998, pp. 207-208; Juan de Stéfano, "El silencio administrativo," in *Revista de la Facultad de Ciencias Jurídicas y Políticas de la Universidad Central de Venezuela*, No. 70, Caracas 1988, p. 81; José Antonio Muci Borjas, "El recurso jerárquico por motivos de mérito y la figura del silencio administrativo (Estudio comparativo con el derecho venezolano)," in *Revista de Derecho Público*, No. 30, Caracas April-June 1987, pp. 11 ff.

101 See Allan R. Brewer-Carías, *El Derecho Administrativo y la Ley Orgánica de Procedimientos Administrativos. Principios del procedimiento administrativo*, *loc. cit.*, pp. 97-101.

128. In addition, and as a consequence of this legal presumption, the interested party can file the corresponding administrative or judicial review appeals against the tacit administrative act that is presumed to exist rejecting the interested party's petition.[102] Consequently, as I have affirmed in other work, "regarding the defenselessness in which the citizens are when no prompt decision is adopted by the Administration regarding their petitions and recourses, the only sense that the provision of administrative silence in the Organic Law has by presuming that a decision rejecting the corresponding request or recourse, is no other than to establish a benefit for them, precisely in order to overcome such defenselessness. Consequently, the provision of Article 4 of the Organic Law on Administrative Procedures has been set in support of the petitioners and not of the Administration."[103]

129. This implies, on the other hand, that challenging the implied administrative act resulting from the administrative silence is a right of the petitioner, and never a burden. The petitioner is free to either challenge the tacit act resulting from the administrative silence or to wait for the Administration to issue an express determination.[104] On the other hand, the administrative silence can never be understood as a firm administrative act with respect to the existence of an expiration term for challenging it.[105] The aforementioned has been highlighted in judgment No. 767 of the Political-Administrative Chamber of the Supreme Tribunal of Justice dated June 3, 2009, reaffirming principles that the Tribunal established since the 1980s.[106]

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102 *Idem* p. 97. See also María Amparo Grau, "Comentario jurisprudencial sobre el tratamiento del silencio administrativo y la procedencia del la acción de amparo contra éste," in *Revista de Derecho Público*, No. 47, Caracas July-September 1991, p. 197.

103 Allan R. Brewer-Carías, "El sentido del silencio administrativo negativo en la Ley Orgánica de Procedimientos Administrativos," in *Revista de Derecho Público*, No. 8, Caracas October-December 1981, p. 28. See also Luis A. Ortiz-Alvarez, *El silencio administrativo en el derecho venezolano*, Editorial Sherwood, Caracas 2000, pp. 13-14 and 18-41.

104 See José Araujo-Juárez, *Derecho Administrativo. Parte General*, Ediciones Paredes, Caracas 2008, p. 982.

105 See Allan R. Brewer-Carías, "El sentido del silencio administrativo negativo en la Ley Orgánica de Procedimientos Administrativos," in *Revista de Derecho Público*, No. 8, Caracas October-December 1981, pp. 29-30.

106 The decision, which basically referred to Article 20.21 of the former 2004 Organic Law of the Supreme Tribunal of Justice (equivalent to Article 32 of the current Or-

3. The provisions granting administrative positive effects to administrative silence

ganic Law on the Administrative Contentious Jurisdiction, *Official Gazette* No 39.451 of June 22, 2010), stated: "Specifically the Chamber in decision No. 827 of July 17, 2008, ratified the opinion issued in decision of June 22, 1982 (Case of *Ford Motors de Venezuela*, in which the scope of the administrative silence established in the then in force Article 134 of the Organic Law of the Supreme Court of Justice, equivalent to paragraph 20 of Article 21 of the Organic Law of the Supreme Tribunal of Justice, was interpreted. In that decision, which is one more time ratified, the Chamber concluded as follows: *'1° That the provision included in the first part of Article 134 of the Organic Law of the Supreme Court of Justice (today paragraph 20 of Article 21 of the Organic Law of the Supreme Tribunal of Justice) establishes a legal guaranty which signifies a benefit for the individuals. 2° That as such guaranty, it must be interpreted in an extended and non restrictive sense, because on the contrary, instead of being favorable to the individual, as it was established, what could result is in encouraging arbitrariness and reinforcing privileges of the Administration. 3° That such guaranty consists in allowing, in the absence of an express administrative act finishing the administrative procedure, access to judicial review. 4° That the exhaustion of the term for the administrative silence, without the interested party filing the judicial review recourse, does not mean that he will lose the possibility to file the recourse against the act that could eventually be issued. 5° That the silence is not in itself an act, but the abstention of decision, and consequently it cannot be understood that it converts itself into a firm act because the simple exhaustion of the term to impugn it. 6° That the silence does not excuse the Administration from its duty to issue an express decision, duly motivated. 7° That the petitioner is the one that must decide the opportunity to file a recourse before the judicial review of administrative action jurisdiction, within the term established in Article 134 (today, part 20 of Article 21), or later, when the Administration decides the administrative recourse. 8° That when the Administration expressly decides the administrative recourse, after the terms established in Article 134 (today part 20 of Article 21) have been exhausted, the petitioner can file the judicial review against such particular act. 9° That from the moment in which an express decision of the administrative recourse is notified to the interested party, the general term of six months established to file the corresponding judicial review recourse begins.; and 10° That if an express administrative decision is never issued, the interested party would not be able to file the judicial review of administrative action recourse after the terms established in Article 134 of the L.O.C.S.J. (today part 20 of Article 21 of the L.O.T.S.J.) are exhausted.*" See Decision No. 827 of the Political-Administrative Chamber of the Supreme Tribunal of July 17, 2008 (Case of *Roque's Air & Sea C.A.*), available at http://www.tsj.gov.ve/decisiones/spa/Julio/00827-17708-2008-2006-1505.html.

130. In many countries, contrary to the general rule established in Venezuela regarding the effects of the abstention of the Public Administration from ruling on petitions, the principle of positive silence is adopted as the general rule. This principle of the positive administrative silence has also been adopted in Venezuela but only when expressly established in a statute, as an exception to the general rule set forth in by the Organic Law on Administrative Procedures we have already referred to.

131. In Spain, for instance, the general principle is to give positive effects to administrative silence, as is provided by Article 43.2 of the Law 30/1992, of November 26, 1992 on the Legal Regime of Public Administration and Common Administrative Procedure (modified by 4/1999, of January 13, 1999) that establishes that "in any sort of petition, the interested parties can assume by virtue of administrative silence, that their requests have been granted, except when the contrary is established in any provision with legal rank or in a provision of Communitarian [European] Law." There is only one exception to this general rule: the Legislator has excluded from the positive effects the silence regarding petitions whose favorable acceptance would result in transferring to the petitioner or third parties rights regarding public domain or public service, in which case the principle of negative silence applies (Article 43).

132. In those cases where positive effects are given to administrative silence, the law recognizes that for all purposes the result is that "an administrative act bringing to an end the administrative procedure exists" clarifying – nonetheless- that the presumed act, when contrary to the legal order, as a matter of law (*de pleno derecho*) is to be deemed null and void when lacking the essential conditions set forth for the acquisition of rights (Article 62.1.f). Thus, in cases of positive silence the existence of a tacit administrative act granting the petition is presumed, being normally applied in cases of authorizations and permits. In regard to this matter, Eduardo García de Enterría and Tomás Ramón Fernández have pointed out that

> "since the beginning, as administrative silence mainly referred to authorizations and approvals, the silence has been deemed as a real administrative act, equivalent to the express authorization or approval it substitutes; and the precedents have assumed, also from the beginning, that once [the act] has been produced, it is not possible for the

Administration to decide in an express way in contrary sense to the presumed granting of the authorization or approval."[107]

133. The principle of positive administrative silence has also been established as the general applicable one in statutes in Chile (Article 64 of the Law 1980 on Administrative Procedure), Peru (Article 33 of the Law on Administrative Procedure), and Ecuador (Article 28 of the State Modernization Law). In other countries the principle of positive effects of administrative silence is specifically established in all administrative procedures referring to authorizations, as is the case in Costa Rica (Article 330, General Law on Public Administration).

134. In other counties like Colombia (Article 41 of the Contentious Administrative Code), Argentina (Article 10 of the National Law on Administrative Procedure), and Venezuela, also regarding authorizations,[108] the positive effects of administrative silence have been provided through special statutes. This is the case in Venezuela in the statutes providing for Land Use and Planning and for extension of concessions granted for mining activities[109] and in the Regulation of the Organic Law of Science, Technology and Information as well as the Technical Rules that discipline independent media producers.

135. As mentioned, in the case of the principle of positive silence, it has been generally established by statutes regarding authorizations that individuals must obtain from the Public Administration in order to develop a law-

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107 See Eduardo García de Enterría and Tomás R. Fernández, *Curso de Derecho Administrativo,* Vol. I, 6th Ed., Editorial Civitas, Madrid 1993, pp. 572-573.

108 See, for instance, a remote antecedent in the case of the 1979 Law on Quality Control and Technical Norms, in Allan R. Brewer-Carías, "Comentarios a la Ley sobre normas técnicas y control de calidad de 30 de diciembre de 1979," in *Revista de Derecho Público*, No. 1, Editorial Jurídica Venezolana, Caracas 1980, p. 78.

109 See Luis A. Ortiz-Alvarez, *El silencio administrativo en el derecho venezolano*, Editorial Sherwood, Caracas 2000, pp. 41-73; Daniela Urosa Maggi and José Ignacio Hernández G., "Vicisitudes del Silencio Administrativo de efectos negativos en el Derecho Venzolano," in *Estudios de Derecho Constitucional y Administrativo*, , *Libro Homenaje a Josefina Calcaño de Temeltas*, FUNEDA, Caracas 2010, p. 731.

ful activity,[110] and regarding which the Supreme Tribunal of Justice in Politico Administrative Chamber has said that:

> "Administrative silence with positive effects has been established in order to give speediness and flexibility to control (*policía*) activity on matters related to the Administration and constitutes a guaranty for the individual, not only of a procedural administrative character, but of allowing the effective possibility to perform activities that must be inspected by the Administration, provided that a legal text exists for such purpose."[111]

136. The traditional provision in this regard has been established in the Organic Law on Land Use Planning (OLLUP), which also applies to certain approvals related to mining activities, where the result of the administrative silence regarding petitions for authorizations and approvals is the presumption of a real administrative act granting it[112] **(see *infra* paras. 166 and 196)**. Pursuant to Articles 49 and 55 of the Organic Law on Land Use Planning Law, the administrative silence and the resulting tacit administrative act is understood to be produced once the term of sixty (60) days that the Administration has to make a decision on matters of authorizations and approvals, has elapsed. In such cases, in addition, the Administration is compelled to issue "proof or evidence" of said authorization or approval when requested to do so, in order to certify that the term provided by the Law has elapsed without a pronouncement being issued.[113] This was the principle applied for many years, for instance, on matters of urban land use and planning pursuant

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110 See Humberto Romero-Muci, "El efecto positivo del silencio administrativo en el Derecho Urbanístico venezolano," *loc. cit.*, p. 147.

111 See Decision No. 1414 of the Political-Administrative Chamber of the Supreme Tribunal of Justice of June 1, 2006, available at http://www.tsj.gov.ve/decisiones/spa/Junio/01414-010606-2003-1547.htm.

112 See Margarita Escudero León, "El requisito procesal del acto previo a la luz de la jurisprudencia venezolana," in *Revista de Derecho Público*, No. 57-58, January-June, 1994, pp. 479-481.

113 See Allan R. Brewer-Carías, "Introducción al régimen jurídico de la ordenación del territorio," in *Ley Orgánica para la Ordenación del Territorio*, Editorial Jurídica Venezolana, Caracas 1988, pp. 64-68. See also Humberto Romero-Muci, "El efecto positivo del silencio administrativo en el Derecho Urbanístico venezolano," *loc. cit.*, pp. 152-157; Román J. Duque Corredor, "La Ley Orgánica para la Ordenación del Territorio y el Urbanismo Municipal," in *Revista de Derecho Público*, No. 18, April-June 1984, p. 107.

to Article 85 of the Organic Law on Urban Land Use Planning (OLULUP),[114] whereas in cases of silence of the Public Administration, the requested urban development authorizations were tacitly granted.[115]

137. The general characteristic of the application of the principle of positive effects to administrative silence according to these statutes is that once the administrative act is understood as existing and granting the petition, it creates rights for the petitioner that subsequently cannot be ignored or revoked by the Administration, the only exception being to consider such tacit administrative act as null and void (affected of absolute nullity) according to Article 19 of the Organic Law on Administrative Procedures.

138. If the petitioner has complied with all the formal and substantive conditions legally set for his petition,[116] once the term granted to the Administration to make a decision on the petition goes by, the authorization requested is deemed granted, and a tacit administrative act declaring rights for its holder is presumed to exist that cannot be revoked or repealed by the Ad-

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114 Organic Law on Urban Land Use Planning, *Official Gazette* No. 33.868 of December 16, 1987.

115 See Allan R. Brewer-Carías, "Comentarios a la Ley Orgánica de Ordenación Urbanística: el control urbanístico previo y la nueva técnica autorizatoria," in *Revista de Derecho Público*, No. 32, Caracas October-December 1987, pp. 53-54. See also Humberto Romero-Muci, "El efecto positivo del silencio administrativo en el Derecho Urbanístico venezolano," in Allan R. Brewer-Carías et al., *Ley Orgánica de Ordenación Urbanística*, Editorial Jurídica Venezolana, Caracas 1988, pp. 158 ff.; Juan Domingo Alfonzo Paradisi, "Aplicabilidad del silencio administrativo positivo en la Ley Orgánica de Ordenación Urbanística," in Fernando Parra Aranguren (Ed.), *Temas de Derecho Administrativo. Libro Homenaje a Gonzalo Pérez Luciani*, Vol. I, Tribunal Supremo de Justicia, Caracas 2002, pp. 61 ff.

116 The tacit administrative act containing an authorization, because the application of the principle of administrative silence, cannot be contrary to the provisions of the Law. Otherwise, as ruled by the Political-Administrative Chamber of the Supreme Tribunal of Justice in Decision No. 1217 of July 11, 2007, the tacit administrative act according to Articles 82 and 83 of the Organic Law on Administrative Procedures, can be considered null and void, and as not granted, adding that "[t]he authorization granted by virtue of positive silence, could not be contrary to the law, not having administrative silence any derogatory effects regarding statutes." See Decision No. 1217 of the Political-Administrative Chamber of the Supreme Tribunal of Justice of July 11, 2007 (Case of *Inversiones y Cantera Santa Rita, C.A. v. Ministerio del Poder Popular para el Ambiente*), in *Revista de Derecho Público*, No. 111, Editorial Jurídica Venezolana, Caracas 2007, p. 208.

ministration. That is to say, when the principle of positive administrative silence is applied, the Administration is prevented from issuing another decision in a different sense, which means that once the positive silence has produced its effects, the Administration cannot make an express decision rejecting the petition. On the contrary, such a decision would be null and void pursuant to Article 19 of the Organic Law on Administrative Procedures.

4. Positive administrative silence effects regarding administrative procedures for extension of mining concessions

139. As aforementioned, the 1999 Mines Law is another special statute that has granted a positive effect to administrative silence on matters of petitions for an extension of mining concessions. As we have already mentioned, this statute has provided for the application of both negative and positive effects in cases of administrative silence. Regarding the principle of *negative* silence effects, and in spite of the general rule provided by the Organic Law on Administrative Procedures, it expressly provides in two cases that once the term given to the Administration to make a decision is exhausted, it must be understood that the petition has been rejected. This is the case of Article 30, regarding petitions for authorizations concerning negotiations on the concessions, where the Statute provides that once the term established for the pronouncement to be issued (45 days) elapses, without an express determination, the absence of response is equivalent to a tacit administrative act of rejection of the request **(see *infra* para. 126 ff.)**.

140. Another case refers to the admission of petitions for mining concessions. Pursuant to Article 41, once such a petition has been formally filed and the conditions established in the Law have been met, the Ministry must expressly admit or reject the petition and start the substantiation of the corresponding procedure, which must be notified to the interested party no later than forty (40) continuous days after the date of its filing (with a possible extension of ten (10) additional working days). If the petitioner is not notified of either an admission or rejection of his request, the petition "would be considered as rejected by operation of law (*de pleno derecho*)," meaning that the silence of the Administration stands for a rejection of the petition **(see *infra* para. 126 ff.)**.

141. Contrasting with these two cases of *negative* effects of administrative silence, when regulating petitions for an extension of mining concessions already granted, the Mines Law, after establishing the obligation of the

Ministry to decide such petitions within the same term of six (6) months in which the petition is due to be filled, adopted the principle of *positive* administrative silence, assigning to the silence positive effects. Article 25 of the Law expressly sets forth that if there is no notice of a determination answering a petition requesting an extension of a concession, "it is understood that the extension is granted" **(see *supra* para. 130 ff.).** Thus the administrative silence produces a tacit administrative act granting the requested extension, which has the same general effects of non-revocability that all administrative acts have. Namely, once the extension is granted through the tacit administrative act, the Administration cannot issue another subsequent act in contrary sense, purporting to have decided the petition denying the extension. On the contrary, if such decision is made, as any other repealing the effects of the tacit administrative act, it would be considered null and void pursuant to Article 19 of the Organic Law on Administrative Procedures.

IV. BASIC LEGAL PROVISIONS REGARDING MINING ACTIVITIES: ADMINISTRATIVE PROCEDURE PRINCIPLES AND MINING CONCESSIONS

142. Both the Venezuelan 1999 Constitution (Article 12) and the 1999 Mines Law[117] (Article 2), following the general trend applicable in most of Latin American countries following the legal tradition initiated in Colonial times with the *Ordenanzas de Minería de Nueva España* (1783), declare mining deposits (*yacimientos mineros)* as State owned or public property or domain (*dominio público*).[118]

143. The general consequence of these constitutional and legal declarations is that the exploration and exploitation of such mining deposits is reserved to the National State, namely: the State has reserved for itself each and every mining right. This means that no individual or private corporation can claim, based on the economic freedom constitutionally secured (Article 112), to have "mining rights" for the exploration or exploitation of the subsoil, even if there happens to be mining deposits on his property. The only general exception on this matter provided for in the 1999 Mines Law refers to small-scale mining activities (*pequeña minería*), defined in the Law as "the activity

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[117] Law of Mines, Decree-Law No. 295 of September 5, 1999, *Official Gazette* No. 5.382 Extra. of September 28, 1999 (Exh. C-2).

[118] See Elsa Amorer, *El régimen de la explotación minera en la legislación venezolana*, Editorial Jurídica Venezolana, Caracas 1991, pp. 9-10.

performed by natural or juridical individuals of Venezuelan nationality, for the exploitation of gold and diamonds; during a period no longer than ten (10) years; in areas previously established by means of resolution by the Ministry of the Popular Power for Basic Industries and Mining (from now on, Ministry of Mines); and whose surface is not larger than ten (10) hectares, to be worked by a number of individually considered workers no greater than thirty (30)" (Article 64). In order to develop these small-scale mining activities, nonetheless, an Authorizations for Exploitation (Resolution) is required from the Ministry of Mines (Article 7.c of the Mines Law).

144. In all the other cases, in order to exercise mining rights, they must be granted by the National State, generally through concessions **(see *supra* para. 51)**. Up to 1999, the general power on mining matters was attributed to the national level of government, being the National Executive the only competent authority to grant mining rights. In the 1999 Constitution, some power was granted to the States regarding the regime and use of non-metallic minerals (rocks) not reserved to the national level of government (Article 164.5). Consequently, in these cases only, concessions are granted by the States Governors.

1. General framework of the mining exploration and exploitation regime under the 1945 Law and the Brisas Project Concessions

145. Before the 1999 Constitution and Mines Law were passed, the general regime related to mining activities was governed by the 1961 Constitution, the 1945 Mines Law[119] and several Executive Decrees and Resolutions passed thereafter.

146. Pursuant to such 1961 Constitution and the 1945 Mines Law, although it could be considered that the State owned the mining deposits, the mining activities were not reserved to it.

147. Exploring the territory and furthering the existence of such deposits was almost unrestricted, subject only to a simultaneous notice to be filed at the Ministry in charge of mining activities (*Ministerio de Fomento*) (and the main Municipal authority)[120] which was to issue an exploration per-

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[119] Law of Mines, *Official Gazette* No. 121 Extra. of January 18, 1945 (Exh. C-1).

[120] Arts. 119 ff. of the 1945 Mines Law (Exh. C-1).

mit[121] upon verification of compliance with the legally provided requirements[122]. Some scholars criticized this liberty to explore, stating that basic exploration had to be performed by the State, and that in upcoming statutory reforms an Article providing for exploration prior to mining (exploitation) should be included.[123] Exploitation, however, was subject to concessions[124] that were granted after notice (*denuncio*) of a mineral deposit finding was given and a thorough proceeding was completed. The person first giving the notice was entitled to be granted the exploitation title.[125]

148. This relatively general freedom changed in 1977 when, according to Article 11 of the 1945 Mines Law, the National Executive through Executive Decree No. 2039 of February 15, 1977, reserved to the State all exploration and exploitation activities of minerals not previously reserved to the State[126]. From that moment on, new notice (*denuncio*) regarding mineral deposits were not allowed, and the State generally reserved to itself all mining activities, and private entities could only attain them through concessions for exploration and exploitation granted by the Ministry of Mines[127]. Accordingly, for private individuals and corporations to further either mining explo-

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121 Arts. 116, 129 and 130 of the 1945 Mines Law (Exh. C-1).

122 Pursuant to Articles 116 and 117 of the Law the Ministry was to grant such exploration permits (no more than 5 per petitioner) for no more than 2 years, after verifying that the legal tax had been paid and that: (i) the petitioner was legally capable to acquire concessions, (ii) the permit would not infringe vested rights previously granted; (iii) the areas subject to petition were not greater than 2000 hectares; and (iv) the borders, situation and extension of the area subject to permit and its duration were clearly established.

123 See Elsa Amorer, *El Régimen de la Explotación Minera en la Legislación Venezolana*, Editorial Jurídica Venezolana, Caracas 1991, p. 2.

124 Art. 13 of the 1945 Mines Law (Exh. C-1).

125 Arts. 2, 33 and 134 of the 1945 Mines Law (Exh. C-1).

126 Executive Decree No. 2.039 of February 15, 1977, *Official Gazette* No. 31.175 of the same date.

127 Article 11 and the procedure and requirements regarding a concession's petitions and granting was further regulated first through the "Rules on Granting of Prospection and Concession Permits and Mining Contracts" contained in Resolution No. 528 of the Ministry of Mines issued on December 17, 1986 (*Official Gazette* No. 33.729 of June 1, 1987) and later through the substitutive "Rules on Granting of Concessions and Mining Contracts" contained in Resolution No. 115 of the Ministry of Mines issued on March 20, 1990 (*Official Gazette* No. 34.448 of April 16, 1990).

ration and subsequent exploitation or for exploitation, concessions were to be granted upon request, after taking into consideration several criteria set by such Executive Decree No. 2039[128] and pursuant to the procedure regulated in the Third Book of the 1945 Mines Law (Article 174 ff.).

149. When approved, concessions for exploration and subsequent exploitation granted the concessionaires, their heirs or executors, upon compliance with the relevant provisions,[129] the exclusive right to explore the area conceded for a period of two years and to obtain for its exploitation the lots chosen,[130] having then the exclusive right to exploit or dig out the minerals conceded, within the granted area, for forty (40) years.[131] For the purpose of exploitation, the concessionaire was to submit to the Ministry within the exploratory period, the general drawing of the zone or corresponding lots, in order to obtain a certificate of exploitation. This certificate of exploitation was to be granted after a drawings approbatory Resolution was granted by the Ministry and was final, since hearing to possible oppositions had to be granted, and it had to be registered in the Public Registry Office as a formal proof of the exclusive right to exploit minerals.[132]

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[128] Article 2 of the Decree stated that the Ministry would take into account, for the discretionary granting of the concessions: (i) the technical and financial qualification of petitioner, (ii) the duty to manufacture or refine the mineral in the country, (iii) a tax regime to the satisfaction of the National Treasury, (iv) technology supply and transfer to local and national mining industry, (v) duty to revert to the State all goods at the end of the concession and (vi) whichever special advantage deemed convenient to national mining interests.

[129] The Rules that further regulated the procedure for granting mining concessions issued several years after the Law was passed (1986 and 1990: ***see infra,* footnote 128***)* provided as a special advantage that the petitioner could offer when requesting a concession, to have the 40-year legal duration reduced to a 20-year duration, with subsequent 10-year extensions, upon request made within 3 months prior to expiring. Most of the concession's petitioners under that regime did offer such a special advantage. Thus, there are many concessions granted at the time – as is the case of all the Brisas Project concessions – that do not have a 40-year duration, but were granted for 20 years, with subsequent 10-year extensions, to be requested within 3 months prior to the expiring date.

[130] Art. 179 of the 1945 Mines Law (Exh. C-1).

[131] Art. 188 of the 1945 Mines Law (Exh. C-1).

[132] Arts. 180 and 182 of the 1945 Mines Law. In the 1945 Mines Law, this Certificate of Exploitation as also called Mining Title (Arts. 16, 24, and 26) (Exh. C-1).

150. Except for the **Basic Composition Rocks** (Anfibolita) Concession which was granted according to the legal regime established since the 1999 Constitution by the Governor of the State of Bolívar **(see *supra* para. 144)** through Mining Title dated June 10, 2005,[133] and Exploration certificate dated January 1, 2009,[134] and the Easement Contract over the Kaolin Concessions "Morauana, Venamo, Cuyuní and Mireya," dated December 8, 2006,[135] which was approved by the Autonomous Institute of Mines of the Government of the State of Bolívar on November 11, 2006,[136] all other Brisas Project mining concessions for exploration and exploitation and contracts were granted and entered pursuant to provisions of the 1945 Mines Law, that is, the pre-1999 Mines Law regime, as follows:

> - Gold Alluvial Concession "**Brisas del Cuyuní**," granted for a period of 20 years, through Resolution of the Ministry of Mines No. 75 of May 27, 1987,[137] with Mining Title granted on April 11, 1988.[138]
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> - Gold, Molybdenum and Copper Hard Rock Concession "**Unicornio**," granted for a period of 20 years, through Resolution of the Ministry of Mines No. 452 of December 3, 1997,[139] with Mining Title granted on February 1998.[140]
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> - Gold and Diamond Alluvial Exploration and Exploitation Contract "**Barbara**" entered on October 16, 1998 with Placer Dome of Venezuela C.A., authorized by Corporación Venezolana de Guayana.[141]
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> - Gold and Diamond Alluvial Exploration and Exploitation Contract "**Zuleima**" entered on October 16, 1998 with Placer Dome of Venezuela C.A., authorized by Corporación Venezolana de Guayana.[142]

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133 *Official Gazette* of the State of Bolívar, No. 218 Extra. of June 10, 2005 (Exh. C-9).

134 Exh.C-875.

135 Exh. C-21

136 Exh. C-21, p. 15

137 *Official Gazette* No. 33.728 of May 29, 1987 (Exh. C-898).

138 *Official Gazette* No. 33.947 of April 18, 1988 (Exh. C-3).

139 *Official Gazette* No. 5.190 Extra. of December 11, 1997 (Exh. C-580).

140 *Official Gazette* No. 36.405 of March 3, 1998 (Exh. C-5).

141 Exh. C-8.

142 Exh. C-8.

- Gold and Diamond Alluvial Exploration and Exploitation Contract "**Lucía**" entered on October 16, 1998 with Placer Dome of Venezuela C.A., authorized by Corporación Venezolana de Guayana.[143]

- Constitutive Agreement for Use and Right of Way over the Gold and Diamond Alluvial Exploration and Exploitation Contract "El **Paují**" entered on January 27, 2006[144] and Special Power of Attorney entered on February 12, 2004[145] with ARAPCO, Administración de Proyectos C.A., holder of the Gold and Diamond Alluvial Exploration and Exploitation **El Paují** governed by the Exploitation Certificate granted through Resolution of the Ministry of Mines No. 282 of November 11, 1992.[146]

- Gold and Diamond Alluvial and Hard Rock Exploration and Exploitation Contract "**NLEAV I and NLSAV I**" entered on February 3, 1994 with Corporación Venezolana de Guayana .[147]

- Gold and Diamond Alluvial and Hard Rock Exploration and Easement Contract "**Esperanza**" entered on May 7, 2004 with Minera Las Cristinas C.A.,[148] according to the Mining contract entered between Corporación Venezolana de Guayana and Minera Las Cristinas on January 5, 1993.[149]

- Gold and Diamond Alluvial and Hard Rock Exploration and Easement Contract "**Yusmari**" entered on May 7, 2004 with Minera Las Cristinas C.A.,[150] according to the Mining contract entered between Corporación Venezolana de Guayana and Minera Las Cristinas on December 18, 1992.[151]

- Gold and Diamond Alluvial Exploration and Exploitation Sublea-

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143 Exh. C-8.

144 Exh. C-16.

145 Exh. C-19.

146 See *Official Gazette* No. 4.492 Extra. of November 20, 1992 (Exh. C-17).

147 Exh. C-13.

148 Exh. C-15

149 Exh. C-14.

150 Exh. C-15.

151 Exh. C-15.

> sing Contract "**Choco 5**" entered between GR Minerales El Choco, a subsidiary of Gold Reserve Corporation, and CVG-MINERVEN, Compañía General de Minería de Venezuela,[152] authorized by Corporación Venezolana de Guayana on April 29, 2000,[153] according to the Mining Leasing Contract entered between Corporación Venezolana de Guayana[154] and CVG Compañía General de Minería de Venezuela on December 22, 1998.[155]

151. All those concessions and contracts, as aforementioned, were granted pursuant to the provisions of the 1945 Mines Law. Such Law was amended in 1999, in and in view of the change of the new applicable legal framework that the amendment implied, the terms under which those concessions that were granted prior to September 28, 1999,were to be governed, as was established in Article 129 of the amended Mines Law, as follows: (i) the right to mine (exploit) previously granted was due to be preserved only regarding those minerals and genre for which the concession was originally granted; (ii) the concessionaires were compelled to pay the new legal taxes only after 1 year from the publication of the new Law in the *Official Gazette*; (iii) the duration of the concessions was the term established in the original title (or concession) to be counted from the date of the publication of the Mining Title; (iv) the concessionaires were immediately subjected to those environmental and other provisions on matters of superior national interest included in statutes and regulations in place; and (v) the concessionaires were compelled to maintain the special advantages originally offered to the Republic.

152. Regarding the constitutionality of Article 129 (as well as of Article 132) of the 1999 Mines Law, the Constitutional Chamber of the Supreme Tribunal, sustaining their constitutionality, stated in Decision No 37 of January 27, 2004:

> "[T]he referred provision (Article 129) secures the continuance of the rights arising from mining concessions entered into prior to the pas-

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152 Exh. C-25.

153 Exh. C-27.

154 CVG had the Mining Title for the Choco 5 concession granted for 20 years by the Ministry of Mines, dated May 10, 1993, published in *Official Gazette* No. 4.578 Extra. of May 18, 1993 (Exh. C-22).

155 Exh. C-23.

> sing of the new Law. It could not be otherwise, this Chamber believes, so as to guarantee the principle of legal safety and that of respect of preexisting legal situations. The 1999 legislator wanted to substitute mining contracts, giving their beneficiaries the opportunity to transform them in concessions but for such purpose he could not ignore, of course, that there were already in place concessions on different minerals, ways of presenting themselves and geographic areas.
>
> Thus, article 129, is a provision to guarantee the rights of those that previously acted through concessions. That is why, the first reaction on this challenge should be the surprise, since there is no way it violates the due process right of the concessionaires. […]
>
> [T]he Mines Law in place accepts the division of the area and the distinction of concessionaires according to the ways the minerals are presented. What was fundamental to the legislator was to secure previous rights, of concessionaires as well as of contractors. In that way, what he did was to respect existing situations, which is not only constitutional but also correct. […]
>
> This Chamber understands that the premise of Articles 129 and 132 is valid: to maintain concessions and allow for contracts conversion. With both decisions legal safety is kept and previously created situations are respected. It was not an election for the legislator but its duty."[156]

153. Therefore, regarding the right to mine, those concessions that were already in place when the 1999 Mining Law was passed, were to maintain such right only for the minerals and genre they had been originally granted in the corresponding Title (Article 129.a); and for example, if the concessions were granted originally to exploit alluvial gold, they were to continue being for alluvial gold only. The regime for those concessions' extinction was also established by Article 129, whereas it was provided that the duration of the concessions granted prior to the passing of the Law was to be the one established in the original Title, counted from the date of its publication in the *Official Gazette* (Article 129.c) **(see *infra* para. 190).** Finally, it

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[156] Decision No. 37 of the Constitutional Chamber of January 27, 2004 (Case of *Asociación Cooperativa Civil Mixta La Salvación SRL*), (Record No. 00-1496), available at http://www.tsj.gov.ve/decisiones/scon/Enero/37-270104-00-1496.htm.

was provided that the special advantages offered in such concessions in favor of the Republic, were to be maintained, pursuant to Article 129.d.

154. In matters related to legal taxes Article 129.b set forth that mining concessions granted prior to the Law were compelled to pay the new legal taxes established in the new law, only after one (1) year from its publication. The same can be said for the rest of the provisions of the 1999 Law, whereas Article 129.e provided that they would be fully applicable to mining concessions previously granted, after one year elapsed from the date of the publication of the Law in the *Official Gazette*. In addition, Article 130 of the Law, imposed upon the holders of mining rights, the obligation to conform their plans of exploitation within the term of one (1) year counted from the publication of the law, to the applicable environmental provisions, or otherwise be subject to sanctions.

155. As for pre-1999 existing contracts concluded with *Corporación Venezolana de Guayana* (C.V.G.), Article 132 of the Mines Law expressly provided for the right of the titleholders to have them converted into mining concessions, but also "only regarding the mineral and the presentation form established in the contract," and provided that the corresponding petition was made within three months after the publication of the Law. This transitory provision, allowed the titleholder of mining contracts with *CVG* to petition the Ministry of Mines to convert the contracts into mining concessions within the term established in the law. The Ministry of Mines had the general obligation to respond in a timely manner to such petitions according to both Article 51 of the Constitution and Article 5 of the Organic Law on Administrative Procedure. However the Mines Law did not assign specific positive or negative effects to the administrative silence of the Administration in the case of these petitions, as it did in the cases of petitions for concessions (Article 41) or for extensions of concessions (Article 25) **(see *supra* para. 139 ff., *infra* para. 166)**. Consequently, in case of silence, although the petitioners could have filed a claim against the resulting tacit negative decision, according to article 4 of the Organic Law on Administrative Procedures **(see *supra* para. 126 ff.),** the decision to be adopted by the Ministry of Mines remained pending and to be issued, so the right of the titleholder of the CVG contract to have to the conversion also remained to be decided. That is, negative administrative silence never means that the petitioner lost his right **(see *supra* para. 129)**.

156. Article 135 of the Mines Law added that "the conversion of contracts that could be petitioned on areas of the Imataca Forestry Reserve would be subject to the solution of the legal controversy affecting the zone," which prevented the Ministry from deciding on the petitions when the contracts were within the Imataca Forestry Reserve. However, such provision ceased to have any effect after Decree No. 1.850 dated May 14, 1997 of the Imataca Forestry Reserve (i.e. the one challenged before the Supreme Tribunal), was formally and expressly abrogated and substituted by Decree No. 3.110 dated September 7, 2004 **(see *infra* paras. 246, 264).** That means that after September 2004, the Ministry of Mines had no legal impediment to convert the *CVG* contracts into concessions as requested in 1999, because the legal controversy affecting the zone of the Imataca Forestry reserve was resolved by abrogating the challenged provisions contained in Decree No. 1.850 of May 14, 1997.

157. For the purpose of this Legal Opinion, I will refrain from further explanation of the pre-1999 Law regime, and follow with a general description of the legal framework established by the 1999 Mines Law, with a more detailed description of those provisions governing the concessions that were in place by 1999 but had been previously granted.

2. General framework regarding mining exploration and exploitation regime under the 1999 Law and its applicability to the Brisas Project Concessions

158. Pursuant to Article 302 of the Constitution and to the provisions of the 1999 Mines Law, in principle, all mining activities and mining rights regarding mining deposits, apart from small-scale mining activities, remained reserved to the State, which however does not imply the complete exclusion of private entities from carrying out mining activities. On the contrary, according to the Constitution and the Law, the State can grant mining rights to private entities, again, through concessions. Moreover, Article 7 of the Mines Law lists the different means for exploration, exploitation and use of mining resources as follows[157]:

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[157] See on private mining activities, Allan R. Brewer-Carías, "El régimen de participación del capital privado en las industrias petrolera y minera: Desnacionalización y Tecnicas de regulación a partir de la Constitución de 1999," in Allan R. Brewer-Carías, *VII Jornadas Internacionales de Derecho Administrativo, El Principio de*

> "a) Directly by the National Executive; b) Through concessions for exploration and subsequent exploitation; c) Through authorizations for exploitation via small-scale mining activities; d) Through mining consortiums *(Mancomunidades Mineras)*; and e) Through artisanal mining."

159. Notwithstanding these Mines Law provisions allowing private activities in the mining industry, the State is entitled to declare a complete and total reserve regarding mining activities when ordering the "exclusive exercise of mining activity by the National Executive," in which case, the National Executive is authorized, when deemed convenient for the public interest, to "reserve by means of Decree, certain mineral substances and areas containing them, in order to explore or exploit them directly by an entity of the Ministry of Mines, or by means of entities of the exclusive property of the Republic" (Article 23).

160. Additionally, pursuant to Article 86 of the Law, since the storing, possession, benefit, transportation, circulation and commercialization of minerals under the Law is subject to the scrutiny and inspection of the National Executive and to the regulations issued for the defense of the interests of the Republic and of mining activity, the National Executive, also when deemed convenient to the public interest, can reserve to itself by means of a decree, "any of said activities regarding certain minerals."

161. Thus, except for these cases of exclusive reserve, in all the other fields of mining activities generally reserved to the State, private entities are allowed to perform mining activities, through concessions.

3. General Regime of Mining rights granted through concessions of exploration and subsequent exploitation

162. Concessions are defined in Article 24 of the Mines Law as the administrative act of the National Executive through which rights are granted and obligations are imposed to individuals for the use of mineral resources existing in the national territory. A concession then grants its holder the exclusive right to explore and subsequently exploit the mineral substances found within the area granted. This ratifies the principle that private entities

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Legalidad y el Ordenamiento Jurídico-Administrativo de la Libertad Económica, FUNEDA, Caracas November 2004, pp. 15-58.

have no preexisting rights to develop mining activities, which can only be acquired through these administrative acts called concessions issued by the State **(see *supra* para. 50).**

163. According to the 1945 Mines Law, the holder of alluvial concessions had a preferred right regarding the request for hard rock concessions in the same area (Article 22). This principle was changed in the 1999 Mines Law, as can be read in the Official Document explaining its provisions where it was stated as one of the features adopted was "the elimination of the distinction based on the presentation of minerals, in hard rock, mantle or alluvial; the concessionaire having the right to exploit the mineral no matter its presentation." As the Constitutional Chamber of the Supreme Tribunal of Justice has stated in its Decision No. 37 dated January 24, 2004 after analyzing this explanation, such feature of the "unity of the concession" was confirmed by the text of Article 24 (exclusive right to exploit mineral in a determined area), Article 26 (the volume derived from the existing terrain, within the superficial boundaries of the concession, established downward to the center of the Earth, descending in a pyramidal form) and Article 28 (the horizontal rectangular extension of the concession) of the 1999 Mines Law. Nonetheless, the Constitutional Chamber also pointed out that regarding the exploitation rights of concessions granted before the enactment of the new Law (1999), since the concessionaires have the right to maintain their rights regarding minerals "in the presentation form according to which the [original] Titles were granted", in cases of pre-1999 concessions and conversion of concessions according to article 132 of the Mines Law, "the division of areas and the distinction of the concessionaires according to the form of the presentation of minerals" was to be accepted.[158]

164. In the Mines Law concessions are exclusively conceived and issued "for exploration and subsequent exploitation," being these rights considered, in Article 29 of the Law, as "real immovable property" (*derecho real inmueble*). Similar provisions were established in the Mines Law of 1945, regarding the same concessions for exploration and subsequent exploitation (Article 105).

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[158] See Decision No. 37 of January 27, 2004 (Case of *Asociación Civil Mixta La Salvación SRL*), Record No. 00-1496, available at http://www.tsj.gov.ve/decisiones/scon/Enero/37-270104-00-1496.htm.

165. Mining concessions are to be granted, after the petitioner complies with all the requirements established by the Law and the procedure provided for is completed, by means of an express pronouncement (Resolution) by the Ministry of Mines, whereas a Mining Title for Exploration must be issued, which ought to be subsequently published on the *Official Gazette.*[159]

166. It is important to highlight that the Mines Law, in the administrative procedure regulations that it contains regarding the granting of concessions, has expressly given in several of its provisions, direct effects to the absence of response –-or silence – of the Administration on specific requests filed by an interested party **(see *supra* para. 139 ff.)**. For instance, in Articles 30 (on permits for transactions regarding mining rights) and 41 (petitions for mining concessions) the Law has adopted the administrative procedure principle of "negative" silence, in the sense that once the term established for a pronouncement to be adopted elapses, if no express resolution is adopted, according to the negative silence effects, it is considered that the absence of response is equivalent to a tacit administrative act of rejection of the request. Conversely, in Article 25 (petition for extension of concessions) the 1999 Mines Law has adopted the administrative procedure principle of "positive" silence, in the sense that once the term established for a pronouncement to be adopted elapses, if no express resolution is adopted, according to the positive silence effects, it is considered that the absence of response is equivalent to a tacit administrative act of granting the request **(see *supra* para. 139 ff.)**.

167. Pursuant to Article 48 of the 1999 Law, the concession of exploration and subsequent exploitation, grants the concessionaire, its heirs or executors, the exclusive right to *explore* the granted area, during the exploratory period, and to elect for the consequent exploitation (mining) the surface determined by the technical, financial and environmental feasibility study. Both periods, for exploration and exploitation could also be distinguished in the provisions of the 1945 Mines Law, where the so-called "certificate of exploitation" was in fact the Mining Title of the concession, generally published in

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[159] Since the 1999 Mines Law only provides for concessions *for exploration and subsequent exploitation*, when the concession is granted, the mining title is an Exploration Title. Once the exploratory phase is completed, and all requirements for further exploitation have been satisfied, the concessionaire must seek an exploitation certificate (Article 75 of the Law) **(see *infra* 175 and 181)**. Concessions granted prior to the 1999 Mines Law, such as those in regard to the Brisas Project, may be different.

the *Official Gazette* after being registered in the Public Registrar. In the 1999 Mines Law, the same two periods are distinguished in the concession of exploration and subsequent exploitation, establishing that the concessionaire during the period of exploration must obtain the "certificate of exploration" which is issued after being approved by the Ministry of Mines through Resolution (Article 56).

A. Exploration

168. Under Article 49 of the 1999 Mines Law and 20 of the General Regulation of the Mines Law,[160] the exploratory period must have a duration of no longer than three (3) years, depending on the nature of the mineral and other pertinent circumstances. Said exploratory period, however, can be extended, but only once and for a period of no longer than one (1) year.[161] According to Article 98 of the Law, the concession expires when the exploration is not carried out during the term previously foreseen.[162]

169. Since the Law provides that during the exploratory period the concessionaire has the right to *explore* the area of the granted concession, and to select the section or sections to be subsequently exploited (mined), according to the results of the technical, financial and environmental feasibility study that must be completed therein, it has been commonly accepted that in such period the concessionaire is to perform activities that further the finding of the mine bed or mineral deposits, and to ascertain whether mining is feasible and profitable through adequate means.[163] Conversely, no extraction or

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[160] General Regulations of the Mines Law, *Official Gazette* No. 37.155 of March 9, 2001 (Exh. C-867).

[161] The petition for an extension of the exploratory period has to be filed no later than 180 days prior to the expiring date of such period, i.e., 6 months in advance of the expiration date.Article 23 of the General Regulation of the Mines Law (Exh. C-867).

[162] As I have already stated **(see *supra* para. 154)**, up to February 1977, when the Executive Decree reserving all exploratory and mining activities not previously reserved was passed, exploring the territory furthering the existence of mineral deposits was unrestricted (with the exceptions provided for in the 1945 Mines Law). Therefore, this is a change introduced by the 1999 Law.

[163] *See* Elsa Amorer, *El Régimen de la Explotación Minera en la Legislación Venezolana.* Editorial Jurídica Venezolana, Caracas 1991, pp. 1-2.

digging out of minerals can be carried out within the exploratory period, under penalty of the Law.[164]

170. Exploration has to be done pursuant an *exploration program* that the concessionaire must file at the Ministry of Mines, along with a performance chronogram and an investment plan for such period, before the commencement of exploration activities (Article 21 of the General Regulation). The evolution of the activities performed within the exploratory period, following such exploration program, is to be acknowledged through periodic reports to be filed by the concessionaire within the first ten (10) days of each trimester.

171. The mining sections or parcels selected by the concessionaire as a result of the *exploration* are to be illustrated separately, in individual drawings one per each section, as well as collectively, in a general mining drawing (Article 50 of the Mines Law).

172. As already mentioned, within the exploratory period the concessionaire must also complete and file a technical, financial and environmental feasibility study of the concession, including any other information regarding the activities that are intended to be performed in order to make better use of the mineral **(see *supra* para. 168)**.

173. Under Article 53 of the Mines Law, the concessionaire must file the drawings and the technical, financial and environmental feasibility study with the Ministry of Mines, along with a written request for its approval, as well as for the release of the "Exploitation Certificate" foreseen in Article 56 **(see *infra* para. 192 ff.)**. For the filing of these drawings and of the technical, financial and environmental feasibility study, the concessionaire may request an extension of up to one (1) year, before the period granted for exploratory purposes expires, which can be granted by the Ministry if it considers the request to be reasonable, except in case of force majeure in which case it would have to grant it (Article 55 of the Mines Law). According to Article 98 of the Law, failure to file either the technical, financial and environmental feasibility study or the drawings, within the time given, results in termination of the concession. Should the technical, financial and environmental feasibil-

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[164] Article 27 of the General Regulation of the Law expressly proscribes exploitation activities during the exploratory phase and subjects it to the administrative sanctions provided in Article 109 of the Law (Exh. C-867).

ity study not be approved by the Ministry of Mines, the entity will inform the interested party by means of a duly reasoned pronouncement and the concessionaire would have up to ninety (90) continuous days to file a new study (Article 52 of the Mines Law).

174. Although not expressly provided for, the wording of Articles 30, 60 and 130 of the Law implies that in addition to the technical, financial and environmental feasibility study, drawings and written request, the concessionaire must also complete and file a development and mining (exploitation) program or plan[165].

175. Once the drawings and the technical, financial and environmental feasibility study are approved, pursuant to Article 56 of the Mines Law, the Ministry of Mines must state so by way of a Resolution, to be issued within a period of thirty (30) continuous days, in which it must provide for the issuance of the "Exploitation Certificate" within a period of thirty (30) continuous days after the publication date of the said resolution. The "Exploitation Certificate" must show the parcel units selected by the concessionaire, who ought to file it before the Local Land Registry Office of the location of the concession's Circumscription within the subsequent thirty (30) days of its publication in the *Official Gazette*. Also, the concessionaire must obtain a certified copy of the general plan and of the plans of the chosen parcel units.

176. In the case of those concessions granted prior to 1999 that were granted for both exploration and exploitation and their respective mining titles so indicated (as is the case of all of those associated to the Brisas Project) **(see *supra* para. 150)**; their Mining Titles (already published in *Official Gazette* pursuant to the requirements of Article 180 of the 1945 Mines Law) were the "Certificates of Exploitations," so the concessionaires were obvious-

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[165] When referring to negotiations pertaining to concessions, Article 30 of the Mines Law provides that no such negotiations are to be approved unless the negotiating concessionaire has accomplished all preliminary activities and investments required to present the development and mining (exploitation) program, which must be filed at least 30 days prior to the commencement of the mining (exploitation). Under Article 60, on the other hand, prior to starting mining, the concessionaire must secure fulfillment of said development and mining (exploitation) program through a performance bond. Thus, it follows that such program must also be filed by the concessionaire at this time. Article 130 requires holders of mining concessions granted prior to the passage of the Law to adapt their exploitation plans within 1 year's time.

ly exempted from requesting and obtaining the "Exploitation Certificates" provided in the 1999 Mines Law.

B. Exploitation (Mining)

177. The right to exploit (mine) that a concession grants is the right to extract or dig out, from the mines, those substances contained therein listed in the concession.

178. Prior to starting the exploitation phase the concession's holder must secure through filing of the appropriate bonds both environmental repair and performance of the exploitation and development program or plan (Articles 59 and 60 of the Mines Law).

179. Pursuant to Article 58 of the Mines Law, a concession is being exploited when the substances that are contained in it are being extracted or when all actions for that purpose are being taken, with the unequivocal intention of gaining economic profits from them in proportion to the nature of the substance and the magnitude of the deposit. When a concessionaire is in possession of a group of concessions, all of them are to be considered in exploitation when mining activity is being carried out on one of the facilities, in agreement with the aforementioned.

180. Exploitation, therefore, is being undertaken not only when the concessionaire is actually digging out minerals from the selected parcels, but also according to Article 58 of the 1999 Mines Law – as it was under the 1945 Mines Law regime (Article 24) – when the concessionaire is doing what is necessary in order to extract minerals, with the unequivocal intention of economically exploiting the concession and in proportion to the nature of the substance and the magnitude of the deposit (*yacimiento*).[166] Consequently, a concession can be considered as being in exploitation without minerals actually being extracted, in which case, although the concession is in exploitation, the concessionaire's obligation to pay exploitation taxes is not due under Article 90(2) and cannot be estimated.

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[166] See on exploitation, since the provision of the 1999 Mines Law is very similar to the previous one, the comments in Elsa Amorer, *El Régimen de la Explotación Minera en la Legislación Venezolana,* pp. 82, 85. The Ministry of Mines and the former Supreme Court of Justice constructed a restricted interpretation of Article 2 of the 1999 Mines Law. *Idem* pp. 86-92.

181. Exploitation of a concession, understood in such way, must begin no later than 7 years after the publication of the "Exploitation Certificate," where applicable. Once exploitation has started, it cannot be interrupted, unless there is a justifying cause, in which case suspension cannot exceed one year, except in cases of acts of God or force majeure that must be reported to the Ministry of Mines for its assessment (Article 61 of the Mines Law).

182. As for the minerals to be extracted, pursuant to Article 62 of the Mines Law the holder of a concession granted for the exploitation of a specific mineral has a preferred right to extract other minerals.[167] Accordingly, if during the exploitation process the holder of a mining right finds minerals others than those specified in the Title, he is compelled to give notice about it to the Ministry of Mines, who – according to what is provided in Article 7.a and 7.b of the Law – can decide within 30 continuous days to exploit the mineral directly (Article 28 of the General Regulation). If the Ministry decides not to do to exploit directly, the concessionaire has a preferred right to such exploitation. In these cases the exploitation is assigned to the concessionaire and no concession is required, it being enough to conclude an agreement between the concessionaire and the Ministry of Mines.

183. It must also be mentioned that due to the specific characteristic that each mine exploitation has, the process of extracting mineral in a given concession can normally need to be extended beyond the boundaries of the respective concession area, having layback over areas that may be subject to other concessions. That is why article 63 of the Mines Law establishes that when in a mining exploitation the concessionaire invades the area of another concession, the net value of the mineral extracted in the latter will be shared in half with the neighbor. Only when bad faith of the invader concessionaire is proven, he is then compelled to pay to the affected concession the double of the value of the extracted mineral. According to these provisions, the possibility of layback agreements between concessionaires is expected to be found in mining exploitations. In that regard, it is also relevant to note the following provisions of the Mines Law: Article 5.2 imposes the concessionaire the obligation to take all necessary measures not to waste mineral re-

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[167] Under the 1945 Mines Law, the holder of a concession granted for the exploitation of a specific mineral also had a preferred right to extract other minerals, but was bound to seek another concession for such other minerals. Therefore, the pre-concession administrative procedure was to be followed, and the preferred right had to be exercised within the opposition period of the procedure (Article 199) (Exh. C-1).

sources; and Article 11, in order to carry out mining activities, grant the concessionaire the possibility to request an easement, temporary occupation, and even the expropriation of property.

184. Finally, as in the case of exploration, both the absence of commencement of the exploitation within the indicated timeframe, as well as the suspension of it (*without a justifying cause*) for a longer period than the one permitted, result in termination of the concession (Articles 98.3 and 98.4 of the Mines Law).[168]

185. However, in the case of concessions granted prior to the passing of the 1999 Mines Law, since duration is to be governed by the original (ancient) title (Article 129.c of the Mines Law), termination of the concession for absence of commencement of exploitation is mitigated by a provision preventing it included in most of those titles. Under such provision, following Articles 24 and 55.2 of the previous 1945 Mines Law, and Article 9 of the Rules on Granting Concessions and Mining Contracts, late start of exploitation is permitted upon doubling the payment of the first special advantage[169] therefrom, and up to the beginning of mining (exploitation).

4. The Ministry of Mines supervision and control regarding the compliance of the mining obligations of the concessionaires, and the "compliance certificates"

186. Pursuant to Article 88 of the Mines Law, the Ministry of Mines is the empowered authority to supervise and control the activities subjected to the said Law and its regulations, without prejudice of the supervision and control activities corresponding to the States, for instance on matters of non-metallic mines.

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[168] As aforementioned, in the case of those concessions granted according to the 1945 Mines Law, the Certificate of Exploitation (Article 180) was the Mining Title approved by Resolution and published in the Official Gazette (as is the case of all of those associated to the Project), so the concessionaires were obviously exempted from requesting and obtaining a separate "Exploitation Certificate" provided in the 1999 Mines Law.

[169] The first special advantage was a payment set forth according to the magnitude of the area of the concession and the year of its duration (see Article 9, Table A, of the Rules) and is still in place for concessions granted under the previous Mines Law according to Article 129.f of the current Mines Law **(see *supra* para. 160)**.

187. As a consequence of the permanent and continuous process of supervising mining activities, not only the concessionaries have the obligation to file monthly and annual reports before the Ministry about their activities, but at its turn, the Ministry must verify in a permanent way the compliance by the concessionaires of their duties and obligations, as prescribed in the Mines Law and its Regulations, as well as in the provisions of the Concessions, Mining Titles and mining contracts that could exist.

188. In order to accredit the compliance of such obligations of the concessionaires, the supervision and controlling officials of the Ministry of Mines, at the request of the concessionaries, issue "compliance certificates," which are declaratory administrative acts, that is, administrative acts through which the Administration certifies facts that are within its competency. In the case of mining activities, these "compliance certificates" are issued by the competent mining authorities, certifying the certainty of a determined fact, action or accomplishment **(see *supra* para. 50)**. That is to say, after due verification and control, the Ministry certifies that the concessionaire has given due compliance to the different clauses of the Mining Titles, to the clauses of the mining contracts for instance signed with Corporación Venezolana de Guayana, and also to the provisions of the Mines Law and its Regulation, consequently being declared solvent.[170]

189. All these "compliance certificates" are issued by officials of Ministry of Mines's Division of Fiscalization and Control of Mines, including the Technical Regional Inspectorates and the Fiscal Inspectorates. According to Article 88 of the Mines Law and Article 96.1 of the 2001 General Regulation of the Mines Law, the Division of Fiscalization and Control, and specifically the Technical Regional Inspectorate are in charge of verifying that the concessionaries and the titleholders of mining rights comply with all the obligations established in the Mines Law, its Regulations and other applicable provisions. The Fiscal Inspectorate takes direction from the Technical Regional Inspectorate, and assists the same in carrying out its duties (Article 96.7 and 97.8 of the 2001 General Regulations of the Mines Law). The Fiscal Inspectorate is charged with conducting necessary technical inspections to verify that mining activities are executed in accordance with the laws, regulations, decrees, resolutions and other applicable provisions of laws (Art. 97.7 of the

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[170] See Exhs. C-63 to -71, -73 to -77, -79, -81 to -84.

2001 Regulations).[171] In addition, inspectors may be given specific authority to conduct their functions by resolution of Ministry of Mines. For example, two of the inspectors who issued compliance letters to Compañía Aurífera Brisas del Cuyuní C.A. in this case were specifically empowered by Ministry of Mines resolutions to, *inter alia*, "inspect exploration and exploitation activities and take corrective action" and "issue official letters related to their functions."[172] In addition, it is possible to consider that these administrative acts have the force of a "public document" in the sense of their incontrovertable veracity and validity because being issued by the competent authorities to perform mining inspections **(see *supra* para. 52)**. Also, these administrative acts of certification create legitimate confidence in the concessionaires regarding the verification by the public administration of the accomplishment of their mining duties and obligations according to the concessions or contracts **(see *supra* para. 26 ff.)**.

5. The term of the concessions and its extension

190. In general terms, all concessions related to natural resources according to Article 113 of the Constitution must always be for a limited period of time. Under the Mines Law they cannot exceed twenty (20) years starting

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171 A similar regime existed under the prior version of the Mining Law. Under the 1945 Mining Law (C-1) and accompanying Regulations (C-1), the National Executive, through the Office of Mines (Dirección de Minas) of the Ministry of Public Works (Ministerio de Fomento), was empowered to verify and inspect mining activities. (1945 Mining Law, Art. 100; 1945 Mining Regulation, Art. 159-160). It was aided in this task by the Technical Service of Mining and Geology as well as by the General Technical Inspectorate and the Regional Fiscal Inspectorates. (1945 Mining Regulation, Art. 161), The General Technical Inspectorate was empowered to exercise control over mining companies to verify compliance with the Mining Law and Regulations (1945 Mining Regulations, Art. 163), and the Regional Inspectorate was authorized to exercise control over exploration and exploitation activities in its jurisdiction to verify compliance with the Mining Law and Regulations and to report on non-compliance (1945 Mining Law Regulations, Art. 164).

172 *See* Resolution No. 023 of March 6, 2005, Official Gazette No. 38.203 of July 6, 2005 (C-870) (Ministry of Mines resolution designating Angel Adelso Carpio Garcia as Fiscal Inspector of Las Claritas of the Guayana Region); Resolution No. 022-2008 of April 3, 2008, Official Gazette 38.902 on April 3, 2008 (C-871) (designating Denny de J. Ramirez M. as Fiscal Inspector of the Fiscal Inspectorate of Las Claritas).

from the date public notice of the Mining Title of the concession is given, by promulgation in the *Official Gazette* (Article 25).

191. Nonetheless, according to Article 25 of the Law the term of mining concessions may be subject to extensions for successive periods of no more than ten (10) years if the Ministry of Mines deems it pertinent (*si lo considera pertinente)*, provided that the concessionaire requests such extension within three (3) years – but no later than six (6) months – prior to the expiration of the initial term. For the purpose of requesting the extension of a concession, according to the Single Paragraph of Article 25 of the Law, the concessionaire must have satisfied all his indebtedness to the Republic (*solvente con la República*) by the time of the extension request. All the extensions granted cannot exceed the length of time originally granted.

192. For the purpose of accrediting the compliance of all mining obligations, the concessionaires file with their extension requests, the "compliance certificates" issued by the Ministry of Mines **(see *supra* para. 173)**. That is why, for instance, in the case of the petition for an extension of the Brisas del Cuyuní Concession, Compañía Aurífera Brisas del Cuyuní C.A., filed with its petition dated October 17, 2007,[173] as "*Anexo B*," a copy of the Letter No. LC-111-07 of September 14, 2007 issued by the Fiscal Inspector Mines Las Claritas of the Ministry whereas that authority certified the compliance by the concessionaire with all its obligations accordingly. And in effect, in the said Letter LC-111-07 of September 14, 2007, the Ministry informed to Compañía Aurífera Brisas del Cuyuní C.A., that as concessionaire "it has complied with what is established in the Law (Mines Law), its Regulation and in the Mining Titles, and that consequently it is **solvent** regarding the Ministry."[174] Similar certificates of solvency were given in the previous years to the concessionaire.[175]

193. In a similar way, regarding the extension of El Paují Concession requested on January 17, 2008,[176] with the petition, as "*Anexo B*," was included a copy of the Letter No. LC-113-07 of September 14, 2007 issued by the same Fiscal Inspector Minas Las Claritas of the Ministry in which it ex-

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173 Exh. C-494.

174 Exh. C-77.

175 See Exhs.C-63 to -71, -73 to -77, -79, -81 to -84.

176 Exh. C-108.

plained that it certified the compliance by the concessionaire with all its obligations accordingly. And in effect, in the said Letter LC-113-07 of September 14, 2007, the Ministry informed to Compañía Aurífera Brisas del Cuyuní C.A., that as concessionaire "it has complied with what is established in the Law (Mines Law), its Regulation and in the Mining Titles, and that consequently it is **solvent** regarding the Ministry."[177] Similar certificates of solvency were given in the previous years to the concessionaire[178] **(see *supra* para. 186 ff.).**

194. Following the request for extension of concessions, therefore, the Administration must initiate an administrative procedure in which it must verify the compliance by the concessionaire with all its obligations with the Republic. For such purpose, without doubts, the "compliance" certificates (*solvencia*) that the same Ministry, through its mining organs and officials in charge of supervising and controlling mining activities, subsequently and systematically granted to the concessionaries, are the key formal elements in order to certify or accredit the day to day compliance by the concessionaire, as verified by the Ministry, of their obligations according to the terms of the concession. They are provided with "*fe pública*" in the sense that their content, as stated by the public official in charge of issuing them after verifying the accomplishment by the concessionaire of his mining duties, cannot be contradicted **(see *supra* para. 52)**. In addition, as administrative acts of certifications they create for the concessionaire rights that make them irrevocable **(see *supra* paras. 55 ff. and 68 ff.)**.

195. The provision of Article 25 of the Law regarding the duration of concessions, on the other hand, establishes the exclusive right of the concessionaire to request an extension of the concession he holds, but does not establish a right of the concessionaire to have such extension granted. This is a pronouncement that corresponds to the Ministry of Mines if it considers the extension to be pertinent, which is not a discretionary attribution, and in any case cannot be arbitrary. To deem a matter pertinent, that is pertaining to the issue at hand, is to decide according to the legal situation and the facts surrounding the case. On matters of extensions of mining concessions, the Ministry must consider all the facts surrounding the mining activities developed by the concessionaire that may justify its request for an extension, as well as the public poli-

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177 Exh. C-83.

178 See Exhs. C-81, -82, -878 and -879.

cy conditioning the mining activities that lead to the granting of concessions. Consequently, the decision, for example, rejecting the petition of an extension of a given concession must be reasoned, namely, the Administration has to state its evaluation of the circumstances and how it ascertained an absence of pertinence, and cannot be arbitrary, but based on the general principles of administrative procedure of reasonability, rationality, proportionality, non discrimination, bona fide and legitimate expectation **(see *supra* para. 25 ff.)**.

196. In the case of petitions or requests for extensions of mining concessions, the Mines Law has established the obligation of the Ministry to respond within the same period of six (6) months in which the petition must be filed. The Law has also expressly adopted the administrative procedure principle of giving effects to the silence of Public Administration. In this case, however, contrary to other provisions of the Law regarding the same matter of administrative silence **(see *supra* para. 139 ff.)**, the Mines Law has expressly established that if there is no formal notice of a pronouncement on the matter of the extension, "it is understood that the extension is granted." That is, the Mines Law in the cases of petitions for the extension of concessions has adopted the administrative procedure principle of positive silence, which produces a tacit administrative act granting the requested extension **(see *supra* para. 139 ff.)**.

197. The basic condition from the side of the concessionaire, for the Ministry of Mines to grant the extension of a concession, is compliance by the concessionaire, by the time of his request, with all his obligations with the Republic (*solvente con la República*) according to the Mines Law, its regulations, and to the clauses of the concessions, the Mining Title and mining contracts **(see *supra* para. 191)**. That is, administrative acts deciding to extend a mining concession are administrative acts that create rights in favor of the concessionaire, in general terms subjected to the principles and rules referred to the revocability of administrative acts as provided in the administrative procedures legislation **(see *supra* para. 77 ff.)**. These principles apply, independently if the extension of the concession has been given through an express administrative act, or by means of a tacit administrative act resulting from the legal effects of the positive administrative silence aforementioned **(see *supra* para. 139)**. Nonetheless, it must be noted that in the case of the Mines Law, administrative acts granting concessions or extending the term of concessions, as administrative acts creating rights in favor of the concessionaires, although being in principle irrevocable administrative acts, they can be declared as terminated (*caducidad*) and therefore, the mining rights contained

in them extinguished, in the specific cases listed in Article 98 of the Mines Law, all related to compliance by the concessionaire of his legal and contractual obligations.

6. The extinction of mining rights

198. In fact, according to the Mines Law, the extinction of mining rights can occur in three different situations. First, mining rights can terminate if the concession is declared null and void (*nula de pleno derecho*), which according to Article 96 of the Mines Law, occurs when the concession is granted to high public officers (Articles 20 and 21), or to foreign governments (Article 22). In these cases of absolute nullity, the extinction of mining rights must be formally declared through an administrative act.

199. Second, pursuant to Article 97 of the Mines Law, mining rights extinguish due to the expiring of the term by which they were granted, without the need of any formal decision or administrative act.

200. Third, as I have already stated when referring to exploration and exploitation, concessions can also terminate (*caducar*) and the mining rights can be extinguished, in the following cases provided for by Article 98 of the Mines Law:

> 1. When the exploration is not carried out within the time period stated in Article 49 of the Law;
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> 2. When the corresponding plans are not presented within the time period established in Article 50 or during the extension period that may have been granted according to the Law;
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> 3. When exploitation is not started within the time period established in Article 61 of the Law[179];
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> 4. When the exploitation is suspended for a time period longer than the one established in Article 61 of the Law;

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[179] Except for those concessions granted under the previous Mines Law that contain a provision mitigating the extinction for lack of timely exploitation, upon double payment of the special advantage, provided that an extension of the concession has been timely requested **(see *supra* para. 185).**

> 5. When the taxes or fines established in the Law are not paid during one (1) year. In this case, however, where no express resolution has been issued, the Ministry of Mines can, upon request of the interested party, accept the payment of the unpaid taxes with applicable interest, and declare the termination of the extinction action;
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> 6. When the technical, financial and environmental feasibility study is not filed within the time period established, according to the applicable norms;
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> 7. When the concessionaire does not comply with any of the special advantages offered to the Republic;
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> 8. When on three (3) occasions, in a period of six (6) months, legal infractions are committed that could have originated the application of the maximum financial sanctions established in the Law; and
>
> 9. Any other cause expressly foreseen in the respective mining title.

201. In all these cases, regarding concessions or extensions of concessions granted in an express way or tacitly via positive administrative silence, the Administration always can initiate an administrative procedure to review the compliance of the concessionaries' duties in order to decide upon the termination (*caducidad*) of the concession, which must be subject to the provisions of the Organic Law on Administrative Procedures,[180] guarantying the due process rights of the concessionaire. That procedure must end with an express administrative act declaring that there is no termination cause or otherwise, that termination must be issued, subject to all the formal and substantive conditions of validity of administrative acts provided in the Law. In particular, on these matters of termination of concessions, such administrative acts are governed by the principles of reasonability, proportionality, equity, impartiality, equality, bona fides and legitimate expectation, applicable to all administrative actions.

202. In fact, after the development of the corresponding administrative procedure, if the Administration, after analyzing the factual circumstances provided for in Article 98 of the Mines Law, arrives at the conclusion and demonstrates that a situation of non-compliance of the concessionaire's obli-

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[180] Organic Law on Administrative Procedures, *Official Gazette* No. 2.818 Extra. of July 1, 1981.

gations exist, the procedure could result in the declaration of termination (*caducidad*) of the concession, and of the consequent extinction of the mining rights. In these cases, termination of concessions and extinction of mining rights ought to be formally declared by way of a motivated administrative act (resolution) of the Ministry of Mines, which must be published in the *Official Gazette*. The applicable appeals then can be filed against said resolution (Art. 108). In these cases, it is not that the concession or extension is revoked, but is declared "terminated," based on the particular set of circumstances of non-compliance of duties listed in said Article 98 of the Mines Law.

203. Of course, in these cases of termination (*caducidad*) of concessions, the standard for administrative action must be stricter, particularly because the matter of compliance by the concessionaire of his duties, is a day-to-day matter in the mining activities, and in the relations between concessionaires and the Administration, permanently subjected to verifications, supervisions and control by the mines inspection authorities. In addition, in these constant relations between the concessionaries and the Administration, after verifying the compliance of obligations, the supervising authorities issue "compliance certificates" that as aforementioned, are administrative acts of certification **(see *supra* paras. 50 and 186 ff.)**. Nonetheless, if after all the day-to-day supervision and control of mining activities, after the filing of subsequent (monthly and annual) reports as to the compliance of obligations, and after issuing successive "compliance certificates," all confirming, both implicitly and explicitly, compliance with the terms of a concession and the applicable legislation, the Administration realizes, contrary to earlier determinations, that in a particular situation listed in Article 98 of the Law, the concessionaire has not fulfilled its obligations and that there is non-compliance, in order to contradict the previous administrative actions, the Administration must be extremely cautious in order to terminate the concession. The administrative act terminating the concession must be issued in accordance with all the principles governing such acts that affect individual rights, and particularly, it has to be reasonable, rational, logic, proportional, equalitarian and non discriminative; and in this case, issued according to the principles of bona fide and respecting legitimate expectation (*confianza legítima*) created on the matter by the same Administration **(see *supra* para. 25 ff.)**.

204. Finally, another way of extinction of mining rights according to Article 100 of the Law is by means of resignation that must be made by the applicant in a notarized writing before the Ministry of Mines. Once the aforementioned written waiver is received, it must be published through a

resolution in the *Official Gazette*. This extinction of mining rights does not free its holder from the obligations owing at the time of the extinction (Article 101).

7. The reversion

205. Article 102 of the Mines Law establishes that the land, permanent works, including facilities, accessories and equipment that are an important part of them, as well as any other asset, either real estate or personal property, tangible or intangible, acquired for the purposes of mining activities, must be kept and maintained by the respective holder, in substantial working condition, according to applicable progress and technical principles, during the complete duration of the mining rights and of their possible extension. To that effect, as established in Article 103 of the Law, the holder of mining rights has to file before the Ministry of Mines a detailed inventory of all the acquired goods, intended for the mining activities that the holder is performing, goods that the concessionaire could not sell in any way without the previous written authorization from the Ministry of Mines.

206. Under Article 102 of the Law, upon the extinction of mining rights, whatever the cause, said goods become fully the property of the Republic, free of taxes and charges, without compensation of any kind.

V. THE MAIN ENVIRONMENTAL AND LAND USE PLANNING LAWS AND REGULATIONS APPLICABLE TO MINING PROJECTS, IN PARTICULAR IN FOREST RESERVATIONS LIKE THE IMATACA FORESTRY RESERVE

207. The 1999 Constitution includes a Chapter dedicated to environmental rights as part of the individual rights (and duties), whereas the State is to protect the environment, being its fundamental duty with the society's active participation to grant the people an environment free of contamination (Article 127).

208. The National State's police power in this matter also has being provided for in the Constitution: Article 129 requires for every activity that may have a negative impact in the ecosystem to be previously accompanied by an environmental and sociocultural impact study. It also provides for the mandatory inclusion of a provision stating the duty to preserve the ecological

balance and to reinstate the environment to its natural state, if it was to be altered, in the terms provided for by the law, in State contracts or State granted permits that may have an effect on natural resources.

209. The National State is also constitutionally bound to develop land use policy, taking into account, among others, the ecological, geographic, social and financial realities towards a sustainable development; and to elaborate the principles and criteria to be followed in setting this land use policy through an Organic Law (Article 128).

210. Finally, the National State is the competent authority on environmental and land use planning matters, and thus, is empowered to legislate and regulate it, to the extent that the regime and management of Venezuela's natural resources, the national environmental policy, and the land use planning are matters assigned expressly to it in the Constitution (Articles 156, 16 and 23).

1. The general rules on land planning and land use for mining projects, in particular regarding the Areas with Special Administration Regime

211. In order to regulate the environmental and land use planning, the legal framework has been set forth, following the Constitution's provisions, in the Organic Law on the Environment (*Ley Orgánica del Ambiente*),[181] the Criminal Environmental Law (*Ley Penal del Ambiente*),[182] the Organic Law on Land Use Planning (*Ley Orgánica para la Ordenación del Territorio*)[183] and several Executive Decrees and Regulations related to specific environmental matters.

212. Regarding Land Use Planning, the Organic Law on Land Use Planning, following the Constitution, provides that it must be carried out by a set of plans that have to be observed and complied with, being mandatory for both the State and the individuals. The plans, in which a broad layout of ac-

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[181] Organic Law on the Environment, *Official Gazette* No. 5.833 of December 22, 2006.

[182] Criminal Environmental Law, *Official Gazette* No. 4.358 Extra. of January 3, 1992.

[183] Organic Law on Land Use Planning, *Official Gazette* No. 3.238 Extra. of August 11, 1983. See the general comments in Allan R. Brewer-Carías, *Ley Orgánica para la Ordenación del Territorio*, Editorial Jurídica Venezolana, Caracas 1983.

tivities is defined and the development strategy for the country is outlined, are the following: the National Plan of Land Use, the Regional Plans of Land Arrangement, the National Plans for the use of natural resources and other sector plans; the urban land use city-plans; the plans for the Areas Under Special Administration Regimes; and the other plans of land use that the process of integral development of the country may require (Article 5). In addition, the Organic Law on Land Use Planning specifically provides that all activities that could imply occupancy of the territories are subject to prior control by the Ministry of the Environment through approvals or through authorizations. In the case of decisions to be adopted by entities or organs of the National Public Administration with important territorial incidence implying actions of occupancy of the territory as determined by the Regulations, they must be previously approved by the Ministry of Environment in order to verify its conformity with the lines and previsions of the National Plan of Land Use (Article 49). In such cases, the decision to approve or deny must be issued in a term of 60 days, with approval considered as granted when such term elapses without express decision (Article 49). In this case, the Organic Law has adopted the principle of positive administrative silence effects **(see supra para. 136).** In the case of activities to be developed by individuals and private entities implying occupancy of the territory, they must be previously authorized by the public entities in charge of the execution of the plans (like the Ministry of the Environment), in order to verify their conformity with the same (Article 53). Also in these cases, the administrative decision must be issued within the term of 60 days, and if no decision has been adopted granting or denying the authorization, it must be considered as granted, and the public entity is then obliged to produce the corresponding certification of the authorization (Article 54).

213. As mining activities have an impact on and are capable of degrading the environment, and as they entail the occupation of territory and affect natural resources, they are subject to the environmental and land use laws, decrees and regulations, and thus are subject to the approvals and the authorizations established in the Organic Law as noted above.

214. The Organic Law on Land Use Planning has also specifically provided for the establishment of Areas under Special Administrative Regimes on matters of environment protection and land use planning, comprising among others, National Parks, Protected Zones, Forestry Reserves, Special Areas for Security and Defense, Wildlife Reserves and Refuges, and Tourist Interest Areas (Article 15). In particular, Articles 6, 17 and 35 of the

Organic Law on Land Use Planning empowers the President of the Republic to establish such Areas Under Special Administration Regimes, and also to approve the Land Use Plans and the Uses Regulations for such areas, setting the guidelines for the zoning uses and activities therein allowed (Article 35). These Areas Under Special Administration Regimes can be established wherein land use is determined by special plans conceived within the mentioned system of plans regulating and promoting the orderly occupation of the national territory.

215. "Forestry Reservations" are among those Areas Under Special Administration Regimes listed by Organic Law on Land Use Planning (Article 15), for which the existence of plans – to regulate and promote the orderly occupation of the territory – is anticipated within the mentioned system of plans[184]. Once created by the National Executive, the same authority must approve their use plan, which must contain guidelines, strategies and policies for their management, as well as the guidance for the allocation of uses and activities allowed within their scope of influence (Article 17 Organic Law on Land Use Planning). The Law also requires, in addition to the plan, a Special Regulation for the uses having degrading effects.

216. Mining activities, for instance can be performed within some of the Areas Under Special Administration Regimes, like a Forestry Reservation, as provided in the Plan regulating each area, which must expressly include the guidelines for such activities to be carried out. In the case of the Imataca Forestry Reservation in the Bolivar and Delta Amacuro States, where the Brisas project is located, both the first Master Plan and Use Regulation passed in 1997,[185] as well as the one currently in force, passed in 2004 (Imataca Plan and its Use Regulation), recognized mining as a preexisting

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184 "Forestry Reservations" were initially established in the Forestry, Water and Soil Law of 1966, to be created by the National Executive in wasteland and other territories mainly stately owned, when it was so required to assure the continuous provision of raw materials for the national industry. See *Official Gazette*, No. 1.004 Extra. of January 26, 1966. See the new Law on Forests and Forest Management, *Official Gazette* No. 38.946 dated June 5, 2008.

185 Decree No. 1.850 of May 14, 1997, *Official Gazette* No. 36.215 of May 28, 1997 (Exh. C-700).

activity in the area, further permitting it in the designated zones[186] **(see *infra* paras. 245 and 248)**.

217. In all these cases, the respective Plan for land use and territory occupation in Areas Under Special Administrative Regimes is the legal instrument governing the management and handling of the Area with respect to the permitted activities and uses, their allocation, the parameters to be followed when carrying them out, as well as their management. The Plans are the legal instruments that have to be observed when granting land occupation permits as, for instance, is provided in Articles 35 and 37 of the Imataca Forestry Reservation Plan.

218. The Plans require that a written request be filed before the Ministry of the Environment along with the requirements set forth in the environmental regulations to obtain a land occupation permit. As for the rest of the procedure for granting these permits, the Plans generally refer to Organic Law on Land Use Planning stating that once the requests have been filed, the Ministry of the Environment must decide on the matter within the period stated in the Organic Law on Land Use Planning, in compliance with the environmental regulations in place, including that the interested parties (in the case of private individuals) must fulfill their duty to file an Environmental and Socio-Cultural Impact Study (Article 39). The 1996 Rules on Environmental Evaluation of Activities that may degrade the Environment (Decree No. 1.257, 1996)[187] do not list any further particular requirements but only provide that land occupation permits are to be granted pursuant to Organic Law on Land Use Planning.

219. Indeed, as aforementioned **(see *supra* para. 212)** under Organic Law on Land Use Planning, when a public entity is to adopt a decision that will have an effect on the space or imply occupation of territory, they have to be previously approved to ensure their conformity with the guidelines and provisions of the applicable Land Plan. This is what is provided, for instance, in Articles 43, 46 and 49 of the Imataca Reservation Plan. Thus, in this case, for instance, pursuant to Article 49 of Organic Law on Land Use Planning, a

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[186] Decree No. 3.110 of Sept. 7, 2004, *Official Gazette* No. 38.028 of Sept. 22, 2004 (Exh. C-877).

[187] See Decree No. 1.257 of March 13, 1996 (*Normas sobre Evaluación Ambiental de Actividades Susceptibles de Degradar el Ambiente*), *Official Gazette* No. 35.946 of April 25, 1996.

request for a land occupation approval, filed in accordance with the Imataca Plan and its Use Regulation must be either granted or rejected within sixty (60) days from the last request for information. In this case too, the Organic Law on Land Use Planning has expressly adopted the administrative procedure principle of giving positive effects to the absence of timely pronouncement by the Administration **(see *supra* para. 130 ff.)**. Hence, if there is no formal pronouncement on a land occupation approval request made by a public entity, "the request is to be deemed granted." The Organic Law on Land Use Planning, as the Mines Law in the case of petitions for extensions of concessions, has also adopted the administrative procedure principle of positive silence, which results in an implied administrative act granting the requested land occupation.[188] Consequently in these cases if, for instance, the Ministry of Mines was the requesting public entity of the approval in order to grant mining concessions, the positive administrative silence effect of the absence of decision by the Ministry of the Environment, would mean that the petition of the Ministry of Mines was tacitly approved, with the result that the Ministry of Mines then would be able to grant the corresponding concession.

220. When the land occupation permit is granted, the Ministry of the Environment must set conditions to harmonize mining activities with those provided for the specific Area in the corresponding Plan, for instance in an Area like the Imataca Forestry Reservation, with those established in the Forestry Arrangement and Management Plans (Article 64 of the Imataca Plan and its Use Regulation). In such case, the approval must to be recorded in the special Registry that the Imataca Reserve Administration has to keep (Article 41 of the Plan).

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188 On positive administrative silence in the Organic Law on Land Use Planning, see Allan R. Brewer-Carías, *Ley Orgánica para la Ordenación del Territorio,* Editorial Juridica Venezolana, Caracas 1988, pp. 66-67; Juan Domingo Alfonzo Paradisi, "Aplicabilidad del silencio administrativo positivo en la Ley Orgánica de Ordenación Urbanística," in Fernando Parra Aranguren (Ed.), *Temas de Derecho Administrativo. Libro Homenaje a Gonzalo Pérez Luciani*, Vol. I, Tribunal Supremo de Justicia, Caracas 2002.

2. General regime on the role of the Ministry of the Environment in granting authorizations and its various permitting and compliance requirements relating to mining activities

221. According to the Organic Law on the Environment and developing constitutional concepts, the State (through the Ministry of the Environment) is to exercise environmental control (both preceding and subsequently) over activities that are capable of degrading the environment and its effects (Article 77).

222. As the Political-Administrative Chamber of the Supreme Court of Justice in ruling No. 819 of July 13, 2004 has stated:

> "[P]reservation of the environment and sustainable development are principles developed widely by Chapter IX, Title III of the Constitution of 1999 (arts. 127 to 129) whereas it specifically provides for the duty of the State to unfold a land planning policy taking into account ecological, geographic, population, social, cultural, economic and political realities, in agreement with sustainable development premises, and also stipulates the express duty that all activities susceptible to have a negative impact on the ecosystems, must be previously accompanied by their corresponding environmental and socio-cultural impact study. Hence, after those constitutional dispositions went into force, the matter related to environmental impact declarations has been regulated by a systematized normative set that conveys what is to be a global policy on preservation and conservation of the atmosphere, which, fundamentally, must be carried out through the Ministry of the Environment and Natural Resources, the state and municipal authorities and other national authorities to whom such policy has been trusted, as it is the case, for instance, of the Ministry of Production and Commerce.
>
> In the opinion of the Chamber, this constitutional duty of prevention and environmental control does not belong exclusively to one specific local authority but, on the contrary, requires maximum levels of inter-institutional coordination (Article 26 of the Urban Land Planning Law) to promote the task of drawing and enforcing the National Land Use Plan that the State has to carry out, within which, of course, the Ministry of the Environment and Natural Resources, in fulfillment of the Constitution, carries out a crucial work of environmental control,

> and for that reason the Land Use Planning Law grants such Ministry the power to direct the enforcement of the National Land Arrangement Plan jointly with the state's Governors, acting as agents of the National Government, in accordance with the delegations that the former confer to the latter.
>
> Therefore the Ministry of the Environment and Natural Resources, on the basis of the exercise of these faculties, can grant not only the corresponding authorizations, but also must impose administrative penalties in cases of violation of the National Land Arrangement Plan (Article 43 ejusdem)."[189]

223. Mining activities encompasses fit the legal definition of activities capable of degrading the environment under Article 80 of the Organic Law on the Environment. Therefore the Ministry of the Environment is to exercise environmental control over mining, both before the mining starts and after it has begun, and also over its effects.

A. Preceding environmental control

224. The State (the Ministry of the Environment) exercises its preceding police power through authorizations, approvals, permits, licenses, concessions, assignations, contracts and other (Article 82), instruments that are granted to those that require them in order to be allowed to perform those activities that are environmentally sensible but are, however, permissible.

225. Accordingly, those wishing to pursue mining activities have to obtain the State's consent to do so and, according to the regulations in place, even if they have already been granted the right to do so through a concession, they have to seek the National State's further approval prior to the start of those activities that are inherent to mining, if such activities may have an effect on the environment, since under the Organic Law on the Environment any activities that have the potential of degrading the environment, such as those inherent to mining, cannot be carried out unless the State has previously given its consent.

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[189] See Ruling No. 00819 of the Political-Administrative Chamber of the Supreme Tribunal of Justice of July 13, 2004, available at http://www.tsj.gov.ve/decisiones/spa/julio/00819-140704-2003-0023.htm.

226. Consequently, a request for the corresponding entitling instrument must be filed. The Ministry of the Environment is then to evaluate the impact the activity may have in the environment in compliance with the provisions of the Organic Law on the Environment, the Organic Law on Land Use Planning and any other special laws and technical environmental regulations on the matter (Article 81), and must grant it, provided that the performance of such activity requested: (i) is permitted under land use regulation plans, (ii) produces effects that are tolerable, (iii) create socio-economic benefits, and (iv) the warranties, proceedings and provisions are complied with. Accordingly, it may impose conditions, limitations and restrictions when granting the petition (Article 83).

227. Both these requests and the evaluation process that follows have been further regulated by the Organic Law on Land Use Planning, the 1992 Rules Governing the Affecting of Natural Resources Associated with Mining (Decree No. 2.219, 1992),[190] and the 1996 Rules on Environmental Evaluation of Activities that may degrade the Environment (Decree No. 1.257, 1996).[191]

a. Land occupation permits

228. Under the Mines Law, the Organic Law on Land Use Planning and Decree No. 2.219, the first environmental consent to be obtained for mining activities is the approval or the authorization to occupy the territory, that is, a given piece of land for mining purposes that must be given by the Ministry of Environment. The purpose of this preliminary approval or authorization is to verify that the activities to be carried out are in those territories where the National State has planned them to be.

229. The National State activities directed to protect the environment as well as to preserve it and/or to assure the rational use of natural resources, are an essential part of land planning policy. Therefore, any public decision involving land occupation and/or the use of a natural resource must integrate

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190 See Decree No. 2.219 of April 23, 1992 (*Normas para regular la afectación de los recursos naturales renovables asociados a la exploración y extracción de minerales*), *Official Gazette* No 4.418 Extra. of April 27, 1992.

191 See Decree No. 1.257 of March 13, 1996 (*Normas sobre Evaluación Ambiental de Actividades Susceptibles de Degradar el Ambiente*), *Official Gazette* No. 35.946 of April 25, 1996.

environmental policy. As Article 3 of the Organic Law on Land Use Planning provides, land planning includes "9. protection of the environment and conservation and rational use of water, soil, subsoil, forest resources and other renewable and nonrenewable natural resources based on land planning."

230. Decree No. 2.219, 1992, classified mining activities to be developed through concessions or contracts as "Type II" exploration and exploitations (Article 3). This implies that it is the Ministry of Mines that must file the request for the territory occupancy approval before the Ministry of Environment (and not the interested party requesting a concession), this administrative approval being a "condition" to be fulfilled prior to the granting – by the Ministry of Mines – of a given concession or mining contract within the area (Article 7). Consequently, in the case of mining activities to be developed through concessions or mining contracts it is the Ministry of Mines that is the administrative organ that must seek and obtain this environmental approval by the Ministry of the Environment prior to granting mining concessions or entering into contracts for mining. That was ratified by Decree No. 1.257 containing the Rules of Environmental Evaluation of Activities Susceptible of Degrading the Environment passed in 1996 (Article 15), which provided for those concessions and contracts already in place where neither operation had started nor a land occupation permit issued, the corresponding approval was to be sought as a prerequisite for the commencement of the activities (Article 15, Paragraph 2) by responding to an environmental questionnaire to be published by the Ministry of the Environment (Article 16).

231. Up to this point, by granting both the land occupation approval and the concession for mining purposes the State has exercised its police power twice: (i) first, by checking whether mining activities in a given area are in accordance with the applicable Plan for Land Use (for example, the Imataca Plan and its Use Regulation), that is to say, the appropriateness of the proposed activity, broadly speaking, and (ii) second, by selecting the concessionaire through the process established in the Mines Law, which refers to its suitability and that of the project or operation proposed.

b. Authorizations to affect natural resources

232. After a concession and the subsequent land occupation permit have been granted, a more specific, but still preliminary environmental control follows: before the concessionaire may initiate the exploratory phase of the mining operation he must get an authorization to affect natural resources for exploratory purposes and subsequently, before the commencement of the

productive phase of the mining operation, an authorization to affect natural resources for productive purposes has also to be obtained.

c. *Authorization to affect natural resources for exploratory purposes*

233. Indeed, prior to the initiation of the exploratory phase of the mining operation, the concessionaire must file a petition to obtain from the Ministry of the Environment an authorization to affect natural resources for exploratory purposes (Article 17 of Decree No. 1.257, 1996). The Rules Governing the Affecting of Natural Resources Associated with Mining lists the documents and requirements that must be filed along with the petition, and when exploratory drilling is foreseen, an Environmental Impact Study has to be prepared and submitted as well (Section IV, Chapter II of Decree No. 2.219, 1992 and Article 17 of Decree No. 1.257, 1996).

234. The purpose of these authorizations is to generally set the way in which the activities that will be performed are to be carried out, furthering the lesser impact on the natural resources that are to be affected, as well as to anticipate measures that can minimize such impacts. Thus, the measures and conditions that are included therein must directly relate to this end and cannot have a different or another goal. Basically, those measures and conditions are the terms under which the program or project is approved and can be accomplished. It follows that the conditions established in any such authorization are to be placed on the concessionaire, and not on the administration or third parties: it is the concessionaires who have to comply (through proper performance, either directly or not) with the measures and conditions that the Ministry *imposes on them* when granting the authorizations to affect.

235. Procedurally, when granting these petitions the Ministry of the Environment is bound by the general principles of due process and administrative procedure set forth in the Organic Law on Administrative Procedures; otherwise its acts are absolutely null and void (Article 91) **(see *supra* paras. 35 ff. and 98 ff.)**.

d. Authorization to affect natural resources for exploitation purposes

236. In addition to the authorization to affect natural resources for exploration purposes, the concessionaire ought to obtain an authorization to affect natural resources for exploitation purposes, prior to the beginning of the corresponding phase of the mining operation. For such purpose, the concessionaire must file a petition to the Ministry of the Environment together

with an Environmental Impact Study in which the environmental concerns reflected in the Technical-Economic Feasibility Study and Mining Program are addressed (Article 20 of Decree No. 1.257, 1996) as well as other requirements set forth by the Rules Governing the Affecting of Natural Resources Associated with Mining (Decree No. 2.219, 1992).

237. The scope of this EIS is to be established by the Ministry of the Environment following a terms of reference proposal that has to be filed by the concessionaire, the contents of which are listed under Article 7 of the Rules on Environmental Evaluation of Activities (Articles 20 and 7 of Decree No. 1.257, 1996).

238. The authorization to affect natural resources for productive (exploitation) purposes, when granted, should follow the provisions set forth in the Environmental Impact Study, and should also include a short description of the program or project to be developed, the preventive, mitigating and corrective measures for the foreseen impact and the *conditions under which affecting of the environment will be permitted during the productive phase*. Under the Rules on Environmental Evaluation of Activities, the Ministry of the Environment is also expressly empowered to impose additional conditions as deemed necessary, in accordance with the law (Articles 21 and 18 of Decree No. 1.257, 1996).

239. The duration of these authorizations to affect for productive purposes should be coherent with that of the project to be accomplished. Corollary, under the Rules on Environmental Evaluation of Activities they are to be granted for up to the time estimated for the completion of the corresponding mining production program (Article 21).

B. Subsequent environmental control

240. The environmental authority, as we have stated previously, is also empowered to exercise its police power during the course of the authorized activities.

241. The State (through the Ministry of the Environment and other empowered bodies) exercises its subsequent environmental supervision and control, once an authorization to occupy or to affect (either for exploratory or productive purposes) has been granted, to confirm the compliance of rules and conditions set through those instruments, as well as to prevent environmental

infringements. It does so through environmental safeguarding, auditing, supervision and police (Articles 92 and 93 of Organic Law on Environment).

242. Subsequent monitoring is achieved by pursuing the Environment Supervision Plan included in the Environmental Impact Study submitted by the concessionaire when applying for the authorization to affect. Accordingly, the designated environmental consultant (or designated responsible authority, if that is the case) must submit to the Ministry of the Environment a report assessing the status of the measures and conditions set in the ESP or in the authorization itself (Articles 28 to 30 of Decree No. 1.257, 1996).

243. After the Ministry of the Environment has thoroughly analyzed such reports, it may formulate recommendations or impose further conditions, if deemed necessary to minimize the environmental impact caused by the activities that are being carried out (Article 31 of Decree No. 1.257, 1996). The referenced reports have to be inserted in the program or project file, and are to be used by the Ministry of the Environment in further supervision and control (Article 32 of Decree No. 1.257, 1996). Indeed, the Ministry of the Environment is entitled to carry out inspections at any time in order to verify the accuracy of the reports and compliance with the measures as well as to enforce the legal framework (Article 33 of Decree No. 1.257, 1996).

244. On the other hand, mining concessionaires are entitled to request the Ministry of the Environment to issue certificates of compliance or environmental performance, where satisfaction of the general environmental framework as well as of the specific conditions imposed through the preceding control instruments, is assessed (Article 94 of Organic Law on Environment).

3. The Forestry Reserve of Imataca and the possibility of the development of mining activities in some of its areas

245. As mentioned, the Brisas del Cuyuní Project is located within the area of the Forest Reserve of Imataca in the Bolivar and Delta Amacuro States of Venezuela. This Reservation was originally created by Resolution No. 47 of February 6, 1961 of the "Ministerio de Agricultura y Cria."[192] After

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[192] See *Official Gazette* No. 26.478 of February 9, 1961. The Reserve was extended by Resolution No. 15 of January 7, 1963. See *Official Gazette* No 27.044 of January 8, 1963.

the sanctioning of the Organic Law on Land Use Planning, the Imataca Forestry Reservation was considered according to Articles 6, 17 and 35 as an "Area Under Special Administration Regimes" (Article 15.3), regarding which Land Use Plan and the Uses Regulation was to be approved, setting the guidelines for the zoning uses and activities therein allowed (Article 35).

246. The first Master Plan and Regulation of Use of the Imataca Reservation was established through Decree No. 1.850 of May 14, 1997,[193] wherein the continuation of mining use and activities in the "Mixed Zone (ZMM)" and in all areas in which, before the publication of the said Plan, mining concessions and contracts were given, was recognized. This Plan, considered as an instrument for environment planning (Article 29 of OLE) was substituted by the currently in force *Plan de Ordenamiento y Reglamento de Uso de la Reserva Forestal Imataca, Estados Bolívar y Delta Amacuro*, in Decree No. 3.110 of September 7, 2004 (Imataca Plan and its Use Regulation).[194]

A. Zoning uses and mining activities

247. According to the Imataca Plan and its Use Regulation, ten (10) Zoning Uses (Zonas de Ordenamiento) were established in the Reservation: 1. *Zona de Manejo Forestal (ZMF); 2. Zona de Manejo Forestal con Limitaciones (ZMFL)*; 3. *Zona de Protección (ZP);* 4. *Zona de Reservorio de Genes (ZRG);* 5. *Zona de Recuperación (ZR);* 6. *Zona de Manejo Especial Forestal con Alta Presencia de Comunidades Indígenas (ZMEFAPCI)*; 7. *Zona de Manejo Especial Forestal - Minero (ZMEFM);* 8. *Zona de Manejo Especial Forestal - Minero con Alta Presencia de Comunidades Indígenas (ZMEFMAPCI);* 9. *Zona de Manejo Especial Agroforestal (ZMEA),* and 10. *Zona de Manejo Especial Agroforestal con Alta Presencia de Comunidades Indígenas (ZMEAAPCI)* (Article 7). In these zones, the uses allowed are the following: Forestry, Traditional, Eco-Tourism, Residential Rural, **Mining**, Services, Scientific and Security and Defense (Article 43).

B. Mining activities within the Imataca Reserve

248. Regarding the mining use and activities they are particularly allowed in the following two zones: 7) *Zona de Manejo Especial Forestal -*

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193 See *Official Gazette* No. 36.215 of May 28, 1997 (Exh. C-700).

194 See *Official Gazette* No. 38.028 of September 22, 2004 (Exh. C-877).

Minero (ZMEFM), located to the North of Cuyuní River, in Sifontes Municipality of Bolivar State and in the superimposition zone in the boundaries between the Municipalities Antonio Díaz of Delta Amacuro State and Sifontes of Bolívar State (Article 14) and 8) *Zona de Manejo Especial Forestal - Minero con Alta Presencia de Comunidades Indígenas (ZMEFMAPCI)*, located to the South of Cuyuní River in Sifontes Municipality of Bolivar State, in areas inhabited by the Pemón and Akawaio indigenous people (Article 15). Consequently, Article 61 of the Imataca Plan and its Use Regulation expressly sets forth that "The Mining Use will be made in the *Zona de Manejo Especial Forestal - Minero (ZMEFM)* and in the *Zona de Manejo Especial Forestal - Minero con Alta Presencia de Comunidades Indígenas (ZMEFMAPCI),* subject to the limitations and conditions established in this Decree and other applicable provisions." Corollary, Mining Uses and activities are expressly forbidden in Article 44, in the other Zones of the Reserve (Zone Nos. 1, 2, 3, 4, 5, 6, 9, and 10). The mining use is also forbidden in general in permanent and not permanent water beds (Article 44.5).

249. The mining concessions Brisas del Cuyuní, Unicornio and Barbarita and the Mining Parcels NLEAV1-NLSAV1 and Barbara of Phase 1 of the Brisas Project, are precisely located in the Use Zone 8) *Zona de Manejo Especial Forestal - Minero con Alta Presencia de Comunidades Indígenas (ZMEFMAPCI)*, of the Imataca Reserve, as expressly mentioned in the authorization to affect natural resources given by the Ministry of the Environment through its pronouncement No. 1.080 dated March 27, 2007.

250. It must be noted that mining activities that were duly authorized and in place within the Imataca Reserve prior to the 2004 Imataca Plan and its Use Regulation defining the Zones allowing Mining Use, were allowed to continue subject to the provisions of the Plan, the Mines Law, and the environmental normative framework (Third Transitory Provision of the Plan). Nonetheless, when deemed necessary, those activities were due to adjust their exploitation plans to the provisions of the Imataca Plan and its Use Regulation during the following year (2004-2005).

251. In any case, the mining activities permitted in the Zones 7 and 8 of the Imataca Reserve, according to Article 60 of the Imataca Plan and its Use Regulation, are those of prospection, exploration, exploitation, processing, transformation, storage, transport and commercialization of metallic and non metallic minerals, including associated installations to the mining projects, according to what is established in the Mines Law, and in the spe-

cial mining statutes of the States Bolivar and Delta Amacuro regulating non metallic mines. According to the same provision of Article 60 of the Imataca Plan and its Use Regulation, the State has reserved its rights to the results of the searches with strategic or national security purposes.

252. In any event, pursuant to Article 62 of the Imataca Plan and its Use Regulation, mining activities in the Imataca Reserve must be carried out subject to the provisions contained in the technical regulations for controlling activities affecting the environment and all the other applicable environmental provisions, as well as those established in the Operative Plans indicated in the Imataca Plan and its Use Regulation (Article 62).

253. Moreover, under Article 27 of the Imataca Plan and its Use Regulation the Ministry of Mines, with the participation of the Ministry of the Environment and the Venezuelan Geographic Institute "Simón Bolívar" are in charge of the Evaluation Program of the Mining Activity in the Reserve (Article 18.9), which is to produce and maintain updated information, and to monitor and control the development of activities of land registry and mining exploration and exploitation. Within this program, the Sub-Program of Middle and Big Mining has the purpose of identifying the areas assigned to so-called middle and big mining; of establishing the integral development of infrastructure common to the projects; of establishing the socioeconomic aspects of the region for a better use of human resources; and of implementing the best techniques on matters of environment protection. The execution of such Program of Middle and Big Mining, according to Article 27.3, will be the responsibility of "the competent authorities, those proposing the infrastructure and those responsible for generating damage."

C. The authorizations for mining activities in the Imataca Reserve

254. According to Article 35 of the Imataca Plan and its Use Regulation, projects and activities to be carried out by individuals or corporations, either private or public, within the Imataca Forest Reserve, must be done in compliance with the Plan and the environment regulations in place. Consequently, the requests for authorizations of exploitation of natural resources must be made according to what is established in the Land Use and Forestry *manejo* Plan, subjected to what is established in the forestry legislation (formerly the Forestry, Soil and Water Law of 1965) and its Regulation, and in the Environment Organic Law.

255. Regarding the land occupation permits within the Imataca Reserve, pursuant to Article 36 of the Imataca Plan and its Use Regulation, they must be granted by the Ministry of the Environment following the environmental normative framework. Moreover, under Article 37 the request for such authorizations can only be granted in conformity with what is established in the Imataca Plan and its Use Regulation and the special statutes applicable. These requests are to be filed by the interested parties in writing before the Ministry of the Environment, with the attachments indicated in the environmental normative framework (Article 38). Once the petition for land occupation permit has been duly filed, the Ministry of the Environment must either grant it or deny it within the term set forth in the Organic Law on Land Use Planning. Providing that the request complies with the environmental normative framework and is granted, then the Ministry must inform the interested party of its obligation to file the Study of Environmental and Sociocultural Impact (Article 39). The Ministry of the Environment must establish in the corresponding authorizations the conditions tending to harmonize the mining activities with those established in the Land Use and Forestry Manejo Plan (Article 64). These authorizations must be registered in the special Registry that must be kept by the Imataca Reserve Administration (Article 41). In any case, as I have already explained, for mining concessions and contracts classified in Decree No. 2.219, 1996 as Type II explorations and extractions (Article 3), it is the Ministry of Mines that must request from the Ministry of the Environment the corresponding territory occupancy permit as a condition to be fulfilled prior to granting concessions or contracts in a given area (Article 7), as was ratified by Decree No. 1.257, 1996 **(see *supra* para. 230).**

256. Regarding authorizations for territory occupancy, according to the Imataca Plan and its Use Regulation, they terminate (*prescribe*), if within the term of three years after being issued, the interested party fails to initiate activities. This term can be extended by the Ministry of the Environment up to one more year, providing that a grounded request is made before the exhaustion of the initial term (Article 40).

257. Regarding the authorizations to Affect Natural Renewable Resources within the Imataca Reserve area, they must be filed by the interested parties before the State Environmental Directorate of the Ministry of the Environment with jurisdiction in the area. This request must be filed in writing, properly identifying the interested party with all the needed attachments established in the environmental legal framework (Article 42) as previously explained (**see *supra* para. 233 ff.**).

D. The challenge of the Imataca Reserve Decree on unconstitutional grounds before the Supreme Court

258. The Imataca Reserve Decree No. 1.850 of May 14, 1997 was challenged by a group of people before the former Supreme Court of Venezuela, which in a decision dated November 11, 1997, notwithstanding the opposition formulated by the Attorney General's Office (August 12, 1997), issued a preliminary or precautionary ruling "ordering the Ministry of Mines to refrain from, granting concessions, authorizations and any other act related to mining activity, exploration and infrastructure, projects for exploration and geological exploitation, based on Decree No. 1.850 dated May 14, 1997, until this Court issues a definitive ruling on the unconstitutionality and illegality of the normative provisions it contains."[195] It must be highlighted that the order is given directly and exclusively to the Ministry of Mines, and not to the Ministry of the Environment, so the latter is not prevented by the Court's ruling to grant those authorizations, approvals and permits as required for the continuance of mining activities authorized by the Ministry of Mines prior to the Court's decision. The Political-Administrative Chamber also declared urgent the decision of the case, abbreviating terms. A motion to clarify the ruling was filed by one of the parties, Venezuelan Mining Chamber (CAMIVEN), but was rejected by the Court on December 9, 1997.

259. Other claims challenging the constitutionality of the same Decree were filed before the same Supreme Court and its Political-Administrative Chamber, so almost one year later, on August 11, 1998, the Court decided to accumulate all claims against the Decree in only one file.[196] Due to the lack of any procedural activity in the file by the parties, a motion to declare the claim perished was filed, but on February 2, 1999 the Court refused to rule on the matter and rather decided to postpone it and address it in a definitive ruling on the case.

260. After the new Constitution was sanctioned in December 1999, creating the Constitutional Chamber of the Supreme Tribunal of Justice, this Chamber, after receiving the files that where in process before the former Supreme Court of Justice, on September 24, 2003, almost three years after the new Constitution was sanctioned, decided it lacked jurisdiction in the

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[195] Exh. C-700.

[196] Record Nos. 0943, 0962, 0967 and 13.915.

case due to the fact that the challenged act was an Executive Decree and Regulation, given that the Political-Administrative Chamber of the Supreme Tribunal was the one to decide on its unconstitutionality.[197] On March 10, 2004, a representative of one of the parties in the process (Minera Las Cristinas C.A.) warned the Chamber that the Ministry of Mines had not respected the precautionary measure issued by the former Supreme Court.

261. One year after assuming jurisdiction in the case, through Decision No. 1.217 of September 2, 2004, the Political-Administrative Chamber of the Supreme Tribunal decided to accept jurisdiction in the case[198] and to reinstate the procedure, arguing that regarding the non-compliance by the Ministry of Mines on the precautionary measure, it was to decide promptly. No other decision has been adopted by the Political-Administrative Chamber in this process.

262. One aspect must be highlighted regarding this process originating with the challenging of Decree 1.850 of the Imataca Reserve: the Tribunal has not yet decided on the warning given to it by one of the parties, regarding the non-compliance by the Ministry of Mines with the precautionary measure ordering it to stop, beginning on November 13, 1997, granting concessions and authorizations for mining purposes in the Imataca Reserve Area.

263. It must be mentioned, that the "Brisas del Cuyuní" Concession was granted to Brisas del Cuyuní C.A. in 1988, a decade before the Imataca Reserve Decree was issued, so the precautionary measure did not affect the mining rights granted in it. Nonetheless, regarding the Unicornio Concession, it must be noticed that it was granted to the same company Brisas del Cuyuní C.A. after the precautionary measure of the Supreme Court was issued. The Concession in fact, was approved by Resolution No. 452 of the Ministry of Mines on December 3, 1997 (more than two weeks after the precautionary measure was issued), which was made public in *Official Gazette* No. 5.190 of December 11, 1997, the corresponding Title of the concession was issued on February 11, 1998 and published in *Official Gazette* No. 36.405 of March 3, 1998.[199] Notably, however, although within the Imataca Forestry Reserve, the Unicornio Concession occupies the same area as the

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[197] Record No. 2000-1459.

[198] Record No. 2003-1348.

[199] Exh. C-5.

already granted Brisas concession. Nonetheless, these circumstances have no legal effect as to the validity of the concession because any administrative act must be presumed valid and effective until it is annulled by the courts of the Contentious Jurisdiction Courts, or validly revoked by the Administration. The Unicornio Concessions could have been challenged before the courts only on grounds of its legality, according to the provisions of the Organic Law of the Supreme Tribunal of Justice, within the precise term of six months that followed its publication in *Official Gazette*, (until September 1998) which did not occur.

264. In addition, the contentious administrative judicial process that was initiated with the challenging of the Imataca Reserve Decree No. 1.850 of May 14, 1997, ceased to have any valid object when the new Imataca Reserve Decree No. 3.110 of September 7, 2004 was issued that expressly abrogated the previous challenged Decree No. 1.850 of 1997. Having been abrogated, according to Supreme Tribunal doctrine, it cannot be annulled, because State acts that have ceased to have effects (due to being abrogated) cannot be annulled by means of judicial review actions.[200] Consequently, no legal consequence arises from the fact that the Ministry of Mines approved the Unicornio Concession two weeks after a precautionary measure was issued by the Politico Administrative Chamber of the Supreme Tribunal; a precautionary measure that since 2004 ceased to have any effects.

VI. THE ENVIRONMENTAL AND LAND USE AUTHORIZATIONS RELATED TO THE BRISAS DEL CUYUNÍ MINING PROJECT, AND THE ABSENCE OF EFFECTS REGARDING THE PROJECT OF THE 2006 TEMPORAL DISASTER MANAGEMENT EMERGENCY DECREED IN SOME AREAS OF BOLÍVAR STATE

1. The different and most important administrative acts issued for the Brisas Project.

265. From the information I have reviewed, the "Brisas Project for the Exploitation and Processing of Gold and Copper" (the project) was an

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[200] See Decision No. 37 of the Constitutional Chamber of the Supreme Tribunal of Justice of January 27, 2004 (Case of *Cooperativa Mixta La Salvación, Responsabilidad Limitada*), in *Revista de Derecho Público*, No. 97-98, Editorial Jurídica Venezolana, Caracas 2004, pp. 402-403.

ongoing project, located in Bolívar State, Municipality of Sifontes, in an area within the Imataca Forest Reserve created in 1961. The areas of the concessions, in addition, were incorporated in the area declared in emergency in 2006, according to the Law on Civil Protection and Disaster Management. None of these regulations imply the exclusion of mining activities in the area.

266. The required environmental and mining permits had been requested and granted, following the regulations of the specific statutes already mentioned above, and the authorizations to occupy that were to be obtained pursuant to those regulations **(see *supra* para. 228 ff.)** were sought and granted for both Brisas del Cuyuní and Unicornio Concessions[201].

267. Furthermore, throughout the years the concessionaire obtained several authorizations to affect natural resources for exploratory purposes[202] **(see *supra* para. 232)**.

268. Both the feasibility and environmental impact studies were submitted and approved by the Ministry of Mines and Ministry of the Environment, respectively, whereby the Project was described with detail, as well as the measures suggested to address the related environmental issues.

269. As I have previously explained, all the concessions associated to the Project were granted prior to 1999 and included both exploration and exploitation, being the respective mining titles timely issued **(see *supra* para. 150)**. Therefore, the concessionaire was exempted from requesting and obtaining the exploitation certificate that the current 1999 Mines Law provides **(see *supra* para. 151)**, and was entitled to go ahead with the Project as long as all the other regulations in place were complied with, and within those, the environmental ones I have just referred to above.

2. The authorization to affect natural resources No. 1.080 of March 27, 2007 given to Gold Reserve de Venezuela S.A. and the conditions imposed upon the concessionaire

270. The concessionaire for the Brisas Project requested on January 30, 2007[203] the "authorization to affect natural resources related with the con-

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[201] See Exhs. C-34 and -58.

[202] See Exhs. C-32, -33, -35, -36, -37, -38, -39, -41, -42, -43, -50, -51, -52, -55, -56, -57, -60, -62, -900, -831, -832 and -903.

struction of infrastructure and services, namely, the works inherent to the construction of the whole plant; as well as for the exploitation stage of gold and cooper mineral in the Project." The requested authorization was granted by the Vice Minister of Environmental Planning and Administration (Office of Administrative Permissions) through Resolution No. 010303-1080 dated March 27, 2007,[204] pursuant to Article 53 of the Organic Law on Land Use Planning and after verifying that the concessionaire had complied with all the requirements provided in the applicable statutes and regulations, and after following the different steps of the prescribed administrative procedure before the Ministry of the Environment.

271. The granted authorization to affect contained a detailed description of the works to be carried out, pertaining to access and service roads, sedimentary pools, processing plant, transporting belt, "colas" dam, mining pits, service courts (patios), organic trash, commercial, noncommercial and discarding tree piles, energy layout, camp and sanitary fillings. It also included the natural resources expected to be affected by each of these works, as well as the measures associated with the environmental impact associated with this phase (I) of the Project.

272. Finally, several terms and conditions to be met by the concessionaire when carrying out the authorized works were listed, including: to perform the works in the areas specifically defined, to comply with all the applicable environmental regulations in place, to file several documents and amendments to documents previously submitted, among others; as well as to give notice to Bolívar State Environment Direction, and the General Direction of Environment Control and the Administrative Office of Permissions of the Ministry of the Environment, prior to the initiation of any of such activities. All these conditions were related to issues of environmental relevance and were to be complied with by the concessionaire, the concessionaire personnel or its contractors.

273. However, within the text of "condition" No. 9 "to give notice to Bolívar State Environment Direction, and the General Direction of Environment Control and the Administrative Office of Permissions of the Ministry of the Environment, prior to the initiation of any of the authorized activities" the authorization to affect added the need for an "Initiation Act" that was due to

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[203] Exh. C-605.

[204] Exh. C-44.

be signed (*deberá firmarse un Acta de Inicio*). In such "act" the concessionaire was due to file the detailed schedule of the activities to be performed, which was to become part of the administrative files and was to be used for the purposes of Environmental Audit and Control.

274. As I have previously explained in detail, pursuant to the Organic Law on Land Use Planning (Article 53), the Rules on Environmental Evaluation of Activities (Article 14) and the Rules Governing the Affecting of Natural Resources Associated with Mining (Article 17) an authorization to affect natural resources must set the conditions under which the affecting of the environment will take place during the different stages of a given program or project (implanting, operation, closing, dismantling and recuperation) (Section III.2.A.b.i) **(see *supra* para. 232 ff.)**. For such purposes, the authorization to affect natural resources must follow the measures and conditions established in the authorization or approval for territory occupancy. Regarding in particular the "conditions" that the authorization may impose, they can only refer to circumstances or acts that the concessionaire is compelled to accomplish in order to develop the authorized activities. Consequently, they can only be related to the circumstances that the concessionaire can accomplish in order to develop the activities that have been authorized and that may affect the environment during the various stages of the given project. As any condition, they can only refer to acts to be accomplished by the concessionaire itself or by an entity under its control.

275. The so called "Initiation Act," as mentioned, was to be signed by the national and state environment authorities and the concessionaire, so it could not formally be considered as a "condition" for completion of the administrative act (Resolution 1080), since it did not depend on the accomplishment of an action or activity by the concessionaire. In addition the signing of the "Initiation Act" could not be considered as an additional administrative act or requirement to be complied with, since it is not provided for by the Organic Law on Land Use Planning or other applicable Regulations. The contrary would mean that the authorization to affect natural resources granted was, in fact, not a real administrative act, or an authorization, because it would not "authorize" the concessionaire to develop any activity, since such understanding would amount to subjecting the accomplishment of the authorized activities to an additional administrative action of the same authority that granted it (the signing of the Initiation Act), eventually depending on the will of the same Administration. This would be contrary to the nature of the au-

thorization as provided for by Article 53 of the Organic Law on Land Use Planning.

276. The "Initiation Act" then, cannot be seen as a "condition" for the completion of the granted authorization, neither as an additional administrative act within the administrative procedure, nor an additional "authorization" or requirement to be met. It must be understood as it is provided in the text of Resolution No. 1.080, as an adjective or procedural formality in the course of the accomplishment of the conditions imposed upon the concessionaire, in order just to formally certify such accomplishments; and once it was due, the Administration could not refuse to sign it. In other words, the signing of the "Initiation Act" was not discretionary for the Administration **(see *supra* para. 32 ff.)**. On the contrary, the Administration was compelled to sign the "Initiation Act" once the concessionaire had complied with the conditions imposed by the administrative act previous to it.

277. In conclusion, the "Initiation Act," not being a "condition" for the completion of the already granted authorization, nor a "administrative act" different to the authorization in which it was included, must be considered only as a formality established in order to certify the accomplishment of the real conditions the concessionaire was compelled to comply with. The Administration did not have any discretionary power to decide whether or not to sign such "Initiation Act" **(see *supra* para. 32 ff.)**. No legal provision exists in the Organic Law on Land Use Planning or in its and other applicable Regulations, establishing any discretionary power for the Administration to sign or not to sign it. Consequently, being a procedural or formal requirement embodied in the authorization, once the conditions therein listed were fulfilled by the concessionaire, the Administration was compelled to sign the "Initiation Act," as was repeatedly requested by the concessionaire in many written petitions.[205] The refusal or abstention of the Administration to sign the "Initiation Act" was completely illegal and arbitrary, causing damages to the concessionaire, for which the Administration is liable under Venezuelan law.

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[205] Exhs. C--80, -485, -487, -489, -490, -492, -493, -501, -503, -505, -506, -837 and -899.

3. The absence of effects of the 2006 Decree declaring temporal emergency in some areas of the Bolivar State (Municipalities of Sifontes, Raúl Leoni and Gran Sabana) regarding authorized mining activities of Brisas Project

278. Through Decree No. 4.633 dated June 26, 2006,[206] the President declared "in situation of emergency, and consequently of urgent need, the carrying out of works, actions and programs aimed to the progressive diminishing of risks and damages originated by mining practice, and to the socio productive reconversion of the affected mining workers in the Municipalities of Sifontes, Raúl Leoni and Gran Sabana of Bolivar State" (Article 1). The emergency situation declared in the Decree lasted for one year, until June 26, 2007 (Article 5).

279. The Decree did not declare a "situation of emergency" or "of urgent need" with regard to mining activities in a specific area of the country, and it did not prevent the development or continuation of authorized mining activities in such areas. What the Decree declared in "situation of emergency and of urgent need" was the performance of certain "works, actions and programs" to be taken by public entities in order to seek the progressive diminishment of the risks and damages originated by [small] mining practice, and to reconvert the affected socio productive status of those who worked in small or artisanal mining activities developed in the area of the Municipalities of Sifontes, Raúl Leoni and Gran Sabana in the State of Bolívar. Consequently, Decree No. 4.633 was not an Executive Decree issued in order to affect any activity developed in the said Municipalities, nor to restrict any particular activity or mining activities, but rather was a Decree oriented to promote actions, works and programs by public entities in order to help the reconversion of small or artisanal mining workers.

280. The Decree, in fact, was based on Article 4.2 of the Law on the National System of Civil Protection and Administration of Disasters (*Ley de la organización nacional de protección civil y administración de desastres*) enacted through Decree-Law No. 1.557 of 2001,[207] where "emergency" is defined as "any event capable of affecting the current functioning of a community, that could result in victims or material damages, affecting the social

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206 *Official Gazette* No. 38.466 of June 26, 2006.

207 See *Official Gazette* No. 5.557 Extra. of November 13, 2001.

and economic structure of the community, and that could be effectively taken care of by local entities of primary attention or of emergencies with their resources."

281. According to Article 34 of such Law, the President, Governors and Mayors, in their corresponding jurisdictions, are empowered to declare the existence of a state of emergency, and in the same act, to classify the emergency according to its magnitude and effects, and to determine the deemed provisions according to the special regime of disastrous situations. The same Article 34 of such Law dictates that once a state of emergency is declared, "the administrative authorities must exercise their legal attributions and, in particular, those provided in the special regime, up until the return to normality." In addition, Article 36 of the Law sets forth that the act declaring the state of emergency, "must express, according to its nature, the entities and agencies that will be compelled to participate in the carrying out of the Specific Plan of Action, the role they must develop, and the way in which they will be subjected to the direction, coordination and control by the competent entity or public officer." The same act declaring the emergency must determine "the way and modalities for the participation of public and private entities and the mechanism through which they will be subject to the direction, coordination and control by the competent entity or public officer."

282. Consequently, pursuant to the provisions of the Law under which it was issued, the Decree No. 4.633 is not an "emergency mining decree" as has been improperly qualified by pronouncement No. 088-08 from the Ministry of the Environment.[208] It is just intended to "order the competent public entities (*organismos*) the carrying out of the necessary works and actions" that are needed for the progressive diminishing of risks and damages originated by [small] mining practices; and for the socio productive reconversion of the affected mining workers and "the consolidation of the communities of La Paragua, Ikabarú, Santa Elena de Uairén, and the Axis Km 88-Turmero of the Municipalities of Sifontes, Raúl Leoni and Gran Sabana of Bolivar State" (Article 2).

283. Within such exclusive purposes, Article 3 of the Decree provided that it would be possible to enter into contracts for the works of infrastructure and the acquisition of the goods and service needed within the scope of the declared emergency, from the date the Decree was given public notice by

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208 Exh. C-137.

promulgation in the Official Gazette. Similarly, Article 4 of the Decree instructed the Ministry of Finance to accomplish the actions deemed necessary to provide the extraordinary resources needed to take care of the emergency declared in the Decree. The Ministries of Environment, Mining and Finance were instructed to be in charge of the performance of the Decree (Article 6).

284. The aforementioned is all that Decree No. 4.633 established, so from its content, as well as from the content of its legal basis, namely the 2001 Law on the National System of Civil Protection and Disasters Administration, no prohibition, restriction or limitation regarding public or private activities that are developed in the Sifontes, Raúl Leoni and Gran Sabana Municipalities of Bolívar State was established. The Decree has no negative content, and on the contrary its provisions are of a positive sign, seeking the completion of actions, works and programs by different public entities in order to help the reconversion of mining workers in the area. Consequently, like any other Decree issued in execution of the Law, the Decree No. 4.633 did not affect in any way the activities legally developed by public or private entities in the aforementioned Municipalities.

285. In particular, the Decree did not exclude or encumber the performance of the duly authorized mining activities in such Municipalities and, on the contrary, during its enforceability, approvals for land occupation as well as authorizations to affect natural resources for mining purposes were granted in the area by the Ministry of Environment.[209] During the same time period, Ministry of Mines (which was expressly authorized to carry out Decree No. 4,633 alongside the Ministry of Environment, also permitted mining activities in the municipalities affected by the Decree.[210]

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[209] Notably, the Ministry of the Environment's own records indicate that permits were issued for the following mining properties, among others: (1) the Morauana Concession; (2) Valle Hondo 89; (3) Valle Hondo 90; and (4) Yuruan I. See Other Permits Granted by Ministry of Environment between June 26, 2006 and June 25, 2007 (Exh. C-237) .

[210] Government records available to the public indicate that there were at least 46 Writs Admitting Applications for Authorizations to Exploit granted by Ministry of Mines on various parcels during pendency of Decree No. 4,633. See Permits Granted by Ministry of Mines between June 26, 2006 and June 25, 2007 (Exh. C-200).

VII. THE ABSENCE OF LEGAL BASIS FOR THE REVOCATION OF THE AUTHORIZATION TO AFFECT NATURAL RESOURCES NO. 1.080 OF MARCH 27, 2007 GRANTED TO THE BRISAS PROJECT

286. In the case of the Brisas Project, the administrative authorization given by the Ministry of the Environment to affect natural resources granted to Gold Reserve de Venezuela, C.A. - Compañía Aurífera Brisas del Cuyuní, C.A. through Administrative Act No. 1.080 of March 27, 2007, for the construction of Infrastructure and Services Phase of the Brisas Project to operate and process gold and copper minerals **(see *supra* para. 270)**, was illegally revoked one year later, by the same Ministry of the Environment through Administrative Act No. 088-08 of April 14, 2008 without any legal basis, violating the rights validly granted to the concessionaire according to the applicable environmental and land use legislation. The Administrative Act No. 088-08 of April 14, 2008 is an illegal act that must be considered null and void according to Article 19.2 of the Organic Law on Administrative Procedures **(see *supra* para. 103)**, because deciding on a matter already decided in a definitive way through Administrative Act No. 1.080 of March 27, 2007, which was an irrevocable act that created rights in favor of the concessionaire.

1. Content of the act of revocation of authorization No. 1.080

287. In effect, the Ministry of People's Power for the Environment, in Administrative Act No. 088-08 dated April 14, 2008, which was signed by the Deputy Minister of Environmental Administration and Order, notice of which was given to the concessionaire on May 5, 2008, decided:

RESOLVED

> "To recognize the absolute nullity of the administrative act contained in Letter No. 1080 dated March 27, 2007, and as a result to revoke, for reasons of public order, the authorization granted to Gold Reserve de Venezuela, C.A. - Compañía Aurífera Brisas del Cuyuní, C.A. for the Construction of Infrastructure and Services Phase of the Brisas Project for the Exploitation and Processingof Gold and Copper Minerals, as established in Article 19, number 4 of the Organic Law of Administrative Procedures.

DECIDED

> To recognize and declare the absolute nullity of the administrative act contained in Letter No. 1080 dated March 27, 2007, issued by the Vice-Minister of Planning and Environmental Administration, through which the company Gold Reserve de Venezuela. C.A. was granted the authorization to affect natural resources related to the Construction of Infrastructure and Services Phase of the Brisas Project forthe Exploitation and Processing of Gold and Copper Minerals" (underlined emphasis added).[211]

288. In the motivation of such administrative act the following is referred to as its basis: (1) That it is the duty of the State to guarantee the environment's conservation; (2) That on June 26, 2006, a state of emergency was declared in the area of the Imataca Forestry Reserve, because mining activities in the State of Bolivar had altered the environment; (3) That as of the date of the authorization (to affect natural resources) granted to the company, such Mining Emergency Decree was in place, declaring the urgent need for works, actions and programs designed to decrease the risks and damages caused specifically in that area, which in the opinion of that office resulted in "the impossibility" of continuing with the works that were the purpose of the referred to authorization.

289. Article 83 of the Organic Law on Administrative Procedures was mentioned as the legal foundation for that declaration of nullity, which as has been previously stated, empowers the Public Administration to recognize the absolute nullity of its own acts **(see *supra* para. 96)**. It is, as already mentioned, a declaration of the power of self review, that is permitted at any time and for any kind of administrative acts, regardless of whether it creates individual rights or not, but provided that there is one or more of the causes specifically listed in Article 19 of the Organic Law on Administrative Procedures, and that the formalities of administrative due process are complied with, allowing for the exercise of the right to defense and to be heard **(see *supra* para. 36)**.

290. In the legal basis of the revoking act, the Ministry of the Environment also referred to the powers of environmental control and surveillance held by that Office as a public entity, and specifically within the boundaries of the Imataca Forestry Reserve, but without mentioning any specific empowering regulation or Act; as well as the emergency declared

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[211] Exh. C-44 (emphasis added).

through Executive Decree No. 4.633 published in *Official Gazette* No. 38.466 of June 26, 2006, that in no way affected the duly authorized mining activities.

291. The Administrative Act No. 088-08 dated April 14, 2008, therefore, on one hand is mistaken in its factual and legal basis, and on the other, is itself absolutely null and void since it revokes a valid administrative authorization that was not affected by absolute nullity pursuant to Article 19 of the Organic Law on Administrative Procedures.

2. The vices on the foundations of the administrative act of revocation, in relation to the emergency that was declared based on the civil protection and disaster management statute

292. A reading of the recitals given for Act No. 088-08 shows that it is apparently based on reasons of alleged environmental damage, using as a core of such argument the already analyzed Executive Decree No. 4.633[212] that declared an emergency state in a section of Bolívar State, based on the Law regulating civil protection and disaster management. Two fundamental aspects arise from that Decree declaring the state of emergency **(see *supra* para. 278 ff.)**; the first is that the Decree only provides for the Administration's performance of works, actions and programs designed to progressively diminish the risks and damages caused by mining activities, specifically unauthorized non-industrial mining activities (Article 1); second, in no way does the temporary declaration of emergency imply, pursuant to the Articles of the Decree or to the statute serving as its foundation, that there is any restriction or prohibition of mining activities in the Sifontes, Raúl Leoni and Gran Sabana Municipalities of Bolívar State.

293. Pursuant to Articles 2 and 3 of the Decree, the emergency that was declared sought the performance exclusively by Public Administration entities of works and actions, engagement of infrastructure works, and the acquisition of goods and services needed to decrease the risks and damages caused by mining practices and the socio-productive reconversion of mining workers, understanding as "reconversion" the *"technical process of modernizing industries."*[213] Therefore, the Decree No. 4.633 did not restrict

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212 *Official Gazette* No. 38.466 issued on the same date **(see *supra* para. 278 ff.)**.

213 See *Diccionario de la Lengua Española de la Real Academia Española*, 21st Ed., Madrid 1992.

or prevent in any way the performance of any private or public activity **(see *supra* para. 284)** and specifically, in no way did it restrict or prevent the performance of the works inherent to the authorization legally granted to Gold Reserve de Venezuela, C.A., as was erroneously indicated at the end of the penultimate paragraph of the recitals.

294. On the other hand, I must point out that the authorization granted through Administrative Act No. 1.080, regarding the affecting of natural resources to carry out the Infrastructure and Services Construction Phase of the Brisas Project to Operate and Process Gold and Copper Minerals, had not begun as of the date the Decree No. 4.633 was issued, exclusively because the Ministry of the Environment had not issued the "Initiation Act" referred to by number 9 of the terms of that authorization, as it was required to do.

295. Furthermore, Decree No. 4.633 had a duration of twelve (12) months from the date it was brought out in the *Official Gazette* (June 26, 2006). As such, it was no longer with any effects as of the date Administrative Act No. 088-08 (dated April 14, 2008) was issued, and therefore, the foundation to revoke the authorization to affect natural resources was not valid, inasmuch as it was an emergency decree that had temporary effects as a means of civil protection in managing disasters, not being in place at the time that the authorization to affect was reviewed and revoked.

296. The recitals of Act No. 088-08 argued that the Emergency Decree was in place on the date the authorization to affect was granted to the company, i.e. March 27, 2007, the date of Act No. 1.080. Although this is true, since the Decree was in force until June 26, 2007, this has no significance at all because Decree No. 4.633 did not forbid mining activities in the area, and nothing prevented granting the authorization to affect natural resources and to carry out the infrastructure construction and services stage of the project. Decree No. 4.633 only imposed a duty on public administration entities to adopt measures, actions and programs to progressively diminish the risks and damages caused by artisanal or small scale mining. Even if applied to large mining operations, it would have been doubtless taken into account by the Ministry of the Environment when granting the authorization to affect, since the company was required not only to strictly comply with the stipulations and requirements of the environmental laws and regulations in place, but also with other conditions expressly provided in that act.

297. Then again, since the emergency was temporary in nature, once the period of the emergency established in the Decree No. 4.633 elapsed, the Administration could not refer to such a non-existent emergency for the purposes of revoking a legal and valid administrative act; mostly taking into account that the affecting of natural resources authorized by the revoked Act 1.080 was not executed during the time the emergency decree was in place, and by the time of its revocation had not yet taken place.

298. In conclusion, as of the date of revocation of the administrative act granting the authorization to affect natural resources, there existed no legal cause – and thereafter there has not been any legal cause – of any kind that would make it "impossible" – as indicated in the recitals of Act 088-08 – to perform the works that were duly authorized; consequently the act of revocation had no valid basis.

299. As noted above, Decree No. 4.633 did not forbid or restrict the performance of mining activities during the emergency period. However, from the recitals of Act No. 088-08 it appears that the Ministry of the Environment assumed that during the life of that Decree, no authorizations to affect related to mining activities could be granted. This is inaccurate since, as indicated above, the purpose of that Decree was fundamentally to act as the basis for public administration entities to carry out actions and take on measures needed to *reconvert* miners, particularly illegal miners, but not to hinder the development of duly authorized and planned mining activities by the holders of mining concessions, legally granted by the competent authorities.

300. The statements given in the recitals of Act No. 088-08 are therefore false, when the Ministry of the Environment stated:

301. "That as of the date of the authorization granted to the referenced company, a Mining Emergency Decree was in force, which declared the urgent need for works, actions and programs designed to progressively diminish the risks and damages caused in the area discussed, which leads to the determination that all the activities performed in the area must be **restricted**, in order to restore the damaged ecological balance, circumstance to be carried out by this Office and that causes as a consequence the **impossibility** of continuing to carry out the purpose of the authorization referenced" (emphases added). On the contrary, none of the provisions included in Decree No. 4.633 leads to the conclusion that "restrictions" were im-

posed on the authorized activities to be carried out that could have resulted in "the impossibility of continuing to carry out the purpose of the authorization" that was granted in Act No. 1.080 **(see *supra* para. 284 ff.)**; and even less could such an argument be valid at the time the revocation was declared, since by then, as noted, Decree No. 4.633 was no longer in place. On the other hand, to pretend deducing from such argument an alleged temporary flow of competence, as the Ministry of the Environment pretends, stating that during the time the Decree – erroneously called "emergency mining decree" – was in place, granting an authorization as the one issued through Act No. 1.080 would have been forbidden, a premise that was also given as a cause of the revocation; said deduction would be completely unfounded, as there was no such prohibition or restriction in connection with the authorizations required to affect natural resources related to lawful large scale mining projects (i.e., building of infrastructure required to put into motion a mining concession legally granted by the Ministry of Mining).

3. The absence of absolute nullity motives and the improper revocation.

302. Administrative Act No. 088-08 dated April 14th 2008 is absolutely null and void pursuant to Article 19.2 of the Organic Law on Administrative Procedures, since it reversed an act that declared and created rights to Gold Reserve de Venezuela, C.A. – Compañía Aurífera Brisas del Cuyuní, C.A, that was legitimate and legal, and therefore could not be revoked by the Administration. As previously discussed, under the terms of Articles 82 and 83 of the Organic Law on Administrative Procedures, acts that create subjective rights in favor of an individual can only be revoked if they are affected one or more of the flaws for absolute nullity that are specifically listed in Article 19 the Organic Law on Administrative Procedures **(see *supra* para. 98 ff.)**.

303. Act No. 088-08 quoted Article 19.4 and Article 83 *ejusdem* as the legal foundation for the revoking act. However, the reasons listed in Article 19.4 are a manifest lack of jurisdiction [incompetence] or an absolute absence of a legally provided procedure, which in the case of Authorization No. 1.080 are not present in any respect.

304. Indeed, contrary to the statements regarding the flaw of total absence of procedure, the sole motivation contained in Authorization No. 1.080 shows that the authorization was granted by the authority empowered

to do so after the completion of each and every one of the procedural steps legally prescribed in these cases that are necessary for granting these authorizations to affect natural resources was fulfilled. Just by reading the first part of Authorization No. 1.080 it is possible to see in the wording of the Ministry the compliance with the legal procedure. It is absurd and capricious to think that there was absolute absence of the prescribed procedures. But in the case at hand all of these arguments are completely without merit because Act No. 088-08 contains no reference to specific irregularities allegedly related to the procedure.

305. It then follows that Article 19.4 of the Organic Law on Administrative Procedures was pointed out as a basis for the decision in reference to the flaw of manifest incompetence [lack of jurisdiction] also referred to in that provision. However, that flaw is not present in the revoked authorization either, since as I have already explained **(see *supra* para. 270 ff.)**, the Ministry of the Environment, is the empowered authority to grant such authorizations, pursuant to the Decree for the Organization and Functioning of the Central Public Administration, the Organic Law on the Environment, the Organic Law on Land Use Planning, the Rules on Environmental Evaluation of Activities that may degrade the Environment, the Rules Governing the Affecting of Natural Resources Associated with Mining and the Imataca Plan and its Use Regulation. Moreover, within that ministerial office, this specific power is held by the Deputy Minister of Environmental Administration and Order, which was not challenged in the case at hand, as it was precisely this same official who signed the decision to revoke the authorization.

306. In any case, and even if such a flaw is totally ruled out in the case at hand, I must point out that the criteria of the Political-Administrative Chamber of the Supreme Tribunal is that manifest lack of competency (jurisdiction) does not apply in any case of unlawful exercise of such powers, but only when the lack is total and absolute, like when the "lack of jurisdiction is related to the subject matter or territory as well as usurping of powers."[214]

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[214] See the Decision of the Political-Administrative Chamber of the Supreme Tribunal of Justice of Oct. 19, 1989 (Case of *Edgar G. Lugo*), in *Revista de Derecho Público*, No. 40, Editorial Jurídica Venezolana, Caracas 1989, pp. 85-89, and in Caterina

307. By the same token is the criteria of the First Contentious Administrative Court:

> "The flaw so seriously sanctioned by the legislator is that of manifest incompetence, which occurs in cases where the administrative body resolves on matters that are evidently outside of the sphere of its legal powers. This is basically incompetence by reason of subject matter or territory." [215]

308. It can be deduced that in the case of the Authorization No. 1.080, the alleged incompetence apparently charged by the Ministry would be "incompetence by timing," since allegedly the Ministry of the Environment would not have been empowered to grant authorizations to affect within the territory referred to in Decree No. 4.633 while such Decree was in place. This of course can only result after one makes an exercise of "deduction" to try to understand the sense of the allusion to Decree No. 4.633 contained in Act No. 088-08, but it is not a valid motivation, since Decree No. 4.633 did not prevent the granting of those authorizations, nor did it forbid mining activities in the Municipalities affected by the declaration of an emergency. If said restrictions or limitations had existed, they would have been expressly established in the emergency decree, which on the contrary contains no prohibitions or restrictions of any kind.

309. On the other hand, if one were to assume, contrary to logic and against the text of the emergency decree, that the alleged "temporary incompetence" for granting authorizations to affect natural resources such as that contained in Authorization No. 1.080 could have existed during the life of Decree No. 4.633, i.e. between June 26, 2006 and June 26, 2007, then that alleged flaw would not be one of "manifest incompetence," as that concept is explained above, and therefore could not cause the absolute nullity of the authorization lawfully granted; namely, in no case could it constitute a valid cause for the revocation of the administrative act granting the au-

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Balasso Tejera, *Jurisprudencia sobre Actos Administrativos (1980-1993)*, Editorial Jurídica Venezolana, Caracas 1998, pp. 656-660.

215 See Ruling of the First Contentious Administrative Court of Jan. 30, 1986 (Case of *E. Nancy Becena Rivera*), in *Revista de Derecho Público*, No. 25, Editorial Jurídica Venezolana, Caracas 1986, p. 109, and in Caterina Balasso Tejera, *Jurisprudencia sobre Actos Administrativos (1980-1993)*, Editorial Jurídica Venezolana, Caracas 1998, pp. 654-655.

thorization, thereby harming the rights created in favor of the corporation that was granted the authorization.

310. Moreover, on closer inspection we note that the act of revocation in its foundation on the emergency decree would have no practical use, since as of the date the authorization was revoked (April 2008), the "emergency" had ceased. Consequently, at that time – and indeed today as well – there was no legal, environmental or any other kind of impediment which would have made it impossible to carry on the purpose of Authorization to Affect No. 1.080.

311. Consequently, as such authorization to affect was not null and void pursuant to Article 19.4 of the Organic Law on Administrative Procedures, and being an act that created and declared rights to his holder, Brisas del Cuyuní, it was not subject to being revoked, and therefore it is the act that revoked such Authorization, namely No. 088-08 dated April 14, 2008, that is absolutely null and void, for violating *res judicata* pursuant to Article 19.2 of the Organic Law on Administrative Procedures.

4. The violation of due process regarding administrative procedures

312. Even if any of the causes for absolute nullity that would legally justify the decision contained in Administrative Act No. 088-08 had ceased to exist, which they did not, it must be noted that it was this act that was dictated without complying with any previous proceeding; and thereby the Ministry of the Environment did not satisfy the requirement of a previous administrative proceeding, which, as noted, pursuant to the provisions of Article 49 of the Constitution has been affirmed by judicial precedents **(see *supra* para. 33 ff.)**, is a mandatory requirement in cases of revocation of administrative acts that create rights in favor of individuals, even when such acts are affected by a flaw of absolute nullity.

313. Accordingly, in the case of the revocatory Act No. 088-08, the absolute and complete absence of a previous administrative proceeding results in a denial of due process with the further result that the issued act is itself absolutely null and void.

5. The confusion of the administrative act regarding the motives of the revocation and the impossibility to base the revocation of administrative acts creating rights on public order motives without compensating the beneficiary of the authorization.

314. Finally I must say that Act No. 088-08 is confusing in the causes that were alleged to try to justify the revocation of the authorization previously granted in Authorization No. 1.080: apparently it would have been the "recognition" of a supposed flaw of absolute nullity, but it also mentioned that the authorization was "*revoked for reasons of public order*," thereby attempting to state that the revocation would also have been based on a reason of merit or convenience related – presumably – to environmental protection, as the latter is the only aspect of public order mentioned in the recitals of the Act.

315. Such simultaneous reference to both an "absolute nullity reason" and a "reason of public order" is incompatible by nature and is contradictory. When an administrative act is revoked, either it is unlawful and affected by a flaw of absolute nullity, which would be the cause for the revocation (due to illegality); or it is a valid act, but a factual situation exists that makes it necessary to further general interests protected by the State to revoke the act for reasons of public order (reasons of merit or convenience). Conversely, the simultaneous mention of both reasons as the foundation for revoking an administrative act is a mistake that results in a contradictory motivation.

316. Although I believe that the simultaneous mention of the above two reasons as the foundation for revoking an act is an error that makes the reasoning for the decision contradictory, and even though a revocation of the authorization due to flaws of absolute nullity contained in Authorization No. 1.080 has been shown to be in error, I also analyze in the case at hand, the possible revocation for reasons of merit.

317. After reading Act No. 088-08 one can deduce that the alleged "reasons of public order" called upon would be those of environmental conservation; however, the reference to environmental damages is generic, and not linked specifically to the Brisas of Cuyuní Project. Likewise, there is no due foundation since the works that were to be carried out pursuant to Authorization No. 1.080 had not even begun to be executed because the Ministry did not issue the "Initiation Act" provided for in the authorization to affect natural resources.

318. On the other hand, it is equally pertinent to note that possible environmental damages that could have been caused by the high presence of miners in the area would be the result of unplanned, unlawful and unreasonable mining activities - that is to say, all illegal activity – and not the result of authorized activities performed legally and following environmental laws and regulations, through environmental impact studies, compliance with specific standards and strict control by the public administration, which far from representing a risk of environmental damages, allows for sustained and sustainable development from an ecological perspective, as explained when I referred to environmental aspects.

319. In this sense, Enrique Meier, former Legal Director of the Ministry of the Environment, commenting on environmental standards, has stated that the performance of activities that imply intervention in the environment is based on:

> "… a realistic focus on the relationships between society and nature and the environmental problems generated according to the level of development and the foremost form of production existing in Venezuelan social and economic education. It would be contrary to the subsistence of our nation as a historic community, to say no to the possibilities of its economic and social development. For this reason, the so-called thesis of 'tolerable or permissible damage,' which could be called the *degree of modification of the admissible environmental structure*, constitutes a principle of environmental policy, which applied in the form provided by law, can contribute to the progressive establishment of an economic system based on the idea of Eco-development; in other words, in a form of development that incorporates biological, scientific, aesthetic and economic values, as well as the conservation, protection and defense of the environment.[216]

320. This being the case, an authorization to affect natural resources required to carry out the works necessary for the performance of legal activities such as in the case of the works referred to in Authorization No. 1.080, granted by the environmental authority, could hardly be revoked on grounds of merit related to environmental damages, since such authorization ought to be subject to compliance with all environmental standards, and guar-

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[216] See Enrique Meier, "Estudio preliminar sobre la autorización preventiva de riesgos ambientales," in *Revista de Derecho Público*, No. 11, Editorial Jurídica Venezolana, Caracas 1982, p. 67.

antees that the activities are performed while preventing environmental damage and correcting it in a rational manner. In that context, environmental protection and improvement could only justify new environmental requirements or a greater control by the environmental authority, but not a revocation, which would hinder the development of legal mining activities, thereby harming not just the individual, but also the general public interest.

321. In any event, the foundation stated in Act No. 088-08 is not sufficient to justify the revocation of the authorization to affect previously granted to Gold Reserve de Venezuela, C.A. and Compañía Aurífera Brisas del Cuyuní, C.A.; and the presence of a cause of environmental public order allegedly legitimizing the decision to revoke is ruled out in the case at hand.

322. Moreover, without prejudice to the above, I note that in the event that a revocation were to be effectively justified on bases of merit and founded on public order protection, then such a revocation could not be issued in the terms of Act No. 088-08, i.e., without the express recognition of the right to indemnification for the loss represented by the revocation of that authorization, to the holder of the mining concession. As stated above also in this case the Political-Administrative Chamber of the Supreme Tribunal of Justice, in ruling pronounced on May 11, 2005, has stated that the fundamental consequence of the principle of non revocability of administrative acts creating individual rights, like Authorization to Affect No. 1.080, in a way not authorized by the legal frame gives the holders "the right to receive compensation for the harm and damages caused to them by the revocation or suspension of the act"[217] **(see *supra* para. 83 ff.)**.

323. This is also the sense of the provisions of the law regulating analogous cases, such as for example Article 53 of the Organic Law on the Promotion of Private Investment under Concessions Regime,[218] which recognizes the power of the Administration to an early termination of concessions for reasons of public interest, but expressly provides the right of the concession holder to receive compensation in such cases:

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[217] See Decision No. 01033 of the Political-Administrative Chamber of the Supreme Tribunal of Justice of May 11, 2000 (Case of *Aldo Ferro Garcia v. la marca comercial KISS*), available at http://www.tsj.gov.ve/decisiones/spa/Mayo/01033-110500-13168.htm.

[218] *Official Gazette* No. 5.394 Extra. of October 25, 1999.

"Article 53: Early recuperation. Concessions can be recovered early for causes of public use or interest, by a motivated administrative act by the entity grantor. The integral compensation for the concession holder is allowable in these cases, including remuneration no longer received for the remaining time until termination of the concession.

The list of conditions will establish the elements or criteria to be used to set the amount of the compensation that will cover the concession holder. If the concession holder agrees with the compensation amount, such amount will be final. If the concession holder does not agree, then the amount of the compensation will be set by applying one of the mechanisms provided for conflict resolution in this Decree-Law."

324. The above described standard reflects the principle of the Administration's liability for individual sacrifice, when concessions are revoked for causes which are not the fault of the concession holder. Those provisions of the said law have been the ones that the Political and Administrative Chamber of the Superior Tribunal has applied to declare the validity of administrative acts related to mining concessions.[219]

325. However in the case of the Act revoking the Authorization to Affect No. 088-88 granted to Brisas del Cuyuní for the development of the Brisas Project, such reversal was declared without compensation to the holder of the mining concession for the harm and damages caused, thereby constituting an expropriation without compensation which is not permitted pursuant to Article 115 of the Constitution.

VIII. THE ADMINISTRATIVE PROCEDURE REGARDING THE TACIT EXTENSION OF MINING CONCESSIONS WITHIN THE BRISAS PROJECT

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[219] See Decision No. 847 of the Political-Administrative Chamber of the Supreme Tribunal of Justice of July 17, 2008 (Case of *Minas de San Miguel C.A*.), available at http://www.tsj.gov.ve/decisiones/spa/Julio/00847-17708-2008-2005-5529.html; Decision No. 395 of the same Chamber of March 25, 2009 (Case of *Unión Consolidada San Antonio*), available at http://www.tsj.gov.ve/decisiones/spa/Marzo/00395-25309-2009-2005-5526.html.

1. The petition of Compañía Aurífera Brisas del Cuyuní C.A. for the extension of Brisas concession and the tacit extension of the concession by means of the effects of positive administrative silence

326. The Mining Title of Brisas del Cuyuní Alluvial Concession was published in *Official Gazette* No. 33.947 of April 18, 1988,[220] giving Brisas del Cuyuní C.A., pursuant to Article 25 of the Mines Law, the exclusive exploration and exploitations rights for a period of 20 years beginning on that date. On October 17, 2007, within the term established in Article 25 of the Mines Law, Brisas del Cuyuní C.A. formally requested from the Ministry of Mines the extension of the concession.[221] As the petition for extension did not express the additional term requested, it must be understood that the term requested was the only one contained in Article 25 of the Mines Law, as the maximum allowed of ten (10) years. As noted above **(see *supra* para. 151 ff.),** although the Brisas del Cuyuní concession was granted under the 1945 Mines Law, pursuant to article 129 of the 1999 Mines Law the application to extend the concession was subject to provisions of the latter (1999 Mines Law).

327. The Ministry of Mines thus had the duty to answer the petition within six (6) months, or in the same period, to notify the concessionaire of any observation regarding compliance with its mining duties; hence if no pronouncement was issued and given notice to petitioner before April 18, 2008, as from that date, according to Single Paragraph of Article 25 of the Mines Law, the extension was understood as granted. That was precisely what happened: The Ministry of Mines did not issue a determination regarding the petition for an extension of the concession, and consequently, since April 18, 2008, a tacit administrative act granting the extension exists. Consequently, since April 18, 2008 the Brisas del Cuyuní Alluvial Concession, to all effects and *ex legge*, must be considered as formally extended for a period of ten (10) years.

328. Nonetheless the Ministry of Mines, on the one hand, ignored that the extension of the Concession was requested in due time by the concessionaire; and also ignored that such an extension was granted by means of administrative silence pursuant to Article 25 of the Mines Law.

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220 Exh. C-3.

221 Exh. C-494.

329. First, it must be said that initially, the Ministry of Mines ignored that the extension of the Concession was timely requested by Compañía Aurífera Brisas del Cuyuní C.A. in compliance with the conditions set forth by Article 25 of the Mines Law, on October 17, 2007, through a petition that was received in the Ministry's mailing office.[222] In fact, nine (9) months after the petition of extension was filed, and three (3) months after the extension of the concession had been legally granted by means of the positive administrative silence effect, the General Director of Mining Inspection and Control of the Ministry of Mines answered a request for information about the concession received from the Ministry of the Environment (Letter No. 1.206 of June, 9, 2008),[223] saying: first, that the concession was granted on April 18, 1988 for a period of twenty (20) years; second, that the mining rights extinguished as of April 18, 2008; and third, that due to the fact that in their archives no document or request for extension existed, it would coordinate with the General Direction of Mining Concessions to initiate the administrative procedure of extinction (Letter No. 135 of July 9, 2008).[224]

330. On August 27, 2008 (through Letter No. 1.766) the Ministry of the Environment gave notice to Compañía Aurífera Brisas del Cuyuní C.A. of this factually erroneous answer of the Ministry of Mines[225] telling the company that, consequently, nothing was left to be decided. The concessionaire requested from the Ministry of Mines' the corresponding explanation regarding its petition for the extension of the concession (tacitly granted), which was answered the following month, on September 8, 2008, in Letter No. 163,[226] in which the Ministry proceeded to correct the material omission which had occurred regarding the information about the petition of extension of the concession that was effectively received in the Ministry on October 17, 2007, arguing that it was not sent to the archives of the General Direction of Mining Inspection and Control.

331. Second, as aforementioned, the Ministry ignored that the extension of the concession was effectively granted since April 18, 2008 by means of the application of the legal principle of positive administrative silence pur-

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222 Exh. C-494.

223 See Exh. C-514.

224 Exh. C-514.

225 Exh. C-519.

226 Exh. C-522.

suant to Article 25 of the Mines Law **(see *supra* para. 195 ff.)**. This legal effect, producing a tacit administrative act granting the extension of the concession, cannot be ignored by the Administration, as occurred several times. This was notorious in the Ministry of Mines answer to the administrative reconsideration appeal filled on October 24, 2008[227] by Compañía Aurífera Brisas del Cuyuní C.A. challenging the errors incurred by the Administration in calculating the corresponding mining taxes,[228] in which the Ministry of Mines in Administrative Act No. 007-08 of November 26, 2008[229] to deny the request said:

> "After reviewing and analyzing the administrative file of the BRISAS DEL CUYUNÍ concession for the exploitation of alluvial gold, the existence of a request of an extension of the aforementioned concession was noted, request submitted by ARTURO RIVERO ACOSTA, President of COMPANÍA AURÍFERA BRISAS DEL CUYUNÍ, C.A., previously identified, to the Communications Office of this Ministry on October 17, 2007; There is no Administrative Act issued by a Competent Person of the Ministry of the People's Power for Basic Industries and Mining in the administrative file of the BRISAS DEL CUYUNÍ concesión for the exploitation of alluvial gold granting or giving an extension to the aforementioned concesión …."

332. This means that the Ministry of Mines although expressly recognizing the effective filling of the petition for an extension of the concession, and that no timely notice of response was given by the Ministry to the concessionaire, in an illegal way, just ignored the effects of the binding provision of the Single Paragraph of Article 25 of the Mines Law, and the fact that by virtue of the law, the concession Brisas del Cuyuní was indeed formally extended as from April 18, 2008, through the tacit administrative act of extension that was produced by its silence; and that, therefore, no need for an express administrative act granting the extension was needed. The aforementioned phrases were repeated in other decisions, like the one illegally order-

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227 Exh. C-99.

228 Exh. C-100.

229 Exh. C-101.

ing the suspension of works in the concession, contained in Act No. 001-09 dated March 18, 2009.[230]

333. The illegal decision of the Ministry of Mines contained in Administrative Act No. 007-08 dated November 26, 2008, contrary to what is established in Article 25 of the Mines Law, was challenged by Compañía Aurífera Brisas del Cuyuní C.A. before the Minister of Mining through an administrative hierarchical appeal filed on February 9, 2009,[231] which was rejected through Resolution No. 064 of June 29, 2009[232] in which no decision was made regarding the tacit extension of the concession.

334. On the contrary, illegally ignoring that a tacit administrative act as of April 18, 2008 existed granting the extension of the concession, as requested, on May 25, 2009 the Ministry issued another Resolution No. 050-2009,[233] "answering" the original petition for the extension of the concession and deciding "not to grant the extension requested by the representatives of Compañía Aurífera Brisas del Cuyuní C.A.," because of a supposed non-compliance with the condition of solvency set forth in the Single Paragraph of Article 25 of the Mines Law, and to "declare the extinction because of the exhaustion of the term of the mining rights derived from the concession" given for a term of twenty (20) years.

335. The tacit administrative act issued by virtue of the provision of Single paragraph of Article 25 of the Mines Law is for all legal purposes, an administrative act creating mining rights for the concessionaire Compañía Aurífera Brisas del Cuyuní C.A. regarding the alluvial gold concession called Brisas del Cuyuní and such an administrative act could not be revoked or ignored by the Administration pursuant to Articles 19.2 and 82 of the Organic Law on Administrative Procedures. Consequently, Resolution No. 050-2009 dated May 25, 2009 of the Ministry of Mines,[234] ignoring the extension of the concession already granted, and pretending not to grant such extension, in fact is an administrative act that revoked a previous one granting rights to Compañía Aurífera Brisas del Cuyuní, and as such, is null and void pursuant

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230 Exh. C-110.

231 Exh. C-102.

232 Exh. C-103.

233 Exh. C-91.

234 Exh. C-91.

to Article 19.2 of the Organic Law on Administrative Procedures **(see *supra* para. 103)**.

2. The petition of Compañía Aurífera Brisas del Cuyuní C.A. on behalf of Arapco Administration de Proyectos C.A. for the extension of El Paují Concession and the tacit extension of the concession by means of the effects of administrative positive silence.

336. The same situation previously explained regarding the Brisas del Cuyuní Concession also took place regarding the request for extension of the El Paují Alluvial Gold and Diamonds Concession[235] granted in 1988 for 20 years to Arapco Administración de Proyectos C.A. On January 17, 2008, within the term established in Article 25 of the Mines Law, Compañía Aurífera Brisas del Cuyuní C.A. formally requested the Ministry of Mines an extension of the concession.[236] The absence of any decision on the matter by the Ministry before July 20, 2008, according to the Single Paragraph of Article 25 of the Mines Law, tacitly produced the extension of the concession as requested, by virtue of the application of the same aforementioned legal principle of positive silence **(see *supra* para. 195 ff.)**.

337. In this case, the Ministry of Mines also ignored the tacit extension of the Concession, in particular, when answering to the administrative reconsideration recourse filed on January 19, 2009[237] by Compañía Aurífera Brisas del Cuyuní C.A. against the errors incurred by the Administration in calculating the corresponding mining taxes,[238] in which the Ministry of Mines in Administrative Act No. 001-09 of March 4, 2009, notified to the concessionaire by Letter No. 115 of March 16, 2009,[239] the same false assertions expressed in relation to the Brisas del Cuyuní concession, ignoring the tacit extension of the concession. These same assertions were also repeated in other decisions, like the one illegally ordering the suspension of works in the concession, contained in Act No. 002-09 of March 18, 2009.[240]

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235 *Official Gazette* No. 34.011 of July 20, 1988 (Exh. C18).

236 Exh. C-108.

237 Exh. C-117.

238 Exhs. C-115; C-116.

239 Exh. C-118.

240 Exh. C-110.

338. The illegal decision of the Ministry of Mines contained in Administrative Act No. 001-09 of March 4, 2009, contrary to what is established in Article 25 of the Mines Law, was also challenged by Compañía Aurífera Brisas del Cuyuní C.A. before the Minister of Mining through an administrative hierarchical recourse filed on April 3, 2009,[241] which was rejected through Resolution No. 062 of June 29, 2009[242] in which no decision was taken regarding the tacit extension of the concession. Instead, in this case, as occurred in the Brisas del Cuyuní concession case, the Ministry also in a previous date, issued another Resolution No. 48-2009,[243] "answering" the original petition for the extension of the concession, deciding "not to grant the extension requested" because a supposed non-compliance of the condition of solvency set forth in the Single Paragraph of Article 25 of the Mines Law; and declaring "the extinction" of the concession "because of the exhaustion of the term of the mining rights." This decision, ignoring the extension of the concession already granted, and pretending not to grant such extension, in fact was an administrative act revoking a previous tacit one granting rights to the concessionaire, and as such, null and void according to Article 19.2 of the Organic Law on Administrative Procedures. In any case, this last administrative act also was challenged by means of an administrative recourse of reconsideration before the Ministry of Mines filed on June 15, 2009,[244] being ratified by the Minister through Resolution No. 066/2009 of July 28, 2009,[245] in which the Minister also ignored the administrative positive silence effects in the case that already produced the tacit administrative act of extension of the Concession El Paují on July 20, 2008.

3. The illegal administrative review of the tacit administrative acts of extension of the concessions, and the absence of merits for such illegal review

339. As aforementioned, the tacit administrative acts produced by the application of positive administrative silence according to express legal provisions like the one included in Article 25 of the Mines Law, in the cases of the extensions of the concessions Brisas del Cuyuní and El Paují, not only

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241 Exh. C-120.

242 Exh. C-119.

243 Exh. C-105.

244 Exh. C-107.

245 Exh. C-106.

were illegally ignored by the Ministry of Mines, but they were also illegally reviewed and revoked by the Ministry.

340. In effect, the tacit administrative act produced according to the Law, once verified by the positive administrative silence, was illegally ignored and reviewed by the Ministry of Mines regarding the Brisas del Cuyuní Concession by means of the Resolution of the Ministry of Mines No. 050-2009 of May 25, 2009,[246] untimely "answering" the original petition for the extension of the Brisas del Cuyuní Concession, in which it decided "not to grant the extension requested" by the representatives of Compañía Aurífera Brisas del Cuyuní C.A., because of a supposed non-compliance of the condition of solvency set forth in the Single Paragraph of Article 25 of the Mines Law; and to "declare the extinction because of the exhaustion of the term of the mining rights derived from the concession" given for a term of twenty (20) years. Regarding the El Paují Concession, the same occurred through Resolution No. 48-2009 of May 22, 2009, notified through Letter No. 239/09 of the same date,[247] also untimely "answering" the original petition for the extension of the El Paují Concession, also decided "not to grant the extension requested by the representatives of Compañía Aurífera Brisas del Cuyuní C.A. representing Arapco Administración de Proyectos Mineros C.A.," because of a supposed non-compliance of the condition of solvency set forth in the Single Paragraph of Article 25 of the Mines Law; and to "declare the extinction because of the exhaustion of the term of the mining rights derived from the concession."

341. In these Resolutions with identical content, the Ministry of Mines, without any previous administrative procedure guaranteeing the right to defense to the concessionaires, argued that after the "revision" of the administrative files, the concessionaires supposedly had not been solvent with the Ministry, particularly regarding some obligations and special advantages established in favor of the Republic, basing its appreciation on various Technical Reports: first, regarding Brisas Concession identified as Nos. LC-034-09 and CSCM-049 both of April 29, 2009,[248] and second, regarding El Paují Concession identified as Nos. LC-033-09 and CSCM-048 both of April 29,

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246 Exh. C-91.

247 Exh. C-105.

248 Exh. C-840.

2009.[249] In those documents a few unproven affirmations were made regarding supposed non-compliance by the concessionaires with some Special Advantages contained in the Mining Titles. Based on such documents, to which the concessionaires were never given access and that were never notified to them, in violation of the most elemental principle of due process and defense rights, the Ministry concluded without hearing the concessionaires, that they had not complied with the condition to be solvent in order to request the extension of the concessions, considered that such requests were to be rejected and that the concessions were to be declared extinguished.

342. These Resolutions No. 050-2009 of May 25, 2009 (Brisas Concession) and No. 048-2009 of May 22, 2009 (El Paují Concession) not only were illegal because they ignored that tacit administrative acts had already granted the extension of the concessions; but were also illegal, because they were issued in absolute and complete absence of any due administrative procedure, violating the concessionaires constitutional rights to defense and to be heard before any decision was adopted affecting their rights **(see *supra* para. 35 ff.)**. Such administrative acts, therefore, are null and void according to Article 19.2 of the Organic Law on Administrative Procedures.

343. These Resolutions were challenged before the Ministry of Mines through administrative reconsideration recourses. The one regarding Resolution No. 048-2009 of May 22, 2009 concerning El Paují Concession was filed on June 12, 2009,[250] and in response the Ministry of Mines issued Resolution No.066/2009 of July 28, 2009,[251] in which the Minister not only ignored again the administrative positive silence effects in the case of El Paují Concession that already had produced the tacit administrative act of its extension on July 20, 2008, but proceeded to argue about its supposed power to "review" the conditions required for extensions of concessions supposedly to be granted, ignoring that in this case, the extension had already being granted, considering that administrative silence cannot be argued on matters requiring verifications from the Administration, and that in this case "administrative silence was not applied because the concessionaire did not comply with one of the conditions established in the Mines Law in order for that benefit to operate in its favor." This last administrative act is illegal, because it

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249 Exh. C-876.

250 Exh. C-107.

251 Exh. C-106.

has in a de facto way revoked the extension of the concession granted by means of the positive silence effects established in the law through a tacit administrative act, which having created mining rights in favor of the concessionaire, cannot be revoked. Such act contained in Resolution No. 066-2009 of July 28, 2009, therefore, is null and void according to Article 19.2 of the Organic Law on Administrative Procedures.

344. In addition, the Ministry of Mines Resolution No. 066-2009 of July 28, 2009, as well as the Resolution No. 048-2009 of May 22, 2009 (El Paují Concession) of the same Ministry, which it ratifies, as well as Resolution No. 050-2009 of May 25, 2009 (Brisas Concession), and independently of them being null and void, are also illegal because they ignored the compliance by the concessionaires of both concessions of all their obligations regarding the Administration, as had repeatedly been declared by the Ministry of Mines itself in innumerable occasions, certifying that the concessionaires were solvent in all their obligations **(see *supra* para. 186 ff.).**

345. In effect, among the conditions established in Article 25 of the Mines Law in order for a concessionaire to request the extension of mining concessions, apart from the ones referring to the term to file the petition, the one referring to the concessionaire's solvency regarding taxes and other obligations is the only substantive one. For such purpose, when the concessionaires filed their petitions for the extension of the concessions, they attached to them the formal "compliance" certificates issued by the Mining supervisory authority, explaining that it certified the compliance by the concessionaires with all their mining obligations. In particular, the "compliance" certificates established that the concessionaire "has complied with what is established in the Law (Mines Law), its Regulation and in the Mining Titles, and that consequently it is **solvent** regarding the Ministry" **(see *supra* para. 192)**.

346. Nonetheless, in the case of the El Paují Concession, the Ministry in the aforementioned Resolution No. 066/2009 of July 28, 2009, in an *ex post facto* way, and in violation of the rules of due process applicable in administrative procedures, affirmed without any prior notification to the concessionaire, in order to guarantee its right to defense, that "in this case, no tacit act was configured (extension of the concession) according to the positive administrative silence established in Article 25 of the Mines Law, due to the fact that the concessionaire Arapco Administración de Proyectos C.A. did

not comply with the condition of solvency requested in the provision."[252] Based on the aforementioned, the Ministry concluded that "in spite of the existence of a benefit in favor of the individual, being mining activities of public order, the Administration has review powers (*potestad de autotutela*), being authorized to review the conditions and compliance of the concession obligations regarding the extension request, and to determine according to the inspections and technical reports performed by the competent Units and Directions, to determine if the requested extension is or not to be approved."[253]

347. The Ministry of Mines, in order to adopt its Resolutions No. 050-2009 of May 25, 2009 (Brisas Concession),[254] and No. 048-2009 of May 22, 2009 (El Paují Concession)[255] denying the extension of the concessions (already granted by means of positive administrative silence established in Article 25 of the Mines Law) based them on the following provisions (legal basis): Articles 6, 25, 97 and 108 of the Mines Law; Article 77.19 of the Public Administration Law and Article 12.12 of the regulation on the Organization and Functioning of National Public Administration (Decree 6.670 of April 22, 2009). None of these provisions, however, authorized the Ministry to ignore the legal effects of tacit administrative acts adopted by virtue of the positive effects given by law to administrative silence, nor to review or revoke previous administrative acts that have created rights in favor of individuals.

348. Regarding the provisions of the Mines Law cited in the resolutions, they relate to the general powers of the Ministry on matters of planning, control, inspection, defense and preservation of mining resources (Article 6); to the extinction of mining rights due to the expiring of the term by which they were granted (Article 97) **(see *supra* para. 199 ff.)**; and to the formalities of the administrative acts when declaring the extinction of rights and termination of concessions (Article 108). None of these provisions authorize the Ministry of Mines to revoke concessions or to declare them terminated due to non-compliance suppositions. Consequently, the Resolutions are illegal because of an absence of legal basis.

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252 Exh. C-106, p. 10.

253 Exh. C-106, p. 10.

254 Exh. C-91.

255 Exh. C-105.

349. In addition, the Resolutions, for the purpose of deciding not to extend the concessions that had already been extended, cite Article 25 of the Mines Law whereas it is required for the concessionaire to be solvent with his mining duties and obligations in order to request the extension, a fact that in these cases was proved attaching the "compliance" certificates issued by the same Ministry of Mines. Nonetheless, in the Resolution No. 050-2009 dated May 25, 2009 regarding Brisas Concession,[256] in a very contradictory way to what was stated in these certificates, the Ministry asserts that supposedly the concessionaire was not solvent regarding the various Special Advantages, several of which related only to the extraction of the mineral during exploitation of the concession (Special Advantage Five refers to the payment of exploitation taxes related to extracted mineral; Special Advantages Six and Seven refer to the exploitation phase generally; Special Advantage Eight refers to manufacturing or refining extracted mineral; Special Advantage Nine refers to the transfer of mining technology to the mining industry, promotion of connected sectors, personnel training related to the extracting phase of the concession; Special Advantage Eleven refers to the protection of natural resources as a consequence only of the process of extracting mineral; Special Advantage Twelve refers to the constitution of a new companies for the purpose of mineral extraction and industrialization and commercialization of extracted minerals, contemplated as possible during and related to the extraction of minerals in the concession; Special Advantage Thirteen refers to the incorporation of two intern students, during the exploitation phase; Special Advantages Fourteen refers to the bond regarding the above-mentioned Special Advantages. In the case of the Brisas del Cuyuni concession, although the concession was in the exploitation phase in the terms of article 58 of the Mines Law, because actions for the purpose of extracting mineral were taken, with the unequivocal intention of gaining economic profits from it in proportion to the nature of the substance and the magnitude of the deposit, no actual extraction was possible due to the actions taken by the Administration as discussed above in regard to the Initiation Act **(see *supra* para. 275 ff.)**. The same was argued in Resolution No. 048-2009 dated May 22, 2009 regarding El Paují Concession.[257]

350. To the extent that all these supposed instances of non-compliance referred to in Resolutions No. 050-2009 of May 25, 2009 (Brisas

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256 Exh. C-91.

257 Exh. C-105.

Concession)[258] and No. 048-2009 of May 22, 2009 (El Paují Concession)[259] derived from the fact that the concessionaire although having the concession in exploitation did not physically extract mineral from it,[260] any such supposed non-compliance cannot be attributed to the concessionaire because the absence of physical extraction of mineral was the fault of the Administration and not of the concessionaire, as discussed above with reference to the failure of the Ministry of Environment to sign the Initiation Act. Therefore, it is absurd, illegal, completely arbitrary and contrary to the bona fide principle from the part of the Public Administration, to attribute to the concessionaire a supposed non-compliance with the obligation to start the extraction of mineral, when that process could only be commenced when the Administration signs an act, which it did not sign, signifying that the absence of physical extraction of mineral was due to the omissions of the same Public Administration and not because fault attributed to the concessionaire.

351. The exploitation of the concession is to be understood as set forth in article 58 of the Mines Law (as it had been defined similarly in article 24 of the 1945 Mines Law), as the actual extraction of minerals *or* as doing the necessary works in order to extract minerals **(see *supra* para. 179)**. As the concessionaire obviously was doing the work necessary in order to extract minerals, as it had completed all the work necessary to complete the feasibility and environmental studies necessary to obtain the further approvals from the Administration to begin construction and physical extraction, it cannot reasonably be claimed that the concessionaire failed to comply with the requirement to begin exploitation. This understanding of exploitation is reflected expressly also in Special Advantage Seven of the Brisas Concession.

352. In addition, it must be noted that during the years previous to the issuing of the Resolutions, the concessionaire received from the Supervision and control organs of the same Ministry of Mines successive "compliance" certificates expressing that Compañía Aurífera Brisas del Cuyuní C.A., has duly complied with the different clauses of the Mining Titles, which include

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258 Exh. C-91.

259 Exh. C-105.

260 I understand that prior to Gold Reserve's acquisition of Compañía Aurífera Brisas del Cuyuní C.A., the prior owner began exploitation of the concession, albeit not in compliance with the requirements of the concession. Gold Reserve reported that fact to the Ministry of Mines, and the Ministry granted Compañía Aurífera Brisas del Cuyuní C.A. time to bring the concession into compliance. (Exh. C-578).

the Special Advantages, to the clauses of the mining contracts signed with Corporación Venezolana de Guayana, and also to the provisions of the Mines Law and its Regulation, consequently being declared solvent.[261] These certificates, issued by the competent supervision and control office of the Ministry, after verifying the compliance of all the obligations and duties of the concessionaire, cannot be simply ignored by the same Ministry of Mines. Doing so, the Ministry has violated the basic principles that rule administrative action, and in particular the principle of bona fide and legitimate expectation and confidence imposed for administrative actions in Article 10 of the Organic Law on Public Administration **(see *supra* para. 25)**.

353. Regarding the provisions of the Organic Law on Public Administration of July 15, 2008, also cited in Resolutions No. 050-2009 of May 25, 2009 (Brisas Concession),[262] and No. 048-2009 of May 22, 2009 (El Paují Concession),[263] these provisions only refer to the power of the Minister to sign its acts (Article 77.19). And regarding the Regulation on the Organization and Functioning of National Public Administration (Decree No. 6.670 of April 22, 2009), the provision cited refers to the governing character of the Ministry of Mines regarding mining activity "according to the Mines law" (Article 12.14 of Decree No. 6.670). As mentioned, none of these provisions of Laws or Regulations authorizes the Ministry of Mines to adopt Resolutions in order to ignore the validity of previous tacit administrative acts adopted by the Ministry according to Article 25 of the Mines Law, nor to revoke valid administrative acts of the same Ministry that created rights in favor of individuals, nor to issue administrative acts violating the due administrative process of law, and particularly, the right to defense of the concessionaires by acting without a prior hearing of the interested party.

354. Regarding Resolution No. 066/2009 of July 28, 2009,[264] in addition to the aforementioned insufficient legal basis, it added, in order to justify

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261 See for Brisas del Cuyuní Concession, for the years 1994, 1995, 1997, 1998, 1999, 2001, 2003, 2005, 2007, and 2008, Exhs. C-881, -67, -882, -68, -883, -69, -884, -70, -71, -72, -73, -885, -74, -886, -888, -75, -76, -888, -77, -889 and -79 (Compliance Certificates and Related Requests); and for El Paují Concession, for the years 2001, 2006, 2007, Exhs. C-81, -83, -878 and -879(Compliance Certificates and Related Requests).

262 Exh. C-91.

263 Exh. C-105.

264 Exh. C-106.

its content, reference to Articles 91 and 94 of the Organic Law on Administrative Procedures, which, however, only establish the term to decide reconsideration recourses and the object of such recourses, but do not authorize the Ministry to enact the illegal and arbitrary administrative act contained in the Resolution.

4. Actions taken by Ministry of Mines prior and after the illegal denial of the extension of the term of Brisas alluvial concession that had already been tacitly granted: the suspension of activities and the illegal take-over of private property

355. A year and a half after Compañía Aurífera Brisas del Cuyuní C.A requested the extension of the alluvial concession (October 17, 2007), and one year prior the illegal denial of such extension took formally place – through the aforementioned Resolution No. 050-2009 released on May 25, 2009[265] – the same Las Claritas Fiscal Inspector of Mines that had previously granted the concessionaire successive "compliance" certificates regarding the mining duties and obligations referred to such concession, issued an administrative act (Act No. MIBAM-DGFCM-ITRG No. 1-IFMLC-001-09 dated March 18, 2009[266]) ordering the "immediate suspension of all mining activities (exploration, development and exploitation) in the area of the concession."

356. The legal basis of the decision was Article 114 of the Mines Law, which, however, only empowers the Ministry of Mines to suspend concessions works as an administrative sanction in cases of legal infractions committed by the concessionaire. In this case, no infraction whatsoever committed by the concessionaire was mentioned in Act No. 1-IFMLC-001-09. Moreover, in its motive, the only facts that are explicit are (i) that the concessionaire had requested in due time (on October 17, 2007), the extension of its concession; and (ii) that in the "administrative files" of the concession allegedly there was no administrative act filed granting the extension of such concession.

357. This illegal assertion, of course, ignored completely that by means of the legal provision of Article 25 of the Mines Law, the extension of the concession had been granted one year earlier, on April 18, 2008 as a con-

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265 Exh. C-91.

266 Exh. C-94.

sequence of the principle of positive administrative silence established in that provision.

358. Act No. 1-IFMLC-001-09 also requested the concessionaire to elaborate an inventory of all assets and to preserve them stating that they were to be transferred to the Republic upon termination of the concession without compensation, pursuant to Article 102 of the Mines Law. In addition, based on Article 103 of the Mines Law, the concessionaire was banned from alienating or selling the assets incorporated into the concession. A similar situation occurred in El Paují concession, through Act No. 1-IFMLC-002-09 of the same date April 18, 2007[267] issued by the same Las Claritas Fiscal Inspector of Mines that, as in the cases of Brisas, had previously granted the concessionaire successive "compliance" certificates regarding the mining duties and obligations referred to such concession.

359. These administrative acts of suspension of the mining activities in the concessions were completely illegal, since the commission of an infraction by the concessionaire justifying such sanction was not duly demonstrated, thus being acts without legal or factual support. Moreover, it was an arbitrary administrative act that caused damages to the concessionaire without any justification, and based on the error of considering that the concession had not been extended, violating the provision of Article 25 of the Mining Law.

360. Furthermore, prior to the formal illegal denial of the concession's extension, through the aforementioned Resolution No. 050-2009 dated May 25, 2009,[268] the Ministry of Mines issued the tax return information (*Planillas de Liquidación*) for Brisas del Cuyuní Concession (No. 693 and No. 694, April-June 2008)[269] for superficial mining taxes and special advantage payments, for which calculation the extension of the concessions tacitly granted by means of positive administrative silence pursuant to Article 25 of the Mines Law was deliberately ignored, considering, in a contrary sense, that the concession had not been extended. In response to the administrative appeal filed against such decision by the concessionaire[270] the General

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267 Exh. C-110.

268 Exh. C-91.

269 Exh. C-100.

270 Exh. C-99.

Director of Mining Supervision and Control through Administrative Decision No. CCF-007-08 of December 23, 2008[271] rejected the request to include in the tax return information the amount due for the concession. The only motives included in such administrative act were, again, the same errors made by the other administrative acts, namely, (i) notwithstanding that the concessionaire had requested in due time, on October 17, 2007, the extension of its concession; (ii) that in the "administrative files" of the concession allegedly there was no administrative act filed through which the extension of such concession had been granted. This assertion, of course, gave rise to the illegality of the administrative act due to flaws on its merits, due to the fact that it ignored completely that by means of the legal provision of Article 25 of the Mines Law, the extension of the concession had been already granted on April 18, 2008, as a consequence of the application of the principle of positive administrative silence established in that provision. The act, in addition, violated that provision of Article 25 of the Mines Law.

361. As a consequence of the formal illegal denial of the extension of the Brisas del Cuyuní concession as decided in the aforementioned Resolution No. 050-2009 of May 25, 2009,[272] four months later the Ministry of Mines, through the same Mines Inspectors that had controlled and supervised the concessions for years, proceeded to take-over all the concessionaire's land, property and assets on the site of the concession (see "Reception Act" dated October 2009).[273] In fact, however, such goods were meant not only for the alluvial Brisas del Cuyuní Concession, but also for the Unicornio Hard Rock Concession, which together with the Brisas del Cuyuní Concession formed the Brisas Project. Regarding all the assets, property and installations corresponding to the Unicornio Concession, this take-over thus violated the right to property of the concessionaire, being an administrative act that has to be considered unconstitutional as it was contrary to what is established in Article 115 of the Constitution.

362. Any take-over of private property by the State, that is, any extinction of private individual rights by the State without following the expropriation procedure through the previous payment of due compensation, in the Venezuelan legal system is a "confiscation" (or using the English expression:

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271 Exh. C-101.

272 Exh. C-91.

273 Exh. C-128.

"expropriation without compensation"), which as the main guarantee of property rights, is prohibited in the Constitution (Article 115), and only admitted as a sanction, consequence of criminal conviction for some really grave offences (Article 116). A confiscation is precisely what occurred in this case of the take over of the assets of the concessionaire and the extinction of the rights arising from the concessions illegally extinguished.

363. As aforementioned, pursuant to Article 58 of the Mines Law **(see *supra* para. 179 ff.)** the same concessionaire can have more that one concession in the same site being developed together, even considering that when works are made in one of them with the unequivocal intention of gaining economic profits from the concessions in proportion to the nature of the substance and the magnitude of the deposit, all of them are to be considered in exploitation. This was precisely the case of the Brisas Project where the alluvial and hard rock concessions were being developed together in the very same project site, which necessarily implied that they had the same inventory in connection with both concessions. The fact of the obviously overlapping inventories regarding both concessions was made clear in the monthly and annual reports of the Company, which included inventory lists, that were made to the Ministry of Mines for both the Brisas and Unicornio concessions. Consequently, the Ministry of Mines could not seize the assets and goods that were on the site when terminating the Brisas Alluvial Concession, because the same assets were also for the use of the Unicornio Hard Rock Concession, which together with the Brisas Alluvial Concession formed the Brisas Project. The fact that the Company's personnel were also ordered to leave the site, when the same site remained subject to the Unicornio Concession was unlawful. The taking of the assets violated the right to property of the concessionaire and the expulsion of the Company's personnel from the site was arbitrary. In addition, in this case, the principle of the unity of the concession regarding the mineral independently of its presentation form established in the 1999 Mines Law **(see *supra* para. 163)**, was also due to be considered by the Ministry, maintaining the assets, property and installations corresponding to the Unicornio Concession as they were. In this regard one also may note that under Article 27 of the Mines Law, even if the National Executive authorities decide to undertake mining activities in an area subject to a concession in connection with minerals that are not subject to that concession, they must do so without detriment to the activities that are performed by the concession holder. Thus, to the extent that the National Executive was to take over the mining activities with regard to the alluvial minerals, the law

required that it do so without detriment to the Company's existing rights in regard to the Unicornio Hard Rock Concession.

IX. THE TERMINATION OF THE HARD ROCK UNICORNIO CONCESSION

364. On October 20, 2009, the same Mining Supervision and Control Direction of the Ministry of Mines pursuant to the Organic Law on Administrative Procedures provisions, initiated ex officio an ordinary administrative procedure, by means of Opening Act (*Acta de Apertura*) No. 1-IFMLC-001-09[274] in order to asses whether Compañía Aurífera Brisas del Cuyuní C.A. complied with its mining duties and obligations. The alleged motive to initiate such administrative procedure was the existence of three Technical Reports (*Informe Tecnico de la Concesión Unicornio,* No. LC-032-09 dated April 24, 2009; *Informe Técnico Final de la Concesión Unicornio*, No. CSCM-050-09 dated April 30, 2009; and *Informe Técnico Final de la Concesión Unicornio* No. ITRG-OSCM-154-09 dated May 15, 2009) whereas the Ministry of Mines supposedly assessed non-compliance of the concessionaire's obligations established in the Mines Law, its regulations and in the special advantages offered to the Republic. In particular, the "Opening Act" of the administrative procedure referred as the alleged non-compliance, that the concessionaire had not initiated exploitation of the concession within the 7 year period set forth by Article 61 of the Mines Law. As a consequence of this alleged non-compliance, the Opening Act mentioned other alleged failures of compliance, in particular to Special Advantages provided for by the Unicornio Concession, most related to and were applicable during the exploitation phase of the concession.[275]

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274 Exh. C-128.

275 Special Advantage Three refers to the payment of exploitation taxes; Special Advantage Four refers to the physical extraction of mineral; Special Advantage Seven refers to incorporation of national value added to the process of transforming extracted minerals; Special Advantage Eight refers to the protection of natural resources by completing studies before conducting exploitation activities; Special Advantage Ten refers to the support of interns, from the commencement of exploitation; Special Advantages Fourteen and Fifteen relate to contributions to educational and medical-health matters in the area of the concession, within one year after the beginning of exploitation.

365. The Opening Act argued that these alleged non-compliances were causes for termination (*caducidad*) of the concession pursuant to Article 98, Paragraphs 3, 7 and 9 of the Mines Law **(see *supra* para. 200 ff.)**.

366. As for the basic cause for termination, that is the lack of commencement of exploitation within the 7 year period following the Mining Title, I ought to point out the following:

367. First, as previously stated, in the case of concessions granted prior to the passing of the 1999 Mines Law, since duration is to be governed by the original (ancient) title (Article 129.c of the 1999 Mines Law), termination of the concession for absence of commencement of exploitation is mitigated by a provision preventing that result included in most of those titles. Notably, in concessions such as Unicornio, granted prior to the 1999 Mines Law, a late start of exploitation is permitted, upon doubling the payment of the first special advantage up to the beginning of exploitation.[276]

368. In these cases, then, termination due to lack of commencement of exploitation is not possible, provided that the legally provided circumstances are present, as was the case of Unicornio. The Unicornio Concession was granted for a period of 20 years before the 1999 Mines Law was passed, through Resolution of the Ministry of Mines No. 452 of December 3, 1997,[277] with Mining Title granted on February 12, 1998.[278] The term of the concession consequently was to end on 2018.

369. Second, as noted above **(see *supra* para. 184)**, to the extent that the Opening Act refers to the extraction of minerals phase of the exploitation of the concession, it must be said that the alleged lack of initiation of extraction of minerals in the exploitation could not be attributed to the concessionaire, since it was completely attributable to the Administration as it failed first, to issue environmental permits in a timely manner **(see *supra* para. 373)** and second, to sign the Initiation Act that would have permitted the Company to commence the work leading to the physical extraction. As discussed above, requiring that a further signature be obtained was an arbitrary and irrational condition **(see *supra* para. 275)**. But moreover, from the doc-

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276 See Arts. 24 and 55.2 of the previous Mines Law (Exh. C-1), and Art. 9 of the Rules on Granting Concessions and Mining Contracts.

277 *Official Gazette* No. 5.190 Extra. of December 11, 1997 (Exh. C-880).

278 *Official Gazette* No. 36.405 of March 3, 1998 (Exh. C-5).

uments I have reviewed it appears that the Ministry, in spite of the multiple requirements made by the concessionaire, never signed such "Initiation Act." Notably, however, also as discussed above, exploitation does not mean only physical extraction of minerals – it means doing all the work necessary to achieve extraction, which this Company plainly was doing.

370. Therefore, it is irrational, illegal, completely arbitrary and contrary to the bona fide principle that all administrative action should follow – to assign to the concessionaire the alleged non-compliance with the obligation to start the exploitation process, when that process, as understood in the law, in fact had commenced, and to the extent that more was wanted, *i.e.*, extraction to begin, that could only be commenced following completion of environmental permitting requirements and then when the Administration signed an act that it omitted to sign, namely, the absence of "exploitation" in that sense was due to the omissions of the same Public Administration and not because of a fault of the concessionaire.

371. Third, also as noted above, exploitation, as defined in article 58 of the Mines Law, and as it has been accepted by the Supreme Tribunal[279] is not only the actual physical extraction of minerals but also doing the necessary works to further such extraction with the unequivocal intention of gaining economic profits from the concession in proportion to the nature and magnitude of the deposit **(see *supra* para. 184)**, which clearly the concessionaire of the Unicornio concession was doing. Thus, the assertion that the concessionaire had not commenced exploitation was not in accord with the Mines Law.

372. Fourth, it must be noted that during the years previous to the Opening Act the concessionaire received from the same unit of Supervision and Control of the Ministry of Mines subsequent "compliance" certificates stating that Compañía Aurífera Brisas del Cuyuní C.A., had complied with the different clauses of the Mining Titles, which include the Special Advantages, to the clauses of the mining contracts signed with Corporación Venezolana de Guayana, and also to the provisions of the Mines Law and its

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[279] See, for instance, Decision No 395 of the Political-Administrative Chamber of the Supreme Tribunal of Justice of March 24, 2009, available at http://www.tsj.gov.ve/decisiones/spa/Marzo/00395-25309-2009-2005-5526.html.

Regulation, consequently being declared solvent.[280] These certificates, issued by the competent supervision and control office of the Ministry, after verification of the concessionaire's duties, could not be simply ignored by the same office of the Ministry of Mines. In doing so, the Ministry violated the basic principles that rule administrative action, and particularly the principle of bona fide and the legitimate expectation and confidence derived from administrative actions as set forth by Article 10 of the Organic Law on Public Administration **(see *supra* para. 35).**

373. As mentioned, the concessionaire contradicted through a Response filed on November 18, 2009, all the assertions expressed in the Opening Act, and the Technical Reports on which it was based,[281] but nonetheless, the Ministry of Mines, through Resolution No. 039/2010 of June 17, 2010,[282] rejected the defenses of the concessionaire, declared terminated (*caducidad*) the Unicornio Concession based on Article 98, Paragraphs 3, 7, and 9 of the Mines Law. In this administrative act, the motives expressed as the basis for termination of the concession were only two: First, that the concessionaire did not initiate the exploitation of the concession within the 7 years following the publication of the Mining Title as set forth in the Mines Law, because in the Ministry's opinion, the concessionaire "did not act with the due diligence filing all the request and petitions in order to request the permits and authorization, even filing the recourses or appeals in the absence of response by the Administration." This means that what the Ministry considered as non-compliance in order to terminate the concession, was not even that the physical extraction phase of the exploitation process did not begin within the prescribed term, but only the supposed lack of due diligence by the concessionaire in filing petitions and recourses to obtain the authorizations that the Administration refused to grant, in order to initiate the exploitation of the concession. In an incredible way, the proof of the supposed absence of such due diligence on the part of the concessionaire used by the Ministry, is a letter of the same Ministry exhorting the concessionaire to continue its saga in order to obtain the mentioned administrative permits and authorizations. This, of

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[280] See for the years 1998 to 2001 and 2003 to 2008, Exhs. C-890, -89, -71, -72, -891, -88, -86, -87, -73, -63, -81, -885, -74, -64, -892, -90, -886, -887, -75, -878, -893, -894, -76, -82, -888, -77, -872, -895, -65, -83, -889, -896, -897, -79, -66, and -84 (Compliance Certificates and Related Requests for All Concessions and Parcels).

[281] See Gold Reserve Response to Opening Act for the Unicornio Administrative Proceeding filed with Ministry of Mines on November 18, 2009 (Exh. C-259).

[282] *Official Gazette* No. 39.448 of June 17, 2010.

course, is not, and cannot be a legal cause to terminate a concession pursuant to Article 98 of the Mines Law, particularly of a Project like the Brisas Project in which the concessionaire obviously took so many steps as were needed to commence the physical extraction of mineral, such that the concession clearly was in exploitation within the terms established in Article 58 of the Mines Law **(see *supra* paras. 179 and 351)**. Second, the other motive argued by the Ministry of Mines in order to declare the Unicornio Concession terminated, was the supposed non-compliance with the requirement of the intern engineer students program (2 students for 2 month per year) that was to commence upon exploitation, established in one of the Special Advantages of the concession. Thus the Resolution is internally contradictory and illogical, as it claims on the one hand that the concessionaire failed to commence exploitation in a timely manner, which is untrue because the concession was indeed in exploitation due to the fact that the concessionaire has done all the needed work for such purpose with the unequivocal intention of gaining economic profits from the concession in proportion to the nature and magnitude of the deposit **(see *supra* paras. 184 and 372),** and on the other hand that it failed to satisfy the obligations of a Special Advantage (no. 10), which required sponsorship of interns following the commencement of exploitation.

374. In any event, the actions in fact taken by the concessionaire in regard to the program must be considered in regard to the principle that only a serious breach of such an obligation would warrant a decision to terminate a concession, because to allege such a futile motive in order to declare a concession like the Unicornio Concession terminated for a mining project like the Brisas Project, violates the principle of proportionality imposed for administrative actions in Article 12 of the Organic Law on Public Administration **(see *supra* paras. 25, 32 and 34)**.

X. OBSERVATIONS REGARDING THE REASONABLE EXPECTATIONS OF THE CONCESSIONAIRE TO DEVELOP THE BRISAS PROJECT

375. As aforementioned **(see *supra* para. 26)** one of the main principles deriving from the principle of bona fides that governs the relations between Public Administration and individuals, is the principle of legitimate confidence or legitimate expectation (*confianza legítima*), which implies that when the Administration, according to the provisions of the applicable Law and through its action and relations with an individual, has created legitimate expectations, it must then respect such expectations. In the case of the Brisas

Project, the following are important aspects in the development of the Project, that allow for the identification of legitimate and reasonable expectations of the concessionaire under Venezuelan Law. In effect, the development of the Brisas Project was subject to a Feasibility Study that had been approved by Ministry of Mines and to an Environmental Social Impact Assessment that had been approved by Ministry of Environment in view of the duty set out in Unicornio 8th Special Advantage and submitted to the Ministry of Mines (which in this case was done, notably without any objection as to the Environmental Social Impact Assessment from Ministry of Mines) **(see *supra* para. 218).** The contents of these documents created reasonable expectations as to the manner that the concessionaire would be permitted to develop the Brisas and Unicornio concessions together, as one project, including various mining contracts relating to surrounding parcels for infrastructure use, all according to the principle of the unity of the concessions established in the 1999 Mines Law **(see, *e.g.*, *supra* para. 163).**

376. Specifically regarding the mining contracts, the Brisas Project concessionaire had a legitimate expectation for the conversion of those contracts signed before 1999 with *Corporación Venezolana de Guayana*, that were part of the Project (**see *supra* para. 150),** into mining concessions as established in Article 132 of the Mines Law. The right to the conversion of the contracts into concessions (**see *supra* para. 155)** was exercised by the concessionaire in due time, but without response from the Ministry of Mines, particularly after the legal controversy affecting the zone of the Imataca Reserve was resolved in 2004 when the Decree No. 1.850 of May 14, 1997 establishing its Plan and Uses Regulation was expressly abrogated and substituted by the Decree No. 3.110 of September 7, 2004 **(see *supra* paras. 246 and 264),** eliminating any possible impediment for the conversion.

377. As for the mine life of the Brisas Project, which is linked to the terms of the concessions, being governed by the unity principle of the concession, if it is true that the original term of the Brisas Alluvial concession was due to expire in 2008, the fact that the term of the Unicornio Hardrock concession was due to expire in 2018, as well as the projection of the Brisas project as a comprehensive one, generated for the concessionaire the legitimate expectation that the extension of the Brisas concession was to be granted. The possible discretionary powers **(see *supra* para. 32 ff.)** the Administration could have had in the extension of concessions **(see *supra* para. 190 ff.)** were very limited, particularly because the approval of the Brisas Project pursuant to the Feasibility Study comprised the exploitation of the mineral in

the whole area, including both the alluvial and hard rock material in an integrated manner. The extension of the Brisas Alluvial Concession was for the concessionaire, as holder of the Hard Rock Unicornio concession, a very legitimate expectation that the Ministry of Mines had to respect.

378. In addition, the same Feasibility Study approved by the Ministry of Mines and the Environmental Social Impact Assessment, also provided to the Ministry of Mines as required, both of which governed the development of the Brisas Project, as well as the project's proportions given the nature and magnitude of the deposit, created legitimate and reasonable expectations for the concessionaire regarding the permitted uses of the parcels adjacent to Brisas/Unicornio concession area that were needed for the project infrastructure, following all the principles on the matter established in the Mines Law (Article 4: rational exploration and exploitation; Article 5: optimum recover or extraction of mineral resources; obligation of concessionaire "not to waste the mineral resources"; Articles 11, 12, 13: noting in particular the concessionaire's right to request easements or expropriation of property as may be needed for the rational exploitation of the concession areas; Article 29: efficient development of projects previously approved; Article 63: participation of the other concessionaire in the profits of the exploitation) **(see *supra* para. 183)**. The development of the Brisas Project approved in the Feasibility Study and set forth in the Environmental Social Impact Assessment, based in its content and in these provisions created legitimate and reasonable expectations to the concessionaire regarding the permitted uses of the adjacent parcels.

379. The Company also had such legitimate and reasonable expectations regarding its ability to develop the project's open pit to "layback" onto the Las Cristinas concession, as had been the subject of agreement with the holders of Las Cristinas concession. As indicated in the project's Environment And Social Impact Assessment, given, as required, to both the Ministry of Environment and the Ministry of Mines, the Gold Reserve pit design, contemplated a "lay back" onto the Las Cristinas property to the north. That is, in order to maximally exploit the mineralization in the Brisas concession area, the slope of the pit had to extend onto the Las Cristinas concession area. It was established according to the principle derived from Article 63 of the Mines Law, that whatever overburden would be removed from the Las Cristinas concession area in the mining process would be mined for the benefit of the Las Cristinas concession – with Gold Reserve only mining for its own benefit the material from the Brisas concession area. Gold Reserve had a reasonable expectation that it would have been able to develop its pit with the

layback onto the Las Cristinas concession area even if there was no formal "layback agreement" finally signed by all parties as long as doing so did not unduly interfere with the rationale exploitation on the Las Cristinas concession. Nonetheless, I understand that the documents filed by Gold Reserve,[283] show that Crystallex, CVG, and the Ministry of the Environment all agreed to the layback. I also understand that the Government started to take actions to terminate both projects before the parties could sign a formal agreement. Nonetheless, it is reasonable to assume that Gold Reserve would have had a right to mine the property as contemplated in the layback agreement, to which the parties agreed in fact based also on the provisions of the 1999 Mines Law, for instance regarding the need to maximally and to rationally exploit mines without waste and to petition, for example, for an easement or other right of way when necessary for rationale and efficient exploitation.

380. Other important legitimate expectation that the Brisas del Cuyuni project concessionaire had in this case, was the preferred right to exploit other minerals in the concessions, and in particular silver. In fact, as aforementioned, pursuant to Article 198 of the 1945 Mines Law and to Article 62 of the 1999 Mines Law, the concessionaire has always a preferred right to exploit minerals other than those assigned in the concessions that are found within the concession area **(see *supra* para. 182)**. For such purposes, the 1945 Law required the granting of a new concession (Article 198), a condition that was changed in the 1999 Law that requires only that notice be given by the concessionaire to the Ministry of Mines and that an agreement subsequently be signed regarding the exploitation. These latter provisions, being a matter of administrative procedure, according to Article 24 of the Constitution, have immediate effects even regarding the administrative procedures that was in course and pending to be decided. That is, if prior to the enactment of the 1999 Law, a concessionaire, as was the case of the Brisas del Cuyuní concessionaire, had requested a concession for the exploitation of new minerals according to article 198 of the 1945 Mines Law, the provisions of the 1999 Mines Law had to be applied to the pending procedure. This means that following the enactment of the new Law, the administrative procedure in course must have been understood not as the requesting of a new concession, but as the notification set forth by Article 62 of the new 1999

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[283] See Minutes of Meeting between Gold Reserve, Crystallex Venezuela and CVG of August 12, 2004 (Exh. C-438).

Mines Law, which grants the concessionaire a preferred right to exploit the new mineral, and to obtain a signed agreement in that regard.

381. In the case of the Brisas Project, after obtaining the Unicornio concession, the concessionaire found the presence of small quantities of silver and other minerals in the concession area that were not covered by the mining title, so according to Article 198 of the 1945 Mines Law then in force, filed the petitions for two concessions: the Aluplata Concession on May 20, 1998[284] and the Vetaplata Concession dated May 20, 1998.[285] During the course of the administrative procedure that was initiated by such petitions, the new 1999 Mines Law was enacted, changing in Article 62 the rules for exploitation of different minerals, implying that the petitions already filed for new "concessions" in terms of the new Mines Law were transformed into the notice provided by Article 62 of the same Law, for the Ministry of Mines to decide how to proceed, and eventually, once the short term provided elapsed, allowing the concessionaire according to his preferred right to exploit the mineral by means of an agreement **(see *supra* para. 182).** The Mines Law, in these cases of notices given to the Ministry, did not assign specific positive or negative effects to the administrative silence of the Administration in responding to the notice as was provided in the cases of petitions for concessions (Article 41) or of petitions for extensions of concessions (Article 25) **(see *supra* paras. 139 ff. and 166)**. Consequently, although the concessionaire in this case could have claimed against a tacit negative decision pursuant to Article 4 of the Organic Law on Administrative Procedures **(see *supra* para. 126 ff.),** the notice filed before the Ministry of Mines remained pending to be resolved, so the preferred right to the exploitation of the new mineral also remained in the concessionaire's hand, only pending to be formally documented into an agreement. That is, negative administrative silence never could mean that the concessionaire lost his preferred right to exploit the new mineral after the Ministry failed to inform him of its intentions **(see *supra* para. 129).**

Executed this 15th day of September, 2010.

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Allan R. Brewer-Carías

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[284] See Aluplata Concession Application dated May 20, 1998 (Exh. C-30).

[285] See Vetaplata Concession Application dated May 20, 1998 (Exh. C-30).

7.

ICSID Case Nº ARB(AF)/09/1: *GOLD RESERVE INC. (*Claimant) v. *THE BOLIVARIAN REPUBLIC OF VENEZUELA* (Respondent)

INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES

SECOND EXPERT LEGAL OPINION OF ALLAN R. BREWER-CARÍAS

28 JULY 2011

I, Allan R. Brewer-Carías, hereby declare that the opinions set forth below are in accordance with my sincere belief:

I. RATIFICATION OF THE CONTENT AND CONCLUSIONS OF MY *FIRST EXPERT LEGAL OPINION*

1. After having reviewed the Respondent's *Counter Memorial* dated April 14, 2011 (Respondent's *Counter Memorial*), the *Legal Opinion* rendered by professor Henrique Iribarren Monteverde dated April 8, 2010 (HIM *Legal Opinion*), the *Expert Report* rendered by Isabel de los Ríos dated April 7, 2010 (IDLR *Expert Report*), and the *Statements* rendered by Respondent's Witnesses (*Statements*), I fully ratify all that I expressed in my First Expert Legal Opinion dated September 15th, 2010 (ARBC *First Expert Legal Opinion*). In particular I ratify all my conclusions as follows:

2. The Administrative Act Nº 088-08 of April 14, 2008 of the Ministry of the Environment, revoking without opening any prior administrative procedure, the previous valid and irrevocable Administrative Act Nº 1.080 of March 27, 2007 of the same Ministry, authorizing and granting to Gold Re-

serve de Venezuela, C.A. - Compañía Aurífera Brisas del Cuyuní, C.A. rights to affect natural resources for the "Construction of Infrastructure and Services Phase" of the Brisas Project to Operate and Process Gold and Copper Minerals according to the concessions and contracts held by it; is an illegal administrative act that must be considered null and void by virtue of the provision of Article 19.4 of the Organic Law on Administrative Procedures.

3. In addition, the Act Nº 088-08 dated April 14, 2008 is mistaken in its factual and legal basis, when referring to the powers attributed to the Ministry within the boundaries of the Imataca Forestry Reserve (Decree Nº 3.110 of September 7, 2004, *Official Gazette* Nº 38.028 of September 22, 2004), and to the temporary emergency declared through Executive Decree Nº 4.633 of June 26, 2006 published in *Official Gazette* Nº 38.466 of June 26, 2006, which only provided for the Administration's performance of works, actions and programs in the area in order to deal with unauthorized, non-industrial mining activities, without restricting or prohibiting in any way the performance of any private or public activity or the works inherent to the authorization legally granted to Gold Reserve. It is worth highlighting that although neither Iribarren nor de los Ríos mention it, this – and no other - was the factual and legal basis for Act Nº 088-08 dated April 14, 2008.

4. Resolution Nº 050-2009 of the Ministry of Mines, dated May 25, 2009, allegedly "answering" the petition filed by Brisas del Cuyuní C.A. on October 17, 2007, by which the company requested an extension of the Alluvial Gold Concession initially granted for a period of twenty years (*Official Gazette* Nº 33.947), whereby the Ministry decided "not to grant the extension requested" because of an alleged non-compliance "with the condition of solvency set forth in the Single Paragraph of Article 25 of the Mining Law," and furthermore declared "the extinction" of the concession because of the exhaustion of its initial term of twenty years; is also an illegal administrative act that must be considered null and void by virtue of the provision of Article 19.2 of the Organic Law on Administrative Procedures, since it ignored that the concession had already been extended the previous year for a period of ten years, beginning on April 18, 2008, *ex legge*, by virtue of the positive effects of the administration's silence provided for by Article 25 of the Mining Law.

5. The same can be said about the request for an extension of El Paují Alluvial gold and diamonds Concession, granted for a period of twenty years to Arapco Administración de Proyectos C.A. (Resolution Nº 282 of November 11, 1992, Exploitation Certificate, *Official Gazette* Nº 4.492 Ex-

tra. of November 20, 1992). On January 17, 2008, within the term set forth by Article 25 of the Mining Law, Compañía Aurífera Brisas del Cuyuní C.A., on behalf of Arapco, formally presented a request to the Ministry of Mines for an extension of the concession, so in the absence of any response on the matter by the Ministry on or before July 20, 2008, pursuant to the Single Paragraph of Article 25 of the Mining Law, the extension of the concession was granted as requested, by virtue of the same aforementioned legal principle of positive silence.

6. In this case, the Ministry issued Resolution Nº 48-2009 dated May 22, 2009, allegedly "answering" the petition for an extension of the concession, likewise deciding "not to grant the extension requested" due to an alleged non-compliance with "the condition of solvency set forth in the Single paragraph of Article 25 of the Mining Law," and declaring "the extinction" of the concession "because of the exhaustion of the term of the mining rights". This decision, ignoring the extension of the concession already granted by virtue of the positive effects of the administration's silence, and pretending not to grant such extension, in fact was an administrative act revoking a previous tacit one granting rights to the concessionaire, and as such, is an illegal administrative act that must be considered null and void pursuant to Article 19.2 of the Organic Law on Administrative Procedures.

7. The "denial" of the extension of the concessions already granted by the Ministry by virtue of the Law, based on the alleged "non-compliance" of some of the mining obligations of the concessionaire, violated the basic principles that rule administrative action in Venezuela, and in particular the principle of bona fide and legitimate expectation and confidence that rules administrative action pursuant to Article 12 of the Organic Law on Public Administration (OLPA), since it was in contradiction of the content of the "compliance certificates" issued in a successive and regular way by the Mining supervisory authority, regarding all the concessionaire obligations established in the Mining Law, its Regulation and the Mining Titles, and whereby the Ministry repeatedly affirmed to the concessionaire "that consequently it is solvent regarding the Ministry."

8. It was based on these certificates on its solvency that, pursuant to Article 25 of the Mining Law, the concessionaire requested the extension of the concessions, which were not denied by the Ministry in the term set by the Law. Additionally, the principal basis of alleged non-compliance cited by the Ministry to "deny" the extension of the concessions (already tacitly

granted by virtue of the Law), was that the concessionaire did not initiate the exploitation of the concession, a fact that in no way can be attributed to the concessionaire since the absence of exploitation was the sole responsibility of the Administration and not of the concessionaire, due to the fact, among others, that the authorization to affect natural resources (Administrative Act Nº 1.080 of March 27, 2007) was subjected in its own text, to the signing by the Ministry of the Environment of an "Initiation Act," which the Ministry, in spite of the multiple requests made by the concessionaire, never signed. Therefore, it is illegal and completely arbitrary and contrary to the bona fide principle – indeed it was absurd - to hold the concessionaire responsible for non-compliance with the obligation to begin exploitation when that process could only be commenced if the Administration signed an act that it did not sign, signifying that the absence of exploitation, if any, was due to the omissions of the same Pubic Administration and not due to the concessionaire's fault.

9. Act Nº MIBAM-DGFCM-ITRG Nº 1-IFMLC-001-09 issued on March 18, 2009 by the Las Claritas *Fiscal Inspector of Mines*, ordering the "immediate suspension of all mining activities (exploration, development and exploitation)" in the area of the Brisas Project Concessions two years after the concessionaire requested the extension of the alluvial concession (October 17, 2007), two months prior to the illegal denial of such extension (May 25, 2009), and after that same Office had previously granted the concessionaire successive "compliance certificates" regarding the mining duties and obligations under such concession, is an illegal administrative act that completely ignored that, by means of Article 25 of the Mining Law, the extension of the concession had already been granted one year earlier (April 18, 2008) as a consequence of the principle of positive administrative silence established in that provision.

10. Administrative Acts Nº 693 and Nº 694 of April-June 2008 whereby the Ministry of Mines issued tax payment calculations (*Planillas de Liquidación*) for superficial mining taxes and special advantage payments, ignoring the extension of the concessions that took place by means of the positive effects of the administration's silence, pursuant to Article 25 of the Mining Law, are illegal administrative acts, contrary to such provision.

11. The take-over without compensation of all assets, property and installations of the Brisas del Cuyuní Concession as well as necessarily of the Unicornio mining concession without following the expropriation procedure with previous payment of due compensation, that took place through the

"Reception Act" dated October 20, 2009 issued by the same Mines Inspectors that had controlled and supervised the concessions for years, as a consequence of the decision of the Ministry of Mines "not to renew" the Brisas del Cuyuní Concession, ignoring its tacit renewal already granted, violated the right to property of the concessionaire in particular regarding all assets and properties of the Unicornio Hard Rock concession, protected by Article 115 of the Constitution, amounting to a "confiscation" (or using the English expression: "expropriation without compensation"), which is prohibited in Article 116 of the Constitution.

12. Termination of the Unicornio Hard Rock Concession granted to Brisas del Cuyuní C.A. through Resolution Nº 452 of December 3, 1997 (*Official Gazette* Nº 5.190 Extra. of December 11, 1997), contained in the Ministry of Mines Resolution Nº 032-2010 dated June 17, 2010, is an illegal act, lacking legal basis, and issued in violation of the principles of legitimate expectation and proportionality provided for by Article 12 of the Organic Law on Public Administration and in Article 12 of the Organic Law on Administrative Procedures.

13. Finally, regarding the Brisas Project, after all the approvals and authorizations required, it is possible to say that the concessionaire had very legitimate and reasonable expectations under Venezuelan Law, regarding the manner the concessionaire was due to develop together both Brisas and Unicornio concessions and in addition to all the other mining contracts entered with, *inter alia*, *Corporación Venezolana de Guayana* that were comprised in the Project, as one Project, pursuant to, *inter alia*, the principle of unity of the concession set forth in the 1999 Mining Law. These legitimate expectations, among other aspects, included, *first*, the right to convert, once the new 1999 Mining Law was enacted, the mining contracts signed with *Corporación Venezolana de Guayana*, into concessions; *second*, the mine life of the Brisas Project that was related to the terms of the concessions, given that the term of the Unicornio Hard rock concession was not due to expire until 2018, and that the approved Feasibility Study set out an expected mine life, that at least an extension of the Brisas concession would be granted when its initial term was due to expire in 2008, but also assuming all legal obligations were fulfilled, that both the Unicornio and Brisas Concessions would be extended as needed to achieve the mine operating plan set forth in the Feasibility Study as approved; *third*, the need to use for mining purposes, parcels that were adjacent to the concessions, as was contemplated for project infrastructure as set forth in the various studies and reports submitted to the Ministry of Mines

and the Ministry of Environment, and that the terms of a layback agreement, as agreed in fact with the holders of contract rights to develop the Las Cristinas parcels, and as also was consistent with the Mining Law; and *fourth,* the exercise by the Brisas del Cuyuní C.A. of its preferred right to exploit other minerals in the concessions, including silver, as was requested and notified to the Ministry of Mines.

II. SCOPE OF THIS SECOND EXPERT LEGAL OPINION

14. This Second Expert Legal Opinion, besides ratifying the contents of my First Opinion (ARBC *First Expert Legal Opinion*), is devoted to analyzing what I have considered relevant in the Opinions rendered by Henrique Iribarren Monteverde (HIM *Legal Opinion*) and Isabel de los Ríos (IDLR *Expert Report*), so as to comment on and to clarify some of the issues they have raised.

15. Nonetheless, I ought to say that it seems that the Legal Expert's Opinions and Witnesses' *Statements* filed with the Respondent's Counter-Memorial, have been written at the request of the Venezuelan State, not to give accurate information about the applicable Venezuelan Administrative and Environmental Law relevant to the case, but to try to justify, in an *ex post facto* way, what could have been the possible reasons or motives that the Administration could have had in order to issue the unconstitutional and illegal administrative acts issued by the Ministry of Environment and the Ministry of Mines cancelling the Brisas Project. Nevertheless, even if that was the intention, after reading the *Legal Opinions* it is evident that despite their effort, their authors have failed in such attempt, because what they have written, on the contrary, completely ratifies the arbitrariness in which the Administration acted in this case.

16. Putting this aside, in the following sections of this Second Legal Expert Opinion, I will make comments and some needed clarifications on some issues that Iribarren and de los Ríos have raised in their Opinions, which I have classified following the same general systematization I have used in my First Opinion.

III. SOME COMMENTS REGARDING GENERAL PRINCIPLES OF ADMINISTRATIVE LAW AND PROCEDURE

1. On Matters of Discretionary Power and its absence where the Law uses "indeterminate legal concepts" (conceptos jurídicos indeterminados)

17. As I have stated in my First Opinion (ARBC *First Expert Legal Opinion*, ¶ 32 ff.), as a matter of principle, discretionary powers of the Public Administration must always be expressly established in a text of a statute. Discretionary power is a degree of freedom of action that the law expressly gives to the public officer in a particular decision making process, and consequently, cannot be presumed. However, discretionary power is subject to limits in the sense that it must always be used subject to the criteria of rationality, reasonability, proportionality, equity, and justice. The trespassing of such limits transforms what could have been discretionary action into arbitrary action.

18. In general terms, discretionary powers are usually granted by the Law to empower the Administration, using the words "may" or "can" in an isolated way and without any express qualification. In such cases, the Administration is entitled to select freely among various possible solutions to a given case or matter when the solutions presented are each reasonable and fair. It was in this way that many years ago case law began identifying discretionary powers.[1]

19. In this sense, when the Administration has been given discretionary powers, the statute has given it the freedom to decide among several possibilities, so that any solution is, in principle, legally uncontestable. When a statute dictates, for instance, that the Administration is entitled to take such measures as it deems necessary to the achievement of a given end

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[1] The early decisions of the Supreme Court of Venezuela in this regard, dated from the fifties, were extensively analyzed in my books *Las Instituciones Fundamentales del Derecho Administrativo y la Jurisprudencia Venezolana,* Caracas 1964, pp. 52 ff., and *Fundamentos de la Administración Pública,* Vol. I, Caracas 1980, pp. 203-222; and in particular in my early article on "Los límites al poder discrecional de las autoridades administratives" in *Ponencias Venezolanas al VIL Congreso Internacional de Derecho Comparado,* Caracas 1966, pp. 255-278 (All cited in my First Opinion (ARBC, First Expert Legal Opinion, ¶ 33, fns. 32, 37)).

(even naming several admissible possibilities), according to its own appreciation of opportunity and convenience, any decision reached may be legally sustainable.

20. However, the use of the verb "may" or "can" in a statute empowering the Administration on a decision making process, leads to administrative discretion, but only when the statute does not also use other wording that excludes discretion, or that imposes on the Administration the obligation to provide one and only fair solution. The latter occurs in what in administrative law has been called the doctrine of "indeterminate legal concepts" (*conceptos jurídicos indeterminados*). "Indeterminate legal concepts" do not provide a basis for discretion, and occur where only one fair solution is possible and the Administration has no discretionary power in deciding. The doctrine of the "indeterminate legal concepts," is also generally known and accepted in administrative law in many European counties, and has been also defined and applied by the Supreme Court judicial doctrine in Venezuela in order, precisely, to clarify that in such cases, discretionary powers have not been granted. As it has been pointed out by García de Enterría and Fernández Rodríguez:

> "...The use of indeterminate legal concepts is a case of application of the Law, since what is required is to assimilate in a legal type (described, notwithstanding the vagueness of its boundaries, aimed to govern a precise situation) certain real circumstances; precisely for that it is a regulated process, that ends in the intellective comprehension process of a given reality in the sense that the indeterminate legal concept has sought, process where no willpower decision from the public officer interferes, as is the case when discretionary power is exercised.
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> "… Being the use of indeterminate legal concepts a case of application and interpretation of the Law that has created the concept, the judge can control such use, appreciating whether the solution that through it has been achieved is the only fair solution that the Law allows…".[2]

21. This distinction triggered important outcomes in administrative law: while in the case of discretionary power there was no chance of control-

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[2] See *Curso de derecho administrativo*, Madrid. Ed. Civitas. 2000. Tomo I. p. 459. See also on this matter: Fernando Sainz Moreno, *Conceptos Jurídicos, interpretación y discrecionalidad administrativa,* Madrid, 1976, p. 234.

ling the willpower decision of the public officer, since the law empowers him expressly, leaving aside, however, the limits of logic, reasonability, justice and proportionality; in the case of indeterminate legal concepts there is always a chance that the Administration has made a judging mistake, and precisely such mistake can be controlled and corrected by the contentious administrative courts. The concept has been recognized by case law in Venezuela since more than 30 years ago, first distinguishing discretionary action from so-called "technical discretion" (*discrecionalidad técnica*) which was excluded from the former,[3] and second, distinguishing discretionary action from the use of indeterminate legal concepts (*conceptos jurídicos indeterminados*). And this was precisely what was decided by the former Supreme Court of Justice in a decision adopted in May 19, 1983 (*Hola Juventud/RCTV* case),[4] which perhaps without realizing its content and contrary to his assertions, was quoted in the August 1, 1991[5] decision cited by Iribarren in his Opinion (HIM, *Legal Opinion*, ¶¶ 94, 96). The principle addressed in those two cases of 1983 and 1991, whereby discretionary power was distinguished from the use of "indeterminate legal concepts (*conceptos jurídicos indeterminados*"), which is not discretion, was precisely what is applicable to the case of the provision of article 25 of the Mining Law regarding the decision of the Administration on the extension of concessions. In this case, contrary to discretion, the law imposes upon the Administration, in order to adopt a decision in the case, a requirement to provide only one precise and possible just solution, based in the ineludible need to consider the "pertinence" ("suitability") or "impertinence" of the extension of the concession (See *infra* ¶¶ 97, 104-106, 108-112).

22. As mentioned, this is precisely what was decided in the 1983 *Hola Juventud/RCTV* case, when ruling that in "situations in which there is only one just solution […] in consequence, discretion does not occur," just as is precisely the case in article 25 of the Mining Law in which the concept of "pertinence" ("suitability") leads only to one just solution, excluding discre-

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3 See for instance, decision of the First Court on Judicial Review of Administrative action of March 23, 1983, in *Revista de Derecho Público*, No. 14, Editorial Jurídica Venezolana, Caracas 1983, p. 154.

4 See the text in *Revista de Derecho Público*, No. 34, Editorial Jurídica Venezolana, Caracas 1988, p. 69

5 The decision of August 1, 1991 of the Supreme Tribunal was issued in another case also referring to a TV Program, *RCTV/La Escuelita* case. See the text in *Revista de Derecho Público*, No. 47, Editorial Jurídica Venezolana, Caracas 1991, pp. 80-82.

tion.[6] In the 1983 *Hola Juvetud* case, the indeterminate legal concept that the statute referred to, for the Administration to be empowered to suspend a given TV program was "public morality" (*moral pública*), and the Court stated the following:

> "The factual assumption - an offense to public morality - sets into the rule of Law one of those elements that the administrative doctrine has called indeterminate legal concepts, and that easily differentiates from so-called discretionary power. While the latter allows the officer to choose according to his criteria, between several fair solutions, the same does not happen when applying an indeterminate legal concept. The latter are depicted of being concepts that are hard to describe with precision in their enunciation, but when put into practice do not admit but one fair and correct solution, that is no other than the one conforming with the rationale, goal and intention of the rule of Law.
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> The Public Administration's application of an indeterminate legal concept is a regulated activity and, as a consequence, is subject to legality control by the competent courts. Therefore, the importance of establishing the significance and scope of the concept public morality used by the rule of Law and which has been invoked as a basis for the contested Resolution."[7]

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6 See the comments on the case 1883 *HRCTV/Hola Juventud* case and on the 1991 *RCTV/La Escuelita* case, regarding the concept of *conceptos jurídicos indeterminados* as not granting discretion to the Administration, in my articles "Sobre los límites al ejercicio del poder discrecional," in Carlos E. Delpiazzo (Coordinador), *Estudios Jurídicos en Homenaje al Prof. Mariano Brito*, Fundación de Cultura Universitaria, Montevideo 2008, pp. 609-629; and "Algunos aspectos del control judicial de la discrecionalidad," in Jaime Rodríguez Arana Muñoz et al. (Eds.), *Derecho Administrativo Iberoamericano (Discrecionalidad, Justicia Administrativa y Entes Reguladores), Congreso Iberoamericano de Derecho Administrativo,* Vol. II, Congrex SA, Panamá 2009, pp. 475-512, all cited in my First Opinion (ARBC, First Expert Legal Opinion, ¶ 33, fn 32). See also my article specifically on the concept of "undetermined legal concepts": "La técnica de los conceptos jurídicos indeterminados como mecanismo de control judicial de la actividad administrativa," in *Ley de Responsabilidad Social de Radio y Televisión,* Editorial Jurídica Venezolana, Colección Textos Legislativos, No. 35, Caracas 2006, pp. 217-239.

7 See in *Revista de Derecho Público*, No. 34, Editorial Jurídica Venezolana, Caracas 1988, p. 69. Spanish Text: "El presupuesto de hecho -ofensa a la moral pública- in-

23. Following that case law a distinction was firmly established in Venezuela, between the exercise of discretionary power and what was not such, based on the notion of indeterminate legal concepts as an effective way of reducing the decision-making liberty of the Administration, and the consequent broadening of the judicial authority to control such decision making. Therefore, the Administration has discretionary power only when it can choose among several options, such that in the will of the lawmaker, any one of the options is legally admissible and has the same value; whereas, where there is an indeterminate legal concept, there is no discretion as there is only one decision that is legally admissible. As a consequence, the peculiarity of these indeterminate legal concepts is that their characterization in a given circumstance can only be in one way: There either is a "public utility" need or there is not; either a "public order" disruption has occurred or it has not; either "good customs" or "public moral" have been affected or they have not; the price determined in an expropriation is a "just" price or it is not; the extension of a concession is "pertinent" ("suitable") or it is not.

24. These principles apply to all administrative activities, including mining activities, particularly on matters of granting extensions of mining concessions and of termination of mining concessions, where no discretionary power exists (See *infra* ¶ 105 ff).

2. Administrative Procedure, Due Process and Right to Defense

25. The right to defense and due process in Venezuela, as argued in my First Opinion (ARBC, *First Expert Legal Opinion*, ¶¶ 35-47) is not only of constitutional rank and hierarchy, but also absolute, hence it cannot be ignored, not even if provided so by statute.

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corpora a la norma uno de aquellos elementos que la doctrina administrativa ha denominado conceptos jurídicos indeterminados, y que se diferencian claramente de las llamadas potestades discrecionales. Mientras éstas dejan al funcionario la posibilidad de escoger según su criterio entre varias soluciones justas, no sucede lo mismo cuando se trata de la aplicación de un concepto jurídico indeterminado. Se caracterizan, estos últimos, por ser conceptos que resulta difícil delimitar con precisión en su enunciado, pero cuya aplicación no admite sino una sola solución justa y correcta, que no es otra que aquella que se conforma con el espíritu, propósito y razón de la norma."

26. Consequently, in Venezuelan Administrative Law, for the Administration to issue a decision affecting, restricting or in any way limiting the rights or changing the legal situation of a citizen or a corporation, it must follow a prior administrative procedure whereby due process rights and mainly, the right to self defense are preserved. This right in Venezuela is a constitutional right set forth in the Constitution as a fundamental right (article 49), so its inobservance is a violation of the Constitution and not only of statutes (legality). In addition, the Organic Law on Administrative Procedure declares null and void (absolute nullity) any administrative act issued by the Administration in the absence of an administrative procedure, which is the equivalent to an arbitrary administrative act (article 19.4). Therefore, it is surprising to read in Respondent's *Counter Memorial* expressions such as that due process rights "do not exist under Venezuelan law" or that "Claimant points to no law providing it with such a right" (Respondent's *Counter Memorial*, ¶ 663).

27. It is also absolutely incompatible with the rule of law and with the most elemental principles of administrative law to affirm, as Respondent's witness Hernandez said, that the right to defense can be considered as preserved when the Administration issues an administrative act affecting individual rights, without a hearing in a previous administrative procedure, if in the text of such administrative act the affected individual is "informed" as to the appeals he may subsequently file (Respondent's *Counter Memorial*, ¶¶ 239, 660, 662; Hernandez's *Statement*, ¶ 3). The right to defense needs to be preserved prior to the issuance of the act, not after. The contrary would amount to maintaining that somebody can be condemned without a prior trial, and that his due process rights are not violated if he can file an ex post facto appeal contesting his conviction.

28. It follows that if the Administration decides to revoke or terminate a mining concession, as a matter of principle it may do so only after initiating a formal administrative procedure in order to preserve the concessionaire's right to be heard, to defend himself and to produce evidence to support his case. The Mining Law does not in any way empower the Administration to terminate or revoke a mining concession without first opening an administrative procedure. Even when the Administration decides not to extend a concession at the expiration of its term, it may only do so after initiating a procedure in which the right of the concessionaire to be heard is preserved, mostly due to the concessionaire's rights to file for an extension, and to have it granted if "pertinent" or suitable. Consequently it is incorrect to state that

in the case of the Brisas concession the concessionaire "had no right to prior notice or an opportunity to be heard prior to the expiring of the concession" (Respondent's *Counter Memorial*, ¶ 238) particularly when an extension of the concession already had been requested, as it happened in this case, and even granted by virtue of the "administrative silence" (See *infra* ¶ 61 ff.). Moreover, in the case of the Brisas concession the expiration of the concession did not occur without the concessionaire making a timely request for its extension. Only when the termination of a concession occurs *ex lege* without the concessionaire having requested an extension, can it be said that such termination occurs "without the need of a pronouncement or prior notice by the government" (Respondent *Counter Memorial*, ¶ 238; Hernandez's *Statement*, ¶ 3; HIM, *Legal Opinion*, ¶ 28). But such statement would be absolutely contrary to the sense of the Mining Law provisions if the extension of the concession had been requested, and moreover granted.

29. In the case of Resolution Nº 050-2009 issued by the Ministry of Mines on May 25, 2009, after the tacit extension of the Alluvial Brisas Concession was granted through the effects of positive administrative silence, whereby the Ministry decided "not to extend" the concession, without previously granting the concessionaire's right to defense by opening an administrative procedure in which the concessionaire could have been granted the opportunity to present its case; such act must be considered unconstitutional, and thus, null and void because it violated the due process guaranties established in article 49 of the 1999 Constitution (ARBC, *First Expert Legal Opinion*, ¶ 46).

30. When the Administration, for reasons of general public interest, decides in a discretionary way to terminate a mining concession without opening an administrative procedure, what it does is in fact expropriating the concessionaire's rights, including his administrative procedural rights to be heard, and in such a case the Administration has to compensate the damages thereby caused to the concessionaire. When an expropriation takes place a prior administrative procedure may be avoided, because the right to be heard is "expropriated" altogether with the mining rights that are part of the concession, and it is in this sense that the decisions of the Supreme Tribunal of Justice quoted by Iribarren (HIM, *Legal Opinion*, ¶¶ 73-74) must be interpreted and understood. Not in the sense that the Administration could be authorized to terminate mining concessions on any occasion, at its will, without compensating the concessionaire for the damages caused by the "discretionary" extinction of the inherent rights.

31. Consequently, the "most recent jurisprudence" and the so-called "current position of Venezuelan legal opinion," as mentioned by Iribarren (HIM, *Legal Opinion*, ¶ 73), must be applied following the Constitution and interpreted in harmony with its principles. It follows that contrary to what Iribarren states in his Opinion (HIM, *Legal Opinion*, ¶ 222), in Venezuela, pursuant to the Constitution and the Laws, as a matter of principle, for the termination of a mining concession the Administration must necessarily first must open a formal administrative procedure guaranteeing the due process rights of the concessionaire. Also, contrary to what Iribarren has said in his Opinion (HIM, *Legal Opinion*, ¶ 74), what I explained in my First *Legal Opinion* is correct in the sense that in this case, the Government ignored the due process constitutional rules by not initiating an administrative procedure prior to the decisions taken regarding the Brisas Project concessions, resulting in unconstitutionality and illegality (ARBC, *First Expert Legal Opinion*, ¶ 343).

3. Due Diligence and Bona Fide in the relationship between the Administration and Concessionaires

32. When the concessionaire's performance depends on an administrative act or decision that the Administration is compelled to issue by law, the latter cannot punish the former for noncompliance of his duties, when such compliance can only take place if the Administration permits it by enacting a further decision or act. Therefore the Administration cannot hold the concessionaire responsible when his noncompliance is caused by the negligence of the Administration in issuing those acts that the Concessionaire needed in order to perform.

33. As de los Ríos explained in her Opinion (IDLR, *Expert Report*, ¶ 9 ff.), for mining exploitation to begin, the concessionaire must obtain several permits and authorizations from both the Ministry of Mines and the Ministry of Environment, which are compulsory requirements with which a concessionaire must comply prior to exploitation and the material extraction of substances. However, conversely to what is suggested by de los Ríos (IDLR, *Expert Report*, ¶¶ 16-22, 35), the issuing of a permit or authorization for a previous stage, indeed does create the normal and logical legitimate expectation as to the further permits. There is no basis to support the assertion that when consecutive authorizations are required to develop an activity, the granting of the successive acts would be "unpredictable" and that the concessionaire could not have a "secure expectation for the subsequent authoriza-

tions" (IDLR, *Expert Report*, ¶ 93)**.** This would be tantamount to considering that the Administration may act arbitrarily without subjecting its acts to the principles of administrative procedure, such as reasonability or rationality.

34. For instance, regarding environmental permits for mining activities, as de los Rios says, they must be granted in stages (IDLR, *Expert Report*, ¶ 89). This does not mean, however, that any project could be completely stopped at any time without a reason or compensation, and that mining projects subject to successive environmental permits do not have meaningful future expectations. This again would be the denial of the most elemental rules of administrative procedures that are designed always in order to produce a final act or decision. That is, it would amount to depriving the established administrative procedure of any logical reason and purpose, contrary to the sense of what is provided in the Administrative Procedures Organic Law, substituting procedures and rules with arbitrary conduct.

35. In this same sense, if the Administration fails to grant those permits and authorizations required for the concessionaire to begin exploitation, and the failure is not based on non-compliance by the concessionaire, then the Administration is prevented from later pronouncing that the concessionaire failed to reach exploitation because any such failure would be due solely to the decision of the Administration. As already mentioned, the relation between the Administration and the mining concessionaires, like any administrative relation between the Administration and any addressee or titleholder of administrative acts, must basically be based on bona fide grounds, as required by Venezuelan law (ARBC, *First Expert Legal Opinion*, ¶ 25 ff.).

36. The counterpart of the State has to believe that when the Administration issues a concession, an authorization or an administrative act granting some rights, it is acting in good faith, and it is not deceiving the beneficiary. Therefore the private party in a relation with the Administration has to rely on the administrative act or concession, and on what is granted, permitted or authorized through it. The private party cannot enter into a relationship with the Administration with the idea that the Administration is acting on bad faith and is not going to fulfill its obligations, or that it is not going to act according to what it has authorized or permitted.

37. This means that it is not possible to pretend that a private party should begin the implementation of an administrative permit or authorization by suing the Administration for any delay in the issuing of a subsequent act.

The private party in its relations with the Public Administration, on the contrary, has to be based on confidence and bona fide, and should therefore believe that what has been legally promised by the Administration is going to be realized. An administrative rapport where a private party must base its actions on the presumption that the Administration is not going to comply with the obligations it has assumed is absolutely inconceivable in modern Public Administration. Thus, there is no justification for the Administration to believe, as Respondent and Respondent's Witness García Tovar stated, that once a permit or authorization has been granted by the Administration, the holder acts at its own "risk," without any assurance (Respondent's *Counter Memorial*, ¶¶ 42, 308, 324; García Tovar's *Statement*, ¶ 13); and that if the Administration has not complied with its duties, roles, and pursuant to what it has promised, it has done so because the titleholder has not sued the Administration for its delay. It is simply irrational to think that this could be the normal way to develop a relationship between the Administration and the private party.

38. In cases like a permit given to a concessionaire to affect natural resources, in which the Administration is compelled to do something in order for the concessionaire to achieve what it has been authorized to do, the concessionaire has to presume and expect that the Administration is going to comply with its duty, and cannot be blamed by the Administration for not suing it in case of delay.

39. In addition, and in particular, regarding the mining activities in the Imataca Forestry Reserve, during the years in which due to a preventive judicial decision issued by the former Supreme Court, the granting of land use permits was prevented, such situation cannot be cited in prejudice of the concessionaire.

4. On matters of the motivation of administrative acts and the exclusion of New Ex Post Facto Arguments to Justify Administration Action

40. Administrative procedures are established in contemporary administrative law both to allow the Administration to perform its activities, and to protect the rights and guarantees of interested private parties. For such purposes, the Venezuelan Organic Law on Administrative Procedure has included a series of provisions, among them, the duty of the Administration, when issuing a decision affecting rights and interests of private parties, not

only to have legal motives or reasons to issue the act, but also to duly motivate it, that is, to formally include the reasons in the body of the act, in an express way issuing a specific administrative act.

41. This burden to motivate the administrative acts is one of the most important and basic conditions for the exercise of the constitutional right to defense regarding administrative acts (article 49, Constitution). If an administrative act does not include a statement of reasons, it would be impossible for the addressee to defend himself in the face of such act.

42. This duty of the Administration to formally include in the body of the administrative act all its motives is, in addition, a legal obligation set by articles 9 and 18.6 of the Organic Law on Administrative Procedure, requiring that all the factual and legal motives of the administrative act must be formally stated in its text. Consequently, it is contrary to the rule of law and all principles of administrative law for the Administration to issue a non-motivated administrative act or a partially motivated administrative act, even if the motives could eventually be found in the files.

43. Consequently, the *ex post facto* motivation of administrative acts is completely excluded in Venezuelan Administrative Law. Nonetheless, in this case of the termination or cancellation of the Brisas Project, as it could be appreciated from the Iribarren and de los Ríos Opinions, they have purported to supply, supposedly in an *ex post facto* way, motives the Administration did not express in an attempt to justify the arbitrary administrative conduct. Among other cases (See *infra* ¶¶ 102, 118, 122, 185, 189 ff., 208 ff.), this is precisely what appears to have occurred in the case of the termination of the Brisas Concessions, where the absence of motives and the arbitrary administrative conduct that was followed in issuing the various administrative acts cancelling the concessions is now purportedly fulfilled or justified *ex post facto* with motives not expressed in those acts.

44. In particular, it must be mentioned that in the last Chapter of Iribarren´s Opinion he even purports to supply and construct new "reasons supporting the administrative acts" issued by the Administration in this case (HIM, *Legal Opinion*, ¶¶ 205-211), which is also completely unacceptable in administrative law.

45. Regarding the administrative act of the Ministry of Mines of May 25, 2009 declaring the termination of the Brisas Concession, allegedly reject-

ing the request for its extension, ignoring that it was already extended through the positive effects of administrative silence, Iribarren purports to supply "other reasons" why the concession supposedly "could not be renewed" (HIM, *Legal Opinion*, ¶ 205), recognizing that those new motives "are not contained in the resolution" (*Idem*, ¶ 205), but would be found in the "administrative file substantiated" by the Administration (*Idem,* ¶ 206).

46. It has no basis in administrative law in Venezuela to attempt to supply the reasons that the Administration could have relied upon to issue an administrative act after its enactment, particularly because despite being contrary to logic and principle, the Organic Law on Administrative Procedure compels the Administration to formally motivate its acts, expressing the motives in the body of its administrative acts (articles 9, and 18.6). That is to say, the legal and factual reasons the Administration had to issue the administrative act, must be formally expressed in it.

47. The assertions of Iribarren tending to construct and give other motives for the administrative act that were not contained in it (HIM, *Legal Opinion*, ¶¶ 205-207, 218), have neither sense nor support. In administrative law, once an administrative act has been issued on the basis of expressed motives and reasons, no "new" supposed reasons justifying it can be constructed from the files "substantiated" by the Administration, particularly if the "files" can or have been "substantiated" without the participation and control of the addressee, which has been the case regarding Brisas, where the files have been elaborated behind the back of the concessionaire.

48. The Supreme Court's decisions cited by Iribarren in his Opinion (HIM, *Legal Opinion*, ¶¶ 208-209) do not support at all his unlawful assertion that the reasons derived from the "administrative case files" not expressed in any way and not even summarized in the formal motivation of the administrative act, can contain the reasons supporting its issuing. This is simply not true, particularly if the concessionaire had no access to those "files" since no administrative procedure was followed, and they even could have been constructed in an *ex post facto* way. Contrary to what Iribarren suggests in his Opinion, in both judicial decisions of 2001 and 2010 that he has quoted, what the Supreme Tribunal decided was: first, that not all the exact and precise extended details of the expressed motives must be expressed in its text, it being sufficient to have an outline or summary of the same if all the details are in an express manner in the case file; and second, and above all, as the Supreme Tribunal has expressly ruled in both decisions

(precisely in the paragraphs highlighted by Iribarren (HIM, *Legal Opinion*, ¶¶ 208-209), that the files can help to have the extended details of the motives that have been formally expressed "of course, when the beneficiary of the action has had the necessary access to such elements" (Decision Nº 318, March 7, 2001) (HIM, *Legal Opinion*, ¶ 208, fn 104), or when the interested party "has had access to this and obtained knowledge of the same in a timely manner" (Decision Nº 1143 of November 11, 2010) (HIM, *Legal Opinion*, ¶ 209, fn 105). And this has not been the case in the decisions adopted regarding the Brisas concessions.

49. It is completely inadmissible, therefore, to find in Iribarren's Opinion, as if he were the Administration itself, "new" and *ex post facto* arguments trying to justify the decision of the Ministry not to extend an already extended concession based on a supposed "violation" of the mining title and on a supposed "incompatibility of the same with the feasibility study presented by the concessionaire" (HIM, *Legal Opinion*, ¶ 164), and at the same time, the "incompatibility" of the feasibility study presented by the concessionaire with the mining title (HIM, *Legal Opinion*, ¶ 165). The fact is that none of these "new" motives of the administrative decisions were ever expressed by the Administration to the concessionaire.

IV. SOME COMMENTS REGARDING ADMINISTRATIVE SILENCE IN ADMINISTRATIVE PROCEDURES

1. The legal regime on the effects of administrative silence

50. Regarding the effects of administrative silence, negative or positive, of course, in administrative law, they must be expressly established in a statute. Consequently, there is no basis for the Respondent and Iribarren to note that "no mention is made" in the text of the Brisas concessions "of the positive effects of *silencio administrativo*" (Respondent *Counter Memorial*, ¶ 22; HIM, *Legal Opinion*, ¶ 32). Of course there is no mention in the concessions about this matter. This is strictly an express statutory matter, given that a statute is the only legal source that can give legal effects to administrative silence, and given that it is not a matter that can be resolved in the text of a concession or of any administrative act or contract. Indeed, no effect of administrative silence can be presumed, as it must always be expressly established in a statute (ARBC, *First Expert Legal Opinion*, ¶ 123).

51. There are no absolute rules regarding the assignment of positive or negative effects to administrative silence. It is an option to the lawmaker, and there is no basis to consider that one or the other, -or as Iribarren puts it, that positive effects of administrative silence is "incompatible" with the public interest (HIM, *Legal Opinion*, ¶ 122). If a tacit administrative act is produced due to a statutory provision giving positive effects to administrative silence, and the Administration has grounds to contest its legality, it can initiate an administrative procedure for its review, with the participation of the beneficiary, in order to correct or revoke it, should that be justified, in order to safeguard the public interest.

52. The Laws on Administrative Procedure of different countries show that lawmakers often choose to grant positive effects to administrative silence as a general matter. In some countries, however, lawmakers, also as a general matter, have chosen to grant negative effects to administrative silence. The latter has been the case in Venezuela since the passing of the 1982 Organic Law on Administrative Procedure, where as a general rule the lawmaker provided negative effects to administrative silence (ARBC, *First Expert Legal Opinion*, ¶ 126 ff.).

53. But the fact that a provision of the general Organic Law on Administrative Procedure gives negative effects to administrative silence does not mean that this is the "rule" and that granting positive effects to administrative silence in special laws - as is the case of article 25 of the 1999 Mining Law on matters of extension of concessions - is in itself an "exception" regarding the negative effects granted in a general statute. Consequently, in the special statutes where the lawmaker has provided for the positive effects of administrative silence (like the case of article 25 of the 1999 Mining Law) this is the applicable rule (ARBC, *First Expert Legal Opinion*, ¶ 130).

54. Moreover, it is surprising that Respondent has not understood the consequence of the positive effects of the Administration's silence established by the statute: Respondent claims that "the fact that the Ministry of Mines did not respond to Claimant's request for an extension of the Brisas Concession before its initial term expired, *did not* automatically grant Gold Reserve an extension" (Respondent's *Counter Memorial*, ¶ 22) although Respondent also contradicts itself (Respondent *Counter Memorial*, ¶ 20). In fact, pursuant to article 25 of the 1999 Mining Law, the effect of positive administrative silence on petitions for concession extensions is precisely to

deem the extension granted automatically. This is the essential functions of a provision establishing positive effects of administrative silence.

55. On the other hand, it must be noted that to grant effects to administrative silence (either negative or positive) can only be considered as an "exception" when referred to the "rule" of the need for an express pronouncement through an administrative decision, that is, regarding express administrative acts. But regarding both, the negative or positive effects of administrative silence, there is no relation between one considered to be the "rule" and the other an "exception." Both are exceptional provisions regarding the general manner of administrative decision – by way of formal and written pronouncement. Hence, the so called rule of "strict interpretation" mentioned by Iribarren in his Opinion (HIM, *Legal Opinion*, ¶ 116), does not apply to positive silence as compared to negative silence; it applies to both, negative or positive effect of administrative silence, in contrast to the "rule," which is express decision-making.[8] As mentioned, in either case, when a

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[8] Regarding the judicial decisions of the First Court on Judicial Review of Administrative Action (CPCA) dated 12-21-2000 (*Corporación Bieregi*) and 11-11-2004 (*Juan Manuel Perret*) quoted by Iribarren in his Opinion (ff. 72, 74), contrary to his assertion, they do not establish the "rule" that positive effects of administrative silence must be interpreted in a "restrictive" way supposedly vis-a-vis negative effects of administrative silence. Those decisions refer to the case-law doctrine established by the Court, and subsequently changed by the same Court, on the application by "extension" (*en forma supletoria*) of the positive administrative silence effect provision set forth in article 55 of the Organic Land Use Planning Law (*Ley Orgánica para la Ordenación del Territorio*) to construction permits on urban land that is regulated in the Organic Urban Land Use Law (*Ley Orgánica de Ordenación Urbanistica*) in which no positive effect of administrative silence is provided. It was for the purpose of changing its previous legal opinion in which the Court accepted such extended application of one Law to matters regulated in another law, in order to, on the contrary, deny the applicability of the Organic Land Use Planning Law to the construction permits issued on urban land uses regulated in the Organic Urban Land Use Law, that the Court explained the need to consider that the interpretation of positive silence must be the most restrictive possible ("*la figura del silencio administrativo positivo debe ser lo más restringida posible*") precisely because it is *not* provided in the Organic Urban Land Use Organic Law, but in another Organic Law (Organic Land Use Planning Law). That is, what the Court explained, when changing its interpretation on the matter, is that the interpretation of positive effects of administrative silence provided in the Organic Land Use Planning Law, not being provided in the directly applicable Organic Urban Land Use Organic Law, must be interpreted in a restrictive way when it is applied "by extension" to

statute provides for positive or negative effects for the Administration's silence, and tacit administrative acts result as a consequence, such provision must be followed, in either case being an "exception" to the basic rule that mandates the administration to produce an express administrative pronouncement.

56. In any event, the tacit administrative act produced by virtue of a provision giving effects to administrative silence, either positive or negative, is an administrative act subject to the same principles and rules of administrative law that apply to administrative action, including the rules governing their overturn. There is no rule under which the Administration can revoke tacit administrative acts "with much greater ease and scope that in the case of express acts," as Iribarren says (HIM, *Legal Opinion*, ¶ 124). Tacit administrative acts, which originate from statutes expressly providing for positive or negative effects of administrative silence, are subject to the same rules of administrative law applicable to explicit administrative acts.

2. Positive Administrative Silence

57. As aforementioned, although the provision of Article 25 of the 1999 Mining Law can be considered a "special" regulation compared to the "general" provision of the Organic Law on Administrative Procedure providing for negative effects of administrative silence, that does not mean that there is a supposed need to interpret the effects of silence in an "exceptional" and "restrictive" way only with respect to "negative silence" as compared to positive silence as Iribarren suggests (HIM, *Legal Opinion*, ¶ 116).

58. This supposed distinction has no support in Venezuelan Administrative Law pursuant to which the only general principle is the need for a statutory provision for one or the other, negative or positive effects to administrative silence, as an exception to the rule requiring an explicit administrative act. That means that both negative and positive effects of administrative silence, when giving rise to a "tacit" administrative act, are subject to a restrictive interpretation, because both are exceptions to the general rule of the need for an "explicit" administrative act. As previously explained, what was decided by the First Court on Judicial Review of Administrative Action in the December 21, 2000 ruling (*Corporación Bieregi* case) quoted by Iribarren

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construction permits in urban law. See these decisions in *Revista de Derecho Público*, No. 99-100, Editorial Jurídica Venezolana, Caracas 2004, pp. 219-222.

(HIM, *Legal Opinion*, ¶ 116, fn 74), is not what he improperly "deduced." In that case, as already mentioned (See *supra*, ¶ 55, fn 8), what the First Court decided was that the interpretation of positive effects of administrative silence provided in the Organic Land Use Planning Law, not being provided in the more directly applicable Urban Land Use Organic Law, must be interpreted in a restrictive way when it is applied "by extension" to construction permits in urban law regulated in the latter Law. There is no way to interpret the First Court's decision as establishing a supposed "rule" as deduced by Iribarren in his Opinion, that one must interpret effects of positive administrative silence in a restrictive way.

59. The fact is that despite the general provisions of the 1981 Organic Law on Administrative Procedure on the negative effects of administrative silence, in 1983, in the Organic Land Use Planning Law the positive effects of administrative silence were first introduced. This Organic Law, contrary to what Iribarren claims, is not "defunct law" (HIM, *Legal Opinion*, ¶ 116), but is a statute still in force. As de los Ríos observes in her Opinion, that law is the basic law that applies to granting authorizations and permits related to land use, including mining activities (IDLR, *Expert Report*, ¶¶ 2, 16, 44).

60. Finally, it must be noted that in the case of requests for extension of mining concessions, although article 25 of the 1999 Mining Law provides that the absence of response to the petition has positive effects, this occurs only after the term of six months has elapsed, a term in which the Administration not only has the right to verify the compliance or solvency of the concessionaire, but the duty to do so. For such purpose, as mentioned, the Administration has a non-extendable term of six months that begins counting from the day of the formal filing of the extension's request. The Administration cannot seek to justify its failure to perform its duties during that time by complaining that it did not receive multiple copies of the request in different offices, as Respondent and respondent's Witness Herrera Mendoza have tried to state (Respondent *Counter Memorial*, ¶¶ 492, 502; Herrera Mendoza's *Statement*, ¶ 5). Only the Administration is to blame for the disorder of its own files and inter-office communications systems. As it is expressly provided in article 10 of the Organic Law on Administrative Procedure Simplification (*Ley Orgánica de Simplificación de Trámites Administrativos, Official Gacette* No. 5891 of July 31, 2008), the Administration cannot impose on individuals additional formal burdens greater than those expressly established in the Law.

V. SOME COMMENTS REGARDING THE ADMINISTRATIVE LAW REGIME ON THE REVOCATION OF ADMINISTRATIVE ACTS

1. Irrevocable character of tacit administrative acts produced by positive administrative silence, and the case of extension of mining concessions

61. As I have explained in my First Opinion, according to article 82 of the Organic Law on Administrative Procedures, the general legal principle in administrative law is that definitive administrative acts with particular effects creating or declaring rights are irrevocable. Any overturn of such acts causing damages to its beneficiaries must be compensated by the Administration, unless it is based on grounds of absolute nullity pursuant to the provisions of articles 19 and 83 of the same Organic Law on Administrative Procedures. (ARBC, *First Expert Legal Opinion*, ¶ 68 ff.) These legal rules apply to all administrative acts.

62. Consequently, the so-called tacit administrative acts resulting from the effects given by a statute to administrative silence, whether negative or positive, are administrative acts with the same general character and effect of an explicit administrative act, and without any difference between them, except that in one case, by virtue of the silence, a given petition is to be deemed denied and in the other case, granted. But in each case, the resulting tacit administrative act has the same nature and is governed by the same rules, and as aforementioned, is subject to the same rules of interpretation (See *supra*, ¶ 50 ff., *infra* ¶ 65 ff.).

63. This explains why it is groundless to argue - as Respondent and Iribarren have - that tacit administrative acts resulting from positive administrative silence are of a "revocable character" (Respondent's *Counter Memorial*, ¶ 500; HIM, *Legal Opinion*, ¶¶ 123, 125, 137); that "the government may revoke tacit acts derived from government silence with much greater ease and scope that in the case of express acts" (HIM, *Legal Opinion*, ¶ 124); that "rights granted through *silencio positivo* do not enjoy this irrevocability" or that "rights granted through a *silencio positivo* are far less effective than rights originating from an express action" (HIM, *Legal Opinion*, ¶ 127); and "that under no circumstance […] does *silencio administrativo positivo* generate the irrevocability of the supposed tacit authorizing administrative act" (HIM, *Legal Opinion*, ¶ 134). These assertions have no

basis in Administrative Law in Venezuela, nor in general principles of administrative law as widely recognized in State practice.

64. In Venezuelan administrative law as I have discussed in my First Opinion (ARBC, *First Expert Legal Opinion*, ¶ 77), no administrative act creating or declaring rights in favor of its addressee may be considered revocable. On the contrary, every administrative act that creates or declares rights in favor of a beneficiary, regardless of whether the product of an express administrative act or of a tacit administrative act, is irrevocable.

65. This does not mean that if an administrative act (either express or tacit) is affected by a defect giving rise to absolute nullity the Administration could not revoke it by declaring its absolute nullity pursuant to article 83 of the Organic Law on Administrative Procedure. In fact, nothing different has been said by the Politico Administrative Chamber of the Supreme Tribunal in the 2007 ruling cited by Iribarren in his Opinion (HIM, *Legal Opinion*, ¶¶ 123, 77 ff.). The Administration can always review and correct its action pursuant to articles 82 and 83 of the Organic Law on Administrative Procedure: the first article sets forth the principle according to which administrative acts not creating or declaring rights can be revoked, and by contrary interpretation, if they do create or declare rights, they cannot be revoked; and the second article sets forth the principle that the Administration can always declare the "absolute nullity" of administrative acts (ARBC, *First Expert Legal Opinion*, ¶ 98 ff.). The latter procedure can always be initiated when an absolute nullity defect is detected in relation equally to either an express or tacit administrative acts.

66. In the case of the requested extension of the Brisas Concession, the tacit administrative act generated by virtue of the positive effect of administrative silence was an irrevocable act. If the Administration had detected an absolute nullity defect affecting such act, it had the possibility of initiating an administrative procedure to declare its absolute nullity, and reverse it. But for such purpose, as I have expressed in my First Opinion (ARBC, *First Expert Legal Opinion*, ¶¶ 35 ff., 114 ff.), the Administration was compelled to respect the concessionaire's due process rights and specifically the right to be heard and to a defense, and so would have been required to open an administrative procedure for such purpose. Any revocation of an administrative act without the due administrative procedure is deemed by the same Organic Law on Administrative Procedure, null and void, as such revocation

would itself be affected by a defect of absolute nullity (ARBC, *First Expert Legal Opinion*, ¶ 101 ff.).

67. In this sense, if the Ministry had reasons to believe the concessionaire did not comply with the requirements set forth by article 25 of the Mining Law for an extension of the concession to be granted (for instance, the "solvency" requirement, as it stated in Memorandum Nº DGCM 094-09 dated May 12th, 2009)[9], then a timely answer denying the extension reasoning so should have been issued. However, once the legal term to give a proper response elapsed, the Ministry had no other option but to recognize the approval of the renewal petition by operation of the law (via positive effects of administrative silence) and to commence an administrative procedure to review such tacit administrative act to determine whether the granted extension was legitimate or not and whether the legal requirements had been satisfied, granting to the beneficiary (i.e. the concessionaire) the right to participate to such administrative procedure.

68. What the Administration could not do, being absurd to pretend it was possible, as Respondent now claims, was "to revoke the extension [of the concession] by issuing a decision denying the renewal" when such renewal was already granted by virtue of the Law (Respondent's *Counter Memorial*, ¶¶ 500, 585).

69. The assertion made by Respondent must be read carefully, – to fully understand its absurdity: first, Respondent's assertion entails an admission of the existence of the extension, since an *extension* can only be revoked if it has been already granted and is in place. And second, to revoke such existing extension, Respondent's assertion is that the decision issued denied the renewal (of the extension). Either an extension of the concession existed, and was to be revoked, or was denied. It is absurd and impossible to do both things at the same time, as Respondent argued: to pretend to revoke an extension of a concession already granted, by issuing a decision denying such extension. In revoking, the extension exists, in denying, it does not.

70. If there were grounds for the extension not to be granted, once granted by virtue of the positive effects of administrative silence, then the Administration should have opened an administrative procedure to review the

[9] *See* Exhibit C-735 of the Memorial.

tacit administrative act of renewal. Conversely, in the Brisas case, the Administration, disregarding the operability of article 25 of the Mining Law, pretended to "answer" the petitions for extension well after the legal term for an answer had elapsed, and therefore, after the tacit administrative act extending the term of the concession was produced. This was a completely illegal action, and contrary to what Iribarren argues in his Opinion, an extension of a concession granted by tacit administrative act resulting from the operation of article 25 of the Mining Law, cannot be "validly revoked by the express response of the government denying the renewal" (HIM, *Legal Opinion*, ¶¶ 124, 137). As I have already put into evidence, it is impossible to revoke something by denying it.

71. What Iribarren and Respondent argue amounts to saying that the Administration can fraudulently use administrative acts at its will, for purposes other than those established in the law. Pursuant to article 25 of the Mining Law, the Administration's answer to a concession's extension request must be issued in the 6-month term provided by law. If no response is issued, the silence of the Administration creates positive effects and thus, a tacit administrative act granting the extension. This act creates rights for the concessionaire and its existence cannot be ignored by the Administration; nor can it be freely revoked by the Administration at its discretion: if the Administration believes that the tacit administrative act could be affected with a defect of absolute nullity, pursuant to article 83 of the Organic Law on Administrative Procedure, it must initiate an administrative procedure to review the act and declare the existence of such defect, and if so established, revoke the act safeguarding the due process rights of its beneficiary.

72. The Administration cannot pretend to give a late response to the request for extension of the concession, ignoring applicable legal provisions and failing to respect the existence of an administrative act already produced by virtue of a legal order giving positive effects to administrative silence, in order to, in an "oblique" way, pretend to "revoke" a tacit administrative act of extension of the concession that it has deliberately and illegally ignored. This is simply contradictory: if the Administration has ignored the tacit administrative act of extension of the concession, it cannot revoke such administrative act pretending to answer the extension request, without even mentioning the existence of the tacit administrative act.

73. What in fact occurred in the cases of the illegal decisions adopted by the Ministry of Mines regarding the Brisas concessions on May 25, 2009

and on May 22, 2009, as I have explained in my First Opinion (ARBC, *First Expert Legal Opinion*, ¶ 326 ff.), was that the Ministry pretended to ignore the existence of the tacit administrative acts that had previously resulted from the *ex lege* positive effects granted to administrative silence by article 25 of the Mining Law. By ignoring those legal effect, as Iribarren acknowledges in his Opinion (HIM, *Legal Opinion*, ¶ 138), the Ministry proceeded to issue *ex post facto* decisions pretending to consider that the Brisas Concessions petitions for extension (that had already been granted by virtue of the positive effects of administrative silence), "did not meet an express requirement established by the aforementioned article 25 of the Mining Law" in the sense that "the applicant for an extension must be an *in compliance* concessionaire'" (HIM, *Legal Opinion*, ¶ 138).

74. The matter of the compliance of the concessionaire in order to grant an extension of a concession, is a matter to be considered in order to adopt the express decision to extend or not to extend the concession in the six month term expressly established by article 25 of the Mining Law; but is not a matter that can be analyzed after the concession has been already extended by virtue of the same statute. If there in fact was any basis to challenge or question the concessionaire's compliance following the grant of the extension, it was open to the Administration to initiate an administrative procedure in order to analyze the findings regarding the matter of compliance, and to request the concessionaire to produce evidence regarding compliance in order to safeguard his due process rights, particularly the right to defense.

2. Comments on Absolute Nullity of Administrative Acts

75. Pursuant to article 19 of the Organic Law on Administrative Procedure and regarding the review of administrative acts provided for by article 83 of the same Law, the grounds supporting a finding of the "absolute nullity" cases from an administrative law point of view, is a "*numerus clausus*" listing (ARBC, *First Expert Legal Opinion*, ¶ 101 ff.). Accordingly, administrative acts are absolutely null and void only:

1. When expressly provided for by the Constitution (for instance article 138: acts issued by usurped authority; article 25: acts violating of human rights) or by a statute (for instance, articles 91 and 109 of the Organic Environmental Law).
2. When an administrative act revokes previous administrative acts that have created rights and is not authorized to do so by Law;

3. When performance of the administrative act is impossible or illegal;
4. When administrative acts are issued by public officials that are not empowered; and
5. When they are issued without any administrative procedure to produce them.

76. Only when the situations provided for by the precise provision of article 19 of the Organic Law on Administrative Procedure occur can absolute nullity be invoked by the Administration to revoke an administrative act that has created or declared rights, as has been confirmed by the Venezuelan courts since the enactment of the Law in 1981, and as I have explained in my First Opinion (ARBC, *First Expert Legal Opinion*, ¶ 101 ff.).

77. The former Supreme Court of Justice judgment issued on July 26, 1984: *Despachos Los Teques*, quoted by Iribarren in his *Legal Opinion* (HIM, *Legal Opinion*, ¶¶ 128-131), as well as in my First *Legal Opinion* (ARBC, *First Expert Legal Opinion*, ¶¶ 71, 98), did not change the legal doctrine at all, nor did it create a new "rule" on matters of absolute nullity. There is no situation of absolute nullity related to the notion of "public order" as Iribarren contends (HIM, *Legal Opinion*, ¶ 217).

78. The *Despacho Los Teques* ruling, as can be appreciated from the text of the judgment, in order to study the defect of absolute nullity, was basically devoted to an analysis of the doctrine established on the matter of the distinction between absolute and relative nullity prior to the enactment of the Organic Law on Administrative Procedure in 1981, as addressed by two Venezuelan authors, professor Eloy Lares Martínez and myself (Allan R. Brewer-Carías) in our works published before 1982. The reference made in the judgment to "public order" was only to consider that it was inherent to environmental legislation, concluding that on matters of environmental law, an "administrative act allowing its addressee to perform an activity forbidden by a statute" cannot remain effective, "not being acceptable that in a situation like this one to admit the presumptive existence of acquired rights" (ARBC, *First Expert Legal Opinion*, ¶ 71, fn 60; and ¶ 98, fn 78).

79. On the other hand, regarding the paragraph of the *Despacho Los Teques* ruling quoted by Iribarren in his Opinion (HIM, *Legal Opinion*, ¶ 131), in which the former Supreme Court said that beyond article 19 of the Organic Law on Administrative Procedures *numerus clausus* cases of abso-

lute nullity, it was possible for the Tribunal to have assumed the position, with "the appropriate prudence and caution," of "determining on a case-by-case basis if it was admissible or not to declare absolute or radical nullification, in accordance with the seriousness and scope of the irregularity affecting the act under examination"; this ruling cannot be interpreted as a decision *contra leggem* or as a judicial interpretation authorizing the Administration to establish in an open way other cases of absolute nullity different from those listed in the Organic Law. It is only a judgment reserving that authority for the same Court; hence, it stated that it is for "the Court" and not for the Administration, to seek "to strike a balance between the seriousness of the nullification as a legal sanction and the seriousness of the defects affecting the administrative action." And in any case, it needed to be a matter of a serious case of illegality, as the examples indicated in the same decision: "direct violation of the Constitution; the absence of the essential elements in the action; a gross violation of the Law; the manifest incompetence of the entity; the transgression of legal standards establishing prohibited actions; the violation of public orders and other circumstances of similar nature." Of course, in the case of the illegal revocation of the administrative act containing the authorization to affect natural resources for Brisas Project, no circumstance of absolute nullity was raised by the Administration that could be the object of scrutiny by the Court.

VI. SOME COMMENTS REGARDING MINING LAW PRINCIPLES AND THE BRISAS PROJECT

1. On the application of the 1945 and/or 1999 Mining Law

80. The 1999 Mining Law abrogated the 1945 Mining Law (article 136). This abrogation means that as a matter of principle, since the date of publication of the 1999 Law, pursuant to the 1941 Official Publications Law (*Official Gazette* 20.546 of July 22, 1941), article 218 of the Constitution, and 1 and 7 of the Civil Code, the new Law (1999) became applicable and the abrogated Law ceased to be applied.

81. The issue of the validity and enforcement of a given law is set following the principle "*lex posterior derogat priori*" pursuant to which, the validity of the law is made dependant on the issuance of a subsequent law of the same – or higher – level, that may amend or abrogate the previous one.

82. This general rule in Venezuelan Law can be subject to exceptions that need to be established in the express text of the new Law, and therefore cannot be presumed, being always of restrictive interpretation. When an exception is provided, the issue becomes one of determination of the temporary validity of a given law or of some of its provisions.

83. This happens when the new Law, for instance, sets a future date for its new provisions to begin to govern, and for the commencement of the effective abrogation of the previous Law provisions; or when the new Law provides for its provisions not to be applied to certain facts, in which case, those of the abrogated Law will continue to govern the specific matter established as an exception.

84. An example of the latter was provided by the 1999 Mining Law: article 136 stated the abrogation of the 1945 Mining Law "…except for what is provided by article 128…". Article 128, on the other hand, provides that non-metallic minerals regulated in articles 7 and 8 of the 1945 Mining Law will continue to be governed by articles 7, 8, 9 and 10 of the 1945 Law, up to the moment the States [of the Venezuelan Federation] assume jurisdiction regarding those minerals pursuant to the Decentralization Organic Law.

85. Apart from this specific exceptional regulation in which articles 7 and 8 of the 1945 Mining Law regarding non-metallic minerals were not abrogated by the 1999 Law, the general effect of the abrogation of the 1945 Mining Law is that the provisions of the 1999 Mining Law are immediately in effect and applicable to concessions previously granted. That is why article 129 of the Law, as a matter of principle, began by indicating that the provisions of the 1999 are to govern the concessions granted prior to its enactment (ARBC, *First Expert Legal Opinion*, ¶ 151 ff.), which means that as a matter of principle, any provision included in the titles of the concessions granted under the 1945 Mining Law that is contrary to the provisions of the new 1999 Mining Law is to be considered ineffective.

86. Nonetheless, the same article 129 of the 1999 Mining Law establishes another exception to the immediate effects of its provisions, limiting its immediate application to concessions granted under the 1945 Mining Law.

87. The First exception, as expressly indicated in letters a), c) and f) of article 129 of the 1999 Mining Law, refers to the stipulations of the concessions granted according to the 1945 Mining Law regarding: (i) the exploi-

tation rights only on the *minerals* established in the original titles; (ii) the exploitation rights only on the *form of presentation* of the mineral as established in the original titles; (iii) the *duration* of the concession as established in the original mining title beginning on the date of its publication in the *Official Gacette*, and (iv) the *special advantages* offered by the concessionaire in favor of the Republic contained in the title, which will continue in force. In these four specific cases, and only in these four cases, the terms provided by the concessions granted under the 1945 Mining Law were to remain in force, and the provisions of the 1999 Mining Law were not to be immediately applied. Therefore, and notwithstanding the new provisions on these matters that could be inserted in the 1999 Mining Law, the exploitation rights of the concessions granted according to the 1945 Law could not be extended to another mineral different from the one specified, or to another form of presentation of such specific mineral; the concessions could not have a different duration in relation to the one established in the original mining titles; and the *special advantages* offered by the concessionaire in favor of the Republic would not cease to be in effect, except, of course, if they were to contradict public order provisions of the law (See *infra* ¶ 126). These points follow from the first exception regarding the immediate effects and applicability of the 1999 Mining Law to concessions previously granted according to article 129 of the 1999 Law, which of course means that as exceptions to the general rule (art. 129) of the immediate application of the 1999 Mining Law provisions to the concessions granted prior to its enactment, they are always to be interpreted in a restrictive way.

88. In particular, regarding the "duration" of the Brisas del Cuyuní concession Mining Title published in *Official Gazette* 33,947 of April 18, 1988, such Title established that the exclusive mining rights were granted to the concessionaire for a period or term of 20 years from the date of publication of the Mining Title,[10] with the possibility of being extended up to 40 years as established in article 188 of the 1945 Mining Law. That is, in the case of the Brisas concession, pursuant to the 1999 Mining Law, the "duration" of the concession for a term of 20 years, and when requested and granted, for a term of up to 40 years maximum, was to be governed by the stipulation in the 1988 Mining Title.

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[10] The 1999 Mining Law establishes as the beginning of the term of duration of the concessions the date of publication of the Certificate of Exploitation in *Official Gazette* (art. 25) and not the date of publication of the Resolution granting the Exploration Title (art. 45).

89. It was precisely on this issue of the *duration* that article 129.c of the 1999 Mining Law provided for an exception of the immediate governance of the new law to concessions granted under the 1945 Mining Law. Since the legal provision is an exception to the general rule of the immediate authority of a newly passed law, it is of restrictive interpretation, and therefore, has to be understood as only referring to the term of the concession -that is to say, its duration-. It follows that such exception cannot be read as to refer also to the "regime" for granting the "extensions" or renewal of that term or duration set in the original title. In this matter, one thing is the duration or term of a concession and another is the regime applicable to the extension of such term or duration.

90. The matter of the "extension" is different from the matter addressed in letter c) of article 129, and is not subject to any express exception to the immediate application of the 1999 Law. Therefore, the matter of whether an extension of such concessions is warranted and what procedure should apply to making such requests and deciding such requests, contrary to what Respondent claims (Respondent's *Counter Memorial*, ¶¶ 18, 199, 200, 499) is ineludibly to be governed by the 1999 Mining Law. If the lawmaker had intended to exclude the provisions of law relating to the extensions of concessions from the application of the 1999 Law, it would have expressly so provided in article 129.

91. Moreover, the administration recognized that the extension or renewal of the Brisas concession was to be governed by article 25 of the 1999 Mining Law in Memorandum DGCM 094-09 dated May 12th, 2009,[11] in which the request for an extension of the Brisas title was addressed.

92. The second exception to the immediate application of the 1999 Mining Law to concessions granted under the 1945 Mining Law, pursuant to letter b) of the same article 129, refers to *tax payments*, in which case, the provisions of the 1945 Law were to continue governing the concessions granted pursuant to its provisions, but only for one year after the 1999 Law was made public, that is, up to September 5, 2000. From that date on, the provisions of the 1999 Mining Law on tax matters began to govern all concessions granted under the 1945 Mining Law.

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[11] See Exhibit C-735 of the Memorial.

93. The third exception to the immediate application of the 1999 Mining Law, to concessions granted under the 1945 Mining Law, pursuant to letter e) of same article 129 of the 1999 Mining Law, refers to *all matters other than those enumerated in the other letters* of the article, in which cases the provisions of the 1945 Law were to continue governing concessions granted under its provisions only for one year after the 1999 Law was made public, that is up to September 5, 2000. From that date on, on all other matters, the provisions of the 1999 Mining Law began to govern all concessions granted under the 1945 Law.

94. Finally, letter d) of same article 129 of the 1999 Mining Law, expressly established that from the date it was made public (September 5, 1999), the regulations on *environmental matters* began to immediately govern concessions granted prior to the enactment of the Law.

95. From the aforementioned, it follows that the provisions related to the renewal or extension of concessions, set forth in article 25 of the 1999 Mining Law, pursuant to what is expressly provided by article 129.e) began to govern all concessions granted under the 1945 Mining Law, and therefore, to the Brisas Concessions.

2. On Mining activities and discretionary power

A. Discretion on mining activities is exceptional and can be found, for instance, in the State decision as to whether mines are to be exploited directly by the State or through concessions

96. The assertions made by both Iribarren and Respondent (HIM, *Legal Opinion*, ¶ 22 and Respondent's *Counter Memorial* ¶¶ 15, 638), to the extent that the choice of the Administration either to exploit directly or by means of concession is a matter of public policy in which, according to a constitutional principle, the Administration has discretionary power to opt for one or the other means of exploitation, is basically correct, but cannot lead to the incorrect assertion that "both granting of a concession as well as the decision to extend it are purely discretionary acts" (HIM, *Legal Opinion*, ¶ 22). One thing is for the Administration to decide whether or not to directly exploit mines, that is, to decide whether or not to exploit mines through concessions rather that directly; and something completely different is, after the Administration has decided to exploit mines through concessions, to extend

or not those that have been granted. As a matter of principle, the latter quoted assertion of Iribarren is simply not true. If discretion can be found nowadays only regarding the granting of concessions, which has not always been the case; discretion is not found on matters of extension of concessions.

97. Prior to the reserve declared on 1977, pursuant to the 1945 Mining Law, the Administration was *compelled* to grant concessions when somebody filed a *denuncio* or notice of the existence of certain minerals (article 33, 1945 Mining Law), in which case, contrary to what is claimed by Iribarren (HIM, *Legal Opinion*, ¶ 109), no discretion at all existed.

98. For the mining concessions in the reserved areas of the States, under article 174 of the 1945 Mining Law it was "optional" or "discretionary" (*potestativo)* for the National Executive to grant concessions; and pursuant to article 178 of the same 1945 Law, concessions were granted when the Executive was "willing to do it," that is, on a discretionary basis; a regime that was generalized after 1977. Subsequently, in the 1999 Mining Law, as all natural resource materials were by law reserved to the State, the granting of concessions became a discretionary act.

99. Nonetheless, the same cannot be said regarding the extension of concessions. According to article 25 of the 1999 Mining Law, the concessionaire has a right to file for an extension of the concession, and the Administration must make a decision in regard to such petitions, not based on its sole discretion in the sense that it "may" or "may not" grant the extension (See *supra*, ¶¶ 18, 20); but based on a specific judgment in relation to the matter as to the "pertinence" ("suitability") or "impertinence" of the requested extension, which eliminates the discretion (See *supra*, ¶ 28 ff.). Consequently, it is not true, as claimed by Iribarren, that granting of extensions of mining concessions in Venezuela is "purely discretionary" or is an "essentially discretionary act" (HIM, *Legal Opinion*, ¶¶ 23, 82, 86 ff., 214).

B. Extinction (termination) of Mining Concessions and absence of discretionary power

100. Regarding the extinction or termination of mining concessions, as I explained in my First Opinion (ARBC, *First Expert Legal Opinion*, ¶ 198 ff), according to the Mining Law, the Administration has no discretionary power to decide to terminate them, that is, the Law does not grant the Administration any discretion to decide whether or not to terminate a concession.

On the contrary, the Mining Law is absolutely precise in establishing the circumstances in which concessions may be extinguished or terminated by an act of the Administration, distinguishing nine express cases of termination (*caducidad*) (article 98). No discretionary power whatsoever is given to the Administration to terminate or revoke the concessions.

101. And even in the specific cases where the Mining Law establishes the possibility of terminating a mining concession, the administrative act to be issued must be subject to the legality principle that governs all administrative acts, and to the limits on administrative action imposed by the general principles of administrative law established in the Republic. For instance, one of the grounds the Administration can raise in order to terminate a concession is "the non compliance with any of the special advantages offered by the petitioner to the Republic" (Art. 98.7). Although the provision appears to be very general, in order for the Administration to issue an administrative act terminating a concession based on such non-compliance, it must have previously demonstrated such non-compliance through an administrative procedure that must have been initiated for such purpose, permitting the concessionaire to defend itself, and providing it an opportunity to demonstrate its compliance (ARBC, *First Expert Legal Opinion*, ¶ 35 ff).

102. In addition, as the gravest punishment that can be imposed on a concessionaire is the termination of the concession, a decision regarding termination must be proportional with the type of breach or non-compliance. The Administration would violate the principles of bona fide, proportionality and rationality (ARBC, *First Expert Legal Opinion*, ¶ 25 ff), if for minor, insignificant or unsubstantial breaches regarding some aspects of the special advantages, it were to terminate a concession. The Administration cannot act arbitrarily, and if it does, the administrative act must be considered contrary to the principle of legality, and can be reviewed by the courts accordingly.

103. In any case of termination of a concession, as always when administrative sanctions are imposed, a formal administrative procedure must be initiated and followed by the Administration with the safeguard of due administrative procedure rights. The general rule in Administrative Law in Venezuela and elsewhere, is that no administrative act restricting the legal situation of a citizen or corporation or that affects their rights and interests, can be issued without a prior administrative procedure whereby their rights to defense, to be heard and to present their case are guaranteed (ARBC, *First Expert Legal Opinion*, ¶ 35 ff).

104. In the required administrative procedure, all the elements and circumstances related to the decision must be considered and addressed, so the resulting administrative act deciding whether to terminate the concession contains all the grounds on which the decision is based. Pursuant to the Organic Law on Administrative Procedure the Administration is compelled to articulate in the same text of the administrative act the motives supporting its content (articles 9, 18.5). No "new" arguments or motives other than those expressly incorporated into the text of the administrative act can "later" be invoked by the Administration in order to seek to justify in an *ex post facto* way the enactment of an administrative act. It is contrary to the most elemental principles of administrative law to argue, as Iribarren has done in his Opinion (HIM, *Legal Opinion*, ¶ 205 ff.) that an administrative act can be justified *ex post facto*, after its enactment, with reasons contained in the administrative files not previously raised. This contention has no basis in Administrative law (See *supra* ¶ 40 ff; and *infra* ¶¶ 189 ff., 208 ff.).

C. Extension of mining concessions and absence of discretionary power

105. Regarding the extension of mining concessions, as explained in my First Opinion (ARBC, *First Expert Legal Opinion*, ¶ 195), the Administration has no discretionary power to decide whether or not to extend them. The Mining Law does not grant the Administration the power to decide to grant or not to grant the extension of a given concession at its discretion. In general terms, in administrative law, as I explained in my First Opinion, discretionary power exists when a statute expressly grants the Administration the power to decide a matter at its own discretion (ARBC, *First Expert Legal Opinion*, ¶¶ 32, 33), normally just using the verb "can" or "may" (*podrá*) (See *supra* ¶¶ 18, 10). For instance, if the power to grant the extension of a concession according to the Mining Law were discretionary, the provision would have read "the Administration "can" or "may" (*podrá*) grant the extension, or would have used wording similar to the wording in the 1945 Law for granting concessions (See *supra* ¶¶ 96, 97). In that case, the decision would rely solely on the judgment by the Administration as to the convenience of the action to be taken and there would be more than one fair solution, albeit subject to limits in the sense that, as explained in my Fist *Legal Opinion*, discretionary decisions cannot be understood as permitting arbitrary decisions (ARBC, *First Expert Legal Opinion*, ¶ 34).

106. Under article 25 of the Mining Law, the Administration's decision whether or not to extend a concession, even though the provision uses the verb "may" (*pudiendo*), must be based on the Administration's judgment as to whether an extension would be "pertinent" ("suitable"). Hence, to reject a petition for an extension of a given concession, once the timing conditions set forth in the article for filing the request are complied with, the Administration must have decided that "it is not pertinent." The pronouncement is not based on the discretion of the Administration, in the sense of freely choosing whether or not to grant the extension. Rather, the Mining Law expressly imposes upon the Administration, when a request for an extension of a concession is filed, a requirement to make a judgment on its "pertinence" (ARBC, *First Expert Legal Opinion*, ¶ 191) which means that the Administration is bound to evaluate whether or not the conditions are present to support only one just solution (See *supra*, ¶¶ 20-23) and decide based on the relevance, importance, or significance of the extension, which means that it is authorized to reject the extension petition only when it concludes that the extension is irrelevant, unimportant or insignificant with reference to the objectives of the Mining Law and the legal basis upon which the mining title was granted.

107. Consequently the Administration is not "free" to decide whatever it wants when an extension of a concession is requested. It is not a decision that it can or may make at its will. On the contrary, it must be adopted after a judgment regarding the pertinence of the extension, that is, its relevance, importance or significance in terms of the objectives of the Mining Law and the mining title. And that decision, as all administrative acts, not only needs to have motives in order to support that judgment, but has to be formally motivated, that is, in the text of the administrative act granting or rejecting the extension, the pertinent, relevant, important or significant reasons for the granting or rejecting the extension must be formally stated.

108. The main reason for this is that the extension of the term of a given mining concessions is not a discretionary matter for the Administration, since the precise wording of article 25 of the Mining Law using an indeterminate legal concept, eliminated the discretionary character of it, by providing that there is only one fair solution in that respect. Article 25 did not empower the Administration to make a choice pursuant to its will, that is if it wishes or not to do so. It must be based on a specific judgment regarding the "pertinence" or "impertinence" of the extension, which eliminates the discretion and which presents an objective standard for assessment with reference

to the object of the Mining Law and the mining title, and subject to judicial review (See *supra* ¶¶ 20-23). Consequently, it is incorrect to purport to modify the precise terms of article 25 of the Mining Law as Iribarren in effect suggests when saying that such article must be read in a way that differs from the way it is written, and in the arbitrary sense he claims (HIM, *Legal Opinion*, ¶ 82).

109. *First*, although the "extension" of concessions provided for in article 25 of the 1999 Law refers to the extension of "Certificates of Exploitation" provided in the 1999 Law, pursuant to article 129 of the same Law, it also applies to the extension of concessions granted under the 1945 Mining Law, where only "concessions of exploitation" were established.

110. And *Second*, although article 25 uses the verb "may" (*pudiendo*), which when used alone, in general terms can be considered as providing discretionary powers, the article also compels the Administration to decide the matter not based on its own discretion (as of to grant or not) but taking into account the "pertinence" or "impertinence" of the extension. This is a case of an "indeterminate legal concept" case (See *supra* ¶¶ 20-23), where only one "just" solution can and must be reached. That is, as aforementioned, in the case of the decision to extend or not to extend a concession, the Administration is not free to ascertain whatever criteria the public official may subjectively think, but is subject to the standards legally dictated as to the pertinence of the extension. In this case, as indicated by the former Supreme Court of Justice in the decision of November 2, 1982 (*Depositaria Judicial* case), quoted by Iribarren (HIM, *Legal Opinion*, ¶ 95), the Lawmaker, precisely in the specific case of article 25 of the 1999 Mining Law on matters of extension of concessions, has "regulated the entire activity of the Government" on the specific matter and "predicted" the situation. In such regulation it excluded the extension of concessions on the basis of discretion, which is precisely the "area" exclusively ruled by "the opportunity or appropriateness" as noted in that Supreme Court decision, by compelling the Administration to establish the "pertinence" of the extension. This regulation of the way the Administration must carry on its activities can only lead to one just solution, and therefore the Administration is not free to decide whatever it considers "opportune" or "appropriate".

111. Consequently, article 25 of the Mining Law, contrary to discretionary power, provides that the Administration must make a decision, not based on discretionary power, but constrained to determine the suitability

("pertinence") of the extension of the concession using for such purpose an "indeterminate legal concept (*concepto jurídico indeterminado*). Thus, the Administration is not "free" to act and has not several options to choose from, all them just, but just one fair resolution: either the extension is pertinent or not. Consequently, it is not true that the "extension" of a concession "is entirely at the Ministry of Mines discretion" (Respondent's *Counter Memorial*, ¶¶ 7, 132, 184, 489, 582), or that the extension must occur if the Administration deems "appropriate" to grant it, as it is erroneously claimed by Iribarren in his Opinion (HIM, *Legal Opinion, ¶ 106).* The word "appropriate" is not used in the text of the Law, and on the contrary, article 25 of the Mining Law imposes the need for the Administration to decide based in just one and single just solution to be reached in order to grant or not to grant the extension, based on the "pertinence" or "impertinence" of the extension, that is, on its "relevance" or "irrelevance," "importance" or "no importance," or "significance' or "insignificance," i.e., based on an objective standard assessed with reference to the objectives of the Mining Law and the mining title and subject to judicial review. As aforementioned (See *supra*, ¶¶ 103, 104), if granting the extension of the concession were to be an entirely discretionary power, the law would have only used the verb "may" in the construction or article 25, without any other consideration, with the result the decision could be taken based on the subjective preferences of the Administration without basis for disagreement by the Courts, but it did not do so. Instead, the Mining Law imposed the need to decide upon verification of the "pertinence" or "impertinence" of the extension.

112. Furthermore, it is groundless to say that the alleged discretionary powers to grant or not to grant the extension of a given concession, comes from the fact that it is a matter that is to be decided only by the Government, which "has sole power to decide," as Iribarren asserts (HIM, *Legal Opinion*, ¶¶ 92, 97). Exclusive powers and discretionary power are different concepts, and as a matter of principle, exclusive powers are not always discretionary. If all powers of the Public Administration, being in its exclusive competency, were to be considered discretionary, the rule of law would be simply non-existent.

113. Consequently, article 25 of the 1999 Mining Law, does not establish discretionary powers for the Administration to grant or not to grant the extension of concessions. It is a completely misleading assertion of Iribarren in his *Legal Opinion*, in the sense that article 25 of the 1999 Mining Law, when referring to the extension of the concessions, and taking only into con-

sideration the use of the verb "may" or "can" for granting the extension, ignoring the other provisions of the law that exclude discretion (the decision based on the "pertinence" of the extension), concludes that it is a "clear indication that case law has given to determine whether a power is discretionary" (HIM, *Legal Opinion*, ¶ 105). On the contrary, as aforementioned (See *supra* ¶¶ 20-23), case law in situations that are analogous to the one regulated in article 25 of the Mining Law, related to the notion of "indeterminate legal concepts," has excluded any discretion.

114. When a statute grants discretion to the Administration to decide a matter, the provision uses the verb "may" or "can," without using any other verb or word that could eliminate the freedom to chose and to exclude discretion. And this is precisely the case of article 25 of the 1999 Mining Law, as aforementioned, that does not limit itself to say that the concessions may (*pudiendo*) be extended, but in addition imposes the need for the Administration to decide, not at its sole discretion, but based on its decision on the "pertinent" character of the extension, which can only result in just one "just" solution supported in law. If granting the extension were to be discretionary, in the sense that "the Executive may extend the concession or it may not" as Iribarren claims (HIM, *Legal Opinion*, ¶ 105), the Law would have not used in article 25 the need for the Administration to determine the pertinence or impertinence of the extension, that is, its "relevance" or "irrelevance," "importance" or "unimportance," or "significance' or "insignificance," with reference to the objectives of the Mining Law and mining titles and subject to judicial review. That is, the Administration must provide an objective basis supported with evidence and with reference to the objectives of the law as to the pertinence or not of extending a given concession and, moreover, must do so in a manner reviewable by a court. Thus, the evidence supporting pertinence or not must be substantial and have a rational connection to the objectives of the law. Consequently, for the Administration to grant the extension of a concession "if it deems it pertinent," not if "it deems appropriate" as incorrectly quoted by Iribarren (HIM, *Legal Opinion*, ¶ 106), is not discretion at all.

115. Hence, contrary to what is established in article 41 of the 1999 Mining Law as to the provision governing the granting of concessions, where, as noted by Iribarren considering that this is a manifestation of discretion, the law uses the expression to "accept or reject the application" (HIM, *Legal Opinion*, ¶¶ 107-108); such is not the wording of article 25 when providing for the extension of a concession, as article 25 is not a case of discretion. Consequently, if the extension of the concession is pertinent, contra-

ry to what Respondent has also asserted (Respondent's *Counter Memorial*, ¶¶ 489, 505), the *concessionaire has the right* for the extension of the concession to be granted. This is, of course, different from Iribarren's statement that it "cannot be said that a private party has a right […] to have a concession that as expired renewed" (HIM, *Legal Opinion*, ¶ 22; Respondent's *Counter Memorial*, ¶¶ 184, 489). There is no doubt as to this statement, because if the concession has expired, it is not eligible for an "extension," as an extension may only be requested for a concession that has not yet expired. Nor, however, does that statement contradict the fact that a concessionaire has the right to an extension when extension of the particular concession would be "pertinent" (suitable) in view of the objectives of the law and the initial grant of the concession.

D. The Irrelevance of the Discussion on Discretionary Power for the Extension of Mining Concessions in the Brisas case, where there was no Decision not to Extend a Concession based on the supposed Existence of Discretionary Powers

116. Although the matter of discretionary power in Administrative Law and, in particular, regarding mining activities in Venezuela can be a very interesting subject, the fact is, it is completely irrelevant and purely theoretical in this case, because the Ministry of Mines did not adopt any decision in this case related to the extension of the Brisas Project concessions supposedly grounded on the use of its "discretionary powers."

117. The petition for an extension of the Alluvial Gold Concession granted in 1988 for a period of twenty years was filed on October 17, 2007, and was granted by virtue of the positive effects of administrative silence pursuant to article 25 of the 1999 Mining Law. Within the 6-month term provided by article 25 of the Mining Law the Administration did not issue any decision based on its alleged discretionary powers and supposedly rejecting the extension of the concession as Iribarren and Respondent argue (HIM, *Legal Opinion*, ¶ 22; Respondent's *Counter Memorial*, ¶¶ 132, 184, 489, 582), and consequently, the concession was renewed by operation of law.

118. It must be noted that the Ministry of Mines Resolution Nº 050-2009 dated May 25, 2009, allegedly "answering" the initial petition for extension of the Brisas concession, and supposedly deciding "not to grant the extension requested by the representatives of Compañía Aurífera Brisas del

Cuyuní C.A.," was not issued on the basis of the supposedly discretionary powers the Ministry holds to reject at its will an extention of a concession. On the contrary, it was based on alleged non-compliance "with the condition of solvency set forth in the Single paragraph of Article 25 of the Mining Law," declaring, in addition, "the extinction" of the concession because of the supposed exhaustion of its initial term of twenty years. In this decision the Ministry disregarded the extension of the term of the concession that had already been granted by operation of law (positive silence), and thus, violated the Law.

119. As argued in my First Opinion (ARBC, *First Expert Legal Opinion*, ¶ 191) this is an illegal administrative act that must be considered null and void by virtue of the provision of Article 19.2 of the Organic Law on Administrative Procedures, since it ignored that the concession had already been extended *ex legge* for a period of ten years beginning on April 18, 2008, by virtue of the said positive effects granted to administrative silence by Article 25 of the Mining Law once the six months after the extension petition term elapsed.

120. Consequently, what the Administration did with its Resolution Nº 050-2009 of May 25, 2009, was to seek to disguise an illegal administrative act by purporting to declare the extinction of a concession that had been extended, without legal motives, pretending that it was a decision not to extend the concession. But in doing so, and even in the irregular manner in which it proceeded, the Administration did not even suggest that it was using discretionary powers not to grant the extension, as in an *ex post facto* way Iribarren seeks to defend the decision in his Opinion (HIM, *Legal Opinion*, ¶ 82 ff.). On the other hand, this assertion is contradicted by other Respondent's Witness, Ygnacio Hernández, who argued as does the Respondent (Respondent's *Counter Memorial*, ¶ 239), that in this case, the Administration did not issue any decision not to extend the concession based on discretionary powers, but only "acknowledge[d] the expiry of the concession" because allegedly its term had expired (Hernández's *Statement*, ¶ 3).

121. The same occurred in the request for extension of the El Paují Alluvial gold and diamonds Concession, granted in 1992 for a period of twenty years to Arapco Administración de Proyectos C.A. On January 17, 2008, within the term set forth by Article 25 of the Mining Law, Compañía Aurífera Brisas del Cuyuní C.A., on behalf of Arapco, requested the Ministry of Mines for an extension of the concession. The Ministry did not respond to the petition and did not use its supposedly discretionary powers for such mat-

ters as incorrectly argued by Iribarren in his Opinion (HIM, *Legal Opinion*, ¶ 82 ff.), so in the absence of a response on the matter by the Ministry before July 20, 2008, pursuant to the single paragraph of Article 25 of the Mining Law, the extension of the concession was granted by operation of the aforementioned legal principle of positive silence.

122. In this case, the Ministry also issued Resolution Nº 48-2009 dated May 22, 2009, allegedly "answering" the petition for an extension of the concession, likewise deciding "not to grant the extension requested," not based on the alleged discretionary powers not to extend the concession, but based on an alleged non-compliance of "the condition of solvency set forth in the Single paragraph of Article 25 of the Mining Law." The decision, in this case, also declared "the extinction" of the already extended concession "because of the exhaustion of the term of the mining rights." This decision, ignoring the extension of the concession already granted by operation of the positive effects of the Administration's silence, and pretending not to grant such extension, in fact was an administrative act tacitly revoking a previous administrative act granting rights to the concessionaire, and as such, is an illegal administrative act that must be considered null and void according to Article 19.2 of the Organic Law on Administrative Procedures.

123. The supposed "denial" of the extension already granted by the Ministry, or the so called "acknowledgement of the expiry of the concession" (Hernández, *Statement*, ¶ 3; Respondent's *Counter Memorial*, ¶ 239), was in no way based on any discretionary powers of the Administration either, as Iribarren incorrectly pretends to sustain in an *ex post facto* way (HIM, *Legal Opinion*, ¶ 82 ff.). The alleged cause was the not proved "non-compliance" of some mining obligations of the concessionaire. This resolution thus also violated the basic principles that govern administrative action in Venezuela, and in particular the principle of bona fide and legitimate expectation and confidence that governs administrative actions pursuant to Article 12 of the Organic Law on Public Administration, since it contradicted the content of the "compliance certificates" issued in a successive and periodic way by the Mining supervisory authority, whereby the concessionaire was found "solvent regarding the Ministry".

3. The extension of concessions granted under the 1945 Mining Law and the enforcement of the administrative silence provision of Article 25 of the 1999 Mining Law

124. As I have already stated, pursuant to article 129 of the 1999 Mining Law, the Brisas Concession of 1988, apart from those matters included in the express exceptions provided in such article (exploitation rights regarding "mineral", "form of presentation" and "duration") (See *supra*, ¶ 92 ff.), became subject to the provisions of the 1999 Mining Law commencing from the date of the Law's enactment, including matters relating to the extension of the concession.

125. For the concessionaire to be in the position of requesting an extension, the duration or term had to be close to exhaustion, and this occurred under the 1999 Mining Law, as the applicable law, in which the competency of the Ministry of Mines is expressly regulated. Moreover, the extension request was made *after* the 1999 Mining Law was passed, and since the extension was not included by the lawmaker among the matters to be governed by the 1945 Mining Law, there is no doubt as to the applicability of the 1999 Law.

126. Additionally, regarding the provision on this matter contained in the Sixth Special Advantage of the concession's Title, it must be noted that the Mining Law, as the Hydrocarbon Law, has always being considered in Venezuela as a law of "public order," in the sense that it cannot be relaxed or changed through contracts (Art. 6, Civil Code[12]) or by bilateral acts, like concessions. Also, it is a general principle of Venezuelan administrative law that legal provisions empowering public organs and entities are also public order provisions that cannot be affected, altered or relaxed by contracts or bilateral agreements. In this sense, article 26 of the Public Administration Organic Law expressly provides that "Any competency attributed to Public Admin-

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[12] Art. 6 Civil Code: "Laws, in which observance public order or good customs are interested, cannot be renounced or relaxed through individual agreements." Spanish text: "Atículo 6° No pueden renunciarse ni relajarse por convenios particulares las leyes en cuya observancia están interesados el orden público o las buenas costumbres." Public order has been defined as "a value destined to maintain the necessary harmony basic for the development and integration of society." See Decision No. 1104 of May 25, 2006 of the Constitutional Chamber of the Supreme Tribunal of Justice (quoting Decision No. 144 of March 20, 2000), in *Revista de Derecho Público* No. 106, Editorial Jurídica Venezolana, Caracas 2006, p. 146.

istration organs and entities is to be compulsorily accomplished and exercised under the conditions, limits and procedures established; it cannot be waived, delegated, extended or relaxed by any agreement, except in the express cases established by law and normative acts."[13] This means that under the provision of article 129 of the 1999 Mining Law, the rules applicable to the extensions of a concession granted according to the 1945 Mining Law, are those set forth in article 25 of the 1999 Law, in which the power of the Ministry of Mines is regulated for such purpose, and not the ones included in the Sixth Special Advantage of the concession's Title as Iribarren erroneously asserts (HIM, *Legal Opinion*, ¶ 6), since this matter of the decision to be taken by the Administration regarding the extension of concessions, is precisely a matter in which public order is interested. In this regard, the principle to be applied is the one expressed by Iribarren in his same Opinion, when he states that: "The Mining Title is subject to the law. Its contents may not contradict the provisions of the law" (HIM, *Legal Opinion*, ¶ 26), as is precisely the case regarding provisions of public order as those empowering the organs of Public Administration.

127. Consequently, the provisions of articles 129 and 25 of the 1999 Mining Law, on matters of extension of the concessions, prevail over what could have been established in the special advantage of the concession, as a bilateral act. This is so notwithstanding that article 129 provides that the Special Advantages agreed in an earlier mining title remain in effect. That is because, as just noted, provisions in individual agreements may not be contrary to laws of public order, such as the Mining Law or as the provisions empowering public organs. That means that any special advantage agreed in an earlier mining title that conflicted in these matters with provisions of the 1999 Law were thereby modified[14].

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[13] *Official Gacette* No. 5.980 of July 31, 2008. Spanish Text: "*Artículo 26. Toda competencia atribuida a los órganos y entes de la Administración Pública será de obligatorio cumplimiento y ejercida bajo las condiciones, límites y procedimientos establecidos; será irrenunciable, in delegable, improrrogable y no podrá ser relajada por convención alguna, salvo los casos expresamente previstos en las leyes y demás actos normativos*.

[14] It must be remembered that -as is the case with most of the special advantages- the Sixth Special Advantage of the Concession´s title was established following article 12 of the Regulations for Granting Mining Concessions and Contracts (Resolution Nº 115 of the Ministry of Energy and Mines dated March 20, 1990; Official Gazette Nº 34.448 dated April 16th, 1990). Such article of the Regulations provided as an

128. It follows that the discretionary power granted through such Special Advantage Sixth of the Brisas concession, whereby the Administration was empowered to decide if it "may" or "may not" (*pudiendo*) renew the concession, if it deemed it convenient (*conveniente*), according to the precise terms of article 129 of the 1999 Mining Law, became inapplicable with its e*nactment* and the matter of the extension of concessions was to be governed by the provisions of the newly passed Law.

129. The difference between what the Law provides and what the Special Advantage set is apparently subtle, but very relevant. Although the verb "may" (*pudiendo*) was preserved in the wording of article 25 of the 1999 Law, the judgment based on the "convenience" (*conveniente*) that was present in the Special Advantage was eliminated, and the provision commands the Administration to decide on the renewal, based on the consideration whether it is or is not "pertinent." Thus, the pure discretional judgment (based on the verb "may" and the word "convenient") was excluded by the Law (See *supra* ¶ 20 ff).

130. Therefore, Iribarren´s assertion in his Opinion (HIM, *Legal Opinion*, ¶ 6), that the "duration of the concession "may be extended if the Ministry deems it appropriate" quoting in footnote 2 of his Opinion the Mining Title to the Brisas Concession (1988) (HIM, *Legal Opinion*, ¶ 6, fn 2), is misleading.

131. The 1988 Title to the Brisas Concession, as mentioned, in fact used the verb "may" (*pudiéndo*), which is also used by article 25 of the Law. Nonetheless, the Brisas Concession Title did not use, as erroneously mentioned by Iribarren, the word "appropriate," but used instead the word "convenient," a word commonly used to identify discretion. These expressions were not included in the text of article 25 of the later enacted 1999 Mining Law, which uses the word "pertinent," referring to the relevance, importance, or significance of the extension of the concession, limiting the scope of the decision to be adopted by the Administration and eliminating any discretion on the matter.

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advantage the reduction of the duration of the term of the concession from 40 years (as provided by the Law) to only 20 years, with successive 10 years extensions. Therefore, the advantage was referred to the reduction of the duration and not to an extensions regime.

132. In any case, the regime for extension of concessions established by article 25 of the 1999 Mining Law, as it is provided by article 129 of the same Mining Law, is the one that was to be applied to the Brisas concession, including the provision related to the extension of the concession granted by virtue of the positive effects of administrative silence established in such provision (ARBC, *First Expert Legal Opinion*, ¶ 139 ff.).

133. Iribarren argues out that the applicability of article 25 of the 1999 Mining Law to mining titles granted under the 1945 Mining Law was "not evident," and that "from a legal point of view, one should validly assert the contrary," that is, that the extension of concessions granted under the 1945 Mining Law should be governed by the 1945 Law (HIM, *Legal Opinion*, ¶¶ 99, 100). He also argues that "the renewal" of the Brisas Concession could not operate by virtue of the *positive administrative silence* allowed for by article 25, Sole Paragraph of the 1999 Mining Law, because, in his opinion, that regime did not apply to concessions granted prior to the passing of the Law by virtue of article 129, letter c) of the same 1999 Mining Law (HIM, *Legal Opinion*, ¶ 215).

134. As I have already stated, these assertions have no legal support at all, and are contrary to the very text of article 129 of the 1999 Mining Law, whereby it is declared that the 1999 Mining Law is to govern all concessions granted prior to its enactment, also on the issue of extension of concessions.

135. In fact, regarding the extension of concessions as provided in the 1999 Mining Law, the Sole Paragraph of article 25 specifically establishes the positive administrative silence, as the consequence of the omission of response by the Administration on the matter. As explained in my First Opinion (ARBC, *First Expert Legal Opinion*, ¶ 125), the Lawmaker can validly provide for negative or positive effects of the administrative silence. Moreover, as I already stated, the 1981 Organic Law on Administrative Procedures opted for the general solution to give negative effects to administrative silence; but this does not mean that when the lawmaker chooses instead to provide for positive effects of administrative silence, it has to be considered as Iribarren claims, as an "extremely rare and exceptional institution" (HIM, *Legal Opinion*, ¶¶ 99, 100). This could effectively be a "special" provision, but this cannot mean that the provision is to be considered "exceptional."

136. As for article 25 of the 1999 Mining Law, the lawmaker decided to give positive effects to the administration's silence where the Administration neglects the duty to answer petitions for an extension of concessions promptly, changing the general regime provided for in the Organic Law on Administrative Procedure. And pursuant to article 129 of the Mining Law, this provision is to govern the extension of all concessions, contrary to Iribarren´s erroneous assertion that article 25 "attributes positive effects to the silence of the Government only when concessions have been granted 'under this Law', that is, the law of 1999" (HIM, *Legal Opinion*, ¶ 104). This assertion has no grounds whatsoever. Article 129 does not exempt the issue of extensions from the 1999 Law and therefore, on such matters, there is no doubt that the 1999 Mining Law is to govern.

137. Also without basis is Iribarren's assertion that the extension of a concession could only be granted when the concession is being exploited and "producing benefits to the Republic" (HIM, *Legal Opinion*, ¶ 104); a "condition" that is not in article 25 of the Mining Law (nor was there even any such condition in the prior law or in the relevant mining titles).

138. Another issue to be mentioned is the general principle of administrative law in the sense that the effects given by a statute to administrative silence, as a matter of principle, does not exempt the Administration from its original duty to decide and to issue an express pronouncement as was expressed in the Supreme Court ruling quoted in my First Opinion (ARBC, *First Expert Legal Opinion*, ¶¶ 129, 135). This means that administrative silence is a guarantee that is legally established for the benefit and protection of the rights of the citizens and private parties facing the Administration, and not a privilege for the Administration to avoid deciding the cases submitted to its consideration. Being a guarantee for the private party in its relation with the Administration, the administrative acts issued as a consequence of administrative silence are binding and final, contrary to what is claimed by Iribarren in his Opinion (HIM, *Legal Opinion*, ¶ 133 ff.). They are not at all precarious administrative acts that can be reviewed and revoked at the will of the Administration. If this were the case, the legal provisions for the effects (negative or positive) of administrative acts would be useless.

139. Finally, in the case of the positive effects of the administrative silence provided for by article 25 of the Mining Law, Iribarren argues that the application of positive administrative silence "assumes a previously existing right of the individual benefiting therefrom" (HIM, *Legal Opinion*, ¶¶ 135-

136) in order to justify its regulation in the statute. Here it must be mentioned that such right is precisely a "right to renewal of the mining concession" if such extension is pertinent, as discussed above; and in addition, of course, is also the right of the concessionaire to request the extension of the existing concession.

4. Mining Contracts and Mining Rights

140. One of the purposes of the 1999 Mining Law, as explained in its *Exposición de Motivos* was to put an end to a system of exploration and exploitation of mines based on mining contracts that were entered into by the *Corporación Venezolana de Guayana* (CVG) with several mining Corporations. For such purpose, the 1999 Mining Law expressly provided for a procedure to convert the mining contracts into concessions or authorizations of exploitation pursuant to its provisions. Such CVG mining contracts, as it resulted from their text, granted to the titleholder effective rights to explore and exploit mines under their own clauses (ARBC, *First Expert Legal Opinion*, ¶ 150). Consequently it is basically incorrect to say, as Iribarren states, that the mining contracts signed by CVG, first were "work contracts;" and second, that not being concessions "they do not produce real rights nor give the contractor any rights to the land" (HIM, *Legal Opinion*, ¶¶ 42, 44). To say this, is simply, first, to ignore the nature and content of the contracts signed by CVG with the approval of the National Executive, not just to do "works" but to explore, develop and exploit mines in the Guayana Region, based on the responsibility given to CVG by Decree Nº 1409 of December 29, 1990; and second, to ignore what a contact is, being inconceivable that the existence of a contract between parties that does not encompasses rights and obligations.

141. Based on the Executive delegation given to CVG, this Public Corporation signed true and real public contracts that created real and effective rights to its counterparts for the purpose of exploring and exploiting mines in plots of land. I referred in my First Opinion (ARBC, *First Expert Legal Opinion*, ¶ 150) to the list of the CVG contracts that were part of the Brisas Project, all of them related to the exploration and exploitation of mines, and thus, causing those rights to exist.

142. Such contracts were not formal concessions because the direct rights to explore and exploit were given by the National Executive to the CVG, who authorized the Corporation to further assign them. According to

their clauses they had the same effects as concessions in the sense that the contractor had the same rights and duties as any concessionaire. This was acknowledged by the 1999 Mining Law when providing for their transformation into concessions. So it was not a "legal pretext" as mentioned by Iribarren (HIM, *Legal Opinion*, ¶ 45), to include such contracts as part of the Brisas Project, as they were effectively contracts with their rights and obligations legally assigned by CVG.

5. On the Concepts of Exploration and Exploitation, and the Extraction of substances

143. Article 58 of the Mining Law, as I explained in my First Opinion (ARBC, *First Expert Legal Opinion*, ¶ 179 ff.), set forth in an express way that it must be understood that a concession is in "exploitation" not only "when the substances of the mines are been extracted" (*cuando se estuviera extrayendo de las minas las sustancias que la integran*) but also, without any material extraction, when all that is necessary is been done in order to extract substances from the mines (*haciéndose lo necesario para ello*); and in either case, with the unequivocal aim or intention to obtain economic profit from it, or to economically exploit the concession, in proportion to the nature of the substance and the magnitude of the deposit.

144. There is no indication in article 58 of the 1999 Mining Law that those acts of exploitation (different from the material extraction of mineral) must be "understood as *material* activities," as erroneously claimed by Respondent and Iribarren (Respondent's *Counter Memorial*, ¶¶, 29, 52, 40, 135, 204, 223, 563; HIM, *Legal Opinion*, ¶¶ 39, 40). The Law has no provision in that sense, and does not restrict in any way the nature of the activity to be considered exploitation (although not being material extraction of minerals), making it improper to pretend to qualify - in an arbitrary way - certain activity as "material" extraction activities.

145. Pursuant to the Mining Law, by definition, exploitation cannot be reduced only to "material" steps of extracting minerals. This would be a contradiction with the express text of article 58 of the Mining Law. Article 58 of the Mining Law plainly contemplates that once the exploration phase has ended, the subsequent activities required to later start extracting minerals, all of which are necessary for doing so, are considered as exploitation of the concession, comprising, *e.g.*,the preparation and drafting of the exploitation project, the completion of the feasibility studies, the construction of the infra-

structure and access to the field, and the buildings needed for the management of the exploitation process and services, as well as the activities devoted to request all the environmental authorizations required for the extraction of substance process.

146. On the other hand, the fact that article 24 of the 1945 Mining Law, when defining exploitation, also without limiting that concept to extracting minerals, only referred to "the appropriate works according to the case," as mentioned by Iribarren in his Opinion (HIM, *Legal Opinion*, ¶ 39), is not significant at all on this issue. Reference to the earlier law in this regard simply underscores that the term exploitation was never limited in the manner claimed by Respondent in this arbitration, but rather always encompassed the works appropriate for the given project, which is in substance equivalent to including the works that are necessary to complete before extraction could begin. Moreover, there is nothing inconsistent with these provisions in the Seventh Special Advantage of the Brisas Concession, which states that exploitation includes all the activity performed for the purpose of developing the project as approved by the Ministry of Mines in the feasibility study. Perhaps recognizing that the definition of exploitation agreed by the Ministry in the Brisas mining title is more expansive that the definition established by Iribarren for this arbitration, he argues (HIM, *Legal Opinion*, ¶ 39) that the mining title Seventh Special Advantage must be read to be consistent with the provisions of the Law so as not to be seen as having "modified the Law". There is no basis to claim that the Seventh Special Advantage, however, is in any way inconsistent with the Mining Law, it is evidently only inconsistent with the restrictive and inaccurate definition of exploitation proffered by Respondent in this case.

147. Moreover, contrary to what Iribarren also has said in his Opinion (HIM, *Legal Opinion*, ¶ 40), when referring to my First Opinion in the sense that a concession "can be considered as being in exploitation without minerals actually being extracted" (ARBC, *First Expert Legal Opinion*, ¶ 180), this is not at all inaccurate or wrong. On the contrary, it is completely correct and consistent with the exact terms set forth by article 58 of the 1999 Mining Law. All the steps taken by the concessionaire, once exploration has concluded, in order to initiate the extraction of minerals, including obtaining authorizations to occupy the territory and authorization to affect natural resources like the one given for the Brisas Project in 2007, in order to construct the infrastructure needed for the material extraction of substances, contrary to Iribarren's argument (HIM, *Legal Opinion*, ¶ 40), are an indication of the

exploitation phase as they were taken with the purpose to economically exploit the mine, particularly after the recent development of environmental law imposing the need of a successive list of permits and authorizations, as explained by de los Ríos (IDLR, *Expert Report*, ¶ 10 ff.). Those are, without doubt, exploitation actions taken in order to do what is required to enable extraction with unequivocal intention to obtain economic profits from the substances to be extracted.

148. As the Law states, actual extraction of minerals is not required to regard the mine as being in exploitation. The wording is clear and offers no chance for interpretation. This has been the conclusion of other scholars when addressing the homologous provision of the 1945 Mining Law. Gonzalez Berti, for instance, stated:

> "It is not essential to be extracting the substances of the concession to deem it in exploitation: it is sufficient to carry out the appropriate works for it, even if there has not been mineral extraction: since the existence of minerals does not depend on mankind but on nature, the Lawmaker could not require for the concession to be in exploitation the immediate extraction of the mineral; there are mining industries that in order to obtain the desired minerals have to accomplish works long time in advance to obtain what is desired."[15]

149. Amorer has also addressed this point, and stated, as I referred to in my First Opinion, that "…exploitation does not comprise only the works accomplished to take advantage of a mineral deposit, but when the Lawmaker established the provision related to the fact that "…in the concession the efforts required to obtain the extraction of the substances are being accomplished, through the performance of the works that, according to the case, were appropriate towards that end…", considered also, as mining exploitation, those cases that, although the substances were not being extracted, the concessionaire is in the way of extracting them since is performing the appropriate works for it. Basically, when abandoned the exploration, the concessionaire has resolved undoubtedly to extract the substances with the intent

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[15] See Luis Gonzalez Berti, *Compendio de Derecho Minero Venezolano*. Volumen I, Colección Justitia et Jus. Tercera Edición, 1969, pp. 461.

to commercialize them and is performing works in proportion to the importance of the mineral deposit…."[16]

150. Likewise the administrative doctrine of the Ministry of Mines has followed this path, differentiating exploitation from exploration, and stating that the Law has regarded a mine in exploitation not only when the minerals are being extracted, but also when what is needed for it to happen is being undertaken:

> "…The exploitation is no longer provided of the investigative works, it is an activity to harvest the mineral, to extract it and profit from it. The generosity of the Law has extended the exploitation concept to the works to achieve such extraction.
>
> But here is where we must restrict the reading: the works must be intended, without any doubt, to extract the mineral, dig it out and profit from it, with no doubt about it, and no studies on profitability. Therefore if the works are aimed to establish the kind of mineral, or its abundance and other circumstances, and the extraction pending on it, those will be works of exploration"[17].

151. In my First Opinion I referred in general to the Brisas Project's concessions of "exploitation" (referring to both the Brisas and Unicornio concessions) and the series of mining contracts for "exploration and exploitation," using in general the expression "exploration and exploitation." Consequently, there is nothing "incorrect" as argued by Iribarren (HIM, *Legal Opinion*, ¶ 34, fn 42) referring to my First Opinion when supposedly I said that the Brisas concessions were granted for "exploration and exploitation." This Iribarren assertion just shows that he did not read my First Opinion carefully (ARBC, *First Expert Legal Opinion*, ¶ 176), and did not grasp the sense of what was being said when reference was made to all the concessions, mining titles and CVG mining contracts comprised, as a whole, in the sense that

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16 Elsa Amorer. *El Régimen de la Explotación Minera en la Legislación Venezolana.* Colección Estudios Jurídicos Nº 45, Editorial Jurídica Venezolana, Caracas 1991, pp 82.

17 "Memorandum Nº 180 from the Legal Department of the Ministry of Mines" cited by Elsa Amorer. *El Régimen de la Explotación Minera en la Legislación Venezolana.* Colección Estudios Jurídicos Nº 45, Editorial Jurídica Venezolana, Caracas 1991, pp 84.

in their respective mining titles the scope of the mining activities authorized were indicated ("both exploration and exploitation."). In the same Paragraph of my First Opinion (ARBC, *First Expert Legal Opinion*, ¶ 176) cited by Iribarren, I expressly refer to another Paragraph (160) of my same Opinion, in which I mentioned that two concessions (Brisas and Unicornio) of the Brisas Project were for "exploitation," and that also eight CVG Contracts of the Brisas Project were signed for "exploration and exploitation."

6. On the Notion of "Exploitation" and the long administrative processes of requesting authorizations and permits for the extraction of minerals

152. The concessionaire in the case of Brisas concessions, as mentioned, regarding the Brisas Project, had two exploitation concessions and various CVG contracts for exploration and exploitation, but along the endless process of trying to perform the activities inherent to the project, never received from the Administration the needed permits authorizing the material extraction of minerals. The concessions for exploitation never were allowed to arrive to the final stage of extracting minerals. The Respondent has recognized this fact, when stating that the concessionaire was never authorized even to put the first shovel in the ground (Respondent's *Counter Memorial*, pp. 4 ff.), so "it failed to exploit even a single ounce of gold" (*Idem*, ¶¶ 52, 640), it "did not even advance beyond the pre-operational stage of mining development" (*Idem*, ¶ 182); and all because the concessionaire has obtained only a "simple permission to clear certain areas and construct access roads, service yards and other preliminary infrastructure to support the proposed mines" (*Idem*, ¶ 42) that "did not authorize Gold Reserve to affect natural resources for the exploitation phase" (*Idem*, ¶¶ 117, 208). After making these assertions, it is inconceivable, then, that the same Respondent could argue that the concessionaire "failed to commercially produce any materials on either the Brisas concessions or any of its other parcels" (*Idem*, ¶ 162) since it was Respondent who prevented the concessionaire from further development so as to get to the point of commencing extraction of minerals.

153. As aforementioned, in the case of the Brisas Concessions, for the purposes of exploitation, the concessionaire had only been granted an Authorization to Affect Natural Resources through Administrative Act No. 1080 dated May 27, 2007, considered by the Respondent and Respondent's Witnesses as the "first phase" of the Brisas Project, that is, as an "initial permit" that "did not authorize extraction of the mineral resource" (Respondent's

Counter Memorial, ¶¶ 9, 137, 310, 313, 314; IDLR, *Expert Report*, ¶¶ 35, 57, 75; Rodriguez's *Statement*, ¶ 8; Romero's *Statement*, ¶¶ 6, 7; García Tovar's *Statement*, ¶ 5).

154. Consequently, if regarding the Brisas Project the Administration only gave an authorization to affect natural resources in order to build and construct services and infrastructure that were needed for the exploitation process but that was not an authorization to affect of natural resources for the actual extraction of minerals, it is a contradiction for the Administration to try to justify its illegal action of ignoring the extension of the Brisas Concession *ex legge*, and its illegal pretension of supposedly not extending the concession that already was extended, arguing about the alleged non compliance of conditions of the concessions that are entirely dependant upon the effective process of extraction of minerals. This is not, as described by Iribarren in his Opinion, an argument to "excuse" the non-compliance of concessionaire obligations (HIM, *Legal Opinion*, ¶ 143, fn 91). If compliance with an obligation by the concessionaire depends on the issuing of a administrative act by the Administration to authorize the activity (extraction of material), the Administration cannot pretend to argue that the concessionaire did not comply with an obligation that depended entirely on its own decision when the Administration decided not to authorize the activity. In the Brisas concession case, it very evidently was not "the lack of capital that prevented Gold reserve from beginning to exploit [extract minerals from] the Brisas concession" as argued by Respondent's Witness Herrera Mendoza (Herrera Mendoza's *Statement*, ¶ 6), but the limited authorizations given by the Administration to the concessionaire.

155. In effect, in mining concessions of exploitation, in order to arrive to an actual process of extracting material, a successive chain of administrative, mining and environmental authorizations is needed. When a concession is in exploitation because all the actions required to enable extraction of minerals, with the unequivocal intention obtain economic profits from the substances to be extracted are taken, although without actually extracting minerals, the extension of the concession may be deemed "pertinent" by the Administration. It is therefore not at all "illegal," as suggested by Iribarren (HIM, *Legal Opinion*, ¶ 144), to extend a concession that is in exploitation although is not still in the process of "extraction of material," which is a further stage of exploitation. It is a phase of the exploitation process, which begins with the process of requesting and obtaining a series of administrative

authorizations for such purposes, as well as the necessary construction of any required infrastructure.

156. As it has been extensively studied by de los Ríos, mining activities involving long-term effects to the environment require: first, authorization from the Administration that indicates that it is possible to perform the activity in the chosen space (authorization to occupy the territory); second, authorization from the Administration that make it possible to affect natural resources; and third, authorization from the Administration that refers to the environmental quality regarding contamination produced by the mining activity (IDLR, *Expert Report*, ¶ 11). That is, in de los Ríos own words: "Only once it is verified that the activity is in accordance with land use plans is it possible to affect natural resources in the location where the infrastructure works inherent to the activity itself will be performed, and only after concluding the infrastructure works is it possible to begin to perform the activity itself, which may compromise environmental quality" (IDLR, *Expert Report*, ¶ 12), adding that "the permits are requested in that same order, logically, prior to beginning occupation of the space, affecting resources, or placing facilities in operation, respectively" (IDLR, *Expert Report*, ¶ 13).

157. The request for the extension of the Brisas Concessions, being, as they are "exploitation" concessions, had to take place in the middle of the administrative process developed before the Administration for the purpose of arriving at the step of the exploitation process of extracting materials. All these procedural steps required different actions by the concessionaire developed before the Administration that, although not causing "material" extraction of minerals, are nonetheless signs of the exploitation process, since they are accomplished for such purpose of extracting, as defined by article 58 of the Mining Law, with the unequivocal intention of economically exploiting the concession in proportion to the nature of the substance and the magnitude of the deposit.

158. It is easy to understand how the Mining Law conceived such process, on the other hand, when realizing that there are activities that cannot be fit into the exploration phase of a concession, since they involve processes that exceed what the Law comprises within such phase. Therefore, it is fair to say that after the steps required to complete exploration are fulfilled, and the concessionaire moves on to further the project, to accomplish all those works that are required to take place for the extraction to begin, the concession is being exploited, within the meaning of the terms of the Mining Law.

7. On the "Brisas Project" and its treatment as a whole large-scale mining project by the Administration, particularly in the Feasibility Study

159. The Brisas Project was progressively developed, as was known by all the officers of the Public Administration related to mining activities and environmental control, as reflected in the files that exist in those organs. The existence of this "Mining Brisas Project," considered as a comprehensive mining project integrated by the Brisas concessions and the CVG Mining contracts comprised in it as I have enumerated in my First Opinion (ARBC, *First Expert Legal Opinion*, ¶ 150), is something that cannot be put into doubt. Not only because the titleholder of all the mining concessions, contracts and permits was the same Gold Reserve/Brisas del Cuyuni Company, but because the Ministry of Mines and the Ministry of the Environment recognized and acknowledged its existence, in the approval of the Environment Impact Study and the Feasibility Study, as well as in the Authorization to Affect Natural Resources for its First Phase (Administrative Act No. 1080 of March 27, 2007).

160. Although Respondent has pretended to "ignore" the Project (the "imaginary" or "nebulous" "Brisas Project," Respondent's *Counter Memorial*, ¶¶ 53, 55), in fact it has recognized its existence (*Idem*, ¶¶ 39, 42, 55, 463, 468, 820) as have Respondent's Witnesses (Casadiego's *Statement* ¶¶ 8, 9), who moreover have considered it to be a "national-level mining project, given the size, scale, estimated duration and environmental impact" (Romero's *Statement*, ¶ 2). The Project was in fact studied by various offices of the Mining and Environmental Administration, as the documents related to its study were of great importance, since they put into evidence that the Administration was well aware of its existence. The Project included a series of concessions and mining contracts that received a unified treatment as part of a cohesive Project that did not need to be expressed or authorized in a special administrative act for such purpose, and the mining concessions, titles and contracts that comprised the project also did not need to be modified.

161. The Project, as a whole, was not formally structured as one concession, but as an aggregate of mining concessions and contracts with multiple parcels, whose existence cannot be denied or ignored. For the purpose of developing the Brisas Project as a whole, contrary to what is claimed by Iribarren, there was no need to amend or change each concession or mining title, and no legal provision imposed any such requirement in writing from

the Administration (HIM, *Legal Opinion*, ¶ 170). That is, the Mining Law does not have any specific provision, in a case like the Brisas Project, establishing a need of formal aggregation of the different areas in just one Title, as the Mining Law permits each area to be governed by its own title, but subject to one directive and management of the Project (Gold Reserve Inc.). In addition, being an aggregate of concessions and mining contracts, none of the mining titles were thereby "tacitly modified," neither is there a provision in the Mining Law requiring the concessionaire to modify or to ask for authorization to modify the mining titles, as erroneously claimed by Iribarren (HIM, *Legal Opinion*, ¶¶ 170, 196, 198).

162. As mentioned, the existence of the Brisas Project as a global mining project where all its components (concessions and contracts) were to be developed jointly, was undoubtedly an administrative fact that was expressly accepted by the Ministry of Mines when giving approval to its Feasibility Study, and also by the Ministry of Environment when approving its Environmental Impact Study regarding Phase 1. This means that the Administration knew, acknowledged and accepted the existence and scope of the Project as a whole, and the administrative acts through which it did so were the main source of legitimate expectation of the concessionaire to develop the Project as conceived for the years of the duration of the concessions and their extension. These legitimate expectations included the extension of the Alluvial concession together with the other concessions as envisioned in the Feasibility Study. To assert otherwise would be to deny the very concept of the Project as had been reviewed, studied, approved and accepted by the Administration.

163. It follows that the Brisas Project, contrary to what Iribarren claims (HIM, *Legal Opinion*, ¶¶ 166, 167, 186, 201), undoubtedly had legal standing as a conglomerate or consortium of concessions and mining contracts granted to and controlled by the same group of companies (Gold Reserve Inc.). Although each of the concessions and contracts had their own mining title, the syndicate or consortium of concessions and contracts forming the Brisas Project, were included in the filing before the Administration of the Feasibility Study with reference to the Unicornio Concession, as well as in the Environmental and Socio Cultural Impact Assessments (ESIA), and as recognized in the Authorization to Affect Natural Resources for its First Phase (Administrative Act No. 1080 of March 27, 2007). That is why, contrary to what Iribarren claims, as de los Ríos asserts, the Brisas project was a "large-scale, multiyear project" and that the ESIA "constituted a complete and in-depth assessment of the project, with precise identification of the envi-

ronmental impacts, their scope and the mitigation proposal" (IDLR, *Expert Report*, ¶ 66). And that is why Respondent explained that the study of the Project made by the Administration highlighted its importance "due to the size, complexity, duration and significant impacts of the proposed Brisas Project" (Respondent's *Counter Memorial*, ¶ 39).

164. Specifically regarding the technical, financial and environmental feasibility, pursuant to the 1999 Constitution (article 129) and the 1999 Mining Law, it is a requirement for the development of concessions and as a key element for the transition between exploration and exploitation, that a feasibility study be filed in the exploration phase and as a condition that must be fulfilled in order to obtain the Certificate of Exploitation (articles 52-56, 1999 Mining Law) (for concessions that require such certificates).

165. Regarding mining concessions of exploitation granted before the enactment of the 1999 Law, and pursuant to the 1945 Law, of course, as expressed by Iribarren (HIM, *Legal Opinion*, ¶ 195) no "certificate of exploitation" had to be granted, since the concessionaire already had his "exploitation concession." Nonetheless it was required for it to file a feasibility study, not only because of the constitutional regulation, but also because it was a condition set in the Mining Title (*e.g.* such as in the Unicornio Concession (First Special Advantage)) (Respondent's *Counter Memorial*, ¶ 27). As Iribarren explained, once accepted and approved by the Administration, the feasibility study "becomes the definitive mining project of the concessionaire" (HIM, *Legal Opinion*, ¶ 194), and since the concessions of the Brisas Project were concessions for exploitation, it is doubtless that the Feasibility Study was the definite mining project for the exploitation of the concessions and contracts of the Project.

166. Having said that, it is beyond comprehension how Iribarren, referring to what I said in my First Opinion (ARBC, *First Expert Legal Opinion*, ¶ 377), says that "it is clear that no action of the Venezuelan government approved, as Brewer-Carías says, 'exploitation of minerals in the whole area, including both the alluvial and hard rock material in an integrated manner'" (HIM, *Legal Opinion*, ¶ 197); particularly when both of the Brisas concessions, the alluvial (Brisas) and the hard rock (Unicornio) concessions, were actually concessions for "exploitation" and the Administration had approved "the exploitation" of the mine in the same area to which the Feasibility Study referred. Moreover, the approved Feasibility Study expressly details an integrated plan for exploitation of the alluvial concession together with the hard-

rock concession. What the Administration did fail to approve was actual commencement of works to extract minerals in accordance with the plan set forth in the feasibility study, which had been approved, but of course the exploitation of the concession had been approved in the feasibility study and even earlier by the Administration when the concessions for exploitation initially were granted.

8. On the Unity of the Concessions principle

167. One of the main motives that originated the reform of the 1999 Mining Law was the concept of unity of the concession, as it was expressed in the *Exposición de Motivos* of the Law and as I mentioned in my First Opinion (ARBC, *First Expert Legal Opinion*, ¶ 179 ff.). This was also noted by Iribarren, when he referred to "the elimination of the distinction based on the presentation of the mineral, with respect to hard-rock, mantel and alluvial deposits," saying that "the concessionaire will have the right to exploit the mineral regardless of its presentation" (HIM, *Legal Opinion*, ¶ 177). The previous situation of dual concessions for the same substance in the same area was one of the issues that the 1999 legal reform intended to change, by establishing the "unity of the concession" in the sense expressed in the *Exposición de Motivos*.[18] Thus, after the 1999 Law no distinction must be made when granting concessions between alluvial or hard-rock mantle presentations of the mineral, since the concession must always be granted for exploration and exploitation of the specific substance or material, regardless of its presentation, comprising both alluvial and hard rock mantle and allowing exploitation in the area in a horizontal and vertical way (article 24, 1999 Mining Law).

168. This important reason for the 1999 mining legal reform intended to "establish a regime of a single concession for the exploration and exploitation of certain materials, regardless of their form of presentation" (HIM, *Legal Opinion*, ¶ 178), but it is not supported to argue, as Iribarren does that the "principle of the unity of the concession," which was recognized expressly by the Constitutional Chamber of the Supreme Tribunal of Justice, as noted above, is more correctly understood as a supposed "principle of the *single nature* of the concession" (HIM, *Legal Opinion*, ¶ 179). What this funda-

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[18] The Constitutional Chamber of the Supreme Tribunal of Justice has used the expression "unity of the concession" to qualify the new regime established in the 1999 Mining Law. See Decision No. 1520 of December 6, 2000, in *Revista de Derecho Público*, No. 84, Editorial Jurídica Venezolana, Caracas 2000, pp. 210-212.

mental aspect of the 1999 legal reform intended when establishing the principle of the "single concession," was rather to eliminate the distinction between "alluvial" concessions and "hard rock mantle" concessions that pursuant to the 1945 Mining Law could have even been granted to different concessionaires for the same substance in the same geographical space. Conversely, after the 1999 amendment of the Law, pursuant to article 28, exploitation is made in the same area in a horizontal and vertical way, and the difference between alluvial and hard rock presentation of the minerals and between the corresponding concessions has no relevance. That is, the concessionaire has the right to exploit the mineral regardless of its presentation.

169. This principle of the unity of the concession is embodied in the 1999 Mining Law, and is the one governing the regime of concessions. The provision of article 129 of the 1999 Mining Law to the effect that concessions granted according to the 1945 Mining Law will maintain the exploitation rights as granted regarding the minerals and their form of presentation, as has been decided by the Constitutional Chamber of the Supreme Tribunal of Justice, seeks only to preserve "vested rights" previously granted.[19] Consequently, as explained in my First Opinion, in the case of the Brisas Project, as two concessions had been granted to the same concessionaire for exploitation of gold in the same area, one for alluvial presentation that was due to expire in 2008, and the other for hard rock mantle presentation that was due to expire in 2018, and as both were part of a comprehensive mining project like the Brisas Project, already subject to feasibility study approval recognizing an integrated development of both the alluvial and the hard rock together, the consequence of the legal principle of the unity of the concession was that the concessionaire had the legitimate expectation that the alluvial concession would be extended, in order to equal the term of the hard rock mantle concession (ARBC, *First Expert Legal Opinion*, ¶ 377). It has to be noted also, that if the alluvial concession was not to be extended, it was also contrary to the Mining Law to assign rights to mine the mineral in the alluvial presentation to another person or entity while the hard rock concession in the same area remained valid and in force.

170. In other words, contrary to what Iribarren asserts in his Opinion (HIM, *Legal Opinion*, ¶ 181), in view of the principle of the unity of the con-

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[19] Decision No. 1520 of December 6, 2000, in *Revista de Derecho Público*, No. 84, Editorial Jurídica Venezolana, Caracas 2000, pp. 210-212

cession embodied in the 1999 Mining Law, in the case of the Brisas Project, since the concessionaire had the hard rock mantle concession until 2018, if the Administration had decided not to grant the alluvial extension beyond 2008 (assuming only that it was not pertinent to do so, which conclusion in this case cannot be accepted), the result would have been that pursuant to article 26 of the 1999 Mining Law the Administration could not have granted a new separate alluvial concession to another concessionaire in the same area. Nor, in that sense should the Administration have granted rights to CVG in regard to the alluvial while the hardrock concession was still in effect. Thus, the result would have been a concessionaire with only a hard rock concession and not the alluvial, in a way contrary to the new principle established in the 1999 Law. That is why the concessionaire, without doubt, had a legitimate expectation, founded in the principle governing the new law, to have the extension of the alluvial concession granted in order to equal the term of the hard rock concession, and allow the exploitation in the geographical area of the concession (articles 26, 28) that under the new law could always be made in the horizontally and vertically.

9. On the Compliance Certificates

171. Pursuant to article 88 of the Mining Law, as I have explained in my First Opinion (ARBC, *First Expert Legal Opinion*, ¶ 186 ff.), the Ministry of Mines has the legal authority to oversee, audit and control mining activities; and under article 96 of the Mining Law Regulation, as quoted by Iribarren (HIM, *Legal Opinion*, ¶ 149), the Officials of the *Inspectorías Técnicas Regionales*, undoubtedly have the precise power to verify and control compliance of mining rights holders with their duties established not only in the Mining Law, but in the respective concessions and mining titles. Such public officials are also authorized to report any illegal circumstance that they may notice when carrying out their control activities, and as a consequence, are empowered to ascertain that they have accomplished their duties by stating in writing that a given concessionaire has complied with his obligations. These "certificates of compliance" are therefore, the written means through which the Administration, at the empowered low-level where its officers are positioned to take these actions, acknowledge that the concessionaires have pursued their mining activities, as mentioned by Iribarren, in compliance with the "regulations and other applicable provisions" (HIM, *Legal Opinion*, ¶¶ 146, 149), which include the land use and environmental permits established in the corresponding administrative acts authorizing the concessionaire to develop its mining activities. That is why, undoubtedly, and con-

trary to the assertion made by Respondent (Respondent's, *Counter Memorial*, ¶¶ 223, 224 ff.), they have the power to issue those Certificates of compliance as I have expressed in my First Opinion (ARBC, *First Expert Legal Opinion*, ¶ 189).

172. In any Public Administration organization, like a Ministry, the power granted to its different officers is allocated following a hierarchical order between the different levels of the organization and its public officials. If the power is granted to a "lower level" office or officer, the Ministry as a whole is bound by the decisions adopted by this office or officer despite its level. The validity and enforcement of the Public Administrative decisions issued by any authority is not conditioned by the "level" it has in the hierarchy, but by the power granted.

173. In the case of the Officers of the *Inspectorías Técnicas Regionales*, they are the ones empowered by the Mining Law and its regulation to control and verify compliance by the concessionaire with its duties, and thus also are empowered to give the controlled concessionaire a written certificate of such compliance. The Administration cannot question any public officer acting within the exercise of its power on the basis of their alleged "low-level," as Respondent does in this case (Respondent's *Counter Memorial*, ¶¶ 174, 175, 223, fn 563, 666), and as Iribarren does as well (HIM, *Legal Opinion*, ¶ 145 ff.).

174. This also means that the empowered offices or officers of the Ministry are the ones that must verify compliance by the concessionaire of his legal duties as established in the Law, the Regulations or the authorizations received by the concessionaire from the Administration, being consequently empowered also to verify, audit, ascertain and confirm whether the concessionaire is in compliance with all its obligation including the technical components as is proper for mining activities. The result of these actions are the written expressions given to a concessionaire stating that they have effectively complied with its mining obligations, as verified by the competent public officers.

175. It is pursuant to their power to oversee, audit and supervise mining activities, that the public officers of the lower units of the Ministry of Mines, who are the ones in direct contact in the field with the concessionaire, issue those written certifications of compliance (*Certificados de solvencia*), attesting to the fact that the concessionaire has complied with its mining du-

ties, and of course, as mentioned by Iribarren in his Opinion, reflecting "the situation of the holder of the rights with respect to a specific date, place and office" (HIM, *Legal Opinion*, ¶ 153), but not only and exclusively reduced to "technical parameters" as Iribarren argues (HIM, *Legal Opinion*, ¶ 219).

176. Such Certifications are administrative acts with their own legal effects, issued by empowered public officers, as provided by article 96 of the General Regulation of the Mining Law, enacted pursuant to the general power granted to the Ministry by article 88 of the Law. The power of the low-level *Inspectorias Técnicas Regionales,* in any case, has been recognized and accepted by "high" level authorities of the Ministry of Mines.[20] And that cannot be otherwise under Venezuelan administrative law, because they are organs of the Republic (of a Ministry as an organ of the Republic or of the Public Administration of the Republic), regardless of their level in the Public Administration organization. That is why it is surprising to read the assessment of Respondent's Witness Carpio saying that when he had issued mining Compliance Certificates he claims to have "certified" the compliance of the concessionaire with its with his office (*Inspectoría las Claritas*) but not with the "Republic" (Carpio's *Statement*, ¶ 6); an assertion that has no sense, because his office, being part of the Ministry of Mines, is an organ of the Republic and the concessionaire owes its duties to the Republic, not to individual offices of the Ministry of Mines.

177. So contrary to what Iribarren asserts (HIM, *Legal Opinion*, ¶ 154), article 88 of the Mining Law and article 96 of its Regulation empower Mining Inspectors to verify and control the compliance by the concessionaires with their obligations, and to give them a written certification of what they have verified. This is confirmed by Respondent's Witness Carpio, when

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[20] For instance, the General Director of Mining Concessions confirmed that the "lower level" Inspectors of Mines have the authority to certify Gold Reserve's compliance with its obligations under the mining titles and concessions: In his May 12, 2009 memorandum entitled "Pronouncement on the request for extension of the Concession named Brisas del Cuyuní" (Exhibit C-735 of the Memorial), the General Director of Mining Concessions explains that "whether or not the request should be granted depends on the inspections and reviews to be conducted by the competent Ministry officers" (Exhibit C-735 of the Memorial). The General Director then states that the authors of the April 29, 2009 memos are "the officers empowered to inspect and verify concessionaires' compliance with their obligations" (Exhibit C-735 of the Memorial).

in his Statement he explains how he was requested by the concessionaire in 2007 to give a certificate of compliance, and how he refused to issue it because of non-compliance with some of the obligations, and how ultimately he issued the certificate once the concessionaire had complied (Carpio, *Statement*, ¶ 5).

178. This was doubtless the administrative legitimate practice in the Ministry of Mines, so it is impossible to understand how Respondent's Witness Herrera Mendoza could have stated that after being "mining manager in the Venezuelan industry for more that 20 years" he would have never had seen those "certificates of *solvencia* prior to this time" (Herrera Mendoza's *Statement*, ¶ 3). Nevertheless, even if it were correct that Mr. Herrera Mendoza never saw such a certificate, it would be irrelevant because the legal basis for their issuance is obvious.

179. However, such Certificates of Compliance, as a written acknowledgment of the verifications undertaken by the *Inspectores regionales* in exercise of their duty to verify and control the concessionaires mining activities, are not issued to "invalidate" or supersede any power of any other officer in the Ministry of Mines, as has been wrongly argued by Iribarren (HIM, *Legal Opinion*, ¶ 154); nor are they to "determine in a final, indisputable and irrevocable manner whether or not a concessionaire has met its essential obligations to exploit, and whether it has done so within the specific time frames" as is also wrongly asserted by Iribarren (HIM, *Legal Opinion*, ¶ 154). Nevertheless, nor can these certifications, once issued, be ignored in any subsequent evaluation of the compliance of the concession in relation to the time periods covered by these certifications (ARBC, *First Expert Legal Opinion*, ¶ 189).

10. On the Occupation of Neighboring Land in Mining Concessions

180. In mining activities, in order to enable an efficient and effective extraction of mineral resource in an area, it is usual to find that for the exploitation of a parcel, the concessionaire needs to occupy other land, parcels or concessions' areas outside the boundaries of the concession. That is why the Mining Law not only regulates, for instance, the way in which any profit produced as a consequence of such occupations must be distributed between the interested parties, but also, provides the manner in which the concessionaire can obtain easements on, occupy or even obtain an expropriation of neighboring land or parcels. In the mining legal system, the legitimate occu-

pation of neighboring land or parcels is allowed, and it is not correct to characterize such permissible adjacent land use as an "invasion," except if an occupation is made on bad faith.

181. In fact, pursuant to articles 9 and 26 of the 1999 Mining Law, mining rights are granted within a specific geographic limit. Nonetheless, it is possible, and in many cases necessary for the concessionaire in order to develop its exploitation works, to occupy or use neighboring land and concessions. Consequently, article 11 of the Mining Law expressly provides for the right of the concessionaire to obtain easements on neighboring land, by concluding corresponding agreements with those parties with mining rights or ownership interests on those parcels, to occupy land and even to obtain the expropriation of land (articles 11, 12) when needed for exploitation purposes. The Law also establishes the right of the concessionaire, when needed, to occupy and use public owned land (*tierras baldías*), by concluding corresponding agreements with the National Executive (article 13). The Law also provides that when the title holder of mining rights needs to use third party land, it must obtain authorization also from the Ministry of Mines (article 105). Apart from these agreed or planned circumstances in which a concessionaire determines that it requires the use of an adjacent parcel for purposes of an efficient and effective exploitation of its concession, the 1999 Mining Law also contemplates the possibility of an inadvertent or unplanned "invasion" of a neighboring property during exploitation. Article 63 of the Mining Law covers that situation and provides that in that case, the concessionaire is compelled to give to the affected neighbor half of the value of the extracted mineral, or if the "invasion" can be shown to have been undertaken in bad faith, double the value of the extracted mineral.

182. In my First Opinion I referred to these situations (ARBC, *First Expert Legal Opinion*, ¶ 183), but again, Iribarren seems not to have understood what I said, when he states (HIM, *Legal Opinion*, ¶ 35) that I said that "article 63 of the Mining Law constitutes a form of authorization to the concessionaire to invade the space of a neighboring concession" which is not true.

183. In a comprehensive mining Project like Brisas, the occupation and use of neighboring land was contemplated as indicated and described in the Feasibility study, the Environmental study as well as in numerous other communications by the Company to the respective Ministries. At the stage of development the Project was, with only the Authorization to Affect Natural Resources for Phase 1 granted, the Project had not yet reached the stage that

it had to have in place all final agreements in place in regard to neighboring parcels, although evidently, the Company had obtained agreements to use the land for the intended purpose, although in some cases it was waiting upon the Ministry's approval. Consequently, the prospect to occupy neighboring land during the exploitation process, contrary to what has been said by the Respondent (Respondent *Counter memorial*, ¶ 80) and Iribarren (HIM, *Legal Opinion*, ¶ 213), was not against the law. Moreover, nor is it accurate for Iribarren to state that the Claimant argues that authorization to occupy neighboring land "could be supplied through the alleged approval of the feasibility study" (HIM, *Legal Opinion*, ¶ 200). On the contrary, that process required agreements with the other titleholders and authorization from the Ministry, which the Brisas concession was in the process of negotiating and obtaining. In any event, however, it would be bad faith for the Administration to claim that it would not approve the use of such other parcels in regard to the Brisas Project where such use already had been contemplated and approved by the relevant Ministries in the Feasibility Study, Environmental Study and other approvals and communications from the Administration in regard to the project.

11. On the Reversion of Concession Assets

184. The reversion as established in Article 102 of the Mining Law, implies that upon the extinction of the mining rights, the land, permanent works, including facilities, accessories and equipment, as well as any other asset, either real estate or personal property, tangible or intangible, acquired for the purposes of the specific mining activities authorized by the concession, will be transferred to the Republic and become fully its property, free of taxes and charges, without compensation to the concessionaire. This right of the Republic, of course, only refers to the assets acquired by the concessionaire for the purpose of the mining activities of a given concession, and cannot include other goods, equipment or assets used for another concession (ARBC, *First Expert Legal Opinion*, ¶¶ 205, 361 ff.).

185. If these assets have been acquired and used for mining activities in another concession, the State cannot pretend to have acquired its property by reversion because it would be a taking (expropriation without compensation). On the other hand, the Republic cannot validly acquire by way of reversion due to the extinction of an alluvial concession, assets that were also used for a hard-rock concession in the same land, as was the case of Brisas.

This would be the same as to allow the Administration to hinder the development of legitimate mining rights in a concession that has not been extinguished.

VII. THE REASONABLE EXPECTATIONS TO DEVELOP THE BRISAS PROJECT

186. According to the various laws governing the environment and land use in mining, the administrative procedure to be followed in order to exploit a mine implies that a number of authorizations and permits have to be granted, in a consecutive way, assuming the existence of the previous one. This means, for instance, that in order to obtain authorizations to affect natural resources, a previous authorization to occupy the land or territory must be issued. The titleholder of the initial authorization, if performing accordingly and complying with the duties therein contained, has undoubtedly the legitimate expectation to obtain the subsequent required authorization, for instance to affect natural resources; and afterwards, when obtaining the approval of the feasibility study of the project, as I have argued in my First Opinion (ARBC, *First Expert Legal Opinion*, ¶ 375 ff.) undoubtedly has the legitimate expectation to obtain the subsequent permits and authorizations inherent to the extraction of minerals.

187. It would simply be unconceivable to imagine that once a mining concession has been granted, and that the concessionaire, in order to develop its mining activities has obtained the authorization to affect natural resources, and in addition, the approval of the feasibility study as well as of the required environmental impact study, that it would not have the legitimate expectation to have the authorizations or permits subsequently required for the exploitation granted, and that all the administrative decisions it has obtained and the investments it has made in order to further exploitation, would mean nothing and that it will be just acting "at its own risk," as suggested by Respondent and Respondent's Expert Witness García Tovar (Respondent's *Counter Memorial*, ¶¶ 42, 308, 324; García Tovar's *Statement*, ¶ 13).

188. In the course of the administrative procedure developed for the purpose of eventually exploiting a mine, the Administration can always decide, following specific "strategic environmental studies" to cease mining projects duly authorized, but when it does, is always compelled to pay due compensation for the loss of the mining rights. What is clear is that in no case, appealing to "strategic environmental studies" can the Administration

pretend to obviate the rights of the concessionaire and end a concession without compensating the loss and damages. As explained in my First Opinion, the Administration can always revoke definitive administrative acts creating rights in favor of their addressees, but in such cases, it must always compensate the damages caused (ARBC, *First Expert Legal Opinion*, ¶ 77 ff.).

189. In addition, in such a case the administrative act containing the decision must be duly motivated, explaining the strategic reasons and the motives derived from such strategic purposes, to cease the mining project.

VIII. SOME COMMENTS REGARDING THE AUTHORIZATION TO AFFECT NATURAL RESOURCES, ITS ILLEGAL REVOCATION AND THE ILLEGAL TERMINATION OF THE BRISAS PROJECT

1. The "environmental concerns" over the Brisas Project, and the issuing of the Authorization to Affect Natural Resources after the approval of the Environmental and Social Impact Study

190. Due to the large scale of the Brisas Project both the Authorization to Affect Natural Resources granted for Phase 1 of the Brisas Project in 2007, as well as the approval of the Environmental and Social Impact Study for the Phase 1 works, were very carefully reviewed and discussed in the Administration. This is what can be deducted from Respondent's *Counter Memorial* and from what its Experts have explained in their Statements in this case, evidencing, as a whole, the complete lack of transparency in the conduct of the Administration, issuing decisions that may be considered deceit or trickery that, from the beginning, seems were not intended to be enforced, but for deceiving the concessionaire. No other conclusion can be arrived at, in general terms, from the comments made by Respondent that for the Brisas concessionaire to consider in its security filings that the approval of the Environmental and Social Impact Statement was "the basis for the issuance of all MINAMB permits and authorizations that we require to ultimately exploit the gold and copper mineralization in Brisas," was no more than a "wishful thinking" or "at worst, they represent outright deception" (Respondent's *Counter Memorial*, ¶ 312).

191. Nonetheless, it is now, after the filing of the Respondent's *Counter Memorial*, and of Respondent's Witnesses Statements, that the full picture can be seen of alleged important debates that allegedly took place inside the

Ministry of Environment before the issuing of the Authorization to Affect Natural Resources, particularly regarding the alleged existing concern over the environmental impact of a huge mining project like the Brisas Project. That "concern" was so important that Respondent's Witness Azuaje allegedly considered that "the AARN for the Brisas Project Phase 1 never should have been granted to Gold Reserve de Venezuela given the great environmental impact that would accompany the Brisas Project" (Azuaje, *Statement*, ¶ 15); that Respondent's Witness Casadiego "recommended not granting the requested authorization to affect natural resources" saying that he "was surprised that this initial AARN had been granted so fast, because after the internal meetings, the office of Supervision and Control continued to object to the approval of the permit," concluding his statement by saying that "the AARN was not well reasoned and it did not have a strong foundation" (Casadiego, *Statement*, ¶¶ 3, 11); and that Respondent's Witness Romero, after referring to the alleged existing "tension within the Ministry" said that he "did not agree" with "the controversial decision made by the Vice Minister of *Ordenamiento* […] to grant the initial AARN" noting that the letter sending the Authorization "only my initials ("PR") appear, not my signature, given the fact that I was not in agreement that the authorization be given" (Romero, *Statement*, ¶¶ 4, 5). Nonetheless, regarding Respondent's Witnesses Azuaje and Romero Statements, Respondent takes them as having said that "the environmental impacts of the proposed 'Brisas Project' were so severe that it should not be permitted at all" (Respondent's *Counter Memorial*, ¶¶ 294, 322).

192. About the alleged "disastrous" effects of a mining project like the Brisas Project in the Imataca Forestry Reserve raised by the Administration, (Respondent's *Counter Memorial*, ¶¶ 9, 39, 107, 40, 293, 294, 322, 329, 331, 336, 644), if accepted, perhaps in such circumstances the Administration could have decided to terminate the whole Project, with compensation to the concessionaire for the damages and losses caused; but the Administration cannot do so in an *ex post facto* way, trying to redirect the discussion away from the illegal manner in which the Brisas Project was cancelled, to focus on alleged "disastrous" effects of the Project on the environment, effects on which the Administration did not base its decision to grant permits approving the Project.

193. It is now, in the Arbitration that the Administration seeks to justify its illegal actions, by saying that "because its strong concerns" over the Brisas Project, but despite its environmental impact, it decided to "continue"

with the process of the "development" of the Project, but by only granting the concessionaire "a limited so-called "'Phase 1 AARN'" (Respondent's *Counter Memorial*, ¶ 9).

194. After the endless administrative procedure followed to develop the Brisas Project, it is now, through Respondent's *Counter Memorial* that the Administration pretends to give the "real" motives it had to terminate in a such an illegal way the Brisas Project; that is, that "almost immediately" after the granting of the Authorization to Affect Natural Resources, it "*realized its mistake, and despite continued pressure from Claimant, refused to authorize initiation of the 'project' works and subsequently declared the initial permit null*" (Italics added) (Respondent's *Counter Memorial*, ¶ 9).

195. Respondent pretends to discuss now what could have been the motives for its decision, that for instance, could have been taken in 1961 or in 2004 that no mining activities were to be permitted in the Imataca Forestry Reserve; in 1988 or in 1998, that no mining concessions were to be granted in the area; in 2001 or in 2005, that the Brisas Feasibility Study of the Environmental and Social Impact Assessment would not be accepted, or that the Authorization to Affect Natural Resources would not be granted. This is, in an incredible extemporaneous way, what the Respondent pretends to discuss in this case before an ICSID Tribunal, when in its *Counter Memorial* it states that: "As will be shown, there is significant evidence, both from inside and outside the Ministry, that this project would had a disastrous effect on Venezuela's environment as the reports from Venezuela's experts submitted herewith attest" (Respondent's *Counter Memorial*, ¶ 9). This pretension is completely misdirected, because this Arbitration Tribunal is not to decide about the supposedly disastrous effect that the Brisas Project could have had on Venezuela's environment, but about the illegal way in which the Brisas Project was terminated by the Administration.

2. On the Illegitimate Failure of the Administration to sign the Initiation Act and the "new" ex post facto motives trying to justify the administrative abstention

196. The aforementioned "concerns" that were considered in 2007 when issuing the Authorization to Affect Natural Resources to Brisas, and the "mistake" that the Administration realized it has committed immediately after such issuing (Respondent's *Counter Memorial*, ¶ 9), lead to a subsequent

illegal action, when it refused to, or decided not to sign the Initiation Act that was required in the Authorization to permit the commencement of works.

197. The purpose of an authorization to affect natural resources for mining purposes, is to allow the concessionaire to develop specific activities for the purpose of exploitation, activities that imply the affection of natural resources.

198. There was no other purpose for the authorization given in this case to Brisas. Therefore, once the concessionaire had satisfied all the requirements set forth for in the conditions specified for it, the Administration was compelled to allow the beginning of the authorized affection of natural resources by signing the Initiation Act. On the contrary, as I have argued in my First Opinion (ARBC, *First Expert Legal Opinion*, ¶ 275 ff.), if the Administration was not compelled to sign such Act, the authorization in itself would have been a fraud, that is, an authorization that was not an authorization. And this is what has now being confirmed in the Respondent's *Counter Memorial*, when it claims that the Ministry of the Environment after realizing "its mistake" of granting the Authorization decided to "refuse to *authorize* initiation of the project works" considering the Initiation Act as a new "authorization" (Respondent's *Counter Memorial*, ¶ 9).

199. Without this "unexpected" new "authorization," from the text of the "real" authorization granted to affect natural resources, the concessionaire had the right to expect the Initiation Act to be signed, as it legitimately requested on various occasions from the Administration, pressing upon it without success. Nonetheless, the concessionaire kept insisting, mainly because the relations between the Administration and a concessionaire must necessarily be based in mutual good faith, as explained in my First Opinion (ARBC, *First Expert Legal Opinion*, ¶ 25 ff.). It is impossible to conceive such relations as a war or constant confrontation between the Administration and the concessionaire, in the sense that for any step to be taken in the administrative procedure, it would be necessary for the private party to sue the Administration, and to file a formal administrative or judicial action or recourse. This is not the way administrative procedure and administrative actions are conceived in administrative law in contemporary world.

200. In the case of the Brisas concession, the Ministry of Environment issued an authorization to affect natural resources directed to a concessionaire with a concession for exploitation, allowing it to affect those natural re-

sources for purposes of building and constructing the services and infrastructure that were required to further exploitation of the mine. This was the purpose of the Authorization in Resolution Nº 1080 dated March, 27, 2007, whereas in addition to imposing on the concessionaire requirements to develop several activities as a condition to commence the affecting of natural resources, it provided for an "initiation act" which could be only interpreted as explained in my First Opinion, that is, as a formal condition aimed to verify the concessionaire's compliance with all the conditions imposed upon the concessionaire by the same Resolution (ARBC, *First Expert Legal Opinion*, ¶ 274 ff.).

201. However it now seems to appear that in this case, the Initiation Act was included in the Authorization as a means to obstruct its use by the concessionaire. That is why Respondent's Witness Rodríguez stated that "because all the negative effects expected to result from the Brisas project were not clear, and due to the government's duty to protect the environment and promote sustainable development, the Ministry did not sign the Initiation Act" (Rodríguez's *Statement*, ¶ 11); and Respondent's Witness Romero in his Statement said that since "there was a great concern within the Ministry due to the serious environmental impacts that this project would cause" therefore "the signing of Initiation Act was frustrated" (Romero's *Statement*, ¶ 10). Nonetheless, none of these reasons were ever expressed or given to the concessionaire, who, based on the bona fide principle, patiently requested and expected the signing of the Act.

202. Also, the request for the Initiation Act did not -- as de los Ríos has pointed out in her Opinion confusing and mixing administrative law institutions -- have the purpose "to record the certain date of start of the work in order to verify its period, and therefore its effectiveness, and that the conditions for the start of the works have been effectively complied with" (IDLR, *Expert Report*, ¶ 97). The fact is that the Initiation Act provided for unilaterally in the authorization to affect natural resources was quite different from the "Initiation Acts" that are regulated in statutes and applicable to public contracts, as for example, the one established, as referred by de los Ríos, in the 2008-2010 Laws on Public Contracting, which are bilateral acts entered between the Administration and its contractor. In such cases, the Initiation Acts have the specific purpose of verifying the exact date of the beginning or initiation of the contractual works by the latter, so as to control the precise term of the completion of works that is always fixed in the contract (IDLR, *Expert Report*, ¶ 96, fn 16). I must point out that the other supposed "exam-

ple" of an Initiation Act mentioned by de los Ríos as established in the Organic Urban Use Law (IDLR, *Expert Report*, ¶ 96, fn 17), is not at all "an initiation act" but just a "receipt" that the Administration has to issue acknowledging the reception of a notice and certain documents so that commencement of works can begin.

203. Conversely, in the case of Initiation acts established without any legal provision authorizing them in administrative acts, as is the case of the one included in the Resolution Nº1080 dated March, 27, 2007 authorizing the concessionaire to affect natural resources, it has the purpose – using de los Ríos' own words - of only verifying that "the conditions for the start of the works have been effectively complied"; whereas in the other cases of initiation acts established for the purpose of public contracts, they have the purpose "to record the certain date of start of the work in order to verify its period." That is why the former cannot be improperly confused with the latter, as de los Rios has done in her Opinion (IDLR, *Expert Report*, ¶ 97).

204. In any case of an Initiation Act, and particularly for any such act established in a unilateral administrative act containing authorizations, in order to verify the compliance of certain conditions imposed to its addressee for the development of the authorized activities, the Initiation Act cannot be considered or understood in itself as a "condition" of the administrative act, because it is not something that the addressee of the authorization can accomplish; rather it is the very office that has granted it which is compelled to sign it once compliance with the other conditions has been accomplished.

205. Conversely, in the case of Brisas, as I explained in my First Opinion (ARBC, *First Expert Legal Opinion*, ¶ 275 ff.) what happened was that the Initiation Act was illegally changed into an obstacle to the authorization becoming effective, voiding it of content, because the Administration refused to sign the Act, making the requirement to obtain a signed Initiation Act an arbitrary condition of the same authorization.

206. In the case of Brisas, the concessionaire met with the conditions listed in the authorization to affect, and requested the Ministry, on several different occasions, to verify compliance and sign the Initiation Act. The concessionaire never received from the Ministry any notice in the contrary sense, that is, the Ministry never communicated to the concessionaire any indication of alleged non-compliance with the requirements and conditions of the authorization, as de los Ríos asserts *ex post facto*, trying to justify what

was an illegal abstention of the Administration from signing the act (IDLR, *Expert Report*, ¶ 118). The Administration simply abstained from signing the Act that it was compelled to sign, without any reasoning, transforming a simple formality contained in the text of the Authorization, into a imposed "new" condition not established in any statute or as explained by the Respondent, into a "new" authorization (Respondent's *Counter Memorial*, ¶ 9). In this way, the Administration, due to its deliberate abstention, as I argued in my First Legal Expert Opinion (ARBC, *First Expert Legal Opinion*, ¶¶ 275-276) changed the administrative act contained in the Resolution into a "no act" in the sense that although it authorized the concessionaire to perform certain activities upon compliance with some conditions, it did not authorize anything because the Ministry supposedly had discretionary power to sign or not to sign the Initiation Act.

207. The concessionaire was compelled to meet the conditions listed in the Authorization in order to begin the authorized activities, and the Ministry was compelled to sign the Initiation Act once the concessionaire had complied, to allow such authorization to be effective. In an incomprehensible contrary sense, de los Ríos argues that "the Administration is not compelled to sign the *Acta de Inicio* […] because if it were, it would not have any logical legal meaning whatsoever that such an act was required if it were signed in advance by the Administration, because it would have no way to avoid the duty to signing it" (IDLR, *Expert Report*, ¶ 104); but subsequently she reproached Gold Reserve for not having "exercised the appeal" against the illegal refusal of the Administration to sign the tacit administrative act of rejection (IDLR, *Expert Report*, ¶¶ 101, 104). This argument, of course, amounts to an ostensible contradiction, because if signing of the Initiation Act was not compulsory, then no appeal could be filed against the refusal to sign it. Moreover, it is incorrect to assert that there is no valid purpose for the Administration to confirm that the conditions of the Authorization in fact had been met.

208. Conversely, as has already been observed, the concessionaire had its duties, as well as the Administration, and considering that the Venezuelan Public Administration is ruled by the principles of bona fide as I have explained in my First Legal Expert Opinion (ARBC, *First Expert Legal Opinion*, ¶ 25 ff.), it is inappropriate, as has been suggested by Iribarren that "obtaining the permits was an obligation of the concessionaire, which was compelled to 'exhaust the pertinent recourses in order to obtain a satisfactory response'" (HIM, *Legal Opinion*, ¶ 157). The same is argued by de los Ríos,

who said that Gold Reserve never "did it exercise any appeal, protective action or complaint in light of the refusal to sign" (IDLR, *Expert Report*, ¶¶ 102, 118).

209. These arguments would amount to say as aforementioned (See *supra*, paragraph 180) that the administrative procedure in Venezuela is basically a regulation concerning a process of constant war and confrontations between the Administration and the citizens, based on attacks and recourses, the latter have to start to force the Administration to adopt the most elemental and simplest of the administrative acts it is compelled to perform. The two rulings cited in my First Opinion (ARBC, *First Expert Legal Opinion*, ¶ 117, fn 86) of the Supreme Tribunal of Justice of 2008 and 2009, also cited by Iribarren (HIM, *Legal Opinion*, ¶ 157), do not apply in this case, because, contrary to what was therein decided, the issue regarding the refusal to sign the Initiation Act was not a "delayed granting of permits" or authorizations, which is the basis of those judicial rulings. The non-compliance at issue here was that the permit was granted, but its effectiveness was illegally delayed.

210. In fact, in the Brisas Project case, the authorization to affect natural resources was granted and no claim has been made in the sense that the Administration did not grant that authorization. In this case, the fact is that that after the Administration granted it, the Ministry of the Environment refused to allow it to be effective, transforming a formality like the Initiation Act into a "new" authorization, and thus suspending the effectiveness of the authorization granted. And the explanation of Iribarren of this arbitrary action was - after recognizing that "there is the solid fact [that] the *acta de inicio* was never signed despite there being an express requirement for this by the competent government authority" - that it was the concessionaire that had the obligation to "exhaust all the recourses at its disposal" (HIM, *Legal Opinion*, ¶¶ 158, 220). The same was argued by Respondent (Respondent's *Counter Memorial*, ¶ 575), in the sense that the concessionaire was supposed to initiate or continue with a legal and endless war of recourses and appeals, contrary to the principle of bona fide governing the Venezuelan Public Administration in its relations with citizens.

211. The truth is that any recourse or appeal that could have been filed against the Administrative abstention to sign the Initiation Act, as it is evident now from what the Respondent has said in its *Counter Memorial*, would have been without sense or meaning, since the Ministry of the Environment

had formally decided not to sign such Act (Respondent's *Counter Memorial*, ¶¶ 329, 331), although it never notified the concessionaire of its decision.

212. On the other hand, it is completely inadmissible regarding this decision of the Administration not to sign the Initiation Act, to find in the Iribarren's Opinion, as if he were the Administration itself, "new" and *ex post facto* arguments through which he tries to excuse the administrative omission or the deliberate decision of the Ministry of the Environment alleging that the concessionaire would have been in breach of the duty to exploit when the authorization was requested, something the Ministry never argued (HIM, *Legal Opinion*, ¶ 161). In fact, none of these "new" alleged motives for the administrative decisions were ever expressed by the Administration to the concessionaire.

213. As for the alleged *ex post facto* reasons the Administration could have had not to sign the Initiation Act but never before expressed, de los Ríos guesses that such refusal "was not a capricious position taken by the ministerial office, rather, to the contrary, it was the only position that could be assumed, taking into account the serious impacts of the project that the Ministry was considering at that time" (IDLR, Expert Opinion, ¶ 118). In the same sense Respondent's Witnesses, Romero and Rodriguez have said that the Ministry of Environment decided not to sign the initiation act because of the concern about the environmental aspects of the project (Romero's *Statement*, ¶ 10; Rodriguez's *Statement*, ¶ 11). That is, de los Ríos, Romero and Rodríguez have now attempted to substitute for the Administration and supply to it, in an *ex post facto* way, motives it did not have, and that, in any case, it never argued, communicated or notified to the concessionaire; a position that is completely inadmissible in a Public Administration subject to the rule of law.

214. Again and despite all the efforts deployed by Iribarren and de los Ríos in trying to excuse the omission of the Ministry of the Environment in signing the Initiation Act, Respondent itself has also stated, in an *ex post facto* way (See *supra*, ¶ 194) that the abstention was due to the belief that it was not "prudent for MinAmb to sign the *Acta de Inicio* while the strong concerns of the technical staff were being addressed" (Respondent's *Counter Memorial*, ¶ 574), a decision that was never notified to the concessionaire. Respondent just concludes its statement recognizing the existence of a determination of the Ministry not to sign the Initiation Act, by saying that "Gold Reserve had the right to contest *the Ministry of the Environment's decision not to sign*

the acta de inicio" (Emphasis added) (Respondent's *Counter Memorial*, ¶ 667), forgetting that to file a recourse against such an administrative decision, the decision had to be communicated to the concessionaire; since filing a *recurso por abstención* was not justified. This type of claim is admissible only when the claimant has no real and reasonable expectation that the Administration will decide or perform an action that it is legally obligated to decide or perform. In this case, the concessionaire had the legitimate expectation that the Ministry would sign, as it was not advised that the Administration had formally decided not to sign such act.

3. The Administrative Decision to Revoke the Authorization to Affect Natural Resources and the "new" ex post facto motives trying to excuse such Revocation

215. As a matter of principle, pursuant to Article 91 of the Organic Environmental Law, environmental control instruments that are issued in contravention of the law, special laws and environmental technical provisions and plans, are considered to be "null and void" and do not create rights in favor of their addressee. Moreover, under article 109 of the same Organic Law, permits, authorizations, approvals and any type of administrative act, that are contrary to the principles established by the Law or its regulations, are also considered to be null and void, not creating rights in favor of their addressees.

216. However, the decision to declare null and void an existing administrative act, based on these provisions, always requires the completion of an administrative procedure that must be initiated by the Administration safeguarding the due process rights of the act holder and in which the causes of review are clearly explained. That is, a such decision must be issued pursuant to article 19.1 of the Organic Law of Administrative Procedure, following the provision of article 83 of the Organic Law of Administrative Procedures, and as I have explained in my First Opinion (ARBC, *First Expert Legal Opinion*, ¶ 114 ff.), only after the initiation of an administrative procedure for such purpose, which must be developed guaranteeing the due process rights of the addressee of the respective act, and in particular his rights to be heard and to defense in relation to the supposed contraventions of the laws. It is contrary to all administrative law principles to claim, as does the Respondent, that the Administration can declare the absolute nullity of administrative acts at any time, without giving prior notice to the interested individual (Respondent's *Counter Memorial*, ¶ 577) and without completing an administrative procedure.

217. However, I must point out that the administrative act revoking the previous 2007 Authorization to Affect Natural Resources (Nº 088, dated April 14, 2008), did not even mention articles 91 or 109 of the Environment Law, and was only based on the existence of a general duty of the State to protect the environment, and on the supposed existence of a non-existent "Mining Emergency Decree." Notably, Respondent in this arbitration stated *ex post facto* that "the annulment of the Phase 1 AARN permit was founded upon the Ministry's statutory and constitutional authority to annul permits that are contrary to Venezuela's environmental laws and its constitutional obligations to protect the environment, promote sustainable development and protect the rights of indigenous peoples" (Respondent's *Counter Memorial*, ¶ 577). There was, however, no reference in the revocation act to the provisions of the environmental laws that had been allegedly violated or to how the rights of indigenous people had been affected; that is, not a single violation of any environmental provision was mentioned in the text of the act.

218. In Venezuelan constitutional and administrative law, there are no exemptions from the rule requiring the Public Administration to respect due process guarantees and, in particular, the right to be heard, to defense and to file evidence in support of claims. Consequently, when the Administration, based on a supposedly supreme public interest, issues illegal decisions revoking definitive administrative acts that have created rights to its addressees, without respecting due process rights, as I have mentioned in my First Opinion (ARBC, *First Expert Legal Opinion*, ¶ 86 ff.), it must always compensate for the expropriation of the violated rights as well as of those rights that are being extinguished with the revocation.

219. This is the general rule in Venezuela as provided by article 115 of the Constitution, pursuant to which any taking or compulsory acquisition of privately owned "assets, rights, or property" – which includes the rights of a titleholder in an authorization or the rights of a concessionaire -- is considered a taking by the State, and a specific procedure must be followed to arrive at payment of just compensation, regardless of the motives for the taking. This applies to any State's taking of acquired rights, and it is not a correct statement suggested in the de los Ríos Opinion that in environmental matters "the principle that exists in legal tradition of sacredness of acquired rights has been revoked" (IDLR, *Expert Report*, ¶ 121). This may be her opinion, and I respect it as such, but it is contrary to the express provisions of the Constitution and of the statute to which she refers without quoting it correctly (IDLR, *Expert Report*, ¶ 121, fn 22). The provision setting forth some-

thing similar to what de los Ríos says, to the extent that "the declaration of protected areas does not cause the right to indemnity," is in fact article 63 of the Organic Land Use Planning Law of 1983, the "defunct law "pursuant to which, according to Iribarren (HIM, Expert Opinion, ¶ 116), the "uses established in the Land Use Plans are considered legal limitations to property and, consequently, by themselves, do not originate the right to compensation", to which he adds –notwithstanding- that compensation "can be claimed by the owners when the burden of said limits empties property rights, providing that they produce certain, effective and individualized, current and quantifiable damage." So, what de los Ríos claims she has been upholding "for quite some time" (IDLR, *Expert Report*, ¶ 121) has not been accepted in the legal order. In any case, the first part of article 63 of the Organic Land Use Planning Law of 1983 refers to cases of declaration of an area where private property exists, for instance, as Forestry Reserve. Such declaration by itself, according to the statute, does not amount to a taking, but the right to compensation exists when the limitations imposed upon property are too great to bear.

220. I also have to point out that pursuant to articles 9 and 18.5 of the Organic Law on Administrative Procedure, individual administrative acts need to be motivated. This means that the body of the act must contain its legal and factual foundations, as well as the reasons that have been alleged by the interested parties, where applicable. It is completely contrary to the basic principles of administrative law to sustain that an administrative act can be issued without expressly including in its text its real motives, but that they can be deducted *ex post facto* from the files that exist in the archives of the Administration, as Iribarren argues (HIM, *Legal Opinion*, ¶ 205 ff.).

221. The addressee of an administrative act, like an authorization, not only must follow and act according to what is provided in the act, but moreover is compelled to perform and accomplish it. Therefore, it is not only convenient for the addressee to rely on the text of the authorization, but he is compelled to do so, not being able to know other motives not included in the body of the act.

222. Hence, if the act is an authorization that allows its addressee to act in a certain way or to develop a given activity, it is a contradiction to say, as has been claimed by the Respondent and Respondent's Witness García Tovar, that in following what is prescribed in it, the addressee acts at its "own risk and under its responsibility" (Respondent's *Counter Memorial*, ¶¶ 42, 308, 324; García Tovar's *Statement*, ¶ 13). The situation is precisely the con-

trary: the addressee of the administrative act must always act according to the instructions received from the Administration, and has no other choice but to rely on the contents of the authorization. Thus Respondent's position is to deny the basic principles of administrative law.

223. As for the efforts of the Legal Experts called by Venezuela to excuse *ex post facto* the illegal administrative acts issued by the Administration, particularly the revocation of the authorization to affect granted to the Brisas Project, Iribarren tries to find a cause of absolute nullity not expressed in the revocation act or even considered in it (Nº 088-08 of April 14, 2008), and after referring to articles 91 and 109 of the Environment Law that –as I said- were not even mentioned or cited in the revocation act, just limits his observation to say, in a hypothetical way, that "If the authorization to affect natural resources […] was issued in contravention of any standard or environment principles or requirement contained in the environment plans, the government could, and was in fact obligated, to declare even an official letter null, in conformity with the provisions of article 83 of the LOPA, without the need to initiate, in these types of cases, a prior administrative proceeding" (HIM, *Legal Opinion*, ¶ 227). Notably, this is only a personal hypothesis of the Legal Expert, since it never happened.

224. Consequently, and despite Iribarren's efforts to imagine in an *ex post facto* way what could have been the motives to issue the illegal act (HIM, *Legal Opinion*, ¶ 229), the fact is that the Administration only based its decision on article 19.4 of the Organic Law on Administrative Procedure that refers to acts enacted by manifestly incompetent authorities or in the absence of any administrative procedure, and not on article 19.1 of such Law that could have been coherent with the aims of Iribarren, since it refers to cases of absolute nullity set forth in the Constitution or in a statute. Needless to say, Iribarren has also failed to mention any case of supposed absolute nullity that could have affected the revoked act pursuant to articles 92 and 109 of the Environment Organic Law.

225. As I already pointed out, Decision of April 14, 2008 No. 088-08 was based (i) on the general "duty of the State to guarantee the environment's conservation," and (ii) on "reasons of public order" without specifically expressing any such "order public' reasons, except the erroneous reference to a non-existent "state of mining emergency" which was not even declared, as I have explained, in the already without effect Decree No. 4633 dated June 26, 2006 (ARBC, *First Expert Legal Opinion*, ¶¶ 286-311). And

precisely one of the defects affecting the revocation of administrative acts, as I have detailed in my First Opinion (ARBC, *First Expert Legal Opinion*, ¶¶ 286-311) is the absence of any specific "public order" motive to support the revocation act; and that in any case, in Venezuelan administrative law, a revocation cannot just be founded on the generic expression of "reasons of public order."

226. This absence of specific "reasons of public order" affecting administrative act No. 088-08 of April 14, 2008, has also been aimed to be filled in an *ex post facto* way by de los Ríos when analyzing the "annulment of the authorization to affect natural resources" (IDLR, Expert Opinion, ¶ 105 ff). She considers that "the magnitude of the Brisas project and its consequences to the environment is alarming" to the point that if developed "the damages would be absolutely irreversible, and not even reparable" (IDLR, Expert Opinion, ¶ 112). In a similar sense, the Respondent itself has tried to construct also in an *ex post facto* way what could have been the motives that were not expressed in the revocation act, when saying in its *Counter Memorial* that the revocation was issued "due to serious concerns regarding its potential unmitigated environmental impact" (Respondent's *Counter Memorial*, ¶¶ 138, 336). None of these new arguments, of course, can be found in the text of the revoking administrative act.

227. De los Ríos adds to her comments, trying to find some rational in view of the non-existent motives for the arbitrary act, that with the dimensions of the Brisas Project, "the standard of analysis and environmental and social and cultural mitigation, is very high to accept that the Brisas Project would be developed in accordance with best international practices, including strict environmental and social standards' (Paragraph 131, Claimant's Memorial)" (IDLR, Expert Opinion, ¶ 113). That is, as an Expert on matters of environment, what de los Ríos has attempted to express is that if she had been in the position of deciding the matter in 2008, she would have founded the revocation act in the motives she now expresses. Of course, she was not in that position, nor is her late suggestion relevant.

228. Eventually, de los Ríos concludes referring to the development of the Brisas Project and particularly to the "planned pit" designed for the Project, saying that the result of it "is not only extremely grave for the environment, but impossible to restore, repair or even to clean up, and much more so when dealing with –as it does- a protected natural area" (IDLR, Expert Opinion, ¶¶ 113, 119, 120). In another part of her opinion, rejecting the criteria of

professor Enrique Meier on "ecological development" as being "30 years old," and defending instead the concept of "sustainable development," de los Ríos asserts her opinion that the damage that the Brisas project could cause "is not tolerable damage, and therefore it cannot be allowed" ((IDLR, Expert Opinion, ¶ 120). Again, in this case, as an Expert on matters of environment, what de los Rios has attempted to express, is that if she would have been in the position of deciding in 2007 to grant the authorization to affect natural resources, she would have not done so, basing her position on the motives she now expresses relating to her criteria of "sustainable development" (and supposedly not "ecological development") for the protection of the environment according to her beliefs. Of course, this is absolutely unacceptable in a legal proceeding.

229. I am not saying that the "new" reasons of environmental "public order," should they have been correct in 2007 or 2008, could have not been motives for the Administration. But they were not: first, because they were not established in an express way in the 1997 and 2004 Land Use Master Plan governing the Imataca Forestry Reserve (ARBC, *First Expert Legal Opinion*, ¶ 246) whereas mining activities were permitted in the protected area (ARBC, *First Expert Legal Opinion*, ¶ 248 ff.); and second, because they were not raised to reject the petition for the authorization to affect natural resources to develop construction in the area for mining purposes for the Brisas Project, that conversely, was granted in 2008.

230. There could also have been, if they were correct, environmental motives for a decision to revoke all or some concessions or authorizations for mining activities in the Imataca Forestry Reserve, of course paying the due compensation to the beneficiaries of such concessions or authorizations.

231. But it is inadmissible to bring them up now to excuse in an *ex post facto* manner, as suggested by de los Ríos (IDLR, Expert Opinion, ¶¶ 113, 119, 120), the issuing a few years ago of administrative acts, in which those concerns were not even stated; neither can such reasons excuse administrative actions that ignored the rights of the affected entities to be compensated for the damages caused by such decisions.

I declare that the foregoing reflects my true opinion on the questions addressed, being correct to the best of my knowledge and belief.

Executed this 28th day of July, 2011.

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Allan R. Brewer-Carías

PART THREE

ON PUBLIC CONTRACTS AND PUBLIC INTEREST CONTRACTS

8.

Caso CIADI/ARB/10/19: *FLUGHAFEN ZÜRICH A.G., GESTIÓN E INGENIERÍA IDC S.A.* (*Demandantes*) *c. REPÚBLICA BOLIVARIANA DE VENEZUELA* (*Demandada*)

INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES

OPINIÓN LEGAL DE ALLAN R. BREWER-CARÍAS

5 MAYO 2012

INTRODUCCIÓN

Quien suscribe, Allan R. Brewer-Carías, declaro que lo siguiente es cierto y correcto:

1. *He sido miembro activo del Colegio de Abogados del Distrito Federal de Venezuela desde 1963. Desde 1973 he sido socio de la firma de abogados* Baumeister & Brewer*, ubicada en la Torre América, PH, Avenida Venezuela, Urbanización Bello Monte, Caracas 1050, Venezuela. En mi carrera profesional y académica, me he especializado en derecho público, particularmente en derecho constitucional, derecho administrativo y derecho público económico, lo cual incluye el régimen jurídico relativo al uso y explotación de bienes públicos. Desde septiembre de 2005, resido en los Estados Unidos de América en la ciudad de Nueva York, Nueva York.*

CALIFICACIONES

2. *En 1962 recibí el título de abogado (*suma cum laude*) de la Universidad Central de Venezuela. Entre 1962 y 1963 cursé estudios de postgrado en Francia, en la Facultad de Derecho de la antigua Universidad de París. Recibí el título de Doctor en Derecho (D.J.) en 1964 (*suma cum laude*), de la Universidad Central de Venezuela.*

3. *Desde 1963 he sido profesor de derecho administrativo y constitucional en la Universidad Central de Venezuela. Durante el ciclo académico 1972-1974, fui* Visiting Scholar *en la Universidad de Cambridge, Reino Unido (Centro de Estudios Latinoamericanos); y durante el ciclo académico de 1985-1986, fui* Simon Bolivar Professor *en la misma Universidad de Cambridge, donde dicté un curso sobre* Judicial Review in Comparative Law *en el Programa* LL.M. *de la Facultad de Derecho; siendo* Fellow del Trinity College.

4. *En 1990 me desempeñé como profesor adjunto en la Universidad de Paris II (*Panthéon-Assas*) donde dicté el curso de tercer ciclo, sobre* Les principes de la procédure administrative non contentincieuse en droit comparé. *A partir de 1998 y por varios años fui Profesor regular de las Maestrías en Derecho Administrativo en la Universidad El Rosario y en la Universidad Externado de Colombia (ambas en Bogotá, Colombia), en las materias: "Principios del Procedimiento Administrativo en América Latina" y "El Modelo Urbano de la Ciudad Colonial Hispanoamericana," respectivamente. En 1998 fui designado profesor invitado en la Universidad de París X (*Nantèrre*), donde impartí un curso sobre el régimen jurídico de la economía en Venezuela.*

5. *Entre el 2002 y el 2004 fui* Visiting Scholar *en la Universidad de Columbia en la ciudad de Nueva York, y a partir de 2006, fui designado profesor adjunto de derecho en la Facultad de Derecho de la misma Universidad, donde dicté durante los semestres de otoño de 2006 y primavera de 2007, un seminario sobre* Judicial Protection of Human Rights in Latin America: A Constitutional Comparative Law Study on the Amparo Proceeding.

6. *Desde 1982 hasta 2010 fui Vicepresidente de la Academia Internacional de Derecho Comparado (La Haya), y desde 1967 he sido profesor en la Facultad Internacional para la Enseñanza de Derecho Comparativo (Estrasburgo). Soy Individuo de Número de la Academia de Ciencias Políticas y Sociales de Venezuela, de la cual fui su Presidente entre 1997 y 1999.*

Soy Miembro Extranjero de la Academia Colombiana de Jurisprudencia, de la Academia Chilena de Ciencias Sociales, Políticas y Morales, de la Academia Peruana de Derecho, de la Academia Nacional de Derecho y Ciencias Sociales de Córdoba y de la Real Academia de Legislación y Jurisprudencia, Madrid.

7. *Durante las últimas décadas he participado en numerosos programas académicos, incluyendo congresos, seminarios y cursos, impartiendo conferencias en universidades e instituciones públicas y privadas en Europa, los EE.UU y Latinoamérica en materia de derecho público.*

8. *Tengo una extensa obra publicada en materias de derecho público, e historia constitucional. Una lista de los más de 135 libros que he publicado puede verse en el* ***Anexo ABC-1*** *de esta Opinión Legal. Además, soy autor de más de 700 estudios monográficos (artículos) en materia de derecho público, particularmente en derecho administrativo, derecho constitucional, derecho municipal, derecho urbanístico, derecho ambiental, derecho minero y de los hidrocarburos, y en materia de administración pública. La información sobre todos estos textos y de los libros antes mencionados y, además, el contenido de casi todos ellos, está disponible en mi página web: http://allanbrewercarias.com/.*

9. *Desde 1978 hasta 1987 fui Director del Instituto de Derecho Público de la Universidad Central de Venezuela. Desde 1980 he sido el editor y director de la Revista de Derecho Público, de la Fundación de Derecho Público y de la Fundación Editorial Jurídica Venezolana (Caracas).*

10. *En 1999 fui electo Miembro independiente de la Asamblea Nacional Constituyente, habiendo contribuido a la redacción de muchas disposiciones de la Constitución de Venezuela de 1999. Todas mis propuestas y votos disidentes están recopilados en Allan R. Brewer-Carías,* Debate Constituyente (Aportes a la Asamblea Nacional Constituyente), *3 Vols., Fundación de Derecho Público, Editorial Jurídica Venezolana, Caracas 1999.*

11. *Anexo a esta Opinión Legal***,** *una copia de mi* Currículum Vitae.

ALCANCE DE LA OPINIÓN

12. *Esta Opinión la formulo en relación con el Caso CIADI No. ARB/10/19 del Centro Internacional de Arreglo de Diferencias Relativas a Inversiones (CIADI), con motivo de la demanda interpuesta por*

*FLUGHAFEN ZÜRICH A.G. / GESTION E INGENIERÍA IDC S.A. (*las Demandantes*) contra la República Bolivariana de Venezuela (*la Demandada*). La firma de abogados* ***Bofill Mir & Alvarez Jana****, abogados de las Demandantes, me ha solicitado que emita una opinión legal en relación con los siguientes asuntos en el derecho venezolano:*

1. El régimen constitucional y legal de la distribución de competencia en el sistema federal, entre el Poder Nacional y el Poder de los Estados, en materia de administración y conservación de obras de infraestructura nacionales, en particular, de las autopistas, puertos y aeropuertos nacionales al momento de celebrarse el Contrato de Alianza Estratégica.

2. El ejercicio de la competencia constitucional y legal en materia de administración y conservación de aeropuertos nacionales por el Estado Nueva Esparta y la celebración del el Contrato de Alianza Estratégica con el Consorcio UNIQUE IDC en fecha 27 de febrero de 2004.

3. El Contrato de Alianza Estratégica suscrito con el consorcio UNIQUE IDC en fecha 24 de febrero de 2004 para la prestación del servicio de administración y conservación de aeropuertos como "contrato administrativo".

4. La situación de las Demandantes ante la actuación de la Sala Constitucional del Tribunal Supremo de Justicia de Venezuela y su significación de cara a los derechos derivados del Contrato de Alianza Estratégica celebrado entre el Estado Nueva Esparta y el Consorcio conformado por las Demandantes.

13. *Como abogado venezolano en ejercicio, especializado en derecho constitucional y administrativo, a continuación expreso mi opinión legal basada en mi experiencia y conocimiento sobre el derecho venezolano, acumulados durante 50 años de actividad académica y profesional de la abogacía, esta última principalmente en Venezuela.*

DOCUMENTOS CONSIDERADOS

14. *Para propósitos de esta Opinión Legal, he evaluado y considerado, entre otros, los siguientes documentos:*

A. ***Demanda*** presentada por las Demandantes de fecha 21 de octubre de 2011.

B. ***Memorial de objeciones a la Jurisdicción del Centro y la competencia del Tribunal*** presentada por la Demandada de fecha 8 de febrero de 2012.

C. ***Informe de Experto del profesor Carlos Enrique Mouriño Vaquero*** de fecha 7 de febrero de 2012.

D. ***Contrato de Alianza Estratégica*** suscrito entre el Estado Nueva Esparta y el Consorcio UNIQUE IDC en fecha 27 de febrero de 2004.

E. ***Decreto No. 1.188 de fecha 26 de febrero de 2004 del Gobernador del Estado Nueva Esparta***, publicado en *Gaceta Oficial* No. Extraordinaria E-284 de 26 de febrero de 2004.

F. ***Resolución No. 0001-05 de fecha 10 de junio de 2005 del Gobernador del Estado Nueva Esparta***, publicado en *Gaceta Oficial* No. Extraordinaria E-443 de 10 de junio de 2005.

G. ***Oficio No. DG-5190-05 de 29 de noviembre de 2005 del Gobernador del Estado Nueva Esparta.***

H. ***Decreto No. 806 de fecha 17 de julio de 2006 del Gobernador del Estado Nueva Esparta***, publicado en *Gaceta Oficial* No. Extraordinario E-734 de 17 de julio de 2006.

I. ***Sentencia No. 219 de 7 de febrero de 2006 de la Sala Político Administrativa del Tribunal Supremo de Justicia***, en http://www.tsj.gov.ve/decisiones/spa/Febrero/00219-080206-2006-0013.htm

J. ***Sentencia No. 72 de 3 de agosto de 2006 de la Sala Político Administrativa del Tribunal Supremo de Justicia,*** en http://www.tsj.gov.ve/decisiones/spa/Agosto/AMP-072-030806-2006-0584.htm

K. ***Sentencia ncia No. 1502 de 04 de agosto de 2006 de la Sala Constitucional del Tribunal Supremo de Justicia,*** en http://www.tsj.gov.ve/decisiones/scon/Agosto/1502-040806-05-1812.htm

L. ***Sentencia No. 189 de 9 de febrero de 2007 de la Sala Constitucional del Tribunal Supremo de Justicia***, en http://www.tsj.gov.ve/decisiones/scon/Febrero/189-090207-05-1812.htm

M. ***Sentencia No. 202 de 14 de febrero de 2007 de la Sala Constitucional del Tribunal Supremo de Justicia, en*** http://www.tsj.gov.ve/decisiones/scon/Febrero/202-140207-07-0054.htm

N. ***Sentencia. No. 364 de 1 de marzo de 2007 de la Sala Constitucional del Tribunal Supremo de Justicia, en*** http://www.tsj.gov.ve/decisiones/scon/Marzo/364-010307-05-1812.htm

0. ***Sentencia. No. 1200 de 25 de junio de 2007 de la Sala Constitucional del Tribunal Supremo de Justicia,*** en http://www.tsj.gov.ve/decisiones/scon/Junio/1200-250607-06-0468.htm

P. ***Sentencia No. 313 de 6 de marzo de 2008 de la Sala Constitucional del Tribunal Supremo de Justicia***, en http://www.tsj.gov.ve/decisiones/scon/Marzo/313-060308-05-1812.htm

Q. ***Sentencia No 311 de 12 de marzo de 2008 de la Sala Político Administrativa del Tribunal Supremo de Justicia*** en http://www.tsj.gov.ve/decisiones/spa/Marzo/00311-12308-2008-2006-0013.html

R. ***Sentencia No 538 de 4 de abril de 2008 de la Sala Constitucional del Tribunal Supremo de Justicia,*** en http://www.tsj.gov.ve/decisiones/scon/Abril/538-080408-05-1812.htm

S. ***Sentencia No. 565 de 15 de abril de 2008 de la Sala Constitucional del Tribunal Supremo de Justicia,*** (Interpretación del artículo 164.10 de la Constitución) en http://www.tsj.gov.ve/decisiones/scon/Abril/565-150408-07-1108.htm

T. ***Sentencia No. 155 de 4 de marzo de 2009 de la Sala Constitucional del Tribunal Supremo de Justicia,*** en http://www.tsj.gov.ve/decisiones/scon/Marzo/155-4309-2009-08-0864.html

U. ***Sentencia No. 1044 de 23 de julio de 2009 de la Sala Constitucional del Tribunal Supremo de Justicia,*** en http://www.tsj.gov.ve/decisiones/scon/Julio/1044-23709-2009-08-0864.html

V. ***Auto de fecha 18 de febrero de 2010 de la Sala Constitucional del Tribunal Supremo de Justicia,*** en http://www.tsj.gov.ve/decisiones/scon/Febrero/02-18210-2010-08-0864.html

Además, otros documentos que se mencionan en esta declaración, y que he considerado necesario analizar para el propósito de emitir una opinión jurídica sobre los asuntos antes señalados.

15. *A los efectos de esta opinión, me he basado en las declaraciones sobre los hechos formuladas por las Demandantes, contenidas en la Demanda y en los otros documentos que han sido utilizados como referencia.*

RESUMEN EJECUTIVO

16. *De mi análisis he llegado a las siguientes conclusiones:*

A. De acuerdo con el artículo 164 de la Constitución, una de las materias que se califica como de la "competencia exclusiva de los Estados", es "la conservación, administración y aprovechamiento de carreteras y autopistas nacionales, así como de puertos y aeropuertos de uso comercial…." (ord. 10).

B. En ejecución de esa competencia constitucional exclusiva, el Gobernador del Estado Nueva Esparta decidió contratar la prestación del servicio aeroportuario y el mantenimiento y operación del Aeropuerto Internacional del Caribe 'General en Jefe Santiago Mariño', para lo cual autorizó la firma de una Alianza Estratégica entre ese Estado y el Consorcio UNIQUE IDC.

C. La celebración del Contrato de Alianza Estratégica no fue precedida de un procedimiento licitatorio para la selección del contratista adjudicatario del servicio, pues el mismo estaba exceptuado conforme lo expresamente establecido en el artículo 23.4 de la Ley de Concesiones de Obras y Servicios Públicos del Estado Nueva Esparta de 1997. Conforme a dicha norma, la adjudicación del contrato podía hacerse directamente por la Gobernación por tratarse de la continuación de la prestación de un servicio cuyo contrato de concesión previo había sido resuelto por el Ejecutivo Estadal "…por incumplimiento del concesionario, rescate anticipado de la concesión o quiebra del concesionario, conforme a lo establecido en esta Ley."

D. La suscripción del Contrato de Alianza Estratégica no requería autorización previa de la Asamblea Nacional, pues las sociedades mercantiles integrantes del Consorcio UNIQUE IDC son empresas domiciliadas en Venezuela. Tampoco era necesaria la aprobación legislativa estadal, pues la "Ley por la cual el Estado Nueva Esparta asume la Administración y el mantenimiento de los puertos y aeropuertos públicos de uso comercial ubicados en su territorio" de 1991, no previó que este tipo de contratos debieran someterse a este tipo de control previo.

E. La intervención de la Sala Constitucional del Tribunal Supremo de Justicia en el caso que nos ocupa constituye un caso manifiesto de desviación de poder. La Sala Constitucional se avocó ilegítimamente al conocimiento de recursos contencioso administrativos que se encontraban fuera de su competencia; posteriormente, la misma Sala rehusó pronunciarse sobre el fondo de la controversia a cuyo conocimiento se había avocado y en la práctica suspendió la tramitación de dichos recursos por un período de casi dos años, para finalmente declarar agotado el avocamiento sin realizarse tramite sustancial alguno en el marco de dichos procedimientos. La Sala Constitucional del Tribunal Supremo, además, le entregó la administración del Aeropuerto al Poder Nacional sin fundamento constitucional alguno, produciendo un vaciamiento del objeto de los recursos sometidos a su conocimiento. Esto constituyó una usurpación inaceptable de la competencia exclusiva que tienen los Estados en materia de administración de aeropuertos conforme el artículo 164.10 de la Constitución de Venezuela.

F. La Sala Constitucional –una vez declarado el agotamiento del avocamiento y entregado el Aeropuerto al Poder Nacional- remitió al juez natural la tramitación de los recursos contencioso administrativos qiue se habían interpuesto no obstante no existir materia alguna sobre la cual se pueda decidir en dichos recursos, pues al juez natural le es jurídicamente imposible revertir la entrega del Aeropuerto al Consorcio UNIQUE IDCdispuesta por el Tribunal Supremo de Justicia. Estas actuaciones ponen de manifiesto la absoluta denegación de justicia llevada a cabo por la Sala Constitucional del Tribunal Supremo, así como la indefensión de las Demandantes en el ámbito interno, de la misma manera que evidencian la confiscación que se ha producido respecto de sus derechos, por parte del Estado venezolano.

G. Lo anterior puede decirse que fue realizado en el contexto de una política de Estado de apropiación de los aeropuertos nacionales por parte del Poder Nacional en desmedro de los poderes Estatales, iniciada en el año 2007. Nótese que tan sólo 20 días después de la decisión de la Sala Constitucional del Tribunal Supremo, se dictó una reforma legal - del todo inconstitucional- que entregó al Poder Nacional el control y administración de todos los aeropuertos que se encontraban en poder Estadal. Se creó asimismo un

empresa pública nacional denominada "Bolivariana de Aeropuertos" para la administración de todos los aeropuertos que le fueron usurpados inconstitucionalmente a los Estados.

I. SOBRE EL RÉGIMEN DE DISTRIBUCIÓN DE COMPETENCIAS ENTRE EL PODER NACIONAL Y LOS ESTADOS EN MATERIA AEROPORTUARIA AL MOMENTO DE CELEBRARSE EL CONTRATO DE ALIANZA ESTRATÉGICA

17. *Uno de los pilares fundamentales de la Constitución venezolana es la forma federal del Estado que siempre se ha adoptado en toda la historia constitucional del país. En este sentido, el artículo 4 de la Constitución de 1999, declara que "la República Bolivariana de Venezuela es un Estado federal descentralizado en los términos consagrados en esta Constitución, y se rige por los principios de integridad territorial, cooperación, solidaridad, concurrencia y corresponsabilidad."*[1]

18. *La conformación constitucional del Estado con forma federal se puede identificar al menos un núcleo esencial de la misma en la Constitución, que se refiere, precisamente, al sistema de la "distribución" del Poder Publico que regula el artículo 136 "entre el Poder Municipal, el Poder Estadal y el Poder Nacional," el cual se materializa en la distribución de una serie de competencias entre los tres niveles territoriales.*[2] *Algunas en forma exclusiva y la mayoría en forma concurrente.*

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1 Constitución de la República Bolivariana de Venezuela de 1999 (**Anexo ABC-2 y LR-62)**. Véase nuestros estudios sobre el tema elaborados apenas la Constitución fue sancionada: Allan R. Brewer-Carías, *Federalismo y Municipalismo en la Constitución de 1999 (Alcance de una reforma insuficiente y regresiva),* Editorial Jurídica Venezolana, Caracas-San Cristóbal 2001; "El Estado federal descentralizado y la centralización de la federación en Venezuela. Situación y perspectiva de una contradicción constitucional" en Diego Valadés y José María Serna de la Garza (Coordinadores), *Federalismo y regionalismo***,** Universidad Nacional Autónoma de México, Tribunal Superior de Justicia del Estado de Puebla, Instituto de Investigaciones Jurídicas, Serie Doctrina Jurídica Nº 229, México 2005, pp. 717-750 (**Anexo ABC-3**).

2 Véase Allan R. Brewer-Carías, "Consideraciones sobre el régimen de distribución de competencias del Poder Público en la Constitución de 1999" en Fernando Parra Aranguren y Armando Rodríguez García (Coord.), *Estudios de Derecho Administrativo. Libro Homenaje a la Universidad Central de Venezuela*, *Facultad de Ciencias Jurídicas y Políticas, con ocasión del Vigésimo Aniversario del Curso de Es-*

19. *Por la Ley Orgánica de Descentralización, Delimitación y Transferencia de Competencias del Poder Público de 1989,[3] sancionada con base en lo establecido en el artículo 137 de la Constitución de 1961,[4] a fin de promover la descentralización, se transfirieron competencias del Poder Público a los Estados, las cuales en muchos casos quedaron establecidas como competencias exclusivas propias de los Estados, lo cual se recogió posteriormente en el Texto Constitucional de 1999.*

20. *En la Constitución de 1999, en efecto, el conjunto de competencias que se asignan a favor del Poder Nacional están contenidas en el artículo 156, las que se asignan al Poder Estatal, están contenidas en una lista en el artículo 164, y las que se asignan a favor del Poder Municipal están contenidas en los artículos 178 y 179 de la Constitución. Esta distribución de competencias además de referirse a atribuciones asignadas a los órganos de los tres niveles territoriales, enumera las materias sobre las cuales se ejercen esas atribuciones en dichos tres niveles territoriales.[5]*

21. *Así, en particular, en materia de obras de infraestructura, conforme a la Constitución, corresponde en forma exclusiva al Poder Nacio-*

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pecialización en Derecho Administrativo, Tomo I, Tribunal Supremo de Justicia, Colección Libros Homenaje Nº 2, Caracas 2001, pp. 107-136 (**Anexo ABC-4**).

3 Véase artículo 11, Ley Orgánica de Descentralización, Delimitación y Transferencia de Competencias del Poder Público de 1989, en *Gaceta Oficial* No. 4153 de 28 de diciembre 1989 (**Anexo ABC-5**). Véase sobre esta Ley: Allan Brewer Carías, "Bases Legislativas para la descentralización política de la federación centralizada (1990: el inicio de una reforma)," en *Leyes para la Descentralización Política de la Federación,* Colección Estudios Legislativos Nº 11. Editorial Jurídica Venezolana, Caracas 1990, p. 17 (**Anexo ABC-6**). La Ley Orgánica se reformó posteriormente en 1993. Véase en *Gaceta Oficial,* Nº 35.327 de 28-10-1993 (**Anexo ABC-7**).

4 Por ello, la Ley Orgánica que conforme a la autorización de la Constitución modificó la distribución de competencias que la misma establecía, se consideró que tenía rango constitucional. Véase Carlos Ayala Corao, "Naturaleza y alcance de la descentralización estadal" en Allan R. Brewer-Carías *et al., Leyes para la Descentralización Política de la Federación*, Caracas 1994, pp. 99 y ss. (**Anexo ABC-8)**; Allan R. Brewer-Carías, *Asamblea Constituyente y Ordenamiento Constitucional,* Caracas 1999, pp. 122 ss. (**Anexo ABC-9**).

5 Véase Allan R. Brewer-Carías, "Consideraciones sobre el régimen de distribución de competencias del Poder Público en la Constitución de 1999" en Fernando Parra Aranguren y Armando Rodríguez García (Coord.), *Estudios de Derecho Administrativo. Libro Homenaje a la Universidad Central de Venezuela*, *Facultad de Ciencias Jurídicas y Políticas, con ocasión del Vigésimo Aniversario del Curso de Especialización en Derecho Administrativo*, Tomo I, Tribunal Supremo de Justicia, Colección Libros Homenaje Nº 2, Caracas 2001, pp. 107-136 (**Anexo ABC-4**).

nal la regulación del sistema normativo de las obras de infraestructura, para lo cual el artículo 156.19 le asigna competencia para "el establecimiento, coordinación y unificación de normas y procedimientos técnicos para obras de ingeniería, de arquitectura y de urbanismo;" y el artículo 156.26 le atribuye competencia exclusiva para el establecimiento del "régimen [...] de los puertos, aeropuertos y su infraestructura". Además, el artículo 156.26 de la Constitución atribuye competencia exclusiva al Poder Nacional, en materia del "régimen de la navegación y del transporte aéreo, terrestre, marítimo fluvial y lacustre, de carácter nacional...".[6]

22. *En cuanto a la competencia de los Estados, el artículo 164 de la Constitución, además de un conjunto de atribuciones, también define unas materias que califica como de la "competencia exclusiva de los Estados", entre las cuales está "la ejecución, conservación, administración y aprovechamiento de las vías terrestres estadales" (ord. 9); y "la conservación, administración y aprovechamiento de carreteras y autopistas nacionales, así como de puertos y aeropuertos de uso comercial…." (ord. 10).*

23. *En esta forma, como consecuencia de la ejecución de la política de descentralización de competencias efectuada a favor de los Estados por el artículo 11.5 de la Ley Orgánica de Descentralización, Delimitación y Transferencia de Competencias del Poder Público de 1989,*[7] *en la Constitución de 1999 se "constitucionalizó" la previsión legal, asignándose competencia exclusiva a los Estados en materia de "la conservación, administración y aprovechamiento de [...] puertos y aeropuertos de uso comercial, en coordinación con el Poder Nacional"*[8] *(Art. 164.10). Como consecuencia de dicha norma, la competencia estadal a que se refiere el artículo 164.10 quedó establecida como competencias propias de los Estados, siéndoles asignadas por vía constitucional de manera exclusiva, que deben ejercer "en coordinación con el Poder Nacional.".*

24. *Con excepción de las competencias exclusivas asignadas a los tres niveles territoriales del Poder Público, respecto de la gran mayoría de las materias cuyas competencias se establecen en los artículos 156, 164 y*

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6 Véase **Anexo ABC-2 y LR-62**.

7 Véase **Anexo ABC-**5.

8 Véase sentencia de la Sala Constitucional del Tribunal Supremo de Justicia N° 2495, caso *Estado Carabobo vs Decreto 1.436 con Fuerza de Ley General de Puertos de fecha 19 de Diciembre de 2006*, en http://www.tsj.gov.ve/decisiones/scon/Diciembre/2495-191206-02-0265.htm (**Anexo ABC-10**).

178 de la Constitución, las mismas se distribuyen en general en forma concurrente, entre la República, los Estados y los Municipios; o entre la República y los Municipios; o entre la República y los Estados, habiendo quedado su precisión, en ausencia de una "enumeración" constitucional precisa,[9] *a lo que disponga la ley nacional.*[10]

25. *El anterior era el régimen constitucional y legal de la distribución de competencias entre el Poder Nacional y los Estados en materia aeroportuaria al momento de celebrarse el Contrato de Alianza Estratégica.*

II. EL EJERCICIO DE LA COMPETENCIA CONSTITUCIONAL EN MATERIA DE ADMINISTRACIÓN Y CONSERVACIÓN DE AEROPUERTOS POR PARTE DEL ESTADO NUEVA ESPARTA Y LA CELEBRACION DEL CONTRATO CON EL CONSORCIO UNIQUE IDC DE FECHA 27 DE FEBRERO DE 2004

26. *Conforme a las competencias asignadas a los Estados de la federación venezolana, de acuerdo con las previsiones de la Ley Orgánica de Descentralización, Delimitación y Transferencia de Competencias del Poder Público de 1989, el Estado Nueva Esparta desde 1991 asumió la competencia para la conservación, administración y aprovechamiento del Aeropuerto ubicado en la Isla de Margarita, lo que hizo mediante la sanción de la "Ley por la cual el Estado Nueva Esparta asume la Administración y el manteni-*

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9 Respecto de la carencia de precisión constitucional en la enumeración de las competencias concurrentes, véase nuestro voto salvado en la Asamblea Nacional Constituyente en 1999, en Allan R. Brewer-Carías, *Debate Constituyente, (Aportes a la Asamblea Nacional Constituyente)*, Tomo III, (18 octubre-30 noviembre de 1999), Fundación de Derecho Público-Editorial Jurídica Venezolana, Caracas, 1999, pp. 193 y 194 (**Anexo ABC-11**).

10 Conforme al artículo 165 de la Constitución las materias de competencia concurrente deben ser reguladas mediante las llamadas "leyes de base" que debe dictar la Asamblea Nacional y, además, por las llamadas "leyes de desarrollo" a ser sancionadas por los Consejos Legislativos de los Estados. Véase en general, José Peña Solís, "Dos nuevos tipos de leyes en la Constitución de 1999: leyes habilitantes y leyes de bases", en Revista de la Facultad de Ciencias Jurídicas y Políticas de la UCV, Nº 119, Caracas, 2000, pp. 79-123 (**Anexo ABC-12**). Lo importante a destacar aquí es que estas leyes de base no pueden referirse a las materias de la competencia exclusiva, global o parcial, que se asignan a los Estados indicadas en el artículo 164, sino sólo a las materias de la competencia concurrente. Además, esas leyes, en todo caso, conforme al artículo 206 de la Constitución, durante el proceso de su discusión, deben obligatoriamente someterse a consulta de los Estados, a través de los Consejos Legislativos.

miento de los puertos y aeropuertos públicos de uso comercial ubicados en su territorio" aprobada por su Asamblea Legislativa.[11]

27. *Para la prestación del servicio aeroportuario, el 29 de diciembre de 1993, el Gobernador del Estado celebró un contrato para la operación del aeropuerto Internacional Santiago Mariño con el Consorcio CVA. C.A. Posteriormente, por Resolución N° 011 de 19 de octubre de 2001 dictada por el Secretario General de Gobierno del Estado, se acordó rescindir el mencionado contrato, iniciándose el procedimiento administrativo correspondiente. Como consecuencia de la citada Resolución No. 011, el Ejecutivo del Estado Nueva Esparta reasumió la administración y mantenimiento del Aeropuerto Internacional del Caribe Santiago Mariño (en adelante el "Aeropuerto"), conforme a la competencia establecida en el artículo 11.5 de la Ley Orgánica de Descentralización, Delimitación y Transferencia de Competencias del Poder Público de 1989, que en 1999 se había incorporado en el artículo 194.10 de la Constitución. Para ello, por Decreto 477 de 22 de octubre de 2001 se creó en la Administración Pública del Estado, una estructura organizativa temporal, con patrimonio separado, para la administración y mantenimiento del Aeropuerto.*[12]

28. *Posteriormente, en fecha 27 de febrero de 2004, el Gobernador del Estado Nueva Esparta suscribió con el Consorcio UNIQUE IDC constituido por las sociedades mercantiles GESTIÓN E INGENIERÍA IDC, S.A. y FLUGHAFEN ZURICH S.A., ambas inscritas ante el Registro Mercantil Segundo de la Circunscripción Judicial del Estado Nueva Esparta, un Contrato de Alianza Estratégica para la Prestación de Servicios del Aeropuerto Internacional del Caribe "General en Jefe Santiago Mariño" (en adelante "Contrato de Alianza Estratégica").*[13]

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11 Véase la Ley por la cual el Estado Nueva Esparta asume la Administración y el Mantenimiento de los Puertos y Aeropuertos Públicos de Uso Comercial ubicados en su Territorio, *Gaceta Oficial* del Estado Nueva Esparta Extraordinaria de 31 de julio de 1991 (**Anexo CD-4)**. Véase en *Informe sobre la descentralización en Venezuela. Memoria del Dr. Allan R. Brewer-Carías, Ministro de Estado para la Descentralización*, Presidencia de la República, Caracas 1994, pp. 992- 997 (**Anexo ABC-13)**.

12 Según se indica en Decreto No. 1.188 de la Gobernación del Estado Nueva Esparta de 26 de febrero de 2004 (**Anexo CD-16, ABC-14)**.

13 Contrato de Alianza Estratégica de 27 de febrero de 2004 **(Anexo CD-17, ABC-15)**.

29. *Dicho contrato lo suscribió el Gobernador del Estado, conforme a la competencia que el artículo 164.10 de la Constitución de 1999 le asigna en forma "exclusiva" a los Estados de la federación venezolana en materia de "conservación, administración y aprovechamiento de carreteras y autopistas nacionales, así como de puertos y aeropuertos de uso comercial, en coordinación con el Ejecutivo Nacional."*[14] *La misma competencia, como se dijo, estaba establecida en el artículo 11.5 de la Ley Orgánica de Descentralización, Delimitación y Transferencia de Competencias del Poder Público de 1989 (reformada en 1993),*[15] *mediante la cual se transfirió a los Estados de la federación "la administración y mantenimiento de puertos y aeropuertos públicos de uso comercial," la cual como se explicó anteriormente (***Véase supra ¶ 19***) en el marco de la Constitución de 1961, era una materia de competencia del Poder Nacional.*

30. Como se indicó en el "Considerando No. 10" del Contrato de Alianza Estratégica, "en fecha 26 de Febrero de 2004, el Gobernador dictó el Decreto N° 1.188, publicado en la *Gaceta Oficial* del Estado Nueva Esparta Extraordinaria N° 284, de fecha 26 de febrero de 2004[16] en donde se exponen las razones que justifican la necesidad de contratar directamente la prestación del servicio aeroportuario y el mantenimiento y operación del Aeropuerto Internacional del Caribe 'General en Jefe Santiago Mariño' para lo cual se autorizó la firma de una Alianza Estratégica entre el Estado Nueva Esparta y el Consorcio UNIQUE IDC.[17]

31. El Contrato se suscribió, conforme a lo dispuesto en la Ley por la cual el Estado Nueva Esparta asumió la administración y el mantenimiento de los puertos y aeropuertos públicos de uso comercial ubicados en su territorio de 1991[18] y a la Ley de Concesiones de Obras y Servicios Públicos del Estado Nueva Esparta de 1997,[19] con base en el acto administrativo dictado por el Gobernador contenido en el Decreto No. 1.188 de 26 de febrero de 2004, cuyo

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14 **Anexo ABC-2 y LR-62**.

15 Véase Ley Orgánica de Descentralización, Delimitación y Transferencia de Competencias del Poder Público de 1993 en *Gaceta Oficial,* Nº 35.327 de 28 de octubre de 1993 (**Anexo ABC-7**).

16 Véase **Anexo CD-16, ABC-14**.

17 **Anexo CD-17, ABC-15**.

18 **Anexo ABC-13**.

19 Ley de Concesiones de Obras y Servicios Públicos del Estado Nueva Esparta de 19 de junio de 1997 (**Anexo CD-7, ABC-16**).

articulado está precedido de una serie de "Considerandos" que constituyen la motivación del mismo a los efectos de proceder a la adjudicación directa del contrato, en los cuales en resumen, se indicó lo siguiente:

- Que era indispensable y urgente continuar con la prestación de los servicios en el aeropuerto, y que se habían producido una serie de situaciones comprobadas de emergencia en dicha organización que podían afectar el servicio.

- Que por las referidas razones de necesidad y urgencia, el Gobernador había decidido proceder a la adjudicación directa en la contratación del servicio de administración y mantenimiento del Aeropuerto.

- Que "no es necesario abrir procedimiento licitatorio alguno, por cuanto la adjudicación a que se hace referencia en este decreto es la prestación de un servicio cuyo contrato fue resuelto por el Ejecutivo estadal en virtud del incumplimiento del concesionario, concretándose con toda claridad el supuesto de hecho previsto en el artículo 23, numeral 4 de la Ley de Concesiones de Obras y Servicios Públicos del Estado Nueva Esparta."

- Que el Estado Nueva Esparta tiene competencia en materia aeroportuaria a los fines de garantizar la efectiva prestación del servicio aeroportuario y el interés del colectivo y las necesidades de la sociedad.

32. Por otra parte, de conformidad con el artículo 23.4 de la Ley de Concesiones de Obras y Servicios Públicos del Estado Nueva Esparta de 1997, "no será necesario abrir el procedimiento licitatorio," "cuando la adjudicación tenga por objeto continuar la ejecución de obras o la prestación de servicios cuyos contratos hayan sido resueltos por el Ejecutivo Estatal, ya sea por incumplimiento del concesionario, rescate anticipado de la concesión o quiebra del concesionario, conforme a lo establecido en esta Ley."[20] Se trata, por tanto, de una excepción al procedimiento licitatorio, correspondiendo al Gobernador del Estado tomar la decisión al respecto; excepción que se aplicó, precisamente al Contrato de Alianza Estratégica.

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[20] Véase **Anexo CD-7, ABC-16**.

33. Conforme a lo anterior, por tanto, el Ejecutivo del Estado, procedió a dictar el acto administrativo debidamente motivado, el Decreto No. 1.188 de 26 de febrero de 2004, procediendo, conforme a la competencia que constitucional y legalmente tenía atribuida, a adjudicar "directamente la contratación del servicio público aeroportuario al Consorcio UNIQUE IDC, inscrito por ante el Registro Mercantil Segundo de la Circunscripción Judicial del Estado Nueva Esparta en fecha 25 de febrero de 2004, bajo el N° 70, Tomo 5-A, el cual está conformado por las empresas FLUGHAFEN ZURICH S.A., y la empresa GESTION E INGENIERIA IDC S.A., sociedades debidamente inscritas en la misma Oficina de Registro Mercantil, también en fecha 25 de febrero de 2004 bajo los N° 66 y 67 respectivamente, Tomo 5-A."[21]

34. A los efectos de dicha adjudicación directa, como se puede apreciar de la motivación del Decreto No. 1.188 de 26 de febrero de 2004, se explicó cómo se verificaron las condiciones establecidas en el artículo 23.4 de la Ley de Concesiones de Obras y Servicios Públicos del Estado Nueva Esparta ("Ley de Concesiones"), en el sentido de que el acto administrativo adoptado buscó "continuar," mediante un nuevo contrato "la ejecución de obras o la prestación de servicios cuyos contratos hayan sido resueltos por el Ejecutivo Estatal," en este caso, del servicio de administración y mantenimiento del Aeropuerto Internacional Santiago Mariño, que había sido objeto de contrato suscrito con el Consorcio CVA C.A., el cual había sido resuelto por la Gobernación del Estado "por incumplimiento del concesionario." La norma del artículo 23.4 de la Ley de Concesiones, lo que prevé como condición para su aplicación mediante la adjudicación directa es que el servicio hubiese estado prestándose bajo régimen de contrato de concesión, que el contrato hubiese sido rescindido por la Administración, y que ésta hubiese decidido continuar la prestación del servicio mediante otro nuevo contrato.

35. Debo advertir que contrariamente a lo afirmado por el Experto Carlos Enrique Mouriño, la norma del artículo 23.4 de la Ley de Concesiones no hace mención a que la adjudicación directa allí prevista deba ser necesariamente "consecuencia de un estado de urgencia que comprometa la continuidad en la prestación del servicio" (Informe de Experto del profesor Carlos Enrique Mouriño Vaquero, en adelante "***Informe C. E. Mouriño***", ¶ ***22***), o que el mismo deba encontrarse "bajo amenaza de interrupción" (***Informe***

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21 **Anexo CD-16, ABC-14**.

C.E. Mouriño,* ¶ *24). El supuesto al que hace referencia el experto es distinto, subsumible quizá en lo previsto en el artículo 23.2 de esa Ley estadal.

36. Por el contrario, en el caso bajo estudio, al rescindir el contrato anterior, la Administración resolvió en primera instancia asumir temporalmente la prestación directa del servicio, hasta que tomó la decisión de continuarla indirectamente, para lo cual procedió conforme la habilitaba la Ley, mediante la suscripción de un nuevo contrato.

37. En efecto, para evitar la interrupción que podía haberse producido como consecuencia de la rescisión del Contrato con el Consorcio CVA S.A., fue que la Administración del Estado Nueva Esparta asumió directamente la prestación del servicio, creando para tal efecto una organización temporal, con patrimonio autónomo, lo que precisamente buscaba asegurar la continuidad del mismo, hasta que se pudiera proceder a efectuar una nueva contratación. No tiene lógica alguna deducir de ello, como se hace en el ***Informe C.E. Mouriño***, que como el servicio no estaba efectivamente interrumpido con la rescisión del contrato precedente, pues la Gobernación aseguraba temporalmente su prestación directa, entonces no podía procederse a la adjudicación directa para continuar la prestación mediante concesión. En dicho informe, en efecto se afirma que la previsión del artículo 23.4 de la Ley de Concesiones resultaba inaplicable en este caso pues no se podía considerar "que para el 26 de febrero (dos años y medio después del momento en que se terminó anticipadamente el contrato con el Consorcio CVA S.A.) el servicio público aeroportuario se encontraba bajo amenaza de interrupción, o se pudiera ver afectada la continuidad o calidad en la prestación del mismo, pues el propio Estado Nueva Esparta se encontraba brindando el servicio con la continuidad requerida" (***Informe C.E. Mouriño,* ¶ *24***).

41. Basta leer la norma del artículo 23.4 de la Ley para constatar que el supuesto que permite la adopción de la decisión administrativa de proceder a la adjudicación directa de un contrato de concesión, es sola y exclusivamente que "la adjudicación *tenga por objeto continuar la ejecución de obras o la prestación de servicios cuyos contratos hayan sido resueltos* por el Ejecutivo Estatal, ya sea por incumplimiento del concesionario, rescate anticipado de la concesión o quiebra del concesionario, conforme a lo establecido en esta Ley."[22] Es decir, el supuesto se aplica única y exclusivamente cuando

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22 **Anexo CD-7, ABC-16**.

en los casos de servicios públicos que venían siendo prestados mediante concesión, la Administración haya decidido resolver el contrato por cualquier causa, procediendo la adjudicación directa para continuar la prestación del servicio mediante una nueva concesión, independientemente de las medidas temporales que haya adoptado la Administración para que entre una concesión y otra se asegurase la prestación del servicio y evitar su interrupción.

III. EL CONTRATO DE ALIANZA ESTRATÉGICA SUSCRITO CON EL CONSORCIO UNIQUE IDC EN FECHA 27 DE FEBRERO DE 2004 PARA LA PRESTACIÓN DEL SERVICIO DE ADMINISTRACIÓN Y CONSERVACIÓN DE AEROPUERTOS COMO "CONTRATO ADMINISTRATIVO"

42. El ya mencionado Contrato de Alianza Estratégica para la prestación de los servicios aeroportuarios en el Estado Nueva Esparta, suscrito por el Estado Nueva Esparta y el Consorcio UNIQUE IDC, dentro de la clasificación tradicional de los contratos públicos o contratos del Estado entre contratos administrativos y contratos de derecho privado de la Administración, sin duda, podía calificarse como un "contrato administrativo."

1. Precisión sobre el tema de los contratos administrativos

43. Como en toda América Latina, la noción de contrato administrativo también se desarrolló en Venezuela desde el siglo pasado, fundamentalmente por los aportes de la doctrina del derecho administrativo[23] y de la jurisprudencia contencioso administrativa;[24] desarrollo al cual hemos contribuido en una u otra forma todos los que nos hemos ocupado de esta disciplina.[25] A diferencia de lo que ocurrió en otros países latinoamericanos, sin em-

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23 Véase por ejemplo, Rafael Badell Madrid, *Régimen Jurídico del Contrato Administrativo*, Caracas 2001, pp. 49-50 **(Anexo ABC-17)**.

24 Véase Allan R. Brewer-Carías, "Los contratos de la administración en la jurisprudencia venezolana," en *Revista de la Facultad de Derecho* N° 26, Universidad Central de Venezuela, Caracas, 1963, pp. 127-154 **(Anexo ABC-18)**.

25 Véase por mi parte, entre otros trabajos, Allan R. Brewer-Carías, "Las cláusulas obligatorias y los principios especiales en la contratación administrativa», *Estudios de Derecho Administrativo*, Ediciones Rosaristas, Colegio Nuestra Señora del Rosario, Bogotá 1986, pp. 91-124 **(Anexo ABC-19)**; "El régimen de selección de contratistas en la Administración Pública y la Ley de Licitaciones» en *Revista de Derecho Público*, Nº 42, Editorial Jurídica Venezolana, Caracas, Abril-junio 1990, pp. 5-25 **(Anexo ABC-20)**; *Contratos Administrativos*, Colección Estudios Jurídicos, N° 44, Editorial Jurídica Venezolana, (Caracas 1992), Reimpresión: Caracas 1997

bargo, en Venezuela no se dictó una legislación general en materia de contratos administrativos, encontrándose dicha denominación escasamente en algunas leyes, como la derogada Ley Orgánica de la Corte Suprema de Justicia de 1976 o la derogada Ley Forestal de Suelos y Aguas de 1965,[26] lo que incluso provocó el propio cuestionamiento de la noción.[27] En todo caso, sólo fue en

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(Anexo ABC-21); "Nuevas consideraciones sobre el régimen jurídico de los contratos del Estado en Venezuela," en *Estudios de Derecho Administrativo 2005-2007*, Editorial Jurídica Venezolana, Caracas 2007, pp. 417-451 **(Anexo ABC-22)**.

[26] En la Ley Orgánica de la Corte Suprema de Justicia de 1976, la cual fue sustituida por la Ley Orgánica del Tribunal Supremo de Justicia de 2004, se utilizó la expresión "contratos administrativos" a los solos efectos de atribuir competencia a algunos órganos de la jurisdicción contencioso administrativa para resolver las controversias que resultasen de "contratos administrativos" suscritos por la República, los Estados y los Municipios (Art. 5,25); previsión y terminología que sin embargo desapareció de la Ley Orgánica del Tribunal Supremo de Justicia de 2010 (*Gaceta Oficial* Nº 39.522, de 01-10-2010) y que no se incorporó en la nueva Ley Orgánica de la Jurisdicción Contencioso Administrativa de 2010 (*Gaceta Oficial* No. 39447 de 16-06-2010). Por su parte, en la derogada Ley Forestal, de Suelos y Aguas de 1965 (*Gaceta Oficial* Nº 1.004 Extraordinario de 26-01-1966), las concesiones de explotación forestal se calificaron como tales "contratos administrativos" (Art. 65), terminología que también desapareció de dicho régimen en la nueva Ley de Bosques y Gestión Forestal, que derogó la Ley de 1965 (*Gaceta Oficial* Nº 38.946 de 05-06-2008). Más recientemente, la expresión "contratos administrativos" se utilizó en Ley de Reserva de 2009 de los bienes y servicios conexos a las actividades primarias de hidrocarburos (*Gaceta Oficial* Nº 39.173 del 07-05-2009), para "reconocer," como tales, *ex post facto*, los contratos relativos a dichos servicios; calificativo que sólo tuvo pocos días de efecto, pues dichos contratos quedaron extinguidos de pleno derecho al entrar en aplicación dicha Ley.

[27] Véase en general: Jesús Caballero Ortiz, *"*Deben subsistir los contratos administrativos en una futura legislación?", en *El Derecho Público a comienzos del siglo XXI: Estudios homenaje al Profesor Allan R. Brewer-Carías,* Tomo II, Instituto de Derecho Público, UCV, Civitas Ediciones, Madrid, 2003, pp. 1765-1777 **(Anexo ABC-23)**; Rafael Badell Madrid, se refiere al vago e impreciso criterio utilizado para su identificación, en *Régimen Jurídico del Contrato Administrativo*, Caracas, 2001, p. 32 **(Anexo ABC-24);** Gonzalo Pérez Luciani, en "Los contratos administrativos en Venezuela," en Allan R. Brewer-Carías (Director), *Derecho Público en Venezuela y Colombia: Archivo de derecho Público y Ciencias de la Administración*, Caracas, 1986, p. 253 **(Anexo ABC-25**); Allan R. Brewer-Carías, "La evolución del concepto de contrato administrativo," en *Libro Homenaje al Profesor Antonio Moles Caubet*, Tomo I, Facultad de Ciencias Jurídicas y Políticas, Universidad Central de Venezuela, Caracas, 1981, pp. 41-69 **(Anexo ABC-26)** Este trabajo fue publicado también en Allan R. Brewer-Carías, *Estudios de Derecho Administrativo,* Ediciones Rosaristas, Colegio Nuestra Señora del Rosario, Bogotá, 1986, pp. 61-90; y como "Evoluçao do conceito do contrato administrativo," *en Revista de Direito Publico* Nos. 51-52, Sao Paulo, July-December 1979, pp. 5-19. Véase además, Allan

el año 2008 cuando se dictó una Ley de Contrataciones Públicas, en la cual por lo demás, no se utiliza la denominación de contrato administrativo.[28]

44. Por otra parte, no hay ni ha habido en la Constituciones venezolanas definición alguna sobre los "contratos administrativos," pudiéndose sólo encontrar en ellas referencias a los "contratos de interés público" nacional, estadal o municipal, fundamentalmente a los efectos de regular la intervención del órgano legislativo para su aprobación o autorización (Art. 150, 151, Constitución).[29]

45. Todo ello, por supuesto, no ha impedido que la expresión contratos administrativos se utilice en la teoría del derecho administrativo para identificar algunos contratos del Estado o contratos públicos que por su objeto tienen un régimen preponderante de derecho público.[30] Por ello he sostenido que "la noción de contrato administrativo sólo puede ser aceptada para

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R. Brewer-Carías, *Contratos Administrativos,* Editorial Jurídica venezolana, Caracas 1997*,* pp. 13 ss. **(Anexo ABC-27)**.

28 La Ley de Contrataciones Públicas fue dictada mediante Decreto Ley Nº 5.929 de fecha 11 de marzo de 2008, derogó vieja la Ley de Licitaciones de 2001. Fue reformada por Ley publicada en *Gaceta Oficial* Nº 39.165 de 24 de abril de 2009 **(Anexo ABC-28)**. Véase sobre la Ley, Allan R. Brewer-Carías, "Los contratos del Estado y la ley de Contrataciones Públicas. Ámbito de aplicación," en Allan R. Brewer-Carías *et a*l., *Ley de Contrataciones Públicas*, Editorial Jurídica Venezolana, Caracas 2008; Segunda Edición, Caracas 2009 **(Anexo ABC-29)**. Por ello, se ha considerado que la noción de contrato administrativo se ha abandonado frente al régimen uniforme establecido en la nueva legislación. Véase José Ignacio Hernández, "El contrato administrativo en la Ley de Contrataciones Públicas venezolana," en *Idem*, p. 235 **(Anexo ABC-30)**.

29 Véase en general: Jesús Caballero Ortiz, *"*Los contratos administrativos, los contratos de interés público y los contratos de interés nacional en la Constitución de 1999", en *Estudios de Derecho Administrativo: Libro Homenaje a la Universidad Central de Venezuela,* Volumen I, Imprenta Nacional, Caracas, 2001, pp. 139-155 **(Anexo ABC-31)**; Allan R. Brewer-Carías, "Los contratos de interés público nacional y su aprobación legislativa" en *Revista de Derecho Público,* Nº 11, Caracas, 1982, pp. 49-54 **(Anexo ABC-32)**; Allan R. Brewer-Carías, *Contratos Administrativos, op. cit.*, pp. 28-36 **(Anexo ABC-21)**; Allan R. Brewer-Carías, *Debate Constituyente, Aportes a la Asamblea Nacional Constituyente,* Tomo II, Caracas, 1999, p. 173 (**Anexo ABC-33**).

30 Véase Allan R. Brewer-Carías, "La interaplicación del derecho público y del derecho privado a la Administración Pública y el proceso de huída y recuperación del derecho administrativo," en *Las Formas de la Actividad Administrativa. II Jornadas Internacionales de Derecho Administrativo "Allan Randolph Brewer-Carías,*" Fundación de Estudios de Derecho Administrativo, Caracas, 1996, pp. 58-60 **(Anexo ABC-34)**.

identificar un tipo de contrato público (contratos de Administración Pública)" que en virtud de una finalidad pública específica perseguida que puede ser por ejemplo la prestación de un servicio público, la construcción de una obra pública, el uso de bienes públicos, un empréstito público,[31] "está sujeto preponderantemente a un régimen de derecho público, pero no con el objeto de distinguir entre contratos públicos sometidos al derecho público y otros supuestamente sujetos a un régimen de derecho privado. La preponderancia de uno u otro régimen es ahora lo importante."[32]

46. Es bajo este ángulo, por tanto, que el contrato suscrito entre el Estado Nueva Esparta y el Consorcio UNIQUE IDC en fecha 27 de febrero de 2004, "denominado Alianza Estratégica para la Prestación de Servicios del Aeropuerto Internacional del Caribe "General en Jefe Santiago Mariño" precisamente por su objeto vinculado a la prestación del servicio público de transporte aéreo, se puede calificar como "contrato administrativo," sometido a las normas preponderantemente de derecho público que rigen la contratación estatal, en este caso, por ejemplo, las previsiones de los artículos 150 y 151 de la Constitución de la República; el artículo 50 de la Constitución del Estado Nueva Esparta, la normas relativas a Aeronáutica Civil, y la Ley de Concesiones de Obras y Servicios Públicos del Estado Nueva Esparta de 1997.[33]

47. Por otra parte, de acuerdo con la terminología utilizada en el texto constitucional (Art. 151) de "contratos de interés público" destinada a calificar ciertos contratos públicos, y que algunos autores han identificado con los "contratos administrativos,"[34] el Contrato de Alianza Estratégica sin duda es uno de ellos. Dichos contratos, de acuerdo con lo expresado por la Sala Constitucional del Tribunal Supremo de Justicia en sentencia No. 2.241

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31 Por ejemplo, Rafael Badell considera como "contratos administrativos," a contratos como por ejemplo, los relativos a la prestación de "servicios públicos," a la construcción de obras públicas, al uso de bienes públicos, a la explotación de obras públicas o de recursos naturales o de monopolios fiscales. Véase Rafael Badell Madrid, *Régimen Jurídico del Contrato Administrativo*, Caracas 2001, pp. 50-51 **(Anexo ABC-24).**

32 Véase Allan R. Brewer-Carías, *Contratos administrativos, op. cit.*, p. 14 **(Anexo ABC-27)**.

33 Véase **Anexo CD-7, ABC-16**.

34 Véase Eloy Lares Martínez, *Manual de Derecho Administrativo*, Universidad Central de Venezuela, Caracas 1983, p. 306 **(Anexo ABC-35)**.

del 24 de septiembre de 2002,[35] son aquellos sucritos por una parte, por las personas estatales de derecho público territoriales, es decir, por la Republica, los Estados y los Municipios en los que esté envuelto un interés público nacional, estadal y municipal;[36] y por la otra, en general, por empresas privadas constituidas o domiciliadas en el país, o por consorcios formados por las mismas.

2. Precisión sobre la figura del "consorcio" en el derecho venezolano

48. El Contrato de Alianza Estratégica fue suscrito entre el Estado Nueva Esparta y el Consorcio UNIQUE IDC, siguiendo una práctica común en la contratación pública en Venezuela, a los efectos de lograr la más eficiente prestación por parte del contratista conforme al objeto del contrato. Un consorcio de empresas no implica la extinción o sustitución de las empresas consorciadas, en este caso de las sociedades mercantiles GESTIÓN E INGENIERÍA IDC, S.A. y FLUGHAFEN ZURICH S.A., inscritas ante el Registro Mercantil Segundo de la Circunscripción Judicial del Estado Nueva

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35 La Sala Constitucional del Tribunal Supremo de Justicia como el más alto y ultimo interprete de la Constitución en esa sentencia (Caso: *Anulación del artículo 80 de la Ley Orgánica de Administración Financiera del Sector Público)*, estableció una interpretación vinculante, y redujo la categoría de los "contratos de interés público" (Art. 150 C.) a aquellos suscritos o celebrados por la Republica, los Estados y los Municipios, en consecuencia, excluyendo de tal calificación a los contratos públicos suscritos por institutos autónomos o empresas públicas nacionales como por ejemplo podría ser PDVSA, y sus empresas filiales. El argumento central de la decisión de la Sala se refirió al tema de la autorización parlamentaria previa en relación con los contratos de deuda pública suscritos por la República, los Estados y los Municipios. Véase en http://www.tsj.gov.ve/decisiones/scon/Septiembre/2241-240902-00-2874%20.htm **(Anexo ABC-36)**.

36 Sobre esta sentencia véase los comentarios críticos en Allan R. Brewer-Carías, "Sobre los Contratos del Estado en Venezuela," en *Derecho Administrativo Iberoamericano (Contratos Administrativos, Servicios públicos, Acto administrativo y procedimiento administrativo, Derecho administrativo ambiental, Limitaciones a la libertad), IV Congreso Internacional de Derecho Administrativo***,** Mendoza, Argentina, 2010, pp. 837-866 **(Anexo ABC-37)**; y en *Revista Mexicana Statum Rei Romanae de Derecho Administrativo,* No. 6, Homenaje al Dr. José Luis Meilán Gil, Facultad de Derecho y Criminología de la Universidad Autónoma de Nuevo León, Monterrey, Enero-Junio 2011, pp. 207-252; "Los contratos del Estado y la Ley de Contrataciones Públicas. Ámbito de aplicación," en Allan R. Brewer-Carías et al., *Ley de Contrataciones Públicas***,** Editorial Jurídica Venezolana, Colección Textos legislativos No. 44 (2ª Edición Actualizada y aumentada), Caracas 2009, pp. 9-47 **(Anexo ABC-29)**.

Esparta; ni la constitución de una nueva sociedad mercantil. Cada empresa consorciada conserva su personalidad jurídica, pero las mismas actúan en conjunto de acuerdo al convenio del consorcio, el cual como tal no tiene personalidad jurídica. Esto último, que es lo único que destaca el profesor Mouriño en su Informe (***Informe C.E. Mouriño, ¶¶ 34, 35, 62-64***), y que es un tema que no está en discusión, no implica que los consorcios no sean una realidad incontestable en la legislación y en la práctica contractual pública en Venezuela.

49. En el campo de la contratación pública, los consorcios se han previsto legalmente en el ámbito nacional en la Ley Orgánica sobre Promoción de la Inversión Privada bajo el régimen de Concesiones dictada por Decreto-Ley N° 318 de 17 de septiembre de 1999,[37] en la cual al regularse las "condiciones subjetivas de los licitantes" se estableció expresamente que pueden "participar en los procesos de licitación todas las personas jurídicas, consorcios o asociaciones temporales nacionales o extranjeras, que tengan plena capacidad de obrar y de acreditar su solvencia económica, financiera, técnica y profesional" (art. 20). Las normas de dicha Ley, conforme se indica en el artículo 5 de la misma, pueden aplicarse a los Estados y Municipios "para el otorgamiento en concesión de las obras o servicios públicos de su competencia," y las mismas, en todo caso, conforme al artículo 4 del Código Civil, son de aplicación analógica respecto de cualquier contrato público en los que intervenga como parte un "consorcio de empresas."

50. La Sala Político Administrativa del Tribunal Supremo de Justicia se ha pronunciado sobre la figura de los consorcios en la sentencia No 75 de fecha 23 de enero de 2003 (Caso *Radiodata-Datacraft-Saeca v. C.V.G Benalum C.A.*)[38] citada – sin embargo - en forma imprecisa en el ***Informe C.E. Mouriño,*** **(¶ 35)**, la cual fue dictada al analizar la capacidad procesal de un consorcio específico, el Consorcio Radiodata-Datacraft-Saeca que había sido constituido para licitar, suscribir y ejecutar un contrato con una empresa del Estado, C.V.G Bauxilum C.A. para la instalación y montaje de un servicio de teléfonos en una zona minera. En ese caso, la Sala Político Adminis-

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37 Véase Ley Orgánica sobre Promoción de la Inversión Privada bajo el régimen de Concesiones de 1999, en *Gaceta Oficial* No. 5394 Extraord. de 25 de octubre de 1999 (**Anexo ABC-38)**.

38 Véase sentencia No 75 de fecha 23 de enero de 2003 (Caso *Radiodata-Datacraft-Saeca v. C.V.G Benalum C.A.*) en http://www.tsj.gov.ve/decisiones/spa/Enero /00075-230103-2001-0145.htm (**Anexo ABC-39**).

trativa entró de lleno a analizar los consorcios en el derecho venezolano, considerándolos como unión, grupo o agrupación de empresas que si bien no han sido objeto de una regulación integral, ni tienen *per se* personalidad jurídica, son una realidad jurídica incontestable con plena capacidad jurídica de obrar que está reguladas en diversas normas del ordenamiento como es precisamente, la mencionada Ley Orgánica sobre Promoción de la Inversión Privada bajo el régimen de Concesiones de 1999 (art. 20).[39]

51. Lo importante de la decisión de la Sala Político Administrativa es su conclusión de que los mismos constituyen una realidad jurídica y económica "que el derecho no puede desconocer" y que, además, en la práctica forman parte de contratos públicos reconocidos en los mismos por los entes públicos como "Parte" en el contrato, como fue el caso del Consorcio Radiodata-Datacraft-Saeca reconocido como "Contratista" por la empresa del Estado, C.V.G Bauxilum, y es el caso del Consorcio UNIQUE-IDC, reconocido en el Contrato de Alianza Estratégica por el Estado Nueva Esparta como "La Contratista."

52. En consecuencia, en los contratos públicos celebrados con consorcios de empresas, conforme a la Ley Orgánica sobre Promoción de la Inversión Privada bajo el Régimen de Concesiones tienen como tales consorcios "plena capacidad de obrar" a los efectos del contrato y su ejecución. En el caso del Contrato de Alianza Estratégica, el mismo se celebró entre el Estado Nueva Esparta y el Consorcio UNIQUE-IDC, el cual como expresamente se indica en el texto del contrato, "se encuentra constituido por las sociedades mercantiles GESTIÓN E INGENIERÍA IDC, S.A. y FLUGHAFEN ZURICH S.A., ambas empresas inscritas ante el Registro Mercantil Segundo de la Circunscripción Judicial del Estado Nueva Esparta en fecha 25 de febrero de 2004, bajo los números 67 y 66 respectivamente, Tomo 5-A."[40]

3. La intervención del órgano legislativo nacional en la contratación pública y la no exigencia de autorización de la Asamblea Nacional para la celebración del Contrato de Alianza Estratégica

53. En el ordenamiento jurídico venezolano, en algunos casos, debido a la importancia de determinados contratos suscritos por órganos del

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39 **Anexo ABC-38**.

40 **Anexo CD-17, ABC-15**.

Estado, para que algunos de ellos tengan validez o produzcan efectos, se requiere de la intervención de los órganos legislativos en la formación de la voluntad administrativa. Esta intervención puede ser previa, mediante autorización, o posterior, mediante aprobación.[41]

54. Esta distinción, tradicional en el constitucionalismo histórico venezolano, ha sido recogida por la Constitución de 1999, en la cual se dispuso en primer párrafo del artículo 150 que "la celebración de los contratos de interés público *nacional* requerirá la **aprobación** de la Asamblea Nacional sólo *en los casos que determine la ley";* agregándose en el aparte de la misma norma, en concordancia con el artículo 187.9, la exigencia de **autorización** parlamentaria respecto de los contratos de interés público *municipal, estadal o nacional* celebrados "con Estados o entidades oficiales extranjeras o con sociedades no domiciliadas en Venezuela" o de los traspasos a ellos de dichos contratos.[42] En consecuencia, y salvo la excepción directamente establecida en la Constitución, sólo cuando mediante ley se determine expresamente que un contrato de interés público nacional debe someterse a la aprobación de la Asamblea, ello se convierte en un requisito de eficacia del contrato.[43] En el caso del Contrato de Alianza Estratégica no existe ley en este

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41 Véase Allan R. Brewer-Carías, "La formación de la voluntad de la Administración Pública Nacional en los contratos administrativos," en *Revista de la Facultad de Derecho*, N° 28, Universidad Central de Venezuela, Caracas, 1964, pp. 61-112 **(Anexo ABC-40)**, publicado también "con referencias al derecho uruguayo por Horacio Casinelli Muñoz," en *Revista de Derecho, Jurisprudencia y Administración*, Tomo 62, N° 2-3, Montevideo 1965, pp. 25-56; y *Contratos Administrativos*, Caracas 1992, pp. 85 y ss.

42 Ello se ha corroborado por la Sala Constitucional del Tribunal Supremo la cual en sentencia No. 2241 de 24 de septiembre de 2002, estableció un criterio interpretativo conforme al cual, en el artículo 150, primer párrafo de la Constitución se establece una aprobación parlamentaria sólo en los casos en que así lo establezca la ley en cada caso, la cual, como tal aprobación se debe dar con posterioridad a la celebración del contrato; y en los artículos 150, aparte y 187.9 de la Constitución lo que se establece directamente es una autorización parlamentaria, que se debe dar con anterioridad a la celebración del contrato. Véase en http://www.tsj.gov.ve /decisiones/scon/septiembre/2241-240909-00-2874%20.htm (**Anexo ABC-36**).

43 La Sala Constitucional del Tribunal Supremo de Justicia, en la misma sentencia No. 2241 de 24 de septiembre de 2002, estableció un criterio interpretativo conforme al cual la aprobación parlamentaria en los casos en que así lo establezca la ley, se debe dar con posterioridad a la celebración del contrato -como condición de eficacia de la contratación- (como en el caso del Art. 150, primer párrafo). En cambio, en los otros supuestos relativos a una autorización, la misma se debe dar con anterioridad a la celebración del contrato -como condición de validez de la contratación- (como en el caso del Art, 150, aparte). *Idem*. (**Anexo ABC-36**).

sentido que requiera la aprobación de dicho contrato por la Asamblea Nacional porque considere que el mismo sea uno de interés público nacional. No hay discusión, por lo demás, en cuanto a que este contrato no es de "interés público nacional".

55. En relación con contratos de "interés público estadal," conforme al artículo 150 constitucional, los mismos sólo requieren autorización parlamentaria por parte de la Asamblea Nacional cuando se celebren con "Estados o entidades oficiales extranjeras o con sociedades no domiciliadas en Venezuela." Por tanto, cuando dichos contratos se celebren con sociedades domiciliadas en el país, así se trate de empresas extranjeras, los mismos no requieren de dicha autorización, como fue precisamente el caso del Contrato de Alianza Estratégica, celebrado entre el Estado Nueva Esparta y el Consorcio UNIQUE IDC, el cual según se indica en el contrato, "se encuentra constituido por las sociedades mercantiles GESTIÓN E INGENIERÍA IDC, S.A. y FLUGHAFEN ZURICH S.A., ambas empresas inscritas ante el Registro Mercantil Segundo de la Circunscripción Judicial del Estado Nueva Esparta en fecha 25 de febrero de 2004, bajo los números 67 y 66 respectivamente, Tomo 5-A."

56. No es cierto, por tanto, que el Consorcio UNIQUE IDC esté "conformado por las sociedades mercantiles Flughafen Zürich A.G. y Gestión e Ingeniería IDC, S.A." constituidas en Chile y Suiza, como erradamente lo afirma el profesor Carlos Enrique Mouriño Vaquero (***Informe C. E. Mouriño***, ¶ 7); sino como lo indica el mismo texto del "Contrato de Alianza Estratégica," el Consorcio está constituido por "las sociedades mercantiles GESTIÓN E INGENIERÍA IDC, S.A. y FLUGHAFEN ZURICH S.A., ambas empresas inscritas ante el Registro Mercantil Segundo de la Circunscripción Judicial del Estado Nueva Esparta," es decir, domiciliadas en el país, aún cuando originalmente inscritas en Chile y Suiza, respectivamente. La Constitución no exige para que se aplique la excepción, que las empresas que celebren los contratos sean empresas "nacionales;" lo que exige es que sean empresas domiciliadas en Venezuela, pudiendo ser por supuesto, empresas extranjeras con o sin sucursales en el país siempre que estén domiciliadas.

57. Por tanto, el Contrato de Alianza Estratégica no requería en forma alguna, haber sido autorizado por la Asamblea Nacional como erradamente se afirma en el ***Informe C. E. Mouriño*** (¶¶ ***37, 38***), porque supuestamente hubiese sido celebrado "por un consorcio constituido por sucursales de sociedades mercantiles domiciliadas en el extranjero." (¶ ***34***). Ante ello debe

recordarse la existencia de las precisas normas del Código de Comercio que establecen que las "sociedades constituidas también en país extranjero que "sólo tuvieren en la República sucursales o explotaciones que no constituyan su objeto principal, conservan su nacionalidad, pero se les considerará domiciliadas en Venezuela"(art. 354). A tal efecto, exige la misma norma que "si son sociedades por acciones, registrarán en el Registro de Comercio del lugar donde está la agencia o explotación, y publicarán en un periódico de la localidad, el contrato social y demás documentos necesarios a la constitución de la compañía, conforme a las leyes de su nacionalidad, y una copia debidamente legalizada de los artículos referentes a esas leyes" (art. 354).[44]

58. La figura de las sociedades extranjeras, con o sin sucursales en el país, domiciliadas en Venezuela, ha estado tradicionalmente regulada en el Código de Comercio, y a ellas es que se refiere el artículo 150 de la Constitución en el cual sólo se requiere la autorización parlamentaria de la Asamblea Nacional para la celebración de contratos de interés público, cuando la empresa co-contratante extranjera no esté domiciliada en el país; por lo que si se ha domiciliado dicha autorización parlamentaria no se requiere. Es errada la afirmación de la Demandada como se expresa en el ***Memorial de Objeciones a la Jurisdicción del Centro y la Competencia del Tribunal*** de 8 de febrero de 2012, cuando afirma que para celebrar el Contrato de Alianza Estratégica supuestamente debía contarse "con la venia de un órgano institucional federal - la Asamblea Nacional-" (¶ ***2***). Al contrario, como fue correctamente indicado en el Decreto No. 1.188 de 26 de febrero de 2004 del Gobernador del Estado Nueva Esparta, el Contrato de Alianza Estratégica para el servicio público aeroportuario se adjudicó "al Consorcio UNIQUE IDC, inscrito por ante el Registro Mercantil Segundo de la Circunscripción Judicial del Estado. Nueva Esparta en fecha 25 de febrero de 2004, bajo el N° 70, Tomo 5-A, el cual está conformado por las empresas FLUGHAFEN ZURICH S.A., y la empresa GESTION E INGENIERIA IDC S.A., sociedades debidamente inscritas en la misma Oficina de Registro Mercantil, también en fecha 25 de febrero de 2004, bajo los N° 66 y 67 respectivamente, Tomo 5-A.," agregándose en el Decreto que "por cuanto el contrato de Alianza Estratégica se va a celebrar con una sociedad mercantil domiciliada en la República Bolivariana de Venezuela, no se requiere la aprobación por parte de la Asamblea Nacional."

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[44] **Anexo ABC-41.**

4. La intervención del órgano legislativo estadal en la contratación pública y la no exigencia de aprobación del Consejo Legislativo del Estado Nueva Esparta para la celebración del Contrato de Alianza Estratégica

59. En cuanto a la intervención del Consejo Legislativo del Estado Nueva Esparta en la celebración de contratos de interés público estadal, el artículo 50 de la Constitución del Estado Nueva Esparta de 2000, dispone que "sin la aprobación del Consejo Legislativo o de su Comisión Delegada no podrá celebrarse ningún contrato de interés estadal, salvo los casos permitidos por ley." Dicha norma, sin duda, siguió la redacción que tenía el artículo 126 de la Constitución Nacional de 1961, que sometía a la aprobación legislativa del Congreso Nacional a los contratos de interés nacional, "salvo... los que permita la Ley." Esta expresión siempre se interpretó como equivalente a indicar que salvo que la ley respectiva requiriera expresamente la intervención del Poder Legislativo, se entendía que la ley al regular los contratos sin dicha exigencia "permitía" que se celebrasen por la autoridad pública competente sin dicha intervención. De ello se desprendió que, en la práctica legislativa y administrativa, lo que aparentaba ser la excepción en realidad fue la regla general, con lo cual los contratos de interés público no se sometieron en general a la aprobación legislativa, pues en la gran mayoría de los contratos administrativos la ley no requería la intervención a posteriori del Congreso Nacional, por lo cual el requisito de aprobación legislativa era siempre excepcional.[45]

60. Con esta apreciación coincidió Eloy Lares Martínez al señalar que "la segunda de las excepciones indicadas exime de la aprobación legislativa los contratos "que permite la Ley", esto es, aquellos que, en virtud de disposición legal, podían celebrarse y ejecutarse sin necesidad de la referida aprobación. Esta excepción procedía, no sólo cuando los preceptos legales referentes a determinados contratos los regulaban en todos sus trámites sin

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[45] Véase Allan R. Brewer-Carías, "La formación de la voluntad de la Administración Pública Nacional en los Contratos Administrativos" en *Revista de la Facultad de Derecho,* U.C.V. Nº 28, Caracas 1964, pp. 61 a 112 (**Anexo ABC-40)**; reproducido en Allan R. Brewer-Carías, *Jurisprudencia de la Corte Suprema 1930-1975 y Estudios de Derecho Administrativo,* Tomo III, Vol. 2, Caracas 1977, p. 485; y "Los contratos de interés nacional y su aprobación legislativa," *en Revista de Derecho Público*, N° 11, Editorial Jurídica Venezolana, Caracas, julio-septiembre 1982, pp. 40-54 (**Anexo ABC-32)**.

señalarles la necesidad de aprobación legislativa (sería un caso de permisión implícita), sino también cuando los eximían de manera expresa de la necesidad de dicha aprobación explícita.[46] En igual sentido, L. H. Farías Mata señaló que "también están exceptuados de la regla general de la aprobación legislativa, los contratos cuya celebración sin la aprobación del Congreso permita la ley. Esta nueva excepción a la regla general resulta lógica, porque la permisión de la ley haría redundante una nueva intervención del Parlamento por vía de aprobación.[47]

61. Fue por ello, por lo que al discutirse la norma correspondiente de la Constitución de 1999 la redacción de la misma (art. 150) se cambió de manera que se dispusiera con toda claridad, que la aprobación legislativa sólo procede cuando la Ley lo exija expresamente en relación con determinado contrato, es decir, "en los casos que determine la ley."[48]

62. Lo mismo, por supuesto, se aplica respecto de lo establecido en el artículo 50 de la Constitución del Estado Nueva Esparta (que siguió la misma redacción del artículo 126 de la Constitución de 1961) y, por lo que en realidad, conforme a lo previsto en dicha norma, al igual que con lo que disponía el artículo 126 de la Constitución de 1961, los contratos de interés público estadal que deben someterse a la aprobación del Consejo Legislativo, son sólo aquellos respecto de los cuales, en la regulación legal que les es aplicable, se prevé expresamente la aprobación. Por tanto, si una ley establece la posibilidad de celebración del contrato y no prevé la aprobación legislativa, significa que ha sido el mismo legislador quien ha "permitido," median-

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46 Véase Eloy Lares Martínez*, Manual de Derecho Administrativo, op. cit..,* p. 139 (**Anexo ABC-42**).

47 Luis Henrique Farías Mata, *La Teoría del Contrato Administrativo en la Doctrina, Legislación y jurisprudencia Venezolanas.* Caracas, 1968, p. 50 (**Anexo ABC-43)**.

48 La redacción del artículo 150 de la Constitución se justificó, conforme a nuestra propuesta, señalándose: "La práctica constitucional, en relación con esta norma, ha conducido a que los contratos de interés nacional (que, como se dijo anteriormente, son los de interés público nacional quedando excluidos de la aprobación parlamentaria nacional, los contratos de interés público estadal y municipal) que se han sometido a la aprobación parlamentaria, han sido sólo aquellos respecto de los cuales la ley expresamente ha establecido este requisito. Es decir, la aprobación legislativa sólo se ha producido cuando la ley respectiva ha sometido los contratos de interés nacional a tal requisito, convirtiéndose la excepción en la regla."Véase Allan R. Brewer-Carías, *Debate Constituyente, Aportes a la Asamblea Nacional Constituyente,* Tomo II, Caracas, 1999, p. 175-177 (**Anexo ABC-44**).

te ley, la celebración del contrato sin aquella aprobación.[49] A esta situación como se dijo, conducía la redacción del artículo 126 de la Constitución de 1961, en cuanto a las excepciones a la aprobación parlamentaria en los contratos de interés nacional, en la misma forma que conduce la redacción del artículo 50 de la Constitución del Estado Nueva Esparta. Y precisamente por ello, en relación con los contratos de concesión "para la administración y el mantenimiento de los puertos y aeropuertos" que fueron regulados expresamente en la "Ley por la cual el Estado Nueva Esparta asume la Administración y el mantenimiento de los puertos y aeropuertos públicos de uso comercial ubicados en su territorio" de 1991, se dispuso expresamente que los mismos "serán otorgados por el Ejecutivo del Estado Nueva Esparta "(art. 5),[50] sin preverse ni exigirse la aprobación legislativa.

63. En consecuencia, sólo cuando mediante ley se determine expresamente que un contrato de interés público estadal debe someterse a la aprobación del Consejo Legislativo ello se convertiría en un requisito de eficacia del contrato. En el caso de los contratos que celebre el Ejecutivo Estadal relativos a la operación de los aeropuertos nacionales, por supuesto, ninguna ley ni nacional o estadal exige que se sometan a la aprobación del Consejo Legislativo.

IV. DENEGACIÓN DE JUSTICIA Y CONFISCACIÓN: UN GRAVÍSIMO CASO DE DESVIACIÓN DE PODER INCURRIDO POR LA SALA CONSTITUCIONAL DEL TRIBUNAL SUPREMO DE JUSTICIA

64. La intervención de la Sala Constitucional del Tribunal Supremo de Justicia en el caso que nos ocupa, manifestada a través de las decisiones que dictó aprovechando la existencia de los asuntos litigiosos que surgieron entre el Estado Nueva Esparta y el Consorcio UNIQUE IDC, ponen de manifiesto la absoluta denegación de justicia llevada a cabo, así como la indefensión de las Demandantes en el ámbito interno, de la misma manera que evidencian la confiscación que se ha producido respecto de sus derechos, por parte del Estado venezolano.

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49 La opinión de la Procuraduría fue que cada vez que un texto legal autorizaba a la Administración pública a celebrar el contrato sin aprobación legislativa, era un contrato de interés nacional que no requiere ley aprobatoria". Véase *Doctrina PGR 1972,* Caracas 1973, p. 314 (**Anexo ABC-45)**.

50 Véase en **Anexo ABC-13**.

65. Nuestro análisis versará sobre ciertas decisiones de la Sala Constitucional del Tribunal Supremo, en particular:

i) **Sentencia No. 1502 del 4 de agosto de 2006**[51] mediante la cual, entre otros, la Sala Constitucional:

- se avocó[52] *de oficio*, al conocimiento de varias acciones de amparo constitucional y contencioso-administrativas de nulidad, que involucraban tanto al Consorcio UNIQUE IDC, como a la Gobernación del Estado Nueva Esparta (***Véase infra*** **¶¶ xx**);

- *de oficio,* intervino la administración del Aeropuerto entregándola a una Junta Interventora (***Véase infra*** **¶¶ xx**);

ii) **Sentencia No. 313 del 6 de marzo de 2008**[53] mediante la cual, fundamentalmente, la Sala Constitucional ordenó la tramitación de los recursos de nulidad interpuestos por el Consorcio UNIQUE IDC contra la Resolución N° 0001-05 y contra el Decreto N° 806 (***Véase infra*** **¶¶ xx**).

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51 Ver sentencia No. 1502 del 4 de agosto de 2006 dictada por la Sala Constitucional del Tribunal Supremo de Justicia http://www.tsj.gov.ve/decisiones/scon/Agosto/1502-040806-05-1812.htm. **Anexo CD-148, ABC-46**.

52 El avocamiento puede definirse como un remedio procesal extraordinario que permite a las Salas del Tribunal Supremo de Justicia, según su competencia material, asumir el conocimiento de juicios que se tramitan ante otros tribunales (competentes), "en caso grave, o de escandalosas violaciones al ordenamiento jurídico que perjudiquen ostensiblemente la imagen del Poder Judicial, la paz pública, la decencia o la institucionalidad democrática venezolana, y se hayan desatendido o mal tramitado los recursos ordinarios o extraordinarios que los interesados hubieren ejercido". Artículo 18, párrafo 12, Ley Orgánica del Tribunal Supremo de Justicia 2004) (**Anexo ABC-47)**. Véase en general, Roxana Orihuela, *El avocamiento de la Corte Suprema de Justicia*, Editorial Jurídica Venezolana, Caracas 1998 (**Anexo ABC-48)**.

53 Ver sentencia No. 313 del 6 de marzo de 2008 dictada por la Sala Constitucional del Tribunal Supremo de Justicia, en http://www.tsj.gov.ve/decisiones/scon/Marzo/313-060308-05-1812.htm. **Anexos ABC-49.**

iii) **Sentencia No. 155 del 4 de marzo de 2009**[54] mediante la cual la Sala Constitucional del Tribunal Supremo de Justicia venezolano:

- declinó la competencia para conocer de los recursos contencioso-administrativos de nulidad señalados en el número anterior en el Juzgado Superior en lo Civil y Contencioso Administrativo de la Circunscripción Judicial de la Región Nor-Oriental (***Véase infra*** **¶¶ xx**); y

- declaró terminado el proceso de intervención del Aeropuerto, entregándolos al Ministerio del Poder Popular para la Infraestructura (en realidad Ministerio del Poder Popular para Obras Públicas y Vivienda) ***(Véase infra*** **¶¶ xx**).

1. La Sala Constitucional del Tribunal Supremo de Justicia se avocó al conocimiento de asuntos, respecto de los cuales luego rehusó pronunciarse

66. El Tribunal Supremo de Justicia es el máximo tribunal de la República Bolivariana de Venezuela. Su Sala Constitucional, por demás, ha construido la idea de que es ella la máxima instancia de ese Tribunal.

67. Conforme se explicará a continuación, la Sala Constitucional del Tribunal Supremo de Justicia venezolano, se avocó ilegítimamente al conocimiento de los procesos judiciales que habían sido intentados contra las actuaciones del Estado Nueva Esparta y posteriormente rehusó pronunciarse al respecto, al tiempo de -en la práctica- agotar los recursos internos existentes.

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[54] Ver sentencia No. 155 del 4 de marzo de 2009 dictada por la Sala Constitucional del Tribunal Supremo de Justicia, en http://www.tsj.gov.ve/decisiones/scon/Marzo/155-4309-2009-08-0864.html. **Anexo CD-153 y ABC-50**.

En efecto, la Sala Constitucional primero se avocó de oficio al conocimiento de un recurso contencioso administrativo de nulidad (sentencia No. 1502 de 04/08/2006), que carecía de objeto, toda vez que el acto administrativo impugnado a través de ese recurso (es decir, la Resolución No. 0001-05[55] revocatoria del Decreto No. 1.188 de 26 de febrero de 2004 por el cual se acordó por adjudicación directa la celebración del Contrato de Alianza Estratégica entre el Estado Nueva Esparta y el Consorcio UNIQUE IDC) había sido revocado por su autor.[56] No obstante ello, la Sala insistió en conocer del recurso contencioso administrativo de anulación sin formular explicación alguna en derecho al respecto.

68. Luego, y por haberse avocado al conocimiento del primer recurso, decidió conocer de otro recurso, interpuesto contra otro acto administrativo (el Decreto No. 806 de 17 de julio de 2006[57] por el cual, además de revocarse la Resolución No. 0001-05, se decidió el rescate anticipado de la concesión para el mantenimiento y administración del Aeropuerto, con base en la Ley Orgánica sobre Promoción de la Inversión Privada bajo el Régimen de Concesiones[58] y la Ley de Concesiones de Obras y Servicios Públicos del Estado Nueva Esparta[59]) para cuyo conocimiento carecía materialmente de competencia (sentencia No. 202 de 14/02/2007).[60] Fue bajo esa premisa que la Sala Constitucional tramitó en el expediente Nº 08-0864 los dos recursos contencioso-administrativos de nulidad. Y esto necesariamente implicaba que la Sala Constitucional debía resolver directamente ambos recursos.

69. Como desarrollaré a continuación, esas actuaciones llevadas a cabo por la Sala Constitucional, y su decisión respecto del asunto, en la práctica se tradujeron en un secuestro del conflicto judicial existente entre el Consorcio UNIQUE IDC y el Estado Nueva Esparta (A), en la suspen-

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55 **Anexo CD-69, ABC-51**.

56 **Anexo CD-16, ABC-14**.

57 *Gaceta Oficial* del Estado Nueva Esparta, Nº E-734 del 17 de julio de 2006 (**Anexo CD-147, ABC-52)**.

58 **Anexo ABC-38**.

59 **Anexo CD-7, ABC-16**.

60 **Anexo ABC-36**.

sión injustificada de su tramitación (B) y en el vaciamiento del objeto de dichos recursos (C).[61]

A. La Sala Constitucional del Tribunal Supremo de Justicia secuestró el conflicto judicial existente entre el Consorcio UNIQUE IDC y el Estado Nueva Esparta

70. Por sentencia No. 1502 del 4 de agosto de 2006, la Sala Constitucional:

- de *oficio*, se **avocó** al conocimiento de varias acciones de amparo constitucional y contencioso-administrativas de nulidad, que involucran tanto al Consorcio UNIQUE IDC, como a la Gobernación del Estad Nueva Esparta;

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61 El Consorcio UNIQUE IDC también ejerció cuatro (4) acciones judiciales contra otras actuaciones administrativas del Gobernador del Estado Nueva Esparta en defensa de sus derechos e intereses, que dieron lugar a las más dispares y hasta inejecutables sentencias. En efecto, se ejercieron acciones de amparo constitucional con el objeto de evitar que se dictaran los actos administrativos definitivos que se han referido y, ante la ineficiencia material de tales acciones, se ejercieron posteriormente los recursos contencioso-administrativos de nulidad en referencia. No reseñaré el trámite de esos juicios en detalle, en particular en cuanto se trata de las acciones de amparo constitucional. Sin embargo, es pertinente distinguir los dos tipos de acción judicial de acuerdo con el ordenamiento jurídico venezolano: i) La acción de amparo constitucional, en Venezuela, *"es un derecho fundamental que se concreta en la garantía de acceder a los tribunales de justicia, mediante un procedimiento breve, gratuito, oral y sencillo, a los fines de restablecer urgentemente los derechos constitucionales que hayan sido vulnerados"* (Véase Rafael Chavero Gazdik en *El nuevo régimen del amparo constitucional en Venezuela,* Sherwood, Caracas, 2001, pp. 34. (**Anexo ABC-53);** Allan R. Brewer-Carías, "El derecho de amparo y la acción de amparo", en *Revista de Derecho Público*, Nº 22, Editorial Jurídica Venezolana, Caracas, abril-junio 1985, pp. 51-61 (**Anexo ABC-54**). Véase también, "El derecho de amparo en Venezuela" en *Garantías jurisdiccionales para la defensa de los derechos humanos en Iberoamérica*, Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México, México 1992, pp. 7-53; "El derecho de amparo en Venezuela" en *Revista de Derecho*, Nº 1, año V, Facultad de Derecho, Universidad Central, Santiago de Chile 1991, pp. 151-178). ii) En cuanto al recurso contencioso administrativo de nulidad de los actos administrativos, el mismo tiene por objeto solicitar ante los tribunales de la Jurisdicción Contencioso Administrativa, la anulación de los actos administrativos conforme a las previsiones establecidas en la Ley Orgánica del Tribunal Supremo de Justicia.

- por último, *oficiosamente* intervino la administración del Aeropuerto entregándola a una Junta Interventora.[62]

71. Como se verá, el análisis del caso conduce a las siguientes conclusiones:

> Primero: la Sala Constitucional, arbitrariamente, sustrajo del conocimiento del juez natural (el Juzgado Superior en lo Civil y Contencioso Administrativo de la Región Nor-Oriental), el recurso contencioso administrativo de nulidad incoado contra la Resolución Nº 0001-05 y también el recurso contencioso administrativo de nulidad ejercido contra el Decreto Nº 806.
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> Segundo: la Sala Constitucional, arbitrariamente, arrebató a la Sala Político-Administrativa del Tribunal Supremo de Justicia la competencia para avocarse al conocimiento del recurso contencioso administrativo de nulidad incoado contra la Resolución Nº 0001-05.
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> Tercero: la Sala Constitucional, de manera también arbitraria y por vía de consecuencia, modificó el régimen del procedimiento para la impugnación de los dos actos antes señalados: originalmente sujetos al conocimiento de dos instancias. El avocamiento de la Sala Constitucional implicaría un juzgamiento en primera y única instancia, sin derecho siquiera el ejercicio del extraordinario recurso de revisión de sentencias, que competería ultimadamente, a la Sala Constitucional.

72. El avocamiento realizado por la Sala Constitucional del Tribunal Supremo de Justicia fue ilegítimo por cuanto carecía de competencia para realizar dicha avocación. Este fue un acto de total *desviación de poder* conforme se deriva, de manera evidente, de la previsión del artículo de la Ley

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[62] Ver sentencia No. 1502 del 4 de agosto de 2006 dictada por la Sala Constitucional del Tribunal Supremo de Justicia http://www.tsj.gov.ve/decisiones/scon/Agosto/1502-040806-05-1812.htm. **Anexo CD-148 y ABC-46**. Esta sentencia debe leerse conjuntamente con la No. 189, que resolvió la solicitud de aclaratoria formulada por la representación judicial del Estado Nueva Esparta, del 9 de febrero de 2007 http://www.tsj.gov.ve/decisiones/scon/Febrero/189-090207-05-1812.htm. **Anexo ABC-55.**

Orgánica del Tribunal Supremo de Justicia de 2004 que autorizaba el avocamiento.[63]

73. Dicho esto, vale la pena transcribir el contenido del artículo 5, numeral 4, de la Ley Orgánica del Tribunal Supremo de Justicia de 2004, de acuerdo con el cual, la Sala Constitucional es competente para:

> "Revisar las sentencias dictadas por una de las Salas, cuando se denuncie fundadamente la violación de principios jurídicos fundamentales contenidos en la Constitución de la República Bolivariana de Venezuela, Tratados, Pactos o Convenios Internacionales suscritos y ratificados válidamente por la República, o que haya sido dictada como consecuencia de un error inexcusable, dolo, cohecho o prevaricación; ***asimismo podrá avocarse*** al conocimiento de una causa determinada, ***cuando se presuma fundadamente*** **la violación de principios jurídicos fundamentales contenidos en la Constitución de la República Bolivariana de Venezuela, Tratados, Pactos o Convenios Internacionales suscritos y ratificados válidamente por la República,** *aun cuando por razón de la materia y en virtud de la ley, la competencia le esté atribuida a otra Sala."* [Énfasis añadido]

74. De manera que para que la Sala Constitucional pueda avocarse al conocimiento de una causa que materialmente compete a otra Sala, como ocurrió en el caso analizado, es determinante que se presuma *con base* la violación de principios jurídicos fundamentales de orden constitucional –el avocamiento en este caso supone el ejercicio de la jurisdicción constitucional. Y esa presunción no sólo debe ser alegada por la parte interesada, sino que visto que la institución supone la "derogación" del orden legal de la competencia judicial, tiene que expresarse claramente en la motivación de la sentencia, máxime si el avocamiento opera *de oficio.*

75. En el caso concreto, debe señalarse que la Sala Constitucional no sólo carecía de competencia para avocarse al conocimiento del recurso contencioso administrativo de anulación ejercido contra la Resolución Nº 0001-05 y para admitir y tramitar el recurso contencioso administrativo ejer-

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63 Artículo 5, numeral 4, de la Ley Orgánica del Tribunal Supremo de Justicia (2004) (**Anexo ABC-47)**.

cido contra el Decreto Nº 806, ambos del Gobernador del Estado,[64] sino que además, nada dijo en relación con los motivos (v. gr. violación de principios jurídicos fundamentales contenidos en la Constitución) que habría tenido para atraer las causas a su fuero.

76. En el primer caso – el avocarse al conocimiento del recurso contencioso administrativo de nulidad ejercido contra la Resolución Nº 0001-05 -, la competencia material para avocarse correspondía -en principio- a la Sala Político-Administrativa del Tribunal Supremo de Justicia. En el segundo caso – el haber admitido y tramitado el recurso contencioso administrativo ejercido contra el Decreto Nº 806- , en el que no medió decisión alguna de avocamiento, la competencia para conocer correspondía al Juzgado Superior en lo Civil y Contencioso Administrativo de la Circunscripción Judicial de la Región Nor-Oriental.[65]

77. Pues bien, en su sentencia de avocamiento No. 1502 de 4 de agosto de 2006, pendiente como estaba de decisión la solicitud de avocamiento que había sido formulada por el Estado Nueva Esparta ante la Sala Político-Administrativa respecto del mismo juicio de nulidad intentado contra la Resolución Nº 0001-05, la Sala Constitucional sostuvo que tenía competencia para avocarse al conocimiento de esa causa, pues en su decir *"se encuentran involucrados intereses que guardan relación con el orden constitucional"*; determinando la *"utilidad"* del Aeropuerto objeto del contrato de alianza estratégica *"para el interés público en razón del servicio que prestan y por la importancia en sí que representa para el Poder Nacional y para la colectividad la materia aeronáutica".* Como puede verse fácilmente, los motivos invocados nada tuvieron que ver con la violación de principios jurídicos fundamentales contenidos en la Constitución exigidos para el ejercicio de esa excepcional facultad.

78. En lo que atañe al recurso contencioso administrativo contra el Decreto Nº 806, éste fue intentado directamente ante la Sala Constitucional y no ante el juez natural, resolviendo esa Sala por Sentencia No. 202 de 14 de

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[64] La Sala Constitucional es competente "materialmente" en cuanto concierne al amparo constitucional; por ello, en principio, no se discute su facultad de avocamiento en cuanto a las tres acciones de amparo constitucional que se refieren enla sentencia No. 1502 del 4 de agosto de 2006.

[65] Véase lo decidido por la Sala Político Administrativa del Tribunal Supremo en sentencia de 27 de abril de 2004 (caso: *Marlon Rodríguez)* (**Anexo ABC-56**).

febrero de 2007, su admisión y ordenando su acumulación con el expediente en el cual se tramitaba el avocamiento.[66]

> "Visto entonces que el análisis de la constitucionalidad y legalidad del acto administrativo impugnado mediante el presente recurso de nulidad se encuentra estrechamente vinculado a aquellas decisiones que ulteriormente adopte esta Sala en el marco de los procedimientos relacionados con la concesión del Aeropuerto Internacional del Caribe "General en Jefe Santiago Mariño", todo ello en virtud del avocamiento acordado […] resulta aplicable, de forma supletoria, el instituto de la acumulación de causas conforme a la regulación contenida en el Código de Procedimiento Civil, ello por remisión del primer aparte del artículo 19 de la Ley Orgánica del Tribunal Supremo de Justicia."

79. De modo que como ya apunté, la Sala Constitucional resolvió admitir el recurso y acumularlo a aquél a cuyo conocimiento se había avocado, decisión que resulta por lo demás jurídicamente absurda, pues el Decreto Nº 836 impugnado a través de ese recurso revocaba la Resolución Nº 0001-05 impugnada inicialmente. Es decir, con evidente arbitrariedad la Sala Constitucional se declaró competente para conocer de este segundo recurso y lo acumuló al anterior que había quedado desprovisto de objeto (por haber sido revocado el acto administrativo que era objeto del mismo, v.gr. la Resolución Nº 0001-05).

80. Posteriormente, la Sala Constitucional, por sentencia No. 313 del 6 de marzo de 2008 ordenó *"tramitar conforme a la motiva de este fallo mediante **AVOCAMIENTO** los recursos de nulidad interpuestos por Unique IDC contra la Resolución núm. 0001-05 (...) y contra el Decreto núm. 806 (...)".*[67] Al respecto, declaró lo siguiente:

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[66] Véase sentencia No. 202 de 14 de febrero de 2007 de la Sala Constitucional del Tribunal Supremo de Justicia, en http://www.tsj.gov.ve/decisiones/scon/Febrero/202-140207-07-0054.htm (**Anexo ABC-57**); y la sentencia No. 1200 de 25 de junio de 2007 de la Sala Constitucional del Tribunal Supremo de Justicia, en http://www.tsj.gov.ve/decisiones/scon/Junio/1200-250607-06-0468.htm (**Anexo ABC-58)**.

[67] Ver sentencia No. 313 del 6 de marzo de 2008 dictada por la Sala Constitucional del Tribunal Supremo de Justicia http://www.tsj.gov.ve/decisiones/scon/Marzo/313-060308-05-1812.htm. (**Anexo ABC-49**). Ver también sentencia No. 538 dictada

> [L]os referidos recursos contencioso administrativos de nulidad se **tramitarán conjuntamente** bajo un mismo procedimiento, por lo que, dada la conexidad entre los mismos, en razón de las partes y del título con el que se demanda (nulidad de los actos administrativos y que se establezca a la recurrente en su condición de concesionaria de los aeropuertos), deben ser instruidos en una causa común. (…)
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> A tales efectos se instruye a la Secretaría de la Sala para abrir un nuevo expediente que deberá estar conformado, previo su desglose respectivo, con las actas originales de los recursos de nulidad, las cuales comprenden escritos contentivos de los recursos, actos administrativos impugnados, así como cualquier otra actuación relacionada directamente con el proceso de nulidad, ello, con la finalidad de proveer esta causa.
>
> En virtud de lo anterior, y de conformidad con el artículo 52 del Código de Procedimiento Civil, visto que en ambos recursos de nulidad […] persiguen la nulidad de las decisiones administrativas que impiden a la concesionaria acceder con tal carácter a la administración y prestación del servicio de los aeropuertos, esta Sala ordena la tramitación conjunta de ambos recursos para que sean dirimidos en el expediente separado antes referido. Así se decide" (Énfasis añadido).

81. Así, como bien lo afirma Carlos Enrique Mouriño Vaquero en su Informe, "*la Sala Constitucional no era competente en materia contencioso administrativa para conocer sobre las nulidades interpuestas por el Consorcio, pues para ello existía la Sala Político Administrativa" (**Informe Mouriño, par. 50),*** lo que el mismo Mouriño repitió en su Informe cuando afirmó que "*la Sala Constitucional no era competente en materia contencioso administrativa para conocer sobre los recursos de nulidad interpuestas por las Demandantes y resolver el fondo de esas disputas" (**Informe Mouriño, par. 60)***. La Sala Constitucional no podía asumir ni excepcionalmente ni en forma alguna el conocimiento de los juicios contencioso-administrativos de nulidad que nos ocupan, pues nadie invocó, ni siquiera ella misma, la vio-

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con motivo de solicitud de ampliación formulada por la representación el Estado Nueva Esparta, de fecha 8 de abril de 2008 http://www.tsj.gov.ve/decisiones/scon/Abril/538-080408-05-1812.htm. **Anexo ABC-59**.

lación de principios jurídicos fundamentales de orden constitucional, como lo exige la norma legal que dio fundamento a su actuación.

82. Por lo demás, y no obstante estar de acuerdo en este aspecto con la conclusión a la cual llega el Experto del Estado venezolano, debo hacer varias aclaraciones con respecto al razonamiento de Mouriño Vaquero:

> 1) La Sala Constitucional nunca se avocó al conocimiento del recurso contencioso administrativo de nulidad ejercido contra el Decreto Nº 806. Dicho recurso se ejerció directamente ante la Sala y ella, inconstitucional e ilegalmente, lo admitió –y lo tramitó.
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> 2) La Sala Constitucional, al no ser competente por la materia, no podía avocarse el recurso contencioso administrativo de nulidad ejercido contra la Resolución Nº 0001-05, ni siquiera para "ordenar el proceso", como lo afirmó Mouriño Vaquero (***Informe Mouriño, ¶ 50)***).
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> 3) Valga señalar, por último, que la ley aplicable a las sentencias dictadas por la Sala Constitucional, en lo que nos ocupa es la Ley Orgánica del Tribunal Supremo de Justicia publicada en la *Gaceta Oficial* Nº 37.942 del 19 de mayo de 2004; y no la publicada en la *Gaceta Oficial* Nº 19.522 del 1º de octubre de 2010, como lo señaló Mouriño Vaquero (***Informe Mouriño, nota 43***).

83. Lo anteriormente expuesto pone en evidencia cómo la Sala Constitucional secuestró el conflicto judicial existente entre el Consorcio UNIQUE y el Estado Nueva Esparta, sin que sea posible argumentar que luego, con la decisión definitiva contenida en su sentencia No. 155 de 4 de marzo de 2009, al ordenar la remisión al juez natural del expediente en el que se tramitaban los recursos, que dicha remisión pueda considerarse en el ordenamiento venezolano como un "remedio" a la incompetencia incurrida por la Sala Constitucional en los términos antes expuestos.[68]

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[68] Mouriño Vaquero, en efecto, advierte que la Sala Constitucional no es competente para tramitar los recursos contencioso-administrativos que nos ocupan, para justificar el agotamiento del avocamiento y la consecuente remisión del juicio a la jurisdicción contencioso-administrativa. (***Informe Mouriño,*** ¶¶ 50 y 60).

84. Esas actuaciones ponen de manifiesto la *desviación de poder* con la que actuó la Sala Constitucional, que utilizó la facultad de avocamiento que le acuerda la Ley Orgánica del Tribunal Supremo de Justicia, no para *preservar la correcta administración de justicia* y, en el caso concreto, la *supremacía constitucional;* sino para evitar que los tribunales competentes se pronunciaran sobre la nulidad de los actos emitidos por el Gobernador del Estado Nueva Esparta y, más allá, ***para entregar definitivamente el Aeropuerto al Poder Nacional.***

85. En realidad, la Sala Constitucional se valió de las formas procesales para entregar materialmente el Aeropuerto al Poder Nacional, y luego de haberlo hecho, se rehusó a pronunciarse sobre el fondo de los asuntos que atrajo para sí y, además, de manera progresiva y arbitraria, confiscó los derechos de las Demandantes.

B. La injustificada (e injustificable) suspensión del trámite de dos recursos contencioso-administrativos

86. El recurso contra la Resolución Nº 0001-05 a que ya me he referido fue interpuesto por el Consorcio UNIQUE IDC el 27 de septiembre de 2005, pero su sustanciación y trámite se vieron suspendidas por diversas solicitudes del Estado Nueva Esparta: recusación del juez, solicitud de regulación de jurisdicción, solicitud de avocamiento a la Sala Político-Administrativa del Tribunal Supremo de Justicia. Luego, en el ámbito de este mismo recurso contencioso administrativo, intervino la Sala Constitucional que, como ya he señalado, por sentencia No. 1502 de 4 de agosto de 2006, se avocó de oficio al conocimiento de este asunto.[69]

87. A pesar de que el avocamiento se produjo en agosto de 2006 fue más tarde que la Sala Constitucional ordenó que se tramitara el asunto. En efecto, no aparecen de la documentación analizada las razones por las cuales todo esto ocurrió así, pero fue a partir de la sentencia de la Sala Constitucional No. 313 de 6 de marzo de 2008[70] que se ordenó la tramitación del recurso contra la Resolución No. 0001-05. Es decir, el juicio de nulidad que la Sala Constitucional atrajo hacia su fuero estuvo paralizado sin causa aparente desde el 4 de agosto de 2006 hasta el 6 de marzo de 2008, prácticamente dos años.

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69 **Anexo CD-148, ABC-46**.
70 **Anexo ABC-49**.

88. La suspensión del juicio, en el sentido expresado, permitió la acumulación a que ya me he referido con el segundo recurso contencioso administrativo de anulación, que como ya he señalado también, fue intentado el 16 de enero de 2007 contra el Decreto No. 806, y admitido por la Sala Constitucional el 14 de febrero de 2007. Pero nuevamente, no obstante que fue en febrero de 2007 cuando la Sala Constitucional admitió el segundo recurso y ordenó su acumulación con el primero, la tramitación de ninguno de los recursos se llevó a cabo, lo que ocurrió apenas en marzo de 2008.

89. De tal manera, la Sala Constitucional, so pretexto de un supuesto desorden procesal, básicamente (si lo hubo) creado por ella misma, suspendió prácticamente durante dos años el trámite del primero de los recursos contencioso-administrativos que nos ocupan, y durante más o menos un año el trámite del segundo.

90. Como si ello no bastara, después de esta suspensión injustificada y a un año de haber ordenado la continuación del trámite, justo cuando correspondía dar inicio a la fase probatoria, la Sala Constitucional del Tribunal Supremo de Justicia venezolano no continuó con el procedimiento sino declaró "agotado" el avocamiento respecto a los dos recursos contencioso administrativos ejercidos por el Consorcio UNIQUE IDC (sentencia definitiva No. 155 del 4 de marzo de 2009)[71]; ordenando la remisión de las actas judiciales a la jurisdicción contencioso-administrativa[72] y provocando una nueva suspensión del juicio, a la par de asegurar la entrega formal del Aeropuerto del Estado Nueva Esparta al Ejecutivo Nacional.

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71 **Anexo CD-153, ABC-50**.

72 Por sentencia aclaratoria No. 1044 del 23 de julio de 2009, la Sala Constitucional acordó " en virtud de que el Juzgado Superior de lo Contencioso Administrativo del Estado Nueva Esparta ha iniciado sus funciones, se ordena declinar en esa instancia el juicio correspondiente a los recursos contenciosos administrativos de nulidad interpuestos por las sociedades mercantiles que conforman el Consorcio Unique IDC, contra la Resolución N° 0001-06, del 10 de junio de 2005, y contra el Decreto N° 806, del 17 de julio de 2006, ambos dictados por la Gobernación del Estado Nueva Esparta, todo ello de conformidad con lo dispuesto en el artículo 4 de la Resolución N° 2008-0021 dictada por la Sala Plena del Tribunal Supremo de Justicia el 2 de julio de 2008, según el cual "…*los expedientes que conforme a la nueva distribución de competencia territorial correspondan al nuevo Juzgado Superior* [Contencioso Administrativo de la Circunscripción Judicial del Estado Nueva Esparta]*, deberán ser remitidos a éste para que continúe su tramitación*" (corchetes añadidos). http://www.tsj.gov.ve/decisiones/scon/Julio/1044-23709-2009-08-0864.html (**Anexo ABC-60)**

91. He aquí otra muestra de la arbitrariedad de la Sala Constitucional, la excepcional institución del avocamiento está prevista en la Ley Orgánica del Tribunal Supremo para que las Salas se avoquen al conocimiento de causas que cursan en otros tribunales. El avocamiento es precisamente, para eso, para que la Sala respectiva del Tribunal Supremo "se avoque," de manera que no puede haber avocamiento para no avocarse. La Sala respectiva, luego de admitir la solicitud, sólo podría decidir no avocarse cuando considere que el avocamiento es improcedente. No está previsto ni ha sido práctica de la Sala Constitucional, pura y simplemente declarar "agotado" algún avocamiento para declinar el conocimiento del juicio en el mismo tribunal ante el cual se tramitó antes de la intervención extraordinaria del Tribunal Supremo de Justicia.

92. En efecto, de acuerdo con lo establecido en el artículo 18, párrafo 11, de la Ley Orgánica del Tribunal Supremo de Justicia (2004), cualquiera de las Salas puede *"recabar de cualquier tribunal de instancia, en el estado en que se encuentre, cualquier expediente o causa, para resolver si se avoca, y directamente asume el conocimiento del asunto, o, en su defecto lo asigna a otro tribunal".* Luego, el párrafo 14 del mismo artículo, disponía que la sentencia sobre el avocamiento podría *"decretar la nulidad y subsiguiente reposición del juicio al estado que tiene pertinencia, o decretar la nulidad de alguno o algunos de los actos de los procesos, u ordenar la remisión del expediente para la continuación del proceso o de los procesos en otro tribunal competente por la materia, así como adoptar cualquier otra medida legal que estime idónea para restablecer el orden jurídico infringido"*.[73]

93. El avocamiento no es meramente, como lo afirma Mouriño Vaquero, "un proceso extraordinario conforme al cual el Tribunal Supremo de Justicia (...) tiene la facultad de ordenar el proceso seguido ante tribunales de instancia" (***Informe Mouriño, ¶ 55***). Por supuesto que en el curso del avocamiento, el Tribunal Supremo de Justicia puede –y debe, si es el caso- ordenar el proceso seguido ante tribunales de instancia. El avocamiento es en realidad un medio de defensa extraordinario, que implica la ruptura del orden legal de competencia en materia judicial, una excepción al derecho a ser juz-

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[73] **Anexo ABC-47**.

gado por el juez natural, según el procedimiento de ley. Por ello, la atribución debe ser ejercida con suma prudencia.[74]

94. En el caso que nos ocupa, quien suscribe no termina de entender el proceder de la Sala Constitucional. Primero se avocó de oficio al conocimiento de un recurso contencioso administrativo de nulidad (sentencia No. 1502 de 04/08/2006), que carecía de objeto, toda vez que el acto administrativo impugnado (Resolución No. 0001-05) había sido revocado por su autor. No obstante ello, la Sala insistió en conocer del recurso contencioso administrativo de anulación sin formular explicación alguna en derecho. Luego, y por haberse avocado al conocimiento del primer recurso, decidió conocer de otro recurso contra otro acto administrativo (Decreto No. 806) para cuyo conocimiento carecía materialmente de competencia (sentencia No. 202 de 14/02/2007). Esto necesariamente implicaba que la Sala Constitucional debía resolver directamente ambos recursos. Lo más notable es que todo lo anteriormente descrito fue realizado por la Sala Constitucional del Tribunal Supremo para en definitiva no "avocarse" al conocimiento y resolución del conflicto al cual se había avocado por cuanto paralizó la tramitación de los procedimientos a los cuales se avocó por un período de prácticamente 2 años hasta entregarle el control y administración del Aeropuerto en disputa al Poder Nacional por sentencia No. de 155 de 4 de marzo de 2009. En dicha fecha, la Sala Constitucional declaró agotado el avocamiento y ordenó la remisión del juicio a la jurisdicción contencioso-administrativa sin nunca haber entrado a tramitar sustantivamente dichos procedimientos y privando de paso al Consorcio –y al Estado de Nueva Esparta- de la administración de dicho Aeropuerto en consistencia y sintonía con la voluntad del Poder Nacional de eliminar la competencia exclusiva que tenían los Estado bajo el marco constitucional vigente a efectos de conseguir que la administración del Aeropuerto pasara a manos del Poder Nacional.

95. A todo evento, no puedo dejar de referirme a algunos acontecimientos que sucedieron en forma paralela a la suspensión de la tramitación de estos recursos a los cuales ilegítimamente se había avocado la Sala Constitucional del Tribunal Supremo.

96. En primer lugar, la misma Sala Constitucional dictó con fecha 15 de abril de 2008 otra sentencia, la No. 565 por medio de la cual se realizó

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74 Artículo 18, párrafo 12, de la Ley Orgánica del Tribunal Supremo de Justicia (2004) **Anexo ABC-47.**

una interpretación vinculante del artículo 164.10 de la Constitución[75] estableciendo que la competencia exclusiva que tienen los Estados para "la conservación, administración y aprovechamiento de [...] puertos y aeropuertos de uso comercial, en coordinación con el Poder Nacional," era más bien una competencia sujeta a la decisión del Ejecutivo Nacional, el cual podría intervenirla y reasumirla. Esta fue una interpretación totalmente excesiva e ilegítima de la Sala Constitucional del Tribunal Supremo por medio de la cual se modificó el régimen de competencias establecido en la Constitución Nacional por vía interpretativa. Destáquese que esta interpretación fue adoptada al resolver un recurso de interpretación intentado por el abogado de la República, es decir, por el mismo Procurador General de la República.

97. *En segundo lugar, sobre la base de la referida sentencia 565, el 17 de marzo de 2009 la Asamblea Nacional, procedió a reformar la Ley Orgánica de Descentralización, Delimitación y Transferencia de Competencias del Poder Público,[76] a los efectos de eliminar las competencias exclusivas de los Estados establecidas en los ordinales 3 y 5 del artículo 11 de dicha Ley, agregando dos nuevas normas en las cuales se dispuso que "el Poder Público Nacional por órgano del Ejecutivo Nacional, podrá revertir por razones estratégicas, de mérito, oportunidad o conveniencia, la transferencia de las competencias concedidas a los estados, para la conservación, admi-*

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75 Véase Sentencia No. 565 de 15 de abril de 2008 de la Sala Constitucional del Tribunal Supremo de Justicia**,** (Interpretación del artículo 164.10 de la Constitución) en http://www.tsj.gov.ve/decisiones/scon/Abril/565-150408-07-1108.htm **(Anexo ABC-61).** Véanse los comentarios sobre esta sentencia en Allan R. Brewer-Carías, "La Ilegítima mutación de la Constitución y la Legitimidad de la Jurisdicción Constitucional: La "Reforma" de la forma federal del Estado en Venezuela mediante interpretación constitucional," en *Memoria del X Congreso Iberoamericano de Derecho Constitucional,* Instituto Iberoamericano de Derecho Constitucional, Asociación Peruana de Derecho Constitucional, Instituto de Investigaciones Jurídicas-UNAM y Maestría en Derecho Constitucional-PUCP, IDEMSA, Lima 2009, tomo 1 , pp. 29-51; y en *Anuario No. 4, Diciembre 2010***,** Instituto de Investigación Jurídicas, Facultad de Jurisprudencia y Ciencias Sociales, Universidad Dr. José Matías Delgado de El Salvador, El Salvador 2010, pp. 111-143 (ISSN 2071-2472) (**Anexo ABC-62**).

76 Véase Ley Orgánica de Descentralización, Delimitación y Transferencia de Competencias del Poder Público de 2009, en *Gaceta Oficial* N° 39 140 del 17 de marzo de 2009 (**Anexo CD-154, ABC-63**). Véase sobre esta reforma, Mauricio Subero Mujica, "Comentarios a la Ley de Reforma Parcial de la Ley Orgánica de Descentralización, Delimitación y Transferencia de Competencias del Poder Público del 17 de marzo de 2009," en http://www.ucab.edu.ve/tl_files/POSTGRADO/ boletines/ dere cho-admin/1_boletin/MAURICIO_SUBERO.pdf (**Anexo ABC-64**).

nistración y aprovechamiento de los bienes o servicios considerados de interés público general, conforme con lo previsto en el ordenamiento jurídico y al instrumento que dio origen a la transferencia" (art. 8); y que "El Ejecutivo Nacional, por órgano del Presidente o Presidenta de la República en Consejo de Ministros, podrá decretar la intervención conforme al ordenamiento jurídico, de bienes y prestaciones de servicios públicos transferidos para su conservación, administración y aprovechamiento, a fin de asegurar a los usuarios, usuarias, consumidores y consumidoras un servicio de calidad en condiciones idóneas y de respeto de los derechos constitucionales, fundamentales para la satisfacción de necesidades públicas de alcance e influencia en diversos aspectos de la sociedad" (art. 9).

98. *En tercer lugar, el Presidente de la República en Consejo de Ministros dictó el Decreto Nº 6.646 de 24 de marzo de 2009*[77]*, donde se autorizó al Ministro entonces del Poder Popular para las Obras Públicas y Vivienda (Infraestructura, en todo caso), para que constituyera una empresa del Estado bajo la forma de sociedad anónima, que habría de denominarse "Bolivariana de Aeropuertos", cuyo objeto principal sería "el acondicionamiento, mantenimiento, desarrollo, administración, explotación y aprovechamiento del conjunto de instalaciones, bienes y servicios que comprende la infraestructura aeronáutica civil propiedad de la República Bolivariana de Venezuela".* [78]

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77 Decreto Nº 6.646 de 24 de marzo de 2009, en *Gaceta Oficial* Nº 39.146 de 25 de marzo de 2009. http://www.pgr.gob.ve/dmdocuments/2009/39146.pdf (**Anexo ABC-65).**

78 Véase Resolución del Ministerio del Poder Popular para las Obras Públicas y Vivienda designando una Comisión de Enlace para la Entrega, Manejo y Control del Aeropuerto Internacional del Caribe "General en Jefe Santiago Mariño", en *Gaceta Oficial* Nº 39.143 de 20 de marzo de 2009 en *Gaceta Oficial* Nº 39.143 de 20 de marzo de 2009 (**Anexo ABC-66)**, Acuerdo de la Asamblea Nacional, por el cual se autorizó la "reversión" al Poder Ejecutivo Nacional de los bienes que constituyen la infraestructura de los aeropuertos que allí se mencionan en *Gaceta Oficial* Nº 39.145 del 24 de marzo de 2009, en *Gaceta Oficial* Nº 39.145 de 24 de marzo de 2009 (**Anexo ABC-67)**, Acta constitutiva de la Sociedad Anónima Bolivariana de Aeropuertos (BAER), en *Gaceta Oficial* Nº 39.233 de 3 de agosto de 2009 (**Anexo ABC-68)** y Resolución que declara la reversión inmediata al Poder Ejecutivo Nacional, por órgano de este Ministerio, de los bienes que conforman la infraestructura aeronáutica civil ubicada en el estado Anzoátegui, así como también las competencias para la conservación, administración y aprovechamiento que sobre los mismos se ejercen, en *Gaceta Oficial* Nº 39.342 de 8 de enero de 2010 (**Anexo ABC-69**).

99. *En cuarto lugar, con base en esta reforma legal provocada por el Poder Nacional en sintonía con la decisión de la Sala Constitucional No. 565 y una vez ya creada la empresa del Estado "Bolivariana de Aeropuertos" a la que se ha hecho referencia, el Ejecutivo procedió con fecha 24 de marzo de 2009 a revertir al Poder Nacional el manejo de los aeropuertos de los Estados Táchira, Miranda, Zulia, Carabobo, Anzoátegui, creándose incluso una empresa del Estado (Sociedad Anónima Bolivariana de Aeropuertos) a tales fines, a cuyo patrimonio quedaron adscritos. Evidentemente, lo anterior se realizó con excepción precisamente del Aeropuerto del Estado Nueva Esparta, el cual 20 días antes de la reforma de la Ley Orgánica fue entregados al Poder Ejecutivo Nacional mediante sentencia de la Sala Constitucional del Tribunal Supremo No. 155 de 4 de marzo de 2009,*[79] *dictada con anterioridad a la publicación de dicha reforma legal, para que lo administrara a través del Ministerio del Poder Popular para la Infraestructura al Poder Ejecutivo.*

100. En quinto lugar, el 3 de agosto de 2009 –todavía suspendidos los juicios a la espera de la entrega formal del Aeropuerto al Ejecutivo Nacional, apareció publicada en la *Gaceta Oficial* Nº 39.233 el "Acta Constitutiva Estatutaria de la Sociedad Anónima Bolivariana de Aeropuertos (BAER)", cuyo capital, según disposición presidencial, está constituido entre otros bienes por los que en aquel momento estaban afectados al funcionamiento del tantas veces referido Aeropuerto (v.gr. Aeropuerto Internacional del Caribe General en Jefe Santiago Mariño)[80].

101. No es posible conocer la intención cierta que pudieron tener los magistrados de la Sala Constitucional que suscribieron las sentencias que nos ocupan. Sí se sabe, de las mismas, que insistieron en el trámite de un juicio de nulidad que versaba sobre un acto administrativo revocado; y que se pretendía la continuación de otro juicio cuyas resultas serían inejecutables. Por

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79 Véase sentencia de la Sala Constitucional del Tribunal Supremo No. 155 de 4 de marzo de 2009, en http://www.tsj.gov.ve/decisiones/scon/Marzo/155-4309-2009-08-0864.html (**Anexo CD-153, ABC-50**).

80 Nótese, en cuanto a esto, que en *Gaceta Oficial* Nº 39.145 del 24 de marzo de 2009 (**Anexo ABC-67**), apareció publicado un Acuerdo de la Asamblea Nacional, por el cual se autorizó la "reversión" al Poder Ejecutivo Nacional de los bienes que constituyen la infraestructura de los aeropuertos que allí se mencionan. Entre esos aeropuertos no aparecen los del Estado Nueva Esparta, pues su "reversión" había sido ordenada por la Sala Constitucional mediante sentencia No. 155 del 4 de marzo de 2009 (**Anexo CD-153, ABC-50**).

ello, la única conclusión a la que se puede llegar lógicamente es que la intención de la Sala Constitucional fue siempre la de evitar que los tribunales competentes contencioso-administrativos se pronunciaran en los juicios de nulidad contra actos administrativos del Estado Nueva Esparta, lo que le permitió además abonar el terreno para que el Ejecutivo Nacional se hiciera de la administración, control y aprovechamiento de los aeropuertos comerciales, contra lo expresamente establecido en la Constitución.

102. No hay, a mi juicio, otra justificación para la suspensión del trámite de los recursos contencioso-administrativos durante tanto tiempo, que no haya sido la de impedir que los tribunales competentes se pronunciaran sobre la nulidad de los actos administrativos dictados por el Gobernador del Estado Nueva Esparta y, así, evitar que el Consorcio UNIQUE IDC (o el propio Estado de Nueva Esparta) siguiera administrando el Aeropuerto. A fin de cuentas, en ejecución de una política de Estado, la intención final era poner al Ejecutivo Nacional, contra la Constitución, en posesión del Aeropuerto, lo que efectivamente hizo la Sala Constitucional sin competencia alguna para ello (**ver *infra* ¶ 139**).

C. El vaciamiento del objeto de los dos recursos contencioso-administrativos

103. Por sentencia No. 155 del 4 de marzo de 2009, la Sala Constitucional del Tribunal Supremo, entre otros, declinó la competencia para conocer de los recursos contencioso-administrativos de nulidad contra la Resolución 001-05 y el Decreto No. 806, en el Juzgado Superior en lo Civil y Contencioso Administrativo de la Circunscripción Judicial de la Región Nor-Oriental[81].

104. Sobre la base de lo anterior, el experto Carlos Enrique Mouriño Vaquero, cuya opinión fue consignada por el Estado venezolano, afirma erróneamente (***Informe Mouriño, ¶¶ 43, 51, 53, 54***) que las Demandantes supuestamente cuentan con recursos judiciales internos que aún no se han agotado; lo cual a su juicio se traduciría en la falta de jurisdicción de ese Tribunal Arbitral.

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[81] Ver sentencia No. 155 del 4 de marzo de 2009 http://www.tsj.gov.ve/decisiones/scon/ Marzo/155-4309-2009-08-0864.html. **Anexo CD-153, ABC-50**. Ver también sentencia aclaratoria No. 1044 del 23 de julio de 2009 http://www.tsj.gov.ve/decisiones/scon/Julio/1044-23709-2009-08-0864.html. **Anexo ABC-60.**

105. Esa afirmación, que sustenta además una de las pretensiones del Estado venezolano de acuerdo con su ***Memorial de Objeciones a la Jurisdicción del Centro y a la Competencia del Tribuna***l (**¶ *49 ss.***), es falsa: de acuerdo con la información de la cual hemos dispuesto,[82] los tribunales venezolanos *no tienen materia sobre la cual decidir.*

106. En relación al recurso contencioso administrativo de nulidad contra la Resolución Nº 0001-05, la misma fue revocada el 17 de julio de 2006 mediante el Decreto Nº 806 dictado por el Gobernador del Estado Nueva Esparta.

107. Como consecuencia de ese Decreto, ese recurso contencioso administrativo quedó lógicamente sin objeto, pues el acto administrativo cuya nulidad es el núcleo de la pretensión, fue revocado por la misma autoridad que lo dictó. Más allá, el efecto jurídico del acto en cuestión fue sustituido por otro: el Gobernador del Estado Nueva Esparta "rescató" anticipadamente el Aeropuerto (Decreto No. 806).

108. Resulta de lo anterior que, de haber seguido su curso normal y de mediar alegato al respecto, por supuesto, la única decisión lógica posible por parte del Tribunal Supremo habría sido que no había materia sobre la cual decidir, dado el decaimiento del objeto del recurso de nulidad. Esta habría sido también la única decisión lógicamente posible a la que podría haber llegado el Juzgado Superior en lo Civil y Contencioso Administrativo de la Región Nor-Oriental, cual era el tribunal natural de esa causa.

109. La representación del Estado Nueva Esparta insistió en el decaimiento del objeto del recurso inherente a la Resolución No. 0001-05 pidiendo la ampliación del fallo últimamente citado. Por su parte, el Consorcio UNIQUE IDC desistió de ese recurso contencioso administrativo, dado que con el recurso ejercido contra el Decreto Nº 806 no se pretendía el restablecimiento de la Resolución que había sido revocada y cuya nulidad era objeto del mismo (26 de marzo de 2008)[83].

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82 Los datos referidos en esta parte fueron tomados principalmente de las sentencias dictadas por la Sala Constitucional del Tribunal Supremo de Justicia el 4/8/2006, el 6/3/2008 y el 4/3/2009. Todas fueron consultadas en www.tsj.gov.ve

83 Desistimiento del recurso de nulidad de 26 de marzo de 2008 **Anexo ABC-70**.

110. Mediante sentencia No. 538 de 4 de abril de 2008,[84] la Sala Constitucional declaró la improcedencia de la solicitud del decaimiento del objeto respecto al recurso contencioso administrativo de nulidad interpuesto contra la Resolución No. 0001-05, del 10 de junio de 2005, el cual había sido revocado un año después por el propio Gobernador del Estado Nueva Esparta mediante Decreto No. 806 de 17 de julio de 2006. No se pronunció en cuanto al desistimiento.

111. Paradójicamente, un año después y no obstante el ***contenido inequívoco*** de la sentencia No. 313 de 6 de marzo de 2008 y de la ley, en decisión del No. 155 de 4 de marzo de 2009[85], la misma Sala Constitucional declaró "agotado" el avocamiento y, sin ofrecer mayores explicaciones, ordenó remitir el expediente al Juzgado Superior en lo Civil y Contencioso Administrativo de la Región Nor-Oriental para que siguiera conociendo de la causa, en el estado en que se encontraba[86]

112. En concreto, el Juzgado Superior Contencioso Administrativo de la Circunscripción Judicial del Estado Nueva Esparta en los juicios que supuestamente están pendientes de continuar sólo podrían declarar que no tienen materia alguna sobre la cual decidir, pues los recursos han quedado sin sentido, tal como paso a explicar de seguidas; y es que si efectivamente llegasen a pronunciarse sobre la nulidad del Decreto Nº 806, esa decisión que no tendría efecto alguno y sería inejecutable, pues el Aeropuerto está en manos del Poder Nacional desde el 2010 por decisión de la Sala Constitucional del

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84 Véase sentencia No. 538 de la Sala Constitucional del Tribunal Supremo de Justicia de 8 de abril de 2008, en http://www.tsj.gov.ve/decisiones/scon/Abril/538-080408-05-1812.htm (**Anexo ABC-59)**.

85 **Anexo CD-153, ABC-50**.

86 Por sentencia aclaratoria No. 1044 del 23 de julio de 2009, la Sala Constitucional acordó "en virtud de que el Juzgado Superior de lo Contencioso Administrativo del Estado Nueva Esparta ha iniciado sus funciones, se ordena declinar en esa instancia el juicio correspondiente a los recursos contenciosos administrativos de nulidad interpuestos por las sociedades mercantiles que conforman el Consorcio Unique IDC, contra la Resolución N° 0001-06, del 10 de junio de 2005, y contra el Decreto N° 806, del 17 de julio de 2006, ambos dictados por la Gobernación del Estado Nueva Esparta, todo ello de conformidad con lo dispuesto en el artículo 4 de la Resolución N° 2008-0021 dictada por la Sala Plena del Tribunal Supremo de Justicia el 2 de julio de 2008, según el cual "…*los expedientes que conforme a la nueva distribución de competencia territorial correspondan al nuevo Juzgado Superior* [Contencioso Administrativo de la Circunscripción Judicial del Estado Nueva Esparta]*, deberán ser remitidos a éste para que continúe su tramitación*" (corchetes añadidos). (**Anexo ABC-60)**.

Tribunal Supremo de Justicia, lo que ha sido ratificado por la ilícita reforma a la Ley Orgánica de Descentralización, Delimitación y Transferencia de Competencias del Poder Público,[87] que eliminó las competencias exclusivas de los Estados en materia de Aeropuertos sobre la base de la totalmente ilegítima decisión de la Sala Constitucional del Tribunal Supremo de fecha 15 de abril de 2008 que le sirvió de antecedente.

113. Lo cierto es que el recurso contencioso administrativo de anulación de la Resolución No. 0001-05 carecía y carece de objeto, pues no puede "anularse" un acto que no existe por haber sido sustraído del ordenamiento jurídico al haber sido revocado por la misma autoridad que lo dictó. ¿Cuál puede ser el objeto del recurso contencioso administrativo de nulidad que nos ocupa? El juicio, a mi modo de ver, puede seguir tramitándose, pero la sentencia si se llegase a dictar, tendría que ser una sola: no hay materia sobre la cual decidir.

114. De modo que, en principio y por principio, no puede haber pronunciamiento judicial sobre la revocatoria que nos ocupa. Además, recuérdese que el Consorcio UNIQUE IDC desistió del recurso contencioso administrativo intentado contra la misma Resolución Nº 0001-05.

115. En cualquier caso, la sentencia que recaiga con respecto a la nulidad de la Resolución No. 0001-05 debe declarar que *no hay materia sobre la cual decidir,* y la que se dicte con respecto al Decreto No. 806 buscará la manera de expresar solapadamente que la declaratoria de la nulidad del acto es *inoficiosa* porque es *inejecutable* en atención a la decisión de la Sala Constitucional del Tribunal Supremo de 4 de marzo de 2009.

116. Cabe destacar, adicionalmente, que si bien es cierto que la actuación del Ejecutivo Nacional relativa al Aeropuerto del Estado Nueva Esparta se deriva directamente de la sentencia No. 1502 del 4 de marzo de 2009[88], la misma se inscribe en el marco de una política nacional que ha ve-

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87 Véase Ley Orgánica de Descentralización, Delimitación y Transferencia de Competencias del Poder Público de 2009, en *Gaceta Oficial* N° 39 140 del 17 de marzo de 2009 (**Anexo CD-154, ABC-63**). Véase sobre esta reforma, Mauricio Subero Mujica, "Comentarios a la Ley de Reforma Parcial de la Ley Orgánica de Descentralización, Delimitación y Transferencia de Competencias del Poder Público del 17 de marzo de 2009," en http://www.ucab.edu.ve/tl_files/POSTGRADO /boletines/derecho-admin/1_boletin/MAURICIO_SUBERO.pdf (**Anexo ABC-64**).

88 Ver nota *supra.*

nido diseñándose e imponiéndose en Venezuela desde el año 2007 y que tiene por finalidad desarticular la forma federal del Estado.

117. *En efecto, la forma federal del Estado y la distribución territorial de competencias establecidas en los artículos 156 y 164 de la Constitución, fue uno de los temas a los que se refirió la reforma constitucional que, a iniciativa del Presidente de la República, se pretendió aprobar durante el año 2007, y que fue rechazada por el pueblo en referendo de 2 de diciembre de 2007, con la cual expresamente se buscaba modificar el mencionado sistema, centralizando aún más al Estado.*

118. *Tanto en las Propuestas de Reforma Constitucional que formuló la Comisión Presidencial para la Reforma Constitucional en junio de 2007,*[89] *como en el Anteproyecto para la Primera Reforma Constitucional presentado por el Presidente de la República el 15 de agosto de 2007 ante la Asamblea Nacional*[90]*, en relación con la distribución de competencias públicas entre los tres niveles territoriales de gobierno, por una parte, se buscaba terminar de centralizar materialmente todas las competencias del Poder Público en el nivel nacional, mediante la asignación de nuevas competencias al Poder Nacional, centralizándose las competencias que se atribuyen en la Constitución a los Estados, que se buscaba eliminar; y por la otra, se pretendía terminar de vaciar a los Estados y Municipios de las competencias que le quedan en la Constitución, mediante la obligación que se les imponía*

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89 El documento circuló en junio de 2007 con el título "Consejo Presidencial para la Reforma de la Constitución de la República Bolivariana de Venezuela, "Modificaciones propuestas**"**. El texto completo fue publicado como *Proyecto de Reforma Constitucional. Versión atribuida al Consejo Presidencial para la reforma de la Constitución de la República Bolivariana de Venezuela*, Editorial Atenea, Caracas, 1 de julio de 2007. Véase la referencia en Allan R. Brewer-Carías, *Hacia la Consolidación de un Estado Socialista, Centralizado, Policial y Militarista. Comentarios sobre el sentido y alcance de las propuestas de reforma constitucional 2007,* Colección Textos Legislativos, No. 42, Editorial Jurídica Venezolana, Caracas 2007 (**Anexo ABC-71**).

90 Véase el documento ya citado: *Proyecto de Exposición de Motivos para la Reforma Constitucional, Presidencia de la República, Proyecto Reforma Constitucional. Propuesta del presidente Hugo Chávez Agosto 2007;* y la publicación *Proyecto de Reforma Constitucional. Elaborado por el ciudadano Presidente de la República Bolivariana de Venezuela, Hugo Chávez Frías* Editorial Atenea, Caracas agosto 2007 (Véase la referencia en (**Anexo ABC-71**).

de transferir sus competencias a los Consejos Comunales, con lo que en definitiva hubieran quedado como entelequias vacías. [91]

119. *En cuanto a la centralización de competencias en el nivel nacional, en particular, se buscaba atribuir al Poder Nacional, en el artículo 156.27 la competencia para la conservación, administración y aprovechamiento de autopistas y carreteras nacionales, puertos y aeropuertos de uso comercial; es decir, se pretendía "nacionalizar" la competencia que el artículo 164.10 de la Constitución de 1999 atribuyó a los Estados en la misma materia, lo que hubiera implicado la modificación de los ordinales 9 y 10 del artículo 164 de la Constitución, que como se ha visto, asignan competencia a los Estados en materia de "la conservación, administración y aprovechamiento de carreteras y autopistas nacionales, así como de puertos y aeropuertos de uso comercial, en coordinación con el Ejecutivo Nacional."*[92]

120. *Ahora bien, como se dijo, la reforma constitucional propuesta, a pesar de haber sido sancionada por la Asamblea Nacional en noviembre de 2007, fue rechazada expresa y abrumadoramente por el pueblo en el referendo de diciembre de 2007,*[93] *por lo que la competencia de los Estados establecida en el referido artículo 164.10 quedó sin modificación, sin que exista duda alguna sobre su redacción o sentido, cuando atribuye expresamente a los Estados competencia "exclusiva" para conservar, administrar y*

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91 *Idem.*

92 Véase Allan R. Brewer-Carías, *La Reforma Constitucional de 2007 (Comentarios al Proyecto Inconstitucionalmente sancionado por la Asamblea Nacional el 2 de Noviembre de 2007),* Colección Textos Legislativos, No. 43, Editorial Jurídica Venezolana, Caracas 2007, pp. 75 ss. (**Anexo ABC-72)**.

93 El proyecto de reforma constitucional sólo recibió el voto favorable del 28% de los votantes inscritos en el Registro Electoral. Aún hoy no se conocen los resultados definitivos de la votación en el referendo, pero si sólo se toma en cuenta los resultados anunciados por el Consejo Nacional Electoral el día 2 de diciembre de 2007 en la noche, del un universo de más de 16 millones de electores inscritos, sólo acudieron a votar 9 millones doscientos mil votantes, lo que significó un 44% de abstención; y de los electores que votaron, sólo votaron por aprobar la reforma (voto SI), 4 millones trescientos mil votantes, lo que equivale sólo al 28 % del universo de los electores inscritos en el Registro Electoral o al 49,2% de los electores que fueron a votar. En dicho referendo, por tanto, en realidad, no fue que "triunfó" el voto NO por poco margen, sino que lo que ocurrió fue que la propuesta de reforma fue rechazada por el 72% de los electores inscritos, quienes votaron por el NO (50,7%) o simplemente no acudieron a votar para aprobar la reforma.

aprovechar las carreteras y autopistas nacionales, así como puertos y aeropuertos de uso comercial, en coordinación con el Poder Nacional. Tan clara es la disposición que, precisamente por ello, el régimen existente en el país propuso su reforma para centralizar o "nacionalizar" la competencia, lo cual fue rechazado por el pueblo.

121. *Sin embargo, en fraude a la Constitución y utilizando a la Sala Constitucional del Tribunal Supremo de Justicia,*[94] *el gobierno logró burlar la voluntad popular y obtuvo de dicha Sala una "interpretación constitucional" contraria a la norma, habiéndose producido una usurpación ilegítima de la voluntad popular y una ilegítima (y, paradójicamente, inconstitucional) "mutación constitucional" sin que se reformara formalmente y a través de los mecanismos regulares el texto de la Constitución.*[95] *Por tanto, no sólo se trata de una mutación constitucional ilegítima e inconstitucional, sino que fue hecha en fraude a la Constitución, es decir, al procedimiento de revisión de la misma.*

122. *Ello ocurrió mediante la ya referida sentencia No. 565 de 15 de abril de 2008*[96]*, en la cual, la Sala Constitucional a petición del propio*

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94 Véase Allan R. Brewer-Carías, "El juez constitucional al servicio del autoritarismo y la ilegítima mutación de la Constitución: el caso de la Sala Constitucional del Tribunal Supremo de Justicia de Venezuela (1999-2009)", en *Revista de Administración Pública*, No. 180, Madrid 2009, pp. 383-418 (**Anexo ABC-73**).

95 Una mutación constitucional ocurre cuando se modifica el contenido de una norma constitucional de tal forma que aún cuando la misma conserva su contenido, recibe una significación diferente. Véase Salvador O. Nava Gomar, "Interpretación, mutación y reforma de la Constitución. Tres extractos," en Eduardo Ferrer Mac-Gregor (coordinador), *Interpretación Constitucional*, Tomo II, Ed. Porrúa, Universidad Nacional Autónoma de México, México 2005, pp. 804 ss. (**Anexo ABC-74**). Véase en general sobre el tema, Konrad Hesse, "Límites a la mutación constitucional," en *Escritos de derecho constitucional*, Centro de Estudios Constitucionales, Madrid 1992 (**Anexo ABC-75**).

96 Véase sentencia de la Sala Constitucional No 565 de 15 de Abril de 2008 (Caso *Procuradora General de la República, recurso de interpretación del artículo 164.10 de la Constitución de 1999*), en http://www.tsj.gov.ve/decisiones/scon/Abril/565-150408-07-1108.htm (**Anexo ABC-61**). Véanse los comentarios sobre esta sentencia en Allan R. Brewer-Carías, "La Ilegítima mutación de la Constitución y la Legitimidad de la Jurisdicción Constitucional: La "Reforma" de la forma federal del Estado en Venezuela mediante interpretación constitucional," en *Memoria del X Congreso Iberoamericano de Derecho Constitucional,* Instituto Iberoamericano de Derecho Constitucional, Asociación Peruana de Derecho Constitucional, Instituto de

abogado de la República, es decir, del Procurador General de la República, estableció que la competencia exclusiva antes mencionada que tienen los Estados, ya no es una competencia exclusiva, sino concurrente y sujeta a la voluntad del Ejecutivo Nacional, el cual podría intervenirla y reasumirla, como ha hecho respecto de casi todos los aeropuertos. Para dictar la sentencia mencionada, la jurisdicción constitucional no sólo desconoció el principio de la supremacía constitucional que se impone a todos los órganos del Estado, incluyendo al juez constitucional, sino que ejerció ilegítimamente su potestad de interpretación de la Constitución para modificarla sin alterar su texto.

123. *Después de una ilegítima "mutación constitucional" de esta naturaleza, realizada mediante una interpretación vinculante que trastocó el orden jurídico, como lo dijo la propia Sala, se "genera una necesaria revisión y modificación de gran alcance y magnitud del sistema legal vigente." Por ello no pudo la Sala Constitucional concluir en otra forma que no fuera advirtiendo "de oficio y por razones de orden público constitucional, … que el contenido de la presente decisión debe generar una necesaria revisión y modificación del ordenamiento jurídico legal vigente," para lo cual exhortó a la Asamblea Nacional que "proceda a la revisión y correspondiente modificación de la normativa legal vinculada con la interpretación vinculante establecida en la presente decisión*[97]*, en orden a establecer una regulación legal congruente con los principios constitucionales y derivada de la interpretación efectuada por esta Sala en ejercicio de sus competencias." Es decir, la Sala conminó al legislador a legislar en contra de la Constitución de 1999, y conforme a una ilegítima modificación constitucional de la misma impuesta por ella misma.*[98]

Investigaciones Jurídicas-UNAM y Maestría en Derecho Constitucional-PUCP, IDEMSA, Lima 2009, tomo 1 , pp. 29-51 (**Anexo ABC-62**).

97 De ello resulta, según la sentencia, "la necesaria revisión general de la Ley Orgánica de Descentralización, Delimitación y Transferencia de Competencias del Poder Público, Ley General de Puertos y la Ley de Aeronáutica Civil, sin perjuicio de la necesaria consideración de otros textos legales para adecuar su contenido a la vigente interpretación."

98 En cierta forma ocurrió lo que Néstor Pedro Sagués calificó como una "manipulación interpretativa," que lamentablemente puede conducir a la "perversión" de la Constitución. Véase Néstor Pedro Sagües, *La interpretación judicial de la Constitución*, LexisNexis, Buenos Aires 2006, p. 2 (**Anexo ABC-76**). En este caso, lo que ocurrió fue que la Sala Constitucional una vez el por voluntad popular fue rechaza-

124. *La Asamblea Nacional, siguiendo el mandato de la sentencia de la Sala Constitucional, efectivamente sancionó el 17 de marzo de 2009, una "reforma" parcial de la Ley Orgánica de Descentralización, Delimitación y Transferencia de Competencias del Poder Público,*[99] *con la cual se pretendió modificar el régimen constitucional de la competencia estadal eliminando las competencias exclusivas de los Estados establecidas en los ordinales 3 y 5 del artículo 11 de dicha Ley. Además se agregaron dos nuevas normas en las cuales se dispone que "el Poder Público Nacional por órgano del Ejecutivo Nacional, podrá revertir por razones estratégicas, de mérito, oportunidad o conveniencia, la transferencia de las competencias concedidas a los estados, para la conservación, administración y aprovechamiento de los bienes o servicios considerados de interés público general, conforme con lo previsto en el ordenamiento jurídico y al instrumento que dio origen a la transferencia" (art. 8); y que "El Ejecutivo Nacional, por órgano del Presidente o Presidenta de la República en Consejo de Ministros, podrá decretar la intervención conforme al ordenamiento jurídico, de bienes y prestaciones de servicios públicos transferidos para su conservación, administración y aprovechamiento, a fin de asegurar a los usuarios, usuarias, consumidores y consumidoras un servicio de calidad en condiciones idóneas y de respeto de los derechos constitucionales, fundamentales para la satisfacción de necesidades públicas de alcance e influencia en diversos aspectos de la sociedad" (art. 9). Con ello se completó el fraude constitucional dispuesto por la Sala Constitucional, trastocándose el régimen federal. Esta reforma se produjo, casualmente, poco después del triunfo electoral de la oposición en las elecciones regionales de diciembre de 2008, donde quedaron desplazados los Gobernadores del partido oficialista en algunos Estados claves.*

125. Como se observa, la decisión de la Sala Constitucional del Tribunal Supremo No. 155 de fecha 4 de marzo de 2009 se enmarcó en el contexto de una voluntad expresa y deliberada del Poder Nacional de recuperar

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da una reforma constitucional (2007), hizo que la norma de la Constitución de 1999 que se quería reformar, en virtud de su sentencia lo que se quería que dijera con la rechaza reforma. Y ello sin posibilidad alguna de control. Véase Allan R. Brewer-Carías, "*Quis Custodiet Ipsos Custodes*: De la interpretación constitucional a la inconstitucionalidad de la interpretación", en *Revista de Derecho Público*, No 105, Editorial Jurídica Venezolana, Caracas 2006, pp. 7-27 **(Anexo ABC-77)**.

99 Ley Orgánica de Descentralización, Delimitación y Transferencia de Competencias del Poder Público de marzo de 2009, en *Gaceta Oficial* Nº 39.140 del 17 de marzo de 2009. **(Anexo CD-154, ABC-63)**.

para sí la administración y control de los puertos y aeropuertos cuya administración se encontraba conferida exclusivamente y por mandato constitucional a los Estados.

126. Por lo tanto, a juicio de quien suscribe, no es jurídicamente posible que un tribunal pueda efectivamente anular los actos administrativos impugnados y, en consecuencia, restituir los derechos que ellas adquirieron con base en el Contrato de Alianza Estratégica.

2. La Sala Constitucional del Tribunal Supremo de Justicia, progresivamente y mediante sentencias arbitrarias, confiscó los derechos de las Demandantes (y anuló la competencia constitucional del Estado Nueva Esparta)

127. En ejecución de esa política de Estado que pretende desarticular la forma federal del Estado venezolano, la Sala Constitucional del Tribunal Supremo de Justicia, progresivamente y mediante sentencias arbitrarias, anuló la competencia constitucional del Estado Nueva Esparta en materia de gestión de aeropuertos comerciales, al tiempo que confiscó los derechos de las Demandantes con respecto a los aeropuertos del Estado Nueva Esparta.

128. Lo anterior, primero por una medida de intervención temporal y, luego, mediante la entrega de los aeropuertos al Ejecutivo Nacional, no obstante la solicitud de nulidad atinente a los actos administrativos referidos. Todo, sin base constitucional o legal alguna, de lo que deriva su arbitrariedad.

A. La "intervención" de la administración del Aeropuerto

129. Al decidir avocarse al conocimiento del recurso de nulidad contra la Resolución 001-05 intentado por el Consorcio UNIQUE IDC mediante su sentencia No. 1502 de 4 de agosto de 2006 tantas veces referida, la Sala Constitucional del Tribunal Supremo de Justicia venezolano, alegando la finalidad de asegurar la correcta prestación de los servicios aeroportuarios en el Estado Nueva Esparta, pero sin tener legitimidad alguna para ello, "designó" una Junta Interventora integrada por representantes del Poder Nacional, de la Gobernación del Estado Nueva Esparta y del Consorcio UNIQUE IDC y, por unos veedores nombrados por la propia Sala Constitucional. Esto, pues consideró que:

> "La diversidad de conflictos judiciales, la existencia de dos (2) procedimientos administrativos llevados por la Gobernación del Estado Nueva Esparta, y el constante traspaso que ha habido en el último año sobre la administración del aeropuerto, solamente pueden generar ***situaciones que pongan en riesgo la estructura y prestación del servicio, siendo necesario que se adopten medidas adicionales a la establecida de manera precedente con el objeto de garantizar la continuidad del servicio.***" (Énfasis añadido)

130. La Sala Constitucional, en su sentencia, no refirió ninguna norma justificativa de la "intervención" del Aeropuerto por ella practicada; tampoco hizo referencia a algún precedente jurisprudencial. Y mal podía hacerlo, pues no existían.

131. Debe mencionarse que en el ordenamiento jurídico venezolano, en relación con las concesiones de servicios públicos, la Ley Orgánica sobre Promoción de la Inversión Privada bajo el Régimen de Concesiones de 1999,[100] autoriza en su artículo 52, al "ente concedente" de una obra o un servicio público para que, en caso de que el concesionario *"abandone la obra, interrumpa el servicio de manera injustificada, o incurra en uno de los supuestos de incumplimiento grave de las obligaciones del contrato"*, designe un interventor *"con el propósito de impedir o evitar la paralización de la obra o servicio".*

132. El procedimiento –brevísimo- para dicha "intervención," está definido en el mismo artículo 52 de la Ley Orgánica sobre Promoción de la Inversión Privada bajo el Régimen de Concesiones, el cual supone la obligación para la Administración concedente de demostrar que el concesionario ha abandonado la obra, que ha interrumpido el servicio de manera injustificada o que ha incurrido en uno de los supuestos de incumplimiento grave de las obligaciones del contrato[101]. Esa administración debe, además, oír al concesionario y dar garantía a sus derechos constitucionales.

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[100] Véase Ley Orgánica sobre Promoción de la Inversión Privada bajo el Régimen de Concesiones (Decreto Ley No. 318 de 17-9-1999), en *Gaceta Oficial* Nº 5.394 Extraordinario del 25 de octubre de 1999 (**Anexo ABC-38**).

[101] Entre los supuestos de incumplimiento grave, la norma del artículo 51 de la Ley Orgánica relativa a las Concesiones enumera los siguientes: "a. Demoras no autorizadas en la construcción de las obras, por períodos superiores a los establecidos en el pliego de condiciones; b. Falta de cumplimiento reiterado de los niveles mínimos

133. Entre las decisiones que puede adoptar el ente concedente al término del procedimiento está la terminación de la concesión por incumplimiento grave del contrato; decisión que sobrevendrá –según el artículo 52 ya mencionado- si pasados noventa (90) días desde la designación del interventor, el concesionario no reasume la obra o el servicio. En tal caso –la terminación de la concesión por incumplimiento grave del contrato-, debe procederse a la licitación pública de la concesión, por el plazo que le reste.

134. Teniendo en cuenta estas disposiciones, que conforme al artículo 5 de dicha la Ley Orgánica relativa a Concesiones, son de aplicación potestativa por los Estados, y en todo caso, serían de aplicación analógica conforme al artículo 4 del Código Civil, en nada se parece la "intervención" declarada por la Sala Constitucional del Tribunal Supremo de Justicia venezolano, a la intervención de concesiones prevista en dicha Ley Orgánica relativa a las Concesiones.

135. Asimismo, la medida de "intervención" no sólo atañe a las Demandantes en su condición de concesionarias; sino también al Estado Nueva Esparta. Esto excluye la posibilidad de afirmar que la "intervención" de la Sala Constitucional se hubiese fundamentado en el procedimiento de intervención que había iniciado el Gobernador del Estado Nueva Esparta en diciembre de 2005.

136. En efecto y en cuanto a lo último, tampoco adujo la Sala Constitucional ninguna norma constitucional o legal que la facultara para adoptar la medida de intervención, tantas veces mencionada. No existía –ni existe- norma alguna en tal sentido.

137. De tal manera, debe afirmarse que no tiene sustento jurídico alguno –*ergo* es insostenible- la medida de intervención adoptada por la Sala Constitucional del Tribunal Supremo de Justicia Venezolano en su sentencia primigenia No. 1502 de 4 de agosto de 2006. Tampoco tiene sustento, como se verá, la entrega que la Sala Constitucional hizo del Aeropuerto al Ministerio del Poder Popular para la Infraestructura en marzo de 2009.

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de calidad del servicio establecidos en el pliego de condiciones; c. Cobranza reiterada de tarifas superiores a las autorizadas; d. Incumplimiento reiterado de las normas de conservación de las obras, especificadas en el pliego de condiciones; e. No constitución o reconstitución de las garantías en los plazos y condiciones estipuladas en el pliego de condiciones."

B. La entrega del Aeropuerto al Ejecutivo Nacional

138. En su sentencia definitiva del asunto al que se avocó (No. 155 de 4 de marzo de 2009), la Sala Constitucional del Tribunal Supremo de Justicia venezolano declaró el "agotamiento del avocamiento", en los términos que quedaron ya expuestos (***Véase supra* ¶ *94***), y "concluido el régimen de intervención temporal del Aeropuerto Internacional del Caribe 'General en Jefe Santiago Mariño'"[102] que habría decretado la propia Sala Constitucional previamente (sentencia primigenia No. 1502 de 4 de agosto de 2006).

139. En cuanto a la conclusión del régimen de intervención, la Sala Constitucional señaló en su sentencia definitiva No. 155 de 4 de marzo de 2009 que:

> "con el fin de garantizar la prestación continua, pacífica e ininterrumpida de los servicios aeroportuarios del Estado Nueva Esparta, y ***ante la incapacidad de las partes de asumir el control de las instalaciones aeroportuarias, dada la situación de conflictividad que existe entre ellas y que se manifiesta a través de las causas que se encuentran pendientes de resolución; y visto que el Poder Nacional tiene como Máxima Autoridad garantizar la paz social y la preservación del interés general de la colectividad, así como la competencia en la prestación de los servicios públicos, ordena la entrega de las instalaciones aeroportuarias al Ejecutivo Nacional, por órgano del Ministerio del Poder Popular para la Infraestructura***,"… (Subrayado añadido).

140. Por medio de esta decisión, la Sala Constitucional del Tribunal Supremo privó a ambas partes –al Consorcio y al Estado de Nueva Esparta- de su pretensión de administrar el Aeropuerto. Por lo mismo, tanto el Consorcio UNIQUE IDC como el Estado Nueva Esparta, en su oportunidad, requirieron de la Sala Constitucional que señalara si la entrega de los Aeropuertos al Ejecutivo Nacional era o no una medida cautelar. Con respecto a ello, en sentencia aclaratoria No. 1044 de 23 de julio de 2009,[103] la Sala estableció:

> ***"[D]icha medida*** se adoptó con ocasión al cese del avocamiento por parte de esta Sala sobre los juicios que en sede constitu-

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102 **Anexo CD-153, ABC-50**.

103 **Anexo ABC-60**.

> cional se habían incoado. Al resolver las causas en materia de amparo, esta Sala determinó que, dada su naturaleza, los juicios contencioso administrativos debían volver a la jurisdicción correspondiente; sin embargo, dado el conflicto aún existente, la administración de los aeropuertos no podía asignársele a ninguna de las partes, por lo que se ordenó su entrega al Poder Nacional, al corresponderle la competencia general en materia de servicios públicos, la cual, ***estaría supeditada a la resolución del juicio contencioso administrativo pendiente***. No obstante, ***debe entenderse que los efectos de la sentencia N° 155, del 4 de marzo de 2009, no abarcan las decisiones que el Ejecutivo Nacional pueda dictar en materia de aeropuertos.***"

141. Como se observa, la Sala Constitucional resolvió que la administración del Aeropuerto estaba supeditada "a las decisiones que el Ejecutivo Nacional pueda dictar", independientemente de las resultas del juicio contencioso administrativo pendiente.

142. Recordemos, sin embargo, que cuando se dictó la sentencia aclaratoria No. 1044 de 23 de julio de 2009, el Ejecutivo Nacional ya había adoptado medidas prácticamente irreversibles, a juicio de quien suscribe, con respecto a los derechos e intereses sostenidos por las Demandantes (v.gr. la constitución de la empresa Estatal "Bolivariana de Aeropuertos", para *"el acondicionamiento, mantenimiento, desarrollo, administración, explotación y aprovechamiento del conjunto de instalaciones, bienes y servicios que comprende la infraestructura aeronáutica civil propiedad de la República Bolivariana de Venezuela"* y la adscripción a la misma de aquellos bienes que estaban afectados al funcionamiento del Aeropuertos del Estado Nueva Esparta).

143. El artículo 164.10 de la Constitución venezolana expresa de manera inequívoca que ***es competencia exclusiva de los Estados*** la conservación, administración y aprovechamiento de carreteras y autopistas nacionales, así como de puertos ***y aeropuertos de uso comercial*** en coordinación con el Ejecutivo Nacional. De manera que si el Poder Nacional, a través del Ejecutivo, puede intervenir en la conservación, administración y aprovechamiento de aeropuertos de uso comercial es en razón de su **actuación *coordinada*** con los órganos estadales, es decir, de su acción concertada para alcanzar el fin común en que consiste la correcta operación de los aeropuertos.

144. Por otra parte, cuando se dictó la sentencia No. 155 de 4 de marzo de 2009, no existía norma alguna que pudiera fundamentar la decisión de la Sala Constitucional de "entregar" el Aeropuerto al Ejecutivo Nacional. Incluso si se tuviesen en cuenta las disposiciones de la Ley Orgánica para la Descentralización, Delimitación y Transferencia de Competencias del Poder Público vigentes para cuando se dictó la sentencia,[104] habría que concluir que, efectivamente, el Tribunal Supremo de Justicia no podía ni puede, de oficio y sin que mediase procedimiento al efecto, "entregar" el Aeropuerto conservados, mantenidos y administrados por los Estados al Poder Nacional. En conclusión, la Sala Constitucional del Tribunal Supremo de Justicia entregó irremediablemente y sin fundamento, el Aeropuerto del Estado Nueva Esparta al Ejecutivo Nacional, por órgano del Ministerio del Poder Popular para la Infraestructura (Obras Públicas y Vivienda). Todo, incluso, sin haber fundamentado la medida, más que genéricamente, en la sentencia Nº 565 dictada por esa misma Sala el 15 de abril de 2008.[105]

145. De lo anterior resulta, en todo caso, en relación con el Aeropuerto en cuestión, que fue la Sala Constitucional del Tribunal Supremo la cual, anticipándose incluso a la inconstitucional reforma de la Ley Orgánica de Descentralización, Delimitación y Transferencia de Competencias del Poder Público de 17 de marzo de 2009, la que procedió ilegítimamente a "nacionalizar" dicho Aeropuerto mediante la sentencia No. 155 de 4 de marzo de 2009, entregando su manejo y control definitivo al Poder Ejecutivo Nacional para que lo administrara a través del Ministerio del Poder Popular para la Infraestructura.[106]

146. En esta forma, incluso antes de que se hubiese reformado la Ley Orgánica de Descentralización, Delimitación y Transferencia de Competencias del Poder Público de 17 de marzo de 2009, la Sala Constitucional, sin

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104 Esta ley fue publicada en la *Gaceta Oficial* Nº Extr. No. 4.153 de 28 de diciembre de 1989. **(Anexo ABC-5).**

105 En cuanto a la "reforma" de la Ley Orgánica de Descentralización, Delimitación y Transferencia de Competencias del Poder Público de 17 de marzo de 2009, la misma no podía por supuesto siquiera invocarse pues se aprobó y publicó después de dictada la sentencia. Véase Ley Orgánica de Descentralización, Delimitación y Transferencia de Competencias del Poder Público en *Gaceta Oficial* Nº 39.140 del 17 de marzo de 2009, en *Gaceta Oficial* Nº 39.140 del 17 de marzo de 2009 **(Anexo CD-154, ABC-63)**.

106 **Anexo CD-153, ABC-50**.

competencia alguna de orden constitucional o legal para ello, procedió a "nacionalizar" el Aeropuerto y entregar sus instalaciones al Poder Ejecutivo Nacional, despojando al Consorcio UNIQUE IDC de sus derechos, de manera irreversible, pues evidentemente ejecutó una clara política de Estado impartida desde el año 2007 por el Presidente de la República. Ante esta realidad, ningún tribunal *ordinario* contencioso administrativo tiene facultades para revertir la entrega del Aeropuerto al Ejecutivo Nacional: ¿cómo podría si además la República no fue parte en juicio, mucho menos lo fue la Bolivariana de Aeropuertos, BAER?

147. Por lo expuesto, a juicio de quien suscribe las decisiones de la Sala Constitucional del Tribunal Supremo y, en particular, la sentencia No. 155 de fecha 4 de marzo de 2009 que ordenó la entrega del Aeropuerto al Poder Nacional, constituyen un acción inaceptable de desviación de poder y se traducen, en términos jurídicos precisos, en una *confiscación* que no puede ser revertida por ningún tribunal ordinario contencioso administrativo.

148. Declaro que lo anterior es mi opinión jurídica en relación con los asuntos que se me han requerido estudiar.

Firmado en New York, a los 5 días del mes de mayo de 2012.

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Allan R. Brewer-Carías

9.

Caso CIADI/ARB/10/19: *FLUGHAFEN ZÜRICH A.G., GESTIÓN E INGENIERÍA IDC S.A.* (*Demandantes*) *c. REPÚBLICA BOLIVARIANA DE VENEZUELA* (*Demandada*)

CENTRO INTERNACIONAL DE ARREGLO DE DIFERENCIAS RELATIVAS A INVERSIONES (CIADI)

SEGUNDA OPINIÓN LEGAL DE ALLAN R. BREWER-CARÍAS

28 AGOSTO 2012

1. Quien suscribe, Allan R. Brewer-Carías, mediante la presente declaro que las opiniones legales que aquí expreso responden al conocimiento que tengo respecto de las materias relativas al derecho público venezolano que me han sido consultadas, de acuerdo con mi propio convencimiento.

2. Luego de revisar y estudiar las partes relevantes sobre el derecho venezolano del *Memorial de Réplica sobre Objeciones a la Jurisdicción del Centro y la Competencia del Tribunal* de fecha 28 de junio de 2012 (***Memorial de Réplica***), y del *Segundo Informe de Experto del profesor Carlos Enrique Mouriño Vaquero,* s/f (***Segundo Informe Mouriño***), ratifico en su totalidad todo lo que expresé en mi *Opinión Legal* formulada ante este Tribunal el 5 de mayo de 2012 (***ABC Primera Opinión Legal***).

I. ALCANCE DE LA PRESENTE SEGUNDA OPINIÓN LEGAL Y RESUMEN EJECUTIVO

3. Esta Segunda Opinión, aparte de que ratifica el contenido de mi *Primera Opinión Legal* de fecha 5 de mayo de 2012, tiene por objeto analizar los aspectos del derecho venezolano que he considerado relevantes del *Segundo Informe Mouriño* y en el *Memorial de Réplica*; como también comentar y clarificar algunos de los puntos en ellos tratados.

4. Además, de acuerdo con lo que me han solicitado las Demandantes, expreso mi opinión, conforme al derecho venezolano, en relación con la aplicación del principio de la expectativa o confianza legítima a este caso. Es mi opinión profesional que el Decreto No. 1.188 de 26 de febrero de 2004 ("Decreto No. 1.188 de 2004") por medio del cual el Gobernador del Estado de Nueva Esparta adjudicó la contratación de la prestación del servicio aeroportuario del Aeropuerto Internacional del Caribe General en Jefe Santiago Mariño (el "Aeropuerto") al Consorcio UNIQUE IDC, -en virtud del cual se firmó el Contrato de Alianza Estratégica- generó una confianza o expectativa legítima que debe ser protegida.

5. A título de **RESUMEN EJECUTIVO** puedo indicar que de mi análisis he llegado a las siguientes conclusiones que ratifican y complementan mi *Primera Opinión Legal*. Para facilitar el entendimiento de mi opinión respecto de los distintos temas jurídicos que me han sido consultados, en este resumen ejecutivo incluyo las conclusiones de ambas opiniones.

(i) *Sobre el ordenamiento jurídico aplicable al proceso de contratación de los servicios aeroportuarios en el Estado Nueva Esparta en 2004*

a) De acuerdo con el artículo 164 de la Constitución venezolana de 1999, una de las materias que se califican como de la "competencia exclusiva de los Estados" es la relativa a "la conservación, administración y aprovechamiento de carreteras y autopistas nacionales, así como de puertos y aeropuertos de uso comercial…" (ord. 10). Las competencias "exclusivas" como la asignada en esa norma a los Estados de la federación, son radicalmente distintas a las competencias "concurrentes" que la misma Constitución prevé (artículo 165).

b) Dicha competencia constitucional exclusiva de los Estados, la cual conforme a la anterior Constitución de 1961 estaba asignada al Poder Nacional, en aplicación del artículo 137 de dicha Constitución fue descentralizada y asignada en forma exclusiva a los Estados mediante la Ley Orgánica de Descentralización, Delimitación y Transferencia de Competencias del Poder Público de 1989 ("Ley Orgánica de Descentralización de 1989"). Conforme a las previsiones de dicha Ley Orgánica, el Estado Nueva Esparta, desde el año 1991, asumió dicha competencia exclusiva por medio de la Ley por la cual el Estado Nueva Esparta asumió la Administración y mantenimiento de los Puertos y Aeropuertos Públicos de uso Comercial ubicados en su territorio ("Ley de asunción de competencias ENE de 1991"). Fue en ejecución de esas leyes y de la competencia exclusiva descentralizada, que la Gobernación del Estado Nueva Esparta desde el año 1993 decidió contratar mediante concesión la prestación del servicio aeroportuario y el mantenimiento y operación del Aeropuerto, y posteriormente, en el marco de la competencia exclusiva prevista en la Constitución de 1999, decidió suscribir el 26 de febrero de 2004, un Contrato de Alianza Estratégica con el Consorcio UNIQUE IDC ("Contrato de Alianza Estratégica").

c) El Contrato de Alianza Estratégica, por tanto, se suscribió conforme a la "competencia exclusiva" que tienen los Estados de la federación venezolana en materia de conservación, administración y aprovechamiento de aeropuertos de uso comercial, conforme al artículo 164.10 de la Constitución de 1999; y de acuerdo con lo previsto en el artículo 11.5 de la Ley Orgánica de Descentralización de 1989, en la Ley de asunción de competencias ENE de 1991 y en la Ley de Concesiones de Obras y Servicios Públicos del Estado Nueva Esparta de 1997 ("Ley de Concesiones ENE de 1997"). El hecho de que la prestación de los servicios de conservación, administración y aprovechamiento de aeropuertos de uso comercial por los Estados conforme al artículo 164.10 de la Constitución de 1999 se deba realizar "en coordinación con el Ejecutivo Nacional" no cambia su carácter de competencia exclusiva, y en forma alguna la transforma en una "competencia concurrente". La coordinación es un principio clásico de la actividad y organización administrativa que se da entre órganos que generalmente tienen competencias exclusivas en su respectivo ámbito material o territorial, para que las ejerzan de común acuerdo con el fin de lograr un objetivo común; pero ello no cambia el carácter exclusivo de la competencia ni la convierte en competencia "concurrente".

d) Para el ejercicio de sus competencias exclusivas por parte de los Estados en la federación venezolana, no se exige que se haya dictado previamente una ley nacional que las regule. Por ello son competencias exclusivas. Las llamadas "leyes marco o base" en el artículo 165 de la Constitución de 1999 sólo se refieren al ejercicio de competencias concurrentes entre los entes político territoriales. En consecuencia, en el derecho venezolano, la relación entre la Ley Orgánica de Descentralización de 1989 y la Ley de asunción de competencias ENE de 1991 jamás podría considerarse como una relación entre una "ley marco o base" nacional y una "ley de desarrollo" estadal.

(ii) ***Sobre la legalidad de la adjudicación directa de la contratación de los servicios aeroportuarios en el Estado Nueva Esparta en 2004***

a) El Contrato de Alianza Estratégica podía ser adjudicado en forma directa al Consorcio UNIQUE IDC -sin licitación previa- de conformidad con la Ley de Concesiones ENE de 1997.

b) El régimen de la licitación y de la adjudicación directa de concesiones en el ordenamiento jurídico venezolano, es una materia enteramente dejada al legislador. No hay en Venezuela principio constitucional alguno que se refiera a la licitación como forma obligatoria de selección de contratistas. Por ello, siguiendo la orientación general de las regulaciones legales nacionales, la Ley de Concesiones ENE de 1997 estableció el régimen de selección de contratistas, regulando tanto la licitación como la posibilidad de adjudicación directa de las concesiones.

c) Precisamente conforme a la competencia regulada en artículo 23.4 de la Ley de Concesiones ENE de 1997, la Gobernación del Estado Nueva Esparta dictó un acto administrativo debidamente motivado (Decreto No. 1.188 de 2004), ordenando proceder a la adjudicación directa de la contratación de la prestación del servicio aeroportuario, para lo cual se cumplieron los requisitos previstos en dicha norma. Por lo anterior, la celebración del Contrato de Alianza Estratégica se realizó conforme a las previsiones de la Ley de Concesiones ENE de 1997, en la cual se reguló especialmente el régimen de concesiones en el Estado Nueva Esparta.

d) El artículo 23.4 de la Ley de Concesiones ENE de 1997 dispone expresamente la posibilidad de que la Gobernación del Estado Nueva Esparta pueda decidir la celebración de contratos de concesión mediante adjudicación directa cuando se trate de la continuación de la prestación de un servicio en forma indirecta mediante la modalidad de concesión, en los casos en los cuales un contrato de concesión previo hubiera sido resuelto por el Ejecutivo Estadal "…por incumplimiento del concesionario, rescate anticipado de la concesión o quiebra del concesionario", conforme a lo establecido en dicha ley. Precisamente en este caso, como se trataba de un servicio que se había venido prestando mediante concesión otorgada al Consorcio CVA C.A., cuyo contrato de concesión había sido "resuelto por incumplimiento del concesionario," la misma Gobernación del Estado Nueva Esparta decidió -luego de que asumiera temporalmente la prestación del servicio para evitar su interrupción- que el servicio continuara prestándose por vía de concesión, adjudicándolo en consecuencia en forma directa mediante decisión contenida en acto administrativo debidamente motivado (Decreto No. 1.188 de 2004), al Consorcio UNIQUE IDC, con quien se suscribió el Contrato de Alianza Estratégica.

e) La Ley de Concesiones ENE de 1997 no previó expresamente plazo o lapso alguno para que la Gobernación del Estado Nueva Esparta, una vez rescindido un contrato de concesión, proceda a adjudicar en forma directa el subsiguiente contrato de concesión; correspondiendo al Gobernador del Estado la evaluación y decisión del caso, según sus propias circunstancias, respecto de lo cual adoptó su decisión en forma debidamente motivada "a juicio de la autoridad competente", como lo indica el artículo 12 de la Ley Orgánica de Procedimientos Administrativos de 1981.

f) Es importante precisar que la Ley de asunción de competencias ENE de 1991 fue una ley dictada para ejecutar la Ley Orgánica de Descentralización de 1989, y permitir al Estado Nueva Esparta el ejercicio de la competencia exclusiva que se le descentralizó. Dicha ley no tuvo por objeto regular los contratos de concesión a ser otorgados por el Estado Nueva Esparta, sino regular la asunción de una competencia exclusiva, previendo normas para ello, en ausencia en ese momento de una ley especial del Estado regulatoria de concesiones, normas específicas para la selección de contratistas en el otorgamiento de concesiones. Posteriormente, el Estado Nueva Esparta dictó la Ley de Conce-

siones ENE de 1997 especialmente destinada a regular las concesiones a otorgarse por el Estado, cualquiera sea su objeto. Entre estas dos leyes (Ley de asunción de competencias ENE de 1991 y Ley de concesiones ENE de 1997) no se da la relación entre "ley especial" y "ley general" ya que el supuesto de hecho regulado en las mismas, es decir, el objeto de una y de otra es distinto: una, es una ley específica destinada a concretizar la "asunción" de una competencia pública descentralizada por parte del Estado Nueva Esparta conforme a la Ley de Descentralización 1989; y la otra, es una ley sustantiva que tiene por objeto establecer especialmente el régimen de todas las concesiones del Estado Nueva Esparta aplicable a todas las concesiones, incluyendo las concesiones para la administración y mantenimiento de aeropuertos.

g) Adicionalmente, la Ley de Concesiones ENE de 1997, además de ser una ley posterior a la Ley de asunción de competencias ENE de 1991, la cual por ello tiene efectos derogatorios en cuanto al régimen que establece en materia de régimen de concesiones y selección de contratistas (dándose entre ellas la relación entre "ley posterior" y "ley anterior"), expresamente dispone en su artículo 63 que "las disposiciones de esta Ley *se aplicarán con preferencia* a cualquier otra disposición del ordenamiento legal del Estado, incluida la Ley de Licitaciones". En consecuencia, en materia de adjudicación directa de concesiones por el Estado Nueva Esparta, la Ley de asunción de competencias del ENE de 1991 no constituye, ni puede constituir impedimento alguno para la aplicación del artículo 23.4 de la Ley de Concesiones ENE de 1997, que permite adjudicar en forma directa contratos de concesión, conforme a sus propios términos. Al contrario, en la materia, la última prevalece sobre la primera.

(iii) *Sobre el régimen de los contratos de concesión otorgados por el Estado Nueva Esparta: autorización y/o aprobación legislativa*

a) El Contrato de Alianza Estratégica no requería ser sometido a autorización previa por parte de la Asamblea Nacional conforme lo dispuesto en los artículos 150 y 187.9 de la Constitución de 1999, pues las empresas que conformaron el Consorcio UNIQUE IDC, son empresas domiciliadas en Venezuela e inscritas ante el Registro Mercantil Segundo de la Circunscripción Judicial del Estado Nueva Esparta en 2004 conforme lo dispone el artículo 354 del Código de Comercio de Vene-

zuela. Ello, por lo demás, formó parte expresa de las motivaciones del Decreto No. 1.188 de 2004 donde se expresó que "por cuanto el contrato de Alianza Estratégica se va a celebrar con una sociedad mercantil domiciliada en la República Bolivariana de Venezuela, no se requiere la aprobación por parte de la Asamblea Nacional".

b) El Contrato de Alianza Estratégica tampoco requería ser sometido a autorización previa por parte del Consejo Legislativo del Estado Nueva Esparta. Tampoco era necesaria la aprobación legislativa estadal conforme al artículo 50 de la Constitución del Estado Nueva Esparta, pues ni la Ley de asunción de competencias ENE de 1991 ni la Ley de Concesiones ENE de 1997 previeron que este tipo de contratos debieran someterse a este tipo de control legislativo.

c) El artículo 50 de la Constitución del Estado Nueva Esparta dispone, en la misma orientación que establecía el artículo 126 de la Constitución de 1961, que "sin la aprobación del Consejo Legislativo o de su Comisión Delegada no podrá celebrarse ningún contrato de interés estadal, *salvo los casos permitidos por ley*." No tiene importancia en este caso la discusión de si lo previsto en dicha norma de la Constitución del Estado Nueva Esparta es realmente una aprobación o una autorización; habiendo sido la decisión adoptada por la Gobernación del Estado en el Decreto No 1.188 de 2004, la de proceder a adjudicar el Contrato de Alianza Estratégica sin dicha intervención legislativa, al considerar que dicha norma no se aplicaba al caso, conforme a la ortodoxia interpretativa de esa norma constitucional realizada por todos los órganos del Estado en Venezuela.

d) Esa fue una decisión adoptada exclusivamente por la Gobernación del Estado Nueva Esparta siguiendo la interpretación histórica y pacífica que se ha dado a las normas que prevén la aprobación de los órganos legislativos en materia de contratación pública en Venezuela, la cual sólo se ha exigido *cuando una ley específica así lo requiere*, de manera que si las leyes regulan la celebración de contratos públicos sin exigir la aprobación o intervención legislativa, siempre se ha entendido y se entiende que el legislador "permite" la contratación sin dicha intervención. En este caso, ninguna de las leyes aplicables a los contratos de concesión para la prestación de los servicios aeroportuarios (o para cualquier otra obra o servicio público) en el Estado Nueva Esparta (ni Ley de asunción de competencias ENE de 1991, ni la Ley de Concesio-

nes ENE de 1997), exigieron que dichos contratos de concesión requirieran de aprobación legislativa por parte del Consejo Legislativo del Estado Nueva Esparta conforme al artículo 50 de la Constitución del Estado Nueva Esparta, por lo cual el Gobernador del Estado decidió, y así lo motivó expresamente en el Decreto No. 1.188 de 2004, indicando que no se requería dicha intervención.

(iv) ***Sobre la firmeza del acto administrativo que decidió en 2004 la adjudicación directa y la consecuente celebración del Contrato de Alianza Estratégica con el Consorcio Unique IDC***

a) El Decreto No 1.188 de 2004 fue dictado por el Gobernador del Estado Nueva Esparta como jefe de la Administración estadal y, en dicha calidad, adjudicó al Consorcio UNIQUE IDC, la contratación de la prestación del servicio aeroportuario, firmando en consecuencia el Contrato de Alianza Estratégica.

b) El Decreto No. 1.188 de 2004, como acto administrativo de efectos particulares creador de derechos a favor del Consorcio UNIQUE IDC para la firma del Contrato de Alianza Estratégica, era un acto administrativo firme e irrevocable por la Administración, conforme lo establece el artículo 82 de la Ley Orgánica de Procedimientos Administrativos de 1981.

(v) ***Sobre la inexistencia de un supuesto fraude a la ley en la celebración del contrato de alianza estratégica***

a) El profesor Mouriño llega a argumentar que el supuesto "fraude a la ley" resultaría evidente al expresar categóricamente que "la intención de la administración era la de contratar con empresas extranjeras" y que la propia Administración habría demostrado una "conducta elusiva para evadir y/o relajar los controles previstos en el artículo 50 de la Constitución del Estado Nueva Esparta y 150 de la Constitución de la República Bolivariana de Venezuela". De toda la documentación revisada lo cierto es que este experto no ha encontrado antecedente alguno que permita sustentar tal afirmación. Por lo demás, lo cierto es que lo señalado se opone a lo que se expresaron en los actos administrativos dictados en la época, como por ejemplo el contenido en la Resolución No. 0001-05 del 10 de junio de 2005, en la cual nada se dijo sobre ello.

(vi) ***La expectativa legítima de las demandantes generada por el acto administrativo firme que decidió la adjudicación directa de la concesión del Aeropuerto al consorcio UNIQUE IDC***

a) En el derecho administrativo venezolano rige el principio de la confianza legítima, como manifestación del principio de la buena fe en las relaciones jurídicas que se establecen entre los órganos de la Administración y los particulares. No se permite bajo este principio que la Administración desconozca derechos adquiridos por particulares que se derivan de sus propios actos administrativos. Habiendo actuado los particulares de buena fe, con base de estos mismos actos administrativos, el principio de la confianza legítima impide en este caso que el Estado pretenda ahora alegar la supuesta ilegalidad del Contrato de Alianza Estratégica, que nadie ha declarado, en contra del Consorcio que lo suscribió, habiendo el propio Estado a través de la Gobernación del Estado Nueva Esparta sido parte del mismo.

b) Conforme a los principios que rigen el derecho administrativo venezolano el Decreto No 1.188, y la posterior firma del Contrato de Alianza Estratégica en cumplimiento de dicho Decreto, generó en dicho Consorcio una expectativa legítima en el sentido de que el mismo sería honrado en todos sus efectos como manifestación de voluntad expresa de la Gobernación del Estado Nueva Esparta.

(vii) ***Sobre la figura del avocamiento y la ilegalidad e ilegitimidad de su utilización en el caso de las demandas intentadas por el consorcio UNIQUE IDC, y la pretendida doctrina universal, pero inexistente, de la actuación de oficio de los jueces contencioso administrativos en materia de control de actos administrativos***

a) La intervención de la Sala Constitucional del Tribunal Supremo de Justicia en el caso que nos ocupa constituye un caso manifiesto de desviación de poder. La Sala Constitucional se avocó ilegal e ilegítimamente al conocimiento de recursos contencioso administrativos que se encontraban fuera de su competencia. Posteriormente, la misma Sala rehusó pronunciarse sobre el fondo de la controversia a cuyo conocimiento se había avocado habiendo en la práctica suspendido la tramitación de dichos recursos por un período de casi dos años. Finalmente, la misma Sala declaró agotado el avocamiento sin haber realizado trámite

sustancial alguno en el marco de dichos procedimientos. La Sala Constitucional del Tribunal Supremo, además, le entregó la administración del Aeropuerto a los órganos del Poder Ejecutivo Nacional sin fundamento constitucional alguno, produciendo un vaciamiento del objeto de los recursos sometidos a su conocimiento. Esto constituyó una usurpación inaceptable de la competencia exclusiva que tienen los Estados en materia de administración de aeropuertos conforme el artículo 164.10 de la Constitución de Venezuela.

b) La Sala Constitucional –una vez declarado el agotamiento del avocamiento y entregado el Aeropuerto al Poder Ejecutivo Nacional- remitió al juez natural la tramitación de los recursos contencioso administrativos que se habían interpuesto, no obstante no existir materia alguna sobre la cual se pueda decidir en dichos recursos, pues al juez natural le es jurídicamente imposible revertir la entrega del Aeropuerto al Consorcio UNIQUE IDC dispuesta por el Tribunal Supremo de Justicia, y por tanto restablecer la situación jurídica infringida del Consorcio que constituyó la pretensión fundamental de los recursos. Estas actuaciones ponen de manifiesto la absoluta denegación de justicia llevada a cabo por la Sala Constitucional del Tribunal Supremo, así como la indefensión de las Demandantes en el ámbito interno, de la misma manera que evidencian la confiscación que se ha producido respecto de sus derechos, por parte del Estado venezolano.

c) Lo anterior puede decirse que fue realizado en el contexto de una política de Estado de apropiación de los aeropuertos nacionales por parte del Poder Nacional en desmedro de los poderes estadales, iniciada en el año 2007. Nótese que tan sólo 20 días después de la decisión de la Sala Constitucional del Tribunal Supremo, se dictó una reforma legal de la Ley Orgánica de Descentralización - del todo inconstitucional- que desconociendo el carácter de competencia exclusiva de los Estados, entregó al Poder Nacional el control y administración de todos los aeropuertos que se encontraban en poder de los Estados. Se creó asimismo un empresa pública nacional denominada "Bolivariana de Aeropuertos" para la administración de todos los aeropuertos que le fueron usurpados inconstitucionalmente a los Estados.

II. SOBRE EL ORDENAMIENTO JURÍDICO APLICABLE AL PROCESO DE CONTRATACIÓN DE LOS SERVICIOS AEROPORTUARIOS EN EL ESTADO NUEVA ESPARTA EN 2004

6. El Contrato de Alianza Estratégica se suscribió conforme a todas las normas que lo regulaban, y especialmente:

(i) conforme al artículo 164.10 de la Constitución de 1999 que le asigna competencia en forma exclusiva a los Estados de la federación venezolana en materia de "conservación, administración y aprovechamiento de carreteras y autopistas nacionales, así como de puertos y aeropuertos de uso comercial, en coordinación con el Ejecutivo Nacional" (**Anexo ABC-2**);

(ii) conforme al artículo 11.5 de la Ley Orgánica de Descentralización de 1989 (**Anexo ABC-5**) (reformada en 1993, **Anexo ABC-7**), mediante la cual se transfirió a los Estados de la federación "la administración y mantenimiento de puertos y aeropuertos públicos de uso comercial," la cual en el marco de la Constitución de 1961, era una materia de competencia del Poder Nacional;

(iii) conforme a la Ley de asunción de competencias ENE por la cual el Estado Nueva Esparta asumió la administración y el mantenimiento de los puertos y aeropuertos públicos de uso comercial ubicados en su territorio de 1991 (**Anexo ABC-13**); y

(iv) conforme a la Ley Concesiones ENE (**Anexo ABC-16**).[1]

7. Dejando a salvo la norma de la Constitución de 1999, cada una de las leyes mencionadas precedentemente tiene su ubicación precisa en el ordenamiento jurídico, siendo todas ellas de orden preconstitucional.

8. Como ya he señalado, el artículo 164.10 de la Constitución de 1999 estableció el carácter "exclusivo" de la competencia de los Estados en materia de "la conservación, administración y aprovechamiento de carreteras y autopistas nacionales, así como de puertos y aeropuertos de uso comercial." Se trata de una competencia de naturaleza exclusiva - no concurrente – que

[1] Llama la atención que el profesor Mouriño al referirse al bloque de legalidad aplicable a la competencia transferida al Estado Nueva Esparta omita la referencia a la Ley de Concesiones de Obras y Servicios Públicos del Estado Nueva Esparta, que constituía el ordenamiento legal fundamental aplicable para las concesiones del Estado, y cuya aplicación para el Contrato de Alianza Estratégica se reconoció expresamente en el Decreto No. 1.188 (***Véase Segundo Informe Mouriño, ¶¶ 14-15***).

no cambia en absoluto por el hecho de que la Constitución exija en el mismo artículo 164.10 que esas actividades las realicen los Estados en forma exclusiva, pero "en coordinación con el Ejecutivo Nacional."

9. La coordinación, como principio clásico de la organización y actividad administrativas, precisamente se da entre órganos que pueden tener competencias exclusivas respectivas, para que de común acuerdo se logre un objetivo común;[2] pero ello no cambia el carácter exclusivo de la competencia ni la convierte en competencia "concurrente" como incorrectamente lo pretende el profesor Mouriño al decir que por el hecho de que se haya establecido "una relación de coordinación […] ello se traduce en la existencia de una competencia concurrente y no exclusiva" (***Véase Segundo Informe Mouriño, ¶ 12***). Ello no es correcto en el derecho venezolano donde la distinción entre competencias exclusivas y competencias concurrentes es clara, particularmente después de que se sancionó la Constitución de 1999, en el sentido de que las primeras, las exclusivas, para poder ser ejercidas por los Estados no requieren de legislación nacional previa alguna; en cambio, en las segundas, las concurrentes, para que los Estados las puedan ejercer, sólo lo pueden hacer conforme a lo que se establezca en las llamadas "leyes de base" (art. 165 de la Constitución).[3] Antes de que se dictase la Constitución de 1999, en cambio, el ejercicio de competencias concurrentes por parte de los Estados no exigía que previamente se hubiese dictado una legislación nacional en la materia, y sólo cuando está se dictaba, la misma privaba sobre la legislación estadal.[4]

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2 Por ejemplo, el profesor Luciano Parejo Alfonso, refiriéndose al principio de coordinación, precisamente entre órganos del Estado nacional y de las Comunidades Autónomas en España, precisa que "las técnicas de coordinación no pueden colocar a las entidades locales en una posición de subordinación jerárquica o cuasijerárquica incompatible con su autonomía. Más concretamente, la coordinación no puede traducirse en la emanación de órdenes concretas que prefiguren exhaustivamente el contenido de la actividad del ente coordinado, agotando su propio ámbito de decisión autónoma." Véase Luciano Parejo Alfonso, *Lecciones de Derecho Administrativo*, 4ª edición, Tirant Lo Blanch, Valencia 2011, p. 193 (**Anexo ABC-76)**.

3 Véase Allan R. Brewer-Carías, *Derecho Administrativo*, Universidad Externado de Colombia, Bogotá 2005, Tomo II, pp. 225-244 (**Anexo ABC-77)**.

4 Véase Allan R. Brewer-Carías, *Instituciones Políticas y Constitucionales*, Tomo II, *El régimen del poder Público y su distribución vertical: El Poder nacional y el régimen federal y municipal*, Universidad Católica del Táchira, Editorial Jurídica Venezolana, Caracas–San Cristóbal 1996, pp. 373-394 (**Anexo ABC-78)**.

10. Las competencias exclusivas establecidas en la Constitución en el sistema de distribución de competencias entre los diversos niveles territoriales del Poder Público (nacional, estadal y municipal), son efectivamente competencias que se atribuyen a cada nivel territorial exclusivamente; y las competencias concurrentes son las que se atribuyen a la vez a dos o a todos los niveles territoriales; no siendo posible "mutar" una competencia exclusiva en una concurrente por la mera aplicación del principio de la coordinación.

11. La terminología de "leyes marco o base" y "leyes de ejecución o desarrollo" se incorporó por primera vez en el ordenamiento constitucional venezolano en el artículo 165 de la Constitución de 1999, ya que antes de esa fecha, esa categorización no existía; por lo que la misma sólo puede aplicarse a las leyes dictadas con posterioridad a la entrada en vigencia de la Constitución. Sin embargo, el profesor Mouriño pretende incorrectamente aplicar esta distinción a la relación que pueda darse entre algunas de las leyes que se dictaron antes de la entrada en vigencia de la Constitución de 1999, en particular a la relación entre la Ley Orgánica de Descentralización de 1989 y la Ley de asunción de competencias ENE de 1991 (***Véase Segundo Informe Mouriño, ¶¶ 10, 20***).

12. Además de ser ello jurídicamente erróneo desde el punto de vista temporal, más jurídicamente errado aún es desde el punto de vista sustancial. Primero, porque la distinción entre ese tipo de leyes conforme a la Constitución de 1999, sólo se da en materia de competencias "concurrentes"[5] entre el Poder Nacional y los Estados, y la competencia en materia de administración y mantenimiento de aeropuertos nacionales es una competencia "exclusiva" de los Estados (art. 165), lo que parece olvidar el profesor Mouriño (***Véase Segundo Informe Mouriño, ¶¶ 11 y 12***). Y segundo, porque la relación entre las llamadas "leyes marco o de base" y las llamadas "leyes de desarrollo" está destinada a regular competencias concurrentes de carácter sectorial, como podría ser, por ejemplo, la materia educativa, de salud pública, o de policía. Ninguna aplicación tendría la distinción, por tanto entre una

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[5] Por ejemplo, en materia de legislación sobre salud, que es una materia de competencia concurrente, es la Ley Orgánica de Salud (*Gaceta Oficial* No 36.579 de 11 de noviembre de 1998) (**Anexo ABC-79**), la que establece la responsabilidad de las autoridades de los Estados en materia de cumplimiento de la política nacional de salud, regulando por ejemplo, las competencias de los Estados, entre otros aspectos, para administrar los establecimientos de atención médica propiedad de los Estados (art. 14).

ley que se dictó para promover la descentralización política, y el acto estadal (ley) mediante el cual el Estado decidió asumir la competencia descentralizada, como lo pretende el profesor Mouriño (***Véase Segundo Informe Mouriño, ¶ 10***).

13. Por otra parte, el profesor Mouriño pretende establecer en forma incorrecta una relación de "ley especial" y "ley general," entre la Ley de asunción de competencias ENE y la Ley de Concesiones ENE, para tratar de argumentar sobre la supuesta aplicación preferente de la primera, que no prevé la posibilidad de adjudicación directa, en relación con la segunda, que si permite tal modalidad para las concesiones en general (***Véase Segundo Informe Mouriño, ¶¶ 21-22)***. Sin embargo, en este caso no existe tal relación de *lex specialis* y *lex generalis*. Como lo ha explicado el profesor Joaquín Sánchez Coviza, para determinar la relación entre una ley general y una ley especial basta "comparar los supuestos de hecho de una y de otra. Será general aquella cuyo supuesto de hecho incluya, como un caso específico, el supuesto de hecho de la otra."[6] Con base en ello, más bien, en materia de concesiones otorgadas por el Estado Nueva Esparta, por el contrario a lo que argumenta el profesor Mouriño, lo que se aplica es la Ley de Concesiones ENE en forma preferente.

14. Si bien la Ley de asunción de competencias ENE de 1991, como su objeto lo indica, se refirió a un caso específico relativo a la actividad de administración y mantenimiento de los aeropuertos, la misma no se dictó para regular el régimen de concesiones aeroportuarias del Estado. Esa ley sólo se dictó para ejecutar la Ley Orgánica de Descentralización 1989 (reformada en 1993), mediante la cual se transfirió a los Estados de la federación "la administración y mantenimiento de puertos y aeropuertos públicos de uso comercial," la cual en el marco de la Constitución de 1961, era una materia de competencia del Poder Nacional; y permitir así la asunción de dicha competencia por el Estado Nueva Esparta; y si en la misma se establecieron normas para la selección de contratistas, ello fue en ausencia de una ley especial que regulara el régimen de concesiones. Esta carencia se suplió posteriormente, en 1997, mediante la Ley de Concesiones ENE, dictada para regular especialmente el régimen de concesiones de todas las obras y servi-

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6 Véase Joaquín Sánchez Covisa, *La vigencia temporal de la Ley en el ordenamiento jurídico venezolano* (1956), reproducido en *Obra Jurídica de Joaquín Sánchez Covisa*, Ediciones de la Contraloría General de la República, Caracas 1976, p. 112 (**Anexo ABC-80**).

cios públicos en el Estado Nueva Esparta, incluyendo las aeroportuarias, con lo cual las previsiones específicas en materia de selección de contratistas que podía haber tenido en la materia la Ley de asunción de competencias de 1991, quedaron erogadas.

15. Estas leyes, la Ley de asunción de competencias ENE y la Ley de Concesiones ENE, no tienen el mismo objeto o supuesto de hecho como para que pueda darse la relación de especialidad y generalidad, siendo su objeto totalmente distinto en cada caso: una es una ley específica destinada a concretizar la "asunción" de una competencia pública por parte del Estado Nueva Esparta conforme a la Ley Orgánica de Descentralización 1989; y la otra, es una ley sustantiva que tiene por objeto establecer el régimen de las concesiones del Estado Nueva Esparta aplicable a todas las concesiones que otorgue la Administración, incluyendo las concesiones para la administración y mantenimiento de aeropuertos.

16. Adicionalmente, la Ley de Concesiones ENE (**Anexo ABC-16**), que es una ley posterior a la Ley de asunción de competencias ENE, dispone expresamente en su artículo 63 que "las disposiciones de esta Ley *se aplicarán con preferencia* a cualquier otra disposición del ordenamiento legal del Estado, incluida la ley de Licitaciones." En la exposición de motivos de dicha ley, se indica la aplicación preferente de las normas establecidas en ella con relación a cualquier otra de rango estadal, en todo lo relacionado con la materia que constituye su objeto, incluyendo por supuesto lo dispuesto en materia de concesiones en la Ley de asunción de competencias ENE.

17. En consecuencia, no tiene fundamento alguno en derecho, en relación con el régimen jurídico de las concesiones que pueden ser otorgadas por la Administración en el Estado Nueva Esparta, pretender decir que las previsiones que se establecieron en la Ley de asunción de competencias ENE de 1991 sobre las concesiones para la administración y el mantenimiento de los puertos y aeropuertos – competencia transferida del Poder Nacional al Estado Nueva Esparta en aplicación de la Ley Orgánica de Descentralización -, puedan tener aplicación preferente o tienen prevalencia respecto de las normas reguladoras del régimen de concesiones del Estado establecidas en la Ley de Concesiones ENE de 1997, como lo pretende el profesor Mouriño (***Véase Segundo Informe Mouriño, ¶ 21)***. Menos fundamento tiene tal pretensión, si se considera además, que como ley posterior, la Ley de Concesiones ENE expresamente declara que es ella la que tiene aplicación preferente sobre toda otra ley en materia de concesiones.

18. Por ello, menos aún puede sostenerse, como se indica en el Memorial de Réplica de la República que "la Ley de Concesiones de 1997 no es aplicable frente a la Ley por la que el Estado Nueva Esparta asume los servicios portuarios y aeroportuarios de 1991" (***Memorial de Réplica, ¶ 188***). Ello no tiene fundamento jurídico alguno.

19. Al contrario, la Ley de asunción de competencias del ENE no constituye, ni puede constituir un impedimento para la aplicación del artículo 23.4 de la Ley de Concesiones ENE que permite adjudicar en forma directa contratos de concesión, conforme a sus propios términos. Las normas de la Ley de asunción de competencias del ENE de 1991 en materia de concesiones quedaron tácitamente derogadas por la Ley de Concesiones ENE de 1997, y además, en la relación entre normas, conforme al artículo 63 de esta última Ley, expresamente se dispone que sus normas se aplican con preferencia a cualquier otra disposición del ordenamiento legal del Estado Nueva Esparta, incluyendo la Ley de asunción de competencias ENE; todo ello contrario a lo que expresa el profesor Mouriño (***Véase Segundo Informe Mouriño, ¶ 23)***.

20. En todo caso, entre ambas leyes, lo que si se da, ciertamente, es una relación de ley anterior y ley posterior, de manera que la Ley de Concesiones ENE de 1997, al regular el régimen de todas las concesiones del Estado, derogó las normas sobre contratos de concesión establecidas en leyes anteriores, como la Ley de asunción de competencias de 1991. Y finalmente, es la ley posterior, la Ley de Concesiones ENE la que expresamente prevé que sus disposiciones "*se aplicarán con preferencia* a cualquier otra disposición del ordenamiento legal del Estado, incluida la ley de Licitaciones."

21. Nada tiene de extraño, por tanto, que en materia de otorgamiento de concesiones, el acto administrativo contenido en el Decreto No. 1.188 de 26 de febrero de 2004 (en adelante Decreto 1.188) (**Anexo ABC-14**), haya omitido la aplicación de las normas "relacionadas a la adjudicación directa (sic) y licitación" previstas en la Ley de asunción de competencias ENE y en cambio, haya aplicado la ley reguladora de las concesiones del Estado Nueva Esparta (***Véase Segundo Informe Mouriño, ¶ 22)***. Al contrario, ello era lo que tenía que hacer la Administración.

22. Por tanto, como he dicho, la Ley de asunción de competencias ENE no constituye ni puede constituir un impedimento para la aplicación del artículo 23.4 de la Ley de Concesiones ENE que permite adjudicar en forma

directa contratos de concesión, conforme a sus propios términos. Por ello, nada de "débil" tiene la argumentación contenida en nuestra primera Opinión Legal, y menos aún si se lee el texto del artículo 63 de la Ley de Concesiones ENE, que el profesor Mouriño ignora en su argumentación, donde expresamente se indica que sus normas se aplican con preferencia a cualquier otra disposición del ordenamiento legal del Estado Nueva Esparta (***Véase Segundo Informe Mouriño, ¶ 23)***.

23. Por lo demás, en esta materia de concesiones, nada se establece en la Constitución sobre la forma de otorgamiento de las mismas ni sobre los procedimientos de selección de contratistas. Ello es enteramente una materia atribuida al legislador, y por ello se regula en las leyes respectivas, estableciéndose las normas para selección de contratistas, con previsiones de licitación y adjudicación directa conforme lo juzgue el legislador, tanto nacional como estadal. Por ello no tiene fundamento alguno en el derecho venezolano afirmar, como lo ha hecho erradamente el profesor Mouriño, de que supuestamente la adjudicación directa sea "una excepción a un *principio de carácter constitucional*, en cuanto a la obligatoriedad de la licitación como procedimiento administrativo previo de la conformación de la voluntad de la Administración" (***Véase Segundo Informe Mouriño, ¶ 23)***. Ni la Constitución de 1999, ni la anterior de 1961, establecen ni tal principio ni tal supuesta excepción.

III. SOBRE LA LEGALIDAD DE LA ADJUDICACIÓN DIRECTA DE LA CONTRATACIÓN DE LOS SERVICIOS AEROPORTUARIOS EN EL ESTADO NUEVA ESPARTA EN 2004

24. Mediante Decreto No. 1.188, la Gobernación del Estado Nueva Esparta en ejercicio de sus competencias legales, y de acuerdo con la apreciación que hizo de los supuestos de hecho y de derecho del caso, resolvió proceder con suficiente motivación, tal como se plasmó en el acto administrativo contenido en el mismo, a la adjudicación directa de la contratación para la prestación del servicio aeroportuario y la operación del aeropuerto Internacional del Caribe "General en Jefe Santiago Mariño".

25. Para adoptar su decisión de proceder a la adjudicación directa del contrato de concesión, la Gobernación del Estado Nueva Esparta dictó dicho acto administrativo debidamente motivado, basándose en el artículo 23.4 de la Ley de Concesiones ENE, el cual dispone que no es necesario abrir un procedimiento licitatorio "cuando la adjudicación tenga por objeto conti-

nuar la ejecución de obras o la prestación de servicios cuyos contratos hayan sido resueltos por el Ejecutivo Estatal, ya sea por incumplimiento del concesionario, rescate anticipado de la concesión o quiebra del concesionario, conforme a lo establecido en esta Ley" (**Anexo ABC-16**).

26. Dicha previsión legal del artículo 23.4 de la Ley de Concesiones ENE consagra ciertamente una excepción al procedimiento licitatorio, que permite a la Gobernación del Estado Nueva Esparta proceder a la adjudicación directa de contratos de concesión cuando se cumplen las siguientes condiciones:

(i) que el servicio hubiese estado prestándose bajo régimen de contrato de concesión,

(ii) que el contrato hubiese sido rescindido por la Administración, y

(iii) que ésta hubiese decidido **continuar la prestación del servicio** mediante otro nuevo contrato de concesión; correspondiendo al Gobernador del Estado, como órgano competente, tomar la decisión de respectiva (***ABC Primera Opinión Legal, ¶ 34).***[7]

27. En efecto, la adjudicación directa del contrato para la prestación del servicio aeroportuario y la operación del Aeropuerto se decidió luego de que la Gobernación del Estado Nueva Esparta, mediante Resolución N° 011 de 19 de octubre de 2001 hubiera rescindido el contrato que se había suscrito en el año 1993 con el Consorcio CVA. C.A. para la prestación del servicio aeroportuario y la operación del Aeropuerto, y de que la Administración estadal asumiera en forma directa y temporalmente la administración y mantenimiento de dicho Aeropuerto mediante la creación para tal fin de una estructura organizativa temporal, con patrimonio separado (según se indica en el **Anexo ABC-14**).

28. Fue con base en dicha norma que el Gobernador del Estado Nueva Esparta entonces, después de la rescisión de un contrato previo de concesión, y de la asunción temporal del servicio directamente por la Admi-

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[7] Por tanto no es correcta la afirmación del profesor Mouriño en el sentido de que supuestamente a mi entender "la única condición necesaria para la adjudicación directa es la previa resolución por parte del Ejecutivo Estadal de la concesión." ***Véase Segundo Informe Mouriño, ¶ 24.***

nistración, decidió aplicar dicha excepción prevista en la Ley de Concesiones ENE, adjudicando directamente la contratación del servicio público aeroportuario al Consorcio UNIQUE IDC por medio del acto administrativo contenido en el Decreto No. 1.188. A los efectos de dicha adjudicación directa, y como se indicó en el Considerando N° 10 del Contrato de Alianza Estratégica, en el texto mismo del acto administrativo contenido en el Decreto No. 1.188 se expusieron las razones que justificaron la necesidad de contratar directamente la prestación del servicio aeroportuario y se verificaron las antes mencionadas condiciones establecidas en el artículo 23.4 de la Ley de Concesiones ENE (***Véase supra* ¶ *24***).

29. El acto administrativo contenido en el Decreto No. 1.188 conforme a las previsiones del artículo 9 de la Ley Orgánica de Procedimientos Administrativos de 1981[8] - que son de aplicación supletoria a las Administraciones estadales-, expresó por escrito los motivos que tuvo la Administración del Estado Nueva Esparta para proceder en tal forma, indicando lo siguiente:

- Que luego de la rescisión de la concesión otorgada en 1991 al Consorcio CVA C.A. para la operación del Aeropuerto, el Ejecutivo del Estado Nueva Esparta reasumió la administración y el mantenimiento del Aeropuerto creando una estructura organizativa temporal para ese efecto.
- Que era indispensable y urgente continuar con la prestación de los servicios en el Aeropuerto, y que se habían producido una serie de situaciones comprobadas de emergencia que podían afectar el servicio.
- Que si bien esos servicios se venían concretando, se requería que se ejecutaran de una manera más eficiente y eficaz mediante la participación de empresas que tuvieran una reconocida y larga trayectoria en materia aeroportuaria.

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[8] Véase Ley Orgánica de Procedimientos Administrativos, *Gaceta Oficial* N° 2.818 Extraordinario de 1 de julio de 1981 (**Anexo ABC-81**). Véase los comentarios sobre dicha Ley en Allan R. Brewer-Carías, **"**Introducción al régimen de la Ley Orgánica de Procedimientos Administrativos," en Allan R. Brewer-Carías, Hildegard Rondón de Sansó y Gustavo Urdaneta, *Ley Orgánica de Procedimientos Administrativos***,** , Editorial Jurídica Venezolana, 13ª Edición actualizada, Caracas 2006, pp.7-56 (**Anexo ABC-114**).

- Que el Ejecutivo del Estado Nueva Esparta cumplió en forma objetiva y reflexiva el estudio, análisis y apreciación de las distintas propuestas de empresas nacionales y extranjeras para la administración, mantenimiento y operación del Aeropuerto.
- Que por tales razones de necesidad y conveniencia, el Gobernador decidió proceder a la adjudicación directa de la contratación del servicio de administración y mantenimiento del Aeropuerto.
- Que "no es necesario abrir procedimiento licitatorio alguno, por cuanto la adjudicación a que se hace referencia en este decreto es la prestación de un servicio **cuyo contrato fue resuelto por el Ejecutivo estadal en virtud del incumplimiento del concesionario**, concretándose con toda claridad el supuesto de hecho previsto en el artículo 23, numeral 4 de la Ley de Concesiones de Obras y Servicios Públicos del Estado Nueva Esparta."

30. Por tanto, la autoridad competente del Estado Nueva Esparta decidió, en este caso, aplicar el mencionado artículo 23.4 de la Ley de Concesiones ENE, procediendo a la adjudicación directa de un contrato de concesión, supuesto que se aplica única y exclusivamente cuando en los casos de servicios públicos que venían siendo prestados mediante concesión, la Administración haya decidido resolver el contrato, procediendo la adjudicación directa para continuar la prestación del servicio mediante una nueva concesión, independientemente de las medidas temporales que se hayan adoptado para que entre una concesión y otra, se asegurase la prestación del servicio (***ABC Primera Opinión Legal, ¶ 38).***

31. Como se puede evidenciar, y tal como lo expresé en mi Primera Opinión Legal (***ABC, Primera Opinión Legal, ¶ 35)***, la norma del artículo 23.4 de la Ley de Concesiones ENE no hace mención a que la adjudicación directa deba necesariamente ser consecuencia de un estado de urgencia que comprometa la continuidad en la prestación del servicio o que el mismo deba encontrarse bajo amenaza de interrupción, como pretende argumentar el profesor Mouriño (***Primer Informe Mouriño, ¶¶ 22, 24, y Segundo Informe Mouriño, ¶¶ 24-25).***

32. Además, la referida norma no impone como condición que no haya solución de continuidad entre una concesión u otra, ni el término que pueda durar la operación directa temporal del servicio por parte de la Administración del Estado, siendo esto último una materia que es de la apreciación

que corresponde a la propia Administración. Sin duda, en casos de rescisión de concesiones de servicios públicos, para que el servicio no se paralice, puede decirse que lo común y normal es que la Administración asuma de inmediato y directamente la prestación del servicio para evitar su interrupción, creando por ejemplo, de ser necesario para tal efecto, una organización administrativa temporal, hasta que, si es el caso, se proceda a efectuar una nueva contratación. La Ley de Concesiones ENE no previó expresamente plazo o lapso alguno para que la Gobernación del Estado Nueva Esparta, una vez rescindido un contrato de concesión, proceda a adjudicar en forma directa el subsiguiente contrato de concesión.

33. En este caso, trascurrió un lapso de algo más de dos años entre la rescisión del contrato previo de concesión, y la adjudicación directa del subsiguiente contrato, lo que en el funcionamiento normal de la Administración estadal puede considerarse como un plazo perfectamente razonable, tratándose además de un servicio aeroportuario. Así, en todo caso, fue cómo lo evaluó la propia Administración del Estado, rigiéndose para ello por el principio dispuesto en el artículo 12 de la Ley Orgánica de Procedimientos Administrativos, que dispone que para dictar un acto administrativo cuando la ley deje la decisión "a juicio de la autoridad competente," lo único que la misma debe asegurar es que se mantenga "la debida proporcionalidad y adecuación con el supuesto de hecho y con los fines de la norma, y cumplir los trámites, requisitos y formalidades necesarios para su validez y eficacia," lo que efectivamente ocurrió en este caso, conforme a la motivación que el Gobernador del Estado expresó en el Decreto No. 1.188.

34. Por lo anteriormente señalado, la adjudicación directa de la contratación para la prestación del servicio aeroportuario fue hecha en conformidad a las normas de derecho público venezolano aplicables al caso.

IV. SOBRE EL RÉGIMEN DE LOS CONTRATOS DE CONCESIÓN OTORGADOS POR EL ESTADO NUEVA ESPARTA: AUTORIZACIÓN Y/O APROBACIÓN LEGISLATIVA

35. Ya he explicado en mi Primera Opinión Legal (***ABC Primera Opinión Legal,* ¶¶ 52-55**), que la condición establecida en los artículos 150 y 187.9 de la Constitución de 1999 al exigir la autorización previa de la Asamblea Nacional en relación con los contratos de interés público estadal, sólo se aplica cuando los mismos se vayan a celebrar con "Estados o entidades oficiales extranjeras o con sociedades no domiciliadas en Venezuela" o se vayan

a traspasar a los mismos. El texto es muy claro: "sociedades no domiciliadas en Venezuela", por lo que si el contrato de interés público estadal se va suscribir con una sociedad que está domiciliada en Venezuela, no se requiere dicha autorización legislativa.

36. Para que una sociedad tenga domicilio en Venezuela, no tiene que haber sido "constituida" en el país, como parece sugerirlo el profesor Mouriño (***Véase Segundo Informe Mouriño, ¶ 41***). Al contrario, puede tratarse de una sociedad constituida en el exterior, y lo único que se exige para que tenga domicilio en Venezuela, es que esté "domiciliada en Venezuela," como fue el caso de las empresas que conformaron el Consorcio UNIQUE IDC, las cuales fueron las sociedades mercantiles GESTIÓN E INGENIERÍA IDC, S.A. y FLUGHAFEN ZURICH S.A. Ambas empresas fueron domiciliadas en Venezuela e inscritas ante el Registro Mercantil Segundo de la Circunscripción Judicial del Estado Nueva Esparta en fecha 25 de febrero de 2004.

37. Las empresas matrices del Consorcio hicieron en Venezuela lo que les permitía la ley, y a solicitud de la propia Gobernación del Estado Nueva Esparta procedieron a domiciliarse en el país, y tras la adjudicación de la concesión, suscribieron el Contrato de Alianza Estratégica. Aplicar la ley no puede considerarse, como lo sugiere el profesor Mouriño, como "abuso de derecho y de las instituciones mercantiles" (***Véase Segundo Informe Mouriño, ¶ 41***).

38. La domiciliación de empresas extranjeras en Venezuela está expresamente prevista en el Código de Comercio cuando regula la situación de las sociedades constituidas en país extranjero que "sólo tuvieren en la República sucursales o explotaciones que no constituyan su objeto principal," en cuyo caso, por expresa disposición del artículo 354 del Código, se precisa que "conservan su nacionalidad, *pero se les considerará domiciliadas en Venezuela*." Para efectuar el registro mercantil, el mismo artículo prevé que si se trata de sociedades por acciones, se deben registrar "en el Registro de Comercio del lugar donde está la agencia o explotación," y deben publicar en un periódico de la localidad, "el contrato social y demás documentos necesarios a la constitución de la compañía, conforme a las leyes de su nacionalidad, y una copia debidamente legalizada de los artículos referentes a esas leyes" (**Anexo ABC-41**).

39. Si un contrato de interés público nacional, estadal o municipal se celebra con empresas extranjeras domiciliadas en Venezuela, no es necesario por tanto obtener la autorización legislativa que prevé el artículo 150 de la Constitución de 1999. Eso ha ocurrido, por ejemplo, en muchos casos de contratos celebrados por entidades públicas nacionales con empresas extranjeras domiciliadas en el país,[9] y por ello, eso fue lo que correctamente indicó el Gobernador del Estado Nueva Esparta en el Decreto No. 1.188 agregando que "por cuanto el contrato de Alianza Estratégica se va a celebrar con una sociedad mercantil domiciliada en la República Bolivariana de Venezuela, no se requiere la aprobación por parte de la Asamblea Nacional." (***ABC Primera Opinión Legal, ¶ 55***).

40. Por otra parte, y como hemos explicado en nuestra Primera Opinión Legal (***ABC Primera Opinión Legal, ¶ 56***), el artículo 50 de la Constitución del Estado Nueva Esparta dispone que "sin la **aprobación** del Consejo Legislativo o de su Comisión Delegada no podrá celebrarse ningún contrato de interés estadal, *salvo los casos permitidos por ley*." Asimismo, en su parte *in fine* dicho artículo establece que "la autorización dictada definirá condiciones mínimas necesarias de la negociación que garanticen suficientemente los intereses del Estado, y en todo caso no dispensa del cumplimiento de la formalidades requeridas en las Leyes generales o especiales".

41. En mi criterio, ninguna importancia tiene en este caso la argumentación sobre si lo previsto en el artículo 50 de la Constitución del Estado Nueva Esparta es una "aprobación" o una "autorización." En cualquier caso, si fuese una aprobación, como se califica en la primera parte de la norma, se trataría de un requisito posterior a la suscripción del contrato; y si fuese una autorización, como lo argumenta el profesor Mouriño (***Segundo Informe Mouriño, ¶¶ 36 ss***.), se trataría de un requisito anterior a la celebración del contrato.

42. Al respecto, lo que no se explica es cómo el profesor Mouriño pretende que tratándose de una "autorización" (que debería definir con ante-

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[9] Basta mencionar, como ejemplo, los contratos suscritos por empresas filiales de Petróleos de Venezuela S.A. con empresas extranjeras domiciliadas en el país, para la prestación de servicios conexos con la industria petrolera; servicios que fueron nacionalizados mediante la Ley Orgánica que reserva al Estado bienes y servicios conexos a las actividades primarias de Hidrocarburos, *Gaceta Oficial* Nº 39.173 del 7 de mayo de 2009 (**Anexo ABC-82**).

lación las condiciones mínimas de la negociación a realizarse), el órgano legislativo deba proceder a "autorizar" la celebración del contrato en forma previa a su celebración, pero sólo después de haber realizado la licitación, y de que en la misma ya se hubiese seleccionado el contratista. En tal sentido el profesor Mouriño precisa el supuesto sentido de la autorización, en el sentido de que a su entender, "constituye una evaluación apriorística de los elementos de la negociación," y que según el artículo 50 de la Constitución del Estado Nueva Esparta, la autorización dictada definirá las condiciones mínimas necesarias de la negociación que garanticen suficientemente los intereses del Estado **(*Segundo Informe Mouriño, ¶¶ 36-37*)**. Y agrega el mismo profesor Mouriño, que: "Se debió iniciar el procedimiento administrativo de licitación o concurso, seleccionando el contratista mediante el procedimiento administrativo previsto en el artículo 5 de la Ley […], **y tras obtener la buena pro (acto administrativo de adjudicación)**, se debió presentar al Consejo Legislativo del Estado Nueva Esparta la solicitud de autorización con el respectivo expediente administrativo contentivo del procedimiento licitatorio o de concurso" (***Segundo Informe Mouriño, ¶ 39***). La pregunta elemental es ¿cómo una Administración Pública podría seriamente proceder a desarrollar un procedimiento licitatorio y escoger un contratista para suscribir un contrato del cual no se tienen siquiera las condiciones mínimas de contratación? Al contrario, para que se pueda celebrar un acto licitatorio y se pueda seleccionar un contratista, es elemental que las condiciones mínimas de contratación ya tengan que estar definidas. Es difícil imaginar que unos potenciales contratistas puedan participar en una licitación, sin saber cuáles son las condiciones mínimas de contratación; y que luego que sea seleccionado el contratista, es que las mismas deban definirse. Por ello, en realidad, lo que se deduce del propio texto del Informe del profesor Mouriño es que lo previsto en el artículo 50 de la Constitución del Estado Nueva Esparta el cual emplea ambos términos (aprobación y autorización), es que se trata de una "aprobación" que se otorga después de seleccionado el contratista.

43. Pero esa discusión, en realidad, no interesa en este caso, siendo la discusión que interesa a este tribunal la de determinar si el Contrato de Alianza Estratégica debió haberse sometido o no al conocimiento del Consejo Legislativo del Estado Nueva revistiendo este la forma de aprobación o autorización. La respuesta, es que conforme a como se han interpretado histórica y pacíficamente las normas que prevén la intervención de los órganos legislativos en materia de aprobación de contratación pública en Venezuela, la intervención legislativa sólo se exige *cuando una ley específica así lo requiere*, de manera que si las leyes regulan la celebración de contratos públicos sin

exigir la intervención legislativa, se ha entendido y se entiende que el legislador "permite" la contratación sin dicha intervención (***ABC Primera Opinión Legal, ¶¶ 56 ss.***).

44. Ninguna de las leyes aplicables a los contratos de concesión para la prestación de los servicios aeroportuarios (o para cualquier otra obra o servicio público) en el Estado Nueva Esparta (ni la Ley de asunción de competencias ENE, ni la Ley de Concesiones ENE), exigieron que dichos contratos de concesión requiriesen de aprobación legislativa por parte del Consejo Legislativo del Estado Nueva Esparta conforme al artículo 50 de la Constitución del Estado. Es decir, dichas leyes no exigieron que dichos contratos se sometieran a la aprobación de dicho Consejo Legislativo, o en otros términos, dichas leyes permitieron que los contratos de concesión se suscribieran sin la aprobación legislativa, al no disponer expresamente su necesidad.

45. La discusión sobre el tema, en todo caso, quedó totalmente superada en Venezuela hace décadas, como lo hemos argumentado (***ABC Primera Opinión Legal, ¶¶ 59 ss***), y tal como lo resume el profesor Eloy Lares Martínez en su *Manual de Derecho Administrativo*, al indicar que en Venezuela no están sujetos a la aprobación legislativa "aquellos [contratos de interés nacional] que en virtud de disposición legal, pueden celebrarse sin necesidad de la referida aprobación" lo que ocurre "cuando los preceptos legales referentes a determinados contratos los prevean en todos sus trámites sin señalarles la necesidad de aprobación legislativa," agregando, a título de ejemplo, que "es práctica admitida generalmente que no están sujetos al requisito de la aprobación legislativa, no obstante su carácter de contrato de interés nacional, ni los de obras públicas, ni los relativos al transporte de correspondencia, ni los contratos de suministros,"[10] lista a la cual hay que agregar los contratos de servicios públicos. A tal punto ello es cierto, que desde que se sancionó la Constitución de 1961, puede decirse que ninguna "aprobación" legislativa de contratos fue adoptada, reduciéndose la intervención legislativa en materia de contratos públicos sólo como "autorización" respecto de aquellos casos en los cuales el legislador expresamente lo exigió, como fue el caso por ejemplo, de los Convenios de Asociación para permitir la participación del capital privado en la industria petrolera de acuerdo con las previsiones del artículo 5 la Ley Orgánica que reserva al Estado la Industria y el

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[10] Véase Eloy Lares Martínez, *Manual de Derecho Administrativo*, Universidad Central de Venezuela, Caracas 1983, pp. 321, 324, 325 (**Anexo ABC-83**).

Comercio de los Hidrocarburos de 1975.[11] En ejecución de dicha norma, por ejemplo, las Cámaras Legislativas mediante Acuerdo de 4 de julio de 1995, autorizaron "celebración de los Convenios de Asociación para la exploración a riesgo de nuevas áreas y la producción de hidrocarburos bajo el esquema de ganancias compartidas."[12]

46. Por lo demás, sobre la interpretación de la aprobación parlamentaria en los contratos públicos, nos hemos ocupado desde hace décadas, y no se trata de modificar el alcance y sentido de las disposiciones interpretándolas "de manera inversa a la redacción literal" ni existe contradicción en mis opiniones, como impropiamente lo afirman los abogados de la República Bolivariana de Venezuela en el Memorial de Réplica (***Memorial de Réplica***, ¶¶ ***190, 195-196***).[13]

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[11] Véase Ley Orgánica que reserva al Estado la Industria y el Comercio de los Hidrocarburos de 1975, *Gaceta Oficial Extraordinaria* Nº 1.769 de 29 de agosto de 1975 (**Anexo ABC-84**).

[12] Véase Acuerdo del Congreso para la celebración de los Convenios de Asociación para la exploración a riesgo de nuevas áreas y la producción de hidrocarburos bajo el esquema de ganancias compartidas, en *Gaceta Oficial* N° 35.754 de 17 de julio de 1995 (**Anexo ABC-85**). Véase en general sobre el tema, Allan R. Brewer-Carías, "El régimen de participación del capital privado en las industrias petrolera y minera: Desnacionalización y regulación a partir de la Constitución de 1999", en *VII Jornadas Internacionales de Derecho Administrativo Allan R. Brewer-Carías, El Principio de Legalidad y el Ordenamiento Jurídico-Administrativo de la Libertad Económica,* Fundación de Estudios de Derecho Administrativo FUNEDA, Caracas Noviembre 2004, pp. 15-58 (**Anexo ABC-86**).

[13] En particular, como indiqué en mi Primera Opinión Legal, la expresión constitucional de exigir la aprobación legislativa en los contratos de interés nacional "salvo … los que permita la Ley" siempre se interpretó por el propio Estado "como equivalente a indicar que salvo que la ley respectiva requiriera expresamente la intervención del Poder Legislativo, se entendía que la ley al regular los contratos sin dicha exigencia, "permitía" que se celebrasen por la autoridad pública competente sin dicha intervención. De ello se desprendió que, en la práctica legislativa y administrativa [del Estado], lo que aparentaba ser la excepción en realidad fue la regla general, con lo cual los contratos de interés público no se sometieron en general a la aprobación legislativa, pues en la gran mayoría de los contratos administrativos la ley no requería la intervención a posteriori del Congreso Nacional, por lo cual el requisito de aprobación legislativa era siempre excepcional." (***ABC, Primera Opinión Legal,*** ¶¶ ***56***). Ello en nada implica como lo indican erradamente los representantes del Estado, que los textos "deben interpretarse de manera inversa a la redacción lteral"

47. En efecto, la discusión se planteó en los primeros años de aplicación de la Constitución de 1961 en relación con lo establecido en el artículo 126, que sometía a la aprobación legislativa del Congreso Nacional a los contratos de interés nacional, "*salvo... los que permita la Ley*." Ello planteó la duda si todos los contratos de interés nacional, es decir, materialmente todos los contratos públicos de la época debían someterse a la aprobación legislativa, lo que habría significado la paralización total de la Administración Pública, particularmente por el hecho de que ninguna ley había definido el término. Luego de escritos y divergencias de opiniones expresadas hace ya casi cincuenta años, a principios de los años sesenta, particularmente entre los profesores Eloy Lares Martínez, Luis Henrique Farías Mata y quien suscribe esta opinión, se llegó a un consenso doctrinal que se reflejó en la práctica administrativa y legislativa, en cuanto a que la expresión constitucional "*salvo... los que permita la Ley*" era equivalente a indicar que si la ley respectiva que regulara un contrato público no requería expresamente la intervención del Poder Legislativo, se entendía que la Ley, al regular los contratos sin dicha exigencia, "permitía" que se celebrasen por la autoridad pública competente sin dicha intervención legislativa.

48. De ello se desprendió que, en la práctica legislativa y administrativa, la regla general fue que sólo se sometieron a la aprobación legislativa los contratos de interés público cuando las leyes especiales exigieran expresamente la aprobación legislativa. En la gran mayoría de los contratos administrativos la ley no requería la intervención a posteriori del Congreso Nacional, por lo cual el requisito de aprobación legislativa era siempre excepcional. Esa fue nuestra opinión entonces (1964),[14] coincidiendo, como expresé en mi

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(***Memorial de Réplica***, ¶¶ ***190, 195***), sino en realidad que deben interpretarse correctamente y, además, de acuerdo a como históricamente se han interpretado por el propio Estado. En ello no hay contradicción alguna como parece sugerirlo el profesor Mouriño, y menos cuando pretende atribuir los efectos que siempre le he dado al requisito de la "autorización legislativa," cuando la misma es necesaria, a los casos de "aprobación legislativa" (***Segundo Informe Mouriño, ¶¶ 36 ss.; Memorial de Réplica***, ¶¶ ***190, 196-198***).

14 Véase Allan R. Brewer-Carías, "La formación de la voluntad de la Administración Pública Nacional en los Contratos Administrativos" en *Revista de la Facultad de Derecho,* U.C.V. Nº 28, Caracas 1964, pp. 61-112 (**Anexo ABC-40)**; reproducido en Allan R. Brewer-Carías, *Jurisprudencia de la Corte Suprema 1930-1975 y Estudios de Derecho Administrativo,* Tomo III, Vol. 2, Caracas 1977, p. 485; y Allan R. Brewer-Carías, "Los contratos de interés nacional y su aprobación legislativa," *en Revista de Derecho Público*, N° 11, Editorial Jurídica Venezolana, Caracas, julio-septiembre 1982, pp. 49-54 (**Anexo ABC-32**).

Primera Opinión Legal (***ABC Primera Opinión Legal,* ¶¶ 56 ss.**) con las opiniones del profesor Lares Martínez[15] y del profesor Farías Mata (**Anexo ABC-43).**

49. En lo que respecta a las contrataciones celebradas por el Estado Nueva Esparta, por ejemplo, durante el período 2002-2012, la entidad estadal tuvo una intensa actividad contractual en sectores altamente sensibles como servicios portuarios, de salud y seguridad, en los que no se exigió la aprobación legislativa. Tal es el caso del contrato para la ejecución "inmediata" de la obra "Sistema de Protección de Buques e instalaciones portuarias en el Puerto Internacional de El Guamache" celebrado con la empresa Inversiones 8689, C.A. (2005); el contrato para "la adquisición de sistemas de seguridad de cámaras para principales puertos, avenidas, centros urbanos y comerciales del Estado Nueva Esparta, adjudicado a la empresa Desarrollos Tecnológicos Margarita Tecnomar, C.A. a través del Decreto del Gobernador del Estado N° 378/2009, el contrato para la ejecución de la obra "Acondicionamiento de Área para Sala de Hemodialisis, Hospital Tipo 1 Dr. "Armando Mata Sanchez", adjudicado a través del Decreto del Gobernador N° 381/2009 a la empresa Construmeds, C.A., entre otros.[16]

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15 Véase Eloy Lares Martínez, "Contratos de interés nacional," en *Libro Homenaje al Profesor Antonio Moles Caubet*, Universidad Central de Venezuela, Caracas 1981, p 139. (**Anexo ABC-87**). Por un error mecánico en la confección de los anexos de mi Primera Opinión Legal, al referirme a esta opinión coincidente del profesor Eloy Lares Martínez (***Primera Opinión Legal* (¶ 57)**, en lugar de anexarse la referencia al estudio antes citado (**Anexo ABC-87,** p. 139), se anexaron una páginas 138-139 pero de su libro *Manual de Derecho Administrativo*, Universidad Central de Venezuela, Caracas 1983, referidas a los "actos administrativos" (**Anexo ABC-42),** las cuales, como correctamente lo advirtieron los representantes del Estado en su Memorial de Réplica (***Memorial de Réplica*, ¶ *195, nota al pie de página No. 242),*** nada tienen que ver con el tema. Sin embargo, no fueron diligentes dichos representantes en verificar la opinión del profesor Lares Martínez en las páginas pertinentes de su *Manual*, que deben haber al menos hojeado, pues si hubiesen consultado las páginas 321-325 del mismo (que se anexan), hubiesen encontrado la misma opinión coincidente. Véase Eloy Lares Martínez, *Manual de Derecho Administrativo*, Universidad Central de Venezuela, Caracas 1983, pp. 310-327 (**Anexo ABC-83**).

16 Véase en *Gacetas Oficiales* del Estado Nueva Esparta que incluyen decisiones sobre contratos celebrados por el Estado Nueva Esparta sin intervención legislativa alguna: No. E-266 de 18 de agosto de 2003; E-384 de 12 de enero de 2005; E 770 de 31 de agosto de 2006; E-1040 de 13 de noviembre de 2007; E-1534 de 5 de octubre de 2009 (**Anexo ABC-88**).

V. SOBRE LA FIRMEZA DEL ACTO ADMINISTRATIVO QUE DECIDIÓ EN 2004 LA ADJUDICACIÓN DIRECTA Y LA CELEBRACIÓN DEL CONTRATO DE ALIANZA ESTRATÉGICA CON EL CONSORCIO UNIQUE IDC

50. En cuanto al acto administrativo contenido en el Decreto No. 1.188, el mismo, de acuerdo con los principios del derecho administrativo venezolano, debe considerarse como un acto administrativo de efectos particulares, que en su momento creó derechos a favor del Consorcio UNIQUE IDC para la firma del Contrato de Alianza Estratégica, y conforme al cual efectivamente se firmó dicho contrato. Como tal acto administrativo creador de derechos a favor de la empresa, era un acto administrativo firme, irrevocable por la Administración conforme lo establece el artículo 82 de la Ley Orgánica de Procedimientos Administrativos, el cual dispone que "Los actos administrativos que no originen derechos subjetivos o intereses legítimos, personales y directos para un particular, podrán ser revocados en cualquier momento, en todo o en parte, por la misma autoridad que los dictó, o por el respectivo superior jerárquico". (**Anexo ABC-81**). De esa norma, por interpretación a contrario y sistemática con otras previsiones de la ley, se desprende el principio de la irrevocabilidad de los actos administrativos que creen o declaren derechos a favor de particulares, salvo mediando indemnización, o cuando se revoquen con fundamento en algún vicio de nulidad absoluta.[17]

51. El Decreto No. 1.88 del Gobernador del Estado Nueva Estapra, tratándose de una decisión adoptada por el funcionario competente, debidamente motivada, y ejecutada mediante la firma del Contrato de Alianza Estratégica, no podía ser revocada por la Administración, y no puede el Estado Nueva Esparta desconocer su valor y efectos. Correspondería sólo a los tribunales competentes contencioso administrativos anular los actos administrativos generales o individuales contrarios a derecho (artículo 259 Constitución de 1999), o a la Administración declarar su nulidad absoluta (artículo 83 Ley Orgánica de Procedimientos Administrativos).

52. Por tanto, considero que no pueden traerse a este proceso arbitral argumentos que si hubiese sido el caso, debieron ventilarse ante los tribu-

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[17] Véase Allan R. Brewer-Carías, *El derecho Administrativo y la Ley Orgánica de Procedimientos Administrativos*, Editorial Jurídica Venezolana, Caracas 2002, pp. 213-224 (**Anexo ABC-89**).

nales contenciosos administrativos competentes. Es el caso, por ejemplo, de los argumentos que esgrime el profesor Mouriño, al acusar al Decreto No. 1.188 de contener "falsos supuestos" (***Segundo Informe, Mouriño, ¶ 27***), y de haber sido dictado bajo una "conducta elusiva", supuestamente basado en una "errónea aplicación" del artículo 23.4 de la Ley de Concesiones ENE.

53. Como se dijo, el Decreto No. 1.188, tratándose de un acto administrativo definitivamente firme que creó derechos a favor de particulares y que no fue impugnado ante la jurisdicción contencioso administrativa, la única posibilidad que existía para su revocación en el ordenamiento jurídico venezolano era que la propia Gobernación del Estado Nueva Esparta considerara que el mismo estaba afectado de un vicio de nulidad absoluta, cuyas causales en Venezuela están estrictamente enumeradas en el artículo 19 de la Ley Orgánica de Procedimientos Administrativos (**Anexo ABC-81**), y que se reducen a los siguientes cuatro casos:

> "1. Cuando así esté expresamente determinado por una norma constitucional o legal.
>
> 2. Cuando resuelvan un caso precedentemente decidido con carácter definitivo y que haya creado derechos particulares, salvo autorización expresa de la ley.
>
> 3. Cuando su contenido sea de imposible o ilegal ejecución, y
>
> 4. Cuando hubieren sido dictados por autoridades manifiestamente incompetentes, o con prescindencia total y absoluta del procedimiento legalmente establecido."

54. En esos casos, y sólo en esos casos, conforme al artículo 83 de la misma Ley Orgánica, "la administración podrá en cualquier momento, de oficio o a solicitud de particulares, reconocer la nulidad absoluta de los actos dictados por ella." Y fue precisamente por esta limitación legal que la Gobernación del Estado Nueva Esparta, al año siguiente de suscribir el Contrato, dictó la Resolución No 0001-05 el 10 de junio de 2005 (**Anexo ABC-51**), procediendo a revocar el antes mencionado Decreto No. 1.188 basándose en supuestos vicios de "nulidad absoluta," porque "su contenido" habría sido "de imposible o ilegal ejecución," y porque habría sido dictado "por autoridades manifiestamente incompetentes, o con prescindencia total y absoluta del procedimiento legalmente establecido." Sin embargo, basta leer el texto íntegro de dicho acto administrativo (Resolución No. 0001-05) para constatar que en ella no hay argumento alguno que motive, fundamente o sustente la

supuesta existencia de esos supuestos vicios, o de otros vicios de ilegalidad del acto.

55. En todo caso, habiendo sido la motivación de la Resolución No. 0001-05 la antes indicada, es sencillamente sorprende que el profesor Mouriño, argumente y afirme tan categóricamente ahora, en su Segundo Informe Legal, que el Gobernador anterior al dictar el Decreto No. No. 1.188 de 26 de febrero de 2004 y resolver la adjudicación directa del Contrato de Alianza Estratégica habría cometido "fraude" (***Segundo Informe Mouriño, ¶¶ 28 ss.***), sin que en el texto de la Resolución No 0001-05 el 10 de junio de 2005 se hubiese alegado en forma alguna dicho supuesto vicio, es decir, que el Gobernador anterior al dictar dicho Decreto para resolver la adjudicación directa del contrato de concesión, supuestamente habría cometido dicho "fraude" al dictarlo. Lo menos que debería exigírsele al Experto presentado por el Estado venezolano, al hacer tales afirmaciones ante este Tribunal arbitral, es que debió haber consignado las denuncias que debieron haberse formulado ante los órganos de control competentes del Estado venezolano para la investigación y sanción del supuesto fraude cometido por el Gobernador del Estado.

56. Por supuesto, los supuestos vicios alegados y no fundamentados para revocar el Decreto No. 1.188 mediante la Resolución No. 0001-05, no tenían base alguna. En efecto, tratándose, el acto administrativo contenido en el Decreto No. 1.188 de 2004, de una decisión administrativa de proceder a la adjudicación directa de un contrato público conforme a la Ley de Concesiones ENE, *la autoridad competente para tomar dicha decisión era precisamente la que dictó dicho acto administrativo*, esto es, el Gobernador del Estado Nueva Esparta. Para tomar la decisión, dicho funcionario no tenía que seguir otro *procedimiento legalmente establecido que no fuera el de orden interno de constatar la existencia del supuesto contemplado* en el artículo 23.4 de la Ley de Concesiones ENE, lo que quedó plasmado ampliamente en la motivación del Decreto No. 1.188. Además, la decisión de proceder conforme a dicha norma a la adjudicación directa de un contrato de concesión, *en ningún caso podría considerarse como de "ejecución imposible" o de "ilegal ejecución."* Por tanto, los supuestos vicios aducidos, no motivados, no constituían vicios de "nulidad absoluta" que pudieran fundamentar su revocación.

57. Por ello, en realidad, fue el acto administrativo de revocación contenido en la Resolución No 0001-05 del 10 de junio de 2005, cuyos efectos quedaron suspendidos desde el 21 de julio de 2005 en virtud de una deci-

sión judicial de amparo (**Anexo ABC-52, pág. 2**), el que sí quedó afectado de nulidad absoluta conforme a lo establecido en el artículo 19.2 de la Ley Orgánica de Procedimientos Administrativos, por haber resuelto un caso precedentemente decidido con carácter definitivo que había creado derechos particulares, es decir, por haber revocado un acto administrativo creador de derechos a favor de particulares como el Decreto No. 1.188.

58. Como se ha dicho, la Resolución 0001-05 fue posteriormente revocada mediante Decreto No. 806 de 17 de julio de 2006 (**Anexo ABC-52**) por el mismo Gobernador del Estado Nueva Esparta. En este Decreto, además, se decidió el rescate anticipado de la concesión para el mantenimiento y administración del Aeropuerto aplicando la Ley Orgánica sobre Promoción de la Inversión Privada bajo el Régimen de Concesiones, y la Ley de Concesiones ENE, reconociéndose sin embargo que su "único fundamento" era el "interés público," y que no existía en el caso un "incumplimiento del concesionario, con lo cual, no existe falta imputable a este que, en consecuencia, determine y amerite la apertura de un procedimiento administrativo tendente a su adopción." (**Anexo ABC-52, pág. 4**). En el Decreto No. 806, además, como consecuencia del rescate anticipado, se resolvió la extinción del Contrato de Alianza Estratégica celebrado con el Consorcio UNIQUE IDC, y se decidió que el Estado Nueva Esparta reasumiría de nuevo directamente la prestación del servicio de administración y mantenimiento del Aeropuerto.

59. Se fundamentó la revocación de la Resolución No. 0001-05 de 2005 en el hecho de que en virtud de decisiones judiciales en juicios de amparo, la misma materialmente no había surtido efectos, y además, en el hecho de que dicha Resolución No. 0001-05 – al contrario del Decreto No. 1.188 de 2004 - no era un acto administrativo creador de derechos a favor de particulares, la cual, por tanto, era esencialmente revocable.

VI. SOBRE LA INEXISTENCIA DE UN SUPUESTO FRAUDE A LA LEY EN LA CELEBRACIÓN DEL CONTRATO DE ALIANZA ESTRATÉGICA

60. Por otra parte, debo señalar que asombra que se argumente ante este tribunal arbitral, que en el caso de la celebración del Contrato de Alianza Estratégica con el Consorcio UNIQUE IDC, se habría cometido un supuesto "fraude a la ley" para supuestamente omitir de manera encubierta la aplicación de normas de estricto orden público. Tanto por el profesor Mouri-

ño en su Segundo Informe Legal como por los representantes de la República en su Memorial de Réplica, expresan que ello habría ocurrido:

(i) al supuestamente existir una "intencionalidad de evadir la aplicación" de normas que imponen la tramitación de procedimientos previos para la selección de contratistas, como se constataría de los "considerandos que falsamente son argumentados en el acto administrativo dictado por el Gobernador, contenido en el Decreto No. 1.188" (***Véase Segundo Informe Mouriño, ¶ 30***); y

(ii) Supuestamente, para escapar del requisito de la autorización legislativa (aquí sí, "autorización previa" a la celebración) por parte de la Asamblea Nacional prevista para los contratos suscritos con "sociedades no domiciliadas en Venezuela" (art.150 Constitución 1999), al configurarse el Consorcio UNIQUE IDC con empresas domiciliadas en el país (***Memorial de Réplica, ¶¶ 191 ss***.).

61. De lo anterior, el profesor Mouriño llega a argumentar que el supuesto "fraude a la ley" resultaría evidente al expresar categóricamente que "la intención de la administración era la de contratar con empresas extranjeras" y que la propia Administración habría demostrado una "otra conducta elusiva para evadir y/o relajar los controles previstos en el artículo 50 de la Constitución del Estado Nueva Esparta y 150 de la Constitución de la República Bolivariana de Venezuela" (***Véase Segundo Informe Mouriño, ¶ 41***).

62. De nuevo, en el tratamiento del tema, lo que se evidencia es confusión, a lo que se suma el hecho de que en toda la documentación que he revisado sobre este caso, no hay elementos ni pruebas que permitan deducir las infundadas afirmaciones hechas por los representantes del Estado y por su experto legal. Por lo demás, lo cierto es que las supuestas conductas fraudulentas ni siquiera se expresaron en los actos administrativos dictados en la época, como por ejemplo el contenido en la Resolución No. 0001-05 del 10 de junio de 2005, en la cual nada se dijo sobre ello. Un proceso arbitral como este no puede basarse en especulaciones formuladas *ex post facto*, que nunca antes fueron argumentadas ni alegadas, y que no tienen ningún valor ante este Tribunal.

VII. LA EXPECTATIVA LEGITIMA DE LAS DEMANDANTES GENERADA POR EL ACTO ADMINISTRATIVO FIME QUE DECISIO LA ADJUDICACION DIRECTA DE LA CONCESIÓN DEL AEROPUERTO AL CONSORCIO UNIQUE IDC

63. Se me ha solicitado adicionalmente que comente sobre la expectativa legítima que generó el Decreto No. 1.188 dictado por el Gobernador del Estado Nueva Esparta como Jefe de la Administración estadal al adjudicar la contratación de la prestación del servicio aeroportuario al Consorcio UNIQUE IDC, en virtud del cual se firmó el Contrato de Alianza Estratégica entre la Gobernación del Estado Nueva Esparta y el Consorcio UNIQUE IDC. Dicha expectativa implicaba confiar en que la decisión de la Administración sería honrada como manifestación de voluntad formal de la Gobernación del Estado Nueva Esparta, expresada a través del órgano competente para decidir la adjudicación directa de dicho Contrato y suscribirlo.

64. En una Administración como la de un Estado de la República, las manifestaciones de voluntad del Jefe del Ejecutivo del mismo, sin duda generan expectativas legítimas para los destinatarios de ellas en el sentido de que las mismas serán honradas, máxime si se trata de actos administrativos formales, como fue el caso del Decreto No. 1.188 y la posterior suscripción del Contrato de Alianza Estratégica. Se trata de lo que en el derecho administrativo venezolano se conoce como el **principio de la protección de la confianza legítima**, el cual se ha erigido como uno de los principios básicos que rigen las relaciones jurídicas que se establecen entre los órganos de la Administración y los particulares. En virtud de este principio, la conducta de la Administración, máxime si se traduce en actos administrativos formales, les genera a sus destinatarios una expectativa legítima y justificada de que la Administración responderá o actuará conforme a una conducta determinada y acorde, que puede ser una "prestación, una abstención o una declaración favorable a sus intereses".[18]

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[18] Véase Hildegard Rondón de Sansó, *Dos temas innovadores. Confianza legítima y el principio de precaución en el derecho administrativo,* Ediciones Ex Libris, Caracas 2006, p. 3 **(Anexo ABC-90)**. La Corte Segunda de lo Contencioso Administrativo, por ello, en sentencia 1478 de 10 de octubre de 2011 (Caso *Compactadora de Tierra C.A. CODETICA*), al considerar que el principio de la confianza legítima "es concreta manifestación del principio de la buena fe en el ámbito de la actividad administrativa," expresó "que es esencial dentro de la configuración de todo Estado de Derecho, la existencia de cierta certidumbre jurídica, que en el campo del Derecho Administrativo implica el derecho de todo ciudadano a relacionarse con la Administración dentro de un marco jurídico estable, definible y claro, que le permita an-

65. Como la ha definido Pedro J. Coviello,

> "La protección de la confianza legítima es el instituto de derecho público, derivado de los postulados del Estado de Derecho, de la seguridad jurídica y de la equidad, que ampara a quienes de buena fe creyeron en la validez de los actos (de alcance particular o general, sean administrativos o legislativos), comportamientos, promesas, declaraciones o informes de las autoridades públicas, que sean jurídicamente relevantes y eficaces para configurarla, cuya anulación, modificación, revocación o derogación provoca un daño antijurídico en los afectados, erigiéndose, bajo la observancia de esos componentes, en un derecho subjetivo que puede invocar el administrado..."[19]

66. La fuente de la confianza legítima, por tanto, puede resultar de cualquier actuación de la Administración, reiterada o no, e incluso de las conductas contractuales de la misma. Como lo resolvió el Tribunal Supremo de Justicia en Sala Electoral en sentencia No. 98 de 1 de agosto de 2001 (Caso: *Sabino Garbán Flores, Freddy José Leiva, Antonio Sousa Martins y otros vs. Asociación Civil Club Campestre Paracotos*), siguiendo lo expuesto por Hildegard Rondón de Sansó, que el principio de la confianza legítima:

> "no se limita a los actos formales, sino que abarca una amplia gama de conductas del actuar administrativo, tales como: Compromisos formales de carácter contractual o unilateral; promesas, doctrina administrativa; informaciones e interpretaciones; conductas de hecho que hacen esperar de la Administración una acción en un caso determinado; los usos, costumbres o reglas no escritas.[20]

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ticipar, conocer o esperar, con cierto grado de exactitud, el sentido y alcance verdadero de la actuación administrativa." Véase en http://jca.tsj.gov.ve/decisiones/2011/octubre/1478-10-AP42-N-2008-000099-2011-1411.html (**Anexo ABC-91**).

19 Véase Pedro J Coviello, *La protección de la confianza legítima*, LexisNexis,-Abeledo Perrot, Buenos Aires, p. 462 (**Anexo ABC-92**).

20 Véase Sentencia No. 98 del Tribunal Supremo en Sala Electoral de 1 de agosto de 2001 (Caso: *Sabino Garbán Flores, Freddy José Leiva, Antonio Sousa Martins y otros vs. Asociación Civil Club Campestre Paracotos*), en http://www.tsj.gov.ve/decisiones/selec/Agosto/098-010801-000058.htm (**Anexo ABC-93)**. Véase Hildegard Rondón de Sansó, "El principio de confianza legítima en el derecho venezolano" en *IV Jornadas Internacionales de Derecho Administrativo "Allan Randoplh Brewer Carías". La relación jurídico-administrativa y el procedimiento adminis-*

67. Este principio de la confianza legítima y de su protección, tiene en todo caso varias vertientes, que pueden estar vinculadas al principio de la seguridad jurídica o al principio de la buena fe, sobre las cuales, por ejemplo, el Tribunal Supremo de Justicia, en Sala Electoral, en la misma sentencia No. 98 de 1 agosto de 2001 (Caso: *Sabino Garbán Flores, Freddy José Leiva, Antonio Sousa Martins y otros vs. Asociación Civil Club Campestre Paracotos*), indicó que:

> "para alguna corriente doctrinaria resulta que el aludido principio ostenta un carácter autónomo, para otra se limita a ser una variante del principio de la buena fe que en general debe inspirar las relaciones jurídicas, incluidas aquellas en las que intervengan una o varias autoridades públicas. De igual manera, se alega como su fundamento el brocardo "*nemo auditur sua turpitudinem alegans*" o de que nadie puede alegar su propia torpeza (empleado por alguna sentencia española, como señala González Pérez, Jesús: *El principio general de la buena fe en el Derecho Administrativo*. 3° Edición. Editorial Civitas. Madrid, 1999. p. 128), o bien el aforismo "*venire contra factum proprium non valet*" (prohibición de ir contra los actos propios), así como también se invoca en su apoyo el principio de seguridad jurídica."[21]

68. Así, en general, se vincula el principio de la confianza legítima con el principio de la seguridad jurídica que informa todo modelo de Estado de Derecho, protegiendo las relaciones del Estado cuando se ubica institucionalmente frente a los ciudadanos, ajustándose de forma más armoniosa que otros principios (como el de buena fe, por ejemplo) e informando su actividad para transmitir esa clave de funcionamiento a toda la sociedad.[22]

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trativo, Fundación Estudios de Derecho Administrativo, Tomo I, Caracas 1998, pp. 295-351 (**Anexo ABC-94**).

21 Véase Sentencia No. 98 del Tribunal Supremo en Sala Electoral de 1 de agosto de 2001 (Caso: *Sabino Garbán Flores, Freddy José Leiva, Antonio Sousa Martins y otros vs. Asociación Civil Club Campestre Paracotos*), en http://www.tsj.gov.ve /decisiones/selec/Agosto/098-010801-000058.htm (**Anexo ABC-93**).

22 Véase Edward Colman, *La protección de la confianza legítima en el derecho español y venezolano: Rasgos generales y aplicación de dos supuestos de la actividad administrativa*, FUNEDA, Caracas 2011, pp. 70-75 (**Anexo ABC-95**).

69. Conforme a los postulados de la confianza legítima en esta vertiente de seguridad jurídica, las actuaciones de los órganos que ejercen el Poder Público no pueden contrariar la deducción lógica que venga determinada por su conducta y proceder anterior, y que fomenta la expectativa; conducta que "no está constituida tan sólo de actuaciones, sino que también se conforma con abstenciones y manifestaciones denegatorias u omisiones voluntarias...".[23]

70. La protección de la confianza legítima en esta vertiente se presenta entonces como el principio rector de la relación jurídica que se establece entre los particulares y el Estado, imponiéndole a éste el deber de reconocer el carácter legítimo que tienen las expectativas jurídicas fundadas en sus actuaciones reiteradas y, -en tal sentido-, imponiéndole también el deber de respetarlas, absteniéndose de modificarlas de manera irracional, brusca e intempestiva, sin la debida preparación en relación con los efectos que se generarán. Esta vertiente del principio se ha desarrollado básicamente en el ámbito judicial[24] pero también en materia administrativa con base en la aplicación del artículo 11 de la Ley Orgánica de Procedimiento Administrativos.

71. En Venezuela, la protección de la confianza legítima ha abarcado también aspectos más amplios derivados de la buena fe, que es un principio que además tiene consagración expresa en el artículo de la 10 de la Ley Orgánica de la Administración Pública,[25] con el objeto de proteger las expectativas legítimas que pueda la Administración generar con sus actos administrativos.[26]

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23 Véase Hildegard Rondón de Sansó, *Dos temas innovadores. Confianza legítima y el principio de precaución en el derecho administrativo,* Ediciones Ex Libris, Caracas 2006, p. 3 (**Anexo ABC-90**).

24 Véase sobre ello Caterina Balasso Tejera, "El principio de protección de la confianza legítima y su aplicabilidad respecto de los ámbitos de actuación del poder público," en *El Derecho Público a los 100 números de la Revista de Derecho Público (1980-2005)*, Editorial Jurídica Venezolana, Caracas 2006, pp. 745 ss. (**Anexo ABC-96)**. Véase por ejemplo, la sentencia No. 789 de la Sala de Casación Social del Tribunal Supremo de Justicia de 8 de julio de 2011 (Caso: *Carlos R. Arjona Torres vs. Asociación Cooperativa Seguridad 2050 RC*), en http://www.tsj.gov.ve/decisiones/scs/julio/0789-8711-2011-11-045.html (**Anexo ABC-97**); y la sentencia No. 2442 de la Sala Constitucional de 15 de octubre de 2002 (Caso *Pedro Roas Bravo*), en http://www.tsj.gov.ve/decisiones/scon/septiembre/2442-151002-00-0510.%20.htm (**Anexo ABC-98**).

25 El artículo 10 de la Ley Orgánica de la Administración Pública, en efecto, dispone que "La actividad de la Administración Pública se desarrollará con base en los prin-

72. En tal sentido, el principio de la confianza legítima ha sido igualmente considerado en la sentencia de fecha 9 de junio de 1999, de la Sala de Casación Civil del Tribunal Supremo de Justicia, la cual sobre el particular indicó que:

> "(…) es innegable la existencia de un comportamiento coherente, que en la vida de relación y en el mundo del derecho significa que "*cuando una persona dentro de una relación jurídica, ha suscitado en otra con su conducta una confianza fundada, conforme a la buena fe, en un obrar determinado, según el sentido objetivamente deducido de su conducta anterior, no debe defraudar la confianza suscitada y es inadmisible toda situación incompatible con ella.*"[27]

73. De manera similar, la Sala Político Administrativa del Tribunal Supremo de Justicia en sentencia No. 210 de 9 de marzo de 2010, reconoció la vinculación entre la protección de la confianza legítima y el principio de la buena fe, señalando reiteradamente que:

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cipios de economía, celeridad, simplicidad, rendición de cuentas, eficacia, eficiencia, proporcionalidad, oportunidad, objetividad, imparcialidad, participación, honestidad, accesibilidad, uniformidad, modernidad, transparencia, buena fe, paralelismo de la forma y responsabilidad en el ejercicio de la misma, con sometimiento pleno a la ley y al derecho, y con supresión de las formalidades no esenciales." Véase Ley Orgánica de la Administración Pública en *Gaceta Oficial* No. 5890 Extraordinario de 31 de julio de 2008 (**Anexo ABC-99**). Véase los comentarios sobre dicha Ley en Allan R. Brewer-Carías, "Introducción general al régimen jurídico de la Administración Pública,"en. Allan R. Brewer-Carías, Rafael Chavero Gazdik y Jesús María Alvarado Andrade, *Ley Orgánica de la Administración Pública, Decreto Ley No. 4317 de 15-07-2008,* 4ª edición actualizada, Editorial Jurídica Venezolana, Caracas 2009, pp. 7-103 (**Anexo ABC-100**).

26 Se trata, en efecto, de un principio que la jurisprudencia de la Sala Constitucional incluye entre los que informan "de manera superlativa" a la Administración, siendo la enumeración hecha jurisprudencialmente la de los "principios de economía, celeridad, simplicidad, eficacia, objetividad, imparcialidad, honestidad, transparencia, *buena fe, confianza legítima* y eficiencia." Sentencia No. 1889 de la Sala Constitucional de 17 de octubre de 2007 *(Caso:* Impugnación de los artículos 449, 453, 454, 455, 456 y 457 de la Ley Orgánica del Trabajo*),* en *Revista de Derecho Público,* No. 112, Editorial Jurídica Venezolana, Caracas 2007, p. 435 (**Anexo ABC-101**).

27 Véase sentencia de la Sala de Casación Civil de la antigua Corte Suprema de Justicia de 9 de junio de 1999, en *Jurisprudencia Ramírez & Garay*, Vol. 155, Caracas 1999, p. 347 (**Anexo ABC-102**).

> "uno de los principios que rige la actividad administrativa es el principio de confianza legítima, el cual se refiere a la concreta manifestación del principio de buena fe en el ámbito de la actividad administrativa y cuya finalidad es el otorgamiento a los particulares de garantía de certidumbre en sus relaciones jurídico-administrativas. (Vid. sentencia de esta Sala N° 1.171 del 4 de julio de 2007)."[28]

74. Esta concepción de la confianza legítima vinculada al principio de la buena fe, también ha sido aplicada, por ejemplo, por la Sala Constitucional en la sentencia No, 937 de 28 de abril de 2003, en la cual, al conocer de una acción de amparo interpuesta contra la Comisión Nacional de Casinos, Bingos y Máquinas Traganíqueles por un grupo de empresas del ramo, por incumplimiento de lo ordenando en un fallo anterior de esa misma Sala Constitucional, estableció lo siguiente:

> "...se desprende de los autos, que transcurrió con creces el lapso establecido en el fallo tantas veces mencionado, sin que se haya dado cumplimiento a la orden impartida por la Sala, ya que hasta la fecha no se ha regularizado el otorgamiento de licencias y autorizaciones de funcionamiento de las accionantes, mediante el mecanismo previsto en el artículo 25 de la Ley para el Control de los Casinos, Salas de Bingo y Máquinas Traganíqueles, lo cual, constituye una situación fáctica que genera un estado de indefinida incertidumbre y falta de certeza jurídica en cuanto a la conclusión de un procedimiento administrativo, así como una transgresión a la confianza legítima derivada del otorgamiento de las correspondientes autorizaciones."
>
> "En este contexto es menester señalar que el otorgamiento de los permisos generó expectativas en las accionantes y con ello importantes erogaciones de dinero, con la finalidad de cumplir con los objetivos para los cuales la Administración les confirió tales autorizaciones y ejercer de esta forma la actividad económica de su preferencia. Por lo cual, la omisión de hacer cumplir los requisitos establecidos en la normativa tendiente a la regularización de la actuación de las accionantes no pue-

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[28] Véase sentencia No. 210 de la Sala Político-Administrativa del Tribunal Supremo de Justicia de 9 de marzo de 2010, publicada el 10 de marzo de 2010 (Caso: *Olga del Valle Ontiveros de Ochoa vs. Comisión de Funcionamiento y Reestructuración del Sistema Judicial*) en http://www.tsj.gov.ve/decisiones/spa/Marzo/00210-10310-2010-2008-0213.html (**Anexo ABC-103**).

> de ocasionar perjuicio a quien previamente ha obtenido de la autoridad competente la anuencia para el ejercicio de su actividad, plasmado en actos administrativos, los cuales a pesar de la inhibición de su eficacia, mantenían plena validez, tal como lo apreció esta Sala en su sentencia del 13 de marzo de 2001."[29]

75. Esta garantía de certidumbre que deben tener quienes entran en relación con la Administración, y que genera confianza en que realizada una actuación la consecuencia racional de la misma debe respetarse, llevó por ejemplo a la Corte Primera de lo Contencioso Administrativo a pronunciarse en sentencia de 14 de agosto de 2008 (Caso: *Oscar Alfonso Escalante Zambrano vs. Cabildo Metropolitano de Caracas*), sobre el derecho a la estabilidad provisional o transitoria que debe reconocerse a los funcionarios que hubiesen ingresado por designación o nombramiento a un cargo de carrera, sin haber superado previamente el respectivo concurso, dejando sentado el criterio de que al contrario:

> "Tal proceder de la Administración constituye una especie de negación a la carrera administrativa a un número ciertamente elevado de personas, que ingresan a los organismos o entes públicos con la expectativa de hacer carrera administrativa, con lo cual no sólo se vulnera el espíritu del constituyente, sino que se infringe el principio de la confianza legítima que tienen los aspirantes a ingresar a la carrera administrativa de que se les ratifique, o se les dé ingreso, a través de un concurso público, tal como lo establece el sistema de función pública venezolano, que da prevalencia a la carrera administrativa por encima de los cargos de libre nombramiento y remoción, los cuales ciertamente pueden coexistir, pero, de manera excepcional."[30]

76. De ello, concluyó la Corte en su sentencia indicando:

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[29] Véase en sentencia Nº 937 de la Sala Constitucional de 28 de abril de 2003 (Caso: *Ricardo Javier González Fernández y otros contra la Comisión Nacional de Casinos, Salas de Bingo y Máquinas Traganíqueles*), en http://www.tsj.gov.ve/decisiones/scon/Abril/937-280403-02-2660%20.htm (**Anexo ABC-104**).

[30] Véase Sentencia de la Corte Primera de lo Contencioso Administrativo de 14 de agosto de 2008, Caso: *Oscar Alfonso Escalante Zambrano vs. Cabildo Metropolitano de Caracas*, en *Revista de Derecho Público,* No. 115, Editorial Jurídica Venezolana, Caracas 2008, p. 576 ss. (**Anexo ABC-105**).

> "Que el personal que labora actualmente en las distintas administraciones públicas tiene la confianza o expectativa legítima de acceder a la función pública y de hacer carrera administrativa, y que, en consecuencia, les sea respetada la estabilidad absoluta consecuencia de ello."[31]

77. De todo lo anteriormente expuesto resulta, por tanto, que el principio de la confianza legítima no sólo se vincula al principio de la seguridad jurídica, sino también se vincula, conforme a la doctrina jurisprudencial del Tribunal Supremo, al principio de la buena fe que rige en las relaciones administrativas, y que permite a los particulares que entran en relación jurídica con la Administración tener confianza y expectativa legítima en relación con las propias actuaciones de la Administración, particularmente, con sus actos administrativos de los cuales aquellos son destinatarios. Ello implica, por supuesto, que la Administración no puede invocar actos propios para desconocer derechos adquiridos de privados, habiendo éstos actuado de buena fe con base de estos mismos actos; por lo que el principio de la confianza legítima en este caso impide que el Estado pretenda ahora alegar la supuesta ilegalidad del Contrato de Alianza Estratégica, que nadie ha declarado, en contra del Consorcio que lo suscribió, habiendo el propio Estado a través de la Gobernación del Estado Nueva Esparta sido parte del mismo.

78. Por ello, en Venezuela, el Tribunal Supremo de Justicia, en Sala Electoral, en la sentencia antes citada No. 98 de 1 agosto de 2001 (Caso: *Sabino Garbán Flores, Freddy José Leiva, Antonio Sousa Martins y otros vs. Asociación Civil Club Campestre Paracotos*), indicó que el principio de la confianza legítima como "variante del principio de la buena fe" está vinculado entre otros al principio expresado en el aforismo "*venire contra factum proprium non valet*" (prohibición de ir contra los actos propios)."[32]

79. En el caso del Decreto No. 1188 de 26 de febrero de 2004 mediante el cual el Gobernador del Estado resolvió proceder a la adjudicación directa del contrato de Alianza Estratégica a favor del Consorcio UNIQUE IDC, el mismo constituyó una manifestación de voluntad expresa de la Gobernación del Estado Nueva Esparta, adoptada por el órgano competente para resolver el asunto, constituyendo dicho acto administrativo la fuente del título

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31 Idem.

32 Véase Sentencia No. 98 del Tribunal Supremo en Sala Electoral de 1 de agosto de 2001 (Caso: *Sabino Garbán Flores, Freddy José Leiva, Antonio Sousa Martins y otros vs. Asociación Civil Club Campestre Paracotos*), en http://www.tsj.gov.ve/decisiones/selec/Agosto/098-010801-000058.htm (**Anexo ABC-93**).

jurídico del Consorcio a suscribir el Contrato, como efectivamente ocurrió, y a prestar el servicio. No es posible negar que dicho acto administrativo, y el hecho subsiguiente de que el mismo Gobernador hubiera suscrito el Contrato, generaron confianza legítima en el Consorcio UNIQUE IDC en que el Contrato de Alianza Estratégica sería honrado por la Administración que lo decidió y suscribió, y que podía ser ejecutado con confianza de que sus cláusulas serían respetadas.[33]

80. El Consorcio UNIQUE IDC, por tanto, de acuerdo con el derecho venezolano, tenía derecho a confiar en la Administración del Estado Nueva Esparta cuando dictó el Decreto No. 1.188 mediante el cual el Gobernador resolvió proceder a la adjudicación directa al Consorcio UNIQUE IDC de la contratación para la prestación del servicio aeroportuario del Aeropuerto y la posterior suscripción del Contrato de Alianza Estratégica; a confiar que la Administración había actuado de buena fe; a confiar que dicho acto administrativo y Contrato fueron dictados en un todo conforme a lo exigido en el ordenamiento jurídico; que la Administración respetaría su manifestación de voluntad y sus propios actos. Todo lo cual impide, por interponerse precisamente el principio de la confianza legítima, que la República pretenda ahora alegar una nunca alegada y supuesta ilegalidad de un acto administrativo mediante el cual se decidió celebrar el Contrato de Alianza Estratégica. Por lo demás, ninguna autoridad ha declarado esa supuesta ilegalidad en contra del Consorcio que lo suscribió, habiendo el propio Estado, a través de la Gobernación del Estado Nueva Esparta, sido parte del mismo.

VIII. SOBRE LA FIGURA DEL AVOCAMIENTO Y LA ILEGALIDAD E ILEGITIMIDAD DE SU UTILIZACIÓN EN EL CASO DE LAS DEMANDAS INTENTADAS POR EL CONSORCIO UNIQUE IDC, Y LA PRETENDIDA DOCTRINA UNIVERSAL, PERO INEXISTENTE, DE LA ACTUACIÓN DE OFICIO DE LOS JUECES CONTENCIOSO ADMINISTRATIVOS EN MATERIA DE CONTROL DE ACTOS ADMINISTRATIVOS

81. Como antes se indicó, contra los actos administrativos contenidos en la Resolución No. 0001-05 del 10 de junio de 2005, antes de su revocatoria; y luego, en el Decreto No. 806 de 17 de julio de 2006 (que la revo-

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[33] Véase Pedro J Coviello, *La protección de la confianza legítima*, LexisNexis,-Abeledo Perrot, Buenos Aires, p. 462 (**Anexo ABC-92**).

có), el Consorcio UNIQUE IDC ejerció las acciones judiciales de amparo y contencioso administrativas de nulidad que le otorgaba el ordenamiento jurídico para la defensa de sus derechos, con el objeto de que se restableciera a su favor el Contrato de Alianza Estratégica. La Sala Constitucional del Tribunal Supremo, no obstante la revocatoria administrativa de la Resolución Nº 0001-05, mediante sentencia No. 1502 del 4 de agosto de 2006 *se avocó* al conocimiento de la causa, y posteriormente decidió, de oficio, conocer del recurso de nulidad intentado contra el decreto No. 806 de 17 de julio de 2006.

82. Con ocasión de dicho avocamiento decidido por la Sala Constitucional, el resultado final fue que todos los procesos judiciales incoados fueron vaciados de contenido por la Sala Constitucional, no existiendo en la actualidad materia sobre la cual pudiera haber decisión, tal como hemos argumentado y ahora ratificamos (***ABC Primer Informe Legal, ¶ 61 ss.***), partiendo del supuesto de que la pretensión principal de las Demandantes era *la nulidad de los actos administrativos impugnados y el restablecimiento a su favor del Contrato de Alianza Estratégica* suscrito el 24 de marzo de 2004. Una vez que la Sala Constitucional decidió, violando la Constitución y la Ley, "entregar" el aeropuerto y sus servicios a los órganos del Poder Ejecutivo Nacional, por órgano del Ministerio del Poder Popular para la Infraestructura (en realidad al Ministerio del Poder Popular para las Obras Públicas y Vivienda), dicha pretensión se tornó como de imposible materialización. Y ninguna significación tiene que se argumente, como lo hace ahora el profesor Mouriño en su Segundo Informe (***Véase Segundo Informe Mouriño, ¶¶ 52 ss.***), que las empresas recurrentes sólo intentasen la acción contencioso administrativa de anulación, sin intentar, junto con la misma, una pretensión de condena, (acción que Mouriño califica como "de plena jurisdicción" (***Véase Segundo Informe Mouriño, ¶ 54***), utilizando, por lo demás, una terminología abandonada hace décadas en el contencioso administrativo venezolano), como normalmente ocurre ante la jurisdicción contencioso administrativa cuando la pretensión y objetivo fundamental de la acción, conforme al artículo 259 de la Constitución y como sucedió en este caso, era el restablecimiento de la situación jurídica infringida mediante la declaratoria de nulidad de los actos administrativos impugnados. Esas acciones fueron las que fueron vaciadas de objeto por la decisión de la Sala Constitucional de entregar los bienes y obras objeto del Contrato de Alianza Estratégica a la Administración Nacional, tornando por tanto en ilusoria toda posibilidad efectiva de que después de esa decisión, pueda un juez contencioso administrativo en Venezuela revertir la situación, declarar la nulidad de los actos impugnados, y luego llegar a condenar a la Administración por responsabilidad administrativa

originada no sólo por los efectos de las actuaciones de funcionarios de un Estado de la República, sino de la propia Sala Constitucional del Tribunal Supremo.

83. La actuación de la Sala Constitucional en este caso fue esencialmente contraria a la ley y abusiva, al utilizar la figura del avocamiento para conocer de unos procesos para lo cual carecía de competencia, paralizar unos juicios contenciosos administrativos de nulidad, y vaciarlos de contenido y objeto. Indudablemente que el avocamiento está previsto en el ordenamiento jurídico, pero el mismo tiene una limitante esencial, y es que para que la Sala del Tribunal Supremo pueda decidir avocarse al conocimiento de una causa, *tiene que tener competencia material afín a la del tribunal que lleva la causa*. Esta figura del avocamiento, endémica sin duda de la justicia constitucional venezolana,[34] dado la argumentación esgrimida por el profesor Mouriño que la considera licita, apegada "a la Constitución y a la ley" (***Véase Segundo Informe Mouriño, ¶¶ 42 ss.)***, amerita algunos comentarios.

84. Su origen se puede situar en el artículo 43 de la Ley Orgánica de la Corte Suprema de Justicia de 1976, en la cual se le asignó exclusivamente a la Sala Político Administrativa de la antigua Corte Suprema de Justicia, la competencia para avocarse al conocimiento de una causa que cursara ante otro tribunal. Dicha previsión, antes de la entrada en vigencia de la Constitución, había sido muy cuestionada, a pesar de que la Sala Político-Administrativa misma había auto-restringido sus poderes en la materia.[35] Sin embargo, aún con dicha disposición limitativa, y en ausencia de previsión alguna en la Constitución de 1999, la Sala Constitucional comenzó negándole a la Sala Político Administrativa el monopolio que tenía en materia de avocamiento, y mediante sentencia No. 456 de 15 de marzo de 2002 (Caso: *Arelys J. Rodríguez vs. Registrador Subalterno de Registro Público, Municipio Pedro Zaraza, Estado Carabobo*) se declaró competente para conocer de solicitudes de avocamiento en jurisdicción constitucional, en particular, res-

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[34] Véase Allan R. Brewer-Carías, "La ilegítima mutación de la constitución por el juez constitucional: la inconstitucional ampliación y modificación de su propia competencia en materia de control de constitucionalidad," en *Libro Homenaje a Josefina Calcaño de Temeltas*. Fundación de Estudios de Derecho Administrativo (FUNEDA), Caracas 2009, pp. 319-362 (**Anexo ABC-106**)

[35] Véase Roxana D. Orihuela Gonzatti, *El avocamiento de la Corte Suprema de Justicia,* Editorial Jurídica Venezolana, Caracas 1998 (**Anexo ABC-107**).

pecto de juicios de amparo.[36] En otra sentencia Nº 806 de 24 de abril de 2002 (Caso: *Sindicato Profesional de Trabajadores al Servicio de la Industria Cementera),* además, la Sala Constitucional consideró nula la referida norma de la derogada Ley Orgánica de la Corte Suprema de Justicia de 1976 (Art. 43) que consagraba la figura del avocamiento como competencia *exclusiva* de la Sala Político Administrativa, argumentando que ello era "incompatible con el principio de *distribución de competencias por la materia* a nivel del máximo Tribunal de la República, sin que la propia Constitución lo autorice ni establezca una excepción al mismo en tal sentido;" señalando además que:

> "Esta Sala Constitucional, no obstante la claridad y laconismo con que fue redactado el precepto, objeta el monopolio que se desprende de la lectura conjunta de ambos artículos, en lo que respecta a que el trámite de las solicitudes de avocamiento sea una facultad exclusiva y excluyente de Sala Político Administrativa.
>
> Es decir, y sobre ello ahondará seguidamente, esta Sala es del parecer que tal potestad es inconsistente desde el punto de vista constitucional, y que la misma corresponde, en un sentido contrario a como lo trata dicho dispositivo, *a todas las Salas del Tribunal Supremo de Justicia, según que el juicio curse en un tribunal de instancia de inferior jerarquía a la Sala que en definitiva decida examinar la petición* (aquí el vocablo *inferior* se entiende en sentido amplio, ya que algunas de estas Salas no son propiamente *alzada* de dichos tribunales; tal sucede con las de casación)...
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> Llegado este punto, siendo, pues, que la facultad de avocamiento conferida a la Sala Político Administrativa por el artículo 43 de la Ley Orgánica de la Corte Suprema de Justicia no está prevista en la Constitución, ni se deduce de ella, ni la justifica su texto, y que, por el contrario, conspira contra el *principio de competencia que informa la labor que desempeñan las Salas del máximo tribunal* de la República (art. 232), esta Sala concluye en que dicho precepto resulta inconstitucional...

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[36] Véase Sentencia No. 456 de la Sala Constitucional del Tribunal Supremo de Justicia de 15 de marzo de 2002 (Caso: *Arelys J. Rodríguez vs. Registrador Subalterno de Registro Público, Municipio Pedro Zaraza, Estado Carabobo*), en *Revista de Derecho Público*, Nº 89-92, Editorial Jurídica Venezolana, Caracas 2002, pp. 178-179 (**Anexo ABC-108**).

> Tales declaraciones no son, propiamente, precedentes de la posición que mantiene esta Sala Constitucional respecto al tema, toda vez que en ellas se sostuvo, al mismo tiempo, que dicha facultad excepcional, no obstante las referidas limitaciones, resultaba de la *exclusiva* potestad de dicha Sala Político Administrativa (*Vid.* sobre el punto de la exclusividad: *ob. cit.* pp. 40 y 41). Criterio de exclusividad que ha sido expresamente abandonado por esta Sala desde su sentencia n° 456 del 15-03-02, caso: *Mariela Ramírez de Cabeza*. Lo que *sí comparte es lo relativo a que la Sala Político Administrativa no estaba constitucionalmente facultada para examinar solicitudes de avocamiento ni adentrarse a su conocimiento cuando de conflictos ajenos a su competencia natural se tratara*.
>
> Pero, para prestar un mejor servicio a la justicia, esta Sala Constitucional dará, en atención a sus propias competencias, un giro en este camino, pues declarará que tal competencia (con los límites impuestos por la práctica judicial comentada) debe extenderse a las demás Salas del Tribunal Supremo de Justicia (subrayados nuestros)[37].

85. Esta doctrina evidentemente era contradictoria, pues luego de considerar inconstitucional la figura del avocamiento en manos de la Sala Político Administrativa, por no tener fundamento en la Constitución y ser violatoria de la garantía al debido proceso, pasó a declararlo como competencia *de todas* las Salas del Tribunal Supremo. Sin embargo, lo importante de esta jurisprudencia establecida y "creadora" de la figura generalizada del avocamiento en manos de todas las Salas del Tribunal Supremo, es el criterio de la Sala, expreso e inequívoco, de que tal potestad correspondía a todas las Salas del Tribunal Supremo pero por supuesto, en las *materias afines a sus respectivas competencias*, de manera que todas las Salas podían avocarse *respecto de causas que estuviesen dentro de su competencia natural*. Esto significa que si se trata de una causa ante un tribunal civil, la competencia para avocarse es de la Sala de Casación Civil; si se trata de una causa penal, la Sala competente para avocarse es la Sala Penal; y si se trata de una causa que cursa ante tribunales contencioso administrativos, la Sala competente para avocarse en la Sala Político Administrativa.

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37 Véase Sentencia Nº 806 de la Sala Constitucional del Tribunal Supremo de 24 de abril de 2002 (Caso: *Sindicato Profesional de Trabajadores al Servicio de la Industria Cementera),* en *Revista de Derecho Público*, Nº 89-92, Editorial Jurídica Venezolana, Caracas 2002, pp. 179-184 (**Anexo ABC-109**)

86. La doctrina jurisprudencial sentada por la Sala Constitucional fue luego recogida en la Ley Orgánica del Tribunal Supremo de Justicia de 2004, al establecer en su artículo 5, párrafo 1º, 48, la competencia de todas las Salas de poder avocarse al conocimiento de causas que cursen en otros tribunales, así:

> 5. P1. 48. Solicitar de oficio, o a petición de parte, algún expediente que curse ante otro tribunal, y avocarse al conocimiento del asunto cuando lo estime conveniente. (**Anexo ABC-47**)

87. En consecuencia se atribuyó a todas las Salas del Tribunal Supremo de Justicia, y debe presumirse que en las materias afines a su respectiva competencia natural, la potestad de recabar de cualquier "otro tribunal", es decir, distinto del Tribunal Supremo (tribunales de instancia), *de oficio o a instancia de parte*, con conocimiento sumario de la situación, cualquier expediente o causa en el estado en que se encuentre, para resolver si se avoca y directamente asumir el conocimiento del asunto o, en su defecto lo asigna a otro tribunal (Artículo 18, párrafo 11º). La potestad de avocarse, por tanto, esencialmente tenía que ser respecto de causas en materias afines a la competencia natural de la Sala, pues sólo así podía darse una de las opciones que era asumir el conocimiento directo del asunto.

88. Sobre las repercusiones de esta atribución generalizada de competencia, la propia Ley Orgánica dispuso que debía ser ejercida, como lo indicó el artículo 18.12 de la Ley Orgánica del Tribunal Supremo de Justicia de 2004, "con suma prudencia":

> "y sólo en caso grave, o de escandalosas violaciones al ordenamiento jurídico que perjudique ostensiblemente la imagen del Poder Judicial, la paz pública, la decencia o la institucionalidad democrática venezolana, y se hayan desatendido o mal tramitado los recursos ordinarios o extraordinarios que los interesados hubieren ejercido." (**Anexo ABC-47**)

89. La orientación establecida en la citada jurisprudencia, y en la previsión de la Ley Orgánica de 2004, fue recogida en la reforma de la Ley Orgánica del Tribunal Supremo de 2010,[38] disponiéndose entre las compe-

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[38] Ley Orgánica del Tribunal Supremo de Justicia, *Gaceta Oficial* No. 39.483 de 9 de agosto de 2010 (**Anexo ABC-110**). Sobre dicha Ley orgánica, véanse los comenta-

tencias comunes de todas las Salas del Tribunal Supremo, "***en las materias de su respectiva competencia,"*** la de poder solicitar de oficio, o a petición de parte, algún expediente que curse ante otro tribunal, y avocarse al conocimiento del asunto en los casos que disponga la ley (Art. 31.1), para lo cual la Ley Orgánica ha establecido los siguientes principios del procedimiento:

> 1. El artículo 106 de la Ley Orgánica precisa que cualesquiera de las Salas del Tribunal Supremo de Justicia *en las materias de su respectiva competencia*, *de oficio o a instancia de parte*, con conocimiento sumario de la situación, podrá recabar de cualquier tribunal de instancia, en el estado en que se encuentre, cualquier expediente o causa para resolver si se avoca y asume el conocimiento del asunto o, en su defecto, lo asigna a otro tribunal. La condición legal esencial para que el avocamiento pueda iniciarse, por tanto, es que se trate de una causa que corresponda a la materia de la competencia de la sala respectiva, por lo que legalmente está proscrito que una Sala del Tribunal Supremo se avoque al conocimiento de una causa que corresponde a materias de la competencia de otra Sala del Tribunal Supremo. De allí que el profesor Mouriño "infiera" con alguna correcta aproximación, no sólo – a su juicio - de lo que expuse en mi Primera Opinión legal, sino de las normas que regulan el avocamiento, como él dice, "que la Sala Constitucional sólo podrá avocar para sí el conocimiento de procesos constitucionales, ergo, únicamente en acciones extraordinarias de amparo, los cuales son los únicos procesos constitucionales que conocen los tribunales de instancia" lo cual, al contrario de lo que afirma Mouriño, sí "guarda relación con la legislación y la doctrina vinculante y pacífica emanada de la Sala Constitucional a lo largo de los años" (***Véase Segundo Informe Mouriño, ¶ 44).*** Ello en principio es así, y a esa competencia, sin embargo, ahora hay que agregar conforme a la Ley Orgánica del Tribunal Supremo de Justicia de 2010, la competencia que le es asignada a la Sala Constitucional

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rios en Allan R. Brewer-Carías, "Introducción General al régimen del Tribunal Supremo de Justicia y de los procesos y procedimientos constitucionales y contencioso electorales," en Allan R. Brewer-Carías y Víctor R. Hernández Mendible, *Ley Orgánica del Tribunal Supremo de Justicia*, Editorial Jurídica venezolana, Caracas 2010, pp. 7-164 (**Anexo ABC-111**).

para "avocar las causas en las que se presuma la violación del *orden público constitucional*" (art. 25.16), lo que es considerablemente limitativo.

2. Esta atribución debe ser ejercida, como lo indica el artículo 107, con suma prudencia, y sólo en casos de graves desórdenes procesales o de escandalosas violaciones al ordenamiento jurídico que perjudiquen ostensiblemente la imagen del Poder Judicial, la paz pública, la decencia o la institucionalidad democrática. Legalmente, por tanto, hay una limitante expresa de manera que una sala no puede avocarse al conocimiento de una causa que curse ante un tribunal inferior en materias afín a su respectiva competencia, sino como lo indica la norma, en "casos de graves desórdenes procesales" o de "escandalosas violaciones al ordenamiento" siempre que, acumulativamente, perjudiquen "ostensiblemente," primero, "la imagen del Poder Judicial"; segundo, "la paz pública;" tercero, "la decencia," o cuarto, "la institucionalidad democrática."

3. La Sala respectiva debe examinar las condiciones de admisibilidad del avocamiento, en cuanto que el asunto curse ante algún tribunal de la República, independientemente de su jerarquía y de especialidad o de la etapa o fase procesal en que se encuentre, así como de las irregularidades que se aleguen hayan sido oportunamente reclamadas sin éxito en la instancia a través de los recursos ordinarios (Artículo 108).

4. Al admitir la solicitud de avocamiento, la Sala debe oficiar al tribunal de instancia, requiriendo el expediente respectivo, y puede ordenar la suspensión inmediata del curso de la causa y la prohibición de realizar cualquier clase de actuación. De acuerdo con el mismo artículo 108, "serán nulos los actos y las diligencias que se dicten en desacato a la suspensión o prohibición que se expida."

5. Y por último, la sentencia sobre el avocamiento la debe dictar la Sala competente, la cual puede decretar la nulidad y subsiguiente reposición del juicio al estado que tenga pertinencia, o decretar la nulidad de alguno o algunos de los actos de los procesos, u ordenar la

remisión del expediente para la continuación del proceso o de los procesos en otro tribunal competente por la materia, así como adoptar cualquier medida legal que estime idónea para restablecer el orden jurídico infringido (Art. 109).

90. Lo más importante de esta facultad excepcional de las Salas del Tribunal Supremo de Venezuela, que rompe ostensiblemente el orden procesal, y puede atentar contra el derecho a la doble instancia, es que en todo caso, para que una Sala del Tribunal Supremo se avoque al conocimiento de una causa que cursa ante otro tribunal, tiene que tratarse de un tribunal *con competencia afín a la competencia natural de la Sala*, de manera que esta sólo puede avocarse, como lo dice el artículo 106, "en las materias de su respectiva competencia", no procediendo el avocamiento, en consecuencia, cuando se trata de materias ajenas a su respectiva competencia de la Sala en cuestión. Por ello, queriendo contrariar mi afirmación, el profesor Mouriño no se percató que en su propio Segundo Informe Legal, en acuerdo con lo que he expresado, el articulo que allí copia dice precisamente que "la sentencia sobre el avocamiento *la dictará la Sala competente*" (***Véase Segundo Informe Mouriño, ¶ 46),*** y no otra.

91. En el caso del avocamiento decidido por la Sala Constitucional en el caso de las acciones intentadas por el Consorcio UNIQUE IDC, particularmente las causas contencioso administrativas, la Sala evidentemente que no tenía competencia para conocer y decidir esas causas, cuya competencia correspondía exclusivamente a la Sala Político Administrativa. He allí la ilegitimidad de origen del avocamiento decidido por la Sala Constitucional, lo que se agrava por el hecho comprobado de que la Sala no se avocó al conocimiento de ninguno de los procesos para asumir el conocimiento de las causas, de lo que carecía de competencia; que la Sala no se avocó al conocimiento de las causas para arreglar o poner orden o restablecer el orden en ningún proceso, pues al final, simplemente puso fin al avocamiento después de haber paralizado los procesos. Paralizar unas causas mediante un avocamiento, con la excusa de pretender conocer de las causas avocadas[39] para

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[39] Nótese que a pesar de que el profesor Mouriño insista en que la Sala Constitucional Mouriño supuestamente no se avocó en estos casos para resolver los recursos de nulidad, en la propia sentencia de la Sala Constitucional No. 313 de 6 de marzo de 2008 mediante la cual declaró inadmisibles tres acciones de amparo constitucional, ordenó *"tramitar conforme a la motiva de este fallo mediante* ***AVOCAMIENTO***

luego devolver las causas a los mismos tribunales, sin ninguna "reordenación" de los procesos, asegurando sólo que transcurriera el tiempo con procesos paralizados, no es una conducta legítima y de buena fe. Además, avocarse de unas causas, para solo paralizar unos procesos, y luego tomar medidas confiscatorias de bienes de propiedad privada, asignando los servicios que configuran una competencia exclusiva de los Estados de la federación, a órganos del Poder Ejecutivo Nacional, es un abuso de poder.

92. Por supuesto que al final, después de la ilegítima paralización de los procesos, la remisión que hizo la Sala Constitucional de las causas a los tribunales contencioso administrativos, era completamente lícita (***Véase Segundo Informe Mouriño, ¶ 47);*** pero ello no reafirma para nada que el avocamiento haya sido "legalmente" decidido (***Idem, ¶ 47***). La remisión a dichos tribunales de las causas, luego de vaciarlas de contenido, hace ilegítimo todo el proceso de avocamiento, pues después de haber entregado los bienes de la concesión al Poder Ejecutivo Nacional, la pretensión fundamental de las Demandantes que era el restablecimiento del Contrato de Alianza Estratégica se tornó en ilusorio, careciendo los tribunales contencioso administrativos de materias sobre las cuales decidir.

93. Un último comentario que suscita el Memorial de Réplica de los representantes del Estado, es el que deriva de la afirmación general que hacen los representantes del Estado al indicar que "el control de oficio de la legalidad de los actos es una nota común del Contencioso Administrativo latinoamericano" (***Memorial de Réplica, ¶ 151).*** En más de cincuenta años aprendiendo derecho administrativo, debo decir que jamás había leído una afirmación de esta naturaleza, producto sin duda de una confusión. Una cosa es que frente al desistimiento que el recurrente haga de la acción de impugnación de un acto administrativo ante la jurisdicción contencioso administrativo, el juez tenga competencia para declarar sin lugar el desistimiento y continuar el juicio de nulidad para pronunciarse sobre ella, que es a lo que refiere el profesor Mouriño en su segundo Informe ("declarar improcedente el desistimiento" ***(Véase Segundo Informe Mouriño, ¶50);*** y otra cosa es decir que los tribunales contencioso administrativos en America Latina en general tienen "la facultad de control de oficio de los actos y decisiones administrativos" al punto de argumentar que la misma "es común y está extendida y

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los recursos de nulidad interpuestos por Unique IDC contra la Resolución núm. 0001-05 (...) y contra el Decreto núm. 806 (...)" (**Anexo ABC-49, p. 60**).

aceptada para los tribunales en lo contencioso-administrativos latinoamericanos y son parte de una tradición común," citando en apoyo de esa supuesta "teoría" la decisión aislada de un tribunal de una provincia argentina que "no homologó una transacción entre el Estado y un contratista porque la deuda motiva de la transacción estaba prescrita," y otra relativa a responsabilidad del Estado por falta del servicio y pago de daños y perjuicios (***Memorial de Réplica, ¶ 151, nota 156***). Sólo tengo que imaginarme que el profesor Mouriño, quien fue juez contencioso administrativo en Venezuela, no leyó esta afirmación de los representantes del Estado.

94. Las potestades de actuación de oficio de los jueces de control de legalidad de los actos administrativos están circunscritas a atribuciones específicas establecidas en las leyes, y que sólo pueden ejercer después de que el proceso se ha iniciado a instancia de parte pues el principio dispositivo prevalece, lo que implica que nunca puede existir una tal "facultad de control de oficio de los actos y decisiones administrativas." Ello es así, en Venezuela, y en todo el mundo donde existe un contencioso administrativo y no sólo en América Latina. Solo a título ilustrativo, conforme a la Ley Orgánica de la Jurisdicción Contencioso Administrativa de Venezuela (LOJCA)de 2010,[40] el juez contencioso administrativo tiene las siguientes competencias de actuación de oficio en el curso del proceso, o en un proceso en curso, y siempre "cuando la ley lo autorice" (art 30 LOJCA), y ello ocurre en los siguientes casos: Como rector que es del proceso, el juez puede impulsarlo de oficio hasta su conclusión (art. 4, LOJCA); el juez puede hacer evacuar de oficio las pruebas que considere pertinentes (art. 39, LOJCA); en las demandas de contenido patrimonial, puede resolver de oficio los defectos del procedimiento (art. 57, LOJCA); en las mismas demandas de contenido patrimonial, el juez puede convocar de oficio a las personas, entes, consejos comunales, colectivos o cualquier otra manifestación popular de planificación, control y ejecución de políticas y servicios públicos, para su participación en la audiencia preliminar, siempre que su ámbito de actuación se encuentre vinculado con el objeto de la controversia, para que opinen sobre el asunto debatido (art. 58, LOJCA); en los procedimientos breves, una vez admitida la demanda, el juez puede de oficio, realizar las actuaciones que estime procedentes para consta-

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40 Véase Ley Orgánica de la Jurisdicción Contencioso Administrativa, *Gaceta Oficial* No. 39.451 de 22 de junio de 2010 (**Anexo ABC-112**). Véase los comentarios sobre esta Ley Orgánica en Allan R. Brewer-Carías y Víctor R. Hernández Mendible, *Ley Orgánica de la Jurisdicción Contencioso Administrativa,* Editorial Jurídica Venezolana, Caracas 2010 (**Anexo ABC-113**).

tar la situación denunciada y dictar medidas cautelares (art. 69, LOJCA); y en materia de medidas cautelares, el juez está facultado "dictar, aún de oficio, las medidas preventivas que resulten adecuadas a la situación fáctica concreta, imponiendo órdenes de hacer o no hacer a los particulares, así como a los órganos y entes de la Administración Pública, según el caso concreto, en protección y continuidad sobre la prestación de los servicios públicos y en su correcta actividad administrativa" (art. 4, LOJCA).[41] Y eso es todo.

95. Declaro que lo anterior es mi opinión jurídica en relación con los asuntos que se me han requerido estudiar.

Firmado en Nueva York, a los 28 días del mes de agosto de 2012

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Allan R. Brewer-Carías

[41] Véase Allan R. Brewer-Carías, "Introducción general al régimen de la jurisdicción contencioso administrativa," en Allan R. Brewer-Carías y Víctor R. Hernández Mendible, *Ley Orgánica de la Jurisdicción Contencioso Administrativa*, Editorial Jurídica venezolana, Caracas 2010, p. 84 (**Anexo ABC-113**).

ANEXOS

A LA SEGUNDA OPINION LEGAL DE ALLAN R. BREWER-CARÍAS*

Anexo ABC-76. Luciano Parejo Alfonso, *Lecciones de Derecho Administrativo*, 4ª edición, Tirant Lo Blanch, Valencia 2011, pp. 193-194.

Anexo ABC-77. Allan R. Brewer-Carías, *Derecho Administrativo*, Universidad Externado de Colombia, Bogotá 2005, Tomo II, pp. 225-244.

Anexo ABC-78. Allan R. Brewer-Carías, *Instituciones Políticas y Constitucionales*, Tomo II, *El régimen del poder Público y su distribución vertical: El Poder nacional y el régimen federal y municipal*, Universidad Católica del Táchira, Editorial Jurídica Venezolana, Caracas–San Cristóbal 1996, pp. 373-394.

Anexo ABC-79. Ley Orgánica de Salud, *Gaceta Oficial* No 36.579 de 11 de noviembre de 1998.

Anexo ABC-80. Joaquín Sánchez Covisa, *La vigencia temporal de la Ley en el ordenamiento jurídico venezolano* (1956), reproducido en *Obra Jurídica de Joaquín Sánchez Covisa*, Ediciones de la Contraloría General de la República, Caracas 1976, pp. 110-120.

Anexo ABC-81. Ley Orgánica de Procedimientos Administrativos, *Gaceta Oficial* N° 2.818 Extraordinario de 1 de julio de 1981.

Anexo ABC-82. Ley Orgánica que reserva al Estado bienes y servicios conexos a las actividades primarias de Hidrocarburos, *Gaceta Oficial* Nº 39.173 del 7 de mayo de 2009.

Anexo ABC-83. Eloy Lares Martínez, *Manual de Derecho Administrativo*, Universidad Central de Venezuela, Caracas 1983, pp. 310-327.

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* La numeración de estos Anexos a la Segunda Opinión Legal sigue a la utilizada para enumerar los Anexos de la Primera Opinión Legal de Allan R. Brewer-Carías.

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Anexo ABC-87. Eloy Lares Martínez, "Contratos de interés nacional," en *Libro Homenaje al Profesor Antonio Moles Caubet*, Universidad Central de Venezuela, Caracas 1981, p 139.

Anexo ABC-88. *Gacetas Oficiales* del Estado Nueva Esparta que incluyen decisiones sobre contratos celebrados por el Estado Nueva Esparta sin intervención legislativa alguna: No. E-266 de 18 de agosto de 2003; E-384 de 12 de enero de 2005; E-770 de 31 de agosto de 2006; E-1040 de 13 de noviembre de 2007; E-1534 de 5 de octubre de 2009.

Anexo ABC-89. Allan R. Brewer-Carías, *El derecho Administrativo y la Ley Orgánica de Procedimientos Administrativos*, Editorial Jurídica Venezolana, Caracas 2002, pp. 213-224.

Anexo ABC-90. Hildegard Rondón de Sansó, *Dos temas innovadores. Confianza legítima y el principio de precaución en el derecho administrativo,* Ediciones Ex Libris, Caracas 2006, p. 3.

Anexo ABC-91. Sentencia No. 1478 de la Corte Segunda de lo Contencioso Administrativo de 10 de octubre de 2011 (Caso *Compactadora de Tierra C.A. CODETICA*), en http://jca.tsj.gov.ve/decisiones/2011/octubre/1478-10-AP42-N-2008-000099-2011-1411.html.

Anexo ABC-92. Pedro J Coviello, *La protección de la confianza legítima*, Lexis-Nexis,-Abeledo Perrot, Buenos Aires, p. 462.

Anexo ABC-93. Sentencia No. 98 del Tribunal Supremo en Sala Electoral de 1 de agosto de 2001 (Caso: *Sabino Garbán Flores, Freddy José Leiva, Antonio Sousa Martins y otros vs. Asociación Civil Club Campestre Paracotos*), en http://www.tsj.gov.ve/decisiones/selec/Agosto/098-010801-000058.htm.

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Anexo ABC-95. Edward Colman, *La protección de la confianza legítima en el derecho español y venezolano: Rasgos generales y aplicación de dos supuestos de la actividad administrativa*, FUNEDA, Caracas 2011, pp. 70-75

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Anexo ABC-104. Sentencia Nº 937 de la Sala Constitucional de 28 de abril de 2003 (Caso: *Ricardo Javier González Fernández y otros contra la Comisión Nacional de Casinos, Salas de Bingo y Máquinas Traganíqueles*), en http://www.tsj.gov.ve/decisiones/scon/Abril/937-280403-02-2660%20.htm

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Anexo ABC-106. Allan R. Brewer-Carías, "La ilegítima mutación de la constitución por el juez constitucional: la inconstitucional ampliación y modificación de su propia competencia en materia de control de constitucionalidad" en *Libro Homenaje a Josefina Calcaño de Temeltas*. Fundación de Estudios de Derecho Administrativo (FUNEDA), Caracas 2009, pp. 319-362.

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Anexo ABC-108. Sentencia No. 456 de la Sala Constitucional del Tribunal Supremo de Justicia de 15 de marzo de 2002 (Caso: *Arelys J. Rodríguez vs. Registrador Subalterno de Registro Público, Municipio Pedro Zaraza, Estado Carabobo*), en *Revista de Derecho Público*, Nº 89-92, Editorial Jurídica Venezolana, Caracas 2002, pp. 178-179.

Anexo ABC-109. Sentencia Nº 806 de la Sala Constitucional del Tribunal Supremo de 24 de abril de 2002 (Caso: *Sindicato Profesional de Trabajadores al Servicio de la Industria Cementera),* en *Revista de Derecho Público*, Nº 89-92, Editorial Jurídica Venezolana, Caracas 2002, pp. 179-184.

Anexo ABC-110. Ley Orgánica del Tribunal Supremo de Justicia, *Gaceta Oficial* No. 39.483 de 9 de agosto de 2010.

Anexo ABC-111. Allan R. Brewer-Carías "Introducción General al régimen del Tribunal Supremo de Justicia y de los procesos y procedimientos constitucionales y contencioso electorales," en Allan R. Brewer-Carías y Víctor R. Hernández Mendible, *Ley Orgánica del Tribunal Supremo de Justicia*, Editorial Jurídica venezolana, Caracas 2010, pp. 7-164.

Anexo ABC-112. Ley Orgánica de la Jurisdicción Contencioso Administrativa, *Gaceta Oficial* No. 39451 de 22 de junio de 2010.

Anexo ABC-113. Allan R. Brewer-Carías, "Introducción general al régimen de la jurisdicción contencioso administrativa," en Allan R. Brewer-Carías y Víctor R. Hernández Mendible, *Ley Orgánica de la Jurisdicción Contencioso Administrativa*, Editorial Jurídica venezolana, Caracas 2010, pp. 84-85.

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Caso CIADI/ARB/10/19: *FLUGHAFEN ZÜRICH A.G., GESTIÓN E INGENIERÍA IDC S.A.* (*Demandantes*) *c.* ***REPÚBLICA BOLIVARIANA DE VENEZUELA*** (*Demandada*)

CENTRO INTERNACIONAL DE ARREGLO DE DIFERENCIAS RELATIVAS A INVERSIONES (CIADI)

TERCERA OPINIÓN LEGAL DE ALLAN R. BREWER-CARÍAS

4 FEBRERO 2013

1. Quien suscribe, Allan R. Brewer-Carías, mediante la presente declaro que las opiniones legales que aquí expreso responden al conocimiento que tengo respecto de las materias relativas al derecho público venezolano que me han sido consultadas, de acuerdo con mi propio convencimiento.

2. Luego de revisar y estudiar las partes relevantes sobre el derecho venezolano del *Memorial de Contestación* de los representantes de la Demandada de 19 de noviembre de 2012 (***Memorial de Contestación***), y de la *Ampliación del Segundo Informe del profesor Carlos E. Mouriño V.* de 19 de noviembre de 2012 (***Ampliación Mouriño***), ratifico en su totalidad todo lo que expresé tanto en mi *Opinión Legal* formulada ante este Tribunal el 5 de mayo de 2012 (***ABC Primera Opinión Legal***), como en mi *Segunda Opinión Legal* formulada ante este Tribunal el 28 de agosto de 2012 (***ABC Segunda Opinión Legal***).

3. Esta *Tercera Opinión Legal*, aparte de que ratifica el contenido de las anteriores, tiene por objeto analizar los aspectos del derecho venezolano

que he considerado relevantes de la *Ampliación Mouriño* y en el *Memorial de Contestación*; como también comentar y clarificar algunos de los puntos en ellos tratados.

4. Los títulos de los diversos apartes de esta *Tercera Opinión*, resumen el contenido y alcance de la misma, por lo que a título de **RESUMEN EJECUTIVO** puedo indicar que de mi análisis he llegado a las siguientes conclusiones que ratifican y complementan mis dos *Opiniones Legales* precedentes*:*

a. La Ley por la cual el Estado Nueva Esparta asumió la administración y mantenimiento de los puertos y aeropuertos públicos de uso comercial ubicados en su territorio de 1991, no tiene carácter de "ley especial" en lo que se refiere al régimen de contratos de concesión, en relación con lo regulado en la ley de concesiones de obras y servicios públicos del Estado Nueva Esparta de 1997.

b. El artículo 150 de la Constitución de 1999 sólo somete a la aprobación parlamentaria de la Asamblea Nacional los contratos de interés nacional cuando una ley específicamente así lo establezca; y a autorización parlamentaria los contratos de interés público celebrados con estados extranjeros o sociedades no domiciliadas en Venezuela o los traspasos de contratos de interés público a esos entes.

c. El artículo 50 de la Constitución del Estado Nueva Esparta tiene la misma redacción del artículo 126 de la Constitución nacional de 1961, habiéndose interpretado este último en el sentido de entender que la aprobación legislativa sólo se refiere a los contratos respecto de los cuales la ley expresamente así lo dispusiera, permitiéndose en cambio su suscripción sin dicha aprobación cuando hay silencio al respecto en el texto legal regulador. En otras palabras, los contratos de interés estadal deben someterse a la aprobación del Consejo Legislativo sólo en los casos expresamente determinados por ley estadal.

d. Las sentencias No 566 de 12 de abril de 2004 y No. 3015 de 14 de octubre de 2005 de la Sala Constitucional del Tribunal Supremo no cambiaron las reglas fundamentales sobre el avocamiento por parte de las Salas del Tribunal Supremo en relación con causas afines a sus respectivas competencias, ni la necesidad de que en los casos excepcionales de avocamiento por la Sala Constitucional, ello esté estricta-

mente limitado a casos fundamentados, de violación de principios jurídicos fundamentales contenidos en la Constitución y en los tratados, pactos o convenios internacionales, lo que no fue el caso del avocamiento en este caso.

e. La Sala Constitucional del Tribunal Supremo de Justicia carecía y carece de competencias para "nacionalizar" competencias constitucionales de los Estados y atribuírselas al Poder Nacional, y en particular, carecía de competencias para entregar el Aeropuerto Santiago Mariño del Estado Nueva Esparta al Ejecutivo Nacional. La decisión adoptada en ese sentido fue un acto de ejecución de la política del Gobierno de revertir la descentralización de competencias en materia aeroportuaria, definida desde la propuesta de reforma constitucional de 2007, adoptada incluso por la Sala antes de mutar la norma constitucional que prevé la competencia exclusiva de los Estados mediante interpretación, y de que se reformara la Ley de Descentralización, siendo ello una muestra más de la ausencia de independencia del Poder Judicial y del control político que se ejerce sobre la Sala Constitucional.

f. En el caso concreto, después de la sentencia de la Sala Constitucional de entregar el Aeropuerto Santiago Mariño al Ejecutivo Nacional, no existe remedio judicial alguno al cual pudieran acudir las Demandantes para lograr rescatar la concesión del Aeropuerto, situación que en forma alguna puede considerarse que se deba a la estrategia procesal elegida por las Demandantes. Por lo demás, después de la sentencia interpretativa de la Sala Constitucional de 2008 del artículo 164.10 de la Constitución de 1999, eliminando la competencia exclusiva de los Estados en la materia, y de la subsiguiente reforma de la Ley Orgánica de Descentralización, no es posible revertir judicialmente la situación de la inconstitucional nacionalización de la competencia en materia aeroportuaria.

I. LA LEY POR LA CUAL EL ESTADO NUEVA ESPARTA ASUMIÓ LA ADMINISTRACIÓN Y MANTENIMIENTO DE LOS PUERTOS Y AEROPUERTOS PÚBLICOS DE USO COMERCIAL UBICADOS EN SU TERRITORIO DE 1991, NO TIENE CARÁCTER DE "LEY ESPECIAL" EN LO QUE SE REFIERE AL RÉGIMEN DE CONTRATOS DE CONCESIÓN, EN RELACIÓN CON LO REGULADO EN LA LEY DE CONCESIONES DE OBRAS Y SERVICIOS PÚBLICOS DEL ESTADO NUEVA ESPARTA DE 1997

5. El tema de la prevalencia de las disposiciones de la Ley de Concesiones de Obras y Servicios Públicos del Estado Nueva Esparta de 1997 ("Ley de Concesiones ENE de 1997") (Anexo ABC-16) respecto de las contenidas en esa materia en la Ley por la cual el Estado Nueva Esparta asumió la Administración y mantenimiento de los Puertos y Aeropuertos Públicos de uso Comercial ubicados en su territorio de 1991 ("Ley de asunción de competencias ENE de 1991") (Anexo ABC-13) fue abordada en mis dos Opiniones Legales anteriores. En ambos documentos sostuve que la Ley de Concesiones ENE de 1997 derogó a la Ley de asunción de competencias ENE de 1991 en lo que se refiere a los procesos de otorgamiento de concesiones, posición que ratifico en esta ocasión, contrariamente a lo sostenido por el profesor Mouriño en sus Informes y en su más reciente Ampliación al Segundo Informe.

6. El profesor Mouriño ha insistido en sostener que la Ley de asunción de Competencia ENE de 1991 es una ley especial "…que mantiene plena vigencia en el ordenamiento jurídico aplicable en el Estado Nueva Esparta…" (Ampliación Mouriño, ¶ 16); y que las disposiciones que contiene establecen "…un procedimiento especialísimo de licitación pública o concurso, en sus artículos 5 y 6, el cual está dirigido única y exclusivamente, a la conformación de la voluntad de la Administración Pública para otorgar y contratar concesiones…" para el servicio público de puertos y aeropuertos (Ampliación Mouriño, ¶ 10) y que por tanto prevalecen por encima de las que contiene la Ley de Concesiones ENE de 1997, que en su criterio "…regula la generalidad de procesos licitatorios…" (Ampliación Mouriño, ¶ 10).

7. La relevancia de la divergencia de criterio entre lo expuesto por el profesor Mouriño y lo que sostiene quien suscribe radica en determinar si en el presente caso se aplica o no el artículo 23.4 de la Ley de Concesiones ENE

de 1997 que permite la adjudicación directa de un contrato de concesión cuando, en los casos de servicios públicos que venían siendo prestados mediante concesión, se había interrumpido la prestación de dicho servicio. Y evidentemente que la conclusión es que sí se aplica, tal como lo he argumentado anteriormente, pues la Ley de Concesiones ENE de 1997 derogó la Ley de asunción de competencias ENE de 1991 en lo relativo a la gestión de la competencia a través de concesiones, al (i) ser una ley que fue adoptada con posterioridad, (ii) para regular la materia contratos de concesiones en el Estado de manera integral, y (iii) que así lo dispuso de manera expresa en su articulo 63.

8. La Ley de asunción de competencias ENE de 1991 fue una ley dictada para poner en ejecución la Ley Orgánica de Descentralización, Delimitación y Transferencia de Competencias del Poder Público de 1989 ("Ley Orgánica de Descentralización de 1989") dictada en ejecución del artículo 137 de la Constitución de 1961 que descentralizó y asignó en forma exclusiva a los Estados la administración y mantenimiento de los puertos y aeropuertos públicos de uso comercial ubicados en el territorio de cada Estado. Es decir, fue un instrumento legal adoptado principalmente para regular de manera específica, y atendiendo a la política de descentralización de competencias que se venía ejecutando en la época, la transferencia y asunción de competencias por parte del Estado Nueva Esparta en materia de puertos y aeropuertos de uso comercial en su territorio. Es por ello que su artículo 1º así lo indicó, al señalar que el Estado asumía "…la Administración y el Mantenimiento de los Puertos y Aeropuertos de uso comercial, ubicados en su Territorio, indicados en el Ordinal 5º del Artículo 11 de la Ley Orgánica de Descentralización, Delimitación y Transferencia del Poder Público, en la forma, término y condiciones determinadas…" en esa Ley.

9. Ahora bien, no existiendo en 1991 normas legales estadales reguladoras de los contratos de concesión del Estado, para atender la descentralización específica de competencia, en dicha Ley de asunción de competencias ENE de 1991 se incluyeron normas específicas para la selección de contratistas en el otorgamiento de concesiones para atender la administración y mantenimiento de los puertos y aeropuertos. En tal sentido, dicha Ley estadal de 1991 si bien como lo indicó el profesor Mouriño en su Ampliación, podría considerarse como "una ley especial dictada para asunción de la competencia" (Ampliación Mouriño, ¶ 8), la misma no tuvo por objeto regular los contratos de concesión a ser otorgados por el Estado Nueva Esparta, sino prever la asunción por el Estado de una competencia exclusiva que había sido des-

centralizada estableciendo -sin embargo- normas para la selección de contratistas. Por tanto, como hemos sostenido, y contrariamente a lo que indica el profesor Mouriño (Ampliación Mouriño, ¶ 15), dicha Ley no se dictó para regular el régimen de concesiones aeroportuarias del Estado sino para regular la asunción de la competencia por el Estado (ABC Segunda Opinión Legal, ¶ 14).

10. Con posterioridad, el órgano deliberante del Estado Nueva Esparta, haciendo uso de sus competencias constitucionales, resolvió regular el mecanismo a través del cual los particulares participarían en la construcción y el mantenimiento de las obras públicas estadales, así como en la prestación de servicios públicos también a nivel estadal, a través del esquema de concesión, dictando la Ley de Concesiones ENE de 1997. Es en atención al objeto de ambos textos que se evidencia que entre la Ley de asunción de competencias ENE de 1991 y la Ley de concesiones ENE de 1997 no se dio la relación que puede existir entre una "ley especial" y una "ley general".

11. Para que esto último suceda (la relación entre una "ley especial" y una "ley general") es necesario que el objeto de las leyes sea el mismo, es decir, que los supuestos de hecho de una y de otra sean iguales, de manera que el supuesto de hecho de la "ley general" incluya, como un caso específico, el supuesto de hecho de la "ley especial." Esto no ocurre en relación con estas dos leyes, pues el supuesto de hecho regulado en las mismas, es decir, el objeto de una y de otra, es distinto. La Ley de asunción de competencias ENE de 1991 es una ley específica destinada a concretizar la "asunción" de una competencia pública por parte del Estado Nueva Esparta que fue descentralizada por el Poder Nacional a los Estados conforme a la Ley de Descentralización 1989 (Anexo ABC-5); y la Ley de Concesiones ENE de 1997 es una ley sustantiva que tiene por objeto establecer especialmente el régimen de todas las concesiones del Estado Nueva Esparta aplicable a todas las concesiones, incluyendo las concesiones para la administración y mantenimiento de aeropuertos.

12. Pero incluso si hubiera de aceptarse, a efectos meramente argumentativos, la posible existencia de una relación de ley general a ley especial en la materia, también habría que concluir que la Ley de Concesiones ENE de 1997 derogó a la Ley de asunción de competencias ENE de 1991 en lo referente a la selección de contratistas y suscripción de contratos para la administración, gestión y manejo de los aeropuertos ubicados en el ámbito geográfico del Estado Nueva Esparta, al establecer aquélla de manera posterior la

regulación general sobre la materia incluyendo -de manera expresa- los aeropuertos, y disponer la derogación de todas las normas legales precedentes en la materia contrarias a sus previsiones.

13. Como señala el profesor Sánchez-Covisa, "…cuando la nueva ley general afecta a materias no reguladas o reguladas sólo en casos esporádicos, que ella viene a regular de una manera íntegra y total, es más fácil entender que la ley ha tenido la intención de derogar las normas especiales anteriores…",1 pues se supone que la ley general que se adopta es más adecuada a la vida social de la época y que, por tanto, responde mejor al ideal de justicia, que torna urgente su aplicación de la nueva ley y que por eso mismo "…debe ser lo más amplia posible para que desaparezcan las situaciones que el propio legislador ha querido condenar y evidentemente arrasó con la ley nueva…"2.

14. En el ámbito nacional la situación puede asemejarse con la surgida con ocasión de la promulgación del Decreto con Rango y Fuerza de Ley de Arancel Judicial (publicado en Gaceta Oficial Extraordinaria Nº 5.391 en fecha 22 de octubre de 1999)3 que reguló de manera general la materia relativa al pago de aranceles judiciales y que en sus artículos 58 y ss. se refirió a los depositarios, derogando con ello -en este aspecto- la Ley Sobre Depósito Judicial de 19664, que en relación con los emolumentos a ser cancelados a los depositarios judiciales, remitía a las resoluciones que al respecto fueran dictadas por el Ministro de Justicia.

15. Y es que la Ley de Concesiones ENE de 1997, al ser una ley posterior a la Ley de asunción de competencias ENE de 1991, tuvo sobre ésta evidentes efectos derogatorios en cuanto al régimen que establece en materia de concesiones y selección de contratistas (dándose entre ellas la relación entre "ley posterior" y "ley anterior"). Nadie ha dicho que dicha Ley de 1991 hubiera por ello sido derogada y hubiera perdido vigencia como sugiere el

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1 Véase Joaquín Sánchez-Covisa, *La Vigencia Temporal de la Ley en el Ordenamiento Jurídico Venezolano*, en *Obra Jurídica de Joaquín Sanchez Covisa*, Ediciones de la Contraloría General de la República, Caracas 1976, p. 197. (**Anexo ABC-116**)

2 Como lo resolvió, por ejemplo, la Sentencia de la Corte Constitucional de Colombia, Bogotá D. C., 30 de noviembre de 2011 en http://www.corteconstitucional.gov.co/relatoria/2011/C-901-11.htm (**Anexo ABC-117**)

3 Ley de Arancel Judicial, en *Gaceta Oficial* Extra. Nº 5.391 de 22 de octubre de 1999 (**Anexo ABC-128)**

4 Ley Sobre Depósito Judicial, en *Gaceta Oficial* Nº 28.213 de 16 de diciembre de 1966 (**Anexo ABC-129)**

profesor Mouriño (Ampliación Mouriño, ¶16). A través de la Ley de Concesiones ENE de 1997 se establecieron de manera expresa regulaciones que habrían de ser respetadas en el otorgamiento de concesiones para la ejecución, mantenimiento, explotación y conservación de obras y prestación de servicios públicos, incluidos los aeropuertos; razón por la cual se produjo una derogatoria de las normas que regulaban el régimen de selección de contratistas contenidas en la Ley de asunción de competencias ENE de 1991. Y es que al establecerse la regulación general sobre la materia en la Ley de Concesiones ENE de 1997, incluyéndose de manera expresa a los aeropuertos, no es posible sostener que aún fueran aplicables las disposiciones que al respecto traía la Ley de asunción de competencias ENE de 1991; la cual, por el contrario, debe entenderse que fue derogada al respecto.

16. A mayor abundamiento puede señalarse que en aquellos casos en los cuales el legislador ha querido mantener la vigencia temporal de una ley anterior al establecer disposiciones normativas sobre una materia que ya ha sido regulada, así lo ha establecido de manera expresa,5 circunstancia que no se observó en el caso de la Ley de Concesiones de ENE.

17. Por el contrario, como ya sostuve con anterioridad, y en ulterior abono a la opinión jurídica que he expresado, la Ley de Concesiones de ENE de 1997 (Anexo ABC-16) expresamente estableció en su articulado una disposición contraria, previendo la aplicación preeminente de su articulado respecto de cualquier otra norma vigente en el ordenamiento legal estadal. Se trata del artículo 63 a través del cual el legislador estableció su voluntad de que las normas de la ley se aplicaran de manera preferente "…a cualquier otra disposición del ordenamiento legal del Estado…", incluyéndose obviamente en "cualquier otra disposición del ordenamiento legal del Estado" aquellas destinadas a regular la materia de selección de contratistas y adjudicación directa de concesiones, como es el caso de los artículos 5 y 6 de la Ley de Asunción de competencias ENE de 1991. En ese caso, la derogatoria es también por la previsión expresa de la ley, y frente a esta derogación expresa no pueden suscitarse mayores dudas en relación con la aplicabilidad y vigencia de su contenido respecto del proceso para el otorgamiento de la construcción, mantenimiento, explotación y construcción de aeropuertos, así

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5 Véase por ejemplo la Ley Orgánica de Administración Financiera del Sector Público la cual en su artículo 171 dejó vigente muchas normas de la antigua Ley Orgánica de la Hacienda Pública Nacional, en *Gaceta Oficial* No. 39.892 de 27-3-2012 (**Anexo ABC-118**).

como la prestación de los servicios *aeroportuarios, en el ámbito geográfico del Estado Nueva Esparta.*

II. EL ARTÍCULO 150 DE LA CONSTITUCIÓN DE 1999 SÓLO SOMETE A LA APROBACIÓN PARLAMENTARIA LOS CONTRATOS DE INTERÉS PÚBLICO CUANDO UNA LEY ESPECÍFICAMENTE ASÍ LO ESTABLEZCA, Y A AUTORIZACIÓN PARLAMENTARIA LOS CONTRATOS CELEBRADOS CON ESTADOS EXTRANJEROS O SOCIEDADES NO DOMICILIADAS EN VENEZUELA O LOS TRASPASOS DE CONTRATOS DE INTERÉS PÚBLICO A ESOS ENTES.

18. La Constitución de 1999 (Anexo ABC-2) varió la redacción de las previsiones de la Constitución de 1961 sobre el régimen de intervención parlamentaria en relación con los contratos de interés público, para precisamente establecer con precisión el mismo régimen que se aplicaba bajo la Constitución de 1961, en el sentido de someter a aprobación parlamentaria los contratos de interés público sólo cuando una ley expresamente así lo dispone (ABC, Primera Opinión Legal, 59).6 A tal efecto, la Constitución de 1999, en su artículo 150 precisó, primero, en relación con los contratos de interés público nacional, que su celebración requiere la aprobación de la Asamblea Nacional "sólo en los casos que determine la ley", de manera que si en una ley no se establece que un contrato de interés público nacional deba someterse a la aprobación de la Asamblea Nacional, no se requiere tal intervención parlamentaria como requisito de eficacia del contrato (dado que la aprobación es siempre posterior). Segundo, en relación con los contratos de interés público (nacional, estadal o municipal), estableció que en los casos en que se celebren "con Estados o entidades oficiales extranjeras o con sociedades no domicilia-

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6 Como expresamos en nuestra *Primera Opinión Legal*, ello fue precisamente lo que motivó la propuesta que formulamos ante la Asamblea Nacional Constituyente de 1999, la cual fue acogida e incluida en el texto del artículo 150 de la Constitución de 1999, en el sentido de exigir la aprobación legislativa sólo respecto de aquellos contratos en relación con los cuales la ley expresamente ha establecido este requisito. Véase Allan R. Brewer-Carías, "Régimen general del Poder Público y las competencias del Poder Público Nacional (Comunicación enviada al Presidente de la Comisión del Poder Público Nacional y al Presidente y demás miembros de la Comisión Constitucional en la sesión del 30-09-99)," en *Debate Constituyente (Aportes a la Asamblea Nacional Constituyente),* Tomo II (9 septiembre-17 octubre 1999), Fundación de Derecho Público, Editorial Jurídica Venezolana, Caracas 1999, pp. 175-177 (**Anexo ABC-44**).

das en Venezuela" se requiere la autorización de la Asamblea Nacional, como condición de validez del contrato (dado que la autorización es un acto siempre previo a la celebración del contrato).

19. En el caso del Contrato de Alianza Estratégica, aparte de no ser dicho contrato un contrato de interés público nacional, no existía ley nacional o estadal alguna que requiriera que la celebración del contrato fuera aprobada por la Asamblea Nacional. Dicho contrato, además, no era un contrato de interés público estadal celebrado con algún Estado, o con alguna entidad oficial extranjera, o con sociedades no domiciliadas en Venezuela, en cuyo caso hubiera requerido la autorización previa de la Asamblea Nacional. Las sociedades mercantiles GESTIÓN E INGENIERÍA IDC, S.A. y FLUGHAFEN ZURICH S.A., que conformaron el Consorcio UNIQUE IDC y que celebraron el Contrato de Alianza Estratégica con el Estado Nueva Esparta, eran empresas inscritas ante el Registro Mercantil Segundo de la Circunscripción Judicial del Estado Nueva Esparta en fecha 25 de febrero de 2004, bajo los números 67 y 66 respectivamente, Tomo 5-A, y por tanto, eran empresas domiciliadas en el país. En consecuencia, lo expresado por el Gobernador del Estado Nueva Esparta en el Decreto No. 1.188 de fecha 26-2-2004, en el sentido de que la celebración del contrato de Alianza Estratégica, en virtud de que el mismo "se va a celebrar con una sociedad mercantil domiciliada en la República Bolivariana de Venezuela, no se requiere la aprobación por parte de la Asamblea Nacional," era perfectamente correcta (Anexo ABC-14).

III. EL ARTÍCULO 50 DE LA CONSTITUCIÓN DEL ESTADO NUEVA ESPARTA SIGUIÓ LA REDACCIÓN DEL ARTÍCULO 126 DE LA CONSTITUCIÓN DE 1961, QUE SE INTERPRETÓ EN EL SENTIDO DE EXIGIR LA APROBACIÓN LEGISLATIVA SÓLO EN LOS CASOS DETERMINADOS POR LEY.

20. En cuanto a la intervención del Consejo Legislativo del Estado Nueva Esparta en la celebración de contratos de interés público estadal, el profesor Mouriño ha insistido en mantener su posición de que, en su opinión, para la suscripción del Contrato de Alianza Estratégica era necesaria la autorización por parte del Consejo Legislativo Estadal del Estado Nueva Esparta, a tenor de lo dispuesto en el artículo 50 de la Constitución de ese Estado (Ampliación Mouriño, ¶¶ 20 al 25).

21. Semejante posición, sin embargo, da la espalda a 50 años de interpretación constitucional y de práctica administrativa pues, tal como lo ex-

puse en mis anteriores informes, la disposición a que se contrae el artículo 50 de la Constitución del Estado Nueva Esparta siguió el tenor de la contenida en el artículo 126 de la Constitución Nacional de 1961. Esta última fue interpretada en el sentido de que cuando en una ley se regulaba la suscripción de contratos de interés nacional sin preverse la necesidad de que el Congreso interviniera, debía entenderse que el mismo cuerpo legislativo había autorizado (permitido) de manera implícita la celebración de los mismos sin su ulterior intervención. Es decir, ante el silencio de la ley, se entendía que el legislador había desechado el requerimiento. Salvo que la ley respectiva requiriera expresamente la intervención del Poder Legislativo, se entendía entonces que la ley al regular la celebración de contratos sin establecer dicha exigencia, permitía que los mismos se celebrasen por la autoridad pública competente sin dicha intervención legislativa.7 Solamente en los casos en los cuales una ley exigiera dicha intervención parlamentaria podía entrar en aplicación la segunda parte del artículo que dispone -aún cuando impropiamente al mezclar los conceptos de aprobación y autorización (ABC Segundo Informe Legal ¶¶ 41-42)- que "la autorización dictada definirá condiciones mínimas necesarias de la negociación que garanticen suficientemente los intereses del Estado, y en todo caso ella no dispensa del cumplimiento de las formalidades requeridas en las leyes generales o especiales."

22. Fue así como lo que aparentaba ser una excepción (la no aprobación legislativa), en realidad, en la interpretación pacífica constitucional y administrativa que se hizo de las normas, resultó la regla (la no aprobación legislativa, salvo que una ley lo exigiera expresamente), de manera que la aprobación legislativa fue siempre excepcional, siendo la regla la celebración de contratos sin dicha aprobación, lo que encontró apoyo en la doctrina del derecho administrativo venezolano (Lares Martínez, Anexo ABC-83 y Anexo ABC-87, Farías Mata, Anexo ABC-43, ABC Primera Opinión Legal, ¶ 57; ABC Segunda Opinión Legal, ¶¶ 45, 48). Esa interpretación pacífica condujo a la reforma de la norma de la Constitución nacional en 1999 (art. 150), disponiéndose con toda claridad, que la aprobación legislativa sólo procede cuando la Ley lo exija expresamente en relación con determinado contrato, es decir, "en los casos que determine la ley" (ABC Primera Opinión Legal, ¶ 51). En consecuencia, sólo cuando mediante ley se determine expresamente

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7 A mayor abundamiento véase la opinión que dimos ante el Senado en 1982 sobre "Los contratos de interés nacional y su aprobación legislativa,"en Allan R. Brewer-Carías, *Estudios de Derecho Público*, Tomo I (Labor en el Senado 1982), Ediciones del Congreso de la República, Caracas 1983, pp. 185-193 (**Anexo ABC-119**)

que un contrato de interés público estadal debe someterse a la aprobación del Consejo Legislativo ello se convertiría en un requisito de eficacia del contrato. En el caso de los contratos que celebre el Ejecutivo Estadal relativos a la operación de los aeropuertos nacionales, por supuesto, ninguna ley ni nacional o estadal exige que se sometan a la aprobación del Consejo Legislativo, no siendo ello condición alguna de eficacia del contrato.

23. Es por ello, que siendo ambas normas (la de la Constitución del Estado Nueva Esparta y la de la Constitución de 1961) homólogas, resulta también homóloga la interpretación, lo que conduce a que en el caso del contrato de asociación estratégica suscrito entre el Estado Nueva Esparta y el Consorcio UNIQUE no fuera necesaria la intervención del órgano legislativo, por no estar dispuesto de esa manera por el régimen jurídico aplicable.

24. Lo cierto es que, dejando a salvo las opiniones ya emitidas en relación a la aplicación de cada una, ni en la Ley de asunción de competencias ENE de 1991, ni en la Ley de Concesiones ENE de 1997, adoptadas por el Consejo Legislativo del Estado Nueva Esparta, se previó la intervención de ese órgano legislativo en la suscripción de los contratos para la administración, manejo y mantenimiento de los puertos y aeropuertos del Estado, por lo que el legislador optó por admitir o permitir -de manera implícita- que la suscripción de esos contratos de interés estadal pudiera llevarse a cabo sin su participación.

25. En efecto, en el caso de los contratos de concesión "para la administración y el mantenimiento de los puertos y aeropuertos" que fueron regulados inicialmente en la Ley de asunción de competencias ENE de 1991 (Anexo ABC-13), se dispuso expresamente que los mismos serían "otorgados por el Ejecutivo del Estado Nueva Esparta" (art. 5), regulándose además las "condiciones mínimas" que debían regir tales contratos (art. 6), que eran las conocidas por los administrados, siendo falso que entre esas "condiciones" pudiese estar la "necesidad de la autorización previa del Consejo Legislativo Estadal" como parece sugerirlo el profesor Mouriño (Ampliación Mouriño, ¶ 23). Posteriormente, cuando se reguló en general, en el Estado, el régimen legislativo de las concesiones de obras y servicios mediante la Ley de Concesiones ENE de 1997 se permitió expresamente que los contratos de concesión se celebraran por el Ejecutivo del Estado sin necesidad de someterlos, como condición de validez o eficacia, a la intervención del órgano legislativo, es decir, sin tampoco preverse ni exigirse en dicha Ley la aprobación legislativa. Dichos contratos, en consecuencia, conforme a la Constitución y a la Ley

podían celebrarse por el Ejecutivo estadal sin necesidad de que se sometieran a la autorización o aprobación del Consejo legislativo del Estado.

26. Por supuesto, ello no impide que el Ejecutivo Estadal, en los casos que juzgue conveniente, pueda someter a la aprobación del órgano legislativo un determinado contrato de interés estadal, aunque ninguna ley haya previsto esa intervención legislativa como condición de eficacia. Sin duda, ello fue lo que ocurrió en 1993 cuando el Estado procedió a otorgar la primera concesión en la materia en ejecución de la política de descentralización a través de la concesión otorgada a la empresa Consorcio CVA C.A. mediante contrato de fecha 29-12-1993, en la cual, según se indica en el propio texto del contrato, se requirió de la Asamblea Legislativa de entonces, no sólo una autorización previa sino también una aprobación posterior8. Es decir, con motivo -sin duda- de lo novedoso del proceso de descentralización política iniciado en el país en 1989, como consta en el texto del contrato, el Ejecutivo estadal no sólo requirió y obtuvo la aprobación del Consejo Legislativo del Estado (notificado según se indica en oficio No. 231 de 23-12-1993), sino incluso una autorización legislativa previa para proceder a licitar la administración y mantenimiento del aeropuerto (notificado igualmente según se indica por oficio No. 13 de 26-8-1993). Dicha intervención legislativa, sin embargo, como se ha dicho, no estaba prevista en ley alguna, por lo que no era una condición ni de validez ni de eficacia del contrato.

27. Es evidente que el órgano legislativo en el Estado constitucional tiene siempre entre sus funciones la de controlar a la Administración Pública, lo que siempre puede hacer, aún cuando ello no esté establecido obligatoriamente en una norma legal. Sin embargo, si ninguna Ley establece esa intervención como un requisito de validez o eficacia del contrato, la falta de sometimiento del mismo al órgano legislativo no afecta jurídicamente el contrato. Y esa fue la situación respecto del Contrato de Alianza Estratégica, en relación con el cual el Estado Nueva Esparta, por decisión expresa de su Gobernador cuando procedió a resolver sobre su adjudicación directa, en el Decreto No. 1.188 de fecha 26 de febrero de 2004 dispuso su suscripción sin someterlo a la consideración del Consejo Legislativo del Estado, "de conformidad con lo establecido en el artículo 23, numeral 4, de la Ley de Concesiones de Obras y Servicios Públicos del Estado Nueva Esparta" (Anexo ABC-14).

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[8] **Anexo R-9.**

28. Fue por tanto decisión expresa del Gobernador, en un acto administrativo definitivo dictado previo a la suscripción del contrato, adjudicar el mismo en forma directa al Consorcio UNIQUE sin someterlo a conocimiento del Consejo Legislativo del Estado, por considerar que el artículo 23.4 de la Ley de dicho Consejo Legislativo sobre concesiones de obras y servicios públicos del Estado, que es Ley del propio Consejo, permitía su celebración sin exigir la intervención legislativa.

29. Eso, por lo demás, ocurrió en otros contratos suscritos en el Estado Nueva Esparta después de sancionada la Ley de Concesiones ENE de 1997, en otros sectores como puertos, salud y seguridad, que fueron suscritos sin haber sido sometidos a aprobación legislativa. Tal fue el caso del contrato para la ejecución "inmediata" de la obra "Sistema de Protección de Buques e instalaciones portuarias en el Puerto Internacional de El Guamache" celebrado con la empresa Inversiones 8689, C.A. (2005); el contrato para "la adquisición de sistemas de seguridad de cámaras para principales puertos, avenidas, centros urbanos y comerciales del Estado Nueva Esparta, adjudicado a la empresa Desarrollos Tecnológicos Margarita Tecnomar, C.A. a través del Decreto del Gobernador del Estado N° 378/2009, el contrato para la ejecución de la obra "Acondicionamiento de Área para Sala de Hemodialisis, Hospital Tipo 1 Dr. "Armando Mata Sanchez", adjudicado a través del Decreto del Gobernador N° 381/2009 a la empresa Construmeds, C.A., entre otros (ABC Segunda Opinión Legal, ¶ 49, Anexo ABC-88).

IV. LAS SENTENCIAS NO. 566 DE 12 DE ABRIL DE 2004 Y NO. 3015 DE 14 DE OCTUBRE DE 2005 NO CAMBIARON LAS REGLAS FUNDAMENTALES SOBRE EL AVOCAMIENTO POR PARTE DE LAS SALAS DEL TRIBUNAL SUPREMO, EN PARTICULAR, EL PRINCIPIO DE QUE LA SALA CONSTITUCIONAL NO PUEDE "AVOCARSE PARA NO AVOCARSE"

30. En mi *Primera Opinión Legal*, específicamente en el capítulo IV, expresé que la Sala Constitucional del Tribunal Supremo de Justicia, a partir de una gravísima desviación de poder, incurrió en denegación de justicia y confiscó los derechos del Consorcio UNIQUE IDC. Específicamente señalé que la Sala Constitucional se avocó al conocimiento de asuntos, respecto de los cuales luego rehusó pronunciarse, explicando en ese sentido que: (i) la Sala Constitucional secuestró el conflicto judicial existente entre el Consorcio UNIQUE IDC y el Estado Nueva Esparta; (ii) suspendió injustificadamente el trámite de los dos juicios contencioso-administrativos pendien-

tes entonces; y (iii) vació finalmente de objeto los referidos juicios contencioso-administrativos (***ABC Primera Opinión Legal*, ¶¶ *61 ss*.)**.

31. En mi *Segunda Opinión Legal*, concretamente en el capítulo VIII, me referí nuevamente al ilegal e ilegítimo empleo de la figura del avocamiento, en el caso de las demandas intentadas por el Consorcio UNIQUE IDC (***ABC Segunda Opinión Legal, ¶¶ 81 ss*.)**, reafirmando lo expresado en la Primera Opinión Legal.

32. Ratificando lo expuesto en las señaladas oportunidades, me permito ahora desmentir lo expresado por el Prof. Mouriño Vaquero en la *ampliación de su Segundo Informe Pericial*, en cuanto concierne a la competencia de la Sala Constitucional en materia de avocamiento **(*Ampliación Mouriño, ¶¶ 26 ss*)**. Me referiré, siguiendo su razonamiento, (i) al supuesto abandono, por parte de la Sala Constitucional, del criterio material para delimitar el ámbito de su competencia; y luego (ii) a la supuesta posibilidad que acuerda el ordenamiento jurídico al Tribunal Supremo de Justicia, para "devolver" una causa a cuyo conocimiento se hubiera avocado.

1. Sobre el supuesto abandono, por la Sala Constitucional, del criterio material para delimitar el ámbito de su competencia en materia de avocamiento

33. El profesor Mouriño cita, sobre el tema del avocamiento, la sentencia No. 566 de 12 de abril de 2004 de la Sala Constitucional, con respecto a la cual destaca con "preocupación" que yo no la hubiera referido en mi Segunda Opinión Legal, afirmando que le "resulta sorprendente" que yo "omita hacer del conocimiento de los árbitros" sobre su existencia (Ampliación Mouriño, ¶¶ 27, 29); y que Mouriño ubica como "punto de partida" de una supuesta doctrina que le permitiría a la Sala Constitucional avocarse de cualquier causa, "discrecionalmente" para lo cual "no existen límites" (Ampliación Mouriño, ¶ 28). Rechazo el tono y forma utilizado por el Prof. Mouriño al pretender justificar lo injustificable, precisamente con una sentencia que ha sido entre las más criticadas en Venezuela.

34. La sentencia No. 566 de 12 de abril de 2004 de la Sala Constitucional, en efecto, no es exactamente el mejor ejemplo de una sentencia emanada de un Tribunal Constitucional llamado a "garantizar la supremacía constitucional" según se afirma repetidamente en el texto mismo de la sentencia,

deben ser las sentencias de avocamiento,9 habiéndose iniciado con la misma, en Venezuela, el proceso de secuestro del derecho ciudadano a la participación política mediante el referendo revocatorio del mandato del Presidente de la República. Dicha sentencia logró impedir que la Sala Electoral decidiera sobre la nulidad de las decisiones del Consejo Nacional Electoral, que a la vez habían impedido la celebración del referendo revocatorio que la oposición había convocado en 2003-2004. Para ello, una vez que la Sala Electoral sentenció suspendiendo los efectos de la decisión administrativa que impedía el referendo, la fórmula política que se utilizó para despojar a la Sala Electoral de toda posibilidad de decidir en la causa contencioso electoral respectiva en la que era juez natural en el caso Julio Borges, César Pérez Vivas, Henry Ramos Allup, Jorge Sucre Castillo, Ramón José Medina y Gerardo Blyde vs. Consejo Nacional Electoral,10 fue que la Sala Constitucional se avocara al conocimiento de la misma, tal como se le habían solicitado, lo cual para ese momento no era procedente.

35. El avocamiento entre Salas del Tribunal Supremo evidentemente que no era procedente, pues ninguna Sala es superior a las otras; por tanto, sólo violando la Constitución podía la Sala Constitucional avocarse al conocimiento de una causa cursante ante otra Sala del Tribunal Supremo, como lo hizo en la sentencia No. 566. Por ello, el Magistrado Rondón Haaz, en su Voto Salvado a la sentencia, señaló con razón que: "Determina así, la Ley, que, para la procedencia del avocamiento, debe ser otro Tribunal en donde curse el expediente que será solicitado, lo cual excluye, como es evidente, a las otras Salas del Tribunal Supremo de Justicia; y no podría ser de otra forma, tanto por la igualdad de jerarquía entre las Salas como por el caos que supondría, para el proceso y los justiciables, que unas Salas pudiesen avocar las causas de las otras"11. En adición, en la sentencia se indicó que el avocamiento sobre causas ventiladas ante otras Salas supuestamente tenía como precedente una decisión de la Sala Político Administrativa de la antigua Corte Suprema de Justicia respecto de una causa que cursaba ante la Sala de Casación Civil en 1999, lo cual era completamente falso. Por ello, el mismo

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9 Véase lo que por nuestra parte hemos expuesto sobre la referida sentencia No 566 de 2004 en: Allan R. Brewer-Carías, *La Sala Constitucional Versus El Estado Democrático de Derecho. El secuestro del poder electoral y de la Sala Electoral del Tribunal Supremo y la confiscación del derecho a la participación política,* Los Libros de El Nacional - Colección Ares, Caracas 2004, pp. 109 ss. (**Anexo ABC-120**)

10 Véase las referencias en *Idem*. pp. 117-118 (**Anexo ABC-120)**.

11 Véase la referencia en *Idem*, p. 138 (**Anexo ABC-120)**.

Magistrado Rondón Haaz en su Voto Salvado a la sentencia, calificó de "mendaz la declaratoria de la mayoría sentenciadora," considerándola como una "violación al Código de Ética del Abogado en que incurrieron los Magistrados que suscribieron la sentencia", pues la Sala Político Administrativa nunca había decidido avocarse al conocimiento de causa alguna que cursaba ante la Sala de Casación Civil, habiéndose limitado en decisión de 11-11-1999 a solicitarle a la Sala de Casación Civil un expediente sólo para estudiar una solicitud de avocamiento que había formulado el Procurador General de la República en unos juicios (Caso Capriles), solicitud que luego fue desistida por el Procurador"12 Esos antecedentes hay que señalarlos, dada la "importancia" que el profesor Mouriño atribuye a la mencionada sentencia.

36. Lo que es cierto, en definitiva, es que la sentencia No. 566 de la Sala Constitucional, aunque creó un desorden procesal inaceptable, no cambió nada en el sentido de que siempre, el avocamiento, debe estar justificado en razones graves que se refieran por ejemplo, a la necesidad "de preservar la correcta administración de justicia," y velar porque en el proceso "se garantice la aplicación de los principios y garantías constitucionales," todo ello, porque se hubiere constatado que se ha producido en el proceso "un desorden procesal," que a juicio de la Sala "atenta contra el Estado de Derecho y la transparencia de la justicia." No hay en esa sentencia No. 566 nada que sea "punto de partida" de algo distinto a lo que estaba regulado en la materia de los motivos para el avocamiento, que ameritara su cita, pues ratificaba el principio de que el avocamiento nunca es "discrecional," y menos arbitrario, o que se pueda ejercer *"sin límites."*[13]

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12 Véase la referencia en *Idem*, p. 138 (**Anexo ABC-120).**

13 Al estudio de la sentencia No. 566 no sólo le dediqué el libro antes citado destinado a estudiar el proceso constitucional y judicial en el cual se dictó, diseñado para impedir la realización del referendo revocatorio del mandato del Presidente de la República (**Anexo ABC-120**), y el trabajo mencionado por el profesor Mouriño en su Ampliación *(**Ampliación Mouriño, ¶ 27,*** y *pie de página 18),* el cual además de publicarse en mi página web (Allan R. Brewer-Carías, *El secuestro de la Sala Electoral por la Sala Constitucional del Tribunal Supremo de Justicia.* http://www.allanbrewercarias.com/Content/449725d9-f1cb-474b-8ab2-41efb849fea8/Content/II,%204,452.pdf (**Anexo ABC-121),** se publicó en una obra colectiva *(*"El secuestro de la Sala Electoral por la Sala Constitucional del Tribunal Supremo de Justicia," en Rafael Chavero G. (Coordinador), *La Guerra de las Salas del TSJ frente al Referéndum Revocatorio,* Editorial Aequitas. Caracas 2004, pp. 13-58, **Anexo ABC-122**), sino otros trabajos que hay que recordarle, como: "El secuestro del Poder Electoral y de la Sala Electoral del Tribunal Supremo y la confiscación

37. Omite el profesor Mouriño Vaquero, que la sentencia No. 566 de 12 de abril de 2004, fue dictada antes de la entrada en vigencia de la Ley Orgánica del Tribunal Supremo de Justicia, el 19 de mayo de 2004,[14] aplicable para el momento en cual la Sala Constitucional dictó los fallos que nos ocupan, y de acuerdo con cuyo artículo 5, numeral 4, corresponde a la Sala Constitucional:

> "(…) avocarse al conocimiento de una causa determinada, ***cuando se presuma fundadamente la violación de principios jurídicos fundamentales contenidos en la Constitución de la República Bolivariana de Venezuela***, Tratados, Pactos o Convenios Internacionales suscritos y ratificados válidamente por la República, aun cuando por razón de la materia y en virtud de la ley, la competencia esté atribuida a otra Sala". (Énfasis añadido).

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del derecho a la participación política mediante el referendo revocatorio presidencial: Venezuela: 2000-2004," en ***Revista Costarricense de Derecho Constitucional***, Tomo V, Instituto Costarricense de Derecho Constitucional, Editorial Investigaciones Jurídicas S.A. San José 2004, pp.167-312 **Anexo ABC-123**). En ese contexto es que la sentencia fue "importante," o puede incluso considerarse "notable," como la calificó el profesor Mouriño (***Ampliación Mouriño, ¶ 27***), por servir, lamentablemente, de instrumento para impedir que la Sala competente del Tribunal Supremo de Justicia (Sala Electoral) pudiera ejercer sus competencias para controlar la legalidad de los actos del Consejo Nacional Electoral, y con ello, impedir la realización del referendo revocatorio presidencial. Por todo lo anterior, porque consideré que esa sentencia No. 566 de 12 de abril de 2004 nada aportaba al tema de los motivos del avocamiento distinto a lo que estaba en la propia doctrina de la Sala, y porque no constituye un paradigma en la historia de la justicia constitucional en Venezuela, fue que estimé que no era importante referirme a ella en mis Opiniones legales anteriores, en la misma forma como no me he referido a la multitud de otras sentencias muchas de ellas también abusivas de la Sala Constitucional, que han lesionado derechos ciudadanos y la base de la democracia, las cuales por lo demás he estudiado sucesivamente a lo largo de estos años. Véase entre otros los estudios publicados en los libros: Allan R. Brewer-Carías, *Crónica sobre la "in" justicia constitucional. La Sala Constitucional y el autoritarismo en Venezuela*, Colección Instituto de Derecho Público, Universidad Central de Venezuela, No. 2, Caracas 2007, 702 pp. (**Anexo ABC-124**); *Práctica y distorsión de la justicia constitucional en Venezuela (2008-2012),* Colección Justicia No. 3, Acceso a la Justicia, Academia de Ciencias Políticas y Sociales, Universidad Metropolitana, Editorial Jurídica Venezolana, Caracas 2012, 520 pp. (**Anexo ABC-125**); *La patología de la justicia constitucional,* Editorial Investigaciones Jurídicas/ Editorial Jurídica Venezolana, San José, Costa Rica 2012, 596 pp. (**Anexo ABC-126**).

14 Ley Orgánica del Tribunal Supremo de Justicia de 2004, en *Gaceta Oficial* Nº 37.942 del 20 de mayo de 2004 (**Anexo ABC-47**).

38. En esta norma se permitió expresamente a la Sala Constitucional avocarse a causas que, por razón de la materia, deben ser resueltas por otra de las Salas, pero por supuesto, condicionada esta excepcional competencia a que "se presuma fundamentadamente la violación de principios jurídicos fundamentales contenidos en la Constitución."

39. De todo lo anterior resulta en relación con el caso sometido ante este Tribunal Arbitral, que la mencionada sentencia No. 566 no sirve para tratar de justificar una supuesta discrecionalidad absoluta de la Sala Constitucional para avocarse al conocimiento de causas sin justificar, fundamentar y razonar su competencia sobre la base de la "violación de principios fundamentales contenidos en la Constitución", referidas a materias que no son de su competencia. Menos sirve para tratar de justificar la arbitraria desviación de poder en la cual incurrió la Sala Constitucional, consistente en utilizar la facultad de avocamiento, no para avocarse y preservar la correcta administración de justicia y, en el caso concreto, la supremacía constitucional, sino para proceder, sin base legal o constitucional alguna a entregar definitivamente el Aeropuerto a órganos del Poder Ejecutivo Nacional, confiscando los derechos del Consorcio de los demandantes.

40. Con este irregular avocamiento, en realidad, la Sala Constitucional se valió de las formas procesales para entregar materialmente el Aeropuerto a los órganos del Poder Nacional, despojando de competencia al Estado Nueva Esparta, para luego rehusarse a pronunciarse sobre el fondo de los asuntos que atrajo para sí y, particularmente, sobre los supuestos motivos que habrían justificado el avocamiento. Por ello en la sentencia No. 1502 del 4 de agosto de 2006 de la Sala Constitucional dictada en el caso, nada se dijo ni se fundamentó sobre en qué podía consistir la supuesta violación de principios fundamentales contenidos en la Constitución, ni de cuáles principios fundamentales constitucionales se trataba, o cuáles principios y garantías constitucionales se quería garantizar en el proceso, o en qué consistía la situación que contrariaba los postulados constitucionales" o en qué forma la Sala debía "garantizar la supremacía constitucional" teniendo en cuenta en todo caso que si se tratase de supuestos desórdenes procesales, no es de cualquier "desorden procesal", sino sólo los que ameriten el control de la Sala por la presunta vulneración de principios jurídicos fundamentales.15 En dicha senten-

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15 En la sentencia 1502 de 4 de agosto de 2006 de la Sala Constitucional del Tribunal Supremo de Justicia, en efecto, solo se hace referencia a los motivos generales para el avocamiento de las Salas en las respectivas materias de su competencia, tales

cia No. 1502 del 4 de agosto de 2006, al contrario en cuanto a los motivos constitucionales que eran los que podían justificar su la excepcional competencia de avocamiento de causas cuyo conocimiento correspondía a otras Salas del Tribunal Supremo, la Sala Constitucional solo hizo referencias genéricas a que en dichas causas, "se encuentran involucrados intereses que guardan relación con el orden constitucional" o a "la existencia de elementos que atañen al orden constitucional" pero sin mayor argumentación,16 lo que a todas luces no es la argumentación que permita afirmar que se presumía fundadamente la violación de principios jurídicos fundamentales contenidos en la Constitución, que exige la norma.

41. En cuanto a la sentencia No. 3015 de 14 de octubre de 2005 (Caso Banplus), también mencionada por el profesor Mouriño (Ampliación Mouriño, ¶ 30), en la misma, la Sala se limitó a homologar el desistimiento de una solicitud de avocamiento; decisión en la cual la Sala Constitucional no estableció doctrina "vinculante" alguna en la materia, como erradamente lo afirma en general el profesor Mouriño (Ampliación Mouriño, ¶ 27). Más bien, en los considerandos de la sentencia, lo que hizo la Sala fue recordar el principio que se estableció en el artículo 18.11 de la Ley Orgánica del Tribunal Supremo de Justicia de 2004, entonces vigente, en el sentido de que el avocamiento corresponderá a las Salas "en las materias de su respectiva competencia" indicando con precisión que:

42. "las solicitudes de avocamiento que se presenten ante este Tribunal Supremo de Justicia deberán ser tramitadas por la Sala a cuya competencia esté atribuida la materia propia de la controversia que se solicita sea objeto del avocamiento. De esta forma, debe hacerse un examen de la naturaleza propia de cada pretensión y las materias que forman parte del abanico competencial de cada una de las Salas que constituyen este Máximo Tribunal, para la cabal determinación de la competencia para el conocimiento del caso concreto."

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como existencia de un desorden procesal (p. 52); riesgo en la correcta administración y continuidad del servicio público del aeropuerto (pp. 65, 66); la existencia de decisiones contradictorias que constituirían un abuso de derecho con visos de fraude procesal (pp. 72, 76). Véase la sentencia en http://www.tsj.gov.ve/decisiones/scon/Agosto/1502-040806-05-1812.htm (**Anexo CD-148, ABC-46).**

16 *Idem*, pp. 70-75

43. No obstante, lo anterior, la Sala Constitucional también constató que como antes se ha mencionado, el legislador había consagrado en el artículo 5.4 de la misma Ley Orgánica de 2004 "un avocamiento cuya competencia es exclusiva" de la Sala Constitucional, al permitirle:

> "***avocarse al conocimiento de una causa determinada, cuando se presuma fundadamente la violación de principios jurídicos fundamentales contenidos en la Constitución de la República Bolivariana de Venezuela, Tratados, Pactos o Convenios Internacionales suscritos y ratificados válidamente por la República, aun cuando por razón de la materia y en virtud de la ley, la competencia le esté atribuida a otra Sala***." (subrayado por la Sala).

44. *Y agregó la Sala en esa sentencia:*

> "Esta excepcional potestad de avocamiento atribuida a la Sala, se encuentra consagrada en virtud de las altas funciones que como órgano protector y ***defensor*** de la constitucionalidad tiene atribuida, la cual en determinados casos por ser de cierta trascendencia al mundo jurídico o al conglomerado nacional puede reservarse su conocimiento con carácter de exclusividad, ***previa verificación de ciertos desórdenes procesales que ameriten el control de esta Sala por la presunta vulneración de principios jurídicos fundamentales*.**"

45. *A esta posibilidad regulada en la Ley Orgánica es a la que, sin* duda, se refiere el párrafo aislado de la sentencia que transcribió el profesor Mouriño en su Ampliación (Ampliación Mouriño ¶ 30); párrafo que no es correcto entresacar con pinza y pretender sostener con ello que la Sala Constitucional haya establecido una doctrina vinculante para avocarse libre y discrecionalmente sobre cualquier causa que curse ante cualquier tribunal aún cuando por la materia sea afín a la competencia de otra Sala. Para que este supuesto excepcional se pueda presentar, la Sala Constitucional está siempre obligada a argumentar y fundamentar su decisión para avocarse, y ello debe expresarlo en la decisión, razonando "fundadamente" que en el proceso concreto haya ocurrido "la violación de principios jurídicos fundamentales contenidos en la Constitución de la República Bolivariana de Venezuela, Tratados, Pactos o Convenios Internacionales suscritos y ratificados válidamente por la República."

46. Resulta a todas luces evidente, con base en los "notable fallos" citados, la veracidad de lo que he señalado en mis Opiniones Legales anterio-

res: la Sala Constitucional del Tribunal Supremo de Justicia no tenía competencia para avocarse al conocimiento de los juicios contencioso-administrativos incoados por el Consorcio UNIQUE IDC contra actuaciones de la Gobernación del Estado Nueva Esparta. No tenía competencia, porque dado que materialmente el avocamiento correspondía a la Sala Político-Administrativa, nunca justificó la Sala Constitucional que existiera presunción fundada de violación de principios jurídicos fundamentales contenidos en la Constitución o a tratados internacionales ratificados por la República, como estaba –y está- previsto en la ley y como lo había advertido la propia Sala Constitucional en su anterior jurisprudencia.

2. Sobre la supuesta posibilidad que acuerda el ordenamiento jurídico al Tribunal Supremo de Justicia de "devolver" una causa luego de haberse avocado a su conocimiento

47. Discrepa el Prof. Mouriño Vaquero de quien suscribe, en cuanto a que cuando el Tribunal Supremo de Justicia se avoca al conocimiento de una causa, esté obligado a pronunciarse sobre el fondo de la misma. En tal sentido, afirma que "de conformidad con el contenido del artículo 18 de la Ley Orgánica del Tribunal Supremo de Justicia, la Sala podía tomar 'cualquier medida legal que estime idónea para restablecer el orden jurídico infringido', lo cual se traduce en 'supuestos en los cuales es posible que la causa pueda ser objeto de revisión por los tribunales de instancia nuevamente" (***Ampliación Mouriño, ¶ 33***). El profesor Mouriño se apoya en lo expresado por el profesor Román José Duque Corredor, en un artículo denominado *Límites constitucionales a la facultad de avocamiento y debido razonamiento de las sentencias*, específicamente en la página 3 del estudio[17].

48. Advierte al respecto, el profesor Mouriño Vaquero, que "el avocamiento tiene dos etapas, la primera, cuando la Sala Constitucional decide avocarse (…), y en la cual se ordena al tribunal de la causa la remisión de las actas procesales; y la segunda, que inicia una vez remitido el expediente y que éste curse por ante la Sala correspondiente (…), y procede la Sala a realizar el análisis del caso, producto del cual ésta determina si se requiere o no restablecerse (sic) el orden jurídico, y de ser el caso, se procede a lo conducente" (***Ampliación Mouriño, ¶ 34***). Es decir, según expresa, podría el Tri-

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17 Véase Román José Duque Corredor, *Límites constitucionales a la facultad de avocamiento y debido razonamiento de las sentencias, en* http://acienpol.org.ve/cmacienpol/Resources/SentenciasCIJ/Limites%20constitucionales%20de% 20la%20facultad%20del%20avocamiento%20y%20el%20debido%20razonamiento%20de% 20las%20sentencias.pdf (**Anexo ABC-127**)

bunal Supremo pronunciarse sobre el fondo; ordenar el proceso, reponiendo la causa o aplicando directamente remedios procesales, para luego remitir el juicio al tribunal de la causa; remitir el expediente a otro tribunal competente; o devolver el expediente al tribunal de la causa, pura y simplemente, por considerar que no hubo quebrantamientos (***Ampliación Mouriño, ¶ 35***). Esta interpretación del artículo 18 de la Ley Orgánica del Tribunal Supremo de justicia, como también del artículo del profesor Duque Corredor, es incorrecta.

49. El artículo 18 de la Ley Orgánica del Tribunal Supremo de Justicia (**Anexo ABC-47**) establece lo siguiente:

> "***Cualesquiera*** de las Salas del Tribunal Supremo de Justicia en las materias de su respectiva competencia, de oficio o a instancia de parte, ***con conocimiento sumario de la situación***, podrá recabar de cualquier tribunal de instancia, en el estado en que se encuentre, cualquier expediente o causa, ***para resolver si se avoca***, ***y directamente asume el conocimiento del asunto, o, en su defecto lo asigna a otro tribunal.***
>
> Esta atribución deberá ser ejercida con suma prudencia y sólo en caso grave, o de escandalosas violaciones al ordenamiento jurídico que perjudique ostensiblemente la imagen del Poder Judicial, la paz pública, la decencia o la ***institucionalidad*** democrática venezolana, y se hayan desatendido o mal tramitado los recursos ordinarios o extraordinarios que los interesados hubieren ejercido.
>
> La Sala requerida ***examinará las condiciones concurrentes de procedencia del avocamiento,*** en cuanto que el asunto curse ante algún tribunal de la República, independiente de su jerarquía y de especialidad, que la materia vinculada sea de la competencia de la Sala, sin importar la etapa o fase ***procesal*** en que éste se encuentre, así como las irregularidades que se alegan hayan sido oportunamente reclamadas sin éxito en la instancia a través de los recursos ordinarios. ***Al admitir la solicitud de avocamiento, la Sala oficiará al tribunal de instancia, requiriendo el expediente respectivo, y podrá ordenar la suspensión inmediata del curso de la causa y la prohibición de realizar cualquier clase de actuación***. Serán nulos los actos y las diligencias que se dicten en desacuerdo por el mandamiento de prohibición.
>
> ***La sentencia sobre el avocamiento*** la dictará la Sala competente, la cual ***podrá decretar la nulidad y subsiguiente reposición del***

> ***juicio al estado que tiene pertinencia, o decretar la nulidad de alguno o algunos de los actos de los procesos, u ordenar la remisión del expediente para la continuación del proceso o de los procesos en otro tribunal competente por la materia, así como adoptar cualquier medida legal que estime idónea para restablecer el orden jurídico infringido***." (Énfasis añadido).

50. Así, tal como lo he expresado en mis anteriores Opiniones Legales y como lo ratifico ahora, la norma establece en efecto dos únicas fases procesales para el avocamiento: la admisión y la decisión definitiva. Al "admitirse" una solicitud de avocamiento –o al decidirse de oficio la apertura del procedimiento-, el Tribunal Supremo oficia al tribunal que conoce, requiriéndole el expediente respectivo, y puede además ordenar la suspensión inmediata del curso de la causa y la prohibición de realizar cualquier clase de actuación. Con el expediente en mano, pasa la Sala del Tribunal Supremo *avocante* a examinar las condiciones concurrentes de procedencia, para resolver **si se avoca, y directamente asume el conocimiento del asunto** o, en su defecto –es decir, aun sin avocarse- **lo asigna a otro tribunal**. En esa sentencia de admisión del avocamiento, la Sala competente puede "decretar la nulidad y subsiguiente reposición del juicio al estado que tiene pertinencia, o decretar la nulidad de alguno o algunos de los actos de los procesos, u ordenar la remisión del expediente para la continuación del proceso o de los procesos **en otro tribunal competente por la materia**, así como adoptar cualquier medida legal que estime idónea para restablecer el orden jurídico infringido".

51. Es eso, por cierto, lo que expresa el profesor Duque Corredor en el artículo citado por el Prof. Mouriño Vaquero:

> "***Respecto*** de la facultad del avocamiento, la Sala Constitucional, en la sentencia en comento, precisó que esta potestad reviste carácter extraordinario porque altera las garantías del juez natural y del doble grado de jurisdicción, por lo que ha de darse estricto cumplimiento al contenido del artículo 18 de la ley Orgánica del Tribunal Supremo de Justicia, en cuanto a su ejercicio por la Salas de dicho Tribunal. En este orden de ideas, vale la pena señalar que según la norma citada, (…) el legislador circunscribió su ejercicio a la posibilidad de: (1) de asumir "*el conocimiento del asunto"*, con lo cual la respectiva Sala decide el fondo del asunto planteado". O, (2) *"decretar la nulidad y subsiguiente reposición del juicio al estado que tiene pertinencia, o decretar la nulidad de alguno o algunos de los actos de*

> *los procesos, u ordenar la remisión del expediente para la continuación del proceso o de los procesos en otro tribunal competente por la materia, así como adoptar cualquier medida legal que estime idónea para restablecer el orden jurídico infringido"*; supuestos en los cuales es posible que la causa pueda ser objeto de revisión por los tribunales de instancia nuevamente". [18]

52. De manera que el avocamiento no opera, como incorrectamente lo afirma el profesor Mouriño Vaquero, en el sentido de que primero decide el Tribunal Supremo avocarse al conocimiento de una causa, para luego decidir si la remite a otro tribunal. El procedimiento en los casos de avocamiento, en líneas generales sigue el siguiente *iter* procesal: (i) Solicitud ante el Tribunal Supremo; (ii) Decisión de recabar el expediente o causa; (iii) Decisión sobre admisión de la solicitud de avocamiento; (iv) Decisión de avocamiento o de no avocarse. Si el Tribunal Supremo decide avocarse, es para avocarse al conocimiento del fondo del asunto, no para remitirlo a la postre a otro tribunal. Esto último puede ocurrir sólo si la decisión del Tribunal Supremo es de no avocarse, en cuyo caso, sin embargo, no debe remitir la causa al mismo tribunal sino ordenar que el proceso continúe en otro tribunal competente en la materia.[19]

53. Esto así, no podía la Sala Constitucional, en el caso que nos ocupa, luego de haberse avocado al conocimiento de los dos juicios contencioso administrativos relativos a este caso, justificadamente o no, suspender por años el trámite de los mismos, para finalmente no avocarse sino "devolverlos" a la jurisdicción contencioso-administrativa.

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[18] Véase Román José Duque Corredor, *Límites constitucionales a la facultad de avocamiento y debido razonamiento de las sentencias, p. 3, en* http://acienpol.org.ve/cmacienpol/Resources/SentenciasCIJ/Limites%20constitucionales%20de%20la%20facultad%20del%20avocamiento%20y%20el%20debido%20razonamiento%20de%20las%20sentencias.pdf (**Anexo ABC-127**)

[19] Como lo indicaba el artículo 18, párrafo 14 de la ley Orgánica del Tribunal Supremo de 2004**: "**La sentencia sobre el avocamiento la dictará la Sala competente, la cual podrá decretar la nulidad y subsiguiente reposición del juicio al estado que tiene pertinencia, o decretar la nulidad de alguno o algunos de los actos de los procesos, u *ordenar la remisión del expediente para la continuación del proceso o de los procesos en* ***otro tribunal competente por la materia***, así como adoptar cualquier medida legal que estime idónea para restablecer el orden jurídico infringido" (**Anexo ABC-47**). La misma disposición se recogió en el artículo 109 de la Ley Orgánica del Tribunal Supremo de 2010 **(Anexo ABC-110).**

V. LA SALA CONSTITUCIONAL DEL TRIBUNAL SUPREMO DE JUSTICIA CARECÍA Y CARECE DE COMPETENCIAS PARA "NACIONALIZAR" COMPETENCIAS CONSTITUCIONALES DE LOS ESTADOS Y ATRIBUÍRSELAS AL PODER NACIONAL

54. De acuerdo con lo establecido en la Constitución, "La Constitución y la ley definen las atribuciones de los órganos que ejercen el Poder Público, a las cuales deben sujetarse las actividades que realicen" (art. 137, Anexo ABC-2). A este imperativo no escapa la Sala Constitucional, la cual si bien tiene competencia para adoptar decisiones judiciales, ello debe hacerlo de manera que las mismas tengan relación con el objeto de los procesos que esté conociendo.

55. En el caso de los avocamientos ocurridos en este caso, la Sala no entró a conocer en forma alguna de los procesos inherentes a las causas a cuyo conocimiento se avocó, y más bien, luego de paralizarlos por un largo período de tiempo, al considerar "concluido" su avocamiento, devolvió los expedientes a los tribunales competentes sin justificar los motivos de tal proceder. Lo que resulta grave de esto, jurídicamente, fue que con ocasión de ese no fundamentado "avocamiento para no avocarse", la Sala no sólo intervino los Aeropuertos, sino que le confiscó los derechos a las Demandantes, al proceder a "entregar" las instalaciones de los Aeropuertos a los órganos del Poder Nacional con competencia en materia de infraestructura aeronáutica.

56. En su sentencia No. 155 de 4 de marzo de 2009 (Anexo ABC-50), en efecto, la Sala Constitucional declaró el "agotamiento del avocamiento", la conclusión del "régimen de intervención temporal del Aeropuerto" que la propia Sala había decretado en su sentencia No. 1502 de 4 de agosto de 2006 (Anexo ABC-46), y "la entrega de las instalaciones aeroportuarias al Ejecutivo Nacional, por órgano del Ministerio del Poder Popular para la Infraestructura," quedando sujetas, como la Sala decidió en la sentencia 1044 de 23 de julio de 2009 (Anexo ABC-60), "a las decisiones que el Ejecutivo Nacional pueda dictar." Con esta decisión, por una parte, la Sala, violando el artículo 164.10 de la Constitución, procedió a "nacionalizar" una competencia estadal exclusiva del Estado Nueva Esparta, y en cuanto a las Demandantes, llevó a cabo una confiscación pues significó el despojo de sus derechos violándose la garantía del artículo 115 de la Constitución, careciendo de competencia alguna para ello.

57. En efecto, debe insistirse en que el artículo 164.10 de la Constitución expresa claramente que la conservación, administración y aprovechamiento de *aeropuertos de uso comercial* ***es competencia exclusiva de los Estados*** que deben ejercer en coordinación con el Ejecutivo Nacional. De manera que si el Poder Nacional, a través del Ejecutivo, puede intervenir en la conservación, administración y aprovechamiento de aeropuertos de uso comercial es en razón de su **actuación *coordinada*** con los órganos estadales, es decir, de su acción concertada para alcanzar el fin común en que consiste la correcta operación de los aeropuertos. Para el momento en el cual la Sala Constitucional dictó su sentencia No. 155 de 4 de marzo de 2009, no existía en el ordenamiento jurídico venezolano, norma alguna que pudiera fundamentar su decisión de "entregar" el Aeropuerto al Ejecutivo Nacional, despojando al Estado Nueva Esparta de su competencia exclusiva. Incluso si se tuviesen en cuenta las disposiciones de la Ley Orgánica de Descentralización de 1989 (**Anexo ABC-5**) vigentes para cuando se dictó la sentencia, habría que concluir que, efectivamente, el Tribunal Supremo de Justicia no podía -ni puede-, de oficio y sin que mediase procedimiento al efecto, "entregar" el Aeropuerto que estaba en manos del Estado, al Poder Nacional; y menos aún sin fundamento alguno, excepto la remisión a la sentencia Nº 565 dictada por la misma Sala el 15 de abril de 2008 (**Anexo ABC-61**)[20].

58. Es sabido que era una política pública, que el gobierno nacional pretendía "nacionalizar" de nuevo los aeropuertos revirtiendo el proceso de descentralización iniciado en 1989. Por ello presentó la propuesta de reforma constitucional de 2007, a la cual ya me he referido, que buscaba precisamente eliminar la competencia exclusiva de los Estados prevista en el artículo 164.10 de la Constitución. Ante el rechazo popular manifestado a través de referendo llevado a cabo en diciembre de 2007, el Procurador General de la República solicitó a la Sala Constitucional que "interpretara la norma" para, con dicha interpretación, mutar la norma constitucional, y transformar la competencia exclusiva en una competencia concurrente. La Sala Constitucional resolvió la solicitud de interpretación, mediante la ya mencionada sentencia No. 565 de 15 de abril de 2008 (**Anexo ABC-61**), estableciendo que la competencia exclusiva que tienen los Estados para "la conservación, administración y aprovechamiento de [...] puertos y aeropuertos de uso comercial, en

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[20] Sentencia de la Sala Constitucional No 565 de 15 de abril de 2008 (Caso Procuradora General de la República, recurso de interpretación del artículo 164.10 de la Constitución de 1999), en http://www.tsj.gov.ve/decisiones/scon/Abril/565-150408-07-1108.htm (**Anexo ABC-61**).

coordinación con el Poder Nacional" era más bien una competencia sujeta a la decisión del Ejecutivo Nacional, el cual podría intervenirla y reasumirla, modificando así ilegítimamente el régimen de competencias establecido en la Constitución Nacional (***ABC Primera Opinión Legal, ¶ 94***).

59. En la sentencia No. 565 de 15 de abril de 2008, "de oficio y por razones de orden público constitucional," la Sala Constitucional al considerar que su decisión debía "generar una necesaria revisión y modificación del ordenamiento jurídico legal vigente," exhortó a la Asamblea Nacional a que procediera en consecuencia, en particular a "la revisión general de la Ley Orgánica de Descentralización, Delimitación y Transferencia de Competencias del Poder Público" […] "en orden a establecer una regulación legal congruente con los principios constitucionales y derivada de la interpretación efectuada por esta Sala en ejercicio de sus competencias."

60. Y así fue como la Asamblea Nacional, en marzo de 2009 procedió a reformar la Ley Orgánica de Descentralización, Delimitación y Transferencia de Competencias del Poder Público,[21] a los efectos de eliminar las competencias exclusivas de los Estados establecidas en los ordinales 3 y 5 del artículo 11 de dicha Ley, agregando dos nuevas normas en las cuales se dispuso que "el Poder Público Nacional por órgano del Ejecutivo Nacional, podrá revertir por razones estratégicas, de mérito, oportunidad o conveniencia, la transferencia de las competencias concedidas a los Estados, para la conservación, administración y aprovechamiento de los bienes o servicios considerados de interés público general, conforme con lo previsto en el ordenamiento jurídico y al instrumento que dio origen a la transferencia" (art. 8); y que "El Ejecutivo Nacional, por órgano del Presidente o Presidenta de la República en Consejo de Ministros, podrá decretar la intervención conforme al ordenamiento jurídico, de bienes y prestaciones de servicios públicos transferidos para su conservación, administración y aprovechamiento, a fin de asegurar a los usuarios, usuarias, consumidores y consumidoras un servicio de calidad en condiciones idóneas y de respeto de los derechos constitucionales, fundamentales para la satisfacción de necesidades públicas de al-

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[21] Véase Ley Orgánica de Descentralización, Delimitación y Transferencia de Competencias del Poder Público de 2009, en *Gaceta Oficial* N° 39 140 del 17 de marzo de 2009 (**Anexo CD-154**). Véase sobre esta reforma, Mauricio Subero Mujica, "Comentarios a la Ley de Reforma Parcial de la Ley Orgánica de Descentralización, Delimitación y Transferencia de Competencias del Poder Público del 17 de marzo de 2009," en http://www.ucab.edu.ve/tl_files/POSTGRADO/boletines/derecho-admin/1_boletin/MAURICIO_SUBERO.pdf (**Anexo ABC-64**).

cance e influencia en diversos aspectos de la sociedad" (art. 9). Quedaba así completamente ejecutada la política definida por el gobierno nacional desde 2007, de asumir todos los aeropuertos de uso comercial, eliminando la competencia de los Estados, sin reformar la Constitución.[22]

61. Con base en esta reforma, se procedió a revertir al Poder Nacional y a entregar al Poder Ejecutivo el manejo de los aeropuertos de los Estados Táchira, Miranda, Zulia, Carabobo, Anzoátegui, creándose incluso una empresa del Estado (Sociedad Anónima Bolivariana de Aeropuertos) a tales fines, a cuyo patrimonio quedaron adscritos, incluidos los aeropuertos del Estado Nueva Esparta.[23] Dicha reversión ocurrió mediante dicha reforma de la Ley Orgánica de Descentralización, con excepción precisamente de los aeropuertos del Estado Nueva Esparta, los cuales antes de la reforma de la Ley Orgánica ya habían sido entregados al Poder Ejecutivo Nacional mediante sentencia de la Sala Constitucional del Tribunal Supremo No. 155 de 4 de

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22 Véase sobre esto los comentarios relativos a la sentencia No. 565 de 15 de abril de 2008 en Allan R. Brewer-Carías, "La Ilegítima mutación de la Constitución y la Legitimidad de la Jurisdicción Constitucional: La "Reforma" de la forma federal del Estado en Venezuela mediante interpretación constitucional," en *Memoria del X Congreso Iberoamericano de Derecho Constitucional,* Instituto Iberoamericano de Derecho Constitucional, Asociación Peruana de Derecho Constitucional, Instituto de Investigaciones Jurídicas-UNAM y Maestría en Derecho Constitucional-PUCP, IDEMSA, Lima 2009, tomo 1 , pp. 29-51; y en *Anuario No. 4, Diciembre 2010,* Instituto de Investigación Jurídicas, Facultad de Jurisprudencia y Ciencias Sociales, Universidad Dr. José Matías Delgado de El Salvador, El Salvador 2010, pp. 111-143 (ISSN 2071-2472) (**Anexo ABC-62**).

23 Véase la Resolución del Ministerio del Poder Popular para las Obras Públicas y Vivienda designando una Comisión de Enlace para la Entrega, Manejo y Control del Aeropuerto Internacional del Caribe "General en Jefe Santiago Mariño", en *Gaceta Oficial* Nº 39.143 de 20 de marzo de 2009 en *Gaceta Oficial* Nº 39.143 de 20 de marzo de 2009 (**Anexo ABC-66)**, Acuerdo de la Asamblea Nacional, por el cual se autorizó la "reversión" al Poder Ejecutivo Nacional de los bienes que constituyen la infraestructura de los aeropuertos que allí se mencionan en *Gaceta Oficial* Nº 39.145 del 24 de marzo de 2009, en *Gaceta Oficial* Nº 39.145 de 24 de marzo de 2009 (**Anexo ABC-67)**, Acta constitutiva de la Sociedad Anónima Bolivariana de Aeropuertos (BAER), en *Gaceta Oficial* Nº 39.233 de 3 de agosto de 2009 (**Anexo ABC-68)** y Resolución que declara la reversión inmediata al Poder Ejecutivo Nacional, por órgano de este Ministerio, de los bienes que conforman la infraestructura aeronáutica civil ubicada en el estado Anzoátegui, así como también las competencias para la conservación, administración y aprovechamiento que sobre los mismos se ejercen, en *Gaceta Oficial* Nº 39.342 de 8 de enero de 2010 (**Anexo ABC-69**).

marzo de 2009,[24] dictada con anterioridad a la publicación de dicha reforma legal, para que lo administrara a través del Ministerio del Poder Popular para la Infraestructura al Poder Ejecutivo.

62. Fue así que el Estado Nueva Esparta fue despojado de su competencia en relación con el Aeropuerto y ordenado a entregar sus instalaciones al Poder Ejecutivo Nacional. Fue despojado así también el Consorcio UNIQUE IDC de sus derechos, de manera irreversible, violándose la garantía establecida en el artículo 115 de la Constitución ("Sólo por causa de utilidad pública o interés social, mediante sentencia firme y pago oportuno de justa indemnización, podrá ser declarada la expropiación de cualquier clase de bienes"). Ante esta realidad, como hemos dicho, ningún tribunal contencioso administrativo puede tener facultad alguna para revertir la entrega del Aeropuerto al Ejecutivo Nacional.

VI. EN EL CASO DEBATIDO, DESPUÉS DE QUE LA SALA CONSTITUCIONAL ENTREGÓ EL AEROPUERTO SANTIAGO MARIÑO AL EJECUTIVO NACIONAL, NO EXISTE REMEDIO JUDICIAL ALGUNO A DISPOSICIÓN DE LAS DEMANDANTES PARA PODER RESCATAR LA CONCESIÓN DEL AEROPUERTO, SITUACIÓN QUE EN FORMA ALGUNA PUEDE CONSIDERARSE QUE SE DEBA A LA ESTRATEGIA PROCESAL ELEGIDA POR LAS MISMAS.

63. Una vez que la Sala Constitucional declaró agotado el avocamiento y entregó el Aeropuerto al Poder Nacional, la remisión que hizo de los expedientes al juez natural para que se continuara con la tramitación de los recursos contencioso administrativos que se habían interpuesto, produjo una situación de no existir materia alguna sobre la cual se pueda decidir en los mismos, pues al contencioso administrativo, en la práctica y desde el punto de vista jurídico, le es completamente imposible revertir la operación de entrega del Aeropuerto al Ejecutivo Nacional, y disponer su entrega al Consorcio UNIQUE IDC. Por ello para las Demandantes, en el ámbito interno, se ha producido una manifiesta y absoluta denegación de justicia llevada a cabo por la Sala Constitucional del Tribunal Supremo, ocasionándole una situación

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[24] Véase sentencia de la Sala Constitucional del Tribunal Supremo No. 155 de 4 de marzo de 2009, en http://www.tsj.gov.ve/decisiones/scon/Marzo/155-4309-2009-08-0864.html (**Anexo CD-153**).

de indefensión, de cara a la confiscación que se ha producido respecto de sus derechos, por parte del Estado venezolano. Y ello, por supuesto, no se debe a que las demandantes no hubiesen ejercido los recursos que tenían disponibles conforme al ordenamiento jurídico que les era aplicable para la defensa de sus derechos e intereses frente a actuaciones arbitrarias de la Administración, que era la impugnación oportuna de los actos administrativos lesivos ante los tribunales competentes de la jurisdicción contencioso administrativa solicitando su nulidad, y el ejercicio de los recursos de amparo para la protección de sus derechos constitucionales violados por la Administración. Ese orden procesal fue el que fue trastocado por el Tribunal Supremo de Justicia, al avocarse para no avocarse, y paralizar los procesos hasta que se completara la ilegitima "nacionalización" de los aeropuertos, lo que ocurrió con la participación activa del propio Tribunal Supremo.

64. Esta situación de "nacionalización" de la operación del Aeropuerto Santiago Mariño, después de la sentencia de la Sala Constitucional que lo entregó al Ejecutivo Nacional, confiscando los derechos de las Demandantes, en todo caso, como se dijo, se selló posteriormente por obra de la propia Sala Constitucional, al interpretar el artículo 164.10 de la Constitución en 2008, "mutando" su contenido en el sentido de eliminar la competencia "exclusiva" de los Estados en materia de administración y mantenimiento de aeropuertos de uso comercial, y convertir esa competencia en una especie de competencia concurrente autorizando al Ejecutivo Nacional a revertir la descentralización e intervenir dichos servicios, todo lo cual luego, bajo exhortación de la propia Sala Constitucional, lo plasmó la Asamblea Nacional en la inconstitucional reforma de la Ley Orgánica de Descentralización de 2009. El resultado de todo ello, en la práctica, fue la asunción de las competencias en la materia por los órganos del Poder Nacional, en virtud de sentencias del Tribunal Supremo y de reformas legales, que ningún juez contencioso administrativo podrá revertir.

65. Declaro que lo anterior es mi opinión jurídica en relación con los asuntos que se me han requerido estudiar.

Firmado en Nueva York, a los 4 días del mes de febrero de 2013

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Allan R. Brewer-Carías

ANEXOS

A LA TERCERA OPINION LEGAL DE ALLAN R. BREWER-CARÍAS[1]

Anexo ABC-116. Joaquín Sanchez Covisa, *La Vigencia Temporal de la Ley en el Ordenamiento Jurídico Venezolano*, en *Obra Jurídica de Joaquín Sanchez Covisa*, Ediciones de la Contraloría General de la República, Caracas 1976, p. 197.

Anexo ABC-117. Sentencia de la Corte Constitucional de Colombia, Bogotá D. C., 30 de noviembre de 2011 en http://www.corteconstitucional.gov.co/relatoria /2011/C-901-11.htm

Anexo ABC-118. Ley Orgánica de Administración Financiera del Sector Público en *Gaceta Oficial* No. 39892 de 27-3-2012.

Anexo ABC-119. Allan R. Brewer-Carías, "Los contratos de interés nacional y su aprobación legislativa,"en *Estudios de Derecho Público*, Tomo I (Labor en el Senado 1982), Ediciones del Congreso de la República, Caracas 1983, pp. 185-193.

Anexo ABC-120. Allan R. Brewer-Carías, *La Sala Constitucional Versus El Estado Democrático de Derecho. El secuestro del poder electoral y de la Sala Electoral del Tribunal Supremo y la confiscación del derecho a la participación política*, Los Libros de El Nacional - Colección Ares, Caracas 2004, pp. 93-172.

Anexo ABC-121. Allan R. Brewer-Carías, *El secuestro de la Sala Electoral por la Sala Constitucional del Tribunal Supremo de Justicia.* http://www.allanbrewercarias.com/Content/449725d9-f1cb-474b-8ab2-41efb849fea8/Content/II,%204,452.pdf

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[1] La numeración de estos Anexos a la **Tercera Opinión Legal** sigue a la utilizada para enumerar los Anexos a la **Primera** y a la **Segunda Opinión Legal** de Allan R. Brewer-Carías.

Anexo ABC-122. Allan R. Brewer-Carías, "El secuestro de la Sala Electoral por la Sala Constitucional del Tribunal Supremo de Justicia". en *La Guerra de las Salas del TSJ frente al Referéndum Revocatorio,* Editorial Aequitas. Caracas 2004, pp. 13-58.

Anexo ABC-123. Allan R. Brewer-Carías, "El secuestro del Poder Electoral y de la Sala Electoral del Tribunal Supremo y la confiscación del derecho a la participación política mediante el referendo revocatorio presidencial: Venezuela: 2000-2004," en *Revista Costarricense de Derecho Constitucional***,** Tomo V, Instituto Costarricense de Derecho Constitucional, Editorial Investigaciones Jurídicas S.A. San José 2004 . pp. 167-312.

Anexo ABC-124. Allan R. Brewer-Carías, *Crónica sobre la "in" justicia constitucional. La Sala Constitucional y el autoritarismo en Venezuela*, Colección Instituto de Derecho Público, Universidad Central de Venezuela, No. 2, Caracas 2007, 702 pp. (Sólo Sumario).

Anexo ABC-125. Allan R. Brewer-Carías, *Práctica y distorsión de la justicia constitucional en Venezuela (2008-2012),* Colección Justicia No. 3, Acceso a la Justicia, Academia de Ciencias Políticas y Sociales, Universidad Metropolitana, Editorial Jurídica Venezolana, Caracas 2012, 520 pp. (Sólo Sumario).

Anexo ABC-126. Allan R. Brewer-Carías, *La patología de la justicia constitucional,* Editorial Investigaciones Jurídicas/ Editorial Jurídica Venezolana, San José, Costa Rica 2012, 596 pp. (Sólo Sumario).

Anexo ABC-127. Román José Duque Corredor, *Límites constitucionales a la facultad de avocamiento y debido razonamiento de las sentencias, en* http://acienpol.org.ve/cmacienpol/Resources/SentenciasCIJ/Limites%20constitucionales%20de%20la%20facultad%20del%20avocamiento%20y%20el%20debido%20razonamiento%20de%20las%20sentencias.pdf

Anexo ABC-128. Ley de Arancel Judicial, en *Gaceta Oficial* Extra. Nº 5.391 de 22 de octubre de 1999. En *Gaceta Legal Ramírez y Garay* No. 982 Suplemento de 30 de noviembre de 1999, pp. 1672 ss.

Anexo ABC-129. Ley Sobre Depósito Judicial, en *Gaceta Oficial* Nº 28.213 de 16 de diciembre de 1966. *Gaceta Legal Ramírez y Garay* No. 192 de 31 de diciembre de 1999, pp. 2 ss.

PART FOUR

SOBRE LAS CONCESIONES MINERAS Y LA REVERSIÓN DE BIENES AL ESTADO

(*ON MINNING CONCESSIONS AND THE REVERSION OF ASSETS TO THE STATE)*

11.

Caso CIADI No. ARB(AF)/14/11: *ANGLO AMERICAN PLC* (Demandante) -contra- *REPÚBLICA BOLIVARIANA DE VENEZUELA* (Demandada)

ARBITRAJE BAJO LAS REGLAS DEL MECANISMO COMPLEMENTARIO DEL CENTRO INTERNACIONAL DE ARREGLO DE DIFERENCIAS RELATIVAS A INVERSIONES

OPINIÓN LEGAL DE ALLAN R. BREWER-CARÍAS

24 ABRIL 2015

Quien suscribe, Allan R. Brewer-Carías, declaro:

1. He sido miembro en forma ininterrumpida desde 1963 del Colegio de Abogados del Distrito Federal de Venezuela. Desde 1973 he sido socio principal de la Firma de Abogados *Baumeister & Brewer*, con sede en la Torre América, PH, Avenida Venezuela, Bello Monte en Caracas. En mi actividad profesional, me he especializado en temas de derecho público, particularmente, de derecho constitucional, derecho administrativo y derecho público de la economía, incluyendo el derecho minero y de los hidrocarburos. En la actualidad resido permanentemente en la ciudad de Nueva York, Estados Unidos de América.

I. INTRODUCCIÓN

1. Calificaciones

2. En 1962, me gradué de abogado en la Universidad Central de Venezuela. Seguí estudios de postgrado en Francia, en la entonces Facultad de Derecho de la Universidad de Paris (1962-1963), y en 1964 recibí el título de Doctor en Derecho de la Universidad Central de Venezuela.

3. En 1963 comencé a enseñar derecho administrativo y derecho constitucional en la Universidad Central de Venezuela, como profesor adscrito al Instituto de Derecho Público, del cual fui posteriormente Director durante 10 años (1978-1987). Durante los años 1972-1974, fui *Visiting Scholar* en la Universidad de Cambridge (*Centre of Latin American Studies*), Reino Unido, y durante el año académico 1985-1986, fui electo *Fellow of Trinity College* y *Simón Bolívar Professor* habiendo dictado en la Facultad de Derecho de la misma Universidad de Cambridge, un curso en el Master de Derecho (LL.M) sobre *Judicial Review in Comparative Law.* En 1990, fui *Professeur Associé* en la Universidad de Paris II (*Panthéon- Assas*) en los Cursos de Tercer Ciclo, donde dicté un Curso sobre *La Procedure Administrative Non Contentieuse en Droit Comparé*. Desde 1998, también fui profesor en el Master de Derecho Administrativo de la Universidad del Rosario y de la Universidad Externado de Colombia, ambas ubicadas en Bogotá, donde dicté cursos sobre los *Principios del Procedimiento Administrativo en América Latina,* y sobre *El Modelo Urbano de la Ciudad Colonial Hispanoamericana*. En 1998, como *Professeur invité*, dicté un curso en la Universidad de París X (*Nantèrre*), sobre *Droit économic au Venezuela.* Entre 2002 y 2004, fui *Visiting Scholar* en la Universidad de Columbia en la ciudad de Nueva York, y en 2006, fui nombrado *Adjunct Professor of Law* en la Facultad de Derecho de la misma Universidad, donde tuve a mi cargo, entre 2006 y 2007, un seminario sobre *Judicial Protection of Human Rights in Latin America. A Constitutional Comparative Law Study on the Amparo Proceeding.*

4. En 1978 fui electo miembro de la Academia de Ciencias Políticas y Sociales de Venezuela de la cual fui su Presidente, entre 1997 y 1999. Desde 1982 he sido miembro titular de la *International Academy of Comparative Law*, de la cual fui Vicepresidente entre 1982 y 2010. Soy miembro de la *Société de Legislation Comparée* de París. En 1981, recibí en Venezuela el Premio Nacional de Ciencias por mis aportes a las ciencias jurídicas.

5. A lo largo de mi carrera académica y profesional he publicado numerosos libros y artículos especializados en derecho venezolano y en derecho

comparado. En particular, en relación con los temas relevantes en este caso, he publicado ampliamente sobre derecho administrativo, el cual abarca el derecho de la minería y de los hidrocarburos, y el derecho de la expropiación, siendo mis más recientes obras publicadas las siguientes: *Contratos administrativos. Contratos públicos. Contratos del Estado*, Editorial Jurídica Venezolana, Caracas 2013, 576 páginas; *Administrative Law in Venezuela,* Editorial Jurídica Venezolana, Caracas 2013 488 páginas; y *Constitutional Law in Venezuela* Wolters Kluwer, 2012, 318 páginas.. Más recientemente han salido publicadas mis obras: *Tratado de Derecho Administrativo*, seis volúmenes, Thompson Civitas, Madrid 2013, 6.400 páginas, y la *Colección Tratado de Derecho Constitucional*, nueve volúmenes, Editorial Jurídica Venezolana, Caracas 2013-2015, 9.900 páginas.

2. Alcance de la Opinión

6. La presente opinión sobre derecho venezolano (la ***Opinión Legal***) la he preparado a requerimiento de la firma de abogados Freshfields Bruckhaus Deringer, para ser presentada en el caso *Anglo American plc v. República Bolivariana de Venezuela*, que se sigue bajo las Reglas del Mecanismo Complementario del Centro Internacional de Arreglo de Diferencias Relativas a Inversiones (Caso CIADI Nº ARB (AF)/14/11).

7. Freshfields Bruckhaus Deringer, en su carácter de abogados de la Demandante, me han solicitado que emita esta Opinión Legal basada en los principios generales del derecho administrativo venezolano, así como en la legislación y las concesiones aplicables a la inversión de *Anglo American plc* en Venezuela, con el objeto de describir y explicar los siguientes aspectos jurídicos:

A. En primer lugar, explicar el régimen legal vigente en Venezuela, aplicable a las concesiones administrativas, con referencia a las concesiones mineras, destacando, en particular, su naturaleza jurídica como contratos administrativos, mediante los cuales el Estado otorga a los concesionarios determinados derechos previamente reservados al propio Estado.

B. En segundo lugar, explicar la figura de la reversión en el contexto del derecho administrativo aplicable a las concesiones administrativas, y analizar la distinción entre aquellos bienes que al extinguirse las concesiones deben revertirse o traspasarse al Estado (bienes reversibles) y aquellos que no revierten ni se transfieren al Estado y que permanecen como propiedad del concesionario (bienes no reversibles).

C. En tercer lugar, analizar el régimen de la reversión de bienes en la legislación del sector minero en Venezuela, con particular referencia a las Leyes de Minas de 1945 y 1999; y explicar, considerando las diversas actividades que pueden ser realizadas por los concesionarios bajo el régimen legal de la minería en Venezuela, qué bienes del concesionario deben considerarse como bienes reversibles y qué bienes deben considerarse como bienes no reversibles al extinguirse las concesiones mineras.

D. En cuarto lugar, en relación con las concesiones mineras de explotación de níquel de manto identificadas como "San Antonio Nº 1", "Camedas Nº 1" y "Camedas Nº 3" (las ***Concesiones Restantes***) de las que fue titular la empresa Minera Loma de Níquel, C.A. ***(Minera Loma de Níquel)*** y que estuvieron en vigencia hasta noviembre de 2012, determinar, conforme a la legislación aplicable y el texto de las Concesiones, qué bienes de la empresa debían considerarse como bienes reversibles, y qué bienes debían considerarse como bienes no reversibles a su terminación. En particular, determinar si ciertos activos propiedad de la concesionaria sobre los cuales el Estado Venezolano asumió control el 11 de noviembre de 2012, incluyendo (i) la planta de procesamiento metalúrgico y otros bienes relacionados no afectos a las actividades de explotación minera; y (ii) el ferroníquel acopiado en depósito que había sido procesado con anterioridad al vencimiento de las concesiones, constituían bienes no reversibles que permanecieron como propiedad de la concesionaria y respecto de los cuales el Estado debe una indemnización.

8. Como profesional del derecho, especializado en derecho constitucional y administrativo, rindo entonces esta declaración y Opinión Legal basada en mi experiencia y conocimiento sobre el derecho venezolano, acumulado durante los más de 50 años dedicado a la actividad académica y al ejercicio profesional del derecho, esté último, básicamente desarrollado en Venezuela. Esta opinión está basada en la revisión que he hecho de varios documentos que me han sido entregados por los abogados de la Demandante, que se enumeran en el **Apéndice A** de esta Opinión Legal, así como de los documentos y fuentes que se citan en las notas al pie de página.

II. RESUMEN EJECUTIVO

9. Conforme al derecho venezolano, las concesiones administrativas son actos bilaterales celebrados entre el Estado y una persona privada o conce-

sionario, mediante los cuales el Estado le concede a éste último el derecho de desarrollar determinadas actividades que han sido legalmente reservadas al Estado.

10. Las Leyes de Minas de 1945 y 1999 solamente reservaron para el Estado la actividad de exploración y explotación de minerales, la cual por consiguiente sólo puede desarrollarse por los particulares mediante concesiones mineras otorgadas por el Estado. Cualquier otra actividad, como la trasformación o el procesamiento de los minerales extraídos, en principio puede realizarse por los particulares sin necesidad de obtener concesión del Estado.

11. Al extinguirse una concesión administrativa, según se establezca en la ley o en las cláusulas del contrato, la reversión sólo opera en relación con los bienes afectados específicamente al desarrollo de la actividad concedida, es decir, que es el objeto de la concesión, de manera que si es el caso, el Estado pueda continuar realizándola utilizando dichos bienes. Esos bienes, que son los bienes reversibles, son los que el concesionario debe transferir a la Administración libres de gravamen. Todos los otros bienes del concesionario, en general, se consideran como bienes no reversibles, los cuales sin embargo pueden ser adquiridos por el Estado pero siempre mediando el pago de una indemnización.

12. En el caso de *Minera Loma de Níquel*, las tres Concesiones Restantes que expiraron en noviembre de 2012 fueron concesiones cuyo objeto específico, tal como surge del propio texto de las mismas, fue la explotación de níquel de manto. Conforme al artículo 58 de la Ley de Minas de 1999, el término "explotación" en este contexto se refiere a actividad de "extracción" de mineral del yacimiento concedido, la cual, por lo demás, es la única que causa el impuesto de explotación establecido en el artículo 90.2 (c) de la misma Ley de Minas de 1999, estando excluida de la explotación las otras actividades que pueden realizarse por el concesionario o por otras personas, incluso mediante plantas industriales de beneficio o refinación.

13. De acuerdo con las previsiones del artículo 102 de la Ley de Minas de 1999 y con las cláusulas de las Concesiones Restantes, al extinguirse las concesiones, los bienes adquiridos por la concesionaria con destino a la realización del objeto de la concesión (es decir, la explotación de níquel de manto), debían ser revertidos al Estado, libres de todo gravamen. Esos son, conforme a la mencionada Ley de Minas de 1999 y a las Concesiones Restantes, los bienes que pueden ser considerados como bienes reversibles en dichas concesiones.

14. La Ley de Minas de 1999 refiere en su artículo 86 a ciertas actividades auxiliares o conexas con las actividades mineras, que no se han re-

servado en general al Estado, como son el almacenamiento, tenencia, beneficio (es decir, procesamiento o refinación), transporte, circulación y comercio de los minerales. El mismo artículo 86 establece sin embargo la posibilidad de que dichas actividades puedan ser reservadas al Estado en relación con ciertos minerales cuando ello convenga al interés público. Así lo ha hecho el Estado recientemente en el caso de las nacionalizaciones de los sectores siderúrgico y aurífero, pero no en relación con el mineral de níquel.

15. Las Concesiones Restantes también distinguen la actividad objeto de la concesión (explotación de níquel de manto) y con las actividades conexas a ésta. Concretamente, las Ventajas Especiales refieren a la facultad del concesionario de realizar otras actividades relativas a incorporación de valor agregado mediante la metalurgía, refinación, manufactura o industrialización del mineral extraído.

16. De la distinción expresada en los artículos 86 y 90.2 (c) de la Ley de Minas de 1999 y en las Ventajas Especiales incluidas en las Concesiones Restantes, surge entonces claramente la distinción entre las dos categorías de actividades que el concesionario puede realizar: aquellas que se corresponden con el objeto de la concesión y aquellas que son conexas o auxiliares a ésta. De ello resulta necesariamente que los bienes que revierten al Estado al extinguirse las concesiones, son los bienes utilizados para la primera de estas dos categorías, es decir, los bienes utilizados en la explotación de mineral níquel de manto en las Concesiones Restantes.

17. Respecto de los bienes adquiridos por *Minera Loma de Níquel* para ser utilizados en la realización de otras actividades distintas de la explotación de níquel de manto, como son las actividades que se enumeran en el artículo 86 de la Ley de Minas o en las Ventajas Especiales de las Concesiones Restantes, estos no son bienes reversibles, y al extinguirse las concesiones, permanecieron como propiedad de *Minera Loma de Níquel*.

18. En esta última categoría, se incluye (i) la planta de procesamiento metalúrgico y otros bienes relacionados no afectos a la minería, incluyendo materias primas; y (ii) el ferroníquel acopiado en depósito que había sido procesado con anterioridad al vencimiento de las Concesiones Restantes. Estos bienes no estaban destinados o afectos a la actividad de explotación de níquel de manto y por tanto, con posterioridad a la extinción de las Concesiones siguieron siendo propiedad del concesionario, *Minera Loma de Níquel*. Conforme a la garantía del artículo 115 de la Constitución, dichos bienes no podían ser "adquiridos" por el Estado Venezolano sino a través de una negociación de una negociación con el concesionario o mediante el procedimiento previsto en la Ley de Expropiación. Su apropiación por el Estado sin previa

indemnización y/o un procedimiento formal de expropiación, constituyó una violación a la normativa venezolana.

III. ANTECEDENTES

19. En 1992, de acuerdo con la Ley de Minas de 1945,[1] el Ministerio de Energía y Minas[2] otorgó a la empresa *Corporación Federal de Minas S.A.* (***Cofeminas***) 10 concesiones mineras para realizar actividades mineras reservadas al Estado en el yacimiento denominado Depósito Loma de Níquel situado en los Municipios Guaicaipuro del Estado Miranda y Santos Michelena del Estado Aragua de Venezuela.

20. En 1995, *Cofeminas* obtuvo cuatro concesiones adicionales con el mismo objeto.[3] En 1996, el nombre de *Cofeminas* fue cambiado al de *Minera Loma de Níquel*. En 1997 y 1998 algunas de las concesiones fueron renovadas,[4] y en 1999 la empresa obtuvo del Ministerio de Energía y Minas dos nuevas concesiones con el mismo objeto, llegando a un total de 16 concesiones.[5] En 2000, el Ministerio de Energía y Minas revisó algunos de los términos de las concesiones de 1992, habiendo sido republicadas en ese mismo año, teniendo todas un lapso de duración de 20 años contados a partir del 10 de noviembre de 1992, y por tanto, con fecha de vencimiento el 10 de noviembre de 2012.[6]

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1 Ley de Minas, en *Gaceta Oficial* Extra Nº 121, de 18 de enero de 1945, **Anexo C-1** (***Ley de Minas de 1945***).

2 El Ministerio de Energía y Minas se creó en 1976 en sustitución del Ministerio de Minas e Hidrocarburos que había sido creado en 1950. En esta Opinión Legal, utilizaremos la denominación común de "Ministerio de Energía y Minas" a pesar de que posteriormente, el Ministerio a cargo de la materia minera haya cambiado de denominación en 2005 (Ministerio de Industrias Básicas y Minería), en 2007 (Ministerio del Poder Popular para Industrias Básicas y Minería), y en 2014 (Ministerio del Poder Popular para Petróleo y Minería).

3 Concesiones mineras Cofemina Nº 4, 5, 6 y 7, en *Gaceta Oficial* Extra Nº 4.867, de 14 de marzo de 1995, **Anexo C-5**.

4 Concesiones renovadas El Tigre y Camedas Nº 1-5 en *Gaceta Oficial* Extra Nº 5.190, de 11 de diciembre de 1997, **Anexo C-13**; concesiones renovadas San Onofre Nº 1, 2 y Nº 3, y San Antonio Nº 1 en *Gaceta Oficial* Extra Nº 5.206, de 13 de enero de 1998, **Anexo C-15**.

5 Concesiones mineras Cofemina Nº 1 y 2, en *Gaceta Oficial* Extra Nº 5.306, de 4 febrero de 1999, **Anexo C-18**.

6 Concesiones mineras revisadas San Onofre Nº 3, Camedas Nº 1, 2, 3, 4 y 5, y San Antonio Nº 1, en *Gaceta Oficial* Extra. Nº 5.432, de 7 de enero de 2000, **Anexo C-20**.

21. He sido informado que en 2008, el Ministerio de Energía y Minas revocó 13 de las 16 concesiones de *Minera Loma de Níquel*, quedando en vigencia tres concesiones identificadas como "San Antonio Nº 1" "Camedas Nº 1" y "Camedas Nº 3" (las ***Concesiones Restantes***),[7] respecto de las cuales, con fecha 17 de mayo de 2012, el Ministerio de Energía y Minas informó a *Minera Loma de Níquel* que no serían prorrogadas,[8] razón por la cual, dichos títulos vencieron el 10 de noviembre de 2012.

22. En virtud de ello el 18 de octubre de 2012, *Minera Loma de Níquel* envió a las autoridades del Ministerio de Energía y Minas una nota invitando a un traspaso de las operaciones al vencimiento de las Concesiones Restantes, en la cual incluyó un listado de los bienes que *Minera Loma de Níquel* consideraba como bienes no reversibles conforme a los términos del régimen legal aplicable y de las cláusulas de las Concesiones, por los que esperaba recibir la correspondiente compensación por parte del Estado.[9] Este listado incluía: (i) la planta de procesamiento metalúrgico y otros bienes relacionados no afectos a la minería; y (ii) el ferroníquel acopiado en depósito que había sido procesado con anterioridad al vencimiento de las Concesiones Restantes pero que *Minera Loma de Níquel* se había visto obligada a mantener en depósito al no poder exportarlo.

23. Entiendo que tras el vencimiento de las Concesiones Restantes, el día 11 de noviembre de 2012 las autoridades tomaron control de todos los bienes de *Minera Loma de Níquel* en el sitio del Depósito Loma de Níquel incluyendo los indicados en el párrafo precedente. He sido informado asimismo que a la presente fecha, *Anglo American plc* y *Minera Loma de Níquel* no han recibido compensación alguna por concepto de la toma de control sobre dichos bienes por parte del Estado Venezolano.

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7 *Idem*, **Anexo C-20**, páginas 11 a 13; 15 a 18; y 22-24.

8 Comunicación del Ministerio de Energía y Minas de 17 de mayo de 2012, **Anexo C-31**.

9 Carta de Anglo American Loma de Níquel de 18 de octubre de 2012, dirigida al Ministro del Poder Popular de Petróleo y Minería y al Vice Ministro de Minas del Ministerio del Poder Popular de Petróleo y Minería, relativo al "Plan para la Trasferencia Operacional de las Plantas, Sistemas y Equipos de Minera Loma de Níquel con motivo de la terminación de las concesiones "San Antonio", "Camedas Nº 1" y "Camedas Nº 3", **Anexo C-56**.

IV. LAS CONCESIONES ADMINISTRATIVAS EN LA LEGISLACIÓN MINERA VENEZOLANA

24. Los principios del derecho administrativo venezolano, como en general sucedió en el resto de los países latinoamericanos, incluyendo por ejemplo Argentina y Colombia, tuvieron sus raíces en los principios sentados por la doctrina y jurisprudencia francesas, que fueron en definitiva los que dieron origen a la misma disciplina. Con base en esos principios, el derecho venezolano reconoce a las concesiones administrativas como actos bilaterales, considerados en general como contratos públicos celebrados entre el Estado y una persona privada o concesionario, mediante los cuales el Estado le otorga o concede el derecho de desarrollar determinadas actividades que han sido legalmente reservadas al Estado, y que por tanto no pueden ser desarrolladas libremente por los particulares. En virtud de dicha reserva, los particulares sólo pueden desarrollar las actividades reservadas mediante el título que les confiere la respectiva concesión. Ésta es, por tanto, la que crea en cabeza del particular o concesionario el derecho otorgado, al concederle el derecho a realizar una actividad que previamente no tenía.[10]

25. Así, como acto bilateral, la concesión minera difiere de otras instituciones de derecho administrativo eminentemente unilaterales, como son las autorizaciones administrativas. Estas son actos administrativos mediante los cuales se permite al particular realizar ciertas actividades respecto de las cuales, si bien tiene derecho a realizarlas, la legislación exige una autorización previa del Estado para ello. Por tanto, a diferencia de las concesiones, las autorizaciones sólo tienen efectos declarativos, en el sentido de que sólo declaran que la persona autorizada puede realizar la actividad que previamente tenía derecho a realizar, y que sólo estaba sujeta a dicha autorización estatal. Las mismas, por tanto, a diferencia de las concesiones, no *crean* el derecho sino que *autorizan* su ejercicio.

26. Una de las actividades económicas que han sido reservadas al Estado en el ordenamiento jurídico venezolano ha sido la actividad de exploración y explotación de yacimientos mineros,[11] los cuales el artículo 12 de la

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[10] Véase en general, sobre las concesiones administrativas en Venezuela: Víctor Hernández Mendible, "La concesión de servicio público y la concesión de obra pública," en *Revista de la Facultad de Ciencias Jurídicas y Políticas,* Universidad Central de Venezuela, Nº 113, Caracas 1999, páginas 53-91.

[11] En materia minera, en efecto, conforme a la Ley de Minas de 1999, en virtud de la reserva al Estado de las actividades de exploración y explotación minera, estas actividades sólo pueden desarrollarse directamente por el Estado o por los particula-

Constitución de 1999 declara como bienes de dominio público. Conforme a las Leyes de Minas de 1945 y de 1999, la actividad objeto de las concesiones es la exploración y explotación de minerales o de recursos minerales,[12] entendiéndose en general en la legislación de minas por "explotación" la acción de excavar y extraer minerales del yacimiento minero.[13] En consecuencia, las actividades mineras de exploración y explotación de minerales en Venezuela, con las excepciones previstas en el artículo 7 de la Ley de Minas de 1999, sólo pueden realizarse por los particulares mediante concesiones mineras otorgadas por el Estado. Con ellas, el Estado otorga el derecho de explotar o extraer minerales, que es la actividad reservada al Estado, teniendo en consecuencia el concesionario, además, el derecho de realizar actividades ulteriores para el aprovechamiento del mineral extraído, aún cuando dichas actividades no sean legalmente parte del objeto de la concesión, ni estén reservadas al Estado.

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res mediante "concesiones de exploración y subsiguiente explotación" (artículo 7). En cambio, no han sido reservadas al Estado, y no están sujetas al régimen de concesión, las actividades denominadas de "pequeña minería" o realizadas mediante "Mancomunidades Mineras" constituidas por pequeños mineros, las cuales la ley sujeta a autorizaciones administrativas; así como las actividades denominadas de "minería artesanal." Véase, Decreto Ley Nº 295, en *Gaceta Oficial* Extra Nº 5.382, de 28 de septiembre de 1999, **Anexo C-19**, artículos 7 y 64 a 85 (***Ley de Minas de 1999***). Conforme a la Ley de Minas de 1945, **Anexo C-1**, la reserva de las actividades de exploración y explotación minera se fue estableciendo por el Ejecutivo Nacional (artículo 11), en cuyo caso la actividad de explotación minera por los particulares sólo podía realizare mediante concesión (artículo 12).

12 Así resulta de lo establecido en el artículo 13 de la Ley de Minas de 1945, **Anexo C-1**; y en el artículo 24 de la Ley de Minas de 1999, **Anexo C-19**. En línea con ello, el artículo 12 de la Constitución de 1999 se refiere a "yacimientos mineros". Véase, Constitución de la República Bolivariana de Venezuela, de 20 de diciembre de 1999, en *Gaceta Oficial* Extra Nº 5.453, de 24 de marzo de 2000, **Anexo C-[]** (***Constitución de 1999***).

13 Ello deriva del texto mismo de la Ley de Minas de 1999, **Anexo C-19**, cuando al referirse a las "concesiones de explotación" establece en su artículo 58 que "se entiende que una concesión *está en explotación, cuando se estuviere extrayendo de las minas las sustancias que la integran*" o haciéndose lo necesario para ello, con ánimo inequívoco de aprovechamiento económico de las mismas y en proporción a la naturaleza de la sustancia y la magnitud del yacimiento." La Ley de Minas de 1945 estableció una definición casi idéntica al disponer que "*[s]e entiende que la concesión esta en explotación cuando se estuvieren extrayendo de esta las sustancias a que se refiere la presente Ley*, o haciéndose lo necesario para lograr su extracción mediante las obras que según el caso fueren apropiadas a este fin […]". Ver, Ley de Minas de 1945, **Anexo C-1**, artículo 24.

27. De lo anterior resulta, por tanto, que lo que ha sido reservado al Estado conforme a las Leyes de Minas de 1945 y de 1999, es la actividad de exploración y explotación de minerales de los yacimientos mineros, generalmente ubicados en el subsuelo.[14] En cambio, en la legislación minera no se ha establecido, en general, reserva alguna a favor del Estado respecto de otras actividades conexas, como son todas las que se refieren al almacenamiento, tenencia, beneficio o refinación, transporte, circulación y comercio de los minerales, es decir, en general al aprovechamiento del mineral extraído. Es decir, en las concesiones mineras, por esencia, respecto de los minerales explotados, una vez extraídos del subsuelo, pueden ser aprovechados por el concesionario como mejor lo disponga.[15]

28. En consecuencia, el principio general en el derecho venezolano en materia minera es que sólo la actividad de exploración y explotación de minerales ha sido reservada al Estado, pudiendo dichas actividades desarrollarse por los particulares solamente mediante concesiones mineras otorgadas por el Estado.[16] Cualquier otra actividad, como la trasformación o refinación

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14 Así resulta de lo establecido en los artículos 17 y 18 de la Ley de Minas de 1945, **Anexo C-1**; y en el artículo 10 de la Ley de Minas de 1999, **Anexo C-19**.

15 Sobre esas actividades de "almacenamiento, tenencia, beneficio, transporte, circulación y comercio de los minerales," que encajan en la noción de aprovechamiento y que al no haber sido reservadas al Estado en general no son el objeto de las concesiones de explotación, el artículo 86 de la Ley de Minas de 1999 las califica como "actividades conexas o auxiliares de la minería." La misma norma prevé, sin embargo, que cuando convenga al interés público, "el Ejecutivo Nacional podrá reservarse mediante decreto cualquiera de dichas actividades con respecto a determinados minerales." Y precisamente por ello, por ejemplo, mediante ley, el Estado se ha reservado en algunos casos, además de la explotación de minerales, su industrialización y comercialización. como ha sucedido en las recientes nacionalizaciones de la actividad siderúrgica del hierro y de las actividades conexas con la explotación del oro. Ver Ley Orgánica de Ordenación de las Empresas que Desarrollan Actividades en el Sector Siderúrgico en la Región de Guayana, Decreto Ley Nº 6.058, de 30 de abril de 2008, en *Gaceta Oficial* Nº 38.928, de 12 de mayo de 2008, **Anexo BC-[]**, articulo 1; y Ley Orgánica que Reserva al Estado las Actividades de Exploración y Explotación del Oro así como las conexas y auxiliares a éstas, Decreto Ley Nº 8.413, de 23 de agosto de 2011, en *Gaceta Oficial* Nº 39.759, de 16 de septiembre de 2011, **Anexo BC-[]**, articulo 2. La Ley fue reformada mediante la Ley Orgánica que Reserva al Estado las Actividades de Exploración y Explotación del Oro, así como las conexas y auxiliares a éstas, Decreto Ley Nº 1395, de 13 de noviembre de 2014, en *Gaceta Oficial* Extra Nº 6.150, de 18 de noviembre de 2014, **Anexo BC-[]**.

16 Tal y como se indicó anteriormente (***Ver supra* ¶ 26, nota 11**), la única excepción en la Ley de Minas de 1999 se refiere a la "minería artesanal," o "pequeña minería" que pueden realizarse por las personas particulares mediante autorización del Mi-

de los minerales extraídos, en principio puede realizarse por los particulares en virtud de su derecho a la libertad económica sin necesidad de obtener concesión del Estado, y por supuesto puede realizarse por los concesionarios.

29. Ahora bien, siendo las concesiones mineras, como antes se dijo, actos bilaterales o contratos públicos, las relaciones jurídicas que en ellas se establecen entre el Estado y el concesionario se rigen, en principio, además de por sus cláusulas, por las previsiones de la ley de minas vigente al momento de la celebración de la concesión o emisión del título minero que la integra.[17] Sin embargo, en el supuesto de que con posterioridad a la firma del contrato de concesión o emisión del título minero, una nueva ley de minas reemplace a la que se encontraba vigente al momento de la celebración del contrato, la misma se aplicará a los contratos celebrados antes de su entrada en vigor, en los términos en los cuales la propia ley lo disponga.[18]

30. Así, en el caso de contratos de concesión celebrados durante la vigencia de la Ley de Minas de 1945 que continuaron vigentes bajo la Ley de Minas de 1999 (tal como fue el caso de las Concesiones de *Minera Loma de Níquel*), los mismos estuvieron regidos en su origen, además de por los términos de sus cláusulas, por las disposiciones de la Ley de Minas de 1945. Cuando la Ley de Minas de 1945 fue sustituida por las de la Ley de Minas de 1999, ésta última previó expresamente que salvo excepciones puntuales enumeradas,[19] la misma se aplicaría a las concesiones mineras otorgadas con anterioridad, una vez vencido el lapso de un año contado a partir de la fecha de su publicación en la Gaceta Oficial.[20]

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nisterio de Minas (artículos 7 y 68), lo que significa que dichas actividades de minería artesanal o pequeña minería no han sido reservadas al Estado. Ver, Ley de Minas de 1999, **Anexo C-19**.

17 Mediante dichas cláusulas, cuando sean el resultado del acuerdo entre las partes, sin embargo, en ningún caso pueden "renunciarse ni relajarse […] las leyes en cuya observancia están interesados el orden público o las buenas costumbres." Código Civil Venezolano (reformado), en *Gaceta Oficial* Extra Nº 2.990 (extractos), de 26 de julio de 1982, **Anexo C-2**, artículo 6 (***Código Civil***).

18 Asimismo serán de aplicación en todos los casos, aún sin que estar expresamente establecido, aquellas normas que se consideren como de orden público, como ser las que se refieren a las competencias de los órganos y entes de la administración pública.

19 Las excepciones están previstas en el artículo 129 de la Ley de Minas de 1999, **Anexo C-19**, y son analizadas en detalle más adelante (***Ver infra* ¶ 52**).

20 Ley de Minas de 1999, **Anexo C-19**, artículos 129 (e) y 136. Adicionalmente, debe mencionarse, que son aplicables supletoriamente a las concesiones administrativas, como a todos los contratos públicos, las disposiciones del Código Civil o del Código de Comercio según corresponda, así como las de otras leyes y regulaciones ad-

V. EL PRINCIPIO DE REVERSIÓN EN EL RÉGIMEN LEGAL DE LAS CONCESIONES ADMINISTRATIVAS

1. La institución de la reversión en el derecho venezolano

31. En virtud de que el derecho otorgado al particular mediante la concesión administrativa lo habilita a realizar una actividad que ha sido previamente reservada por ley al Estado, una vez que la concesión termina, el derecho otorgado también se extingue. En tal caso, el Estado puede decidir continuar realizando directamente la actividad reservada mediante sus órganos o entes, o proceder a otorgar una nueva concesión. A tal efecto, es habitual que las leyes aplicables y los contratos de concesión establezcan, al extinguirse la concesión, la figura de la reversión administrativa mediante la cual se transfieren al Estado los bienes afectos al objeto de la concesión. Por ejemplo, en las concesiones de obra pública o de servicio público, la reversión consiste en "la obligación del concesionario de entregar a la Administración la obra o servicio y todos los instrumentos necesarios: bienes, acciones y derechos para asegurar la continuidad de esa obra o servicio, una vez extinguida la concesión".[21] En cambio, en las concesiones de explotación de bienes del dominio público, como son precisamente las concesiones de explotación minera, conforme a esa misma definición, la reversión opera respecto de los instrumentos necesarios: bienes, acciones y derechos para asegurar la continuidad de la explotación minera una vez extinguida la concesión.

32. Esta institución de la reversión tiene una larga tradición en Venezuela, habiéndose regulado desde el siglo pasado, incluso en la Constitución, aun cuando en forma parcial y limitada. En tal sentido, por ejemplo, el artículo 70 de la Constitución de 1947[22] estableció lo siguiente:

> "Art. 70. Las tierras adquiridas por nacionales o extranjeros en territorio venezolano y destinadas a la explotación de concesiones mineras, comprendidas las de hidrocarburos y demás minerales combustibles, pasarán en plena propiedad al patrimonio de la Nación, sin indemni-

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ministrativas que se encuentren en vigor al tiempo de la celebración del contrato de concesión.

21 Véase Carlos García Soto, "Reversión de bienes en el contrato de concesión" en la Revista *Derecho y Sociedad. Revista de los estudiantes de la Universidad Monteávila*, Caracas 2003, **Anexo BC-[]**, página 95.

22 Constitución de los Estados Unidos de Venezuela, en *Gaceta Oficial* Extra de los Estados Unidos de Venezuela Nº 194, de 30 de julio de 1947, **Anexo BC-[]** (***Constitución de 1947***).

zación alguna, al extinguirse por cualquier causa la respectiva concesión."

33. Esta norma sólo se refirió a la reversión de las "tierras adquiridas" y destinadas a la explotación de las concesiones, y específicamente, sólo respecto de las concesiones mineras y de hidrocarburos que habían sido reguladas en la Ley de Minas de 1945 y en la Ley de Hidrocarburos de 1943.[23] Una disposición similar se recogió en la Constitución de 1961,[24] habiendo, sin embargo, desaparecido en la Constitución de 1999, la cual lo que estableció fue la declaratoria general de que los yacimientos mineros y de hidrocarburos son bienes del dominio público, y por tanto, inalienables e imprescriptibles.[25]

34. Además de las normas constitucionales, en el derecho venezolano también se pueden identificar diversas leyes sectoriales destinadas a regular actividades reservadas al Estado, en las cuales además se estableció el régimen de las concesiones administrativas aplicable en cada caso, incorporándose también disposiciones relativas al régimen de la reversión de bienes. Si bien en algunas de ellas se establecieron ciertos principios en materia de reversión, la tendencia ha ido paulatinamente remitiendo a lo que debía ser estipulado al respecto en los contratos de concesión.[26]

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23 Ley de Hidrocarburos de 1943, **Anexo BC-[]** (***Ley de Hidrocarburos de 1943***), artículo 80.

24 La Constitución de 1961 estableció en su artículo 103 que "[l]as tierras con destino a la exploración y explotación de concesiones mineras, comprendidas las de hidrocarburos, pasarán en plena propiedad a la Nación, sin indemnización, alguna, al extinguirse por cualquier causa la concesión."; Constitución de la República Bolivariana de Venezuela de 1961, en *Gaceta Oficial* Extra Nº 3.357, de 23 de enero de 1961, **Anexo BC-[]** (***Constitución de 1961***).

25 Constitución de 1999, **Anexo C-[]**, artículo 12.

26 El régimen de la reversión vinculado con las concesiones administrativas se estableció originalmente en diversas leyes especiales ya derogadas, como por ejemplo la Ley de Ferrocarriles de 1956, en *Gaceta Oficial* N° 25.425, de 7 de agosto de 1957, **Anexo BC-[]**, página 187.379, artículo 9 (***Ley de Ferrocarriles de 1956***), y la Ley Forestal de Suelos y de Aguas de 1966, en *Gaceta Oficial* N° 1.004, de 26 de enero de 1966, **Anexo BC-[]**, artículo 92 (***Ley Forestal de Suelos y Aguas de 1966***). Igualmente, la Ley Orgánica de Régimen Municipal de 1989, estableció en su artículo 41.10 el principio de reversión entre las condiciones mínimas que debían contener los contratos de concesión de servicios públicos municipales y de explotación de bienes del Municipio; Ley Orgánica de Régimen Municipal en *Gaceta Oficial* N° 4.109, de 15 de junio de 1989, **Anexo BC-[]**, artículo 41.10 (***Ley Orgánica de Régimen Municipal de 1989***). Las disposiciones se eliminaron de la nueva Ley Orgánica del Poder Público Municipal, en *Gaceta Oficial* Extra Nº 6.015, de

35. Ésta última orientación fue la que se recogió en la Ley Orgánica sobre Promoción de la Inversión Privada bajo el Régimen de Concesiones de 1999[27], al disponer que el alcance de la reversión de bienes específicamente en las concesiones de obras públicas y servicios públicos, debe regularse en las cláusulas contractuales. De acuerdo con el artículo 48 de dicha ley, en efecto, corresponde establecer en los contratos respectivos "los bienes que por estar afectos a la obra o al servicio de que se trate, revertirán al ente concedente, a menos que no hubieren podido ser totalmente amortizadas durante el mencionado plazo".[28] La misma ley establece en su artículo 60 una distinción entre los bienes reversibles y no reversibles, indicando que "los bienes o derechos que por cualquier título adquiera el concesionario para ser destinados a la concesión pasarán a formar parte del dominio público desde que se incorporen o sean afectados a las obras" quedando "a salvo las obras, instalaciones o bienes que por no estar afectados a la concesión permanecerán en el patrimonio del concesionario según lo establezca el respectivo contrato."[29]

36. Ahora bien, en general, respecto de la institución de la reversión administrativa en el derecho venezolano, sus características generales fueron resumidas por la jurisprudencia sentada por la Corte Plena de la antigua Corte Suprema de Justicia, en su sentencia de 3 de diciembre de 1974 dictada al decidir la acción de nulidad por inconstitucionalidad que había sido intentada contra la Ley sobre Bienes Afectos a Reversión en las Concesiones de Hidrocarburos de 1971 (la ***Ley de Reversión***).[30] En dicha sentencia, la Corte estimó

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28 de diciembre de 2010, **Anexo BC-[]** (***Ley Orgánica de Régimen Municipal de 2010***).

27 Véase, Ley Orgánica sobre Promoción de la Inversión Privada bajo el Régimen de Concesiones, en Gaceta Oficial Extra Nº 5.394, de 25 de octubre de 1999, **Anexo BC-[]** (***Ley sobre la Promoción de Inversión Privada de 1999***).

28 En estos casos de bienes sujetos a reversión que no han sido completamente amortizados, en virtud del principio del equilibrio económico del contrato, para que ocurra su transferencia, el Estado tiene que cancelar al concesionario el monto equivalente a la porción no amortizada.

29 De acuerdo con lo establecido en el artículo 4 de la Ley sobre la Promoción de Inversión Privada de 1999, "los contratos de concesión cuyo otorgamiento, administración o gestión se encuentre regulado por leyes especiales" - como son precisamente las concesiones mineras - "se regirán preferentemente por dichas leyes" - Ley de Minas -, siendo en tales casos las disposiciones de la Ley sobre la Promoción de Inversión Privada de 1999 "de aplicación supletoria." Es decir que las disposiciones de esta ley se aplican en todos aquellos asuntos no regulados expresamente en dichas leyes especiales.

30 Ley sobre Bienes Afectos a Reversión en las Concesiones de Hidrocarburos, en *Gaceta Oficial* Nº 59.577, de 6 de agosto de 1971, **Anexo BC-[]** (***Ley de Rever-***

que el principio de la reversión, que implica que al extinguirse la concesión "los bienes integrantes de la concesión pasarán al Estado sin indemnización alguna" deriva del hecho de que siendo la actividad del Estado de carácter permanente, mediante dicha reversión precisamente se asegura la posibilidad de continuidad de la actividad administrativa de explotación que había sido confiada temporalmente al concesionario, mediante los bienes que pasan directamente al Estado.[31] En su sentencia, la Corte indicó que la "finalidad original" de la reversión es que "los bienes empleados en la explotación" que son los que se hallan afectos al objeto de la concesión, deben restituirse "sin reserva alguna", razón por la cual "se ha aceptado la reversión, cuya finalidad original es mantener sin interrupción la explotación." En dicha sentencia, la Corte resolvió sobre la pretensión de los impugnantes de que sólo los "bienes inmuebles" eran los sometidos a reversión, decidiendo en definitiva que los bienes sujetos a reversión comprenden "todo lo que se haya adscrito a la explotación con destino fijo y permanente y para hacerla realizable."

37. Ahora bien, en relación con los bienes que revierten al Estado al terminar la concesión junto con el derecho concedido al concesionario, la doctrina reconoce dos categorías: Primero, los bienes del dominio público o de propiedad del Estado que se afectaron al desarrollo del objeto de la concesión; y segundo, los bienes que el concesionario haya incorporado al desarrollo de las actividades objeto de la concesión para ejecutar dicho derecho concedido[32]. La reversión, por tanto, sólo opera respecto de los bienes afectos a la actividad objeto de la concesión (por ejemplo, la explotación de una obra pública, la prestación de un servicio público, o la explotación de un bien del dominio público, según el caso), que son los que permiten al

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sión). Esta ley fue sancionada años antes de que ocurriera el primer vencimiento de las concesiones de hidrocarburos otorgadas en los años 40.

31 Corte Suprema de Justicia, en *Gaceta Oficial* Extra Nº 1.718, de 20 de enero de 1975, **Anexo BC-[]**.

32 Señala Ismael Mata que el concepto de la reversión es utilizado para referirse a dos situaciones diferentes: "1º El regreso a la Administración de la explotación del servicio, es decir, el retorno del ejercicio, ya que la titularidad siempre estuvo en cabeza del Estado. 2º En segundo lugar, por reversión se entiende la transferencia al Estado de los bienes afectados a la explotación, en oportunidad de la extinción del título." Para el autor, sin embargo, cuando se trata de bienes aportados por el concesionario, "[…]carece de sentido expresar que revierten al Estado porque nunca le pertenecieron; lo correcto es decir que debe operarse su transferencia o cesión a favor del Estado". Véase Ismael Mata, *Régimen de los bienes en la concesión de servicios públicos*, en Contratos Administrativos, Jornadas Organizadas por la Universidad Austral, Facultad de Derecho, Editorial Ciencias de la Administración, División de Estudios Administrativos, Buenos Aires 1999, **Anexo BC-[]**, páginas 296 ss.

Estado poder continuar realizando la actividad concedida, directamente o a través de un nuevo concesionario[33] y sin los cuales la misma no podría continuar realizándose.[34]

38. En conclusión, al extinguirse una concesión administrativa, según se establezca en la ley o en las cláusulas del contrato, la reversión sólo opera en relación con los bienes afectados específicamente al desarrollo de la actividad que es el objeto de la concesión (por ejemplo, la prestación de un servicio público, la explotación de una obra pública, o la explotación de un bien del dominio público, como los yacimientos mineros) de manera que si es el caso, el Estado pueda continuar realizándola utilizando dichos bienes[35]. Esos bienes, que son los bienes reversibles, son los que el concesionario debe transferir a la Administración libres de gravamen[36]. Todos los otros bienes del concesionario, en general, se consideran como bienes no reversibles.

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33 Como lo ha señalado Fernando Garrido Falla en relación con las concesiones de servicios públicos, esos bienes que revierten son aquellos que "están de tal manera afectos a la concesión, que forman parte sustancial de ella" de tal forma, que "al finalizar el plazo por el que la concesión fue otorgada, tales bienes revierten a la "Administración concedente, precisamente por la misma razón de asegurar la continuidad del servicio, bien a cargo de la Administración (mediante explotación directa) o de nuevo concesionario." Véase Fernando Garrido Falla, "Efectos económicos de la caducidad de las concesiones administrativas", en *Revista de Administración Pública*, Nº 45, Madrid 1964, **Anexo BC-[]**, páginas 235-237.

34 En tal sentido la Procuraduría General de la República de Venezuela en Dictamen emitido en 1972, y también en relación con las concesiones de servicios públicos, sostuvo que siendo que "[…] la finalidad que se persigue con el otorgamiento de las concesiones es la prestación de una actividad que corresponde a la Administración," de allí "la preocupación de que los bienes afectos a las concesiones [al terminar las mismas] pasen a propiedad del Estado, porque sin ellos no se podría continuar prestando el servicio." Ver Dictamen Nº 324, A.E. de 8 de marzo de 1972 en 20 Años *de Doctrina de la Procuraduría General de la República 1962-1981*, Tomo III, Vol. I, Caracas 1984, **Anexo BC-[]**, páginas 142 ss.

35 Véase sobre la reversión como una forma del Estado de adquirir bienes: Allan R. Brewer-Carías, "Adquisición de la propiedad privada por parte del Estado en el derecho venezolano," en *Jurisprudencia de la Corte Suprema 1930-1974 y Estudios de Derecho Administrativo*, Instituto de Derecho Público, Universidad Central de Venezuela, Tomo VI, Caracas 1979, **Anexo BC-[]**, páginas 17-45.

36 En el régimen de la Ley de Promoción de Inversión Privada de 1999, dicha transferencia a título gratuito tiene lugar siempre que los bienes reversibles en cuestión hubiesen sido amortizados por el concesionario. Véase Ley de Promoción de Inversión Privada de 1999, **Anexo BC-[]**, artículo 48.

2. La distinción entre bienes reversibles y no reversibles

39. El otorgamiento de una concesión administrativa generalmente implica la necesidad para el concesionario de establecer los medios materiales y técnicos necesarios para la realización de la actividad objeto de la concesión, por ejemplo, la prestación del servicio público, la explotación de una obra pública o la explotación de un bien del dominio público. A tal efecto, el concesionario debe proceder a instalar, organizar y poner en funcionamiento un conjunto de bienes que son esenciales para cumplir con el objeto de la concesión. Estos bienes son, como se ha dicho, los bienes sujetos a reversión en las concesiones administrativas.

40. Además de esos bienes, por supuesto, el concesionario puede adquirir y utilizar otros bienes distintos, destinados a otras actividades que incluso pueden ser conexas o auxiliares pero que no constituyen el objeto de la concesión. Por tanto, dichos bienes no están sujetos a reversión. En la doctrina francesa, donde se establecieron los criterios predominantes en la materia en el derecho comparado, André de Laubadère en su conocida obra sobre *Contratos Administrativos* estableció en materia de concesiones administrativas y en relación con el tema de la reversión, la clásica distinción entre los siguientes bienes: "1) *biens demeurant la propriété du concessionnaire*, 2) *biens de retour,* y 3) *biens de reprise,*"[37] la cual fue en general seguida por toda la doctrina francesa.[38] Conforme a esta clasificación, que en todo caso,

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37 Véase André de Laubadère, *Traité des contrats administrattifs*, Librairie Général de Droit et de Jurisprudence, Tomo III, Paris 1956, **Anexo BC-[]**, páginas 211-222.

38 Véase en el mismo sentido, más recientemente, lo expuesto por Jean-Marie Auby, Pierre Bon, Jean-Bernard Auby, Philippe Terneyre, siguiendo la misma distinción, así: "1º Bienes de retorno [*biens de retour*] son aquellos que, en virtud del pliego de condiciones [*Cahier de charges*], deben volver obligatoria y gratuitamente a la autoridad delegante al término del contrato.// En virtud de ese retorno obligatorio, estos bienes son considerados ab inicio como propiedad de la persona pública delegante. Tales bienes pueden formar parte del dominio público si cumplen las condiciones exigidas al efecto; si no, pasan a formar parte del dominio privado del delegante. // 2º Son *bienes de recuperación [biens de reprise*] aquellos con respecto a los cuales el contrato sólo prevé una recuperación facultativa a la cual podrá proceder el delegante, si lo quiere, mediando indemnización. Mientras la recuperación no tenga lugar, esos bienes son propiedad del delegatario; no pueden pues formar parte del dominio público. // 3º Una última categoría consiste en los bienes propios del delegatario: los inmuebles que ha construido o adquirido con sus propios fondos. Estos bienes son de su propiedad: no forman parte del dominio público". Véase Jean-Marie Auby, Pierre Bon, Jean-Bernard Auby, Philippe Terneyre, *Droit administratif des biens*, 5ª edición, Col. Précis de Droit Public et Science Politique, Dalloz, Paris 2008, **Anexo BC-[]**, página 108.

conforme a lo explicado por de Laubadère debe establecerse en las cláusulas del contrato (*cahier des charges*), los primeros (*bienes propios*) son los bienes no reversibles, que son los adquiridos por el concesionario, que "no son parte integral de la explotación," es decir, que no están afectados al objeto de la concesión. Los mismos permanecen en la propiedad del concesionario y sólo podrían ser adquiridos por la autoridad concedente, mediando una indemnización. Los segundos (*biens de retour*) son los bienes reversibles, que son todos aquellos que son "parte integral de la concesión" generalmente de carácter inmobiliario, afectados por el concesionario a la realización del objeto de la misma, por ejemplo, para la prestación del servicio, para la explotación de la obra pública o para la explotación del bien del dominio público concedido, y que son los bienes necesarios o imprescindibles para la continuación de la actividad concedida. Estos bienes pasan a la Administración sin pago de indemnización alguna al finalizar la concesión; y ello precisamente, según lo explicado por de Laubadère, es lo que los distingue de la tercera categoría (*biens de reprise),* que son aquellos bienes de propiedad del concesionario, que por su utilidad relacionada con la actividad concedida, la Administración puede decidir adquirir, mediando una indemnización.[39]

41. De igual forma, la doctrina venezolana recoge esta distinción entre los diversos bienes que pueden existir en poder del concesionario al finalizar la concesión. Al respecto, por ejemplo, Carlos García Soto ha indicado que:

> "La reversión implica una entrega gratuita de bienes, libres de gravámenes, porque, mediante ella, sólo se entregarán aquellos que ya hayan sido amortizados y sean indispensables para la gestión del servicio; son los llamados de retorno. Los bienes propios del concesionario y no indispensables para la prestación de la obra o servicio, y por ello no afectos a la reversión no pueden pasar a manos de la

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[39] André de Laubadère, *Traité des contrats administrattifs*, Librairie Général de Droit et de Jurisprudence, Tomo III, Paris 1956, **Anexo BC-[]**, páginas 211-222. La distinción formulada por de Laubadère también influyó, por ejemplo, en la doctrina española. Así, por ejemplo, Fernando Garrido Falla distinguió entre "1. Bienes reversibles (*biens de retour*), es decir, aquellos que por estar afectados al objeto de la concesión deben pasar a ser propiedad de la Administración concedente una vez que expire el plazo concesional.; 2. Bienes accesorios o de reversión indemnizable (*biens de reprise*), aquellos que, por su utilidad para la explotación del servicio, son de reversión facultativa para la Administración, pero debiendo pagar su precio al concesionario […].y 3. Bienes de propiedad del concesionario: aquellos que no forman parte de los dos grupos anteriores." Véase Fernando Garrido Falla, "Efectos económicos de la caducidad de las concesiones administrativas," en *Revista de Administración Pública*, Nº 45, Madrid 1964, **Anexo BC-[]**, páginas 235-237.

> Administración, y aquellos útiles a la reversión, más no indispensables deben ser pagados mediante indemnización por parte de la Administración."[40]

42. La clasificación arriba mencionada ha sido adoptada también por la Procuraduría General de la República, como órgano de asesoría jurídica de la República. La Procuraduría, en efecto, aun cuando refiriéndose exclusivamente a las concesiones de servicio público, luego de admitir que la reversión en la concesiones "puede ser total o parcial, esto es, del conjunto de bienes (obras, instalaciones y demás elementos materiales) afectados al servicio, o solamente de determinados bienes especificados en las cláusulas de la concesión,"[41] precisó que para la determinación de los bienes reversibles "se requiere de una *cuidadosa distinción entre los diferentes bienes*" adoptando para ello, el mismo criterio seguido por la doctrina francesa, de bienes reversibles (*biens de retour*), que pasan al Estado sin compensación; y bienes no reversibles (*biens de reprise;* y *biens propres*) que sólo pueden ser adquiridos por el Estado mediando indemnización, así:

> "1. Bienes reversibles (*biens de retour*), es decir aquellos que deben pasar a ser propiedad de la autoridad concedente una vez extinguida la concesión. Pertenecen a este grupo, en primer lugar, las obras e instalaciones que el concesionario se obligó a construir, los bienes aportados por el concesionario o adquiridos por cualquier título, de derecho público -expropiación- o de derecho privado (compraventa), necesarias o imprescindibles al funcionamiento del servicios público concedido.
>
> Otro grupo estará constituido, por aquellas dependencias del dominio del Estado que fueron puestas a disposición del concesionario; éstos, más que objeto de reversión propiamente dicha, son bienes en que simplemente cesa la ocupación del concesionario, por el carácter de accesoriedad y que, en consecuencia, deben revertirse a la autoridad concedente.

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40 Véase Carlos García Soto, "Reversión de bienes en el contrato de concesión," en la Revista *Derecho y Sociedad. Revista de los estudiantes de la Universidad Monteávila*, Caracas 2003, **Anexo BC-[]**, página 97.

41 Véase Dictamen Nº 324, A.E. de 8 de marzo de 1972 en 20 *Años de Doctrina de la Procuraduría General de la República 1962-1981*, Tomo III, Vol. I, Caracas 1984, **Anexo BC-[]**, páginas 142 ss. En este mismo sentido, véase Rafael Badell Madrid, *Régimen jurídico de las concesiones en Venezuela*, Caracas 2002, **Anexo BC-[]**, páginas 271 ss.

> 2. Bienes de rescate (*biens de reprise*), aquellos que, tratándose de una reversión total, a juicio de la autoridad concedente, son útiles para la explotación del servicio. En esta categoría, el elemento esencial y determinante es la idea de afectación al servicio público.
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> En materia de reversión rigen, como señala Villar Palasi (ob. Cit. P. 758) el principio de la unidad pertenencial, según el cual las obras e instalaciones objeto de la reversión, se delimitan por su afectación al servicio público de que se trate, así como el principio de unidad reversional, por el cual todos esos bienes, revierten a favor del beneficiario, sin posible división.
>
> 3. Bienes propiedad del concesionario (*biens propres*): aquellos bienes que no forman parte de los dos grupos anteriores, es decir, los bienes adquiridos por el concesionario que no forman parte integrante -por adscripción o por destino- de la explotación del servicio público. Tales bienes podrá adquirirlos la autoridad concedente, mediando una indemnización."[42]

43. Conforme a lo antes expuesto, el signo común de todas las clasificaciones mencionadas, es que los bienes reversibles en las concesiones administrativas son los bienes que al concluir el plazo de la concesión, están afectos al objeto de la misma, es decir, a las actividades que constituyen el objeto del derecho concedido por la Administración al concesionario. Tal derecho, como se ha dicho, puede ser por ejemplo la prestación de un servicio público, la explotación de una obra pública o la explotación de un bien del dominio público, como sería el caso de las concesiones de explotación de un yacimiento minero. En este último caso de las concesiones mineras, el derecho concedido es, en efecto, la exploración y explotación de minerales, por lo que los bienes que revierten al Estado a título gratuito sólo son aquellos que se encuentran afectados a dichas tareas de exploración y explotación de los yacimientos. En ningún caso, por tanto, la reversión gratuita puede abarcar bienes que no estén afectos al objeto de la concesión otorgada o estén destinados a actividades distintas a las que son objeto de la concesión, los cuales sin embargo pueden ser adquiridos por el Estado pero siempre mediando el pago de una indemnización.

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[42] Dictamen Nº 324, A.E. de 8 de marzo de 1972 en 20 *Años de Doctrina de la Procuraduría General de la República* 1962-1981, Tomo III, Vol. I, Caracas 1984, **Anexo BC-[]**, páginas 164-165.

VI. EL RÉGIMEN DE LA REVERSIÓN EN LA LEGISLACIÓN DEL SECTOR MINERO EN VENEZUELA

1. La situación previa al dictado de la Ley de Minas de 1999

44. Como se explicó anteriormente, la institución de la reversión tiene una larga tradición en Venezuela, incluyendo su regulación parcial en disposiciones constitucionales y en diversas leyes especiales (***Ver supra* ¶¶ 31 ss**), como consecuencia del establecimiento de un régimen de reserva al Estado de determinadas actividades y la previsión de la posibilidad de su desarrollo por los particulares mediante concesión. Ese fue el caso, por ejemplo, de la Ley de Minas de 1945[43], que permitió al Ejecutivo Nacional disponer la reserva de "la exploración y explotación de todas las sustancias a que se refiere el artículo 2º o de alguna de ellas, en todo el territorio nacional o en la zona o zonas que se determinarán," previendo sin embargo, en su artículo 11, que el Estado podía otorgar "concesiones [de exploración y subsiguiente explotación] respecto de tales reservas". La ley además, identificó el objeto esencial de las concesiones mineras que es la "explotación" de minerales, en el sentido de la acción de extraer las sustancias minerales de los yacimientos, al indicar expresamente, que "se entiende que la concesión esta en *explotación* cuando se *estuvieren extrayendo de esta las sustancias* a que se refiere la presente Ley, o *haciéndose lo necesario para lograr su extracción* mediante las obras que según el caso fueren apropiadas a este fin."[44]

45. Respecto de dichas concesiones de explotación, la Ley de Minas de 1945 también reguló la reversión en relación con las mismas, disponiendo en su artículo 61 que una vez extinguida la concesión, la misma, es decir, el derecho minero otorgado mediante la concesión "vuelve a poder del Estado," y con ella, "todas las obras y demás mejoras permanentes que en ella hubiere," es decir, que hubiere en la concesión, por supuesto destinadas a la realización del objeto de la actividad concedida que era el "derecho de explotación minera"[45].

46. En consecuencia, todos los otros bienes del concesionario que hubiesen estado destinados a otras actividades distintas a las actividades mineras de explotación, aun cuando estuviesen ubicados en el área de la concesión, no estaban sujetos a reversión, por lo que los concesionarios tenían ex-

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43 Ley de Minas de 1945, **Anexo C-1**.

44 Ley de Minas de 1945, **Anexo C-1**, artículo 24.

45 Ley de Minas de 1945, **Anexo C-1**, artículo 13.

preso derecho de retirarlos del perímetro de la concesión. De no hacerlo, se consideraba que eran bienes abandonados, y podían ser apropiados por el Estado al término de la concesión, no a título de reversión, sino de adquisición de bienes abandonados.[46]

47. Esas previsiones sobre la reversión establecidas en el artículo 61 de la Ley de Minas de 1945, se desarrollaron mediante diversas normas reglamentarias que fueron establecidas, primero, en el Decreto Nº 2039 del 15 de febrero de 1977,[47] y posteriormente en la Resolución Nº 115 de 20 de marzo de 1990[48] del Ministerio de Energía y Minas contentiva de las "Normas para el Otorgamiento de Concesiones y Contratos Mineros" en la cual se precisó que los bienes que estaban sujetos a reversión en las concesiones mineras eran "los bienes de la concesión"[49], siendo tales los que el artículo 61 de la Ley de Minas de 1945 identifica como "las obras y demás mejoras permanentes" de la concesión, es decir, afectos a la concesión y por tanto, destinados a la explotación minera.[50]

48. Como antes se ha dicho, con anterioridad a la Ley de Minas de 1999, e incluso antes de la Ley de Minas de 1945, en Venezuela se dictó la Ley de Hidrocarburos de 1943 en la cual se estableció una reserva a favor del Estado en la materia, que abarcó no sólo la exploración y explotación de hi-

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46 Ley de Minas de 1945, **Anexo C-1**, artículo 61.

47 Decreto Nº 2039, de 15 de febrero de 1977, en *Gaceta Oficial* Nº 31.175, de 15 de febrero de 1977, **Anexo BC-[]**. Sobre reversión: artículos 2 y 5.

48 Resolución Nº 115, de 20 de marzo de 1990, en *Gaceta Oficial* Nº 34.448, de 16 de abril de 1990, **Anexo BC-[]**, página 273.329 ss.

49 Resolución Nº 115, de 20 de marzo de 1990, en *Gaceta Oficial* Nº 34.448, de 16 de abril de 1990, **Anexo BC-[]**, artículo 19.

50 Esta previsión de la Resolución Nº 115, de 20 de marzo de 1990, en *Gaceta Oficial* Nº 34.448, de 16 de abril de 1990, **Anexo BC-[]** es particularmente relevante en la materia, si se tiene en cuenta que con la misma se sustituyeron las anteriores normas reglamentarias relativas a la misma, como fueron las Normas para el Otorgamiento de Permisos de Prospección, Concesiones y Contratos Mineros, establecidas en la Resolución Nº 528, de 17 de diciembre de 1986, en *Gaceta Oficial* Nº 33.729, de 1 de junio de 1987, **Anexo BC-[]**, página 261.351; y las Normas para el Otorgamiento de Concesiones Mineras reguladas en la Resolución Nº 148, de 21 de marzo de 1978, en *Gaceta Oficial* Extra Nº 2.210, de 6 de abril de 1978, **Anexo BC-[]**, las cuales al enumerar los bienes sujetos a reversión, incluyeron "las tierras, obras y demás mejoras permanentes, maquinaria, útiles, enseres y materiales, incluidos instalaciones, accesorios equipos, además de cualesquiera otros bienes *afectos a la concesión o utilizados en operaciones conexas o derivadas de ella*." Esta norma, sin embargo, desapareció en la Resolución Nº 115, de 20 de marzo de 1990, en *Gaceta Oficial* Nº 34.448, de 16 de abril de 1990, **Anexo BC-[]**, a la que me refiero en el párrafo 47 arriba.

drocarburos, sino su manufactura y refinación y su transporte. Por ello, en dicha ley, a diferencia de la legislación minera, se distinguieron cuatro tipos de concesiones: (i) concesiones de exploración y subsiguiente explotación (artículos 12-21); (ii) concesiones de explotación (artículos 22-27); (iii) concesiones de manufactura y refinación (artículos 28- 31), y (iv) concesiones de transporte (artículos 32- 37).[51] Precisamente por ello, y de acuerdo con ese ámbito de reserva y de las diversas concesiones, en el artículo 80 de la Ley de Hidrocarburos de 1943,[52] se estableció el régimen de la reversión en dichas concesiones en ella reguladas, cuyo alcance fue desarrollado posteriormente en la Ley de Reversión.[53] En dicha Ley, en relación con los bienes reversibles en los diversos tipos mencionados de concesiones de hidrocarburos, se enumeraron globalmente en su artículo 1, los siguientes bienes: "tierras, obras permanentes, incluyendo instalaciones, accesorios y equipos que formen *parte integral de ellas*; y los otros bienes adquiridos *con destino o afectos a los trabajos* de exploración, explotación, manufactura, refinación o transporte en las concesiones de hidrocarburos", incluyendo además, salvo prueba en contrario, "cualesquiera otros bienes corporales o incorporales adquiridos por los concesionarios."

49. En todo caso, conforme a esta ley, y según lo precisó la jurisprudencia de la Corte Suprema de Justicia (***Ver supra* ¶ 36**), el dato esencial para calificar un bien como bien reversible entonces fue que formase "parte integral" de la concesión, por supuesto según el tipo de concesión, y que, por tanto, estuviese destinado o afecto a los trabajos propios de los títulos concedidos, es decir, del objeto de la concesión. En esta forma, en esencia, la Ley de Reversión mantuvo el principio de que sólo los bienes formaban parte integral de la concesión y que estaban destinados o afectados al objeto de la misma, eran los bienes que revertían al Estado, dependiendo en todo caso, de la actividad específica objeto de cada concesión que podía ser de

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51 Ver Ley de Hidrocarburos de 1943, **Anexo BC-[]**.

52 La previsión se estableció, incluso, antes de que se regulara la institución en el artículo 70 de la Constitución de 1947, **Anexo BC-[]**. El artículo 80 de la Ley de Hidrocarburos de 1943, **Anexo BC-[]** estipula: "La Nación readquirirá, sin pagar indemnización alguna, las parcelas concedidas y se hará propietaria, del mismo modo, de todas las obras permanentes que en ellas se hayan construido."

53 Ley de Reversión, **Anexo BC-[]**. Véase en general sobre esta Ley: Arístides Rengel-Romberg, "El derecho de reversión en la legislación de minas e hidrocarburos", *Estudios jurídicos: estudios procesales, escritos periodísticos, pareceres jurídicos*, Academia de Ciencia Políticas y Sociales, Caracas 2003, **Anexo BC-[]**, páginas 283 ss.

exploración y subsiguiente explotación, de explotación, de manufactura y refinación, y de transporte de hidrocarburos.

50. En contraste con el régimen en el sector de hidrocarburos, en las Leyes de Minas de 1945 y 1999, en cambio, se estableció la reserva al Estado de sólo las actividad de exploración y explotación minera, por lo que se reguló un sólo tipo de concesión – de exploración y explotación de minerales o yacimientos mineros. Por ello, el principio de la reversión en el sector minero está limitado a los bienes destinados a la realización de la actividad que se concede como objeto del único tipo concesión, que es la exploración y explotación de minerales.

2. La institución de la reversión en la Ley de Minas de 1999

A. La Ley de Minas de 1999 y el régimen de su aplicación respecto de las concesiones otorgadas con anterioridad

51. Como antes se indicó (**Ver *supra,* ¶ 30***)***, la Ley de Minas de 1999 derogó la ley anterior de 1945, con lo cual, a partir de su entrada en vigencia, en principio, sus normas comenzaron a tener efecto y a aplicarse incluso a las concesiones mineras otorgadas con anterioridad[54]. Es decir, conforme al principio *lex posterior derogat priori*, la Ley de Minas de 1999 derogó o modificó todas las previsiones de la Ley de Minas de 1945 que fueran contrarias a sus previsiones, salvo las excepciones precisas previstas en la propia Ley de Minas de 1999.

52. Dichas excepciones respecto del principio de la aplicación inmediata de la Ley de Minas de 1999 a las concesiones otorgadas con anterioridad, se establecieron en el artículo 129 de la Ley de Minas de 1999 y se refirieron: *primero*, al derecho a explotar las minas anteriormente otorgado mediante concesión, el cual debía preservarse en cuanto a los minerales y forma de presentación, en los términos previstos en la concesión original; *segundo*, a los nuevos impuestos establecidos en la ley que sólo se aplicarían a los concesionarios después del transcurso de un año a partir de su publicación en la Gaceta Oficial; *tercero*, a la duración de las concesiones que quedaba conforme al plazo que se había establecido en el título original de la concesión, contado a partir de la fecha de la publicación del título minero; y *cuarto*: a las

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[54] Ley de Minas de 1999, **Anexo C-19**, artículos 129 y 136.

ventajas especiales ofrecidas a la República en los títulos originales de las concesiones, que los concesionarios quedaron obligados a mantener.[55]

53. En consecuencia, en el caso de las concesiones otorgadas con anterioridad a la entrada en vigencia de la nueva Ley de Minas de 1999, como fue caso de las Concesiones de *Minera Loma de Níquel*, sus disposiciones se les comenzaron a aplicar a partir de su entrada en vigencia[56], salvo en lo previsto en las excepciones del mencionado artículo 129.

B. El tratamiento de la reversión en la Ley de Minas de 1999

54. Siguiendo la misma orientación de Ley de Minas de 1945 (**Ver *supra,* ¶ 50***)*, en la Ley de Minas de 1999 se reguló un sólo tipo de concesión, expresando su artículo 25 que "las concesiones que otorgue el Ejecutivo Nacional conforme a esta Ley serán únicamente *de exploración y subsiguiente explotación*, y su duración no excederá de veinte (20) años, contados a partir de la fecha de publicación del Certificado de Explotación en la *Gaceta Oficial*."

55. En relación a estas concesiones de exploración y subsiguiente explotación, la Ley de Minas de 1999 también reguló la figura de la reversión de los bienes adquiridos con destino a las actividades mineras concedidas, derogando la previsión que en la materia estaba consagrada en la Ley de Minas de 1945 (**Ver *supra,* ¶ 45***)*, a cuyo efecto, en el artículo 102 se dispuso lo siguiente:

> "Artículo 102. Las tierras, obras permanentes, incluyendo las instalaciones, accesorios y equipos que formen parte integral de ellas, así como cualesquiera otros bienes muebles o inmuebles, tangibles e intangibles, adquiridos con destino a las actividades mineras**,** deben ser mantenidos y conservados por el respectivo titular en comprobadas condiciones de buen funcionamiento, según los adelantos y principios técnicos aplicables, durante todo el término de duración de los derechos mineros y de su posible prórroga, y pasarán en plena propiedad a

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55 La Sala Constitucional del Tribunal Supremo se pronunció expresamente sobre la constitucionalidad del mencionado artículo 129 de la Ley de Minas de 1999. Véase Sentencia Nº 37 de la Sala Constitucional del Tribunal Supremo de Justicia, *Asociación Cooperativa Civil Mixta La Salvación SRL,* (Registro Nº 00-1496), de 27 de enero de 2004, **Anexo BC-[]**.

56 El artículo 129 (e) de la Ley de Minas de 1999 dispuso que sus previsiones se comenzarían a aplicar a las concesiones otorgadas con anterioridad, luego de un año de su publicación en la *Gaceta Oficial*.

> la República, libres de gravámenes y cargas, sin indemnización alguna, a la extinción de dichos derechos, cualquiera sea la causa de la misma."

56. En esta forma, esta norma de la Ley de Minas de 1999, precisa que la reversión de bienes en materia de concesiones de exploración y subsiguiente explotación procede sólo respecto de los bienes adquiridos por el concesionario "*con destino a las actividades mineras*" que realice con base en la concesión de exploración y explotación otorgada, y forman parte integral de ella. Por tanto, todos los otros bienes adquiridos por el concesionario y no destinados a las actividades mineras otorgadas en la concesión, incluyendo las actividades auxiliares o conexas que no son parte del objeto de la concesión, no pueden considerarse como bienes "reversibles."[57]

57. Dichas actividades auxiliares y conexas de la minería, que no forman parte del objeto de la concesión minera, por otra parte, se han regulado expresamente en el artículo 86 de la Ley de Minas de 1999. Allí se establece el ámbito de la potestad de control del Estado (vigilar e inspeccionar) en relación con las actividades de los concesionarios mineros.[58] Dicha potestad incluye no sólo las actividades mineras que sean objeto de una concesión, sino además las actividades que puedan realizar los concesionarios que sean distintas a las actividades mineras concedidas, que se denominan en la Ley como actividades conexas o auxiliares de la minería. El artículo 86, en efecto, prevé lo siguiente:

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[57] Sobre estos bienes no reversibles, por otra parte, debe observarse que en la Ley de Minas de 1999, **Anexo C-19**, se eliminó la previsión contenida en el artículo 61 de la Ley de Minas de 1945, **Anexo C-1**, en relación con la "presunción de abandono" respecto de bienes propiedad del concesionario no afectos a las actividades mineras objeto de la concesión, que se consideraba que pasaban al dominio del Estado cuando no eran retirados oportunamente del perímetro de la concesión, no en virtud de reversión, sino de adquisición de bienes abandonados. En todo caso, la posibilidad misma de que bienes no reversibles pudieran pasar a propiedad del Estado al término de las concesiones conforme a esa "presunción de abandono," no tiene aplicación alguna a partir de la entrada en vigencia de la Ley de Minas de 1999, aun cuando las concesiones hubiesen sido otorgadas con anterioridad.

[58] En ejercicio de dichas potestades, la Ley de Minas de 1999 estableció en sus artículos 37 y 103 la obligación de los concesionarios de presentar al Ministerio de Energía y Minas informes sobre la totalidad de las actividades mineras, incluyendo, en su caso, inventarios de bienes. Véase Ley de Minas de 1999, **Anexo C-19**, artículos 37 y 103.

> "Artículo 86. El almacenamiento, tenencia, beneficio, transporte, circulación y comercio de los minerales regidos por esta Ley, estarán sujetos a la vigilancia e inspección por parte del Ejecutivo Nacional y a la reglamentación y demás disposiciones que el mismo tuviera por conveniente dictar, en defensa de los intereses de la República y de la actividad minera. Cuando así convenga al interés público, el Ejecutivo Nacional podrá reservarse mediante decreto cualquiera de dichas actividades con respecto a determinados minerales."

58. La distinción entre las actividades de explotación o extracción minera, y otras actividades conexas o auxiliares en materia minera, en concesiones de explotación de minerales como el níquel de manto, deriva además de otras previsiones de la propia Ley de Minas. Por ejemplo, en relación con el régimen tributario, y en particular, el "impuesto de explotación" que grava o se causa precisamente sólo por la "*extracción* del mineral" que es la explotación, se pague "dentro los primeros quince (15) días continuos del mes siguiente *al de la extracción que lo cause*." En el caso de la explotación de minerales como el níquel de manto, por tanto, el artículo 90.2 (c) de la Ley precisa además, que el valor comercial de la mina sobre el cual debe aplicarse el porcentaje para el cálculo del impuesto, debe incluir "los costos en que se incurra *hasta el momento en que el mineral extraído, triturado o no, sea depositado en el vehículo que ha de transportarlo fuera de los límites del área otorgada o a una planta de beneficio o refinación, cualquiera sea el sitio donde ésta se localice*."[59] Las actividades desarrolladas después de que el mineral extraído se deposite en los vehículos de transporte, son actividades conexas o auxiliares distintas de la explotación, que es el único objeto de la concesión, y que pueden realizarse tanto por el concesionario como por otras personas, dentro o fuera del área de la concesión, incluso mediante plantas industriales de beneficio o refinación.

59. Lo importante de la distinción legal establecida en estas normas entre las actividades que pueden realizar los concesionarios como consecuencia del objeto de la concesión y que son las reservadas al Estado, y las actividades conexas o auxiliares que también pueden realizar los concesionarios, distintas a las que son el objeto de la concesión, es que de ella se deriva cuáles de los bienes del concesionario están afectados a la explotación minera (extracción del mineral) y por tanto son bienes reversibles; y

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[59] Ley de Minas de 1999, **Anexo C-19**.

cuáles, por estar destinados a otras actividades auxiliares y conexas, no son bienes susceptibles de reversión.

60. La distinción que deriva de las norma antes citadas, entre las diversas actividades que pueden realizar los concesionarios, por supuesto, es sin perjuicio de que toda están sometidas a "la vigilancia e inspección" del Estado, lo cual también se encontraba previsto en la Ley de Minas de 1945.[60] En todo caso, la disposición más precisa del artículo 86 de la Ley de Minas de 1999, al regular las potestades de control del Estado, comenzó a regir con la entrada en vigencia de sus disposiciones, incluso respecto de las concesiones otorgadas con anterioridad.

VII. EL RÉGIMEN DE LA REVERSIÓN APLICABLE A LAS CONCESIONES DE MINERA LOMA DE NÍQUEL

1. Las Concesiones de Minera Loma de Níquel y el régimen de los bienes reversibles y no reversibles

61. Tal como surge de los títulos expedidos por el Ministerio de Energía y Minas, todas las Concesiones de *Minera Loma de Níquel* concedidas en 1992 y republicadas en 2000, conforme a las previsiones de la Ley de Minas de 1945 fueron "concesiones de explotación de níquel de manto." Las mismas fueron otorgadas precisamente con el objeto de la "explotación" del mineral "níquel de manto" en el Depósito Loma de Níquel[61] por el período indicado en las concesiones, en el sentido de extracción de minerales que era la actividad reservada al Estado, confiriéndole además a *Minera Loma de Níquel*, el derecho exclusivo de "aprovechar" el mineral extraído,

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60 En la Ley de Minas de 1945, por ejemplo, se distinguía en las actividades de "exploración y explotación" de minerales que eran el objeto de las concesiones, de las actividades de "beneficio y transporte" de los minerales, que no era el objeto de la concesión. Ley de Minas de 1945, **Anexo C-1**, artículo 94.1. En todo caso, a los efectos del ejercicio de sus potestades de control, los concesionarios estaban obligados a informar al Ministerio de Energía y Minas sobre todas las actividades que realizasen, sin distinción entre aquellas que eran el objeto de la concesión, y las que eran auxiliares y conexas. Véase, Ley de Minas de 1945, **Anexo C-1**, artículos 94.6 y 94.7.

61 Sobre el término "explotación" se recuerda que el artículo 58 de la Ley de 1999, considera que una mina está en "explotación" "cuando se estuviere extrayendo de las minas las sustancias que la integran o haciéndose lo necesario para ello, con ánimo inequívoco de aprovechamiento económico de las mismas y en proporción a la naturaleza de la sustancia y la magnitud del yacimiento." Véase Ley de Minas de 1999, **Anexo C-19**, artículo 58.

como actividad auxiliar o conexa en los términos del artículo 86 de la Ley de Minas de 1999[62]

62. Precisamente con base a la distinción legal respecto de las diversas actividades del concesionario, en materia de reversión de bienes en las Concesiones Restantes se previó que:

> "es entendido que las obras y demás mejoras permanentes, además de la maquinaria, útiles y materiales, incluyendo las instalaciones, accesorios y equipo y cualesquiera otros bienes *utilizados con destino al objeto de la concesión y que formen parte integral de ella*, sea cual fuere el título de adquisición, pasarán en plena propiedad a la Nación libres de gravámenes o cargas, sin indemnización alguna, al extinguirse por cualquier causa la concesión."[63]

63. De acuerdo con esta disposición, por tanto, los bienes reversibles eran sólo aquellos que fueran "utilizados con destino al objeto de la concesión" que era la explotación minera, *y que además*, acumulativamente, "formen parte integral de ella," es decir, de la concesión de exploración y explotación minera. Ello deriva de la utilización, en la frase, de la conjunción copulativa "*y*", que denota el sentido de suma o acumulación, de manera de reunir en una sola unidad funcional los dos elementos que la componen (bienes "utilizados con destino al objeto de la concesión," y bienes "que formen parte integral de ella"), indicando su adición.

64. Conforme a esta estipulación contractual de las Concesiones de *Minera Loma de Niquel,* se estableció entonces un ámbito detallado y preciso

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62 Ley de Minas de 1945, **Anexo C-1**, artículo 188 ("El certificado que se expida conforme al artículo 182 y los títulos que se expidan de conformidad con los artículos 186 y ordinal 4º del artículo 187, confieren al concesionario, sus herederos o causahabientes, y siempre que cumplan con las disposiciones legales, el derecho exclusivo, que durará cuarenta años, a contar de la fecha de la publicación del respectivo certificado o título en la *Gaceta Oficial* de los Estados Unidos de Venezuela, de *extraer*, dentro de los límites de la correspondiente parcela de explotación, *el mineral concedido*, con arreglo en todo a las disposiciones pertinentes de la presente Ley"), y Ley de Minas de 1999, **Anexo C-19**, artículo 24 ("La concesión minera confiere a su titular el derecho exclusivo *a la exploración y explotación de las sustancias minerales otorgadas* que se encuentren dentro del ámbito espacial concedido).

63 Cláusula 17, concesiones mineras El Tigre, San Onofre Nº 1, 2 y 3, Camedas Nº 1, 2, 3, 4 y 5, y San Antonio Nº 1 en *Gaceta Oficial* Extra, Nº 4.490, de 10 de noviembre de 1992, **Anexo C-3**. En el mismo sentido se prevé en la cláusula 18 de las concesiones mineras revisadas de 2000. Véase concesiones mineras revisadas San Onofre Nº 3, Camedas Nº 1, 2, 3, 4 y 5, y San Antonio Nº 1, en *Gaceta Oficial* Extra. Nº 5.432, de 7 de enero de 2000, **Anexo C-20**.

de los bienes reversibles en las mismas en relación con todos los bienes adquiridos por la concesionaria "utilizados con destino al objeto de la concesión" y "que formen parte integral" de la misma, es decir, destinados o afectos a la "explotación" del mineral denominado "níquel de manto," que eran los que debían revertir al Estado. Este ámbito, por lo demás, tiene el mismo sentido del establecido en la previsión del artículo 102 de la Ley de Minas de 1999 (que reemplazó la regulación del artículo 61 de la Ley de Minas de 1945), en el sentido de que la reversión solamente se refiere a los bienes "adquiridos con destino a las actividades mineras [de explotación de níquel de manto]" que es lo que constituye el objeto de las concesiones.

65. Como resultado de lo anterior, al extinguirse las Concesiones Restantes de *Minera Loma de Níquel*, es claro que sólo los bienes adquiridos o utilizados por la concesionaria para la realización de las actividades objeto de las respectivas Concesiones, podían considerarse como bienes reversibles. Al contrario, cualquier otro bien adquirido o utilizado por la concesionaria para actividades distintas de la explotación de níquel de manto, como las auxiliares o conexas en los términos del artículo 86 de la Ley de Minas, debía considerarse como bien no reversible. En materia minera, en general, puede afirmarse que dichas actividades auxiliares o conexas no han sido reservadas al Estado, por lo que para su realización no se requiere concesión administrativa alguna. Sólo recientemente, y en forma puntual, en la misma orientación de la última frase del artículo 86 de la Ley de Minas ("Cuando así convenga al interés público, el Ejecutivo Nacional podrá reservarse mediante decreto cualquiera de dichas actividades con respecto a determinados minerales.") se decidió mediante Ley la reserva al Estado de determinadas actividades conexas o auxiliares a la minería, específicamente en materia de la industria siderúrgica en relación con el mineral de hierro, y de las actividades conexas y accesorias a la explotación del mineral de oro (***Ver supra* ¶ *27***, **Nota 15**).[64]

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[64] Se destaca, en particular, respecto de la distinción anotada, que la Ley Orgánica que Reserva al Estado las Actividades de Exploración y Explotación del Oro, así como las conexas y auxiliares a éstas, de 2011, reformada en 2014, distinguió con toda precisión, lo que son "las actividades primarias" en materia de exploración y explotación de oro, de lo que son las actividades "conexas y auxiliares al aprovechamiento del oro"; a cuyo efecto en su artículo 6, *definió por actividades primarias* "la exploración y explotación de minas y yacimientos de oro," y *por actividades conexas y auxiliares*, "el almacenamiento, tenencia, beneficio, transporte, circulación y comercialización interna y externa del oro, en cuanto coadyuven al ejercicio de las actividades primarias". Ley Orgánica que Reserva al Estado las Actividades de Exploración y Explotación del Oro, **Anexo BC-[]**, articulo 6.

No existe en la legislación venezolana una reserva similar en relación a la industria de níquel.

2. La realización de actividades auxiliares o conexas por parte de Minera Loma de Níquel

66. Por otra parte, en el caso de las Concesiones Restantes de *Minera Loma de Níquel,* de su texto también surge claramente la distinción entre la actividad primaria de explotación minera y las actividades auxiliares y conexas. Entre esas otras actividades distintas al objeto de la concesión estuvieron las que realizó la concesionaria *Minera Loma de Níquel* en cumplimiento con determinadas Ventajas Especiales estipuladas en las concesiones, tales como:

- La "incorporación del valor agregado nacional por metalurgía, refinación, manufactura o industrialización si lo considerase posible o conveniente," a su sola decisión.[65]
- La venta a los interesados de un determinado porcentaje de la producción "en caso de establecerse en el futuro una industria vinculada con la transformación de los minerales" objeto de la concesión; y de "comprobarse que tal industria sea beneficiosa" establecer "su propia empresa."[66]
- La continuación del "desarrollo de actividades de aplicación industrial de los minerales, mediante el aporte de la tecnología adecuada y la oportuna creación de los correspondientes establecimientos industriales en campos aún no existentes en el país."[67]

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65 Concesiones mineras Camedas Nº 1 y 3, y San Antonio Nº 1 en *Gaceta Oficial* Extra, Nº 4.490, de 10 de noviembre de 1992, **Anexo C-3**, cláusula 5 ("La concesionaria ofrece la incorporación del valor agregado nacional por metalurgia, refinación, manufactura o industrialización si lo considera posible o conveniente [..]".

66 Concesiones mineras Camedas Nº 1 y 3, y San Antonio Nº 1 en *Gaceta Oficial* Extra, Nº 4.490, de 10 de noviembre de 1992, **Anexo C-3**, cláusula 10 ("En caso de establecerse en el futuro una industria vinculada con la transformación de los minerales objeto de la presente concesión, o de requerirlo el Estado para fines educativos, investigativos o científicos, la concesionaria se compromete a solicitud de los interesados a vender a éstos en conjunto, hasta el 25 % de su producción a valor de mercado. En caso de comprobarse que tal industria sea beneficiosa se compromete a establecer su propia empresa en el país.").

67 Concesiones mineras Camedas Nº 1 y 3, y San Antonio Nº 1 en *Gaceta Oficial* Extra, Nº 4.490, de 10 de noviembre de 1992, **Anexo C-3**, cláusula 11 ("La concesionaria se compromete a continuar el desarrollo de actividades de aplicación industrial de los minerales, mediante el aporte de la tecnología adecuada y la oportu-

67. Ninguna de esas actividades estaban o están reservadas al Estado, y por tanto, no sólo no formaron parte del objeto de las concesiones, sino que podían ser desarrolladas libremente por la concesionaria *Minera Loma de Níquel,* la cual podía realizarlas incluso a su sola decisión, "si lo considerase posible o conveniente,"[68] y sin necesidad de intervención estatal adicional alguna (excepto, por ejemplo, la obtención de las autorizaciones administrativas que pudieran requerirse previstas en la legislación sobre ordenación del territorio o conservación y protección del ambiente).

68. En el caso de las Concesiones de *Minera Loma de Níquel*, de acuerdo a lo establecido en las antes mencionadas cláusulas relativas a Ventajas Especiales, la empresa desarrolló un proceso industrial para la producción de ferroníquel, que es un producto refinado de hierro y níquel. Con este propósito, *Minera Loma de Níquel* construyó entre 1999 y 2001, y luego puso en operación, una planta metalúrgica de su exclusiva propiedad, situada en el área de las concesiones. Además de corresponderse con las Ventajas Especiales ofrecidas en las concesiones, dicho proceso industrial es una actividad conexa o auxiliar equiparable al "beneficio" del mineral extraído a que se refiere el artículo 86 de la Ley de Minas de 1999[69].

69. En consecuencia, todos los bienes destinados y utilizados para dichas actividades conexas o auxiliares, que no constituían el objeto de las Concesiones de *Minera Loma de Níquel*, eran bienes que no estaban sujetos a reversión conforme a lo dispuesto en el artículo 102 de la Ley de Minas de 1999, y que, por tanto, continuaron siendo de exclusiva propiedad de *Minera Loma de Níquel* al extinguirse las Concesiones Restantes.

3. Situación de los bienes que quedaron en el sitio de las Concesiones a la fecha de su expiración

70. Con base en esta distinción establecida en la Ley y las Concesiones Restantes los *Minera Loma de Níquel* identificó en su comunicación al Ministerio de Energía y Minas de fecha 18 de octubre de 2012 (***Ver supra* ¶ 22**), solicitó una compensación con relación a sus bienes no reversibles. Estos

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na creación de los correspondientes establecimientos industriales en campos aún no existentes en el país.").

68 Concesiones mineras Camedas Nº 1 y 3, y San Antonio Nº 1 en *Gaceta Oficial* Extra, Nº 4.490, de 10 de noviembre de 1992, **Anexo C-3**, cláusula 5.

69 Es precisamente el beneficio del mineral níquel de manto en la planta industrial construida por la concesionaria, el que produce el ferroníquel. Véase Ley de Minas de 1999, **Anexo C-19**, artículo 86.

bienes, sin embargo, fueron ocupados por el Estado al terminar la vigencia de las concesiones, el 11 de noviembre 2012, tomando control de los mismos, sin pago alguno de la compensación debida al concesionario. Esos bienes incluyeron: (i) la planta de procesamiento metalúrgico y otros bienes relacionados no afectos a la minería, incluyendo materias primas; y (ii) el ferroníquel acopiado en depósito que había sido procesado con anterioridad al vencimiento de las Concesiones de *Minera Loma de Níquel*.

71. Al respecto, es claro que la planta de procesamiento metalúrgico y los otros bienes relacionados no afectos a las actividades de extracción minera constituyen bienes no reversibles respecto de los cuales el Estado debió indemnizar a *Minera Loma de Níquel* una vez que tomó control sobre ellos. Como es lógico, ninguno de estos bienes estaban destinados o afectos al objeto de la concesión, es decir, a la "explotación de níquel de manto", sino que por el contrario, los utilizaba el concesionario en el proceso de transformación industrial del mineral que era una actividad auxiliar o conexa en los términos de los artículos 86 y 90.2 (c) de la Ley de Minas de 1999 (***Ver supra* ¶¶ 57, 58**).

72. En el caso del ferroníquel acopiado que había sido procesado con anterioridad al vencimiento de las concesiones mineras, éste tampoco puede considerarse como un bien reversible. Como es lógico, este producto no estaba afecto a las actividades de explotación objeto de la concesión, sino más bien, era el producto resultante de actividades conexas o auxiliares. Por consiguiente, su estatus jurídico es el de una "cosa" de propiedad privada, la cual debe quedar en consecuencia como propiedad del concesionario al extinguirse la concesión. Ello tiene además su fundamento jurídico en el artículo 546 del Código Civil, cuando dispone que "el producto o valor del trabajo o industria lícitos […] de cualquier persona, son propiedad suya, y se rigen por las leyes relativas a la propiedad en general y las especiales sobre estas materias,"[70] y en el artículo 545 del mismo Código que define la propiedad como "el derecho de usar, gozar y disponer de una cosa de manera exclusiva."[71] Por tanto, el producto derivado del trabajo e industria desarrollados por un concesionario con ocasión del ejercicio de los derechos mineros que le fueron concedidos por el Estado, es propiedad del concesionario[72].

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70 Código Civil, **Anexo C-2**.

71 Código Civil Venezolano (reformado), en *Gaceta Oficial* Extra Nº 2.990 (extractos), de 26 de julio de 1982, **Anexo BC-[]** (***Código Civil***), artículo 545.

72 Además, conforme al artículo 552 del Código Civil, el concesionario también adquiere la propiedad por accesión de los minerales producidos en la concesión en

73. De lo arriba expuesto se deduce que (i) la planta de procesamiento metalúrgico y otros bienes relacionados no afectos a la minería, incluyendo materias primas; y (ii) el ferroníquel acopiado en depósito que había sido procesado con anterioridad al vencimiento de las concesiones; con posterioridad a la extinción de las concesiones siguieron siendo propiedad del concesionario, *Minera Loma de Níquel*, mientras no les cediera o los abandonara. Dichos bienes producidos por el concesionario, y que son de su propiedad, en consecuencia, conforme a la garantía del artículo 115 de la Constitución,[73] no podían ser "adquiridos" por el Estado Venezolano sino a través de una negociación con *Minera Loma de Níquel* o mediante el procedimiento de expropiación. Su apropiación por el Estado sin compensación constituyó una confiscación, pues dichos bienes no reversibles eran propiedad del concesionario, y no podían ser considerados abandonados al haber sido reclamados por éste antes y después de la toma de control por parte del Estado.[74]

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ejercicio de sus derechos mineros. Dicha norma establece que "los frutos naturales" pertenecen "por derecho de accesión al propietario de la cosa que los produce" definiéndose como "frutos naturales" a "los que provienen directamente de la cosa, con o sin industria del hombre" como son precisamente "los productos de las minas o canteras." En tal sentido, todos los minerales extraídos de la explotación de las concesiones, en ejercicio de los derechos mineros, son bienes que pertenecen al titular de los derechos mineros derivados de la concesión. Véase Código Civil, **Anexo C-2**.

73 Constitución de 1999, **Anexo C-[]**.

74 Como lo ha destacado Roberto Dromi en relación con Argentina, en casos de caducidad de contratos de concesión: "En principio, los bienes del particular afectados a la ejecución contractual, siguen perteneciéndole, excepto en aquellos casos en que se hubiera convenido que los bienes afectados a la prestación queden en manos del Estado (a título de dueño o con un derecho de uso precario hasta que concluya la ejecución), en los supuestos de caducidad del contrato, sin indemnización alguna en favor del contratista (CSJN, Fallos, 141:212). No habiéndose previsto en el contrato cláusula alguna en relación a los bienes del particular, si el Estado se apodera de ellos deberá indemnizar al contratista por su valor pues de lo contrario se trataría de un despojo, en mérito a lo establecido por el art. 17 de la Constitución, que tutela el derecho de propiedad, no sólo respecto de las cosas afectadas a la prestación del servicio público, sino también de las obras que haya realizado el contratista y de que se hubiera apropiado el Estado.// La CSJN ha expresado: "La declaración de caducidad no autoriza de por sí la ocupación por parte de la autoridad concedente de los bienes propios del concesionario afectados a la prestación de los servicios que constituyen el objeto de la concesión. Una cosa es la concesión, otra los bienes del concesionario por más que estén afectados del modo que se acaba de indicar. A estos últimos los ampara la inviolabilidad de la propiedad que, en principio, sólo cede ante la expropiación por causa de utilidad pública formalmente declarada y previa indemnización (art. 17, CN)" ("Compañía de Electricidad de Corrientes c/Provincia de Corrientes", Fallos, 201:432. En igual sentido "Bracamonte, Juan A.,

74. En efecto, el mencionado artículo 115 de la Constitución de 1999 establece la garantía del derecho de propiedad, disponiendo que sólo "por causa de utilidad pública o interés social, mediante sentencia firme y pago oportuno de justa indemnización, podrá ser declarada la expropiación de cualquier clase de bienes." Para asegurar en la práctica administrativa estatal la vigencia de dicha garantía, la Ley de Expropiación por causa de utilidad pública y social[75] (***Ley de Expropiación***) precisa que la expropiación es un medio extraordinario de adquisición de la propiedad privada por parte del Estado, concebida como una institución de derecho público "sometida por el legislador al cumplimiento de formalidades específicas"[76] mediante la cual el Estado actúa en beneficio de una casusa de utilidad pública o de interés social, "con la finalidad de obtener la transferencia forzosa del derecho de propiedad o algún otro derecho de los particulares, a su patrimonio, mediante sentencia firme y pago oportuno de justa indemnización".[77]

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c/Provincia de Tucumán", (Fallos, 204:626)." Véase Roberto Dromi, Tratado de Derecho Administrativo, **Anexo BC-[]**, páginas 362 ss.

75 Ley de Expropiación por Causa de Utilidad Pública o Social, en *Gaceta Oficial* No. 37.475, de 1 de julio de 2002, **Anexo BC-[]** (***Ley de Expropiación***). (La Ley reformó la anterior de 1947 publicada en *Gaceta Oficial* Nº 22.458, de 6 de noviembre de 1947, que había sido modificada parcialmente por Decreto Ley Nº 184, de 25 de abril de 1958, *Gaceta Oficial* Nº 25.642, de 25 de abril de 1958, **Anexo BC-[]**).

76 Como lo precisó la Sentencia de la antigua Corte Federal y de Casación, de 29 de octubre de 1948, en *Compilación Legislativa 1948-1949*, Anuario 1948, página 789, ya en 1948, recién adoptada la Ley: "La expropiación es un medio extraordinario de adquirir, sometido por el Legislador al cumplimiento de determinadas formalidades; ella es una institución de derecho público en el cual no tienen aplicación los principios del derecho común […] dada la naturaleza extraordinaria del derecho a expropiar, es de fundamental interés público el que se verifique la expropiación con estricta sujeción a las disposiciones de la ley que la reglamenta" y que con el procedimiento el Tribunal declare "la necesidad de adquirir el todo o parte de la propiedad." Véase en Allan R. Brewer-Carías, *Jurisprudencia de la Corte Suprema 1930-1974 y Estudios de Derecho Administrativo, Volumen VI, La Propiedad y la Expropiación por causa de utilidad pública e interés social*, Ediciones del Instituto de Derecho Público, Facultad de Derecho, Universidad Central de Venezuela, Caracas 1979, **Anexo BC-[]**, páginas 394 s.

77 Ley de Expropiación, **Anexo BC-[]**, artículo 2. Ello lo ha ratificado más recientemente la Sala Político Administrativa de la Corte Suprema de Justicia en su sentencia de 24 de febrero de 1965, en la cual expresó que la expropiación de bienes de propiedad privada debe desenvolverse "a través de un procedimiento especial cuyo objeto esencial es llegar a la transferencia de dominio del bien expropiado." Véase, Sentencia de la Sala Político Administrativa de la Corte Suprema de Justicia, en *Gaceta Oficial* Nº 27.676, de 24 de febrero de 1965, **Anexo BC-[]**, página 205.971, y también Allan R. Brewer-Carías, *Jurisprudencia de la Corte Suprema 1930-1974*

75. Toda expropiación, por tanto, como lo ha expresado la antigua Corte Suprema de Justicia, "supone justa compensación," de manera que en la expropiación, "la función del Juez se limita a la declaratoria de la necesidad de adquirir el todo o parte de la propiedad, o algún otro derecho, al correspondiente avalúo, y al pago, puesto que toda expropiación supone una justa compensación."[78]

76. La garantía de la propiedad, conforme a la Ley de Expropiación, por tanto, exige que el Estado deba pagar la justa compensación debida por la expropiación, no sólo para materializar la trasferencia de la propiedad privada al Estado (artículo 46), sino incluso para que el Estado pueda tomar posesión u ocupar los bienes a expropiar, al establecer como único mecanismo para poder efectuar la ocupación de los mismos mientras dura el juicio de expropiación, la denominada "ocupación previa" (artículo 56), la cual debe siempre ser decretada por el juez competente de la expropiación una vez iniciado el juicio de expropiación, mediando el previo avalúo del inmueble para establecer la justa compensación por una Comisión de Avalúos designada con la participación del expropiado (artículo 19), cuyo monto debe necesariamente depositarse en el tribunal competente y ser puesto a disposición del expropiado, quien tiene el derecho de aceptar el monto como el pago de la justa compensación (artículo 56).

77. Pues bien, esta exigencia de la garantía de la propiedad desarrollada en la Ley de Expropiación fue abiertamente violada por el Estado, en el caso de los bienes no reversibles de la empresa *Minera Loma de Níquel*, al proceder a tomar posesión y ocupar los mismos sin decretar ni ejecutar la

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y Estudios de Derecho Administrativo, Volumen VI, La Propiedad y la Expropiación por causa de utilidad pública e interés social, Ediciones del Instituto de Derecho Público, Facultad de Derecho, Universidad Central de Venezuela, Caracas 1979, **Anexo BC-[]**, páginas 348 ss.

78 Véase, Sentencia de la Sala Político Administrativa de la antigua Corte Suprema de Justicia, de 10 de junio de 1968, en Gaceta Forense Nº 60, 1968, Anexo BC-[], páginas 173 s. Véase Allan R. Brewer-Carías, Jurisprudencia de la Corte Suprema 1930-1974 y Estudios de Derecho Administrativo, Volumen VI, La Propiedad y la Expropiación por causa de utilidad pública e interés social, Ediciones del Instituto de Derecho Público, Facultad de Derecho, Universidad Central de Venezuela, Caracas 1979, Anexo BC-[], páginas 374. En igual sentido, Sentencia de la Sala Político Administrativa de la antigua Corte Suprema de Justicia, de 29 de abril de 1969, en Gaceta Forense Nº 64, 1969, páginas 133 s. Véase Allan R. Brewer-Carías, Jurisprudencia de la Corte Suprema 1930-1974 y Estudios de Derecho Administrativo, Volumen VI, La Propiedad y la Expropiación por causa de utilidad pública e interés social, Ediciones del Instituto de Derecho Público, Facultad de Derecho, Universidad Central de Venezuela, Caracas 1979, **Anexo BC-[]**, página 427.

expropiación de los mismos, sin intervención judicial, sin realizar el avalúo del bien expropiado y sin pagar o depositar en el tribunal correspondiente y a la orden del expropiado el monto de la compensación. Es decir, la toma de control por parte del Estado Venezolano el 11 de noviembre de 2012 de los bienes listados antes indicados (***Ver supra,* ¶¶ 22, 70, 73**), propiedad de *Minera Loma de Níquel,* sin previo pago de una indemnización y/o un procedimiento formal de expropiación, se configuró como una confiscación prohibida en el artículo 116 de la Constitución, efectuada en violación de la normativa venezolana vigente en la materia.

Afirmo que lo que he expresado en esta Opinión Legal es, según mi leal saber y entender, cierto y correcto.

New York, 24 de abril de 2015

Allan R. Brewer-Carías

12.

Caso CIADI No. ARB (AF)/14/11/: *ANGLO AMERICAN PLC* (Demandante) -contra- *REPÚBLICA BOLIVARIANA DE VENEZUELA* (Demandada)

ARBITRAJE BAJO LAS REGLAS DEL MECANISMO COMPLEMENTARIO DEL CENTRO INTERNACIONAL DE ARREGLO DE DIFERENCIAS RELATIVAS A INVERSIONES

SEGUNDA OPINIÓN LEGAL DE ALLAN R. BREWER-CARÍAS

13 MAYO 2016

Quien suscribe, Allan R. Brewer-Carías, declaro, según mi leal saber y entender, que lo que escribo de seguidas es cierto y correcto:

1. El día 24 de abril de 2015 emití una Opinión Legal como experto independiente sobre cuestiones de derecho venezolano (mi ***Primera Opinión Legal***) en el caso iniciado por Anglo American plc (***Anglo American*** o el ***Demandante***) contra la República Bolivariana de Venezuela (la ***República*** o ***Venezuela***) como resultado de ciertas medidas adoptadas en contra de su inversión en Minera Loma de Níquel, C.A. (***MLDN***), cuyo contenido ratifico aquí en su totalidad. En la presente opinión complementaria (mi ***Opinión Complementaria***) me refiero a ciertas cuestiones legales referidas por la República en su "*Memorial sobre Jurisdicción y Memorial de Contestación sobre Méritos de la República Bolivariana de Venezuela*" (***Memorial de Contestación***), de fecha de 13 de noviembre 2015 y por su experto legal el Dr. Alejandro Canónico en su Opinión Legal de fecha de 11 de noviembre de 2015 (***Opinión Legal Canónico***), que se relacionan con los siguientes reclamos formulados por la Demandante:

2. ***Primero***, el reclamo relativo a la no reversión de ciertos activos propiedad de MLDN presentado por la Demandante, con motivo del cual analizo el régimen jurídico aplicable a los bienes y actividades relacionados con el sector minero y, en particular, el relativo a la figura de la reversión de bienes en las concesiones mineras. Con base en ello, analizo el tema en el contexto específico de los bienes sobre los cuales la Demandante basa su reclamo, y respondo asimismo a los argumentos presentados por la República y el Dr. Canónico;

3. ***Segundo***, el reclamo por el bloqueo a la exportación de contenedores contentivos de ferroníquel de MLDN, analizando en particular los argumentos presentadas por la República en relación con la conducta de los funcionarios de los diferentes entes gubernamentales involucrados en dicho bloqueo, en el contexto del régimen legal aplicable para las exportaciones en Venezuela;

4. ***Tercero,*** el reclamo por la falta de resolución de las Solicitudes de créditos fiscales del IVA a favor de MLDN por parte del SENIAT, con especial referencia al régimen legal aplicable y a la naturaleza y efectos del Manual de Normas y Procedimientos Tributarios sobre Recuperación de Créditos Fiscales para Exportadores al cual se refiere la República; y

5. ***Cuarto,*** los aspectos planteados en la reconvención formulada por la República contra Anglo American en relación con supuestos incumplimientos por parte de MLDN de (i) ciertas obligaciones derivadas de las ventajas especiales establecidas en sus Concesiones, (ii) supuestos daños ambientales derivados de alegadas violaciones de obligaciones ambientales, y (iii) obligaciones tributarias relativas a impuestos de exportación e impuesto sobre la renta, donde me refiero en particular a ciertas cuestiones relacionadas con la legalidad de las fórmulas para calcular el impuesto de explotación minera emitidas en 2007 y 2009 por parte del MIBAM.

RESUMEN EJECUTIVO

6. Del estudio que he realizado en detalle a lo largo de esta Opinión Legal sobre el régimen legal aplicable y la documentación del caso en relación con los reclamos planteados por ambas partes, y en particular, los argumentos esgrimidos por la República y su experto legal, resultan en las siguientes conclusiones:

Respecto del reclamo sobre la toma de activos no reversibles sin compensación

7. Conforme a lo dispuesto en la Constitución de 1999 y la Ley de Minas de 1999, los yacimientos o minas en Venezuela son bienes del dominio público de uso privado del Estado. De ello se deriva que las actividades de exploración y explotación de los mismos están reservadas al Estado como actividades primarias, pudiendo éste otorgar a los particulares el derecho de realizarlas mediante concesiones. Sobre este punto, no existen mayores discrepancias entre mi opinión y la del Dr. Canónico. A tal efecto, la Ley de Minas de 1999 solo reconoce y regula las concesiones de exploración y explotación subsiguiente de yacimientos o minas.

8. Sin embargo, contrario a lo que afirma el Dr. Canónico, la referencia al "aprovechamiento económico" que la Ley de Minas de 1999 emplea en relación con las actividades de exploración y explotación minera bajo concesiones, no busca incluir una tercera actividad primaria adicional a estas dos, y tampoco pretende incluir a la actividad de procesamiento dentro de la actividad de explotación. El carácter del aprovechamiento implica que la exploración y explotación minera se deben efectuar por el concesionario con un ánimo de aprovechamiento económico ulterior (y no, por ejemplo, para fines meramente investigativos o de análisis académico).

9. Solamente las actividades primarias de exploración y explotación de yacimientos o minas pueden ser objeto de concesiones mineras conforme a la Ley de Minas de 1999. La Ley distingue por otra parte en su Título V la categoría de "actividades auxiliares y conexas a la minería". Estas últimas no se realizan en relación con los yacimientos sino con los minerales extraídos de ellos, e incluyen al beneficio, la refinación, el almacenamiento, el transporte y la comercialización de los minerales. Contrario a lo que sostiene la República en su Memorial de Contestación, el término "beneficio" tiene un sentido técnico-minero que significa procesamiento. Al no tratarse de actividades reservadas, su ejercicio por particulares no requiere de concesión y dichas actividades solamente están sujetas al control y vigilancia del Estado.

10. La Ley Orgánica sobre Promoción de la Inversión Privada bajo el Régimen de Concesiones de 1999 prevé que la reversión gratuita de bienes al finalizar la concesión opera respecto de los bienes afectos a la obra o servicio de que se trate. La Ley de Minas de 1999 dispone en sentido similar que los bienes que adquiera el concesionario para ser destinados a las actividades mineras objeto de la concesión, que en este caso son la exploración y explotación, deben ser transferidos libres de gravámenes al Estado al extinguirse la concesión. Ello busca asegurar que el Estado puede seguir ejecutando las actividades reservadas y concedidas una vez terminada la concesión. Con-

forme el texto de la Ley y a la interpretación doctrinal pacífica que existe sobre esta cuestión, los bienes afectos al objeto de la concesión son entonces aquellos bienes que son esenciales para la realización de las actividades objeto de la misma.

11. Por tanto, en el caso de concesiones mineras, el *test* legal sobre la reversión de bienes se refiere únicamente a determinar si los mismos estaban o no afectos al objeto de la concesión que es la exploración y explotación minera, sin que sea necesario indagar, contrario a lo afirmado por la República y el Dr. Canónico, respecto de aspectos fácticos como podría ser la ubicación geográfica de los bienes a la finalización de la concesión, o la importancia relativa de los mismos en el marco de un proyecto minero en general.

12. De todo ello se deriva que la reversión gratuita no opera respecto de bienes que no estén afectos al objeto de la concesión ni respecto de los que el concesionario haya adquirido o afectado para la realización de las actividades auxiliares o conexas con la minería. Si el Estado quiere tomar control sobre dichos bienes al finalizar la concesión, puede hacerlo mediante el correspondiente previo pago de una indemnización al concesionario.

13. Asimismo, aún respecto de los bienes que puedan ser considerados por la ley como reversibles, la Ley Orgánica sobre Promoción de la Inversión Privada bajo el Régimen de Concesiones de 1999 establece el principio de que en el caso de que al momento de su reversión exista una porción de su valor que no ha sido amortizada por el concesionario, el Estado debe abonar al concesionario una indemnización por la porción no amortizada.

14. El proyecto minero industrial definido por MLDN comprendía tanto actividades mineras primarias de exploración y explotación de yacimientos de níquel de manto como actividades conexas o auxiliares con la minería, incluyendo el beneficio del mineral extraído en una planta de procesamiento metalúrgico que se ubicó dentro del área de las Concesiones. En el texto de la las Concesiones de MLDN se limitó claramente la reversión de bienes a aquellos utilizados "con destino al objeto de la concesión", es decir, a la exploración y explotación de yacimientos mineros. En mi opinión, contrario a lo afirmando por el Dr. Canónico, el que MLDN hubiere optado por desarrollar su operación conforme a un proyecto minero que combinara actividades primarias con ciertas actividades conexas o auxiliares, en nada afecta la aplicación del principio de la reversión, que solamente es aplicable a aquellos bienes utilizados en el ámbito de las actividades de exploración y explotación que fueron las otorgadas en concesión.

15. De ello se deriva que en el caso de MLDN, al término de las concesiones, solamente los bienes afectos a la explotación del yacimiento de níquel de manto debieron considerarse reversibles. La planta de beneficio o refinación para la producción de ferroníquel y otros bienes relacionados no afectos al objeto de la concesión (incluyendo materias primas), en cambio, no eran bienes reversibles.

16. Respecto del ferroníquel acopiado que se encontraba en la planta de procesamiento de MLDN al 11 de noviembre de 2012, estoy en desacuerdo con la afirmación de Venezuela y del Dr. Canónico de que el mismo era propiedad del Estado. Las minas o yacimientos como bienes inmuebles conforme al Código Civil se diferencian de los materiales que de ellas se extraen, que son bienes muebles y que el concesionario adquiere en propiedad como frutos de la explotación minera.

Sobre el tema de la prohibición de exportación

17. En mi opinión, el bloqueo o prohibición de exportación impuesta por la Guardia Nacional Bolivariana (la ***GNB***) a partir de febrero de 2012 en relación con los 265 contenedores de ferroníquel de MLDN en los Puertos de Guaranao y Guanta, tuvo lugar en un marco de irregularidades administrativas manifiestas en las cuales incurrieron las autoridades involucradas –en particular, el SENIAT, la GNB y el Vicepresidente de la República.

18. Como máxima autoridad aduanera en cada Aduana, correspondía al Gerente de la Aduana del SENIAT conforme a las previsiones de la Ley Orgánica de Aduanas, dictar en forma oportuna y fundada todas las decisiones relativas a la exportación de los contenedores a que tenía derecho MLDN. En la materia, la ley establece la competencia limitada de la GNB como "órgano auxiliar" y de soporte del SENIAT. Por tanto, en mi opinión la GNB no estaba facultada para encargar por sí misma estudios en cuanto al producto de los 21 contenedores de MLDN en el Puerto de Guaranao, lo que correspondía al Gerente de la Aduana, ni para bloquear su exportación ni elevar unilateralmente el asunto al conocimiento del Vicepresidente Ejecutivo de la República.

19. Considero que al ignorar los estudios técnicos especializados (efectuados por entidades oficiales como PDVSA o INGEOMÍN) confirmando el contenido de ferroníquel en los 21 contenedores en el Puerto de Guaranao, y mantener su bloqueo de hecho, las autoridades del SENIAT en el Puerto de Guaranao, como máxima autoridad aduanera, actuaron de forma arbitraria al ignorar sus obligaciones establecidas en la Ley de Aduanas y su

Reglamento. Según estas normas, el SENIAT debió mantener el control sobre el proceso de exportación de los contenedores de MLDN, requiriéndosele, entre otros, adoptar cualquier decisión respecto de dicho trámite mediante resoluciones escritas y debidamente motivadas. El Vicepresidente Ejecutivo, por otra parte, carecía de competencia alguna en el asunto, aún si el material en los contenedores hubiere sido chatarra ferrosa (ya que ni siquiera el Vicepresidente podía autorizar su exportación por parte de empresas privadas como MLDN). Su obligación conforme a la ley una vez que el asunto le fue incorrectamente referido, era responder oportunamente indicando que la cuestión no era de su competencia. En mi opinión, la omisión de adoptar cualquier decisión respecto de los contenedores de MLDN en el Puerto de Guaranao durante más de ocho meses (durante los cuales los contenedores en cuestión permanecieron bloqueados) constituyó un grave incumplimiento por parte del Vice-Presidente a sus obligaciones legales.

20. Respecto de los 244 contenedores propiedad de MLDN bloqueados en el Puerto de Guanta, considero que el SENIAT igualmente omitió cumplir con sus funciones legales. Su bloqueo de hecho constituyó, en mi opinión, un hecho arbitrario por parte de la administración contrario, entre otros, a las garantías a la propiedad y a la libertad económica previstas en la Constitución de Venezuela.

Sobre el tema de la recuperación de créditos del IVA

21. En mi opinión, MLDN cumplió con los requisitos legales para la presentación de sus Solicitudes para la obtención de créditos fiscales del IVA referidos a los períodos de imposición de octubre de 2007 a mayo de 2012, y por ende tenía derecho a obtener de la administración una decisión, así como una respuesta a sus Solicitudes de dichos créditos fiscales. La conducta del SENIAT respecto de las Solicitudes que le formuló MLDN para la recuperación de créditos fiscales del IVA en su condición de exportador, al no responder ni decidir dichas Solicitudes estuvo también viciada de nulidad absoluta.

22. Los instrumentos normativos que rigen en materia de recuperación de créditos fiscales establecen el ámbito de actuación de los distintos órganos administrativos –incluyendo al SENIAT, el Ministerio de Finanzas/BCV- y de los contribuyentes, así como el procedimiento para la presentación de las solicitudes y el pago de los créditos fiscales. En tal sentido, entiendo que la República acepta que las Solicitudes de MLDN cumplieron con los requisitos previstos en la Ley de IVA y su Reglamento Parcial No. 1. La discrepancia entre las partes surge a partir de la invocación por Venezuela de

ciertos requisitos incluidos en el Manual introducido por el Superintendente del SENIAT mediante Punto de Cuenta en noviembre de 2010. En mi opinión, este Manual no tiene fuerza de ley o reglamento bajo derecho venezolano, sino que representa un típico acto administrativo de mero uso y efectos internos cuyas disposiciones no podían imponerse a MLDN. En consecuencia, la negativa del SENIAT a decidir sobre las Solicitudes de MLDN sobre la base del supuesto incumplimiento con la Regla D.3 de dicho Manual, fue contraria a los principios de derecho administrativos de reserva legal, competencia, publicidad y jerarquía normativa. Asimismo, la pretendida aplicación retroactiva del Manual a Solicitudes presentadas con anterioridad a su aprobación fue contraria al principio constitucional de irretroactividad de la ley.

23. Además, considero que la Regla D.3 del Manual era intrínsecamente ilegal e irrazonable. El requisito de descontar créditos solicitados por vía del procedimiento de recuperación de créditos fiscales de la Declaración del IVA antes de que se emitieran los CERTs correspondientes, es contrario a los principios establecidos en la Ley del IVA de 1999, y a la práctica del SENIAT durante años respecto de las previas Solicitudes de MLDN.

24. En todo caso, en mi opinión, el SENIAT estaba obligado conforme la ley a decidir en forma motivada sobre las Solicitudes de MLDN dentro de un plazo de 30 días hábiles desde su presentación. El "silencio administrativo" está previsto en la ley como una garantía para el contribuyente, y en ningún caso excusa o libera a la Administración de su obligación de decidir y de responder conforme a la ley y a la Constitución. Por otra parte, de haber tenido observaciones a las Solicitudes efectuadas por MLDN, el SENIAT debía, conforme a la legislación aplicable, efectuar requerimientos escritos – y, en su caso, dar seguimiento a las respuestas que presentara MLDN- en relación con cada Solicitud en particular, lo cual no ocurrió.

Sobre la reconvención formulada por la República en este proceso

25. Los reclamos que por reconvención plantea la República contra Anglo American se refieren, todos, a supuestas acciones u omisiones atribuidas o imputadas a MLDN. La ley venezolana, en principio, no permite demandar en justicia exigiendo responsabilidad de una empresa por actos cometidos o ejecutados por otra persona jurídica. Salvo previsión expresa de la ley, en Venezuela, sólo en casos excepcionales relacionados con dolo o fraude, es que un juez podría proceder a levantar el "velo societario" para imputar a los accionistas de una sociedad por los actos de esta última. Sin embargo, entiendo que Venezuela no ha iniciado una acción de este tipo ante los tribunales de la República ni tampoco ha alegado que ello sea el caso en relación con su

reconvención en este procedimiento. Por tanto, en mi opinión, la imputación a Anglo American por incumplimientos supuestamente incurridos por MLDN no sería admisible bajo derecho venezolano.

Sobre el tema de las ventajas especiales de las Concesiones de MLDN

26. Conforme a la legislación de minas, las ventajas especiales son previsiones contractuales impuestas al concesionario, cuyo incumplimiento acarrea la sanción de caducidad de las concesiones, previa decisión mediante acto administrativo motivado. En el caso de MLDN, 13 de las Concesiones de las cuales era titular fueron declaradas caducas por el Ministerio de Minas en 2007, lo cual fue impugnado oportunamente por la empresa. Dichos recursos se encuentran pendientes de resolución a fecha de hoy. En mi opinión, mientras los recursos no sean decididos y los actos impugnados no adquieran firmeza, no puede hablarse de una decisión firme de incumplimiento por parte de MLDN. Por tanto, considero que el reclamo de la República por vía reconvención en este proceso arbitral por daños y perjuicios por los supuestos incumplimientos de las ventajas especiales es prematuro, no es procedente al requerir la ley que previamente se determine con carácter firme el supuesto incumplimiento con dichas ventajas especiales.

Sobre el tema de las obligaciones ambientales

27. Conforme a la legislación ambiental venezolana, para que la República pueda formular un reclamo por responsabilidad civil por supuestos daños ambientales, es necesario que previamente se haya determinado la responsabilidad administrativa o penal del presunto responsable. En el caso de la responsabilidad administrativa, ésta requiere la imposición al responsable de multas u otras medidas correspondientes establecidas mediante un previo procedimiento administrativo. En el caso de la responsabilidad penal, ésta requiere la imposición de penas por los delitos ambientales en un proceso penal, que solo se puede iniciar luego de concluido el procedimiento administrativo previo. En relación con los reclamos ambientales contra MLDN que presenta la República en este proceso, no existió ningún procedimiento administrativo previo. Por ende, considero que el reclamo de la República por supuestos daños ambientales causados por MLDN es igualmente prematuro y por tanto inadmisible bajo derecho venezolano.

Sobre el tema de los impuestos de explotación y sobre la renta

28. En cuanto a los supuestos impagos de MLDN por concepto de impuesto de explotación, cabe destacar que la aplicación retroactiva de la Fórmula de 2007 por parte del Ministerio de Minas a los ejercicios fiscales

2002 a 2006 en mi opinión fue violatoria del principio constitucional de no retroactividad de leyes, en especial en materia tributaria, por lo que resultó viciada de nulidad absoluta. Respecto de la Fórmula de 2009, opino que ésta también está viciada de nulidad absoluta, por dos razones. Por un lado, la misma fue adoptada por un funcionario incompetente, lo cual resultó contrario –entre otros– a los principios de reserva legal y competencia. Por la otra, dicha Fórmula de 2009 excede los parámetros establecidos en la Ley de Minas de 1999 a los fines del cálculo del impuesto de explotación. La Fórmula, en efecto, alteró los elementos para la fijación de la base imponible previstos en la Ley, estableciendo un valor unitario de ingresos mucho mayor al de los costos deducibles, lo que resultó un incremento significativo del impuesto en violación a los principios tributarios-administrativos de no confiscatoriedad, capacidad contributiva, no discriminación y confianza legítima.

29. Finalmente, considero que no procede la demanda de reconvención en el contexto de supuestos impagos por parte de MLDN de impuestos de explotación y sobre la renta. En la materia, MLDN recurrió oportunamente los reparos formulados por el Ministerio de Minas y SENIAT, tanto en vía administrativa como judicial. A la fecha, no existe ninguna decisión final, es decir, irrecurrible (salvo en un caso decidido respecto del impuesto de explotación para el ejercicio fiscal 2006 por el Tribunal Supremo de Justicia, y en relación al cual entiendo que MLDN ha presentado una declaración de pago voluntario). Por consiguiente, considero que hasta que dichos recursos no se decidan y adquieran firmeza los actos impugnados, no puede exigirse judicialmente cumplimiento por parte de MLDN y la demanda por vía de reconvención sería por tanto inadmisible bajo derecho venezolano.

I. EL RECLAMO DE REVERSIÓN DE VENEZUELA

1. *Las actividades mineras en las concesiones mineras conforme a la ley venezolana*

30. En su Opinión Legal, el Dr. Canónico dedica varios párrafos a analizar la regulación de las actividades mineras en la legislación minera venezolana, llegando a formular un concepto de actividades mineras primarias en el cual incluye las actividades de exploración y explotación -con lo cual coincido-, pero agregando que supuestamente también existiría una actividad minera primaria de "aprovechamiento" de minerales extraídos. Según el Dr. Canónico, dentro del concepto de dicha actividad de "aprovechamiento" se

incluiría asimismo la actividad de procesamiento de minerales extraídos[1]. Estoy en total desacuerdo con esta conclusión del Dr. Canónico, la cual no solamente es contraria a las disposiciones contenidas en las sucesivas Leyes de Minas venezolanas, sino que carece de base lógica así como de cualquier soporte doctrinario y jurisprudencial. En respuesta a los argumentos del Dr. Canónico, en esta sección describo las bases fundamentales del sistema regulatorio minero en Venezuela, y en particular, la relación jurídica que existe entre, por un lado, los bienes del dominio público y las actividades reservadas al Estado y, por el otro, las concesiones mineras.

A. Los yacimientos mineros como bienes del dominio público

31. De acuerdo con las previsiones que tradicionalmente se han incluido en el Código Civil de Venezuela desde el siglo XIX, los bienes según las personas a quienes pertenecen se clasifican en bienes de propiedad de los entes públicos y bienes de propiedad de los particulares[2]. En cuanto a los bienes de los entes públicos, el Código Civil los clasifica en bienes del dominio público o del dominio privado[3]. Conforme lo previsto en el propio Código Civil, los últimos están sometidos al mismo régimen de la propiedad privada[4]; en cuanto a los bienes del dominio público, estos son inalienables[5], y por supuesto, están sometidos a un régimen de derecho público.

32. La enumeración clásica de bienes del dominio público en el Código Civil establecida desde finales del siglo XIX[6] se complementó durante

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1 Véase Opinión Canónico, ¶¶ 20, 22, 30, 35, 49, 53, 54 y 62.

2 Véase, Código Civil Venezolano, en *Gaceta Oficial* Nº 2.990 Extraordinario, de 26 de julio de 1982, **Anexo C-[]**, (***Código Civil***), artículo 538: "Los bienes pertenecen a la Nación, a los Estados, a las Municipalidades, a los establecimientos públicos y demás personas jurídicas y a los particulares."

3 Véase Código Civil, **Anexo C-[ ]**, artículo 539.

4 Véase Código Civil, **Anexo C-[ ]**, artículo 544: "Las disposiciones de este Código se aplicarán también a los bienes del dominio privado, en cuanto no se opongan a las leyes especiales respectivas".

5 Véase Código Civil, **Anexo C-[ ]**, artículo 543.

6 El artículo 539 del Código Civil establece que "son bienes del dominio público, los caminos, los lagos, los ríos, las murallas, fosos, puentes de las plazas de guerra y demás bienes semejantes." En cuanto a los "bienes del dominio privado" de los entes públicos, los mismos –conforme a los artículos 543 y 544 del Código Civil- se rigen por sus disposiciones relativas a la propiedad, en cuanto no se opongan a las

el transcurso del siglo XX con nuevas regulaciones en leyes especiales[7] y en la Constitución de 1999, con la incorporación de nuevas categorías de bienes del dominio público. Respecto de los yacimientos mineros, en contraste con la Ley de Minas de 1945 que indicaba que "[t]odo lo concerniente a las minas, […] depósitos o yacimientos minerales situados en Venezuela se declara de utilidad pública"[8], en la Constitución de 1999[9] se dispuso que "los yacimientos mineros" son bienes del dominio público. En línea con ello, en la Ley de Minas de 1999 se estipuló que "las *minas o yacimientos* minerales de cualquier clase existentes en el territorio nacional pertenecen a la República, son bienes del dominio público y por tanto inalienables e imprescriptibles"[10].

33. De acuerdo al Código Civil, los bienes del dominio público pueden ser de uso público o de uso privado de los entes públicos del Estado[11]. Los primeros abarcan aquellos bienes de uso común a los que el público en general puede acceder aun cuando existan regulaciones estatales para su ejercicio, por ejemplo, circular en las vías públicas o navegar en las aguas. Los bienes del dominio público de uso privado del Estado, por otra parte, son aquellos respecto de los cuales el Estado se ha reservado su uso y explota-

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leyes especiales respectivas, y pueden enajenarse de conformidad con las leyes que les conciernen. Véase Código Civil, **Anexo C-[ ]**.

7 Entre ellas, las establecidas en la Ley Orgánica de Bienes Públicos sancionada inicialmente en 2012 según reforma de 2014. Véase Ley Orgánica de Bienes Públicos, *Gaceta Oficial* Nº 6155, de 19 de noviembre de 2014, **Anexo BC-[ ]**, ***(Ley Orgánica de Bienes Públicos***), artículo 6. Véase también Allan R. Brewer-Carías, *Código de Derecho Administrativo*, Editorial Jurídica Venezolana, Caracas 2013, **Anexo BC []**, páginas 115 ss.

8 Véase Ley de Minas, en *Gaceta Oficial* Nº 121 Extraordinario, de 18 de enero de 1945, **Anexo C-1** (***Ley de Minas de 1945***), artículo 1.

9 La Constitución de 1999 fue la primera vez en el constitucionalismo venezolano en la que se declararon como del dominio público una serie de bienes, incluyendo los yacimientos mineros y de hidrocarburos. Véase Constitución de la República Bolivariana de Venezuela, de 20 de diciembre de 1999, en *Gaceta Oficial* Nº 5.453 Extraordinario, de 24 de marzo de 2000, **Anexo C-80** (***Constitución de 1999***), artículos 12, 304, 303 y 324.

10 Ley de Minas, Decreto Ley Nº 295, en *Gaceta Oficial* Nº 5.382 Extraordinario, de 28 de septiembre de 1999, **Anexo C-19** (***Ley de Minas de 1999***), artículo 2 (énfasis añadido). En su Preámbulo, la Ley de Minas de 1999 indica también que "la propiedad de los yacimientos […] es siempre de la República". Ley de Minas de 1999, **Anexo C-19**, Preámbulo, página 2.

11 Véase, Código Civil, **Anexo C-[ ]**, artículo 540.

ción, no teniendo las personas en principio derecho de uso de los mismos, como es el caso, por ejemplo, del uso y explotación de los yacimientos mineros. En estos casos, sin embargo, el Estado puede conceder a los particulares el ejercicio exclusivo de esas actividades que se ha reservado, mediante el otorgamiento de una concesión, *creando* en cabeza del concesionario a través de esta figura jurídica el derecho que se le concede y que antes no tenía.

34. El término "yacimiento" en este contexto, como dominio público, conforme al Diccionario de la Real Academia Española, es el "sitio donde se halla naturalmente una roca, un mineral o un fósil". En sentido similar, el mismo diccionario define a la "mina" como el "criadero de minerales de útil explotación"[12]. Conforme a estos conceptos, por tanto, lo que se ha declarado como del dominio público en Venezuela no son los minerales, sino los yacimientos o minas, es decir, los depósitos naturales de minerales[13].

B. Las actividades reservadas al Estado en relación con los yacimientos o minas: la exploración y explotación de los mismos

35. En el régimen de las actividades económicas en Venezuela debe siempre distinguirse entre aquellas actividades que pueden ser realizadas libremente por los particulares conforme al principio constitucional de libertad económica[14], de aquellas que el Estado se ha reservado expresamente para sí, conforme a la misma Constitución o mediante ley[15], configurándose en este

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12 Véase "yacimiento", Real Academia Española, *Diccionario de la lengua española*, Edición del Tricentenario, Octubre de 2014, **Anexo BC []**.

13 Véase "mina", Real Academia Española, *Diccionario de la lengua española*, Edición del Tricentenario, Octubre de 2014, **Anexo BC []**. Véase la misma definición desde el punto de vista jurídico y económico que da el Prof. Víctor Hernández Mendible, uno de los autores citados por el Dr. Canónico. "En sentido jurídico, se considera mina al criadero o depósito de sustancias minerales determinadas, susceptibles de apropiación," y en sentido económico, la mina es el depósito, acumulación o agrupación de sustancias minerales útiles, susceptibles de ser extraídas y aprovechadas mediante una explotación organizada." Véase Víctor Hernández Mendible "La participación privada en la actividad minera y las cláusulas ambientales, en *Regulación minero petrolera colombiana y comparada*, Universidad Externado de Colombia, Bogotá, páginas 195-270, **Anexo AC-11**, página 2.

14 Véase Constitución de 1999, **Anexo C-80**, artículo 112.

15 Véase Constitución de 1999, **Anexo C-80**, artículo 302.

último caso, una intervención estatal que implica, respecto de dichas actividades, una excepción al principio de libertad económica[16]. Por ello, la primera gran división que tiene que hacerse respecto de las actividades económicas en Venezuela, es a los efectos de determinar, sin que quepan términos medios, si los particulares pueden ejercerlas libremente o si las mismas han sido reservadas al Estado[17] .

36. Respecto de aquellas actividades reservadas al Estado, si bien en principio no existe libertad económica en cabeza de los particulares para realizarlas, dicha reserva puede no ser excluyente, en el sentido de que de acuerdo con la regulación legal que se disponga, se puede permitir su realización por los particulares, siempre que el Estado les otorgue expresamente dicho derecho a realizarlas. Ello puede ocurrir mediante las concesiones, que tienen carácter constitutivo de derecho sobre una actividad reservada, creando precisamente en cabeza del concesionario el derecho que se otorga[18].

37. En cambio, respecto de las actividades que no han sido reservadas al Estado, existe libertad económica y los particulares tienen pleno derecho a ejercerlas, aun cuando dicho derecho puede estar sometido a las limitaciones que siempre deben imponerse mediante ley como exige la Constitución[19]. En tal sentido, con frecuencia, el ejercicio de las actividades económicas por los particulares está sujeto a la obtención de actos administrativos de

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16 Véase Magdalena Salomón de Padrón, "Las Exclusiones de la Libertad Económica: Nacionalización y Reserva" en *VII Jornadas Internacionales de Derecho Administrativo Allan R Brewer Carías: El principio de la Legalidad y el ordenamiento jurídico-administrativo de la libertad económica*, FUNEDA, Caracas 2004, **Anexo BC []**, páginas 309 ss.

17 Véase José Ignacio Hernández, "Disciplina Jurídico-Administrativa de la Libertad Económica" en *VII Jornadas Internacionales de Derecho Administrativo Allan R. Brewer Carías: El principio de la Legalidad y el ordenamiento jurídico-administrativo de la libertad económica*. FUNEDA, Caracas 2004, **Anexo BC []**, páginas 181 ss.

18 En estos casos de actividades reservadas "los particulares no tienen derecho alguno a desplegar su iniciativa: ese derecho ha de ser *concedido* por la Administración, cuando así haya sido admitido en el marco de la Ley concreta de reserva." Véase José Ignacio Hernández, "Disciplina Jurídico-Administrativa de la Libertad Económica" en *VII Jornadas Internacionales de Derecho Administrativo Allan R. Brewer Carías: El principio de la Legalidad y el ordenamiento jurídico-administrativo de la libertad económica*, FUNEDA, Caracas 2004, **Anexo BC-[]**, página 197.

19 Constitución de 1999, **Anexo C-80**, artículo 112.

autorizaciones, licencias o permisos que emite el Estado, y que tienen carácter declarativo de derechos.

38. El dominio público sobre los yacimientos mineros, que a pesar de su declaración reciente ha sido una tradición en Venezuela desde la constitución de la República hace doscientos años, ha implicado siempre que el Estado haya sido considerado como el "propietario de las minas", quedando reservada al Estado su exploración y explotación[20]. Al respecto, la actividad de "exploración" comprende según la definición del Diccionario de la Real Academia Española la acción y efecto de explorar, es decir, de reconocer, registrar, inquirir o averiguar con diligencia una cosa o un lugar[21]. Por su parte, la "explotación" se refiere a la acción y efecto de explotar, es decir, de extraer de las minas la riqueza que contienen[22].

39. La regulación de las actividades de explotación y explotación minera ha pasado de un régimen "regalista" en la Ley de Minas de 1945 a un régimen predominantemente "dominial" establecido en la Ley de Minas de 1999. Bajo el régimen regalista de la Ley de Minas de 1945, la exploración del territorio no estaba casi restringida. En dicho régimen, el interesado en conducir exploración debía únicamente dar aviso a la autoridad a cargo de las actividades mineras, la cual debía emitir un permiso de exploración, previa verificación del cumplimiento de los requisitos establecidos legalmente[23]. La explotación de las minas, en cambio, sí estaba sujeta a la obtención de concesiones las cuales se otorgaban después de que se presentara la notificación (denuncio) del hallazgo de un depósito mineral y de seguirse un minucioso trámite procedimental administrativo[24].

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20 Tal como se indica en la Exposición de Motivos de la Ley de Minas de 1999, "uno de los principios fundamentales que nutren las bases de esta Proyecto de Decreto-Ley, lo constituye la declaratoria expresa de que las minas son propiedad de la República." Véase Ley de Minas de 1999, **Anexo C-19**.

21 Véase "exploración", Real Academia Española, *Diccionario de la lengua española*, Edición del Tricentenario, Octubre de 2014, **Anexo BC-[ ]**. Véase también Ley de Minas de 1999, **Anexo C-19**, artículos 48 a 57.

22 Véase "explotación", Real Academia Española, *Diccionario de la lengua española*, Edición del Tricentenario, Octubre de 2014, **Anexo BC []**. Véase también Ley de Minas de 1999, **Anexo C-19**, artículo 58.

23 Véase Ley de Minas de 1945, **Anexo C-1**, artículos 116, 117, 129 y 130.

24 Véase Ley de Minas de 1945, **Anexo C-1**, artículo 13.

40. Este régimen regalista para la exploración y explotación de yacimientos mineros, cambió a partir del 15 de febrero de 1977, cuando en el marco de lo establecido en la Ley de Minas de 1945, el Ejecutivo Nacional mediante el Decreto Ejecutivo Nº 2.039 (***Decreto 2.039***) reservó al Estado las actividades de exploración y explotación de minerales, sujetando la realización de las mismas al otorgamiento de concesiones[25]. La consecuencia de ello fue que a partir de ese año 1977 no se permitieron nuevas notificaciones o denuncios respecto de yacimientos, y el Estado se reservó de manera general las actividades mineras de exploración y explotación, de forma tal que los particulares solamente pudieron realizarlas mediante concesiones de exploración y explotación emitidas por el Ministerio de Minas[26].

41. En 1999, la Ley de Minas de 1999 y en la Constitución de 1999 consolidaron el sistema predominantemente dominial y de actividad reservada, en línea con lo previamente dispuesto en el Decreto Nº 2.039[27]. Al respecto, la Sala Constitucional del Tribunal Supremo indicó:

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25 Véase Decreto Nº 2.039 de 15 de febrero de 1977, en *Gaceta Oficial* Nº 31.175, de 15 de febrero de 1977, **Anexo BC-10** (***Decreto Nº 2.039***). La Ley de Minas de 1945 proveía, exclusivamente las *concesiones de exploración y explotación*. Véase Ley de Minas de 1945, **Anexo C-1**, artículos 174 a 189.

26 Véase Decreto Nº 2.039, **Anexo BC-10**, artículo 1 y Normas para el Otorgamiento de Permisos de Prospección, Concesiones y Contratos Mineros, Resolución Nº 528, de 17 de diciembre de 1986, en *Gaceta Oficial* Nº 33.729, de 1 de junio de 1987, **Anexo BC-[ ]**, artículo 1. Éstas fueron sustituidas en 1990, véanse Reglas sobre Otorgar Concesiones y Contratos de Minas, Resolución Nº 115, de 20 de marzo de 1990, en *Gaceta Oficial* Nº 34.448, de 16 de abril de 1990, **Anexo BC-18 (*Normas para el Otorgamiento de Concesiones*)** artículo 1.

27 Véase Constitución de 1999, **Anexo C-80**, artículo 12 y Ley de Minas de 1999, **Anexo C-19**, artículo 2. Así lo destacó la Sala Político Administrativa del Tribunal Supremo al indicar que "si bien el sistema regalista rigió durante todo el siglo pasado, el mismo ha tendido a desaparecer y da paso al sistema dominial, conforme al cual el Estado, como dueño de las Minas, puede explotarla directamente o concederla facultativamente a terceros. En efecto, el sistema dominial es el que informa las disposiciones contenidas en el vigente Decreto con Rango y Fuerza de Ley de Minas". Véase Sentencia Nº 598 de la Sala Político Administrativa del Tribunal Supremo de Justicia, *Régulo Belloso Baptista, Daniel Belloso Baptista, Enid Belloso De Molina, Mariela Inés Belloso, José Gregorio Belloso, Beatriz Delia Belloso Y Gladys Briceño De Belloso* (Registro Nº 2007-0795), 10 de mayo de 2011, **Anexo BC- [ ]**, página [ ].

> "[T]odos los yacimientos minerales de cualquier clase son bienes del dominio público, propiedad de la República […] su explotación sólo puede hacerse previa la obtención de la respectiva concesión. Al ser del dominio público, y por tanto, inalienables, no son susceptibles de ser propiedad particular."[28]

42. Tratándose las minas de recursos naturales propiedad del Estado, por tanto, su explotación como bienes del dominio público está sujeta conforme al artículo 113 de la Constitución de 1999 al "régimen de concesiones" que sólo pueden ser otorgadas por tiempo determinado, asegurándose "la existencia de contraprestaciones o contrapartidas adecuadas al interés público"[29].

43. Este régimen constitucional ha sido desarrollado en la Ley de Minas de 1999, en el cual la realización de actividades mineras de exploración y subsiguiente explotación de yacimientos o minas del dominio público del Estado, pueden ser realizadas por los particulares mediante la obtención de "concesiones mineras". La Ley de Minas de 1999 prevé en su artículo 25 que las concesiones mineras reguladas en la misma son "únicamente" de exploración y subsiguiente explotación[30], no previéndose ningún otro tipo de concesión minera, principio que se reafirma en varios otros artículos de dicha Ley de Minas de 1999[31].

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28 Véase Sentencia Nº 1.520 de la Sala Constitucional del Tribunal Supremo de Justicia, *Asociación Cooperativa Mixta La Salvación* (Registro Nº 00-1496), 6 de diciembre de 2000, **Anexo BC-[ ]**, páginas 38 ss.

29 Véase Constitución de 1999, **Anexo C-80**, artículo 113.

30 Véase también Ley de Minas de 1999, **Anexo C-19**, artículos 25 y 7(b).

31 Véase Ley de Minas de 1999, **Anexo C-19**. En particular, artículo 1 ("Esta Ley tiene por objeto regular lo referente a las minas y a los minerales existentes en el territorio nacional, cualquiera que sea su origen o presentación, incluida su *exploración y explotación*"); artículo 7 ("La *exploración, explotación* y aprovechamiento de los recursos mineros sólo podrá hacerse mediante las siguientes modalidades: […] b) Concesiones de *exploración y subsiguiente explotación*."); artículo 24 ("La concesión minera confiere a su titular el derecho exclusivo a la *exploración y explotación* de las sustancias minerales otorgadas"); artículo 29 ("El derecho de *exploración y de explotación* que se deriva de la concesión es un derecho real inmueble."); artículo 32 ("El título de las concesiones de *exploración y subsiguiente explotación* deberá contener los siguientes señalamientos"); artículo 39 ("El uso de sustancias explosivas y sus accesorios, en labores de *exploración y explotación* minera"); artículo 49 ("La concesión de *exploración y subsiguiente explotación*… […] Los ar-

44. En materia minera, por tanto, es justamente la condición de las minas o yacimientos como bienes del dominio público y la reserva al Estado de las actividades de exploración y explotación lo que define el ámbito de las concesiones mineras[32]. La concesión es entonces el título mediante el cual se crea, en cabeza del particular o concesionario, el derecho concedido a realizar la actividad reservada, que es la de explorar y explotar los yacimientos que previamente dicho concesionario no tenía.[33] Ésas son, por otra parte, las actividades que –al ser reservadas al Estado y referirse y realizarse en relación con un bien de dominio público (el yacimiento o mina)- se califican como actividades *primarias* en relación con la minería[34].

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tículos 48 a 57, además, se refieren a las actividades de "*exploración*;" y los artículos 58 a 63 a las actividades de "*explotación*.") (énfasis añadido).

32 Así lo acepta el Prof. Víctor Hernández Mendible, uno de los autores citados por el Dr. Canónico. ("la Ley declaró que "las minas o yacimientos minerales de cualquier clase existentes en el territorio nacional pertenecen a la República, son bienes del *dominio público* y, por tanto, inalienables e imprescriptibles" y seguidamente también declara de utilidad pública la materia minera. La intención expresa de la Ley es eliminar algunas de las tradicionales figuras del Derecho Minero en Venezuela, tal como se afirma en el texto de la exposición de motivos de la misma, al señalar que "el proyecto adopta el sistema dominial que comprende las dos modalidades mencionadas anteriormente, es decir, la explotación directa o *explotación mediante concesiones* facultativas, en consecuencia, esto provoca la eliminación del sistema regalista y desaparecen por tanto las figuras del denuncio, la exploración libre, la explotación exclusiva y el libre aprovechamiento.") ("La concesión minera es el acto jurídico unilateral expedido por el Ejecutivo Nacional, mediante el cual se otorgan a su titular los derechos exclusivos a la exploración y explotación y se le imponen obligaciones, para el aprovechamiento de los recursos o sustancias minerales, que se encuentren dentro del ámbito espacial concedido.") Véase Víctor Hernández Mendible, "La participación privada en la actividad minera y las cláusulas ambientales, en *Regulación minero petrolera colombiana y comparada*, Universidad Externado de Colombia, Bogotá, páginas 195-270, **Anexo AC-11**, páginas 26 y 28.

33 Véase Primera Opinión Brewer, ¶ 25.

34 La más precisa calificación legislativa de las actividades de exploración y explotación como "actividades primarias" en materia de minería, está en el artículo 6 de la Ley Orgánica que Reserva al Estado las Actividades de Exploración y Explotación del Oro, así como las conexas y auxiliares a éstas, de 2011, reformada en 2014, al definir como *actividades primarias* "la exploración y explotación de minas y yacimientos de oro," y *por actividades conexas y auxiliares*, "el almacenamiento, tenencia, beneficio, transporte, circulación y comercialización interna y externa del oro, en cuanto coadyuven al ejercicio de las actividades primarias." Ley Orgánica que Reserva al Estado las Actividades de Exploración y Explotación del Oro así

45. En consecuencia, es totalmente incorrecto afirmar, como lo hacen el Dr. Canónico y la República, que supuestamente existiría respecto de los yacimientos mineros una "actividad minera" adicional "principal" reservada al Estado que sería la de "aprovechamiento" de los mismos[35]. Tal como se explica a continuación, la referencia en la regulación de las concesiones mineras al concepto de "aprovechamiento" como consecuencia de la explotación de yacimientos no puede entenderse de ese modo, sino que responde al necesario aspecto económico que toda explotación de recursos mineros por los particulares debe conllevar.

C. El concepto de "aprovechamiento" en la Ley de Minas de 1999

46. De lo anterior resulta que conforme a las previsiones de la Ley de Minas de 1999, el Estado se ha reservado solamente las actividades de exploración y explotación de los yacimientos mineros como bienes del dominio público, sujetándose su realización por particulares a concesiones otorgadas por el Estado[36]. Sin embargo, en su Opinión Legal el Dr. Canónico objeta este análisis y se refiere al artículo 7 de la Ley de Minas de 1999 para sostener que en lugar de dos actividades, supuestamente "son tres las actividades reservadas por el Estado en materia de minería, a saber: la exploración, la explotación y el aprovechamiento"[37]. En la misma orientación, el Dr. Canónico también afirma que la Ley de Minas de 1999 "*pareciera* (sic) distinguir el aprovechamiento de la explotación como una actividad distinta y ulterior de la extracción del mineral"[38]. En esta forma, el Dr. Canónico identifica dicha supuesta "actividad" de "aprovechamiento" con la actividad de proce-

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como las conexas y auxiliares a éstas, Decreto Ley Nº 8.413, de 23 de agosto de 2011, en *Gaceta Oficial* Nº 39.759, de 16 de septiembre de 2011, **Anexo BC-30**, artículo 6.

35 Véanse Memorial de Contestación, ¶¶ 202 ss y Opinión Canónico, ¶¶ 20, 22, 30, 35, 49 y 50.

36 Sin perjuicio de las otras modalidades previstas en el artículo 7 de la Ley de Minas de 1999, **Anexo C-19,** artículo 7 ("La exploración, explotación y aprovechamiento de los recursos mineros sólo podrá hacerse mediante las siguientes modalidades: a) Directamente por el Ejecutivo Nacional; b) Concesiones de exploración y subsiguiente explotación; c) Autorizaciones de Explotación para el ejercicio de la Pequeña Minería; d) Mancomunidades Mineras; y, e) Minería Artesanal").

37 Véase Opinión Canónico, ¶ 30; Memorial de Contestación, ¶ 202.

38 Véase Opinión Canónico, ¶ 30 (énfasis añadido).

samiento del mineral extraído, el cual según el Dr. Canónico "forma […] parte de la noción integral de los derechos mineros que obtuvieron y ejecutaron durante [la concesión]"[39]. Sobre esta base, el Dr. Canónico luego concluye diciendo que "dentro de las actividades principales de la concesión minera, se encontraban la exploración, la explotación y el aprovechamiento, lo que incluye sin dudas la extracción del níquel de manto, su trituración y el procesamiento"[40].

47. La posición del Dr. Canónico de pretender incluir la actividad de "procesamiento" de minerales extraídos dentro de las actividades reservadas por el Estado en el régimen legal minero en Venezuela, en mi criterio, no tiene fundamento jurídico alguno en la legislación venezolana. Ya se dijo que la Ley de Minas de 1999 sólo reconoce como actividades reservadas al Estado a la exploración y explotación de los yacimientos mineros como bienes del dominio público. No hay en la Ley de Minas de 1999 ninguna actividad reservada al Estado que se efectúe sobre los minerales extraídos. Contrario a lo afirmado por el Dr. Canónico, la referencia en el artículo 7 de la Ley de Minas de 1999 al "aprovechamiento" en forma alguna busca describir una actividad primaria separada y adicional a la exploración y explotación mineras, sino que refiere a la necesaria consecuencia económica que debe seguir a la explotación de los yacimientos por el concesionario privado, de aprovecharse de los minerales extraídos.

48. Tal y como indica el Dr. Canónico, conforme el Diccionario de la Real Academia Española, "aprovechamiento" refiere a la "acción y efecto de aprovechar o aprovecharse", es decir, la utilización o extracción de bienes[41]. Éste es, además, el sentido en que el término se emplea en la Ley de Minas de 1999, refiriéndole a la obligación que tiene todo concesionario de explotar el yacimiento minero de forma que genere un provecho económico para el concesionario y, en consecuencia, para Estado. El artículo 24 de la Ley de Minas de 1999 establece que la concesión minera "es el acto del Ejecutivo Nacional, mediante el cual se otorgan derechos e imponen obligaciones a los particulares para el aprovechamiento de recursos minerales existentes en el

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39 Véase Opinión Canónico, ¶ 30.

40 Véase Opinión Canónico, ¶ 30.

41 Véase "aprovechamiento", Real Academia Española, *Diccionario de la lengua española*, Edición Tricentenario, octubre 2014, **Anexo BC-[]**.

territorio nacional"[42]. En línea con ello, el artículo 58 Ley de Minas de 1999 refiere al elemento económico que debe guiar la explotación de las minas:

> "Se entiende que una concesión está en explotación, cuando se estuviera extrayendo de las minas las sustancias que la integran o haciéndose lo necesario para ello, con ánimo inequívoco de aprovechamiento económico de las mismas y en proporción a la naturaleza de la sustancia y la magnitud del yacimiento."[43]

49. La referencia al aprovechamiento económico en la regulación no es para incorporar nuevas actividades primarias, sino lo que busca es establecer el requisito de que la concesión sea explotada con una motivación económica, de forma tal que ello resulte eventualmente en un beneficio a la Nación[44]. El mismo artículo 58, al definir la explotación, pone énfasis en *la*

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42 Véase Ley de Minas de 1999, **Anexo C-19**, artículo 24 (énfasis añadido).

43 Véase Ley de Minas de 1999, **Anexo C-19**, artículo 58.

44 En ello es que ha insistido el Tribunal Supremo de Justicia, haciendo referencia a las normas constitucionales y legales que regulan los contratos del Estado, señalando que: "el contrato de concesión minera se ubica conforme a la doctrina de la Sala Constitucional de este Alto Tribunal entre los contratos de interés público nacional, vale decir, aquellos "*contratos celebrados por la República, a través de los órganos competentes para ello del Ejecutivo Nacional cuyo objeto sea determinante o esencial para la realización de los fines y cometidos del Estado venezolano en procura de dar satisfacción a los intereses individuales y coincidentes de la comunidad nacional y no tan sólo de un sector particular de la misma como ocurre en los casos de contratos de interés público estadal o municipal, en donde el objeto de tales actos jurídicos sería determinante o esencial para los habitantes de la entidad estadal o municipal contratante, que impliquen la asunción de obligaciones cuyo pago total o parcial se estipule realizar en el transcurso de varios ejercicios fiscales posteriores a aquél en que se haya causado el objeto del contrato, en vista de las implicaciones que la adopción de tales compromisos puede implicar para la vida económica y social de la Nación".* (V. sentencia de la Sala Constitucional N° 2.241 del 24 de septiembre de 2002 y 953 del 29 de abril de 2003)." Sentencia Nº 832 de la Sala Político Administrativa, (Registro Nº 2002-0464), 14 de julio de 2004, **Anexo BC-[]**. En la misma sentencia la Sala Político Administrativa agregó: "que "[l]a importancia de la explotación de la minas en la vida económica nacional se evidencia de la lectura del propio Texto Constitucional, cuando expresamente dispone lo siguiente: "*Artículo 311*.- […] *El ingreso que se genere por la explotación de la riqueza del subsuelo y los minerales, en general, propenderá a financiar la inversión real productiva, la educación y la salud.* […] *Artículo 113.* [...] Cuando se trate de explotación de *recursos naturales propiedad de la Nación o de la prestación de servicios de naturaleza pública con exclusividad o sin ella,* el Es-

extracción y en el aprovechamiento de las sustancias minerales, de modo que únicamente cuando ello estuviese sucediendo, o se estuviesen ejecutando las actividades materiales tendientes a ello "con ánimo inequívoco de aprovechamiento", es que puede hablarse de "explotación" en términos de la ley[45]. Todo ello implica que con ocasión de la explotación minera, la extracción o el desprendimiento de sustancias a realizarse debe tener como finalidad última la obtención de un beneficio económico, y no, por ejemplo, una finalidad de análisis o de investigación académica[46].

50. Por ello, cuando se habla de explotación de la mina, no se trata de que en el yacimiento se realice cualquier tipo de extracción para que pueda considerarse que la mina está efectivamente en explotación, sino que se exige que se trate de una extracción *calificada*, que es con miras al aprovechamiento económico de los minerales extraídos. Esa fue la orientación seguida por el Ministerio de Minas e Hidrocarburos al interpretar el concepto de explotación minera, según lo explicó Elsa Amorer al comentar un memorándum de ese Ministerio:

> "[S]e infieren dos situaciones para que una concesión se considere en *explotación*: primera, cuando de la concesión se estuvieren extrayendo las sustancias a que se refiere la Ley, y segundo, cuando se esté *haciendo lo necesario para lograr esa extracción* mediante las obras que según el caso fueren apropiadas para ello.
>
> En lo que respecta al requisito de que la concesión se estuvieren extrayendo las sustancias a (*sic*) la que la Ley se refiere, [el Ministerio] fue del criterio de que la ley no pide cualquier tipo de extracción para que se configure la explotación; ella aspira a que se realice una *extracción en condiciones de ser económicamente aprovechable*, desprovista de las labores de análisis tendientes a conocer si un yacimiento es económicamente explotable, de las labores para cubicar el yacimiento y conocer las cantidades de mineral que encierra, o de

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tado *podrá otorgar concesiones* por tiempo determinado, *asegurando siempre la existencia de contraprestaciones o contrapartidas adecuadas al interés público*." (destacado de la Sala)."

45 Véase Ley de Minas de 1999, **Anexo C-19**, artículo 58 (énfasis añadido).

46 En tal sentido, pueden extraerse materiales y sustancias de la mina para conocer su calidad, cantidad, presentación, etc. sin que ello pueda considerarse *explotación* de la mina o yacimiento.

> cualquier otra actividad exploratoria, que no conlleve el ánimo de comerciar la sustancia.
>
> Probados todos estos elementos, debe ser una extracción de mineral en cantidades suficientes para lograr un beneficio económico."[47]

51. En similares términos se ha pronunciado más recientemente el Ministerio de Energía y Minas:

> "[P]ara que la extracción del mineral configure la explotación requerida por le Ley, tiene que ser una extracción con ánimo inequívoco de aprovechamiento económico, actual o futuro, desprovista ya en lo fundamental de la labor de investigación de la substancia o el yacimiento y proporcionada a la naturaleza y magnitud de éste"[48].

52. De todo ello se deriva que el "derecho" de exploración y explotación dentro del ámbito espacial y temporal fijado por la concesión, es a su vez una obligación en el mismo sentido[49], bajo pena de caducidad de la concesión si se verifica que dicha exploración o explotación no están teniendo lugar[50].

53. En este mismo sentido, la decisión de la Sala Político Administrativa del Tribunal Supremo de Justicia de 1962 citada por el Dr. Canónico,

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47 Véase Elsa Amorer, *El Régimen de la Explotación Minera en la Legislación Venezolana.* Colección Estudios Jurídicos Nº 45, Editorial Jurídica Venezolana, Caracas 1991, **Anexo BC-[ ]**, páginas 84 y 85.

48 Dictamen de la Consultoría del Ministerio de Energía y Minas citado por Elsa Amorer en su obra *El Régimen de la Explotación Minera en la Legislación Venezolana,* Colección Estudios Jurídicos, Nº 45, EJV, Caracas 1991, **Anexo BC-[ ]**, página 83.

49 Los artículos 58 y 61 de la Ley de Minas de 1999 describen el contenido de la obligación de explotación del yacimiento minero, que se extiende a: extraer de la mina materiales o sustancias que la integran o hacer lo necesario para llegar a esa extracción; con ánimo inequívoco de sacar provecho económico de esas sustancias; en una cantidad proporcionada con la naturaleza de la sustancia y la magnitud del yacimiento; en un plazo no mayor a siete años contados a partir de la publicación del Certificado de Explotación; y de manera continua e ininterrumpida, salvo que medie autorización que lo permita, por un plazo que no puede ser superior a un año. Véase Ley de Minas de 1999, **Anexo C-19**, artículos 58 y 61.

50 Véase Ley de Minas de 1999, **Anexo C-19**, artículos 98.1, 98.3 y 98.4.

destacó cómo el viejo Reglamento de la Ley de Minas[51] incluso incorporó criterios de eficiencia que se referían al aprovechamiento racional *de la mina* otorgada en concesión. La Sala dijo:

> "[A]coge la Corte el criterio sostenido por el Procurador cuando afirma, que el concepto de explotación que se contiene en el artículo 24 de la Ley de Minas, se encuentra desarrollado en el artículo 120 del Reglamento de dicha Ley, que establece: «Las concesiones deben trabajarse en conformidad con los principios económicos, de suerte que la explotación minera se efectúe eficientemente, con el mayor rendimiento y hasta la total extracción del mineral, si fuere posible"[52].

54. En términos similares, en la misma sentencia la Sala Político Administrativa se expresó destacando que:

> "[E]l objetivo económico perseguido por el legislador al regular la *explotación minera*, no pudo ser otro que el de procurar a la Nación el mayor beneficio *a través del mayor volumen de explotación, sin dar base para que las minas concedidas permanezcan inactivas o con una extracción de mineral tan insignificante, en proporción a su reserva, que mantenga improductiva una riqueza necesaria para la evolución económica del Estado*"[53].

55. En su Opinión Legal, el Dr. Canónico acepta la noción de aprovechamiento como acción de aprovechar o aprovecharse en el sentido de sacar utilidad de algo o de sacar provecho o rendimiento económico de algo[54]. Pero luego el Dr. Canónico erra al pretender derivar de la noción de aprovechamiento económico, una supuesta actividad primaria y separada de la ex-

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51 Decreto Nº 305 de 28 de diciembre de 1944, en *Gaceta Oficial* Nº 121, de 18 de enero de 1945, **Anexo BC-[ ]** artículo 120.

52 Véase Sentencia de la Sala Político Administrativa de la Corte Suprema de Justicia de 7 de noviembre de 1962 citada en Opinión Canónico, ¶ 28.

53 Véase Sentencia de la Sala Político Administrativa de la Corte Suprema de Justicia de 7 de noviembre de 1962 citada por Elsa Amorer, *El Régimen de la Explotación Minera en la Legislación Venezolana*, Colección Estudios Jurídicos Nº 45, Editorial Jurídica Venezolana, Caracas 1991, **Anexo BC-[ ]**, página 89 (énfasis añadido). Igualmente citada, aun cuando en forma incompleta, en Opinión Canónico, ¶ 28.

54 Véase Opinión Canónico, ¶ 27 y, en particular, nota al pie de página 28 ("Igualmente el artículo 58 de la Ley de Minas de 1999 establece que la explotación de la concesión supone un "ánimo inequívoco económico" de las sustancias o minerales").

ploración y la explotación. No hay ninguna indicación en la Ley de Minas de 1999 de que el "aprovechamiento" sea una actividad minera "primaria". De hecho, esta Ley reconoce expresamente que las actividades mediante las cuales el concesionario puede "aprovechar" las sustancias o minerales extraídos del yacimiento son múltiples. El ejercicio de dichas actividades dependerá de las características particulares de cada concesión y de la planificación técnica y económica de cada concesionario. A tal fin, los artículos 1 y 86 de la Ley de Minas de 1999 regulan, tal como se explica en la sección a continuación[55], una serie de actividades auxiliares o conexas que incluyen varias formas de aprovechamiento de material extraído, incluyendo mediante el procesamiento.

56. El texto de las concesiones "de explotación de níquel de manto" otorgadas a MLDN (las ***Concesiones***) sigue esta misma interpretación, al conferirle a la concesionaria "el derecho exclusivo de *extraer* y *aprovechar* el mineral [níquel de manto], por un periodo de veinte (20) años, dentro de los límites de la concesión"[56]. En su Opinión Legal, el Dr. Canónico pretende ver en esta definición una "noción más integral" según la cual las Concesiones de MLDN no se circunscribirían exclusivamente a la actividad de extracción del mineral. Sin embargo, el Dr. Canónico no aclara en qué consistiría esta supuesta noción. Lo cierto es que el texto de la citada cláusula de las Concesiones es completamente consistente con la regulación de la Ley de Minas de 1999, en la cual la actividad concedida se circunscribe a la explotación del yacimiento para extraer el mineral con finalidad de aprovechamiento económico[57].

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55 Véase ***supra ¶¶ [24, 26 ss].***

56 Véanse, por ejemplo, Concesiones mineras Camedas Nº 1 y 3, y San Antonio Nº 1 en *Gaceta Oficial* Nº 4.490 Extraordinario, de 10 de noviembre de 1992, **Anexo C-3**.

57 Por ello, la Sala Político Administrativa de la Corte Suprema de Justicia, en sentencia de 21 de diciembre de 1967, al destacar el aspecto económico y social de la industria minera, indicó que: "cuando la Ley autoriza al Estado para que otorgue a los particulares concesiones mineras, no puede pensarse que lo hace con el fin único y exclusivo de constituir un derecho en beneficio sólo del concesionario, cualquiera sea la naturaleza jurídica de ese derecho. Es decir, no puede suponerse que el Estado entregue esa riqueza al concesionario para que sea retenida por éste, indefinidamente ociosa y estéril en su patrimonio." Véase la cita de la sentencia en Elsa Amorer, *El Régimen de la Explotación Minera en la Legislación Venezolana.* Colección Estudios Jurídicos Nº 45, Editorial Jurídica Venezolana, Caracas 1991, **Anexo BC-[]**, página 96.

57. De todo lo anterior se concluye, por tanto, que en el ordenamiento jurídico minero venezolano, no existe base legal alguna para sostener la tesis de que además de la exploración y explotación mineras de los yacimientos, como actividades mineras primarias que son las reservadas al Estado y que son también el objeto de las concesiones, habría adicionalmente una "tercera" actividad primaria que sería el "aprovechamiento" minero. Por lo contrario, el régimen minero identifica el aprovechamiento como una consecuencia de la explotación minera, pudiendo manifestarse en la más variada forma en relación con los minerales o sustancias extraídos, incluyendo actividades de beneficio, refinación o procesamiento que siempre son actividades conexas con la minería, y que no son parte del objeto de la concesión.

D. Las actividades mineras primarias y conexas en la legislación de minas

58. El intento del Dr. Canónico por distinguir el "aprovechamiento" como una supuesta tercera actividad reservada al Estado que estaría referida al procesamiento del mineral extraído, no solamente reposa en una incorrecta interpretación de dicho término en la Ley de Minas de 1999, sino que también es inconsistente con la expresa regulación de actividades que establece dicha ley.

59. En efecto, la Ley de Minas de 1999 distingue entre (i) actividades primarias de explotación y exploración de los yacimientos, que son reservadas al Estado[58], y (ii) actividades auxiliares y conexas a la minería, que en general se realizan, no en relación con los yacimientos-, sino en relación con los minerales extraídos en su explotación. [59] Estas últimas se encuentran reguladas expresamente en el Título V de la Ley de Minas de 1999, titulado "De las Actividades Conexas o Auxiliares de la Minería", cuyo artículo 86 prevé:

> "El almacenamiento, tenencia, beneficio, transporte, circulación y comercio de los minerales regidos por esta Ley, estarán sujetos a la vigilancia e inspección por parte del Ejecutivo Nacional y a la reglamentación y demás disposiciones que el mismo tuviera por conveniente dictar, en defensa de los intereses de la República y de la actividad minera. Cuando así convenga al interés público, el Ejecutivo

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58 Véase ***supra ¶¶ [---]***

59 Véase sobre la distinción, ***infra ¶¶ 80.***

Nacional podrá reservarse mediante decreto cualquiera de dichas actividades con respecto a determinados minerales."[60]

60. El texto del artículo 86 de la Ley de Minas de 1999 reproduce la enumeración de actividades también dispuesta en artículo 1 de la misma ley[61]. Como se puede apreciar, las actividades descritas en estos artículos - almacenamiento, tenencia, beneficio, transporte, circulación y comercio/comercialización de minerales- en ningún caso tienen por objeto intervenir directamente en la mina o yacimiento minero como bien del dominio público, sino que tienen lugar en relación con los "minerales" (según el artículo 86) o las "sustancias extraídas" (de acuerdo al artículo 1). Por ello, las actividades conexas y auxiliares de la minería se refieren a procesos que involucran los materiales o sustancias extraídos que resultan de la explotación del yacimiento minero y que al haber sido separado de aquél, entran en el dominio privado del concesionario. Al no estar reservadas al Estado e involucrar bienes que no son de dominio público, la realización de estas actividades por particulares no requiere de concesión.

61. El artículo 86 de la Ley de 1999 es particularmente ilustrativo ya que, además de enumerar las distintas actividades conexas o auxiliares a la minería, precisa que las mismas se encuentran sujetas únicamente al régimen de "vigilancia e inspección del Estado"[62]. Ello contrasta claramente con el régimen de las actividades primarias de exploración y explotación que, como se dijo, son actividades reservadas y se encuentran sujetas al régimen de concesión. Es interesante notar igualmente que el artículo 86 de la Ley de Minas de 1999 reconoce que las actividades conexas no son actividades reservadas al Estado, al disponer expresamente la posibilidad de que el Estado pueda decidir reservarse alguna de ellas, cambiando en tal caso su régimen legal de actividad que cae dentro de la libertad económica por uno que sería entonces de reserva al Estado y, por tanto, objeto de concesiones[63].

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60 Véase Ley de Minas de 1999, **Anexo C-19**, artículo 86.

61 Véase Ley de Minas de 1999, **Anexo C-19**, artículo 1 ("Esta Ley tiene por objeto regular lo referente a las minas y a los minerales existentes en el territorio nacional, cualquiera que sea su origen o presentación, incluida su exploración y explotación, así como el beneficio, o almacenamiento, tenencia, circulación, transporte y comercialización, interna o externa, de las sustancias extraídas, salvo lo dispuesto en otras leyes").

62 Véase ***supra, [¶ 26]***.

63 Véase ***infra, [¶ 65]***.

62. Al respecto, entre las actividades auxiliares y conexas a la minería que enumeran los artículos 1 y 86 de la Ley de Minas de 1999 está la actividad de "beneficio" que -como término técnico de la minería y de acuerdo con el significado propio de la palabra- he considerado en mi primera opinión como equivalente a "procesamiento, manufactura, transformación o refinación"[64]. En el Memorial de Contestación, la República indica que yo habría presentado "en forma engañosa el texto del artículo 86" de la Ley de Minas de 1999 al haber incluido las actividades de "procesamiento y refinación" en el "concepto de 'beneficio'"[65]. Según Venezuela, esta interpretación habría implicado "reescribir" el texto del artículo 86 de la Ley de Minas de 1999, pues supuestamente "beneficio" no significa "procesamiento"[66]. Lo afirmado por la República es incorrecto. Por el contrario, el término "beneficio" en la Ley de Minas de 1999 es utilizado como sinónimo de procesamiento o refinación en el lenguaje jurídico y técnico minero que emplea esta ley[67].

63. Este significado del término se confirma, por ejemplo, en el Diccionario de la Real Academia Española que explica que "beneficiar" consiste en la acción de "someter las sustancias útiles de una mina al tratamiento metalúrgico"[68]. De igual manera, el Webster New World, International Spanish Dictionary, lo traduce al inglés como "smelting, processing of ores"[69]. Y ello tiene su explicación: en la jerga técnica de la minería se entiende como "beneficiar" al mineral, el remover de los minerales extraídos las impurezas, tales como otros minerales o elementos no minerales. Es decir, desde el punto de vista etimológico y técnico minero:

> "El *beneficio* constituye el enlace tecnológico entre la extracción o arranque de materias primas minerales y su transformación en materiales de uso industrial. Las técnicas utilizadas sirven para concentrar el fino (material valioso) después de separarlo del material estéril que lo rodea. La gran variedad de materias primas y las grandes

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64 Véase Primera Opinión Brewer, ¶¶ 12, 14, 27.

65 Véase Memorial de Contestación, ¶ 204.

66 Véase Memorial de Contestación, ¶ 34.

67 Véase Ley de Minas de 1999, **Anexo C-19**.

68 Véase "beneficiar", Real Academia Española, *Diccionario de la lengua española*, Edición del Tricentenario, Octubre de 2014, **Anexo BC-[]**.

69 Véase "beneficiar" en *Webster New World, International Spanish Dictionary* Second Edition, Roger Steiner, Editor in Chief, Wiley Publizhing, Inc., New York, 2004, pág. 980., **Anexo BC-[ ]**.

> diferencias entre los yacimientos exigen una amplia gama de *técnicas de beneficio*, que van desde procesos simples de clasificación y lavado de arena y grava hasta sofisticadas técnicas de enriquecimiento de metales finamente interestratificados, pasando por los métodos relativamente complejos empleados en el procesamiento de la hulla."[70]

64. Por su parte, el Diccionario Jurídico Inglés-Español de Mc Graw Hill, traduce al inglés la palabra "beneficio" en el ámbito de la "minería" como:

> "Benefaction, mining. Works for the preparation, treatment, first hand smelting and *refining* of mineral products, at any of their stages, with the purpose of recovering or obtaining minerals or substances, as well as to increase the concentration and purity of their contents."[71]

65. Es precisamente este significado etimológico y técnico-minero de la palabra beneficio el que se recoge en los artículos 1 y 86 de la Ley de Minas de 1999 (además de los artículos 66, 90.2(c) y 113) como equivalente a procesamiento, tratamiento, transformación, refinación o manufactura de minerales. Debe destacarse que el propio artículo 90.2(c) de la Ley de Minas de 1999 se refiere a beneficio como equivalente a "refinación"[72]. Así, no hay ninguna contradicción o error tipográfico al referir a beneficio como procesamiento o sus sinónimos, y su asimilación de ninguna manera puede enten-

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70 Véase "Impactos Ambientales y Actividades Productivas. Minería Beneficio y Transporte," Descripción del ámbito de actividad, en *Estrucplan on line*, 1 de agosto de 2003, **Anexo BC-[]** (énfasis añadido).

71 Véase "benefaction", Henry Saint Gahl, MacGraw-Hill's, *Spanish and English Legal Dictionary. Diccionario Jurídico Inglés-Español*, Mac Graw-Hill, 2004, página 22 (énfasis añadido).

72 Véase Ley de Minas de 1999, **Anexo C-19**, artículo 90 ("Los titulares de derechos mineros pagarán los siguientes impuestos: […] 2) El impuesto de explotación […] c) El tres por ciento (3%) calculado sobre su valor comercial en la mina, para otros minerales, el cual incluye los costos en que se incurra hasta el momento en que el mineral extraído, triturado o no, sea depositado en el vehículo que ha de transportarlo fuera de los límites del área otorgada o a una planta *de beneficio o refinación*, cualquiera sea el sitio donde ésta se localice, teniendo en cuenta su riqueza y el precio del mineral en el mercado comprador entre otros factores relevantes") (énfasis añadido).

derse como un intento por "presentar en forma engañosa el texto del artículo 86"[73], como erradamente se indica en el Memorial de Contestación.

66. En definitiva, queda claro que la Ley de Minas de 1999 distingue con precisión entre las actividades primarias o reservadas y las actividades conexas o auxiliares. Dentro de estas últimas, se incluye bajo el concepto de "beneficio" a la actividad de procesamiento, transformación o refinación de los minerales extraídos de una explotación. El propio Dr. Canónico así lo reconoce –en abierta contradicción con su propia teoría según la cual la actividad de procesamiento sería una actividad "reservada" o "principal" en el régimen minero- cuando en su opinión indica que las "actividades conexas o accesorias de la minería" del artículo 86 de la Ley de Minas de 1999 incluyen al beneficio[74].

2. El régimen de la reversión de bienes en las concesiones mineras

67. En mi primera Opinión Legal dediqué varias páginas a discutir los alcances del instituto legal de la reversión en el contexto del derecho de las concesiones en Venezuela, con un detallado análisis de la distinción legal entre bienes reversibles y no reversibles[75]. En su Opinión Legal, el Dr. Canónico ignora gran parte de este análisis legal, y en cambio se esfuerza por presentar una suerte de postulado general según el cual "la determinación de la reversibilidad depende fundamentalmente de un análisis *fáctico*, y especialmente de un estudio *técnico-minero*, de si la planta de procesamiento metalúrgica o cualquier otro bien era integral a la explotación minera objeto de la concesión"[76]. De ello deriva luego el Dr. Canónico que "todos los bienes que se vinculen con las actividades mineras (principales, accesorias o conexas) desarrolladas por el concesionario quedan sujetos a reversión"[77]. Este análisis es incorrecto. Tal como he explicado en mi primera Opinión Legal, el derecho venezolano -siguiendo la doctrina de derecho administrativo francés y latinoamericano- sujeta la figura de la reversión de bienes a un análisis eminentemente legal, que distingue claramente las distintas categorías de bienes de una concesión[78]. En su Opinión Legal, el Dr.

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73 Memorial de Contestación, ¶ 204.

74 Véase Opinión Canónico, ¶ 35.

75 Véase Primera Opinión Brewer, ¶¶ 29 ss.

76 Véase Opinión Canónico, ¶ 12.

77 Véase Opinión Canónico, ¶ 41.

78 Véase Primera Opinión Brewer, ¶¶ [ ].

Canónico omite cualquier referencia a la distinción de bienes, a pesar de que se trata de un concepto básico y con amplio desarrollo doctrinario en el análisis de la figura de la reversión y el derecho de las concesiones. En las siguientes páginas reitero los puntos fundamentales de la regulación de la reversión de bienes en Venezuela y explico por qué la posición del Dr. Canónico en esta cuestión es equivocada.

A. Los principios generales que rigen la reversión de bienes en las concesiones administrativas

68. Tal como lo expresé en mi primera Opinión Legal[79], la reversión de bienes en el derecho venezolano es una de las formas de extinción de la propiedad privada, esencialmente vinculada a las concesiones administrativas[80]. A través de las concesiones el Estado otorga a los particulares el derecho para la realización de actividades que se han reservado al mismo, como son la exploración y explotación mineras, y que conllevan la explotación de bienes del dominio público, como son los yacimientos mineros. Por tanto, la figura de la reversión de bienes como forma de extinción de la propiedad privada, tiene aplicación en un contexto en el que exista una reserva de actividades al Estado o bienes declarados como del dominio público, y concesiones de explotación de dichas actividades reservadas o de los bienes del dominio público cuya explotación o uso es otorgada a un concesionario.

69. Al constituir la reversión una forma de extinción de la propiedad privada del concesionario, en la misma incide la garantía constitucional de la propiedad. Ello requiere, por consiguiente, su necesaria regulación mediante ley (principio de reserva legal), y/o su inclusión expresa en las cláusulas del

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79 Véase Primera Opinión Brewer, ¶¶ 29 ss.

80 La reversión en las concesiones administrativas consiste en que "una vez terminada la concesión, el concesionario debe traspasar los bienes afectados a la concesión al Estado, sin indemnización; y el fundamento de esta institución se considera que está en la naturaleza misma de la concesión: mediante ella, el Estado traspasa al particular concesionario, un privilegio para realizar una actividad de que aquél generalmente se ha reservado para sí, y la compensación por haber ejercido ese privilegio en base a un acto del Estado es que al concluir la concesión, reviertan a él todos los bienes afectos a la concesión." Véase Allan R. Brewer-Carías, "Adquisición de la propiedad privada por el Estado en el derecho venezolano," en *Jurisprudencia de la Corte Suprema 1930-1974 y Estudios de Derecho Administrativo*, Tomo VI: Propiedad y expropiación, Instituto de Derecho Público UCV, Caracas 1979, **Anexo BC- []**, página 26.

contrato de concesión. De ello se deriva, además, que el concepto de reversión debe ser objeto de una interpretación restrictiva en su aplicación práctica, abarcando únicamente los bienes sin los cuales los derechos otorgados en concesión no pueden ser ejercidos por el Estado que los retoma.

70. De lo anterior resulta, como lo indiqué en mi primera Opinión Legal[81], que la reserva al Estado de una actividad es el elemento primordial en la comprensión del alcance del principio de la reversión, siendo la causa misma de su existencia. En efecto, al extinguirse la concesión, el derecho otorgado al particular para ejercerla también se extingue, y nuevamente es el Estado quien, en virtud de la reserva, ostenta el derecho de ejecutar la actividad. En tal sentido, la reversión supone el traslado de todos aquellos bienes que son imprescindibles para que, en caso de que sea factible, se pueda continuar llevando a cabo la actividad reservada, ya sea directamente por el Estado o mediante el otorgamiento de una nueva concesión a un particular.

71. En toda concesión, por tanto, al extinguirse la misma, se plantea la necesidad de distinguir cuáles son los bienes reversibles y cuáles son los bienes no reversibles que quedan en la propiedad del concesionario saliente, y por ello los esfuerzos de la doctrina administrativa para poder establecer la distinción, destacándose en tal sentido los aportes de la doctrina francesa, representada, entre otros, en los trabajos de André de Laubadère. Éste en efecto distinguió, en materia de concesiones administrativas y en relación con el tema de la reversión, entre los siguientes bienes: "1) *biens demeurant la propriété du concessionnaire*, 2) *biens de retour,* y 3) *biens de reprise*"[82]; interpretación que fue en general seguida por toda la doctrina francesa[83]. Conforme a esta clasificación, los primeros (*bienes propios*) son los bienes no reversibles, que son los adquiridos por el concesionario, que "no son parte integral de la explotación", es decir, que no están afectados al objeto de la concesión. Los segundos (*biens de retour*) son los bienes reversibles, que son todos aquellos que son "parte integral de la concesión", afectados por el concesionario a la realización del objeto de la misma, y que son los bienes necesarios o imprescindibles para la continuación de la actividad concedida. La tercera categoría (*biens de reprise),* son aquellos bienes de propiedad del

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81 Véase Primera Opinión Brewer, ¶¶ 29 ss.

82 Véase André de Laubadère, *Traité des contrats administratifs*, Librairie Général de Droit et de Jurisprudence, Tomo III, Paris 1956 (extracto), **Anexo BC-3**, páginas 211 a 222.

83 Véase Primera Opinión Brewer, ¶¶ 38 ss.

concesionario, que no son reversibles, pero que por su utilidad relacionada con la actividad concedida, la Administración puede decidir adquirir, mediando una indemnización[84].

72. De acuerdo con lo anterior, el signo común de todas las clasificaciones es que los bienes reversibles en las concesiones administrativas son los bienes que, al concluir el plazo de la concesión, están afectos al objeto de la misma, es decir, a las actividades que constituyen el objeto del derecho reservado y concedido por la Administración al concesionario. En el caso de las concesiones mineras que conceden el derecho de exploración y explotación de yacimientos, los bienes que revierten al Estado a título gratuito sólo son aquellos que se encuentran afectados a dichas tareas de exploración y explotación de los yacimientos. En ningún caso, por tanto, la reversión gratuita puede abarcar bienes que no estén afectos al objeto de la concesión otorgada o estén destinados a actividades distintas a las que son objeto de la concesión.

73. Como indiqué en mi primera Opinión Legal[85], este es el sentido de lo establecido, por ejemplo, en la Ley Orgánica sobre Promoción de la Inversión Privada bajo el Régimen de Concesiones de 1999 (***Ley Orgánica sobre Inversión Privada***) que regula las concesiones de obras públicas o de servicios públicos, al disponer en el artículo 48, el principio de que la reversión opera respecto de los bienes "afectos a la obra o al servicio"; y en el artículo 60, al distinguir entre los bienes reversibles y no reversibles, en dichas concesiones de obra pública o de servicios públicos, siendo los bienes reversibles los "que por cualquier título adquiera el concesionario para ser destinados a la concesión" o que se "incorporen o sean afectados a las obras"; mientras que los bienes no reversibles son "las obras, instalaciones o bienes que por no estar afectados a la concesión permanecerán en el patrimonio del concesionario"[86]. En definitiva, lo que revierte al Estado son los bienes afectados específicamente a la actividad que se otorgó inicialmente mediante el contrato de concesión, es decir la actividad reservada al Estado.

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84 Esta distinción establecida por de Laubadère, también influyó, en el desarrollo de la doctrina española de derecho administrativo. Véase Primera Opinión Brewer, ¶ 35.

85 Véase Primera Opinión Brewer, ¶¶ 33 ss.

86 Véase Ley Orgánica sobre Promoción de la Inversión Privada bajo el Régimen de Concesiones, en *Gaceta Oficial* Nº 5.394 Extraordinario, de 25 de octubre de 1999, **Anexo BC-22**, (***Ley Orgánica sobre Inversión Privada***), artículos 48 y 60.

74. En su Opinión Legal, el Dr. Canónico refiere al artículo 60 de la Ley Orgánica sobre Inversión Privada para derivar un principio según el cual "se presume que todos los bienes que se encuentran en el área concedida y que estén vinculados directa o indirectamente a la ejecución de las actividades mineras están sujetos a reversión, a menos que expresamente en el contrato o en el título se establezca lo contrario"[87]. Esta posición es inconcebible bajo derecho venezolano y prueba de ello es que el Dr. Canónico no presenta ninguna fuente válida para soportar este aserto. Lo indicado por el Dr. Canónico no solamente no surge del texto del artículo 60 de la Ley Orgánica sobre Inversión Privada sino que es contrario a la misma ley y a la ya mencionada pacífica doctrina sobre la cuestión de reversión, que no admite presunciones o reglas de aplicación general, sino que requiere un análisis puntual de cada bien en cuestión para determinar su reversibilidad o no, según su afectación o no al objeto de la concesión, en el contexto de la concesión de que se trate.

B. La Reversión de Bienes en las Concesiones Mineras

75. Los principios antes mencionados recogidos en la Ley Orgánica sobre Inversión Privada, si bien rigen básicamente para las concesiones de explotación de obra pública o de servicio público, conforme al artículo 4 de la misma ley, se aplican supletoriamente a "los contratos de concesión cuyo otorgamiento, administración o gestión se encuentre regulados por leyes especiales"[88]; como es el caso, precisamente, de las concesiones mineras, las cuales se rigen preferentemente por lo dispuesto en la Ley de Minas de 1999.

76. Como se ha explicado, en la Ley de Minas desde su sanción en 1945 se reguló un sólo tipo de concesión minera de exploración y explotación de minas o yacimientos mineros como bienes del dominio público. Siguiendo la misma orientación de Ley de Minas de 1945, en la Ley de Minas de 1999 se reguló igualmente un sólo tipo de concesión de exploración y subsiguiente explotación de yacimientos. Ahora bien, como se explicara anteriormente,[89] las otras actividades conexas o auxiliares con la minería, como el "almacenamiento, tenencia, beneficio, transporte, circulación y comercio de los minerales"[90] no se reservaron al Estado, ni han sido -ni en general son- objeto de concesiones mineras. Por tanto, en el ámbito de las conce-

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87 Véase Opinión Canónico, ¶ 47.

88 Véase Ley Orgánica sobre Inversión Privada **Anexo BC-22**, artículo 4.

89 Véase ***supra* ¶¶ *59 ss.***

90 Véase Ley de Minas de 1999, **Anexo C-19**, artículo 86. Véase ***supra* ¶¶ *[ ].***

siones mineras, la reversión opera solamente respecto de los bienes afectados específicamente al desarrollo de las actividades reservadas de exploración y explotación de los yacimientos o minas.

77. Así surge del artículo 102 de esta la Ley de Minas de 1999 que dispone que las tierras y obras permanentes, y los bienes "adquiridos con destino a las actividades mineras" que realice el concesionario, se entiende, en ejercicio de los "derechos mineros" que le confiere la concesión de exploración o explotación "pasarán en plena propiedad a la República, libres de gravámenes y cargas, sin indemnización alguna, a la extinción de dichos derechos"[91]. En el ámbito minero, ésos son los bienes reversibles, que forman parte de la concesión de explotación, por lo que todos los otros bienes adquiridos por el concesionario y no destinados a las actividades mineras otorgadas en la concesión, incluyendo las actividades auxiliares o conexas que no son parte del objeto de la concesión, no pueden considerarse como bienes reversibles[92]. Dichos bienes, sin embargo, pueden ser adquiridos por el Estado pero siempre mediando el pago de una compensación. En el caso de las Concesiones de MLDN, el lenguaje utilizado en la cláusula de reversión es, si se quiere, aún más preciso que el del artículo 102 de la Ley de Minas de 1999, al disponer que al finalizar la concesión en cuestión revertirán al Estado gratuitamente los "bienes utilizados con destino al objeto de la concesión y que formen parte integral de ella". Es decir, bajo los términos de las Concesiones se impone un doble requisito cumulativo para que un bien se considere reversible: (i) que el bien en cuestión sea utilizado con destino al objeto de la concesión, es decir, con destino a la explotación, y además (ii) que dicho bien forme parte integral de la concesión de explotación.

78. Al respecto, en mi primera Opinión Legal mencioné el caso de las concesiones otorgadas conforme a la derogada Ley de Hidrocarburos de 1943[93]. Se trata de un ejemplo particularmente ilustrativo del funcionamiento práctico del régimen de reversión en el régimen legal venezolano. En dicho caso, conforme lo precisó la antigua Corte Suprema de Justicia, al extinguirse las concesiones de hidrocarburos, la reversión de bienes en dichas concesiones partía del supuesto de que la finalidad de la misma era "mantener sin interrupción la explotación" y operaba respecto de "los bienes integrantes de la

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91 Véase Ley de Minas de 1999, **Anexo C-19**, artículo 102.

92 Véase Primera Opinión Brewer, ¶ 54.

93 Véase Primera Opinión Brewer, ¶¶ 34 ss.

concesión" o de "los bienes empleados en la explotación"[94]. En dicha ley, el Estado no sólo se había reservado las actividades de exploración y explotación de los hidrocarburos, sino también las actividades de transporte, manufactura y refinación de los hidrocarburos. Conforme a ello, los particulares no podían realizar ninguna de estas actividades sino mediante concesión[95]. En esos casos, claro está, los bienes integrantes o afectos a cada uno de esos tipos de concesión debían revertir al Estado al extinguirse las mismas. En su Opinión Legal, el Dr. Canónico ignora enteramente este importante precedente que contrasta con el régimen de la Ley de Minas de 1999 donde solo se ha reservado al Estado las actividades de exploración y explotación mineras.

79. Como también se indicó anteriormente[96], los artículos 1 y 86 de la Ley de Minas de 1999 describen las actividades conexas o auxiliares respecto de las cuales el Estado no ha ejercido reserva y dentro las cuales se incluye al procesamiento o beneficio o refinación de los minerales extraídos. Al respecto, la ya mencionada parte final del artículo 86 le confiere al Estado la facultad de extender el ámbito de reserva respecto de dichas actividades si lo considera conveniente. Tal y como he explicado en mi primera Opinión Legal, esta reserva ha sido ejercida por el Estado en Venezuela en sectores puntuales, en años recientes, por ejemplo, en relación con las actividades conexas o auxiliares de la industria siderúrgica y del oro, pero por supuesto no ha tenido lugar en relación con las actividades auxiliares de la explotación de manto de níquel.

80. En tal sentido, en mayo de 2008 se dictó la Ley Orgánica de Ordenación de las Empresas que Desarrollan Actividades en el Sector Siderúrgico en la Región de Guayana, mediante la cual se reservó al Estado "la industria de la transformación del mineral del hierro en la región de Guayana, por ser ésta una zona en la que se concentra el mayor reservorio de hierro,

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94 Véase Sentencia de la Corte Suprema de Justicia, en *Gaceta Oficial* Nº 1.718 Extraordinario, de 20 de enero de 1975, **Anexo BC-9**, página 24.

95 De allí los diferentes tipos de concesión, según su objeto, que reguló la Ley de Hidrocarburos de 1943: además de las concesiones cuyo objeto fue la exploración y explotación de los hidrocarburos, se regularon otras con otros objetos distintos, como fueron, las concesiones de manufactura y refinación, y las concesiones de transporte. Véase Ley Orgánica de Hidrocarburos de 1943, *Gaceta Oficial* de los Estados Unidos de Venezuela Nº 31 Extraordinario, de 13 de marzo de 1943 (***Ley de Hidrocarburos de 1943***), **Anexo BC-1**, artículos 12 a 27, 28 a 31, 32 a 37.

96 Véase ***supra ¶¶ 26 ss.***

cuya explotación se encuentra reservada al Estado desde 1975"[97]. Igualmente, en agosto de 2011 se dictó la Ley Orgánica que Reserva al Estado las Actividades de Exploración y Explotación del Oro así como las conexas y auxiliares a éstas, mediante la cual se reservó al Estado "las actividades primarias y las conexas y auxiliares al aprovechamiento del oro", definiéndose expresamente como "*actividades primarias*, la exploración y explotación de minas y yacimientos de oro, y por *actividades conexas y auxiliares*, el almacenamiento, tenencia, beneficio, transporte, circulación y comercialización interna y externa del oro, en cuanto coadyuven al ejercicio de las actividades primarias"[98]. Ello demuestra que cuando el Estado ha querido reservarse para sí ciertas actividades auxiliares a la minería en relación con determinados minerales, así lo ha hecho. En dicho casos, la figura de la reversión sin duda es aplicable a los activos afectos a las actividades auxiliares en cuestión. Al respecto, advierto que el Dr. Canónico ha omitido mención alguna en su Opinión Legal respecto de los importantes precedentes de reserva expresa que ha hecho el Estado de las actividades de procesamiento en los sectores siderúrgico y aurífero.

C. La cuestión de la amortización en las concesiones mineras

81. Tal como lo indiqué en mi primera Opinión Legal, en la propia Ley Orgánica sobre Inversión Privada que rige supletoriamente para todas las concesiones, se prevé que la reversión gratuita de los bienes efectivamente afectos a la concesión sólo tiene lugar cuando dichos bienes han sido totalmente amortizados. Así se establece en sus artículos 4 y 48, los cuales prevén que "*[e]l contrato establecerá* […] *los bienes que por estar afectos a la obra o al servicio de que se trate revertirán al ente concedente, a menos que no hubieren podido ser totalmente amortizadas durante el mencionado plazo*"[99].

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97 Ley Orgánica de Ordenación de las Empresas que Desarrollan Actividades en el Sector Siderúrgico en la Región de Guayana, Decreto Ley Nº 6.058, de 30 de abril de 2008, en *Gaceta Oficial* Nº 38.928, de 12 de mayo de 2008, **Anexo BC-29**.

98 Ley Orgánica que Reserva al Estado las Actividades de Exploración y Explotación del Oro así como conexas y auxiliares a esta, Decreto Ley Nº 8.413, de 23 de agosto de 2011, en *Gaceta Oficial* Nº 39.759, de 16 de septiembre de 2011, **Anexo BC-31**.

99 Ley Orgánica sobre Inversión Privada, **Anexo BC-22**, artículos 4 y 48 (énfasis añadido).

82. De esta norma resulta, al igual que de otras de la ley, que el régimen de las concesiones no sólo se estableció en beneficio del ente concedente, sino también del concesionario,[100] de manera que si bien se prevé la reversión de los bienes afectos a la obra o servicios concedidos, se dispone que la misma no procede respecto de aquellos bienes que, aun cuando fueran considerados reversibles, no hayan sido amortizados, es decir, cuyo valor no se haya podido depreciar completamente durante el tiempo de la concesión[101]. Por ello existe en el ámbito del derecho de concesiones una estrecha vinculación entre los conceptos de reversión y de amortización. Tal como lo ha establecido la jurisprudencia venezolana citada por el Dr. Canónico al referir a la reversión de bienes afectos a la concesión, "la cláusula de reversión se basa de un lado en el hecho de que durante la ejecución del contrato la parte contratista pueda amortizar su inversión, y del otro lado, en el propósito de asegurar al ente contratante la posibilidad de continuar la explotación con los bienes revertidos"[102].

83. Por tanto, a pesar de que en el artículo 2 de la Ley se indica que la duración de la concesión deberá fijarse "durante un tiempo determinado, suficiente para recuperar la inversión", la ley no asume en forma automática que dicha amortización habrá necesariamente tenido lugar al finalizar la concesión de que se trate, y por eso precisa que si por cualquier causa los bienes afectos al objeto de la concesión no hubieren podido ser totalmente amortizados durante el mencionado plazo, entonces los mismos no revierten al Estado. Con ello, el Estado asegura que el concesionario, para asegurar la regular ejecución de una obra o prestación de un servicio hasta el final de la conce-

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100 Véase por ejemplo, como lo ha observado Manuel Rachadell, con la Ley "se persigue no es ya el beneficio del ente concedente sino el del concesionario," y por ello se pauta en el último aparte de la Disposición Transitoria Decimoctava que "La ley establecerá en las concesiones de servicios públicos, la utilidad para el concesionario o concesionaria y el financiamiento de las inversiones estrictamente vinculadas a la prestación del servicio, incluyendo las mejoras y ampliaciones que la autoridad competente considere razonables y apruebe en cada caso." Véase Alfredo Romero Mendoza, "Aspectos financieros de las concesiones" en *Régimen legal de las concesiones públicas. Aspectos Jurídicos, Financieros y Técnicos*, Editorial Jurídica Venezolana, Caracas 2000, **Anexo BC-[]**, página 71.

101 Sobre el concepto de amortización véase por ejemplo, Carlos E. Rodríguez, *Diccionario de Economía*, 2009, **Anexo BC-[]**.

102 Sentencia la Corte Segunda de lo Contencioso Administrativo, *Municipio Guaicaipuro del Estado Miranda vs. Parcelamiento Chacao*, (Registro Nº AW42-X-2008-000022), abril de 2009, **Anexo AC-10**, página 6.

sión, continúe haciendo las inversiones necesarias hasta ese momento y que el transcurso del tiempo o la proximidad a la terminación de una concesión no sean motivo de desinversión. Ello además, en el espíritu de la previsión de la Ley Orgánica Sobre Inversión Privada, podría entenderse que busca disipar toda posibilidad de enriquecimiento sin causa para el Estado, en caso de que la amortización de la inversión no se haya podido lograr en el término fijado. Tal como explica María Amparo Grau, en los casos en que el concesionario demuestre que el bien a revertir no se encuentre totalmente amortizado, "la consecuencia sería la de que sobre la base de su consideración de utilidad o interés público pudiesen ser igualmente revertidos, previo el pago de la correspondiente indemnización"[103].

84. En el caso de las concesiones mineras, si bien se rigen primeramente por lo dispuesto en la Ley de Minas de 1999 , las disposiciones de la Ley Orgánica sobre Inversión Privada son sin embargo "de aplicación supletoria," como lo indica su artículo 4. Ello implica que los principios establecidos en dicha Ley de 1999, que no están regulados en la Ley de Minas, como el previsto en el artículo 48 sobre amortización, se aplican a las concesiones mineras. Ello es el caso de la no reversibilidad de los bienes que aun estando afectos al objeto de la concesión, no hayan podido ser amortizados en el plazo de la misma, en cuyo caso para ser transferidos al Estado en concesionario tendría derecho a ser compensado por la parte no amortizada.[104]

D. La reversión en el caso de las Concesiones de MLDN

a. El proyecto minero-industrial de MLDN

85. La distinción legal entre actividades mineras primarias y actividades conexas o auxiliares de la minería antes mencionada[105] permite diferenciar con precisión, dentro de las actividades desarrolladas por los conce-

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103 María Amparo Grau, "Extinción de las Concesiones" en el *foro Régimen Jurídico de la Contratación Administrativa,* 23 de junio de 2000, **Anexo BC-[]**, página 3.

104 Véase por ejemplo sobre la aplicación supletoria de la Ley a concesiones municipales regidas por la Ley Orgánica del Poder Público Municipal, incluso haciendo referencia al tema de los bienes no amortizados como no reversibles, en la sentencia del Juzgado Superior Estadal de lo Contencioso Administrativo de la Circunscripción Judicial del Estado Bolivariano de Mérida, *Carmen Victoria Carrasco contra el Concejo Municipal del Municipio Alberto Adriani Del Estado Mérida* (Registro Nº LE41-G-2012-000056) de 16 de noviembre de 2014. **Anexo BC-[ ]**.

105 Véase ***supra ¶¶ 59, 76.***

sionarios, aquéllas que corresponden al objeto de la concesión minera del resto de las actividades comprendidas en los artículos 1 y 86 de la Ley de Minas de 1999. Ello es particularmente relevante en los casos como el de MLDN en los cuales el concesionario definió un proyecto minero integral, que además de las actividades reservadas de exploración y explotación, comprendía otras actividades conexas o auxiliares no reservadas al Estado. Tal como el mismo Dr. Canónico lo acepta, las actividades conexas no han sido reservadas por el Estado, y solo están sujetas a inscripción en el registro respectivo[106].

86. En el caso de MLDN, la misma recibió durante la década de 1990 una serie de concesiones de explotación de níquel de manto, a partir de las cuales desarrolló un proyecto minero-industrial que comprendió actividades mineras primarias y actividades conexas o auxiliares, conforme a las ventajas especiales incorporadas en las concesiones mineras, incluyendo el beneficio del mineral extraído. A pesar de tratarse de un proyecto minero a ser ejecutado enteramente por la misma empresa concesionaria, la distinción entre las distintas actividades mineras e industriales del proyecto, aun cuando estuvieran relacionadas, fue muy clara.

87. En su Opinión Legal, el Dr. Canónico indica que las Concesiones de MLDN fueron otorgadas en consideración de la actividad de procesamiento que conduciría la empresa, sin la cual -según afirma el Dr. Canónico- el negocio "no era rentable"[107]. Entiendo que esta afirmación es inexacta. Por el contrario, según surge del texto de las mismas Concesiones, estas fueron otorgadas con el objeto específico de la *explotación de un yacimiento de níquel de manto*, y no con el objeto de producir ferroníquel, ni níquel. Si bien las Concesiones contemplaron la posibilidad, a través de las ventajas especiales, de que el concesionario realizara actividades auxiliares o conexas en los términos de los artículos 1 y 86 de la Ley de Minas de 1999, incluido el procesamiento del material extraído, mediante plantas industriales de beneficio o refinación, el Estado no garantizó rentabilidad alguna de ningún "negocio" al otorgar las Concesiones. Y ello porque las Concesiones no se otorgaron para ningún negocio específico ni establecieron una forma determinada cómo el aprovechamiento económico de la Concesión debía tener lugar, sino que limitaron su alcance a la explotación del yacimiento. No hay ninguna indicación en las Concesiones de que el otorgamiento de la Concesión hubiere es-

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106 Véase Opinión Canónico, ¶ 37.

107 Véase Opinión Canónico, ¶ 10.

tado "condicionado" por el negocio del níquel o sujeto a la construcción de la planta de procesamiento de ferroníquel por el concesionario. Por ello, la construcción y operación de la planta de ferroníquel que desarrolló el concesionario no fue "parte de la explotación" del yacimiento como incorrectamente afirma el Dr. Canónico[108].

88. En su Opinión Legal, el Dr. Canónico también indica que "la instalación de la planta de procesamiento fue "determinante", tanto para solicitar las Concesiones como para su otorgamiento"[109], citando como base de esta Opinión "los varios Estudios de Factiblidad" elaborados a pedido de MLDN entre 1993 y 1996. Ello es, en primer lugar, factualmente incorrecto, puesto que entiendo que el primer grupo de Concesiones fueron otorgadas en 1992, antes de la elaboración del Estudio de Factibilidad en marzo de 1995[110]. Pero además, la incorporación de actividades auxiliares a la minería como el beneficio y sus derivados representan las formas que tiene el concesionario para aprovecharse del mineral extraído. En el caso particular de MLDN, dichas actividades estaban específicamente previstas dentro de las ventajas especiales de la Concesión, las cuales podían realizarse si el concesionario lo consideraba "posible o conveniente"[111]. De allí que el Estudio de Factibilidad hiciera una clara distinción entre las actividades mineras y las actividades metalúrgicas que tendrían lugar con ocasión de la Concesión, refiriéndose al "proyecto minero- metalúrgico". Es entonces enteramente razonable que el Estudio de Factibilidad haya determinado la conveniencia de la instalación de una planta de procesamiento metalúrgica del mineral extraído.

b. La no reversibilidad de la planta de procesamiento metalúrgica para la producción del ferroníquel

89. En mi primera Opinión Legal expliqué cómo, en el caso de las Concesiones de MLDN, la planta de beneficio, refinación y procesamiento del mineral extraído para producir ferroníquel, no se encontraba afectada al

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108 Véase Opinión Canónico, ¶ 10.

109 Véase Opinión Canónico, ¶ 32.

110 Véase Memorial, ¶ 32.

111 Véanse, por ejemplo, Concesiones mineras Camedas Nº 1 y 3, y San Antonio Nº 1 en *Gaceta Oficial*, Nº 4.490 Extraordinario, de 10 de noviembre de 1992, **Anexo C-3**, ventaja especial 5.

objeto de la Concesión y no era por tanto un bien reversible conforme a lo establecido en la Ley de Minas de 1999 y en los títulos de las Concesiones[112].

90. En su Opinión Legal, el Dr. Canónico opina en contrario que "la planta de procesamiento metalúrgica era un bien reversible en tanto que formaba parte integral de las actividades mineras que desarrollaba la concesionaria en el área otorgada"[113]. Pero esta conclusión es contraria a los principios que rigen en materia de reversión de bienes en el derecho de concesiones, y que han sido desarrollados en las secciones anteriores.[114] Es claro que la reversibilidad de los bienes no se determina por su afectación a las actividades mineras que en general realice el concesionario o su ubicación física en el perímetro de una concesión, sino a la actividad minera específica y primaria "objeto de la concesión" que es la explotación del yacimiento.

91. La planta de procesamiento metalúrgica, aun cuando formaba parte del proyecto "minero-metalúrgico" de MLDN, no estaba afectada al objeto de la Concesión (explotación), sino a una actividad minera conexa o auxiliar como es el procesamiento o beneficio del mineral. Por tanto, en el caso de MLDN, la planta de procesamiento metalúrgica no es un bien reversible, sino un bien de propiedad de la empresa concesionaria. Es, por lo tanto, irrelevante para determinar su reversibilidad (o no) conforme a la ley, que los expertos técnicos de la República en este arbitraje, como lo indicó el Dr. Canónico, puedan haber opinado que el proyecto de MLDN se planificó desde un principio con la inclusión de la planta[115]. De igual manera, son irrelevantes para esta cuestión las afirmaciones de los expertos técnicos que cita el Dr. Canónico, en el sentido de que supuestamente "no puede haber una planta de procesamiento sin la mina" y que "no puede haber una mina sin una planta de procesamiento"[116]. La República en su Memorial de Contestación también indica en forma incorrecta que "la mina y la planta de procesamiento pueden únicamente concebirse como un sólo bien"[117] y que "no puede obtenerse una concesión del Estado sin que haya un proyecto de procesamiento o transfor-

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112 Véase Primera Opinión Brewer, ¶¶ 68 a 74.

113 Véase Opinión Canónico, ¶ 12.

114 Véase ***supra* ¶¶ *75 ss.***

115 Véase Opinión Canónico, ¶ 12. En igual sentido errado se expresó la República en su Memorial de Contestación. Véase Memorial de Contestación, ¶¶ 43, 44 y 121.

116 Véase Opinión Canónico, ¶ 12, nota al pie de página 5.

117 Véase Memorial de Contestación, ¶ 43.

mación de los minerales"[118]. Con todo ello, lo que se pretende es tratar equivocadamente de confundir el "proyecto minero-metalúrgico" con la "concesión de explotación minera". La planta de procesamiento estaba sin duda comprendida dentro del proyecto minero-industrial de MLDN, pero ello no la hacía desde un punto de vista jurídico "parte integral de la explotación minera objeto de la concesión" como erradamente afirma el Dr. Canónico[119]. El error en que incurre el Dr. Canónico es precisamente en el pretender convertir el test aplicable a la reversión, que es un test principalmente *legal*, en uno *técnico-fáctico*.

92. Las afirmaciones de Venezuela y el Dr. Canónico, por otra parte, no tienen ningún sustento en el marco regulatorio. Como ya se explicó, es falso que las Concesiones fueran otorgadas a MLDN sobre la base de su decisión de construir dicha planta:[120] la primera versión del Estudio de Factibilidad, como se dijo, es de fecha posterior (1993) al otorgamiento de la primera serie de diez Concesiones a MLDN (1992). Tampoco existió requisito legal o contractual alguno que obligara a MLDN a que construyera la planta de procesamiento dentro del perímetro de las Concesiones. De hecho, puede perfectamente existir una concesión de explotación minera de un yacimiento o mina sin que tenga que tener su correspondiente planta de procesamiento metalúrgica del mineral extraído. En esos casos, el concesionario puede haber decidido, por ejemplo, que en un momento determinado es más rentable exportar el mineral extraído, o venderlo para que otra empresa lo procese o beneficie; incluso, en caso de decidir procesarlo o beneficiarlo, puede hacerlo con una planta localizada fuera del área de la concesión, de su propiedad o de un tercero[121]. Los propios expertos mineros de la República aceptan que ello hubiera sido posible en este caso[122].

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118 Véase Memorial de Contestación, ¶ 203.

119 Véase Opinión Canónico, ¶ 12.

120 Véase ***supra* ¶ *88.***

121 No son tampoco ciertas, por otra parte, las afirmaciones del Dr. Canónico de que supuestamente "la explotación y aprovechamiento sólo eran factibles si la planta se ubicaba en la misma mina" o de que "no se podía concebir separada la actividad de extracción de su procesamiento in situ". Véase Opinión Canónico, ¶¶ 32 y 33. Éstos pueden ser pareceres o apreciaciones del Dr. Canónico pero no conceptos con base jurídica alguna.

122 Véase Opinión Canónico, ¶ 12; Informe Pericial de Bara Consulting, ¶ 11.

93. Los argumentos de Venezuela y el Dr. Canónico tampoco reflejan la realidad operativa en el sector minero venezolano. Tal como lo explican los expertos mineros de la Demandante, existen en Venezuela varios ejemplos de operadores mineros que han utilizado plantas de procesamiento localizadas fuera del área de sus respectivas concesiones o títulos mineros[123]. Ello confirma que el hecho que la planta de procesamiento esté ubicada dentro o fuera de la concesión en nada afecta la concesión o título minero subyacente, ya que procesamiento y explotación minera son dos actividades enteramente distintas a los efectos de la regulación.

94. En su Opinión Legal, el Dr. Canónico sugiere que el hecho de que las Concesiones contemplaran en sus ventajas especiales la posibilidad de que el concesionario desarrollara actividades de procesamiento, demostraría que la implementación de esos procesos formaba parte del objeto de la Concesión[124]. Ello es incorrecto, pues las ventajas especiales se incluyen en las Concesiones como una estipulación contractual (que en el caso de esta ventaja en particular, es de cumplimiento facultativo para el concesionario) y de ninguna manera se puede decir que forman parte del objeto de la Concesión, que es una materia de reserva legal[125].

95. Al respecto, debe recordarse que las ventajas especiales fueron incorporadas al régimen jurídico de las concesiones mineras mediante el mencionado Decreto 2.039 de 1977 donde se establecieron una serie de condiciones a ser tomadas en consideración para el otorgamiento de concesiones de explotación.[126] Entre éstas se encontraba la ventaja especial de prever alguna "obligación de manufacturar o refinar el mineral en el país"[127]. Por tanto, el procesamiento del mineral no formaba parte de la actividad minera concedida; sin embargo, la posibilidad de que un aspirante a concesionario ofreciese llevar a cabo actividades de procesamiento en Venezuela, estaba considerado como un aliciente, a los efectos de la obtención de la concesión solicitada. Posteriormente, las ventajas especiales mínimas se fueron incorpo-

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123 Véase Reporte RPA

124 Véase Opinión Canónico, ¶ 25.

125 Así lo reconoce el propio Dr. Canónico, al aceptar que en las Concesiones se estableció la posibilidad de que se incorporaran actividades de metalurgia y refinación, actividades que difieren de la actividad minera de explotación y que, por tanto, no forman parte del objeto de la Concesión. Véase Opinión Canónico, ¶ 25.

126 Véase ***supra ¶ 40.***

127 Véase Decreto Nº 2.039, **Anexo BC-10**, artículo 2.2 y ***supra [¶¶].***

rando al proceso de otorgamiento de las concesiones de explotación, quedando plasmadas en las Normas para el Otorgamiento de Concesiones y Contratos Mineros de 1990, donde se estableció que, además de la idoneidad técnica y la capacidad económica del solicitante de una concesión de explotación, se debían tomar en cuenta las ventajas especiales que el solicitante ofreciere[128]. A tal efecto, se estableció como satisfactorio aquel régimen de ventajas especiales que comprendiera como mínimo una serie de medidas y como adicionales otras tantas, entre las cuales figuraba la incorporación directa o indirectamente de valor agregado nacional[129].

96. Por ello, el argumento del Dr. Canónico según el cual las actividades incluidas en las ventajas especiales pueden entenderse como parte integrante del objeto de la concesión no tiene asidero jurídico alguno. Por el contrario, lo que pone en evidencia es que se trata de elementos separados y diferenciados del objeto de la concesión. Aceptar la posición que postula a dichas actividades como formando parte del objeto de la Concesión implicaría darles condición de "actividades reservadas" cuando no lo son.

97. La República también sostiene que MLDN en sus recursos de reconsideración relacionados con la revocación de algunas de sus Concesiones en el año 2007 reconoció que la reversión generaría la entrega al Gobierno de "todos los bienes afectos a las Concesiones"[130]. Con ello la República sugiere que MLDN habría aceptado que "los bienes adquiridos con destino a las actividades mineras" pasarían a poder del Estado una vez que expirara el término de las Concesiones. Ello es incorrecto. De hecho, el lenguaje empleado por MLDN al que la República hace referencia es perfectamente consistente con la distinción legal desarrollada anteriormente. De dicha afirmación de MLDN se puede entender que lo único que "reconoció" MLDN en su recurso de reconsideración, correctamente por lo demás, es que sólo los "bienes afectos a la concesión" son los bienes reversibles, es decir, bienes afectos a la exploración y explotación, que son las actividades concesionadas. En cualquier caso, debe destacarse que bajo derecho venezolano, no es posible insinuar una renuncia de derechos, sino que se exige una manifestación expresa en tal sentido de parte de la persona que está renunciando el derecho[131].

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128 Véase Normas para el Otorgamiento de Concesiones, **Anexo BC-18**, artículo 3.

129 Véase Normas para el Otorgamiento de Concesiones, **Anexo BC-18**, artículo 9.

130 Memorial de Contestación, ¶ 110, nota al pie de página 172.

131 La renuncia de derechos conforme al derecho venezolano, puede realizarse por su titular, con la única limitación general de que no puede significar renuncia de pre-

98. Por otra parte, y tal como lo expliqué en mi primera Opinión Legal, conforme al artículo 90.2(c) de la Ley de Minas de 1999, en materia de concesiones de níquel de manto, el "impuesto de explotación" se calcula "sobre el valor comercial en la mina" *luego de extraído el mineral*, incluyendo

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visiones de "leyes en cuya observancia están interesados el orden público o las buenas costumbres"(art. 6, Código Civil). La renuncia de derechos exige en principio una manifestación expresa de voluntad de su titular, la cual en algunos casos, incluso está sometida a las formalidades de registro, como es el caso de renuncia a los derechos relativos a la propiedad de inmuebles (artículo 1.920, numerales 1, 2 y 3, Código Civil) (Artículo 1.920: "Además de los actos que por disposiciones especiales están sometidos a la formalidad del registro, deben registrarse: 1º.- Todo acto entre vivos, sea a título gratuito, sea a título oneroso, traslativo de propiedad de inmuebles, o de otros bienes o derechos susceptibles de hipoteca. 3º.- Los actos entre vivos, de renuncia a los derechos enunciados en los dos números precedentes.[…]."). En cuanto a la necesidad de que la renuncia a un derecho debe ser expresa, la Sala de Casación Civil del Tribunal Supremo de Justicia, por ejemplo, en sentencia No. 905 de fecha 19 de agosto de 2004 (caso: *Aereohotel Los Roques C.A. vs. Ezio Chiarva*), citando una sentencia anterior de 30 de mayo de 2003 (caso *Servicios de Vigilancia, Resguardo y Protección Serviresproca C.A c/ V.P.S. Seguridad Integral C.A*.), consideró en relación con el desistimiento de un recurso, que el mismo es : "acto jurídico que consiste en el abandono o renuncia positiva y precisa que hace el actor o interesado, de manera directa, ya de la acción que ha intentado, ya del procedimiento incoado para reclamar judicialmente algún derecho, o de un acto aislado de la causa o, en fin, de algún recurso que hubiese interpuesto...", agregando que "Como todo acto jurídico está sometido a ciertas condiciones, que si bien no todas aparecen especificadas en el Código de Procedimiento Civil, han sido establecidas por la jurisprudencia, entre ellas, el desistimiento deberá manifestarse expresamente a fin de que no quede duda alguna sobre la voluntad del interesado." Véase Sentencia Nº 905 de la Sala de Casación Civil, *Aereohotel Los Roques C.A. contra Ezio Chiarva*, (Registro Nº 2003-000278), de 19 de agosto de 2004, **Anexo BC-[]**. En el mismos sentido, la sentencia de la misma Sala de Casación Civil Nº 003, *José Ángel Portales, Vs. Sonia Milena Salcedo Y José Dorney Calderón*, (Registro Nº 2014-000785) de 3 de febrero de 2015, **Anexo BC-[]**. En materia de prescripción, por ejemplo, el artículo 1.957 del Código Civil establece que "La renuncia de la prescripción puede ser expresa o tácita. La tácita resulta de todo hecho incompatible con la voluntad de hacer uso de la prescripción." Como lo ha destacado el profesor José Luis Aguiar Gorrondona al comentar esta norma: "La renuncia expresa resulta de toda manifestación directa de la voluntad de no aprovecharse de la prescripción sin que la ley exija para ello una fórmula especial. La renuncia tácita no se presume; pero resulta de todo hecho que sea manifiesta e inequívocamente incompatible con la voluntad de hacer uso de la prescripción. Véase en José Luis Aguilar Gorrondona, en *Cosas, bienes y derechos reales. Derecho Civil II*, Universidad Católica Andrés Bello, Caracas 2008, **Anexo BC []**, página 384.

"los costos en que se incurra *hasta el momento en que el mineral extraído*, triturado o no" sea trasportado a los efectos de ser *beneficiado*, es decir, antes de que "sea depositado en el vehículo que ha de transportarlo fuera de los límites del área otorgada o a una planta de *beneficio o refinación*, cualquiera sea el sitio donde ésta se localice, teniendo en cuenta su riqueza y el precio del mineral entre otros factores relevantes"[132]. Se trata, por tanto, y ello deriva del nombre mismo, de un impuesto que lo que grava es la *explotación*, y por eso se calcula por el valor de la mina, es decir, del yacimiento una vez extraído el material, teniendo en consideración los costos – incluyendo la trituración en su caso - en que se haya incurrido hasta que el mineral extraído sea transportado fuera de los límites de la concesión a una planta de beneficio.

99. Al respecto, el Dr. Canónico intenta sugerir en su opinión que la referencia a 'trituración' en el artículo 90.2(c) de la Ley de Minas de 1999 permitiría extender el concepto de explotación a actividades de procesamiento[133]. Primeramente, debe decirse que el artículo 90.2(c) deja en claro que el factor clave para determinar los costos de las actividades que están incluidos a los efectos de establecer el valor comercial del mineral en la mina, es que las mismas tengan lugar antes de que el mineral "sea depositado en el vehículo" para su transporte "fuera de los límites del área otorgada o a una planta de procesamiento". Por tanto, la potencial inclusión de los costes de "trituración", no significa que incluya los de "procesamiento", "refinación" o "beneficio". Por tanto, es claro que el impuesto previsto en el artículo 90.2(c) sí es de explotación y se paga sólo por la explotación, aunque el Reglamento de la Ley de Minas de 1999 haya establecido que, en ciertos casos, se incorpore a la estructura de costos la trituración para calcular el valor comercial en la mina[134].

100. El Dr. Canónico incurre en un error similar de apreciación al referir al artículo 91 de la Ley de Minas de 1999. Dicho artículo establece los criterios a tomar en cuenta por la Administración minera[135] para calcular el "valor comercial de la mina" a los fines del pago del impuesto de explota-

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132 Véase Ley de Minas de 1999, **Anexo C-19**, artículo 90.2(c) (énfasis añadido).

133 Véase Opinión Canónico, ¶ 34.

134 Reglamento General de la Ley de Minas Nº 1.234, *Gaceta Oficial* Nº 37.155, 9 de marzo de 2001, **Anexo C-82**, (***Reglamento de 2001***).

135 Es decir, estudio de mercado sobre riqueza media del mineral y su precio promedio de venta en el mercado comprador.

ción en aquellos casos de concesionarios que "comercialicen directamente con productos semielaborados, refinados o beneficiados del mineral explotado"[136]. El Dr. Canónico deriva de todo ello que la refinación o beneficio supuestamente "se encuentra en el marco de la concesión" y que el impuesto de explotación entonces "no es totalmente cierto que sólo se paga por la extracción del mineral"[137]. Sin embargo, contrariamente a lo sostenido por el Dr. Canónico, dicha norma no establece en forma alguna un "impuesto de explotación" que pueda referirse a materiales distintos a los minerales extraídos (pues dejaría de ser impuesto de "explotación"), y que pueda estar destinado a gravar a los productos refinados o beneficiados (que no están dentro de la explotación). Lo que la norma prevé es simplemente una metodología o forma de calcular el "valor comercial de la mina" para gravar la explotación del yacimiento, precisamente porque su explotación es la actividad que se concede, y la que está sujeta al impuesto.

101. Por todo ello es claro que conforme al ordenamiento jurídico venezolano, la planta de beneficio, refinación o procesamiento de mineral extraído del yacimiento de MLDN era un bien propio que construyó la concesionaria para llevar a cabo un proceso ulterior de industrialización del mineral minado de las varias Concesiones que le fueron otorgadas. Esta actividad fue realizada como una actividad auxiliar o conexa a la minería en los términos de los artículos 1 y 86 de la Ley de Minas de 1999 que tanto el concesionario, como cualquier otro particular, pueden ejercer libremente sometidos a la vigilancia del Estado. En tal sentido, dicha planta no era ni es un bien reversible, y en caso de ser considerado un bien útil a efectos de las actividades del Estado, debía haber sido adquirido por él mismo mediando el pago del precio respectivo, o expropiándolo mediante los mecanismos legales adecuados, pagando la indemnización correspondiente.

E. La no reversibilidad del material acopiado de ferroníquel

102. Como se estableció precedentemente[138], si bien las minas o yacimientos son bienes del dominio público, una vez otorgada una concesión de explotación a un concesionario, el mineral extraído de las mismas, y por supuesto los productos y subproductos de los procesos de refinación o bene-

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136 Véase Ley de Minas de 1999, **Anexo C-19**, artículo 91.

137 Véase Opinión Canónico, ¶ 34.

138 Véase Primera Opinión Brewer ***supra* ¶¶ *31 ss.***

ficio del mismo, son propiedad del concesionario[139]. En su Opinión Legal, el Dr. Canónico desconoce esta distinción y sostiene que el ferroníquel acopiado en depósito que fue procesado por MLDN y que se encontraba en la planta de procesamiento metalúrgica el 11 de noviembre de 2012 cuando Venezuela tomó control de la misma, habría revertido legalmente al Estado. En apoyo de su posición, el Dr. Canónico sostiene que "las minas y sus frutos forman parte del dominio público" o que "tanto la mina o yacimiento minero como el mineral extraído, son propiedad del Estado"[140]; y que "ni el mineral ni el producto de su transformación pasan a la propiedad privada del concesionario"[141]. Estos argumentos no tienen fundamento alguno en el ordenamiento jurídico venezolano y prueba de ello es que el Dr. Canónico no aporta soporte legal o doctrinario alguno al respecto.

103. Los argumentos del Dr. Canónico respecto de la supuesta reversibilidad del material acopiado son contrarios a la regulación tanto en Ley de Minas de 1999 como el Código Civil. Si bien es cierto que la declaratoria constitucional y legal de los "yacimientos" o "minas" como bienes del dominio público impide al propietario del suelo y el concesionario minero pretender derechos de propiedad sobre el subsuelo[142], de ello no se puede derivar que los minerales extraídos en ejecución de una concesión de explotación minera sean "bienes del dominio público" y mucho menos, que el material o substancias minerales una vez beneficiados, procesados y transformados, puedan seguir siendo considerados como "bienes del dominio público" como pretende el Dr. Canónico[143]. Ello sería equivalente al absurdo de consi-

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139 Véase Primera Opinión Brewer ***infra* ¶ *104.***

140 Véase Opinión Canónico, ¶¶ 59 y 63.

141 Véase Opinión Canónico, ¶ 59. Siguiendo este razonamiento, en el Memorial de Contestación la República afirma que por haberse adoptado "un régimen demanial de las minas y yacimientos" entonces supuestamente "las minas y sus frutos forman parte del domino público" o que la "noción de dominio público implica que tanto la mina o yacimiento minero, como el mineral extraído, son propiedad del Estado". Véase Memorial de Contestación, ¶ 196.

142 Véase Código Civil, **Anexo C-[ ]**, artículo 549. Por ello, en la Exposición de Motivos de la Ley de Minas de 1999, se expresó: "Es bueno recordar que en ningún caso, los propietarios del suelo ni del subsuelo pueden reclamar la propiedad de los yacimientos que es siempre de la República." Véase Ley de Minas de 1999, **Anexo C-19.**

143 Véase Opinión Canónico, ¶ 58.

derar que como la "mina" es un bien inmueble[144], entonces el material extraído de la misma e incluso el material procesado, seguiría siendo un "bien inmueble" por extensión.

104. Como ya se ha indicado,[145] cuando se otorga una concesión de explotación de un yacimiento minero, se le confiere al concesionario el derecho exclusivo de extraer y aprovechar el mineral extraído, incluyendo - como acepta el Dr. Canónico- el derecho de "comercializarlo para obtener un beneficio económico del mismo"[146]. Pero al contrario de lo que afirma el Dr. Canónico[147], dicha comercialización la hace el concesionario a título de propietario del mineral extraído. Es decir, el mineral extraído y por supuesto el producto de su transformación posterior, son bienes muebles de la propiedad privada del concesionario y por ello la Ley le permite aprovecharse de ellos. Ello surge del artículo 546 del Código Civil que dispone que los bienes que sean producto del trabajo y de una industria lícita como las reguladas en la legislación de minas, son de propiedad de la persona que los produce. Dicho mineral, además, como producto que proviene de las minas, se considera conforme al artículo 552 del Código Civil como un fruto natural del titular del derecho real inmueble de explorar y explotar un yacimiento, y por tanto – nuevamente- propiedad del concesionario[148].

105. En su Opinión el Dr. Canónico indica que respecto del tratamiento de los frutos de las minas o yacimientos mineros existiría entre el Código Civil y la legislación minera venezolana una supuesta "contradicción" que resultaría en la no aplicabilidad en este caso de la normativa del

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144 Véase Código Civil, **Anexo C-[ ]**, artículo 547.

145 Véase ***supra* ¶¶ *35 ss.***

146 Véase Opinión Canónico, ¶ 59.

147 Véase Opinión Canónico, ¶ 59.

148 Conforme al artículo 552 del Código Civil, en efecto, el concesionario también adquiere la propiedad por accesión de los minerales producidos en la concesión en ejercicio de sus derechos mineros. Dicha norma establece que "los frutos naturales" pertenecen "por derecho de accesión al propietario de la cosa que los produce" definiéndose como "frutos naturales" a "los que provienen directamente de la cosa, con o sin industria del hombre" como son precisamente "los productos de las minas o canteras." En tal sentido, todos los minerales extraídos de la explotación de las concesiones, en ejercicio de los derechos mineros, son bienes que pertenecen al titular de los derechos mineros derivados de la concesión. Véase Código Civil, **Anexo C-[ ]**.

Código Civil[149], lo cual es simplemente inexacto. No hay contradicción alguna entre ambas normativas. Una vez extraído el mineral de la mina o yacimiento, el concesionario tiene como consecuencia de su derecho a explotar la mina, el derecho de aprovecharse de ese fruto. Por tal razón, de acuerdo con lo establecido en el Código Civil, el fruto producto del trabajo del concesionario por la explotación del yacimiento o mina es, por accesión, de su propiedad privada.

106. Ello es consistente con la posición adoptada por la Procuraduría General de la República en dictamen de 20 de octubre de 1971, al calificar a la concesión minera como un contrato especial "con una característica principal" que es:

> "que quien contrate con la República, esto es, el concesionario, *se aprovecha y apropia de los minerales extraídos* pagando una determinada suma (royalty) a la entidad pública propietaria de la mina objeto de convenio […]. A nuestro juicio, en la definición de la concesión minera se debe hacer resaltar el carácter particular de éstas, es decir, que *el concesionario se apropia de las sustancias extraídas de la mina*, y ese criterio nos lleva a sostener que los principios acerca de la concesión en general y de la gestión administrativa directa, aplicables para otros sectores de derecho público […] son aceptables en el derecho minero, pero con las adaptaciones necesarias."[150]

107. Según el Dr. Canónico, en cambio, "cuando se otorga una concesión, se le transmite al particular la posibilidad de aprovecharse del mineral y comercializarlo para obtener un beneficio económico del mismo, pero ni el mineral ni el producto de su transformación pasan a la propiedad privada del concesionario"[151]. Esta teoría, completamente insostenible en el derecho venezolano, implicaría que no sólo el mineral extraído sino los subproductos derivados de su transformación seguirían siendo entonces bienes del dominio público. Lo absurdo de esta conclusión, sin embargo, llevó al Dr. Canónico a tratar de corregir los propios deformados efectos de su afirmación, pretendiendo poner un "límite" a la pretendida "extensión del dominio

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149 Ley de Minas de 1999, **Anexo C-19**, artículo 29. Véase Opinión Canónico, ¶ 55.

150 Véase Elsa Amorer, *El Régimen de la Explotación Minera en la Legislación Venezolana,* Colección Estudios Jurídicos Nº 45, Editorial Jurídica Venezolana, Caracas 1991, **Anexo BC-[ ]**, página 144 (énfasis añadido).

151 Véase Opinión Canónico, ¶ 59.

público del yacimiento"[152], afirmando que "cualquier producto del mineral extraído permanece propiedad del Estado hasta que este se comercialice"[153]. Es decir, según el Dr. Canónico, contra toda lógica lo que "sería propiedad del concesionario es el producto económico que se obtenga de la comercialización del mineral procesado, lo que pasaría a ser bien de propiedad privada del concesionario"[154], es decir, en definitiva, sólo el dinero que obtenga de la venta del mineral procesado.

108. Todas esas apreciaciones, por supuesto, no tienen asidero legal alguno. Como ya se explicó, la Ley de Minas de 1999 y el Código Civil garantizan al concesionario de explotación de un yacimiento minero, el derecho exclusivo de extraer y aprovechar el mineral extraído en carácter de propietario del mismo. Así también lo confirma otro autor citado por el propio Dr. Canónico, expresando con claridad que lo que es dominio público en materia minera es el yacimiento o la mina, pero no el "material extraído como producto de la mina" del que se "hacen dueños" los concesionarios, porque "el mineral extraído es distinto de la mina, es solamente su fruto"[155].

109. En definitiva, en el caso de las actividades de la concesionaria MLDN, siendo el ferroníquel acopiado en la planta de procesamiento metalúrgica un bien de propiedad privada del concesionario, y no estando afectado al objeto de la concesión que fue la explotación de níquel de manto, dicho material era un bien no reversible, propiedad de la empresa concesionaria y que no podía ser apropiado por el Estado sin compensación.

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152 Véase Opinión Canónico, ¶ 60. Este argumento, por otra parte, es incompatible con los principios de la reversión, ya que si incluso como afirma el Dr. Canónico, el material acopiado pudiere considerarse como "bienes del dominio público", en relación con los mismos no cabría entonces argumentar ni siquiera su "reversión o no reversión" dado que se trataría entonces de la una "recuperación" de bienes del dominio público, lo que por supuesto no es el caso respecto del ferroníquel acopiado.

153 Véase Opinión Canónico, ¶ 63. El Dr. Canónico basa su conclusión en el "derecho público venezolano" pero sin decir en qué artículo concreto de la Constitución de 1999 o texto legal se apoya.

154 Véase Opinión Canónico, ¶ 60.

155 Véase Miguel A. Basile Urizar, "Consideraciones sobre la declaración de caducidad de las concesiones por no iniciar la explotación de la mina en la ley de Minas", en *Revista Electrónica de Derecho Administrativo Venezolano*, Nº 5, enero a abril 2015, **Anexo AC-03** (citando a la vez a Ezequiel Monsalve Casado).

II. EL RECLAMO SOBRE PROHIBICIÓN DE EXPORTACIÓN DE CONTENEDORES

1. Introducción

110. La Demandante también ha formulado en este caso un reclamo contra la República por las medidas adoptadas contra MLDN consistentes en el bloqueo impuesto por las autoridades de la República a la exportación de sus contenedores con carga de ferroníquel. Entiendo que dicho bloqueo tuvo lugar inicialmente a partir del mes de febrero de 2012 en relación con 21 contenedores en el Puerto de Guaranao, para luego extenderse a partir de junio de 2012 al Puerto de Guanta, donde llegó a afectar a unos 244 contenedores adicionales[156].

111. La Demandante me ha solicitado que revise los argumentos presentados por la República en relación con su reclamo en relación con la prohibición de exportación de los contenedores de MLDN en los Puertos de Guaranao y Guanta, y exprese mi Opinión Legal sobre la legalidad de la conducta de las autoridades de la República en dicho contexto, conforme derecho venezolano.

2. Los hechos subyacentes al reclamo de prohibición de exportación

112. Respecto de los contenedores de MLDN bloqueados en el Puerto de Guaranao, entiendo que en febrero de 2012 la Guardia Nacional Bolivariana (***GNB***) impidió a MLDN la exportación de los 21 contenedores de ferroníquel que se encontraban listos para el embarque. Entiendo asimismo que MLDN había cumplido con todos los requisitos legales necesarios para su embarque y había obtenido la autorización previa para exportarlos por parte del Servicio Nacional Integrado de Administración Aduanera y Tributaria (***SENIAT***).[157] De la documentación referida en el Memorial de Contestación y de lo expuesto por la Demandante se deduce que durante los meses siguientes, en reiteradas ocasiones MLDN intentó obtener clarificación de las autoridades sobre la razón que pudiera justificar el bloqueo impuesto a la expor-

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156 Memorial, ¶¶ 9, 84 a 88, y 94 a 109; Memorial de Contestación, ¶¶ 158 ss., en particular 165 a 177; Declaración de Figueroa, ¶¶ 21 a 28; Declaración de Ortiz ¶¶ 10 a 18, en particular 13; Declaración de Raposo, ¶¶ 24 a 32; Declaración de Chacón; Declaración de Angulo.

157 Memorial, ¶ 84.

tación de los 21 contenedores[158]. Sólo fue a mediados de mayo de 2012 cuando se le comunicó a MLDN que la GNB había bloqueado la exportación de los contenedores a raíz de dudas que habían surgido sobre la naturaleza del material en los contenedores, indicándose que podía tratarse de "chatarra ferrosa", cuya exportación –según se le indicó a MLDN- estaba prohibida en Venezuela sin autorización del Vicepresidente Ejecutivo de la República[159].

113. Entiendo que previo a ello, en febrero de 2012, el SENIAT condujo un estudio técnico sobre el contenido de los 21 contenedores en Guaranao en los laboratorios de PDVSA y que dicho estudio confirmó con fecha 27 de marzo de 2012 el contenido de ferroníquel de los contenedores[160]. Entiendo que el resultado de este estudio no fue comunicado a MLDN. Con posterioridad a ello, el 17 de abril la GNB condujo una inspección a los contenedores indicando que "se procedió a la revisión de los contenedores y el material que tiene en su interior (ferroníquel) y no se observó ningún tipo de sustancia estupefaciente"[161]. Adicionalmente, la GNB realizó un estudio técnico para verificar la naturaleza del material en los 21 contenedores en el Puerto de Guaranao, cuyo resultado de fecha 27 de abril de 2012 indicó que "la muestra presenta un porcentaje de níquel de 9%". Esta conclusión luego la GNB la entendió como indicativa de la presencia de chatarra ferrosa[162].

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158 Ver cartas de MLDN a autoridades, en particular, la Guardia Nacional y la Inspectoría Técnica Regional; carta del agente aduanero de MLDN, NH Import Export, C.A., a la Guardia Nacional, 19 de abril de 2012, **Anexo C-28**; carta de NH Import Export, C.A. a la Guardia Nacional, 20 de abril de 2012, **Anexo C-29**. carta de MLDN a la Inspectoría Técnica Regional Nº 2 del Ministerio de Minas, 21 de mayo de 2012, **Anexo C-33**.

159 Memorial, ¶¶ 85 y 86. Correo electrónico de Tibisay Díaz (MLDN) a Richard Lozada y Ricardo Pérez (MLDN), 18 de mayo de 2012, **Anexo C-32**; Carta de la Guardia Nacional al Gerente de la Aduana de Guaranao, 15 de mayo de 2012, **Anexo C-30**; Decreto Nº 3.895 de fecha 12 de septiembre de 2005 *Gaceta Oficial* Nº 38.271, de 13 de septiembre de 2005, reformado por el Decreto Nº 7.927 del 21 de diciembre de 2010 *Gaceta Oficial* Nº 39578, de 21 de diciembre de 2010, **Anexo C-23**

160 Memorial de Contestación, ¶ 166; Declaración Raposo, ¶ 29.

161 Acta de Revisión de Mercancía del Comando Antidrogas de la Guardia Nacional Bolivariana, 17 de abril de 2012, **Anexo R-25**.

162 Ver Peritaje del Laboratorio Regional Nº 4 de la Guardia Nacional, 12 de mayo de 2012, **Anexo R-28**. Ver también Dictamen Pericial Químico Nº LC-LR4-DQ-12/0356, del Laboratorio Regional Nº 4 de la Guardia Nacional, 27 de abril de 2012, **Anexo R-27**.

Entiendo asimismo que a finales de mayo de 2012 se realizó un nuevo estudio técnico del material en los contenedores, esta vez por parte del ente especializado de la Administración para el análisis de materiales mineros, el Instituto Nacional de Geología y Minería (***INGEOMIN***), organismo técnico oficial adscrito al MIBAM. El resultado de dicho estudio confirmó que los 21 contenedores contenían el ferroníquel declarado por MLDN. Este resultado sí le fue comunicado a MLDN[163]. El 31 de mayo de 2012, el SENIAT volvió a confirmar que MLDN había cumplido con los trámites aduaneros necesarios para efectuar la exportación de ferroníquel a la cual tenía derecho.[164] Según indica la República en su Memorial de Contestación, existió un estudio posterior encomendado por la GNB, realizado por el Instituto Nacional de Investigaciones Científicas (***IVIC***) que en julio de 2012 confirmó que la carga de los contenedores efectivamente era ferroníquel. Entiendo que este estudio tampoco fue comunicado a MLDN.

114. Entiendo asimismo que a partir de junio de 2012 la prohibición de exportación a MLDN se extendió al resto de los puertos venezolanos y concretamente al Puerto de Guanta, donde la misma llegó a afectar a 244 contenedores adicionales. A diferencia de lo sucedido con los 21 contenedores bloqueados en el Puerto de Guaranao, entiendo que los 244 contenedores bloqueados en Guanta jamás fueron objeto de ninguna inspección, procedimiento o acusación expresa de las autoridades venezolanas con respecto a posibles dudas sobre su contenido.

115. Ante el bloqueo de sus contenedores, entiendo que MLDN realizó diversas gestiones formales e informales ante distintos órganos del Gobierno, incluyendo al SENIAT, el Ministerio de Minas, la Inspectoría Técnica Regional Nº 2 (***Inspectoría Técnica***), la GNB y el Vicepresidente Ejecutivo de la República, para conocer la razón de la continuación de la prohibición de exportación de su ferroníquel[165]. Entiendo que, salvo por una respuesta de la

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163 Carta del Laboratorio Técnico de la Dirección Regional del Ministerio de Minas a la Inspectoría Técnica Regional del Ministerio de Minas, 7 de junio de 2012, **Anexo C-38**; carta de MLDN al Ministerio de Minas, 20 de junio de 2012, **Anexo C-42**.

164 Memorial, ¶ 88; Memorial de Contestación, ¶ 176; Declaración Raposo, ¶ 31; Declaración Angulo; Carta del SENIAT a MLDN, 31 de mayo de 2012, **Anexo C-36**.

165 Ver Cartas de MLDN a autoridades, en particular, la Guardia Nacional, la Inspectoría Técnica Regional, el SENIAT, el Ministerio de Minas / Vice Ministro de Minas, y posteriormente, el Vice Presidente de Venezuela: carta de MLDN al Ministerio de Minas, 5 de junio de 2012, **Anexo C-37**; carta de MLDN a la Vicepresidente, 26 de junio de 2012, **Anexo C-40**; carta de MLDN al Ministerio de Minas, 20 de junio de

GNB en el mes de agosto reiterando su posición expresada en mayo respecto de la prohibición de exportación de chatarra ferrosa sin autorización del Vicepresidente, MLDN no obtuvo respuestas a sus consultas ni ninguna decisión administrativa expresa de parte de las autoridades competentes.

116. En su Memorial de Contestación la República indica que las gestiones llevadas a cabo por los diferentes órganos del Gobierno en relación con los 21 contenedores en el Puerto de Guaranao constituyeron el procedimiento habitual ante las sospechas que surgieron de parte de la GNB de que el material a ser exportado era chatarra ferrosa[166]. Venezuela acepta que el análisis del INGEOMIN confirmó que efectivamente respecto del contenido de los 21 contenedores detenidos en Guaranao que se trataba de ferroníquel[167]. Sin embargo, Venezuela explica que el asunto no pudo ser resuelto por las autoridades, dado que como consecuencia de la duda inicial de la GNB respecto del contenido de los contenedores en cuestión, el asunto había sido remitido para la consideración del Vicepresidente Ejecutivo de la República[168]. Entiendo que Venezuela no presenta ninguna evidencia de que el Vicepresidente Ejecutivo de la República hubiese respondido a las

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2012, **Anexo C-42**; carta de MLDN al Vicepresidente de Venezuela, 26 de junio de 2012, **Anexo C-44**; carta de MLDN al Ministerio de Minas, 12 de julio de 2012, **Anexo C-46**; carta de MLDN a la Guardia Nacional, 31 de julio de 2012, **Anexo C-48**; carta de MLDN al Ministerio de Minas, 21 de agosto de 2012, **Anexo C-49**; carta de MLDN a la Guardia Nacional, 5 de septiembre de 2012, **Anexo C-51A**; carta de MLDN al Ministerio de Minas, 5 de septiembre de 2012, **Anexo C-51B**; y carta de MLDN a la Inspectoría Técnica Regional del Ministerio de Minas, 5 de septiembre de 2012, **Anexo C-51C**; carta de Anglo American al Vicepresidente de Venezuela, 14 de septiembre de 2012, **Anexo C-53**. Ver también carta de MLDN al Vicepresidente de Venezuela, 28 de septiembre de 2012, **Anexo C-54A**; carta de MLDN a la Guardia Nacional, 28 de septiembre de 2012, **Anexo C-54B**; carta de MLDN al Ministerio de Minas, 28 de septiembre de 2012, **Anexo C-54C**. Ver también carta de MLDN al Vicepresidente de Venezuela, 5 de octubre de 2012, **Anexo C-55A**; carta de MLDN a la Guardia Nacional, 5 de octubre de 2012, **Anexo C-55B**; carta de MLDN al Ministerio de Minas, 5 de octubre de 2012, **Anexo C-55C**; carta de MLDN al Vicepresidente de Venezuela, 18 de octubre de 2012, **Anexo C-57**; carta de MLDN al Ministerio de Minas, 23 de noviembre de 2012, **Anexo C-59**; carta de MLDN al Ministerio de Minas, 23 de agosto de 2012, **Anexo C-114**; carta de Anglo American a la Guardia Nacional, 5 de junio de 2012, **Anexo R-33**.

166 Memorial de Contestación, ¶ 182; Declaración de Ortiz, ¶ 12.

167 Memorial de Contestación, ¶¶ 166 a 173; Declaración Raposo, ¶ 29.

168 Memorial de Contestación, ¶¶ 173 ss.; Declaración de Figueroa, ¶ 25; Declaración de Ortiz, ¶ 15.

peticiones de MLDN o tomado determinación alguna en relación con los contenedores y su posible exportación[169]. Venezuela justificó las medidas de bloqueo de los contenedores en el Puerto de Guaranao, indicando que la propia MLDN creó una situación desfavorable al pretender exportar por primera vez por desde ese puerto, sin previa comunicación a las autoridades[170]. La posición de Venezuela, en conclusión, es que los diversos órganos del Estado involucrados en la prohibición de exportación impuesta a MLDN –incluyendo el SENIAT, la GNB, el Ministerio de Minas, la Inspectoría Técnica y el Vicepresidente Ejecutivo de la República- actuaron dentro de los confines de la ley venezolana[171].

117. Entiendo finalmente que ante la imposibilidad de exportar los contenedores bloqueados en los Puertos de Guaranao y Guanta y la falta de justificación por parte de las autoridades competentes para dicho bloqueo, MLDN procedió en diciembre de 2012 a vender la totalidad de dichos contenedores bloqueados a la empresa venezolana Xiatools, con el fin de mitigar los daños patrimoniales que se le habían causado producto del bloqueo[172].

3. Análisis de la actuación de las autoridades venezolanas

118. De lo antes expuesto surge que la República, a través de las autoridades administrativas con competencia en materia de aduanas y, en particular, en el proceso de exportación de mercaderías, entre febrero y diciembre de 2012 prohibió la exportación de un total de 265 contenedores con mineral de ferroníquel en los Puertos de Guaranao y Guanta propiedad de MLDN. En ambos casos, el bloqueo se produjo sin que se hubiese dictado por parte de los gerentes o jefes de la aduana responsable -es decir, el SENIAT[173]-, decisión administrativa alguna que indicara expresamente que se

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169 Ortiz declaró que en septiembre de 2012 elevó una nota informativa personalmente al Vicepresidente de la República para informarle del resultado del estudio de INGEOMIN y obtener respuesta. Véase Declaración de Ortiz, ¶ 16.

170 Memorial de Contestación, ¶¶ 165 y 177; Declaración de Figueroa, ¶ 21.

171 Memorial de Contestación, ¶ 190; Declaración de Ortiz, ¶¶ 12 y 18.

172 Memorial, ¶ 109.

173 El Servicio Nacional Integrado de Administración Tributaria (SENIAT), creado mediante Decreto Nº 310 de 10 de agosto de 1994, en *Gaceta Oficial* Nº 35.525, de 16 de agosto de 1994 es el producto de la reestructuración y fusión de la Dirección General Sectorial de Rentas y Aduanas de Venezuela Servicio Autónomo, de modo que las referencias a Aduanas de Venezuela Servicio Autónomo contenidas en las disposiciones legales y reglamentarias se entienden referidas al SENIAT. Véase

había limitado, suspendido o prohibido dicha exportación, y las razones para ello. Adicionalmente, y tal como se evidencia de los hechos, existieron en relación con la prohibición de exportación de los 21 contenedores en el Puerto de Guranao una serie de medidas adoptadas por funcionarios de distintos organismos públicos, que evidenciaron una violación a los más elementales principios de competencia y coordinación, y por tanto, de legalidad[174].

119. Conforme al artículo 136 de la Constitución y a las previsiones de la Ley Orgánica de la Administración Pública[175], todas las actuaciones de la Administración Pública están subordinadas a la ley, de modo que los funcionarios sólo pueden -y deben- hacer lo que la ley le permite, siendo la nulidad, la consecuencia jurídica de la actuación administrativa en violación al principio de la competencia[176]. La competencia de las autoridades administrativas implica, por consiguiente, la atribución de facultades mediante ley, lo cual conlleva necesariamente una obligación de actuar en el marco

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Decreto Nº 310 de 10 de agosto de 1994, en *Gaceta Oficial* Nº 35.525, de 16 de agosto de 1994, **Anexo BC-[]**, artículo 1 y 5. La máxima autoridad aduanera dentro del SENIAT es el Intendente Nacional de Aduanas (Decreto Nº 682 de 07 de febrero de 2000 en *Gaceta Oficial* Nº 36.892 del 15 de febrero de 2000), **Anexo BC-[]**. En cada Aduana funciona unas Gerencias de Aduana a cargo del Gerente (artículos 78, 83 y 119 de la Resolución Nº 32 sobre la organización, atribuciones y funciones del SENIAT de 24 de marzo de 1995, en *Gaceta Oficial* Nº 4.881, Extraordinario de 29 de marzo de 1995) **Anexo BC-[]**, quienes ejercen su actividad en la circunscripción aduanera correspondiente.

174 Para una discusión más detallada sobre el principio de legalidad en el ámbito del derecho administrativo venezolano, véase infra ¶¶ 142 ss., 233

175 Constitución de 1999, **Anexo C-80**, artículo 136; Decreto Con Rango, Valor y Fuerza De Ley Orgánica de la Administración Pública, en *Gaceta Oficial* Nº 6.147 Extraordinario, 17 de noviembre de 2014, (***Ley Orgánica de la Administración Pública***) **Anexo BC-[ ]**, artículos 4 y 26.

176 Véase sentencia 3255 del 18 de noviembre de 2003, caso *Impugnación de varios artículos de la Constitución del Estado Miranda*, *Revista de Derecho Público*, Nº 93 a 96, Editorial Jurídica Venezolana, Caracas 2003, **Anexo BC-[]**, página 315. Como lo ha establecido la Sala Constitucional del Tribunal Supremo de Justicia, al referirse al "principio de la competencia" de los funcionarios y de los órganos públicos, el mismo implica que "las actuaciones de la Administración están subordinadas a la ley, de modo que ésta sólo puede hacer lo que la ley le permite; de allí que la nulidad sea la consecuencia jurídica de la inobservancia del aludido principio". Véase Sala Constitucional del Tribunal Supremo de Justicia, sentencia Nº 1182 del 11 de octubre de 2000 en *Revista de Derecho Público*, Nº 84, Editorial Jurídica Venezolana, Caracas 2000. **Anexo BC-[]**, página 178.

de dichas facultades por parte de la autoridad administrativa[177]. De ello se deriva el principio general de que la competencia de los funcionarios públicos es irrenunciable, indelegable, improrrogable y no puede ser relajada por convención alguna, salvo los casos expresamente previstos en las leyes y demás actos normativos[178].

120. Conforme a esos principios, el régimen de la intervención y actuación del Estado en materia aduanera y en especial en materia del régimen de exportación, está establecido en la Ley Orgánica de Aduanas[179]. En dicha ley se establece la competencia de la "Administración Aduanera" -es decir, el SENIAT[180]- para "intervenir, facilitar y controlar la entrada, permanencia y salida del territorio nacional, de mercancías objeto de tráfico internacional y de los medios de transporte que las conduzcan", siendo la misma la competente para "aplicar los regímenes aduaneros", incluyendo el régimen de exportación[181]. Conforme a esas normas, el SENIAT es competente para "resolver mediante acto motivado los casos especiales, dudosos, no previstos, fortuitos y de fuerza mayor, que se sometan a su consideración, dejando a salvo los intereses de la República y las exigencias de la equidad"[182]. Le corresponde además al SENIAT "ordenar los estudios, experticias y análisis que sean requeridos por los servicios aduaneros", y también "autorizar a laboratorios especializados la realización de los exámenes requeridos para evacuar las consultas"[183].

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177 Véase Allan R. Brewer-Carías, *Principios del régimen jurídico de la organización administrativa venezolana,* Editorial Jurídica Venezolana, Caracas 1991 **Anexo BC-[]**, páginas 47 ss.

178 Ley Orgánica de la Administración Pública, **Anexo BC-[ ]**, artículo 26.

179 Véase Ley Orgánica de Aduanas, *Gaceta Oficial* Nº 6.155 Extraordinario, 19 de noviembre de 2014, **Anexo RLA-136 C-90** (***Ley Orgánica de Aduanas***).

180 Ver nota al pie de página 173.

181 Véase Ley Orgánica de Aduanas, **Anexo RLA-136**, **C-90** artículos 1, 5.5 y 28.

182 Véase Ley Orgánica de Aduanas, **Anexo RLA-136**, **C-90** artículos [ ].

183 Véase Ley Orgánica de Aduanas, **Anexo RLA-136**, **C-90** artículos 5.7, 5.15 y 5.18. La Autoridad Aduanera, además, es la competente para realizar los "reconocimientos" para "verificar el cumplimiento de las obligaciones establecidas en el régimen aduanero y demás disposiciones legales" (art. 55), y en ejercicio del control aduanero, para adoptar todas las medidas necesarias para "fiscalizar, verificar, supervisar y evaluar el cumplimiento" de las disposiciones de la Ley Orgánica y demás normas reguladoras, relativas a la "salida de mercancías del territorio nacional" (art. 140).

121. Conforme a la Ley Orgánica de Aduanas, además, toda actuación de control aduanero tiene necesariamente que iniciarse "mediante Providencia Administrativa emitida por el jefe del [SENIAT] o por el órgano a quien éste delegue", siendo en todo caso, el gerente o jefe de la oficina aduanera "el responsable de la coordinación de la prestación de los servicios de los entes públicos y privados en la zona primaria de la aduana de su jurisdicción, sin menoscabo del ejercicio de las facultades otorgadas por la ley a dichos entes y de la obligación de éstos de coordinar el ejercicio de sus actividades con el jefe de la oficina aduanera"[184]. Para ello, dispone la Ley Orgánica de Aduanas que "los organismos públicos que tengan competencia para verificar físicamente las mercancías en la zona primaria aduanera, que sean introducidas al territorio aduanero nacional o salgan de éste, están obligados a realizarla simultáneamente con los funcionarios aduaneros competentes para el procedimiento de reconocimiento"[185].

122. Entre los organismos que tienen competencia en materia aduanera, y que tienen que actuar bajo la coordinación del gerente o jefe de la oficina aduanera, está la GNB que tiene funciones de resguardo aduanero, o más precisamente como lo establece la Ley Orgánica de la Fuerza Armada Nacional, de "cooperar en las funciones de resguardo nacional"[186]. Por tanto la GNB sólo actúa con carácter de órgano auxiliar y de apoyo al SENIAT conforme se establece en el Reglamento de la Ley Orgánica de Aduanas[187]. Este Reglamento prescribe, en tal sentido, primero, que la GNB en funciones de resguardo aduanero debe cumplir con "las instrucciones en materia fiscal que conforme a sus atribuciones le transmita el gerente o jefe de la oficina aduanera"; y segundo, que es "el jefe de la oficina aduanera el funcionario competente para hacer del conocimiento de los usuarios del servicio aduanero y público en general cualquiera de las medidas relacionadas con la aplicación de las disposiciones de este Reglamento" en materia de resguardo aduanero[188].

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184 Véase Ley Orgánica de Aduanas, **Anexo RLA-136**, **C-90** artículos 142 y 191.

185 Véase Ley Orgánica de Aduanas, **Anexo RLA-136**, **C-90** artículo 191.

186 Ley Orgánica de la Fuerza Armada Nacional Bolivariana, *Gaceta Oficial* Nº 6.020 Extraordinario, de 9 de marzo de 2011, **Anexo BC-[]**, artículo 42.5

187 Reglamento de la Ley Orgánica de Aduanas, *Gaceta Oficial* Nº 4.273 Extraordinario, de 20 de mayo de 1991, **Anexo C-71** (***Reglamento de la Ley de Aduanas***).

188 Reglamento de la Ley de Aduanas, **Anexo C-71**, artículos 455, 459 y 451.

123. La normativa es clara entonces al establecer que en materia de control aduanero, corresponde al gerente o jefe de la oficina aduanera competente adoptar mediante actos administrativos motivados las decisiones que resulten del ejercicio de las funciones de vigilancia y control del régimen aduanero de exportación. Dichos actos sólo pueden dictarse después de cumplirse con las normas pertinentes de procedimiento administrativo, donde se garantice el derecho a ser oído y a la defensa del interesado, conforme a la Ley Orgánica de Procedimientos Administrativos[189]. Sólo contra esos actos administrativos que se dicten en cada caso, por lo demás, es que el interesado podría ejercer los recursos administrativos que se establecen en el Reglamento[190].

124. De acuerdo con lo antes expuesto, por tanto, la GNB no tiene competencia legal alguna para adoptar actos administrativos de prohibición de exportar determinados productos. El rol de la GNB en el contexto de una operación de exportación como la que intentó MLDN, se limita, previa adopción de medidas de resguardo a que hubiere lugar, a informar al gerente o jefe de la Aduana correspondiente. Es este último quien conforme a la ley cuenta con competencia para tomar las medidas a que hubiere lugar, mediante la adopción de los correspondientes actos administrativos motivados.

125. Nada de ello ocurrió en el caso de las fallidas exportaciones de MLDN en los Puertos de Guaranao y Guanta, pues ningún acto administrativo de "suspensión temporal" o de "prohibición" de exportación fue adoptado por los respectivos gerentes o jefes de aduana en dichos puertos. Por el contrario, tal como lo reconoce la República en su Memorial de Contestación[191], fue la GNB la que ordenó la retención del mineral de ferroníquel, con la subsecuente prohibición de hecho para su exportación. Además, como resulta de lo expuesto por la República, en relación con los 21 contenedores bloqueados en el Puerto de Guaranao, fue la propia GNB quien ordenó por su cuenta, usurpando las funciones expresas que correspondían al gerente o jefe de la aduana[192], la realización de estudios, experticias y exámenes requeridos

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189 Sobre los procedimientos iniciados de oficio, con audiencia del interesado en la Ley Orgánica de Procedimientos Administrativos, *Gaceta Oficial* Nº 2818 Extraordinario, de 1 Julio de 1981 (***Ley Orgánica de Procedimientos Administrativos***), **Anexo C-[ ]**, Artículo 48.

190 Reglamento de la Ley de Aduanas, **Anexo C-71**, artículos 462 ss.

191 Memorial de Contestación, ¶¶ 158 ss.

192 Ley Orgánica de Aduanas, **Anexo RLA-136**, **C-90** artículos 5.7 y 5.15.

sobre el material de exportación, en sus propios laboratorios. La GNB tiene funciones de resguardo, para lo cual puede examinar las mercancías, e incluso tomar medidas de resguardo, pero una vez que ello ocurra, tiene que hacerlo del conocimiento del gerente o jefe de la aduana, quien es el que, en su caso, inicia el procedimiento y notifica al interesado.

126. Los estudios realizados por la GNB sobre la carga de los 21 contenedores en Guaranao, por otra parte, arrojaron resultados contradictorios entre sí, y –más importante aún- contradictorios con los estudios realizados por el SENIAT en el laboratorio de PDVSA y por el INGEOMIN. La realización de estudios por la GNB en este contexto resultó irrazonable dado que PDVSA, y en particular, INGEOMIN (que -tal como las mismas autoridades aceptaron- es el organismo de la Administración Pública que está especialmente capacitado para realizar el muestreo de minerales y sus derivados[193]) estaban evidentemente más capacitados para ello. De hecho, tal y como lo reconoce en su declaración testimonial, el técnico de la GNB Capitán Jhomnata Venegas Chacón que efectuó el estudio de 27 de abril de 2012 carecía de experiencia en este tipo de análisis[194], y la propia República acepta que la muestra utilizada en dicho estudio "pudo no haber sido representativo de la mercancía total en los contenedores"[195].

127. Es claro que el resultante bloqueo de los 21 contenedores en el Puerto de Guaranao, que la propia República denominó en su Memorial de Contestación como la "retención de los contenedores" y la "suspensión temporal de la exportación de ferroníquel"[196], no fue objeto de decisión formal administrativa alguna. Dicha medida fue adoptada de hecho por la GNB, en vez de resultar de un acto administrativo emanado del jefe de la oficina aduanera del SENIAT que era el único funcionario competente para adoptarlo. El intento de la República de justificar semejante proceder con el argu-

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193 Memorial de Contestación, ¶ 172; Declaración de Angulo, ¶ 10; minuta de reunión, 24 de mayo de 2012, **Anexo R-32**; Informe Inspección Técnica Guaranao, Punto Fijo, Estado Falcon del INGEOMIN, 8 de junio de 2012, **Anexo R-34**. Entre las atribuciones de INGEOMIN conforme al artículo 118.b de la Ley de Minas, están las de "elaborar estudios geológicos y de investigación, evaluaciones de los recursos mineros, prestar asistencia técnica, servicios de laboratorio y de consultoría en las diferentes áreas de su actividad, a personas naturales o jurídicas, públicas o privadas."

194 Declaración de Chacón, ¶ 7.

195 Memorial de Contestación, ¶ 173.

196 Memorial de Contestación, ¶¶ 165 ss. y 158 ss.

mento de que fue la GNB (y no el jefe del SENIAT) la que habría tenido la mencionada "duda razonable" sobre la naturaleza del material no es admisible, puesto que, como se explicó, la GNB carecía de competencia para decidir sobre esta cuestión de prohibición de exportación.

128. En este contexto, no considero que el argumento de la República según el cual MLDN sería responsable por la situación creada al intentar exportar por primera vez desde el Puerto de Guaranao y sin previa comunicación a las autoridades tenga validez alguna.[197] En primer lugar, no existe en el ordenamiento venezolano norma alguna que le requiera a un particular dar aviso o pedir permiso previo para ello a las autoridades portuarias, y Venezuela no refiere a ninguna en su argumentación. Pero aun así, advierto que en este caso particular existió de parte de MLDN una visita de preparación de la exportación al Puerto de Guaranao que tuvo lugar en el mes de noviembre de 2011. En cualquier caso, es claro que esta justificación de la República se limita a los 21 contenedores bloqueados en el Puerto de Guaranao, sin que se explique la inacción de las autoridades respecto de los 244 contenedores bloqueados en el Puerto de Guanta.

129. Tampoco es admisible la justificación que arguye la República en el sentido de que el asunto hubiese sido eventualmente sometido por la GNB a la decisión del Vicepresidente de la República[198], quien por lo demás, jamás adoptó decisión alguna al respecto con el resultado que el trámite quedó paralizado[199].

130. Por un lado, como ya se indicó, la GNB no era la autoridad competente para tomar dichas decisiones de suspensión de las exportaciones y de remisión del asunto al Vicepresidente Ejecutivo. Por tanto, el acto de remisión de la GNB a la Vicepresidencia de la República estuvo viciado de nulidad absoluta por incompetencia manifiesta. Por otra parte, la pretendida justificación es completamente falaz, pues en este caso, el Vicepresidente de la República no tenía ni tiene competencia alguna para autorizar o denegar la exportación de bienes en general, ni en particular, la exportación de ferroníquel por parte de un concesionario privado como MLDN.

131. En efecto, y contrario a lo alegado por la GNB en sus comunicaciones a MLDN y por Venezuela en su Memorial de Contestación,

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197 Memorial de Contestación, ¶¶ 165 y 177**;** Declaración de Figueroa**,** ¶ 21.

198 Memorial de Contestación, ¶¶ 164, 170, 172, 174, 179 y 181.

199 Memorial de Contestación, ¶ 174.

aun si el material en los contenedores de MLDN hubiera sido efectivamente chatarra ferrosa, el Vicepresidente en ningún caso tenía ni tiene competencia legal alguna para poder autorizar su exportación por parte de un concesionario minero privado como MLDN, pues desde 2005 en Venezuela se prohibió la exportación de chatarra ferrosa. Así, mediante Decreto Nº 3.895 de 12 de septiembre de 2005 (***Decreto Nº 3.895***) relativo al "suministro de materias primas y productos semielaborados provenientes de las industrias básicas," al inicio se estableció una prohibición de exportación de chatarra ferrosa en términos absolutos[200]. Posteriormente, en 2010 se reformó el Decreto Nº 3.895, mediante Decreto Nº 7.927 de 21 de diciembre de 2010 (***Decreto Nº 7.927***) permitiéndose excepcionalmente la dicha exportación de chatarra ferrosa, pero solamente cuando se realiza únicamente por las empresas del Estado y con autorización del Vicepresidente Ejecutivo. A tal efecto, el Decreto 7.927, dispuso:

> "Queda expresamente prohibida la exportación de chatarra ferrosa, no ferrosa y la fibra secundaria producto del reciclaje de papel y cartón, toda vez que dicha acción impacta de manera adversa a la industria nacional para la cual este insumo tiene un valor estratégico y vital para la fabricación de productos. Sólo excepcionalmente, y previa autorización del Vicepresidente Ejecutivo de la República, las *empresas del Estado* podrán exportar chatarra ferrosa, no ferrosa y la fibra secundaria producto del reciclaje del papel y cartón, a los países integrantes de la Alianza Bolivariana para los Pueblos de Nuestra América (ALBA)."[201]

132. Esta norma, independientemente de lo que se pueda indicar sobre su ilegalidad intrínseca[202], es absolutamente precisa al establecer, primero, una prohibición total de exportación de chatarra ferrosa; y segundo, un

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200 Véanse Decreto Nº 3.895 de fecha 12 de septiembre de 2005 *Gaceta Oficial* Nº 38.271, de 13 de septiembre de 2005, y el Decreto Nº 7.927, de 21 de diciembre de 2010 *Gaceta Oficial* Nº 39.578, de 21 de diciembre de 2010, **Anexo C-23**.

201 Véanse Decreto Nº 3.895 de fecha 12 de septiembre de 2005 *Gaceta Oficial* Nº 38.271, de 13 de septiembre de 2005, y el Decreto Nº 7.927, del 21 de diciembre de 2010 *Gaceta Oficial* Nº 39.578, de 21 de diciembre de 2010, **Anexo C-23**.

202 Debe quedar a salvo toda consideración sobre la ilegalidad de este Decreto, ya que conforme al artículo 83 de la Ley Orgánica de Aduanas toda prohibición, restricción o reserva de exportación sólo puede estar especificada en el "arancel de Aduanas". Véase Ley Orgánica de Aduanas, **Anexo RLA-136 C-90**.

régimen restrictivo de excepción ("excepcionalmente") según el cual se puede autorizar la exportación de chatarra ferrosa, para lo cual deben concurrir dos condiciones: (i) que el exportador sea una empresa del Estado; y (ii) que la exportación se haga sólo a países del ALBA. Si el exportador no es una empresa del Estado, mientras el decreto esté en vigencia, en ningún caso la exportación de chatarra ferrosa podría ser autorizada, ni aún por el Vicepresidente de la República. Por tanto, aun en el caso de la supuesta "duda razonable" que Venezuela indica le surgió a la GNB sobre si la carga en los contenedores de MLDN en el Puerto de Guaranao era en realidad "chatarra ferrosa", si tal duda hubiese sido cierta y seria, lo que la GNB debió haber hecho fue simplemente informar al gerente o jefe de la aduana del SENIAT para que éste, una vez comprobado fehacientemente el contenido de los contenedores, tomara la decisión motivada que pudiere corresponder (incluyendo, en el caso de que efectivamente el material hubiese sido chatarra ferrosa, impedir su exportación por un particular como MLDN). Es decir, no existía en este caso ninguna justificación o base legal bajo ninguna perspectiva para poder someter el asunto a una decisión autorizatoria del Vicepresidente de la República. Este último, como se dijo, en ningún caso hubiera podido autorizar la exportación, razón por la cual la presunta excusa esgrimida por la GNB de que la exportación sólo podía hacerse con la autorización del Vicepresidente Ejecutivo, fue falsa, contraria incluso al Decreto Nº 7.927, y por tanto, ilegal y nula.

133. Vale indicar finalmente que el hecho de que el asunto hubiera sido erróneamente sometido al Vicepresidente Ejecutivo de la República no excusaba a éste último de actuar en forma diligente y conforme a la ley. En tal sentido, el Vicepresidente Ejecutivo también incumplió sus deberes legales al no resolver la situación de los contenedores de MLDN bloqueados en el Puerto de Guaranao y al no responder a las peticiones en tal sentido efectuadas por la compañía. Debe recordarse que el Vicepresidente es un funcionario de mayor jerarquía, bajo el Presidente, en la organización de la Administración Pública y, por tanto, sus actuaciones están vinculadas por la Constitución y Ley Orgánica de la Administración Pública. El mismo, por tanto, no teniendo competencia alguna para poder autorizar la exportación de chatarra ferrosa por parte de un concesionario, estaba en la obligación de dar oportuna respuesta a las peticiones que se le dirigieron[203], así como de pro-

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[203] Constitución de 1999, **Anexo C-80**, artículo 51; Ley Orgánica de la Administración Pública, **Anexo BC-[ ]**, artículo 9.

nunciarse respecto de la situación[204]. Por tanto, en el caso particular, si bien el Vicepresidente Ejecutivo carecía de competencia en el asunto, sí tenía, en todo caso, la obligación de responder con celeridad a la remisión del asunto que se le había formulado.

134. Queda claro entonces que respecto del bloqueo de los 21 contenedores de MLDN en el Puerto de Guaranao:

- el gerente o jefe del SENIAT debió emitir una resolución oficial respecto de la situación de los contenedores concluyendo el proceso de exportación, y en cualquier caso no debió permitir que el asunto lo remitiera la GNB a la Vicepresidencia de la República;
- la GNB, por su parte, no tenía competencia ni razón para conducir sus propios estudios ni para enviar el asunto a la supuesta decisión del Vicepresidente de la República sin previa instrucción del gerente o jefe del SENIAT; y
- el Vicepresidente de la República, no tenía competencia alguna para intervenir en este asunto; y una vez que se le remitió el asunto, su obligación era responder a dicha remisión indicando que carecía de competencia para poder autorizar o no la exportación de "chatarra ferrosa" por una empresa privada concesionaria minera (si es que el material en cuestión era efectivamente de esa naturaleza)[205].

135. Debo indicar finalmente respecto a la prohibición de exportación de los 244 contenedores en el Puerto de Guanta, que entiendo que dicha prohibición existió en los hechos, pues –al igual que en el caso de los contenedores en el Puerto de Guaranao- ni el gerente o jefe del SENIAT en Guanta ni ningún otro funcionario jamás emitieron alguna resolución oficial al respecto. Advierto que uno de los testigos presentados por Venezuela manifestó que "en algún momento se pudo haber alertado al Puerto de Guanta sobre la exportación de la mercancía que pretendía exportar MLDN"[206]. Al respecto, entiendo que no existe en el expediente ninguna actuación del Esta-

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204 Ley Orgánica de la Administración Pública, **Anexo BC-[ ]**, artículos 23 y 24.

205 En el Memorial de Contestación, la República se excusa en que el bloqueo de la exportación se debió a que el asunto estaba en manos del Vicepresidente, quien nunca resolvió la cuestión. Véase Memorial de Contestación, ¶¶ 170, 174, 181, 193, 368 a 370. Véase igualmente: Declaración de Figueroa, ¶ 25; Declaración de Ortiz, ¶¶ 9, 12, 14 a 18.

206 Declaración de Ortiz, ¶ 13.

do intentando confirmar si la carga de los 244 contenedores en Guanta era efectivamente chatarra ferrosa. Entiendo que los Demandantes solicitaron a diferentes órganos del Estado la liberación de la carga, pero que no recibieron ninguna respuesta[207]. Este bloqueo de hecho en el Puerto de Guanta, sin causa aparente alguna y sin ninguna justificación por parte de las autoridades aduaneras, resultó abiertamente arbitrario y en violación a las garantías a la propiedad y a la libertad económica que asistían a MLDN garantizados en los artículos 112 y 115 de la Constitución.

136. En su Memorial de Contestación, Venezuela indicó que los contenedores de MLDN en el Puerto de Guaranao habrían quedado en una situación de abandono como resultado de haber sobrepasado el plazo legal de treinta días para desistir de la operación de exportación y retirar la mercancía del área del Puerto. Según Venezuela, MLDN debió desistir de la operación de exportación antes de vender sus contenedores a Xiatools[208]. Ello es incorrecto. El causante de la paralización de las exportaciones en ambos puertos fue claramente la Administración, la cual jamás resolvió las peticiones de MLDN para que se levantara dicho bloqueo. Ese silencio o demora del SENIAT en resolver lo que se había decretado como vía de hecho por la GNB, fue lo que provocó que los contenedores permanecieran en el área de la aduana. MLDN no tenía otra opción que esperar que la Administración decidiera, para a su vez decidir qué debía hacer con los contenedores de ferroníquel. En ningún caso puede presumirse que por el trascurso del tiempo a causa única y exclusivamente de la Administración, ésta podría pretender considerar que respecto de MLDN se habría producido el "abandono legal" del material a que se refiere a la Ley Orgánica de Aduanas[209]. Por lo demás, en este caso, ante la ausencia de respuesta e información sobre la "retención de los contenedores" y la "suspensión temporal de la exportación de ferroníquel,"[210] lo que MLDN debía entender es que el "reconocimiento" de la mercancía no había concluido en las aduanas por las múltiples actuaciones de la Guardia Nacional, lo que implica que el plazo de "30 días continuos a partir de la fecha de reconocimiento" previsto en el artículo 73 de la Ley Orgánica

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207 Véase ***supra*** [159].

208 Memorial de Contestación, ¶ 183 y nota al pie de página 335; Declaración de Raposo, ¶¶ 34 a 35.

209 Véase Memorial de Contestación, ¶ 183; Declaración de Raposo, ¶¶ 15, 34 a 36; Ley Orgánica de Aduanas, **Anexo RLA-136**, **C-90** artículo 73; Ley Orgánica de Aduanas, **Anexo C-90**, artículo 60.

210 Memorial de Contestación ¶¶ 165 ss. y 158 ss.

de Aduanas para presumir el abandono legal, en realidad no habría comenzado a correr.

137. En efecto, las relaciones entre la Administración y los administrados tiene que estar regida por el principio de la buena fe, como lo impone la Ley Orgánica de la Administración Pública.[211] Por ello, la Administración no puede causar un daño al administrado por el trascurso de un determinado tiempo, como considerar abandonados bienes de su propiedad, si el tiempo transcurrido se ha producido por la exclusiva culpa de la propia Administración, sin explicación alguna dada al administrado. Se trata, una vez más, de la confianza que ha de tener el administrado en el buen actuar de la Administración, como lo ha reconocido la jurisprudencia de manera reiterada, por ejemplo la Sala Electoral del Tribunal Supremo de Justicia, al señalar:

> "En efecto, para alguna corriente doctrinaria resulta que el aludido principio ostenta un carácter autónomo, para otra se limita a ser una variante del principio de la buena fe que en general debe inspirar las relaciones jurídicas, incluidas aquellas en las que intervengan una o varias autoridades públicas. De igual manera, se alega como su fundamento el brocardo "*nemo auditur sua turpitudinem alegans*" o de que nadie puede alegar su propia torpeza […], o bien el aforismo "*venire contra factum proprium non valet*" (prohibición de ir contra los actos propios), así como también se invoca en su apoyo el principio de seguridad jurídica."[212]

138. Es el caso, precisamente, de la aplicación del principio legal del "abandono legal" de mercancía cuando permanezca por más de 30 días después del reconocimiento de ley, sin haber sido retirada en el área de la aduna, el cual la Administración no puede aplicar sin contrariar el principio de la buena fe, si el tiempo de permanencia de la mercancía en la Aduana se debe única y exclusivamente a la actuación u omisión de la misma Administración, y en particular, al silencio o abstención de decidir por parte del SENIAT; y menos por no haber concluido formalmente el SENIAT el reconocimiento de ley. Aplicar la presunción legal de "abandono legal" en ese caso, equivaldría a un fraude a la ley, pues con demorarse en decidir, extendiendo

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211 Ley Orgánica de la Administración Pública, **Anexo BC-[ ]**, artículo 10.

212 Sentencia Nº 98 de la Sala Electoral del Tribunal Supremo de Justicia, de 1 de agosto de 2001. Caso: Asociación Civil Paracotos, Anexo BC-[].

el reconocimiento de espaldas al administrado, el SENIAT podría hacer que cualquier mercancía de exportación se considerase como abandonada y podría proceder a rematarla o adjudicarla al Ejecutivo Nacional[213], privando ilícitamente de su propiedad al exportador.

III. EL RECLAMO SOBRE LA AUSENCIA DE DECISIÓN DE LA ADMINISTRACIÓN EN MATERIA DE RECUPERACIÓN DE CRÉDITOS FISCALES POR IMPUESTO AL VALOR AGREGADO

139. La Ley que crea el Impuesto al Valor Agregado (***Ley del IVA***)[214] estableció y reguló un tributo mediante el cual se sometió a gravamen el valor añadido o agregado de un producto, en las distintas fases de su producción. Asimismo, la Ley del IVA estableció expresamente un régimen de recuperación de créditos fiscales con ocasión de los tributos pagados por ese concepto por los exportadores de bienes y servicios, a cuyo efecto se regularon los aspectos generales para su procedencia, estableciéndose ciertos parámetros para tal recuperación[215].

140. Entre los reclamos formulados por la Demandante contra la República, se incluye la falta de resolución por parte de la misma de los procedimientos iniciados por MLDN para la recuperación de los créditos fiscales por concepto de IVA (***Créditos Fiscales***) correspondientes a los períodos de imposición de octubre 2007 a mayo de 2012. La respuesta de la República ante este reclamo ha sido que las solicitudes de recuperación de Créditos Fiscales (***Solicitudes***) efectuadas por MLDN no habrían cumplido con ciertos requisitos establecidos en el Manual de Normas y Procedimientos Tributarios – Recuperación de Créditos Fiscales del IVA para Contribuyentes Exportadores aprobado en noviembre de 2010 (***Manual***)[216]. En las secciones a continuación analizo algunos principios relativos al régimen normativo en materia

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213 Ley Orgánica de Aduanas, **Anexo RLA-136**, **C-90** artículo 74; Ley Orgánica de Aduanas, **Anexo C-90**, artículo 67.

214 Decreto con Rango, Valor y Fuerza de Ley que establece el Impuesto al Valor Agregado (IVA), en *Gaceta Oficial* Nº 38.632, de 26 de febrero de 2007, (la ***Ley del IVA de 2007***) **Anexo [C-21]**, en la versión vigente y aplicable al caso concreto.

215 Ley del IVA de 2007, **Anexo [C-21]**, artículos 43 y 44.

216 Véanse Memorial de Contestación, ¶¶ 138 ss; Manual de Normas y Procedimientos Tributarios – Recuperación de Créditos Fiscales del IVA para Contribuyentes Exportadores, 2010 (***Manual***), **Anexo R-14**.

tributaria en Venezuela, así como ciertas cuestiones relacionadas con la pretendida aplicación del Manual en el contexto de las solicitudes presentadas por MLDN.

1. Algunos principios sobre la actividad normativa de los órganos del Estado

141. Conforme se establece en la Constitución de 1999, la Asamblea Nacional es el órgano del Estado con competencia para legislar sobre las materias de la competencia nacional[217]. Ello no excluye sin embargo la competencia del Presidente de la República para reglamentar las leyes sin alterar su espíritu, propósito y razón[218], y en general la de los órganos de la Administración Pública para dictar actos administrativos de contenido normativo o efectos generales, que en todo caso siempre tienen carácter sublegal.

142. Es decir, en materia de actos normativos, la actuación de los órganos de la Administración Pública está siempre sujeta al principio de legalidad consagrado en el artículo 137 de la Constitución conforme al cual las actuaciones de cada uno de los órganos que integran el Poder Público deben sujetarse a lo dispuesto por la Constitución y las leyes[219]. Este principio, concebido como "elemento esencial del Estado de Derecho[220], está además desarrollado de manera general en la Ley Orgánica de la Administración Pública, la cual establece:

> "La Administración Pública se organiza y actúa de conformidad con el principio de legalidad, por el cual la asignación, distribución y ejercicio de sus competencias se sujeta a lo establecido en la Constitución de la República Bolivariana de Venezuela, las leyes y los actos administrativos de carácter normativo dictados formal y previamente con-

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217 Constitución de 1999, **Anexo C-80**, artículos, 187 y 156.

218 Constitución de 1999, **Anexo C-80**, artículo, 236.10.

219 Constitución de 1999, **Anexo C-80**, artículo 137; Código Orgánico Tributario, en *Gaceta Oficial* Nº 37.305, de 17 de octubre de 2001 (***COT***), **Anexo C-83**, artículo 3; Ley Orgánica de Procedimientos Administrativos, **Anexo C-[]**, artículo 13; Constitución de 1999, **Anexo C-80**, artículo 317.

220 Sentencia de la Sala Constitucional del Tribunal Supremo de Justicia Nº23, *Harry Gutiérrez Benavides y Johbing Richard Álvarez Andrade (*Exp. Nº 03-0017) de 22 de enero de 2003, **Anexo BC-[]**.

forme a la ley, en garantía y protección de las libertades públicas que consagra el régimen democrático, participativo y protagónico."[221]

143. Además, como complemento esencial del principio de legalidad está el de la competencia, que recoge la misma ley al disponer que:

"*Toda competencia atribuida a los órganos y entes de la Administración Pública será* de obligatorio cumplimiento y *ejercida bajo las condiciones, límites y procedimientos* establecidos; será irrenunciable, indelegable, improrrogable y no podrá ser relajada por convención alguna, salvo los casos expresamente previstos en las leyes y demás actos normativos.

Toda actividad realizada por un órgano o ente manifiestamente incompetente, o usurpada por quien carece de autoridad pública, *es nula y sus efectos se tendrán por inexistentes*. Quienes dicten dichos actos, serán responsables conforme a la ley, sin que les sirva de excusa órdenes superiores."[222]

144. De acuerdo con estos principios, por tanto, siempre es necesaria una norma legal atributiva de competencia para que los órganos que ejercen el Poder Público pueden actuar.[223] Por tanto, en materia de competencia para dictar normas de aplicación general, en Venezuela rige ante todo el principio de la reserva legal, conforme al cual la Constitución ha reservado el ejercicio del poder normativo respecto de determinadas materias a la Asamblea Nacional[224] atribuyéndose al Presidente de la República la potestad reglamentaria conforme al artículo 236.10 de la Constitución.

145. La reserva legal y la potestad normativa asignada al legislador conllevan como parte del principio de legalidad y de la competencia, el de la jerarquía normativa conforme al cual todos los actos estatales deben someterse, en primer lugar, a las disposiciones emanadas de los cuerpos legislativos en forma de ley, y en segundo término, a las normas generales y abstractas, previamente establecidas, sean o no de origen legislativo, incluso

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221 Ley Orgánica de la Administración Pública, **Anexo BC-[ ]**, artículo 4.

222 Ley Orgánica de la Administración Pública, **Anexo BC-[ ]**, artículo 26 (énfasis añadido).

223 Véase ***supra ¶ 119.***

224 Constitución de 1999, **Anexo C-80**, artículos 156.32 y 187.1.

cuando han sido adoptadas por la misma autoridad. Ello implica, que por ejemplo, los reglamentos que dicte el Ejecutivo Nacional[225] deben siempre sujetarse a lo establecido en las leyes, pero a la vez implica que el propio Poder Ejecutivo está sujeto a sus reglamentos, que prevalecen sobre todos los actos normativos dictados por funcionarios inferiores, y que además impiden al propio Poder Ejecutivo apartarse de sus propias normas cuando dicta un acto de efectos individuales.

146. Por otra parte, y de manera general, en lo que atañe a la actividad administrativa de carácter normativo, la Ley Orgánica de Procedimientos Administrativos se refiere a la reserva legal, prohibiendo expresamente toda posibilidad de creación o modificación de sanciones, impuestos y contribuciones por vía de actos administrativos, salvo dentro de los límites determinados por la ley, a la cual los actos administrativos por su carácter sub legal siempre deben sujetarse[226]. La misma ley, además, se encarga de establecer el principio de jerarquía de los actos administrativos dictados por los órganos que integran la Administración Pública, incluyendo los actos normativos, al disponer que ningún acto administrativo puede violar lo que haya sido establecido en otro de superior jerarquía, ni los actos administrativos de carácter particular pueden vulnerar lo establecido en las disposiciones administrativas de carácter general[227].

147. Ahora bien, en cuanto a los reglamentos y demás actos administrativos normativos, es decir, los de carácter general o que interesen a un número indeterminado de personas, los mismos, al igual que lo que ocurre con las leyes[228], deben publicarse en la *Gaceta Oficial* para que surtan efecto. Así se dispone expresamente en la Ley Orgánica de Procedimientos Administrativos[229], y se ratifica en la Ley de Publicaciones Oficiales[230]. Los principios y regulaciones anteriores se ratifican en la Ley Orgánica de la Administración Pública en relación con los actos normativos emanados de los órganos que la integran al establecer la obligatoriedad de publicación en la Gaceta

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225 Constitución de 1999, **Anexo C-80**, artículo 236.10.

226 Ley Orgánica de Procedimientos Administrativos, **Anexo C-[]**, artículo 10.

227 Ley Orgánica de Procedimientos Administrativos, **Anexo C-[ ]**, artículo 13.a.

228 Constitución de 1999, **Anexo C-80**, artículo 215.

229 Ley Orgánica de Procedimientos Administrativos, **Anexo C-[ ],** artículo 72.

230 Ley de Publicaciones Oficiales, *Gaceta Oficial* Nº 20.546, de 22 Julio de 1941 (***Ley de Publicaciones***), **Anexo C-[]**, artículos 8 y 9.

Oficial de todos los "reglamentos, resoluciones y actos administrativos de carácter general dictados por la Administración Pública"[231].

148. En cuanto a los actos administrativos referentes a asuntos internos de la Administración, destinados a regular la propia Administración, su organización o funcionamiento, la actuación o la manera de actuar de los funcionarios públicos, como manifestación de la potestad jerárquica, y, por tanto, referidas a la relación entre el superior y el inferior jerárquico, no requieren de su publicación en *Gaceta Oficial*[232] pues sus destinatarios no son los administrados, sino solamente los funcionarios públicos a los cuales se dirigen.

2. Régimen jurídico y potestad normativa en materia tributaria, en particular en relación con el impuesto al valor agregado

149. Ahora bien, por lo que se refiere a la materia tributaria, en la distribución de competencias conforme a la forma federal del Estado, la Constitución consagra una competencia residual a favor del Poder Público Nacional, es decir, de los órganos de la República (Asamblea Nacional y Ejecutivo Nacional fundamentalmente), correspondiéndole lo concerniente a la creación, organización, recaudación, administración y control de ciertos impuestos, entre ellos el Impuesto al Valor Agregado[233]. Como consecuencia, el marco general básico en materia tributaria ha sido establecido por la Asamblea Nacional mediante en el Código Orgánico Tributario (***COT***) en el cual se han reunido sistemáticamente las normas relativas a todos los tributos nacionales, así como a las relaciones jurídicas derivadas de esos tributos[234]. En dicho COT, además, se definieron las fuentes de derecho tributario y su jerarquía al disponerse lo siguiente:

"Artículo 2. Constituyen fuentes del derecho tributario:

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231 Ley Orgánica de la Administración Pública, **Anexo BC-[ ]**, artículo 12.

232 Ley Orgánica de Procedimientos Administrativos, **Anexo C-[]**, artículo 72. En estos casos, se trata de circulares, instrucciones de servicio o manuales destinados al funcionamiento de la propia Administración, cuya publicación, aun cuando no obligatoria, sin embargo, podría ordenarse en los casos de ser adoptadas por los órganos administrativos para dirigir las actividades de sus jerárquicamente subordinados. Véase Ley Orgánica de la Administración Pública, **Anexo-BC []**, artículo 42.

233 Constitución de 1999, **Anexo C-80**, artículo 156.12.

234 COT, **Anexo C-83**, artículo 1.

1. Las disposiciones constitucionales.

2. Los tratados, convenios o acuerdos internacionales celebrados por la República.

3. Las leyes y los actos con fuerza de ley.

4. Los contratos relativos a la estabilidad jurídica de regímenes de tributos nacionales, estadales y municipales.

5. Las reglamentaciones y demás disposiciones de carácter general establecidas por los órganos administrativos facultados al efecto."[235]

150. Específicamente en materia de Impuesto al Valor Agregado[236], la Ley del IVA y su Reglamento General establecen los parámetros para la recuperación de créditos fiscales para exportadores de bienes y servicios[237]. La Ley del IVA incluye asimismo las reglas respecto a la periodicidad en la presentación de Solicitudes[238] y los plazos para su respuesta por

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235 COT, **Anexo C-83**, artículo 2.

236 La ley creó este impuesto desde 1993. Véase la Ley del IVA de 2007, **Anexo C-[21]**, en la versión vigente y aplicable al caso concreto.

237 Ley del IVA de 2007, **Anexo [C-21]**; Reglamento General del Decreto con Fuerza y Rango de Ley que Establece el Impuesto al Valor Agregado, en *Gaceta Oficial* Nº 5.363 Extraordinario, de 12 de julio de 1999 (***Reglamento General***), **Anexo BC-[]**. En realidad el Reglamento General es anterior a la Ley a que se hace referencia (2002), reforma de la Ley que fue adoptada y publicada en G*aceta Oficial* Nº 5.341 Extraordinario, de 5 de mayo de 1999, **Anexo BC-[ ]**. Los artículos 43.2 y 43.4 establecen: "*El procedimiento para establecer la procedencia de la recuperación de los créditos fiscales, así como los requisitos y formalidades que deban cumplir los contribuyentes, serán desarrolladas mediante Reglamento.[…] Se admitirá una solicitud mensual y deberá comprender los créditos fiscales correspondientes a un solo período de imposición, en los términos previstos en esta Ley. El lapso para la interposición de la solicitud será establecido mediante Reglamento*."

238 Ley del IVA de 2007, **Anexo [C-21]**, artículos 43.2 y 43.4, que establecen: "*El procedimiento para establecer la procedencia de la recuperación de los créditos fiscales, así como los requisitos y formalidades que deban cumplir los contribuyentes, serán desarrolladas mediante Reglamento.[…] Se admitirá una solicitud mensual y deberá comprender los créditos fiscales correspondientes a un solo período de imposición, en los términos previstos en esta Ley. El lapso para la interposición de la solicitud será establecido mediante Reglamento*.".

parte del SENIAT[239]. Adicionalmente, en el Reglamento Parcial Nº 1 en materia de recuperación de créditos fiscales para exportadores[240] se regularon con mayor detalle los trámites procedimentales inherentes a las Solicitudes reguladas por la Ley del IVA. Concretamente, en dicho Reglamento Parcial Nº 1 se identificaron las circunstancias a ser atendidas –tanto por la Administración Tributaria como por los contribuyentes solicitantes- en relación con los recaudos, forma, duración y trámite del procedimiento respectivo. Asimismo, en lo que se refiere a la emisión y colocación de los Certificados Especiales de Reintegro Tributario (***CERT***)[241], el Reglamento Parcial Nº 1 habilitó al Ministerio de Finanzas para establecer lo concerniente al procedimiento respectivo, en virtud de lo cual, ese organismo dictó en 2004 la Resolución Nº 1.519 de 2004 (***Resolución 1.519***)[242].

151. Los instrumentos normativos mencionados anteriormente son, por tanto, los únicos que contienen la normativa obligatoria en esta materia[243] y son los que definen, en los términos de la Constitución[244], la competencia y el ámbito de actuación de los distintos actores que intervienen en el procedimiento que se comenta.

152. En dicho contexto, y con base en el sistema normativo definido en el COT, al SENIAT le corresponden las siguientes funciones:

> "9. Proponer, aplicar y divulgar las normas en materia tributaria.
>
> […] 13. Dictar, por órgano de la más alta autoridad jerárquica, instrucciones de carácter general a sus subalternos, para la interpretación y aplicación de las leyes, reglamentos y demás disposiciones relativas

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239 Ley del IVA de 2007, **Anexo [C-21]**, artículos 43 ss.

240 Reglamento Parcial Nº 1 de la Ley que establece el Impuesto al Valor Agregado, en material de recuperación de créditos fiscales para contribuyentes exportadores en *Gaceta Oficial* Nº 37.794 (extracto) (***Reglamento Parcial N° 1***), de 10 octubre 2003, **Anexo C-22**.

241 Ley del IVA de 2007, **Anexo [C-21]**, artículo 43.8.

242 Resolución Nº 1.519, *Gaceta Oficial* Nº 37.875, de 9 de febrero de 2004, modificada luego por la *Gaceta Oficial* Nº 1661, de 18 de julio de 2005 (*Gaceta Oficial* Nº 38.234, de 22 de julio de 2005), **Anexo BC-[]**.

243 Tal como la misma República lo acepta, véase Memorial de Contestación, ¶ 124; Declaración de Villasmil, ¶ 3.

244 Constitución de 1999, **Anexo C-80**, artículo 136.

a la materia tributaria, las cuales deberán publicarse en la *Gaceta Oficial*."[245]

153. En esta forma, el COT recoge los principios de la actividad normativa del Estado antes mencionados, en particular, los de jerarquía normativa y de publicidad antes referidos[246].

3. El Manual de Normas y Procedimientos Tributarios sobre "recuperación de créditos fiscales para exportadores"

154. En respuesta al reclamo sobre reintegro de IVA formulado por la Demandante, la República ha hecho referencia al Manual anteriormente mencionado, el cual fuera aprobado por el Superintendente del SENIAT mediante Punto de Cuenta de 18 de noviembre de 2010[247]. Según sostiene la República, dicho Manual sería aplicable a los contribuyentes en relación con el procedimiento de recuperación de créditos fiscales. En particular, sostiene la República, que la falta de emisión de CERTs en relación a las Solicitudes presentadas por MLDN se debería al incumplimiento, por parte de esta última con la Regla D.3 del referido Manual[248]. Dicha regla, según Venezuela, habría obligado a MLDN a registrar en su Declaración y Pago del IVA (***Declaración del IVA***) el descuento del monto correspondiente al momento de solicitar los créditos fiscales para cada ejercicio.

A. El Manual como un acto administrativo interno de la Administración

155. Estoy en desacuerdo con la posición de la República que sostiene que la normativa incluida en el Manual sería aplicable y obligatoria para MLDN. Por el contrario, en mi opinión, la aprobación del mismo a través de la suscripción del Punto de Cuenta por parte del Superintendente del SENIAT constituyó un típico acto administrativo de orden interno, en los términos del artículo 72 de la Ley Orgánica de Procedimientos Administrativos. Por ello, al tratarse de un acto administrativo tendiente a regular la actividad de los funcionarios públicos en relación exclusivamente el funcionamiento interno de la Administración, el mismo no fue publicado en *Gaceta*

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245 COT, **Anexo C-83**, artículo 121.

246 COT, **Anexo C-83**, artículo 2.

247 Memorial de Contestación, ¶ 137; Declaración Villasmil, ¶ 19.

248 Memorial de Contestación, ¶ 137; Declaración Villasmil, ¶ 20.

Oficial. De ello se deriva que la aprobación carece de eficacia respecto de los contribuyentes, no siendo susceptible de obligarlos ni de vincular sus actuaciones, por lo que no puede exigírseles –ni oponérseles– su cumplimiento.

156. Es decir, la aprobación del Manual no puede considerarse como "de efectos generales o que interesen a un número indeterminado de personas" pues de lo contrario, para tener tales efectos debió haberse publicado en *Gaceta Oficial*[249]. En tal sentido se ha pronunciado la Sala Constitucional, en relación con un acto precisamente del SENIAT que no había sido publicado en *Gaceta Oficia*l, señalando que:

> "el acto presuntamente normativo, objeto de la impugnación, nunca fue publicado en la *Gaceta Oficial* de la República, lo cual lo hace carecer de validez formal, por cuanto aun cuando el mismo pudiese suponer la voluntad del Servicio Nacional Integrado de Administración Tributaria (SENIAT), el mismo carece por completo de una de las formalidades mínimas exigidas para la vigencia de los actos de efectos generales como lo es su publicación en Gaceta Oficial, de conformidad con lo dispuesto en los artículos 72 de la Ley Orgánica de Procedimientos Administrativos y 13 de la Ley de Publicaciones Oficiales. En estos términos, debe esta Sala forzosamente concluir que el referido acto carece de validez formal y por lo tanto resulta imposible que la Administración Tributaria dicte actos particulares con fundamento en la pretendida pauta normativa."[250]

157. La sentencia citada trata una situación similar a la del Manual invocado por la República, y permite concluir que no puede alegarse el incumplimiento del mismo por parte de MLDN para justificar la falta de decisión respecto de las Solicitudes formuladas por la empresa, pues el mismo carece de eficacia frente a terceros. Entre las notas diferenciadoras de este

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249 Ley Orgánica de Procedimientos Administrativos, **Anexo C-[]**, artículo 72. Dicho principio de publicidad respecto de la actividad normativa del Estado, es además reafirmado en materia tributaria, por la interpretación de la normativa relevante en el COT, la Ley Orgánica de la Administración Pública y la Ley de Publicaciones Oficiales. Véase en forma concatenada el COT, **Anexo C-83**, artículos 9 y 121, la Ley Orgánica de la Administración Pública, **Anexo-BC []**, artículo 12 y la Ley de Publicaciones, **Anexo C-[]**, artículos 8, 9 y 13.

250 Sentencia Nº2343 de la Sala Constitucional del Tribunal Supremo de Justicia, *Clodosbaldo Russian,* (Registro N° 00-1955), 21 de noviembre de 2001*,* **Anexo BC-[],** página 8.

tipo de actos internos, en la doctrina se ha señalado, en relación con su eficacia, que está limitada "al ámbito en el cual se desarrolla"[251] dentro de la organización de la Administración, que por tanto "se produce en el ámbito de un ordenamiento jurídico particular" referido a la organización y funcionamiento de la Administración, y que "carece de eficacia para el ordenamiento jurídico general"[252], quedando desvinculado respecto de actividades externas a la Administración.

158. Así ha sido reconocido por la jurisprudencia, por ejemplo de la Sala Político Administrativa del Tribunal Supremo de Justicia, al decidir lo siguiente:

> "Ahora bien, se observa que el 10 de octubre de 1996, la Gerencia de Aduanas del SENIAT, Nivel Normativo, dictó la Circular Nº SAT/GT/GA/200/96/I-027, con la finalidad de prevenir infracciones aduaneras y unificar criterios técnicos de valoración y para servir como elemento de apoyo, guía u orientación a los Servicios de Valoración de las respectivas oficinas aduaneras, en la determinación del valor en aduanas de las distintas mercancías.
>
> […] [C]onforme a la doctrina patria, las circulares son comunicaciones expedidas por un superior jerárquico en el ámbito administrativo, dirigidas a sus subordinados en relación con el régimen interno a fin de orientar y aclarar determinados aspectos de la materia, que no tienen por qué ser observadas por los contribuyentes y responsables, ya que no crean obligaciones ni derechos para éstos.
>
> […] Ellas son por tanto libradas, con el objeto de orientar la actividad de los funcionarios de una determinada dependencia y obligan sólo a los funcionarios a los cuales están dirigidas, por cuanto las mismas tienen su fundamento en el deber de obediencia de los funcionarios con respecto a sus superiores, y no al resto de la colectividad. Su

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251 Hildegard Rondón de Sansó, *Teoría General de la Actividad Administrativa. Organización. Actos Internos*. Facultad de Ciencias Jurídicas y Políticas de la Universidad Central de Venezuela, Editorial Jurídica Venezolana, Caracas 1985, **Anexo BC-[]**, páginas 237 ss.

252 *Idem* Hildegard Rondón de Sansó, *Teoría General de la Actividad Administrativa. Organización. Actos Internos*, Facultad de Ciencias Jurídicas y Políticas de la Universidad Central de Venezuela, Editorial Jurídica Venezolana, Caracas 1985, **Anexo BC-[]**, páginas 237 ss.

> fuerza, desde el punto de vista jurídico, está limitada al campo interno de la Administración, toda vez que su conocimiento está reservado a sus funcionarios"[253].

159. En el caso del Manual invocado por la República, no sólo su forma y falta de publicación en *Gaceta Oficial*, sino también su contenido pone en evidencia su carácter de acto administrativo referente a asuntos internos. Tal como se destaca en la declaración de su "objetivo general", el cual reza:

> "Dar a conocer *a los funcionarios adscritos a las Gerencias Regionales de Tributos Internos*, los lineamientos a seguir para *tramitar* las Solicitudes de Recuperación de Créditos Fiscales soportados por la adquisición y recepción de bienes y servicios, interpuesta por los Contribuyentes Ordinarios que realicen exportaciones de bienes y servicios de producción Nacional."[254]

160. De manera similar, se pone de manifiesto que se trata de un acto interno al observar algunos de los objetivos específicos que se enuncian en el mismo, destacándose los siguientes:

> "2. Establecer las *normas y procedimientos internos* relacionados con los procesos de evaluación, aprobación y control del proceso de Recuperación de Créditos Fiscales soportados por la adquisición de bienes y recepción de servicios.
>
> 3. Constituirse en un instrumento para el proceso de gestión y toma de decisiones *para el SENIAT*.
>
> […] 5. *Proveer a los funcionarios involucrados* en el proceso de Recuperación de Créditos Fiscales soportados por la adquisición de bienes y recepción de servicios, *de un manual que los oriente en el desarrollo de sus funciones* y establecer las responsabilidades operativas de manera adecuada."[255]

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253 Sentencia N° 02558 de la Sala Político Administrativa del Tribunal Supremo de Justicia, *Makro Comercializadora, C.A,* (Registro N° 2001-0339), 14 de noviembre de 2006, **Anexo C-[]**, páginas 14 y 15.

254 Manual, **Anexo R-14,** Capítulo I, página 1 (énfasis añadido).

255 Manual, **Anexo R-14,** Capítulo I, páginas 1 y 2 (énfasis añadido).

161. De la misma manera, resulta ilustrativa la declaración relativa al alcance del Manual en la que se indica que las instrucciones que están contenidas en el mismo "*estarán circunscritas a las actuaciones de los funcionarios involucrados* en el proceso de Recuperación de Créditos Fiscales soportados por la adquisición de bienes y recepción de servicios"[256]. Incluso, en palabras de sus redactores, se trata de un instrumento que fue adoptando para estandarizar y optimizar "la actuación y desarrollo del *trabajo de los funcionarios* que laboran tanto en el nivel operativo como en el normativo, responsables (*sic*) por la tramitación de Solicitudes de Recuperación de Créditos Fiscales".

162. En mi criterio, por tanto, es indudable que el Manual es un instrumento que se identifica con lo que se denomina como acto interno o acto administrativo referente a asuntos internos de la Administración. Por esa circunstancia, conforme al artículo 72 de la Ley Orgánica de Procedimientos Administrativos y al artículo 121.13 del COT, la Administración resolvió no publicarlo en *Gaceta Oficial*, no siendo por tanto ni exigible ni oponible a los administrados contribuyentes. En virtud de ello no puede argumentarse válidamente que su supuesto incumplimiento por parte de MLDN, en particular en relación con la Regla D.3 (a la que me refiero en mayor detalle en la sección a continuación), haya podido haber sido la causa para la falta de resolución de sus solicitudes de reintegro tributario.

B. La ilegalidad intrínseca de la Regla D.3 del Manual

163. Adicionalmente y como corolario a lo antes expuesto, debe señalarse, que incluso en el supuesto negado de que pudiera afirmarse que las disposiciones del Manual pudieran ser exigibles respecto de los administrados contribuyentes, en ningún caso podría aceptarse que a través del mismo, y en particular de la Regla D.3, se regule una modificación al procedimiento relativo a la recuperación de créditos fiscales establecido en la Ley del IVA, en el Reglamento Parcial Nº 1 y la Resolución Nº 1.519.

164. En efecto, en su Memorial de Contestación, la República refiere al supuesto incumplimiento de MLDN con la Regla D.3 del Manual para justificar el que no se hubieran resuelto las Solicitudes formuladas por MLDN. Dicha previsión indica que:

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256 Manual, **Anexo R-14,** Capítulo I, página 3 (énfasis añadido).

> "3. El Funcionario Actuante deberá verificar que el monto de los créditos fiscales solicitados hayan sido descontados en la Declaración y Pago del Impuesto al Valor Agregado (IVA) del periodo de imposición de la solicitud o en los períodos de imposición previos a esta."

165. Sin embargo, la Regla D.3 del Manual contraría de manera palmaria lo dispuesto en la Ley del IVA, que establece los extremos que han de ser verificados por la Administración para determinar la procedencia o no de las solicitudes de reintegro, lo que en todo caso la hace nula por ilegalidad, al violar una disposición legal. En efecto, además de la Solicitud y sus soportes, la Ley del IVA indica que la Administración Tributaria únicamente debe comprobar que se haya cumplido con los requisitos que se enumeran a continuación, dejando al Reglamento Parcial Nº 1 la determinación sólo de los documentos que han de acompañarse a efectos de determinar su cumplimiento:

> "1. La efectiva realización de las exportaciones de bienes o servicios, por las cuales se solicita la recuperación de los créditos fiscales.
>
> 2. La correspondencia de las exportaciones realizadas, con el período respecto al cual se solicita la recuperación.
>
> 3. La efectiva realización de las ventas internas, en el período respecto al cual se solicita la recuperación.
>
> 4. La importación y la compra interna de bienes y recepción de servicios, generadores de los créditos fiscales objeto de la solicitud.
>
> 5. Que los proveedores nacionales de los exportadores sean contribuyentes ordinarios de este impuesto.
>
> 6. Que el crédito fiscal objeto de solicitud, soportado en las adquisiciones nacionales, haya sido registrado por los proveedores como débito fiscal conforme a las disposiciones de esta Ley."[257]

166. Adicionalmente, el artículo 38 de la Ley del IVA requiere específicamente que los créditos fiscales solicitados en un período fiscal de-

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[257] Ley del IVA de 2007, **Anexo [C-21]**, artículo 44.

terminado sean trasladados en la Declaración del IVA al siguiente período fiscal hasta tanto se emitan los certificados correspondientes por parte del Ministerio de Finanzas[258]. Es claro entonces que ninguna de las previsiones relevantes de la Ley del IVA requiere el registro del descuento del monto correspondiente al crédito fiscal cuya recuperación se solicita como un descuento, en la Declaración del IVA por parte del solicitante antes de recibir los CERTs correspondientes. Ello, por lo demás, carecería de toda lógica, pues implicaría realizar la operación contable de descuento aún sin conocer si el reintegro solicitado ha sido aprobado o rechazado por la Administración Tributaria.

167. Al respecto, vale recordar que la Declaración del IVA, como toda declaración tributaria existente y en los términos establecidos en el COT, debe ser *un fiel reflejo de la verdad y compromete la responsabilidad de quien la suscribe*[259]. Como es evidente, al momento en el cual el particular contribuyente realiza la Solicitud, la obligación tributaria no se afecta, por lo que no existe fundamento jurídico alguno que justifique en ese momento la realización de un descuento de la cantidad correspondiente en la Declaración respectiva. De hecho, el crédito fiscal únicamente se hace *deducible* a partir de la decisión afirmativa que haga la Administración Tributaria respecto de la Solicitud. Es sólo en ese caso que el contribuyente está obligado a realizar el descuento correspondiente en los términos a que se contraen los artículos 38 y 43 de la Ley del IVA. Por el contrario, si la decisión respecto de la Solicitud resultase negativa (sea parcial o completamente), el crédito no será deducible pues no ha sido autorizada su recuperación. Como ha sostenido la Sala Político Administrativa del Tribunal Supremo de Justicia, al referirse a la oportunidad en la que se verifica la recuperación:

> "la recuperación de los créditos fiscales, tanto por la adquisición de bienes y servicios en la actividad de exportación (Super Octanos), como por bienes exonerados (FERTINITRO), *se materializa con su reconocimiento por parte de la Administración Tributaria* y con la

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258 Ley del IVA de 2007, **Anexo [C-21]**, artículo 38. Véase también Reglamento General, **Anexo BC-[ ]**, artículo 59.3.

259 COT, **Anexo C-83**, artículo 147 (énfasis añadido).

emisión de los certificados especiales por el monto del crédito recuperable."[260]

168. En definitiva, como se ha señalado, la Ley del IVA no exige que el contribuyente haya descontado el monto de los créditos fiscales solicitados de su Declaración del IVA. Por tanto, mal puede introducirse dicha exigencia adicional por vía de un instrumento distinto a la ley, de efectos internos, que no ha sido publicado en *Gaceta Oficial*, y que no se aplica a los administrados, sino solo a los funcionarios. Ello implicaría una clara violación por parte de la autoridad tributaria a los principios de reserva legal, competencia, publicidad y jerarquía de las normas discutidas anteriormente.

C. La inconstitucionalidad de la aplicación retroactiva del Manual

169. Adicionalmente, no podemos dejar de observar que, a la inaplicabilidad del Manual a MLDN, tanto por su carácter interno y además, en lo que respecta a la Regla D.3, por su ilegalidad intrínseca, el mismo en ningún caso podría aplicarse a solicitudes de reintegro presentadas por MLDN con anterioridad a que el Manual fuera aprobado en noviembre de 2010. Lo contrario implicaría validar su aplicación retroactiva por la Administración, lo que está proscrito en Venezuela por el principio constitucional de la irretroactividad de la ley,[261] al cual nos referimos con mayor detalle más adelante. [262]

170. En efecto, entiendo que las Solicitudes presentadas por MLDN y que no fueron resueltas por la Administración Tributaria estaban referidas a períodos fiscales comprendidos entre octubre de 2007 y mayo de 2012, habiéndose presentado las Solicitudes correspondientes ante el SENIAT entre enero de 2009 y noviembre de 2013. La Sra. Villasmil confirma en su declaración que en el período anterior a la entrada en vigencia del Manual no existía requerimiento alguno relacionado con la aplicación de descuentos por parte del contribuyente:

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[260] Sentencia Nº 01678 de la Sala Político-Administrativa del Tribunal Supremo de Justicia, *Compañía Anónima Venezolana de Guías (CAVEGUÍAS)*, (Registro Nº 2010-1073), de 1 de diciembre de 2011, **Anexo BC-[]**, página 18.

[261] COT, **Anexo C-83**, artículo 8; Ley Orgánica de Procedimientos Administrativos, **Anexo C-[]**, artículo 11; Constitución de 1999, **Anexo C-80**, artículo 24.

[262] Véase ***infra* ¶ ---.**

> "el Manual de Normas y Procedimientos, vigente desde mayo 2003 hasta noviembre 2010, [el cual] no tenía especificación alguna sobre la necesidad de verificar que el contribuyente [*sic*] ha descontado de la declaración del IVA los montos de reintegro solicitados.
>
> 19. Sin embargo, el Manual de Normas y Procedimientos actualmente vigente, entró en vigencia según Punto de Cuenta Nº 93 de fecha 18 de noviembre de 2010, y llegó a nuestras manos en enero de 2011. Las solicitudes de MLDN correspondientes a los periodos de imposición de octubre 2007 en adelante comenzaron a analizarse cuando el Manual actual ya estaba en vigencia, por lo que debían estudiarse de acuerdo a lo indicado en él."[263]

171. Apoyada por la declaración de la Sra. Villasmil, la República pretende aplicar un instrumento como el Manual, en vigencia desde noviembre de 2010, a ejercicios fiscales anteriores a esa fecha, en los cuales se causó el reintegro. Ello implica una clara violación al principio de irretroactividad de la ley. Por dicha razón –que se suma a las razones ya discutidas anteriormente sobre la ilegalidad del Manual - el intento de la República de justificar la falta de decisión de la Administración Tributaria respecto de las Solicitudes formuladas por MLDN en el supuesto incumplimiento con las disposiciones de dicho Manual carece de cualquier base conforme al derecho venezolano.

4. Otras consideraciones procesales planteadas por la República en relación con el reclamo por solicitudes de iva

A. Sobre el sentido y efectos del silencio administrativo en el régimen del procedimiento tributario

172. En su Memorial de Contestación, la República ha argumentado que el SENIAT no estaría obligado por la ley a pronunciarse expresamente mediante Providencia Administrativa (***Providencia***) -dentro de 30 días hábiles-, sobre las Solicitudes que le formulan los contribuyentes. Según Venezuela, "la Ley del IVA y el Código Orgánico Tributario contemplan la posibilidad de que el SENIAT no se pronuncie expresamente dentro del plazo"[264]. Conforme este argumento, vencido el mismo plazo, el contribuyente

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263 Declaración de Villasmil, ¶¶ 18 y 19.

264 Memorial de Contestación, ¶ 148.

lo que podría es optar por esperar la respuesta, solicitar el cierre del expediente o impugnar la denegación tácita[265]. Venezuela apoya este argumento en la declaración de la Sra. Villasmil, quien al respecto afirma que "el silencio administrativo constituye una respuesta tácita a la solicitud del contribuyente"[266]. En esta sección me refiero a este argumento, y analizo el efecto que conforme al derecho venezolano tiene la ausencia de pronunciamiento por parte de la administración a las peticiones de los particulares.

173. Debo comenzar por señalar que tanto la República, como la Sra. Villasmil, aceptan que la Ley del IVA establece en su artículo 43.6 claramente una obligación del SENIAT para decidir sobre la procedencia o no de una solicitud dentro de un plazo no mayor de treinta días hábiles[267], sancionando a los funcionarios de la Administración Tributaria en caso de que no emitan decisión[268]. Al mismo tiempo, ambos incurren en un error de interpretación respecto de la figura del silencio administrativo establecida en el artículo 43.10 de la Ley del IVA, al atribuir a la falta de pronunciamiento de la Administración un efecto absolutorio respecto de su obligación de decidir[269]. De esta manera, se pretende transformar un mecanismo consagrado en la legislación como una garantía procesal en beneficio de los contribuyentes, en un perjuicio para ellos. Al respecto, debe recordarse que desde que esta figura se introdujo en el derecho venezolano, primero con la promulgación de la Ley Orgánica de la Corte Suprema de Justicia en 1976 y luego con su posterior consagración en la Ley Orgánica de Procedimientos Administrativos de 1981[270], fue necesario advertir al respecto, por la errónea interpretación que

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265 Memorial de Contestación, ¶¶ 126 y 148 ss.

266 Declaración de Villasmil, ¶ 36.

267 Memorial de Contestación, ¶ 125, Declaración de Villasmil, ¶ 35. Véanse también, Decreto con rango y fuerza de Ley que establece el Impuesto al Valor Agregado (IVA), *Gaceta Oficial* Nº 5.341, de 5 de mayo de 1999, **Anexo BC-[]**, Reglamento Parcial Nº 1, **Anexo C-22,** artículo 14.

268 COT, **Anexo C-83**, artículo 153 ¶ único. Los artículo 4 y 100 de la Ley Orgánica de Procedimientos Administrativos, por ejemplo, prevén la imposición de sanciones de multa a los funcionarios responsables del retardo u omisión en el trámite de los procedimientos administrativos. **Anexo C-[]**

269 Memorial de Contestación, ¶ [ ]; Declaración de Villasmil, ¶ [ ].

270 El artículo 134 de la Ley Orgánica de la Corte Suprema de Justicia establecía, en su primer aparte, la posibilidad de intentar el recurso de nulidad contra actos administrativos de efectos particulares, "dentro del término de seis meses establecidos en esta disposición, contra el acto recurrido en vía administrativa, cuando la Administración no haya decidido el correspondiente recurso administrativo en el término de

se le dio –en un par de casos aislados– a las disposiciones que la contemplaban[271]. La República repite esta errada y superada argumentación en este caso, ignorando décadas de doctrina y jurisprudencia en contrario.

174. En efecto, ya en aquél entonces explicaba el suscrito que:

> "el único sentido que tiene la consagración del silencio administrativo en la Ley Orgánica, como presunción de decisión denegatoria de la solicitud o recurso, frente a la indefensión en la cual se encontraban los administrados por la no decisión oportuna por la Administración de tales solicitudes o recursos, no es otro que el establecimiento de un beneficio para los particulares, para, precisamente, superar esa indefensión
>
> […] [no existe] elemento alguno en el ordenamiento jurídico que pueda permitir interpretar que el transcurso de los lapsos para que se produzca el acto tácito denegatorio, agota la competencia administrativa, eximiendo a la Administración de su obligación de decidir [pues] la consecuencia del derecho de petición, es la obligación para la Administración de dar "oportuna respuesta" de la cual no puede liberarse por tener fuente en la Constitución[272].

175. Ese criterio fue acogido por la jurisprudencia, habiéndose reiterado de manera pacífica desde entonces[273], como por ejemplo se refleja

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noventa días consecutivos a contar de la fecha de interposición del mismo". Véase Ley Orgánica de la Corte Suprema de Justicia, *Gaceta Oficial* Nº 1.893 Extraordinario, de 30 de julio de 1976, **Anexo BC-[],** artículo 134. Por su parte, de acuerdo con el artículo 4º de la Ley Orgánica de Procedimientos Administrativos en aquellos casos en los cuales la Administración no resuelva un asunto -o recurso- dentro de los correspondientes lapsos, se considera que ha resuelto negativamente "y el interesado podrá intentar el recurso inmediato siguiente". Ley Orgánica de Procedimientos Administrativos, **Anexo C-[]**.

271 Allan R. Brewer Carías, "El sentido del silencio administrativo negativo en la Ley Orgánica de Procedimientos Administrativos," en *Revista de Derecho Público* Nº 8, Editorial Jurídica Venezolana, Caracas 1981, **Anexo BC-[]**, página 28.

272 Allan R. Brewer Carías, "El sentido del silencio administrativo negativo en la Ley Orgánica de Procedimientos Administrativos," en *Revista de Derecho Público* Nº 8, Editorial Jurídica Venezolana, Caracas 1981, **Anexo BC-[]**, páginas 28 y 32.

273 Resulta emblemática en la materia la decisión adoptada por la Sala Político Administrativa de la Corte Suprema de Justicia el 22 de agosto de 1982, pudiendo verse un extracto de la misma en decisión del Juzgado Superior Quinto de la Región Ca-

en sentencia de 2010 de la Sala Político Administrativa del Tribunal Supremo de Justicia, en la cual se afirmó que "la figura del silencio administrativo no puede verse sino como un mecanismo procesal que permite a los administrados ejercer el recurso contencioso administrativo, cuando la Administración ha guardado silencio en la resolución del recurso administrativo y, como consecuencia, debe interpretarse que la regulación de esta figura está concebida en beneficio del interesado, y no en su perjuicio"[274].

176. La misma argumentación puede realizarse, *mutatis mutandi* respecto de la norma del silencio administrativo contenida en el artículo 43.10 de la Ley de IVA. Ante esta norma, es evidente que la República no puede oponer a MLDN la operatividad de la ficción legal establecida como garantía para los contribuyentes, y pretender sostener -con base en esa misma norma- que la Administración Tributaria no está obligada a dar respuesta a las Solicitudes que formulen los particulares. Por el contrario, de acuerdo con el derecho constitucional de petición y oportuna respuesta consagrado en la Constitución[275], y según lo que disponen los artículos 9 y 26 de la Ley Orgánica de la Administración Pública, el artículo 2 de la Ley Orgánica de Procedimientos Administrativos y el artículo 153 del COT [276], el SENIAT *sí* está

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pital, *Luis Daniel Moreno Veliz contra* el *Ministerio del Poder Popular Para la Salud,* (Registro Nº 09-2625), 25 de octubre de 2010, **Anexo BC-[]**.

274 Sentencia Nº 1213 de la Sala Político Administrativa del Tribunal Supremo de Justicia de 30 de mayo de 2000. Magistrado Ponente: Carlos Escarrá Malavé, Caso: Carlos P. García P. vs. República (Ministerio de Justicia). Cuerpo Técnico de Policía Judicial, en *Revista de Derecho Público* Nº 82, Editorial Jurídica Venezolana, Caracas 2000, **Anexo BC-[]**,página 409

275 Constitución de 1999, **Anexo C-80**, artículo 51.

276 Ley Orgánica de la Administración Pública, **Anexo C-[]**, Artículo 9 "Los funcionarios y funcionarias de la Administración Pública tienen la obligación de recibir y atender, sin excepción, las representaciones, peticiones o solicitudes que les formulen los particulares en las materias de su competencia ya sea vía fax, telefónica, electrónica, escrita u oral; así como de responder oportuna y adecuadamente tales solicitudes, independientemente del derecho que tienen los particulares de ejercer los recursos administrativos o judiciales correspondientes, de conformidad con la ley." Artículo 26 "Toda competencia otorgada a los órganos y entes de la Administración Pública será de obligatorio cumplimiento y ejercida bajo las condiciones, límites y procedimientos establecidos legalmente; será irrenunciable, indelegable, improrrogable y no podrá ser relajada por convención alguna, salvo los casos expresamente previstos en las leyes y demás actos normativos. Toda actividad realizada por un órgano manifiestamente incompetente o usurpada por quien carece de autoridad pública es nula y sus efectos se tendrán por inexistentes. En caso de que

obligado a responder esas Solicitudes, teniendo el deber de hacerlo dentro del plazo de treinta días establecido en la Ley del IVA y Reglamento Parcial Nº 1. Es más, el COT establece sanciones para la Administracion tributaria en caso de que no decida dentro del plazo establecido[277]. Además, la República y la Sra. Villasmil[278] hacen referencia a los artículos 153 y 207 del COT al referirse al plazo para que se produzca la decisión y a la garantía del silencio establecida al respecto. Lo cierto es que la Ley del IVA establece el plazo y la garantía en su artículo 43, por lo que los artículos 153 y 207 del COT no resultan aplicables, pues las normas procedimentales de ese instrumento jurídico son aplicables cuando no haya sido dictada una ley especial o cuando, habiéndose adoptado, nada prevea al respecto. En el caso que nos ocupa, la Ley del IVA es la ley especial en la materia y contiene regulación sobre el asunto.

177. La previsión de la posibilidad de acudir al ejercicio del recurso contencioso tributario en caso de que no tenga lugar la respuesta oportuna, por otra parte, es una garantía para el contribuyente, como ya he explicado,[279] que le otorga una alternativa en caso de que la Administración se abstenga de cumplir con su deber. Por tanto, no es cierta la afirmación realizada por la República en el sentido de que el sistema legalmente establecido contempla la "posibilidad de que el SENIAT no se pronuncie expresamente dentro del lapso" y que la regulación del silencio le "aseguraría que el contribuyente reciba una respuesta, sea esta tácita o explícita, a su solicitud de re-

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un funcionario público o funcionaria pública se abstenga de recibir las representaciones o peticiones de los particulares o no den adecuada y oportuna respuesta a las mismas, serán sancionados de conformidad con la ley." Ley Orgánica de Procedimientos Administrativos, **Anexo C-[]**, Artículo 2 "Toda persona interesada podrá, por si o por medio de su representante, dirigir instancias o peticiones a cualquier organismo, entidad o autoridad administrativa. Estos deberán resolver las instancias o peticiones que se les dirijan o bien declarar, en su caso, los motivos que tuvieren para no hacerlo." COT **Anexo C-83**, artículo 153. "La Administración Tributaria está obligada a dictar resolución a toda petición planteada por los interesados dentro del plazo de treinta (30) días hábiles contados a partir de la fecha de su presentación, salvo disposición de este Código o de leyes y normas en materia tributaria. […]"

277 COT, **Anexo C-83**, artículo 153, párrafo único.

278 Memorial de Contestación, nota al pie de página 244; Declaración de Villasmil, nota al pie de página 17.

279 Véase ***supra ¶ 173 ss.***

pago dentro del plazo establecido"[280]. En consecuencia, la falta de respuesta por parte del SENIAT a las Solicitudes de MLDN viola la ley, incluyendo el artículo 51 de la Constitución de 1999[281].

B. Sobre el incumplimiento por parte del SENIAT con las formalidades procesales a que estaba obligado por ley

178. Por otra parte, la República pretende justificar la ausencia de decisión respecto de las Solicitudes de MLDN, señalando que el plazo legal de treinta días para resolver no habría comenzado a correr[282] pues en su criterio, la empresa "nunca" cumplió con los requisitos establecidos en el artículo 10 del Reglamento Parcial Nº 1 para la tramitación de su Solicitud[283]. Según la República, el hecho de que no se hubieran emitido pronunciamientos en relación con las Solicitudes correspondientes a los períodos de imposición de octubre de 2007 a mayo de 2012 no habría "qu[erido] decir que no estaba dando respuesta a las cuestiones formuladas por MLDN"[284], toda vez que la Administración Tributaria le participaba verbalmente todos los meses sobre el estado de los expedientes y le notificó verbalmente que nueve de los casos ya habían sido asignados, al tiempo que continuaba pendiente el descuento de las sumas cuyo reintegro se solicitaba[285]. En particular, la República refiere a un Acta de Requerimiento de 3 de julio de 2012[286], así como a la declaración de la Sra. Villasmil, quien expuso que la Administración Tributaria "mantuvo comunicación constante con MLDN" y que se realizaban reuniones frecuentes para "actualizar el estatus de los expedientes"[287].

179. Por el contrario, lejos de evidenciar que la Administración Tributaria dio respuesta adecuada y oportuna a las Solicitudes por MLDN, lo expuesto por la Sra. Villasmil demuestra que el SENIAT dejó de cumplir el procedimiento establecido en el artículo 43 de la Ley del IVA y el Reglamen-

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280 Memorial, ¶ 149.

281 Memorial de Contestación, ¶ 152; Declaración de Villasmil, nota al pie de página 17.

282 Memorial de Contestación, ¶ 153.

283 Memorial de Contestación, ¶ 153.

284 Memorial de Contestación, ¶ 154.

285 Memorial de Contestación, ¶ 154.

286 Memorial de Contestación, ¶ 155.

287 Declaración de Villasmil, ¶ 33 y 34.

to Parcial Nº 1. Conforme al principio de legalidad al cual ya me he referido,[288] la Gerencia Regional del SENIAT debía adecuar sus procederes a lo establecido en los instrumentos reguladores, manifestando las objeciones que pudiera tener a las Solicitudes formuladas por MLDN de manera escrita y oportuna. A tal efecto, debe ponerse de relieve que las formalidades procedimentales constituyen la manifestación de la garantía del debido proceso establecida constitucionalmente[289] y aplicable en materia administrativa. Por tanto, las reglas pertinentes no pueden ser relajadas, so pena de que se produzcan violaciones al derecho a la defensa que vicien por completo el procedimiento. Como ha señalado la Sala Político Administrativa del Tribunal Supremo de Justicia:

> "los actos administrativos deben ajustarse, para que sean válidos al procedimiento legalmente establecido, esto es, a los trámites, etapas y lapsos prescritos por la Ley. La violación de las formas procedimentales puede acarrear la invalidez de los actos.
>
> La violación de formas puede ser de dos clases: la violación de trámites y formalidades o la violación de los derechos de los particulares en el procedimiento.
>
> Respecto al primero de los vicios de forma, éstos son susceptibles de impugnación, pero queda claro que los vicios en el procedimiento siempre serán vicios que podrían producir la anulabilidad o nulidad relativa de los actos administrativos, conforme al artículo 20 de la Ley Orgánica de Procedimientos Administrativos. […]
>
> En cuanto a la violación de los derechos de los particulares en el procedimiento, cabe destacar el derecho a la defensa, previsto en el artículo 49 de la Constitución Bolivariana de Venezuela. Disposición que consagra además, el derecho al debido proceso, y, al estudiar el contenido y alcance de este derecho se ha precisa-do que se trata de un derecho complejo que encierra dentro de sí, un conjunto de garantías que se traducen en una diversidad de derechos para el procesado, entre los que figuran, además del derecho a la defensa el derecho a acceder a la justicia, el derecho a ser oído, el derecho a la articulación de un proceso debido, derecho de acceso a los recursos legalmente es-

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288 Véase ***supra* ¶ *119, 142.***

289 Constitución de 1999, **Anexo C-80**, artículo 49.

> tablecidos, derecho a un tribunal competente, independiente e imparcial, derecho a obtener una resolución de fondo fundada en derecho, derecho a un proceso sin dilaciones indebidas, derecho a la ejecución de las sentencias. Todos estos derechos se desprenden de la interpretación de los ocho ordinales que consagra el artículo 49 de la Carta Fundamental.
>
> Pues bien, la violación por la Administración, en cualquier procedimiento administrativo de cualquiera de estos derechos de los particulares en el procedimiento provoca la invalidez del acto administrativo y lo hace susceptible de impugnación."[290]

180. En tal sentido, el SENIAT estaba en la obligación de revisar las peticiones presentadas por MLDN *al día siguiente* al que se hubieran presentado, y en caso de que estimara que faltaban requisitos por cumplirse, debía comunicarlo de manera expresa y por escrito a la empresa *en los cinco días siguientes*, para que ésta procediera a subsanar las faltas *dentro de los diez días hábiles siguientes*, pudiendo nuevamente generarse observaciones por parte del SENIAT, en cuyo caso la empresa podía subsanar nuevamente *dentro de los cinco días siguientes* o ejercer las otras vías que tuviera a su disposición[291]. Si la Administración Tributaria no actuó conforme la ley lo prescribía, manifestando las objeciones que pudiera tener de manera escrita y oportuna, no puede ahora alegar su propia torpeza para justificar su mal proceder, y pretender hacerlo en desmedro de los derechos de MLDN, aduciendo que el plazo para responder la solicitud no habría comenzado a transcurrir. La Administración, y en este caso, las autoridades del SENIAT, estaban en la obligación de responder dentro de los lapsos prescritos, los escritos presentados por MLDN, y además, estaban en la obligación de notificar formalmente por escrito a los representantes de la empresa la mencionada respuesta a sus escritos.[292]

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290 Sentencia Nº 1157 de la Sala Político Administrativa del Tribunal Supremo de Justicia de 18 de mayo de 2000. Magistrado Ponente: Carlos Escarrá Malavé. Caso: Mario Castillo vs. República (Ministerio de Relaciones Interiores), en *Revista de Derecho Público* Nº 82, Editorial Jurídica Venezolana, Caracas 2000, **Anexo BC-[]**, página 428 a 429.

291 Reglamento Parcial Nº 1, **Anexo C-22,** artículo 9 y 10.

292 Constitución de 1999, **Anexo C-80**, artículo 49.1 y 51; COT, **Anexo C-83**, artículos 161 y 207; Ley Orgánica de Procedimientos Administrativos, **Anexo C-[]**, artículos 48, 73, 74; **Anexo C-22**, artículo 10.

181. Lo que es más, de acuerdo con el principio de la confianza que rige en la actividad administrativa, y que implica que la Administración en sus relaciones con los administrados, cuando crea expectativas legítimas, las debe respetar[293], la falta de respuesta inicial, en relación con las Solicitudes y la satisfacción de los requisitos legales por parte de la empresa, hicieron nacer en MLDN la expectativa plausible de que las solicitudes que había formulado estaban completas y cumplían con los requisitos de ley, pues el transcurso -con creces- del plazo que tenía la Administración Tributaria para participarle a la empresa la falta de alguno de los recaudos, tiene ese efecto legal. En atención a ello, no puede sostenerse válidamente que el plazo de treinta días establecido en el artículo 43 de la Ley del IVA para que se diera respuesta a las solicitudes de reintegro formuladas por MLDN, para los períodos de octubre de 2007 a mayo de 2012, no hubiera comenzado a transcurrir[294].

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293 Véase en general, sobre el principio Caterina Balasso Tejera, "El principio de protección de la confianza legítima y su aplicabilidad respecto de los ámbitos de actuación del poder público*"* en *El Derecho Público a los 100 números de la Revista de Derecho Público 1980-2005*, Editorial Jurídica Venezolana, Caracas 2006, **Anexo BC-[]**, páginas 745 ss. Como lo ha reconocido la jurisprudencia del Tribunal Supremo de Justicia en Sala Político Administrativa, en sentencia Nº 514 de 3 de abril de 2001, con base en dicho principio de la confianza legítima, "las actuaciones reiteradas de un sujeto frente a otro, en este caso de la Administración Pública, hacen nacer expectativas jurídicas que han de ser apreciadas por el juez y justamente, los criterios administrativos, si bien pueden ser cambiados, son idóneos para crear tales expectativas." Véase en *Revista de Derecho Público*, Nº 85088, Editorial Jurídica Venezolana, Caracas, 2001, **Anexo BC-[]**, páginas 231 a 232.

294 Debe observarse, por otra parte, que además del plazo de 30 días que conforme al artículo 43 de la Ley del IVA tiene la Administración Tributaria para decidir sobre la procedencia o no de la solicitud presentada, en caso de no emitir la oportuna respuesta a que está obligada. al término de dicho lapso, como la Administración en todo caso continúa obligada a decidir, comenzaría entonces a correr el lapso general para adoptar las decisiones en los procedimientos administrativos ordinarios que no requieren sustanciación como sería el que debe seguirse para la emisión de los CERTs por el Ministerio de Finanzas, que conforme al artículo 5 de la Ley Orgánica de Procedimientos Administrativos sería de veinte (20). Si el procedimiento requiriese de sustanciación, regiría el plazo general de cuatro (4) meses, como se establece en el artículo 60 de la misma Ley Orgánica de Procedimientos Administrativos. Ley Orgánica de Procedimientos Administrativos, **Anexo C-[]**.

182. De igual manera, advierto que respecto del Acta de Requerimiento del SENIAT de 3 de julio de 2012[295] -así como otras Actas de similar tenor de lamisma fecha, las mismas fueron respondida por MLDN mediante cartas del 6 de julio de 2012[296] explicando los motivos por los cuales no procedía el descuento solicitado. Posterior a ello, el SENIAT no formalizó ninguna nueva solicitud o nota de seguimiento sobre el tema, y por ende, ello también generó en MLDN la expectativa plausible de que la cuestión referida por el SENIAT en sus Actas de Requerimiento había sido resuelta.

IV. LA RECONVENCIÓN DE DEMANDA DE VENEZUELA

183.En el Memorial de Contestación, la República refirió a supuestos incumplimientos por parte de MLDN en la operación de sus concesiones, con base en los cuales formuló una reconvención contra Anglo American plc[297]. Según Venezuela, la Demandante, por medio de su filial indirecta MLDN, habría incumplido sus obligaciones como concesionaria, y como consecuencia de ello, habría perjudicado los intereses de la Demandada[298] en relación con: (i) El régimen de ventajas especiales de ofrecidas por MLDN[299]; (ii) ciertas obligaciones ambientales a cargo de MLDN[300]; y (iii) los impuestos de explotación y sobre la renta a cargo de MLDN[301]. En esta sección, me refiero a cier-

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295 Acta de Requerimiento del SENIAT (para el Período de Imposición de octubre de 2007), 3 de julio de 2012, **Anexo R-36**. Acta de Requerimiento del SENIAT (para el Período de Imposición de noviembre de 2007), 3 de julio de 2012, **Anexo C-[ ]**; Acta de Requerimiento del SENIAT (para el Período de Imposición de diciembre de 2007), 3 de julio de 2012, **Anexo C-[ ]**.

296 Carta de MLDN al SENIAT, 6 de julio de 2012, **Anexo R-37**; Respuesta de MLDN al Acta de Requerimiento del SENIAT para el Período de Imposición de noviembre de 2007, 6 de julio de 2012, **Anexo C-[ ]**; y Respuesta de MLDN al Acta de Requerimiento del SENIAT para el Período de Imposición de diciembre de 2007, 6 de julio de 2012, **Anexo C-[ ]**.

297 Memorial de Contestación, ¶¶ 576-584; Declaración de Figueroa, ¶¶ 9 a 20; Declaración de Gómez, ¶¶ 20-29.

298 Memorial de Contestación, ¶ 583.

299 Memorial de Contestación, ¶¶ 580 y 49 a 108; Declaración de Figueroa, ¶¶ 10 ss.; Declaración de Gómez, ¶¶ 20 ss.

300 Memorial de Contestación, ¶¶ 85 a 92, 580; Declaración de Gómez, ¶ 16.

301 Memorial de Contestación, ¶¶ 580 ss.; Declaración de Solano, ¶ 20; Declaración de Figueroa, ¶ 11.

tas cuestiones suscitadas a propósito de dicha reconvención desde la perspectiva del derecho venezolano.

1. Observación preliminar sobre la legitimación pasiva De Anglo American Plc para responder a supuestos daños causados por MLDN

184. Debe advertirse, ante todo, que los reclamos que ha planteado Venezuela en su reconvención contra Anglo American plc se refieren todos a supuestas acciones u omisiones atribuidas o imputadas a MLDN en su carácter de titular y operadora de las concesiones mineras del depósito Loma de Níquel, lo que contrasta con las partes en este proceso internacional que ha sido iniciado por Anglo American plc. No se me ha solicitado que rinda una Opinión Legal sobre el tema de la jurisdicción de un tribunal internacional constituido conforme a las previsiones de un tratado bilateral de protección de inversiones para conocer de los reclamos por responsabilidad del accionista controlante por los actos a cargo de su subsidiaria, pero no puedo dejar de observar que, conforme al derecho venezolano, ello en principio no sería posible.

185. En Venezuela, en efecto, en principio, no se puede demandar en justicia exigiendo responsabilidad de una empresa por actos cometidos o ejecutados por otra persona jurídica distinta. Y si bien es cierto que el abuso que en ocasiones se ha hecho de la personalidad jurídica con la finalidad de eludir o diluir las responsabilidades que podrían corresponder a determinadas personas naturales y sociedades respecto de determinadas obligaciones, ha llevado a la necesidad de la construcción legal, doctrinal y jurisprudencial de la despersonalización de la sociedad a través del "levantamiento del velo de la personalidad jurídica"[302], ello sólo está previsto de forma excepcional para garantizar el cumplimiento de determinadas obligaciones ante actuaciones ilícitas y que mediante la utilización abusiva de la personalidad societaria constituyan actos de simulación. La situación la resumió la Sala Constitucional del Tribunal Supremo de Justicia de Venezuela en 2004, señalando que:

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302 Véase, entre otros, Levis Ignacio Zerpa, "El abuso de la personalidad jurídica en la sociedad anónima", en *Revista de la Facultad de Ciencias Jurídicas y Políticas,* UCV, Nº 116, Caracas 1999, **Anexo BC-[ ]**, página 93, nota al pie de página 20; Francisco Hung Vaillant, "La denominada doctrina del levantamiento del velo por abuso de la personalidad jurídica", en *El derecho público a comienzos del Siglo XXI. Estudios en homenaje al profesor Allan R. Brewer-Carías*, Ed. Civitas, Madrid 2003 Tomo II, **Anexo BC-[ ]**, páginas 2035 a 2063.

> "La existencia de grupos empresariales o financieros es lícita, pero ante la utilización por parte del controlante de las diversas personas jurídicas (sociedades vinculadas) para diluir en ellas su responsabilidad o la del grupo, en sus relaciones con las terceras personas, han surgido *normas en diversas leyes* que persiguen la desestimación o allanamiento de la personalidad jurídica de dichas sociedades vinculadas, permitiendo al acreedor de una de dichas sociedades, accionar contra otra con la que carecía objetivamente de relación jurídica, para que le cumpla, sin que ésta pueda oponerle su falta de cualidad o de interés."[303]

186. Como se desprende de esta sentencia, la posibilidad de aplicar la doctrina de la despersonalización societaria o del levantamiento del velo de la personalidad jurídica, ante todo depende de la expresa regulación legal que se haya previsto en el ordenamiento jurídico[304], por lo que debe corresponder en general a los jueces su aplicación, sea cuando la ley expresamente lo autorice o cuando esté comprobada la utilización de la personalidad jurídica como un hecho abusivo, constitutivo de un acto de simulación y, por tanto, ilícito.

187. La figura, por tanto, en Venezuela, considero que *es de la estricta reserva legal*, pues al permitirse que los jueces puedan enervar en un caso concreto la ficción de la personalidad jurídica, ello constituye una limi-

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303 Véase Sentencia Nº 903 de la Sala Constitucional del Tribunal Supremo, Transporte SAET C.A. (Registro. Nº: 03-0796), de 14 de mayo de 2004, **Anexo BC-[ ]**, páginas [ ].

304 Así, por ejemplo, el artículo 66 de la Ley de Regulación Financiera estableció la facultad del juez para ignorar "el beneficio y efectos de la personalidad jurídica de las empresas" cuando existieran "actuaciones o elementos que permitan presumir que con el uso de formas jurídicas societarias se ha tenido la intención de volar a Ley, la buena fe, producir daños a terceros o evadir responsabilidades patrimoniales." *Gaceta Oficial* Nº 36.868, de 12 de enero de 2000, **Anexo BC-[ ].** Por su parte, la Ley de Tierras y Desarrollo Agrario establece la posibilidad de que los jueces competentes en la materia desconozcan "…la constitución de sociedades, la celebración de contratos y, en general, la adopción de formas y procedimientos jurídicos, cuando sean realizados con el propósito de..." defraudar la Ley. Véase Ley de Tierras y Desarrollo Agrario, *Gaceta Oficial* Nº 5.991 Extraordinario, de 29 de julio de 2010, **Anexo BC-[ ]**, artículo 23.Véase los comentarios sobre el fundamento normativo del levantamiento del velo corporativo, en José Antonio Muci Borjas, *El abuso de la forma societaria. "El levantamiento del velo corporativo"* Editorial Sherwood, Caracas 2005, Anexo BC-[ ], páginas 62 a 66.

tación al derecho de asociación garantizado en el artículo 52 de la Constitución de 1999 así como, en su caso, a la garantía de la libertad económica regulada en el artículo 112 del mismo texto constitucional[305]. Es decir, como lo he expuesto en otro lugar:

> "la despersonalización de la sociedad sólo puede decidirse por los jueces cuando mediante un proceso se compruebe *la simulación en la utilización de la personalidad* jurídica; o cuando el ordenamiento jurídico la autorice mediante norma legal expresa, por tratarse de un régimen que es de la reserva legal al constituir una limitación a los derechos constitucionales, y que por ello es de aplicación restrictiva"[306].

188. Por tanto, salvo previsión expresa de la ley, en Venezuela, sólo en casos excepcionales es que un juez podría proceder a levantar el "velo societario" para imputar a los accionistas de una sociedad por los actos de esta última. Sin embargo, entiendo que Venezuela no ha iniciado una acción de este tipo ante los tribunales de la República ni tampoco ha alegado que ello sea el caso en relación con su reconvención en este procedimiento.

2. Los supuestos incumplimientos de las ventajas especiales por parte de MLDN

189. En el Memorial de Contestación, la República ha alegado que, como consecuencia de presuntos incumplimientos de las ventajas especiales por parte de MLDN en el período 2005 a 2008, el Ministerio de Minas se vio obligado a declarar la caducidad de 13 de las 16 Concesiones de MLDN (***13 Concesiones de MLDN***)[307]. En particular, Venezuela indicó que en 2006 y 2007 la Inspectoría Técnica realizó inspecciones para comprobar si MLDN cumplía con sus obligaciones como concesionaria, habiendo constatado ciertos incumplimientos de ventajas especiales. Según indicó Venezuela en el Memorial de Contestación, "la inobservancia de Minera Loma de Ní-

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305 Véase Constitución de 1999, **Anexo C-80**, artículos 52 y 112.

306 Véase Allan R. Brewer-Carías, "La despersonalización societaria y el régimen de la responsabilidad", en *Congreso Internacional La despersonalización societaria y el régimen de la responsabilidad*, Pontificia Universidad Javeriana, Facultad de Ciencias Jurídicas, Bogotá, Colombia, de 28 al 30 de julio 2004, **Anexo BC-[ ]**, páginas 103 a 142.

307 Véanse Memorial de Contestación, ¶ 54 y Memorial, ¶ 77; *Gaceta Oficial* Nº 5.869 Extraordinario, de 28 de diciembre de 2007 (extracto), **Anexo C-25** y *Gaceta Oficial* Nº 38.844 (extracto), de 7 de enero de 2008, **Anexo C-26**.

quel de las ventajas especiales fue una de las causas directas de la caducidad de las trece concesiones"[308], lo que fue decidido por el Ministerio de Minas en 2007 y 2008. Como consecuencia de dichos presuntos incumplimientos, la República reclama en este procedimiento contra Anglo American plc por los supuestos daños causados, aun cuando sin cuantificarlos en su reconvención.

190. Ante todo es importante destacar que las declaraciones de caducidad decretadas por el Ministerio de Minas en relación con las 13 Concesiones de MLDN, han sido impugnadas por MLDN a través de los respectivos recursos jerárquicos contra ellas, todos los cuales se me ha informado que se encuentran pendientes de resolución a la fecha, no habiendo por consiguiente los actos administrativos respectivos adquirido firmeza[309].

191. Ahora bien, sobre el alcance de la demanda de reconvención en este aspecto, debe observarse que tal como se indicó más arriba, las ventajas especiales son cláusulas contractuales que se incorporan a las concesiones mineras[310]. En el caso de MLDN, el régimen de ventajas especiales estaba previsto en las cláusulas primera a décima séptima de los diversos títulos mineros, como "ventajas especiales ofrecidas por el postulante a favor de la Nación"[311].

192. Conforme a la Ley de Minas de 1999, la consecuencia jurídica establecida para los casos de "incumplimiento de cualesquiera de las ventajas especiales ofrecidas por el solicitante a la República" es la posibilidad que tiene el Ministerio de Energía y Minas de declarar la caducidad de las concesiones[312]. Se trata de la misma sanción jurídica de carácter administrativo que la Administración está autorizada a adoptar contra el concesionario en caso de incumplimiento de sus demás obligaciones legales establecidas en la concesión. No se prevé en la Ley de Minas de 1999 una acción autó-

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308 Memorial de Contestación, ¶ 65.

309 Memorial, ¶¶ 77 y 78. Véase, por ejemplo, Recurso de Reconsideración Cofemina 1 y Cofemina 2, 28 de enero de 2008, **Anexo R-13**.

310 Véase Leyy de Minas de 1999, **Anexo C-19**, artículos 32 y 35.

311 Concesiones mineras El Tigre, San Onofre N.° 1, 2 y 3, Camedas Nº 1, 2, 3, 4 y 5, y San Antonio Nº 1, en *Gaceta Oficia*l Nº 4.490 Extraordinario (extracto), de 10 de noviembre de 1992, **Anexo C-3**.

312 El artículo 98 de la Ley de Minas de 1999 enumera los múltiples supuestos que pueden resultar en la caducidad de las concesiones por parte del Ministerio de Minas. Ley de Minas de 1999, **Anexo C-19**.

noma para que el Estado reclame supuestos daños y perjuicios que pudieran derivarse de dichos incumplimientos.

193. La Ley de Minas de 1999 establece el procedimiento a seguir cuando se determine que existe un incumplimiento de las ventajas especiales[313]. En tal caso, la caducidad de las concesiones la debe dictar el Ministerio de Energía y Minas mediante resolución oficial. Dada la gravedad que conlleva la declaratoria de caducidad, el mismo artículo 108 de la Ley de Minas de 1999 indica expresamente que contra las mismas se pueden ejercer los recursos administrativos a que haya lugar conforme a la Ley Orgánica de Procedimientos Administrativos[314]. Ello implica que mientras los recursos en cuestión no hayan sido decididos, el acto administrativo que declara la caducidad de la concesión no se puede considerar como un acto definitivamente firme. Sus efectos, aun cuando se producen de inmediato, en definitiva están sujetos a la decisión que se adopte al decidirse los recursos, pudiendo ser confirmando la caducidad o revocándola[315]. En esta forma, incluso en la propia Ley de Minas de 1999 se precisa que en caso que se declare con lugar el recurso, es decir, se revoque la caducidad decretada, los derechos caducados del concesionario recurrente deben serle restituidos[316]. En consecuencia, sólo cuando se decida finalmente el recurso administrativo y, en su caso, los recursos contencioso administrativos que se ejerzan contra una resolución que declare caducada una concesión minera, es que puede considerarse que dicha resolución ha quedado firme[317].

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313 Véase Ley de Minas de 1999, **Anexo C-19**, artículo 108.

314 Véase nota al pie de página anterior. Véase Ley Orgánica de Procedimientos Administrativos, **Anexo C-[ ]**.

315 Conforme al artículo 90 de la Ley Orgánica de Procedimientos Administrativos, "[e]l órgano competente para decidir el recurso de reconsideración o el jerárquico, podrá confirmar, modificar o revocar el acto impugnado, así como ordenar la reposición en caso de vicio en el procedimiento, sin perjuicio de la facultad de la Administración para convalidar los actos anulables". Véase Ley Orgánica de Procedimientos Administrativos, **Anexo C-[ ]**.

316 Véase Ley de Minas de 1999, **Anexo C-19**, artículo 108.

317 La firmeza de los actos administrativos se produce por el vencimiento de los lapsos de impugnación establecidos por las leyes, que son de caducidad; y, como consecuencia, el acto administrativo *firme* no puede ser impugnado por extinción del recurso respectivo. Es decir, acto administrativo firme es el acto inimpugnable, y que por tanto puede ser ejecutado sin riesgo por parte de la Administración. Sobre la noción de acto administrativo firme, o que adquiere firmeza, véase Allan R. Bre-

194. En materia minera, en todo caso, frente al incumplimiento de las ventajas especiales, la sanción que la administración minera puede adoptar de acuerdo con la ley es la declaratoria de caducidad de la concesión[318]. Ello, por lo demás, está expresamente indicado en los títulos mineros, de manera que la caducidad es el único remedio contractual en las concesiones contra el incumplimiento de las ventajas especiales[319]. Por tanto, si la administración pretendiere ser indemnizada por supuestos daños y perjuicios que considere le pudiera haber causado el incumplimiento de las referidas ventajas especiales, para ello, luego de declarar la caducidad de las concesiones, tendría que intentar una demanda civil separada por daños y perjuicios ante un tribunal competente en el curso de la cual tendría que probar en cada caso particular los daños alegados. Lógicamente, en esos casos, como la demanda por daños y perjuicios tendría su causa en el mismo incumplimiento de las ventajas especiales, para poder ser intentada, el acto administrativo que declare la caducidad debe haber adquirido firmeza de manera que sirva de título ejecutivo, para poder ser ejecutado en vía judicial[320].

195.En todo caso, como antes se ha indicado[321], MLDN ejerció, recursos administrativos que aún están pendientes de decisión (y además aún tiene la posibilidad de ejercer, en su momento, los recursos contencioso-administrativos procedentes si los recursos administrativos fueran eventualmente resueltos en su contra) contra las resoluciones del Ministerio de Minas que declararon la caducidad de las 13 concesiones. Ello implica que las resolu-

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wer-Carías et al., *Ley Orgánica de Procedimientos Administrativos y Legislación complementaria*, Editorial Jurídica Venezolana, 15ª edición, Caracas 2008, **Anexo BC-[ ]**, página 92.

318 Véanse Ley de Minas de 1999, **Anexo C-19**, artículo 98 y Ley Orgánica de Procedimientos Administrativos, **Anexo C-[ ]**, artículos 85 y 93.

319 Véanse, por ejemplo, concesiones mineras Camedas Nº 1 y 3, y San Antonio Nº 1 en *Gaceta Oficial* Nº 4.490 Extraordinario, de 10 de noviembre de 1992, **Anexo C-3**, ventaja especial 17.

320 Como lo he destacado en otro lugar, refiriéndome a un acto administrativo que impone una orden que solo es ejecutable en vía judicial, dicho acto "es un acto administrativo ejecutivo y obligatorio, cuando esté firme, es decir, al devenir inimpugnable por vía de recurso", que es cuando se puede intentar la demanda judicial de ejecución. Véase Allan R. Brewer-Carías, "Consideraciones sobre la ejecución de los actos administrativos (a propósito de los actos administrativos que ordenan el desalojo de viviendas)" en *Revista de Derecho Público*, Nº 41, Editorial Jurídica Venezolana, Caracas enero–marzo 1990, **Anexo BC-[ ]**, páginas 163 a 176.

321 Véase ***supra***

ciones en cuestión aún están en curso de revisión administrativa, y por tanto, no han adquirido firmeza. Por ello no sorprende que la República nunca hubiera formulado hasta la fecha reclamación alguna contra MLDN por supuestos daños y perjuicios derivados de los alegados incumplimientos de las ventajas especiales del contrato de concesión. Y en todo caso, de haberlo hecho, habría tenido que identificar con precisión los supuestos daños y perjuicios, y cuantificarlos adecuadamente, cosa que –por otra parte- la República tampoco ha hecho en este proceso.

3. Los supuestos incumplimientos en cuestiones ambientales por parte de MLDN

196. Venezuela también ha basado la reconvención intentada en supuestos daños al medio ambiente producto de la alegada violación por parte de MLDN de normas ambientales, lo cual habría causado daños ambientales durante su tiempo como concesionaria, en particular, entre 2005 y 2006[322]. Al igual que en el caso de las alegadas violaciones de las ventajas especiales establecidas en las concesiones, en este caso, Venezuela tampoco precisó cuáles habrían sido los específicos daños ambientales causados ni cuantificó en su reconvención el monto de los mismos[323].

197. Por otra parte, de los alegatos formulados se observa que la República no indicó ni ofreció evidencia alguna de que los supuestos daños ambientales que denuncia hubieren sido investigados en su momento y determinados por las autoridades competentes en materia ambiental conforme a las leyes aplicables en Venezuela. Y ello es particularmente relevante pues, como se explica a continuación, en Venezuela no es posible que la República intente una demanda civil por daños ambientales, si los mismos no han sido previamente determinados en un procedimiento administrativo desarrollado ante la Administración ambiental, que es el "procedimiento legal respectivo" a que se refiere la Ley Orgánica del Ambiente (art. 199),[324] y que tiene que desarrollarse en acatamiento a las previsiones de la Ley Orgánica de Procedimientos Administrativos, que es la que regula los procedimientos adminis-

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322 Véanse Memorial de Contestación, ¶¶ 85 a 92 y 580 y Declaración Gómez, ¶ 16.

323 Véase Memorial de Contestación, ¶¶ 580 y 85 a 92.

324 Véase Ley Orgánica del Ambiente, en *Gaceta Oficial* Nº 5.833 Extraordinario, de 22 de diciembre de 2006, **Anexo BC-[]**, (***Ley del Ambiente***), artículo 199.

trativos ante la Administración Pública [325]. De igual manera, el Estado tampoco puede reclamar civilmente daños ambientales derivados de delitos ambientales, sin que previamente se haya dictado sentencia penal condenatoria, en un proceso desarrollado ante los tribunales de la jurisdicción penal, luego de desarrollado el procedimiento administrativo correspondiente.

A. Obligaciones ambientales a cargo de los concesionarios y las responsabilidades por los daños ambientales

198. Las obligaciones ambientales a cargo de los concesionarios mineros, además de estar previstas en las leyes relativas a la protección del ambiente, en particular, en la Ley Orgánica del Ambiente, en la Ley Penal del Ambiente y en la Ley Orgánica para la Ordenación del Territorio[326], también se encuentran específicamente establecidas en la Ley de Minas de 1999. En esta ley[327], en efecto, se establece como principio rector respecto de las actividades mineras reguladas en la misma (incluidas las realizadas por concesionarios) que dichas actividades se deben llevar a cabo, siempre, entre otros principios, con arreglo al principio de "conservación del ambiente", y "con acatamiento a la legislación ambiental". Por ello, incluso, para la determinación por parte del Estado de las modalidades para el ejercicio de las actividades mineras, la ley exige que el Ejecutivo Nacional deba tener siempre en cuenta su "incidencia ambiental", a cuyo efecto la legislación exige presentación por parte de los concesionarios de un "estudio de factibilidad técnico, financiero y ambiental de la concesión"[328].

199. Ahora bien, conforme a las normas establecidas en la Ley Orgánica del Ambiente y en la Ley Penal del Ambiente, las personas, incluyendo los concesionarios mineros, pueden incurrir en responsabilidad administrativa, penal y civil por los daños ambientales que puedan causar al am-

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325 Véase Ley Orgánica de Procedimientos Administrativos, **Anexo C-[ ]**, artículo 1. ("*La Administración Pública Nacional y la Administración Pública Descentralizada, integrada en la forma prevista en sus respectivas leyes orgánicas, ajustarán su actividad a las prescripciones de la presente ley*").

326 Véanse Ley Penal del Ambiente, en *Gaceta Oficial* Nº 39.913, de 2 de mayo de 2012, **Anexo BC-[ ],** (***Ley Penal del Ambiente***); y Ley Orgánica para la Ordenación del Territorio en *Gaceta Oficial* Nº 3.238 Extraordinario, de 11 de agosto de 1983, **Anexo BC-[ ].**

327 Véase Ley de Minas de 1999, **Anexo C-19**, artículos 5 y 15.

328 Véase Ley de Minas de 1999, **Anexo C-19**, artículos 7, 8 y 53 ss.

biente[329]. La distinción entre los tres órdenes de responsabilidades está basada tanto en la autoridad competente para su determinación, como en la sanción que se puede imponer por los daños causados, a cuyo efecto las leyes determinan con precisión el procedimiento que debe seguirse en cada caso.

B. Los distintos procedimientos destinados a determinar las responsabilidades por daños ambientales

200. La responsabilidad administrativa por daños ambientales, conforme a la Ley Orgánica del Ambiente, se establece por la Autoiridad ambiental nacional[330] (la cual tradicionalmente fue el Ministerio del Ambiente y los Recursos Naturales Renovables, y en la actualidad es el Ministerio del Poder Popular para el Ecosocialismo y Aguas), mediante la aplicación de las sanciones administrativas y las demás medidas que en materia ambiental establece dicha ley y otras leyes especiales. Para ello, el mismo artículo exige que para la aplicación de dichas sanciones, debe agotarse el correspondiente procedimiento administrativo de acuerdo con la Ley Orgánica de Procedimientos Administrativos[331].

201. La Ley Orgánica del Ambiente establece, en el caso de infracciones administrativas, su sanción mediante la aplicación de multas[332], cuyo monto debe fijarse dentro de los límites previstos en la ley, de acuerdo con "la gravedad del hecho punible, a las condiciones del mismo y a las circunstancias de su comisión". Adicionalmente, el Ministerio con competencia en la materia ambiental está facultado para adoptar las medidas necesarias para prevenir, suspender, corregir, reparar, entre otras, las actividades ilícitas, sus efectos y los daños; y además, para aplicar medidas para el restablecimiento del ambiente a su estado natural si éste resultare alterado[333].

202. Las personas naturales y jurídicas, incluidos los concesionarios mineros, también puedan incurrir en responsabilidad penal por la co-

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329 Véanse Ley Orgánica del Ambiente, **Anexo BC-[ ]**, artículos 110, 119 ss., 130 ss.; y Ley Penal del Ambiente, **Anexo BC-[ ]**, artículos 4, 9, 16, 17 y Título III.

330 Véase Ley Orgánica del Ambiente, **Anexo BC-[ ]**, artículos 18 y 119.

331 Véase Ley Orgánica del Ambiente, **Anexo BC-[ ]**, artículo 119.

332 Véanse Ley Orgánica del Ambiente, **Anexo BC-[ ]**, artículos 108 y 120.

333 Véanse Ley Orgánica del Ambiente, **Anexo BC-[ ]**, artículos 122 y 123.

misión de los delitos ambientales tipificados en la Ley Penal del Ambiente[334]. La determinación de dicha responsabilidad penal, a los efectos de la imposición de las penas por delitos ambientales exige en todo caso que haya habido "la violación de una norma administrativa"[335]. A los efectos de la determinación de la responsabilidad penal, la Ley Penal del Ambiente exige que antes del proceso penal correspondiente, las investigaciones sobre la comisión de los delitos ambientales deben realizarse por los funcionarios que el Ministerio correspondiente que ejerza la autoridad ambiental que ejerzan funciones de vigilancia y control, así como también por los funcionarios de otros Ministerios con competencia, entre otros, en materia de energía, petróleo, minas, salud o agricultura[336]. Una vez realizadas las investigaciones administrativas necesarias, sus resultados entonces deben pasarse al Ministerio Público que es el órgano competente para intentar dichas acciones penales. Éstas prescriben a los cinco años, a los tres años o al año, desde que se manifiesten los efectos del delito en el ambiente o que la autoridad haya tenido conocimiento del hecho-, dependiendo de las penas de arresto o prisión que corresponda según los delitos cometidos[337].

203. Finalmente, en cuanto a la responsabilidad civil en materia de daños ambientales, la misma puede derivar tanto de la responsabilidad administrativa como de la penal. En cuanto a la responsabilidad civil derivada de la responsabilidad administrativa, la Ley Orgánica del Ambiente establece el principio de subsidiariedad en el sentido de que la misma únicamente puede ser exigida una vez cumplido el procedimiento administrativo sancionatorio correspondiente, de manera que la respectiva demanda civil sólo puede intentarse cuando el sancionado no dé cumplimiento a las sanciones administrativas impuestas por la Autoridad Nacional Ambiental[338].

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334 Véase Ley Penal del Ambiente, **Anexo BC-[ ]**, artículo 1, cuyo objeto es "tipificar como delito los hechos atentatorios contra los recursos naturales y el ambiente e imponer las sanciones penales" a cuyo efecto el Título III los define.

335 Véase Ley Penal del Ambiente, **Anexo BC-[ ]**, artículo 3.

336 Véase Ley Penal del Ambiente, **Anexo BC-[ ]**, artículo 22.

337 Véase Ley Penal del Ambiente, **Anexo BC-[ ]**, artículo 19.

338 Véase Ley Orgánica del Ambiente, **Anexo BC-[ ]**, artículo 125. A tal efecto, el artículo 125 de la Ley Orgánica del Ambiente dispone que "[e]l incumplimiento de las sanciones impuestas por la Autoridad Nacional Ambiental, dará lugar, una vez agotados los mecanismos de ejecución forzosa administrativa, a la interposición de la acción civil ante los tribunales competentes, por la Procuraduría General de la República Bolivariana de Venezuela"

204. Por tanto, una acción civil por daños y perjuicios ambientales conforme a la ley sólo puede ser intentada por el Procurador General de la República una vez que, primero, se haya determinado en el procedimiento administrativo correspondiente la responsabilidad administrativa, y se hayan impuesto las sanciones administrativas; y segundo, se haya agotado el procedimiento administrativo de ejecución forzosa de las sanciones administrativas, y las mismas no hayan sido satisfechas por el obligado.

205. Por último, en lo que respecta a la responsabilidad civil que pueda derivarse de la responsabilidad penal, es decir, de la comisión de los delitos ambientales, Ley Penal del Ambiente dispone que la responsabilidad civil únicamente puede exigirse -también conforme al mismo principio de subsidiariedad- luego de que haya concluido un proceso penal mediante sentencia firme en la cual se impongan la condena respectiva por los delitos cometidos de los cuales resulten daños o perjuicios contra el ambiente[339]. En este caso, el Ministerio Público es el órgano competente para iniciar las acciones civiles derivadas de la responsabilidad penal, las cuales deben tramitarse por ante la jurisdicción especial penal ambiental[340]. Dichas acciones prescriben a los diez años, desde la oportunidad en la cual los efectos ambientales del delito se manifiesten o desde cuando la autoridad tenga conocimiento de su comisión[341].

206. En todo caso, en cuanto a la determinación de la cuantía del daño en materia ambiental, la Ley Orgánica del Ambiente dispone que ello sólo puede determinarse mediante un análisis de experto, cuyo resultado debe agregarse al expediente administrativo correspondiente durante el procedimiento administrativo. Dicho análisis es el que debe servir de fundamento o causa para la imposición de las sanciones y las medidas ambientales[342].

207. De todo lo anterior resulta, en consecuencia, que en Venezuela el Estado no puede intentar una acción judicial civil ante los tribunales competentes contra persona alguna, incluyendo los concesionarios mineros, por reclamo de indemnización como consecuencia de supuestos daños ambientales si previamente no se ha desarrollado el procedimiento administrativo correspondiente para determinar la responsabilidad administrativa

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339 Véase Ley Penal del Ambiente, **Anexo BC-[ ]**, artículo 9.

340 Véase Ley Penal del Ambiente, **Anexo BC-[ ]**, artículo 23.

341 Véase Ley Penal del Ambiente, **Anexo BC-[ ]**, artículo 19.2.a.

342 Véase Ley Orgánica del Ambiente, **Anexo BC-[ ]**, artículo 129.

del presunto responsable, y en su caso, el proceso penal correspondiente para determinar la responsabilidad penal del acusado. En cualquier caso, los daños ambientales deben haber sido debidamente cuantificados en un procedimiento administrativo con la intervención de un experto. Nada de esto ha ocurrido en el caso de los supuestos dañosos ambientales sobre los cuales la República acusa a MLDN. Al respecto, advierto que ninguna de las Caducidades dispuestas por el Ministerio de Minas contra las 13 Concesiones de MLDN en 2007 se basó en el alegado incumplimiento de la ventaja especial 9 (obligaciones ambientales). Ello confirma que el reclamo intentado por supuestos daños ambientales -vía reconvención- en este arbitraje en mi criterio es totalmente improcedente.

4. Los supuestos incumplimientos en el pago de impuestos de explotación y sobre la renta por parte de MLDN

208. Venezuela igualmente basa su reconvención en el supuesto incumplimiento por parte de MLDN de pago de los impuestos de explotación y sobre la renta durante su gestión como concesionaria[343]. Según Venezuela, la supuesta deuda de MLDN por impuesto sobre la renta asciende a más de Bs.F. 131.584.622,59[344]. El supuesto daño causado por impago del impuesto de explotación se cuantifica en Bs.F. 202.469.454[345].

209. Respecto del impuesto de explotación, entiendo que desde el año 2002, MLDN canceló el mismo conforme a una fórmula establecida por el Ministerio de Minas en el año 1999, la cual luego sería modificada dos veces: primero, en febrero de 2007; y luego, en abril de 2009. Entiendo que con respecto a ambas modificaciones efectuadas a la fórmula se originaron disputas entre las partes las cuales siguen pendientes de resolución[346].

210. Entiendo que con respecto de la fórmula introducida por el Ministerio de Minas en febrero de 2007 (***Fórmula de 2007***), la disputa se originó como resultado de su aplicación por el Ministerio de Minas a perío-

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343 Véase Memorial de Contestación, ¶¶ 581 a 582.

344 Véase Memorial de Contestación, ¶¶ 83 ss. y 581. Véase también Análisis Técnico de la Situación de Morosidad de MLDN del SENIAT, 11 de septiembre de 2015, **Anexo R-47**.

345 Véase Memorial de Contestación, ¶¶ 582 y 81 ss. Véase también Aviso de cobro del Ministerio del Poder Popular de Petróleo y Minería, 3 de mayo de 2013, **Anexo R-39**.

346 Véanse Memorial, ¶¶ 64, 79 y 80; y Memorial de Contestación,¶ 73.

dos de imposición anteriores a la introducción de la misma (2002 a 2006), es decir, en forma retroactiva[347]. MLDN se negó a realizar el pago de ajuste para los años 2002 a 2006 e interpuso los correspondientes recursos administrativos y contenciosos en contra de la aplicación retroactiva de la mencionada Fórmula de 2007[348]. En cuanto a la fórmula introducida en abril de 2009 (***Fórmula de 2009***), entiendo que MLDN consideró que la misma incurría en una serie de violaciones a la regulación aplicable[349] y, en particular, de los principios constitucionales-tributarios de reserva legal tributaria, proporcionalidad, no confiscatoriedad y no discriminación. Entiendo asimismo que MLDN efectuó, bajo protesta, algunos pagos conforme a dicha fórmula, hasta julio de 2010 cuando recurrió contra la aplicación de la Fórmula de 2009 interponiendo los recursos administrativos correspondientes, los cuales siguen pendientes de resolución[350].

211. En las secciones a continuación desarrollo mi análisis legal respecto del contenido y la aplicación que dispuso la República en relación con ambas fórmulas, y analizo también la pretensión de la República de reclamar en este arbitraje montos supuestamente adeudados por MLDN por concepto de impuesto de explotación y de impuesto sobre la renta.

A. La aplicación retroactiva de la Fórmula de 2007 para el cálculo del impuesto de explotación a los períodos 2002-2006

212. Como antes indiqué, entiendo que entre los años 2002 y 2006, MLDN canceló el impuesto de explotación calculado con base en la metodología que el MIBAM había aprobado en agosto de 1999. En el año 2007 el MIBAM introdujo una nueva metodología para calcular el impuesto de explotación a través de la Fórmula de 2007. Posteriormente a su introducción,

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347 Véanse Memorial de Contestación, ¶¶ 75 y 79; Declaración Solano, ¶ 15; Punto de Cuenta Nº 09/301, 25 de abril de 2007 y notificado vía Oficio Nº DGPEM-280, 28 de Mayo de 2007, **Anexo C-[]**; COT, **Anexo C-83**, artículo 8; Ley Orgánica de Procedimientos Administrativos, **Anexo C-[]**, artículo 11; Constitución de 1999, **Anexo C-80**, artículo 24.

348 Véanse Memorial de Contestación, ¶ 77; Declaración Solano, ¶ 14.

349 Ley de Minas de 1999, **Anexo C-19**, en particular, artículos 90.2c; Reglamento de 2001, **Anexo C-82,** artículo 126. Oficio Nº DGPEM-020-09, 26 enero 2009, **Anexo C-[]**.

350 Véase Memorial de Contestación, ¶ 80.

entiendo que el MIBAM pretendió aplicar la Fórmula de 2007 de forma retroactiva a los ejercicios 2002-2006 de MLDN.

213. Venezuela justifica la aplicación retroactiva de la metodología establecida en 2007 a los períodos 2002 a 2006 argumentando que los artículos 55 y 56 del COT, le habrían conferido la potestad a la Administración para hacer "ajustes" respecto de las declaraciones correspondientes a entre cuatro y seis años hacia atrás. Venezuela también indica que en todo caso, es común la realización de esos ajustes en materia tributaria para poder así subsanar errores. Sobre dicha base, Venezuela afirma que el Ministerio de Minas estaba facultado para "corregir los errores en la metodología de cálculo incluyendo a años anteriores" y, en consecuencia, aplicar la nueva Fórmula de 2007 al cálculo del impuesto de explotación correspondiente a los ejercicios años 2002 a 2006[351]. En nuestro criterio, esta actuación de la República, no está ajustada a lo que establece el ordenamiento jurídico venezolano.

214. En efecto, conforme a lo que dispuesto en los mencionados artículos 55 y 56 del COT de 2001 que regulaban la prescripción en materia impositiva, la potestad de la Administración Tributaria para "verificar, fiscalizar y determinar la obligación tributaria con sus accesorios" prescribía a los cuatro años; plazo que se extendía a seis años cuando la Administración no hubiera "podido conocer el hecho imponible, en los casos de verificación, fiscalización y determinación de oficio"[352].

215. Conforme a esta potestad de fiscalización y verificación hacía el pasado de acuerdo con el artículo 241 del COT, la Administración Tributaria tiene la facultad de corregir "errores materiales o de cálculo en que hubiere incurrido en la configuración de sus actos"[353]. Sin embargo, es claro que ello sólo puede realizarse aplicando estrictamente los criterios y la normativa vigente para el momento en que hubiera surgido la obligación tributaria sujeta al proceso de control. Los artículos 55 y 56 del COT en modo alguno permiten la aplicación retroactiva de nuevas regulaciones, criterios o interpretaciones que pudieran haber sido establecidas con posterioridad, para calcular un

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351 Memorial de Contestación, ¶ 76; Declaración de Solano, ¶ 12.

352 Véase COT, **Anexo C-83**, artículos 55.1 y 56.3.

353 Véase COT, **Anexo C-83**, artículo 241. En el mismo sentido de lo establecido en general en el artículo 84 de la Ley Orgánica de Procedimientos Administrativos, que dispone: "Artículo 84. La Administración podrá en cualquier tiempo corregir errores materiales o de cálculo en que hubiere incurrido, en la configuración de los actos administrativos."

tributo causado en años anteriores, y menos aún si son desfavorables para el sujeto obligado.

216. Como lo destacó la Corte Superior de lo Contencioso Administrativo, el artículo 241 del COT confiere una facultad "para corregir errores de la Administración, *producidos por inadvertencias, descuidos u otros actos carentes de intencionalidad*. El objetivo esencial de esta facultad es permitir que se *eliminen los errores de transcripción o de operaciones aritméticas* en una forma muy simple, que no prevé solemnidad ni límite temporal alguno,"[354] razón por la cual, no es posible invocar esta facultad para alterar o modificar el contenido de un acto administrativo.[355]

217. Es decir, la fiscalización y verificación que puede realizar la Administración Tributaria en relación con las obligaciones tributarias dentro de los plazos de prescripción previstos en los artículos 55 y 56 del COT tiene en todo caso que conformarse con los principios y parámetros que eran aplicables en el momento en que las mismas se causaron. Es claro que la Administración no puede con posterioridad a la causación del impuesto, con la excusa de corregir errores materiales o de cálculo, pretender corregir la base imponible, estableciendo un nuevo método o sistema de cálculo del impuesto distinto al que existía y pretender aplicar retroactivamente dichos nuevos criterios, interpretaciones y regulaciones tributarias establecidas con posterioridad al momento en el cual surgieron las obligaciones.

218. Lo anterior tiene su fundamento legal, en el derecho venezolano, en el principio de irretroactividad de la ley que garantiza la Constitución en su artículo 24[356]. Dicho principio tiene por objeto, como lo ha establecido el Tribunal Supremo de Justicia "garantizar que los derechos subjetivos legíti-

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354 Véase Sentencia de la Corte Superior Contencioso Administrativa, *Carlos Andrés Meneses Ruíz, contra el Instituto de Beneficencia y Bienestar Social del Estado Táchira*, (Registro Nº 2006-00785) de 29 de marzo de 2006, **Anexo BC-[]**, página, 8.

355 Por ello, en la misma sentencia se indica, citando la sentencia Nº 00762 del 1° de julio de 2004 de la Sala Político Administrativa del Tribunal Supremo se indica que "a través de la potestad de rectificación, no se revoca ni anula el acto, sino que simplemente se adecua el mismo a la voluntad concreta de la Administración, al corregirse los errores materiales en que hubiere incurrido ésta en su configuración."

356 Constitución de 1999, **Anexo C-80**, artículo 24, "Ninguna disposición legislativa tendrá efecto retroactivo, excepto cuando imponga menor pena. Las leyes de procedimiento se aplicarán desde el momento mismo de entrar en vigencia, aún en los procesos que se hallaren en curso".

mamente adquiridos bajo la vigencia de una norma, no sean afectados por lo dispuesto en una nueva norma"[357].

219. Dicho principio tiene aplicación en el ámbito de la actividad administrativa, respecto de todas las actuaciones de la Administración Pública y en relación con los cambios de criterios que pueda adoptar en relación con fórmulas o cálculos para la aplicación de la ley, encontrando su concreción en el artículo 11 de la Ley Orgánica de Procedimientos Administrativos, que establece:

> Artículo 11.- Los criterios establecidos por los distintos órganos de la Administración Pública podrán ser modificados, pero *la nueva interpretación no podrá aplicarse a situaciones anteriores, salvo que fuere más favorable a los administrados*. En todo caso, la modificación de los criterios no dará derecho a la revisión de los actos definitivamente firmes."[358]

220. Esta disposición proscribe la aplicación de nuevos criterios o interpretaciones que difieren de los ya aplicados anteriormente para resolver situaciones pasadas, salvo que de ello se derive una situación más favorable para los administrados. Como lo ha sostenido la jurisprudencia de la Sala Político Administrativa del Tribunal Supremo de Justicia en sentencia Nº 514 de 29 de marzo de 2001 al interpretar el artículo 11 de la Ley Orgánica de Procedimientos Administrativos:

> "el contenido de la norma transcrita, alude al valor de los criterios establecidos por la Administración, que pueden variar, obviamente, por cuanto los organismos que la integran obedecen a las mutaciones de la sociedad en la cual operan, exigiéndose sólo que tales variaciones no se apliquen a situaciones anteriores, salvo que sean más favorables para los administrados."[359]

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357 Véase Sentencia de la Sala Político Administrativa del Tribunal Supremo de Justicia Nº 01738 *Eduardo Rondón Graterol contra Presidente del Consejo Nacional Electoral*, (Registro Nº 16.736) 27 de julio de 2000 **Anexo BC-[]**.

358 Ley Orgánica de Procedimientos Administrativo, **Anexo C-[]**, artículo 11 (énfasis añadido).

359 Véase Sentencia de la Sala Político Administrativo Nº 514, *The Coca-Cola Company vs. Ministerio de la Producción y el Comercio,* (Registro Nº 10.676), 3 de abril de 2001, **Anexo BC-[]**, página 11.

221. En consecuencia, la posibilidad que tiene la Administración de modificar criterios administrativos, no implica que pueda aplicarlos a situaciones anteriores, pues ello significaría darle efectos retroactivos a los actos administrativos. Este principio legal responde además al principio de la confianza legítima sobre el cual se ha pronunciado también la Sala Político Administrativa del Tribunal Supremo de Justicia en la sentencia citada, sentando el criterio de que las actuaciones reiteradas de la Administración Pública hacen nacer a favor de los administrados expectativas jurídicas, señalando respecto del citado artículo 11 de la Ley Orgánica de Procedimientos Administrativos, que el mismo:

> "El artículo 11, brevemente analizado, es considerado como uno de los ejemplos más significativos en la legislación venezolana, del principio de la confianza legítima, con base en el cual, las actuaciones reiteradas de un sujeto frente a otro, en este caso de la Administración Pública, hacen nacer expectativas jurídicas que han de ser apreciadas por el juez y justamente, los criterios administrativos, si bien pueden ser cambiados, son idóneos para crear tales expectativas"[360]

222. Todo lo anteriormente expuesto resulta por tanto particularmente relevante en materia tributaria, donde adicionalmente, en virtud del principio de certeza que implica que las determinaciones que corresponde realizar a la Administración Tributaria se deben referir a ejercicios económicos precisamente identificados, criterio que ha sido aceptado por la Sala Constitucional de Tribunal Supremo de Justicia[361].

223. No cabe duda, por tanto, que una vez formulados nuevos criterios para el cálculo de tributos, su aplicación sólo puede realizarse hacia futuro, para los ejercicios fiscales subsiguientes a aquél en el cual se defina el nuevo criterio, permitiéndose en esa forma a los contribuyentes conocerlos con anterioridad, teniendo certeza de los parámetros a los cuales deben atenerse. Por tanto, la Administración no puede aplicarlos retroactivamente respecto de ejercicios fiscales anteriores.

224. En el entendido de que MLDN realizaba la liquidación del impuesto de explotación aplicando al criterio establecido por el MIBAM a tales fines en 1999, la modificación de los criterios relativos a la metodología o

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360 *Idem*.

361 Sentencia Nº 1252 de la Sala Constitucional del Tribunal Supremo de Justicia, *José Romero Angrisano,* (Registro Nº 02-0405), 30 de junio de 2004, **Anexo BC-[]**.

fórmula de cálculo de dicho impuesto que al respecto hizo la Administración en 2007, no podía ni constitucional ni legalmente ser aplicada a ejercicios pasados y cumplidos de 2002 a 2006, independientemente de la potestad de revisión que establece la legislación tributaria.

225. Al respecto, advierto que la propia Consultoría Jurídica del MIBAM parece haber llegado a esta misma conclusión. En su Memorándum de 1 de agosto de 2011 la Consultora a cargo indica que la Fórmula de 2007 "no debería aplicarse" a los períodos anteriores a su dictado toda vez que su "aplicación retroactiva sería contraria al Principio Constitucional de la Irretroactividad de la Ley", criterio que según se indica en el Memorándum, habría sido compartido por los asistentes por parte del MIBAM a las mesas de trabajo constituidas para discutir esta cuestión con MLDN[362].

226. Entendemos que MLDN impugnó los reparos formulados con ocasión de la aplicación intempestiva de la Fórmula de 2007[363] a los ejercicios anteriores, y que varios de los recursos interpuestos están aún pendientes de decisión. Entiendo que uno de los recursos interpuestos (contra la aplicación retroactiva de la fórmula de 2007 respecto del período de 2006) fue recientemente decidido por la Sala Político Administrativa del Tribunal Supremo de Justicia mediante sentencia publicada el 30 de julio de 2015, en la cual se lo declaró sin lugar[364].

227. En dicha decisión, la Sala Político Administrativa del Tribunal Supremo sostuvo, en línea con la posición del MIBAM al modificar la metodología de la Fórmula de 2007, que la metodología fijada en 1999 que se había modificado mediante la Fórmula de 2007 había sido supuestamente dictada durante la vigencia de la Ley de Minas de 1945 y que habría quedado sin valor legal con motivo de la entrada en vigencia la Ley de Minas de 1999[365], pretendiendo justificar de este modo la aplicación de la nueva Fórmula de 2007 a períodos anteriores.

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362 Memorando del Ministerio de Minas referente a el pago del impuesto de explotación por parte de MLDN, 1 de agosto de 2012, **Anexo C-[]**.

363 Ver ***supra*** ¶*;* Punto de Cuenta Nº 09/301, 25 de abril de 2007 y notificado vía Oficio Nº DGPEM-280, 28 de Mayo de 2007, **Anexo C-[]**.

364 Sentencia de la Sala Político Administrativa Nº 917, *Minera Loma de Níquel*, C.A., (Registro Nº 2011-0139), del 30 julio de 2015, **Anexo BC-[ ]**.

365 Sentencia de la Sala Político Administrativa Nº 917, *Minera Loma de Níquel*, C.A., (Registro Nº 2011-0139), del 30 julio de 2015, **Anexo BC-[ ],** página 23.

228. Al respecto debe señalarse que en realidad, contrariamente a lo afirmado en la sentencia bajo análisis, la Ley de Minas de 1999 no introdujo cambio sustancial alguno respecto del régimen del impuesto de explotación que estaba establecido en la anterior Ley de Minas de 1945, siendo el régimen en ambas leyes materialmente igual. En efecto, el régimen aplicable a MLDN, antes de la sanción de la Ley de Minas de 1999, conforme al artículo 87.2 de la Ley de Minas de 1945, y al régimen de ventajas especiales establecido en la Resolución Nº 115 del Ministerio de Energía y Minas de 20 de Marzo de 1990,[366] consistía en un impuesto de explotación para los minerales extraídos *sobre su valor en la mina, "teniendo en cuenta la riqueza de aquellos, el precio y las clasificaciones del mercado comprador."* Por su parte, el régimen de impuesto de explotación aplicable a MLDN conforme a lo establecido en los artículos 90.2(c) y 91 de la Ley de Minas de 1999 es sustancialmente similar al previsto en el régimen anterior, calculado *sobre su valor comercial en la mina, "teniendo en cuenta su riqueza y el precio del mineral en el mercado comprador entre otros factores relevantes"*[367]. En consecuencia, es claro que el intento por justificar un cambio de criterio sobre la base de la reforma de la Ley de Minas de 1999 no tiene base jurídica alguna.

229. Es evidente entonces que la aplicación de la nueva metodología en la Fórmula de 2007 respecto de ejercicios pasados implicó la modificación de una situación nacida y acaecida en el pasado, pero en función de criterios interpretativos nuevos, aplicados por el MIBAM respecto a la determinación del impuesto de explotación que correspondía pagar a MLDN por las actividades mineras ejercidas en el pasado. Esta modificación fue hecha en violación del principio de irretroactividad que rige para todas las actuaciones administrativas, en perjuicio de MLDN, al resultar en un impuesto más alto que el originalmente pagado, en violación de garantías constitucionales y legales.

B. Las modificaciones implementadas al cálculo del impuesto de explotación mediante la Fórmula de 2009

230. Por otra parte, en enero de 2009, mediante Oficio suscrito por el Director General de Planificación y Economía Minera del MIBAM y enviado a MLDN[368], dicho órgano revisó y modificó la metodología para la determi-

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366 Normas para el Otorgamiento de Concesiones, **Anexo BC-18.**

367 Ley de Minas de 1999, **Anexo C-19**, artículo 90, Parágrafo Primero (énfasis añadido).

368 Oficio Nº DGPEM-020-09, 26 enero 2009, **Anexo C-[]**.

nación del impuesto de explotación que había sido establecida bajo la Fórmula de 2007 por el Ministro de Industrias Básicas y Minería[369]. Como explico a continuación, dicho acto administrativo que modificó la fórmula del impuesto de explotación en 2009 y estableció la Formula de 2009, adoleció de graves irregularidades de forma y de fondo que resultaron en su nulidad absoluta.

231. En Venezuela, de acuerdo con el principio de legalidad ya discutido con anterioridad en esta Opinión Legal[370], todas las actuaciones de los órganos que ejercen el Poder Público deben estar determinadas por la Constitución o la ley, tal como lo disponen el artículo 137 de la Constitución[371] y artículo 4 de la Ley Orgánica de la Administración Pública[372]. En tal sentido, y por lo que atañe al régimen de las minas y –en particular- al impuesto de explotación respectivo, la competencia para la creación, organización, recaudación, administración y control de impuestos se encuentra atribuida al Poder Nacional[373] y sometido al principio de la reserva legal, debiendo estas materias regularse mediante leyes dictadas por la Asamblea Nacional[374].

232. Al respecto, comentando la normativa homóloga que consagraba la Constitución de 1961[375] la cual, al igual que la contenida en la Constitución de 1999, se refería a minas e hidrocarburos, Federico Araujo Medina y Leonardo Palacios Márquez señalaron que la reserva general al Poder Nacional comprendía "todo lo relacionado con la legislación, reglamentación y ejecución" abarcando "cualquier tipo de regulación y control administrativo,

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369 Punto de Cuenta Nº 09/301, 25 abril de 2007 y notificado vía Oficio Nº. DGPEM-280, del 28 mayo de 2007. Memorial de Contestación, ¶ 78; Declaración de Solano, ¶ 16.

370 Véase ***supra*¶¶ *119, 142, 179, 233***.

371 Constitución de 1999, **Anexo C-80**, artículo 137, "Esta Constitución y las Leyes definen las atribuciones de los órganos que ejercen el Poder Público, a las cuales deben sujetarse las actividades que realicen."

372 Ley Orgánica de la Administración Pública, **Anexo BC-[]**, artículo 4 "La Administración Pública se organiza y actúa de conformidad con el principio de legalidad, por el cual la asignación, distribución y ejercicio de sus competencias se sujeta a lo establecido en la Constitución de la República Bolivariana de Venezuela, las leyes y los actos administrativos de carácter normativo dictados formal y previamente conforme a la ley, en garantía y protección de las libertades públicas que consagra el régimen democrático, participativo y protagónico."

373 Constitución de 1999, **Anexo C-80,** artículos 156.12 y 156.16.

374 Constitución de 1999, **Anexo C-80**, artículo 156.32. Véase ***supra*¶¶ --**

375 Artículo 136. Constitución de 1961

organizativo y de naturaleza tributaria"[376]. Por su parte, la Corte Suprema de Justicia, en sentencia de 20 de julio de 1971 señaló que:

> "El artículo 136 de la Constitución de la República, específicamente determina las materias que son competencia del Poder Federal y dentro de ellas, en sus ordinales 8º y 10º, están incluidos respectivamente, "La organización, recaudación y control de las contribuciones de minas" y "El régimen y administración de las minas"[377].

233. Ahora bien, es claro que la reserva legal a la Asamblea Nacional no comporta una prohibición absoluta de actuación respecto de los demás órganos del Poder Público, pero si es evidente que la limita a lo que la legislación disponga en relación con la materia.[378] En materia tributaria, la Sala Político Administrativa del Tribunal Supremo de Justicia se ha referido al principio de legalidad en los siguientes términos:

> "[e]l principio de legalidad tributaria implica que solo mediante ley puede regularse la creación, modificación o extinción de los tributos, *indicando los elementos constitutivos –cuantitativos y cualitativos- de la relación jurídico tributaria,* estos son: sujeto activo (acreedor), sujeto pasivo (deudor), *base de cálculo o base imponible*, alícuota impositiva y la materia imponible (sobre la cual recae el tributo, verbigracia: la renta, una determinada actividad económica, patrimonio hereditario, etc)"[379].

234. Conforme a lo antes expuesto, en materia de minería, la Ley de Minas de 1999 es precisamente el instrumento normativo a través del cual se ha materializado el ejercicio de la competencia reservada, estableciéndose en

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376 Véase Allan R. Brewer-Carías *El Régimen Nacional de los Hidrocarburos aplicable al proceso de la Apertura Petrolera*, Caracas 1995, **Anexo BC-[]**, páginas 72 a 73.

377 Véase la cita de la sentencia en Allan R. Brewer Carías, Allan Randolph, *El Régimen Nacional de los Hidrocarburos aplicable al proceso de la Apertura Petrolera*, Caracas 1995, **Anexo BC-[]**.

378 Véase Sentencia Nº 48 de la Sala Político-Administrativa del Tribunal Supremo de Justicia, *Luis Beltran Aguilera*, (Registro Nº 2005-4715), de 17 de enero de 2007, **Anexo BC-[]**.

379 Sentencia Nº 221 de la Sala Constitucional del Tribunal Supremo de Justicia, *KAPPA UNISEX, C.A.* (Registro Nº 13-1057) de 9 de abril de 2014, **Anexo BC-[]** (énfasis añadido).

los artículos 90 y 91 de la misma el régimen impositivo al cual se encuentran sujetas las actividades de explotación minera por concesionarios. Asimismo, los postulados generales de esa ley han sido desarrollados por el Ejecutivo Nacional a través de la adopción del Reglamento General de la misma[380].

235. En particular, en materia de liquidación de los tributos generados por las actividades mineras, y específicamente respecto del impuesto de explotación, la Ley de Minas de 1999 atribuye esa competencia al Ejecutivo Nacional y la misma ley establece que el Ministerio de Energía y Minas (hoy MIBAM) es el órgano del Ejecutivo Nacional competente a todos los efectos de esa ley, inclusive respecto de la aplicación del impuesto de explotación[381].

236. Para ello, el MIBAM debe sujetarse a lo establecido tanto en la propia Ley de Minas de 1999 y su Reglamento como a las disposiciones aplicables del COT y de la Leyes Orgánicas de Administración Pública y de Procedimientos Administrativos. De ello se deriva que corresponde al titular del MIBAM, en ausencia de alguna asignación específica de competencia a otro órgano o funcionario del MIBAM, el establecimiento de la metodología de cálculo del impuesto de explotación[382]. Así lo hizo el Ministro en 2007, mediante el antes mencionado Punto de Cuenta fijando la Fórmula de 2007.

237. Ahora bien, respecto del Oficio que estableció la Fórmula de 2009, advierto primeramente que el mismo violó una serie de importantes principios administrativos relacionados con las formas que deben respetar los actos administrativos y la competencia de los funcionarios o entes que deben dictarlos. Por una parte noto que dicho Oficio fue suscrito por el Director General de Planificación y Economía Minera del MIBAM. Sin embargo, dado que la Fórmula de 2007 estableciendo la metodología de cálculo del impuesto de explotación había sido establecida por el Ministro a cargo del MIBAM en 2007, su modificación a través de la Fórmula de 2009 por parte de un funcionario de inferior jerarquía implicó una violación al principio de legalidad y de la competencia. La decisión del Director General también está viciada de ilegalidad por carecer de base legal, ya que ninguna de las normas que invocó para dictarla (artículos. 15, 20 y 21 del Reglamento Orgánico del

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380 Reglamento de 2001, **Anexo C-82**.

381 Véase Ley de Minas de 1999, **Anexo C-19**, artículos 6 y 90.

382 Ley Orgánica de la Administración Pública **Anexo BC-[]** Artículo 27."[…] En caso de que una disposición legal o administrativa otorgue una competencia a un órgano o ente de la Administración Pública, sin determinar la unidad administrativa competente, se entenderá que su ejercicio corresponde a la unidad administrativa con competencia por razón de la materia y el territorio."

Ministerio)[383] le atribuyen tal competencia. Adicionalmente, la aprobación de la Fórmula de 2009 por un Director del MIBAM configuró una transgresión al principio de jerarquía de los actos administrativos, conforme al cual ningún acto administrativo puede violar lo establecido en otro de jerarquía superior - en este caso, la Fórmula de 2007 que, como se indicó, fue aprobada por el propio Ministro.[384] Igualmente, la aprobación de la Fórmula de 2009 sin seguir los formalismos aplicados en la aprobación de la Fórmula de 2007, violó el principio del procedimiento administrativo conocido como del "paralelismo de las formas", conforme al cual, las modalidades mediante las cuales los órganos de la Administración Pública pretendan modificar o extinguir una situación jurídica antes establecida, deben ser idénticas a las que se emplearon para crearla, salvo, naturalmente, una expresa disposición en contrario[385].

238. En tal sentido, debe notarse que la Consultoría Jurídica del MIBAM también criticó los defectos de legalidad de la Fórmula de 2009. En el mismo Memorándum de 1 de agosto de 2011, la Consultora a cargo indica que la Fórmula de 2009, la cual "modifica substancialmente" la Fórmula de 2007, podría estar viciado de "NULIDAD ABSOLUTA" (sic) por no haber sido dictado por la autoridad competente. También en este caso la Consultora nota que dicho criterio fue "acogido por unanimidad" por las distintas Direcciones del MIBAM que discutieron esta cuestión[386].

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383 Decreto Nº 3.547 de 28 de marzo de 2005, en *Gaceta Oficial* Nº 38.155, de 30 de marzo de 2005, **Anexo BC-[ ].**

384 Ley Orgánica de Procedimientos Administrativos, Anexo C-[], artículo 13. Dicho principio está también establecido en la Ley Orgánica de la Administración Pública en lo que se refiere a las relaciones intraorgánicas. Ley Orgánica de la Administración Pública, **Anexo BC-[]**, artículo 28. Véase asimismo Allan Brewer Carías, *Principios de Procedimiento Administrativo en América Latina*, Universidad del Rosario, Colombia 2003, **Anexo BC-[]**, página 24.

385 Sobre dicho principio se ha pronunciado la Sala Político Administrativa de la Corte Suprema de Justicia, señalando: "en el campo del Derecho Administrativo rige el principio del paralelismo de las formas cuando no existe una disposición expresa que establezca lo contrario. En virtud de tal principio, será el mismo órgano y con las mismas modalidades que sirven para el establecimiento de los derechos, el competente para proceder a su extinción." Véase Sentencia Nº 157 de 20 de marzo de 1995 en *Revista de Derecho Público* Nº 61–62, Editorial Jurídica Venezolana, Caracas 1995, **Anexo BC-[]** página 177.

386 Memorando del Ministerio de Minas referente a el pago del impuesto de explotación por parte de MLDN, 1 de agosto de 2012, **Anexo C-[]**, página [ ].

239. En todo caso, además de las mencionadas cuestiones de forma y competencia, el Oficio que dispuso el cambio de metodología para el cálculo del impuesto de explotación en 2009 también violó el principio de legalidad tributaria. Dicho principio exige que el régimen legal tributario en general, y en particular en materia de minas se sujete a la garantía de la reserva legal en los términos a que se contraen los artículos 156.12, 156.32 y 187.1 de la Constitución de 1999. Por tanto, específicamente respecto del impuesto de explotación, el MIBAM no puede actuar sino con sujeción a lo dispuesto por la Ley de Minas de 1999 y su Reglamento, cuyas disposiciones no puede contrariar, modificar ni distorsionar.

240. En efecto, el artículo 90.2(c) de la Ley de Minas de 1999 (y en su caso, el artículo 91 de la misma ley), que establece el impuesto de explotación minera prevé que el mismo debe calcularse exclusivamente sobre el *valor comercial en la mina*, es decir, del yacimiento. A tal efecto, dispone la norma que en ese valor han de incluirse "los costos en que se incurra hasta el momento en que el *mineral extraído*, triturado o no, sea depositado en el vehículo que ha de transportarlo fuera de los límites del área otorgada o a una planta de beneficio", aspecto que es reiterado y especificado por el Reglamento que prevé la deducción de los costos y gastos necesarios para la venta del mineral[387]. Igualmente, el valor comercial del mineral en la mina ha de tener en cuenta la riqueza del mineral así como su precio en el mercado comprador, a cuyo efecto el Reglamento señala que se tomará como referencia el valor que resulte mayor entre el precio del mineral en el mercado comprador y el precio de las ventas realizadas por el contribuyente[388].

241. De acuerdo a la ley, por tanto, como el impuesto grava la *explotación* del mineral que ha sido otorgada en concesión, en el sentido de *extracción del mineral* de que se trate, la base imponible ha de tomar en cuenta el volumen de material extraído listo para su comercialización inicial, independientemente de que en efecto esa comercialización se produzca o el mineral pase a una planta industrial para su procesamiento por el mismo concesionario. La actividad objeto de la concesión se materializa en el momento en el cual el material es extraído, y por ello la base para calcular el impuesto es determinada por la Ley de Minas de 1999 para ese momento y en las condiciones para que ello suceda. A mayor abundamiento, y en el entendido de que

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387 Ley de Minas de 1999, **Anexo C-19**, artículo 90.2.c; Reglamento de 2001, **Anexo C-82** artículo 126.3 (énfasis añadido).

388 Ley de Minas de 1999, **Anexo C-19**, artículo 90.2.c y 91; Reglamento de 2001, **Anexo C-82** artículo 126.3.

la preparación del mineral a estos efectos puede comprender no solamente la extracción *per se*, sino también otros costos (por ejemplo, su trituración siempre que ésta tenga lugar antes de que el material sea transportado fuera del área de la concesión o a una planta de procesamiento), el artículo 90.2(c) de la Ley de Minas de 1999 permite que los mismos se deduzcan del valor del mineral[389].

242. La aplicación racional y razonable de estos parámetros, por tanto, se erigen en limitaciones legal y reglamentariamente establecidas, que determinan el margen de actuación del MIBAM en relación con la liquidación y recaudación del impuesto de explotación, a los cuales debe ceñirse. De lo contrario, estará actuando fuera de los límites de sus competencias, invadiendo ámbitos reservados de manera exclusiva a la Ley de Minas de 1999.

243. En tal sentido, y tal como lo explicó la Sra. Rebecca Charlton, Directora Financiera (CFO) de la División Níquel, Niobio y Fosfato de Anglo American plc, en su declaración testimonial de Réplica, entiendo que el Oficio del Director General de Planificación y Economía Minera del MIBAM que estableció la Fórmula de 2009, habría alterado los elementos para la fijación de la base imponible más allá de lo establecido por la Ley de Minas de 1999 y el Reglamento, que se refieren al el establecimiento del valor comercial del mineral en la mina con base a descontar del precio del mineral en el mercado comprador (ingresos) los costos deducibles (costos).

244. En tal sentido, advierto que la Fórmula de 2009 aplicó unidades distintas para determinar los ingresos y los costos a los efectos de establecer el valor comercial en la mina. Como lo explica la Sra. Charlton, el efecto para MLDN de la Fórmula de 2009 fue que los costos de la planta de procesamiento (que históricamente, según explica, son los costos mayores que afronta una operación como la de MLDN) pasaron a calcularse por tonelada húmeda extraída en lugar de por tonelada de níquel producido (como era el caso bajo la Fórmula de 2007). Como lo expresó la Sra. Charlton, el tratamiento inconsistente de los ingresos de MLDN (dividiéndoles por toneladas de níquel producido) y sus costos (divididos por el mineral extraído), tuvo un impacto severo para la compañía, dado que el volumen del níquel producido es mucho menor que el del mineral extraído de la mina, de manera que la disparidad entre las unidades empleadas para los ingresos y los gastos, resultó

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389 Ley de Minas de 1999, **Anexo C-19.**

en un valor unitario de ingresos mucho mayor al de los costos que deben ser deducidos, y por ende un incremento significativo en el monto de la base imponible al impuesto de expropiación.

245. En dichas circunstancias, la Fórmula de 2009 puede considerarse que no solo viola los términos y el espíritu de la Ley de Minas y su Reglamento para el cálculo del valor comercial de la mina, sino que contraría los principios de no confiscatoriedad y capacidad contributiva de MLDN. Al respecto en Venezuela rige el principio general establecido en la Constitución de que los impuestos deben procurar "la justa distribución de las cargas públicas según la capacidad económica" del contribuyente (artículo 316) y de que "ningún tributo puede tener efectos confiscatorios" (artículo 317). Conforme a ello, la Sala Constitucional del Tribunal Supremo de Justicia en sentencia N° 307 de fecha 6 de marzo de 2001 precisó, que no pueden establecerse tributos "que puedan amenazar con absorber una parte sustancial del derecho de propiedad del contribuytente"[…] [390] "*o de la renta," es decir, cuando priva al sujeto pasivo de la relación tributaria de la posibilidad de usar, gozar, disfrutar y disponer de cualquiera de sus bienes, en desconocimiento de su real capacidad contributiva*…" [391] En el presente caso, con el cambio de la Fórmula de 2009, aún sin que el impuesto de explotación pueda considerarse confiscatorio en su regulación en la Ley de Minas, ha sido mediante un acto administrativo emanado incluso de un funcionario incompetente del MIBAN, que al cambiar ilegalmente en 2009 la fórmula de cálculo del mismo, le ha dado carácter confiscatorio, tal como resulta de lo explicado por la Sra. Rebecca Charlton, en su declaración testimonial ante el Tribunal.

246. Finalmente, debo notar que la Fórmula de 2009 viola también el principio de la confianza legítima. al cual se ha aludido anteriormente[392], conforme al cual la Administración está en el deber de reconocer el carácter legítimo que tienen las expectativas jurídicas fundadas en sus actuaciones

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390 Véase Sentencia Nº 307 de la Sala Constitucional del Tribunal Supremo de Justicia, *Cervecería Polar del Centro y otros contra Ordenanza sobre Patente de Industria y Comercio del Municipio San Joaquín del Estado Carabobo*, (Registro Nº 00-0833), 6 de marzo de 2001, **Anexo BC- []**.

391 Véase Sentencia Nº 307 de la Sala Constitucional del Tribunal Supremo de Justicia, *Caribe Motors C.A. y otros contra Ordenanza sobre Patente de Industria y Comercio y/o servicios de índole similar del Municipio Puerto Cabello del Estado Carabobo*, (Registro Nº 02-0493), 19 de febrero de 2004, **Anexo BC- []**.

392 Véase ***supra ¶ 181.***

reiteradas, imponiéndole también el deber de respetarlas, absteniéndose de modificarlas de manera irracional, brusca e intempestiva, sin la debida preparación en relación con los efectos que se generarán" [393]. Es decir, como lo ha decidido la Sala Político Administrativa del Tribunal Supremo de Justicia en sentencia N° 1094 del 20 de junio de 2007, la confianza legítima implica "la firme convicción de que los criterios de la Administración no serán modificados infundadamente y que si llegaren a ser cambiados, los nuevos no podrán ser utilizados para sancionar conductas asumidas bajo los criterios anteriores" [394]. En el presente caso, estando los lineamientos para determinar la base imponible para el impuesto de explotación en la normativa de la Ley de Minas de 1999 y su Reglamento, que estaban plenamente vigentes al momento del dictado de la Fórmula de 2009, y conforme a la cual se realizaron las reiteradas liquidaciones de los impuestos respectivos, desde el año 1999 hasta el año 2007 y 2009, existía de parte de MLDN como contribuyente una expectativa razonable de que dichos lineamientos no serían modificados, con la confianza de que no habría cambios que generaran incertidumbre en su esfera jurídica, y menos cuando con las modificaciones introducidas en la metodología se causaba un severo agravio patrimonial al contribuyente.

247. Noto asimismo que la Consultoría Jurídica del MIBAM parece haber arribado a la misma conclusión respecto a la ilegalidad de fondo de la Fórmula de 2009 conclusión cuando señala que la metodología en la Fórmula de 2007 es la "legal y vigente" y que no corresponde "establecer[…] discrecionalmente, otros criterios adicionales" a los detallados en dicha Fórmula de 2007[395].

248. En conclusión, los factores desarrollados anteriormente demuestran que la Fórmula de 2009 fue dictada con evidentes vicios de forma y

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393 En tal sentido, Hildegard Rondón de Sansó ha sostenido que "los cambios de criterio no pueden producirse en forma irracional, brusca, intempestiva, sin preparar debidamente a los destinatarios sobre la posibilidad de los efectos que sobre los mismos recaerán […] por cuanto este sería violatorio de las expectativas de los ciudadanos de que se continúe aplicando el régimen existente." Véase Hildegard Rondón de Sansó, *El Principio de Confianza Legítima o Expectativa Plausible en el Derecho Venezolano,* Caracas, 2002, **Anexo BC-[],** página 25**.**

394 Sentencia Nº 01094 de la Sala Político Administrativa del Tribunal Supremo, *Agencias Generales CONAVEN S.A. contra. SENIAT,* (Registro Nº 2006-1248), 2 de junio de 2007, **Anexo BC-[].**

395 Memorando del Ministerio de Minas referente a el pago del impuesto de explotación por parte de MLDN, 1 de agosto de 2012, **Anexo C-[]**, página [ ].

competencia, y en violación del principio de legalidad tributaria. Asimismo, la Fórmula efectuó modificaciones a los parámetros establecidos por la Ley de Minas de 1999 y desarrollados por el Reglamento para la base imponible del impuesto de explotación, que escaparon del ámbito de actuaciones permitidas por el ordenamiento jurídico al MIBAN. Por ende, ello acarrea la nulidad absoluta de dicha Fórmula y la misma no debió ser aplicada por el MIBAM al calcular el impuesto de explotación de MLDN, debiéndose en cambio mantener el cálculo sobre la base de la Fórmula de 2007 que se encontraba en vigor al momento de su dictado.

C. Los reclamos sobre impuestos que efectúa la República aún no se encuentran firmes

249. Los reclamos de Venezuela relacionados con la supuesta falta de pago del impuesto de explotación por parte de MLDN, se refieren todos a decisiones administrativas adoptadas por el Ministerio de Energía y Minas, contra las cuales MLDN ejerció los recursos administrativos y contenciosos previstos en la ley. De ello se deriva que si bien en Venezuela el ejercicio los recursos no tiene efectos suspensivos[396], como antes se indicó, mientras dichos recursos no hayan sido decididos[397], los actos administrativos impugnados no se pueden considerar como actos definitivamente firmes.

250. En consecuencia, sólo cuando se decidan finalmente los recursos intentados contra los actos administrativos de fijación de las fórmulas para el cálculo de los impuestos, si la decisión final fuese declarando sin lugar el recurso y ratificando en consecuencia la decisión que había sido impugnada (y, en tal caso, asumiendo que MLDN no decidiere recurrir la decisión administrativa en el ámbito contencioso-administrativo), es que la decisión tendrá firmeza. En consecuencia, mientras ello no suceda, es totalmente improcedente pretender formular una demanda por cobro de impuestos vía reconvención en este caso, ante este Tribunal Arbitral.

251. En lo que refiere a la supuesta deuda de MLDN por concepto de impuesto sobre la renta, en primer lugar, advierto que la República indica en su Memorial que la misma sería causal de caducidad[398]. Ello es incorrecto, pues el impuesto sobre la renta es un impuesto nacional, que no guar-

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396 COT, **Anexo C-83**, artículo 257.

397 Véase ***infra*** **¶¶ --**

398 Memorial de Contestación, ¶ 70.

da relación con la aplicación de la legislación minera[399]. Pero a todo evento, se debe aplicar en este caso la misma situación antes la descrita respecto del reclamo de Venezuela por la supuesta deuda por impuesto de explotación. Al haber sido todas las decisiones administrativas de liquidación de impuestos sobre la renta adoptadas por el SENIAT impugnadas oportunamente por MLDN, tanto en vía administrativa como en vía contencioso administrativo tributaria, los recursos se encuentran a la fecha de hoy pendientes de decisión, no habiendo adquirido firmeza ninguno de los referidos actos administrativos impugnados. Por tanto, las supuestas deudas tributarias en concepto de impuesto sobre la renta no se pueden considerar como provenientes de actos administrativos firmes, susceptibles de demanda[400].

Como indiqué al inicio, afirmo que lo que he expresado en esta Opinión Legal es, según mi leal saber y entender, cierto y correcto.

Nueva York, 13 de mayo de 2016

Allan R. Brewer-Carías

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399 Véase Ley de Minas de 1999, **Anexo C-19**, artículo 98.5 ("La falta de pago durante un (1) año de cualesquiera de los impuestos o multas exigibles *conforme a esta Ley*") (énfasis añadido).

400 Conforme al Artículo 290 del Código Orgánico Tributario, en "cobro ejecutivo" de deudas tributarias, solo procede respecto de "las cantidades líquidas y exigibles," que son, aquellas sobre las cuales se ha determinado la certeza respecto de su existencia y su cuantía, y en relación a las cuales por haberse agotado los recursos establecidos para cuestionar la procedencia de la pretensión fiscal, al haber adquirido firmeza el acto de determinación del tributo, el derecho a su cobro ha quedado afirmado.

13.

Caso CIADI No. ARB (AF)/14/11: *ANGLO AMERICAN PLC* (Demandante) -contra- *REPÚBLICA BOLIVARIANA DE VENEZUELA* (Demandada)

ARBITRAJE BAJO LAS REGLAS DEL MECANISMO COMPLEMENTARIO DEL CENTRO INTERNACIONAL DE ARREGLO DE DIFERENCIAS RELATIVAS A INVERSIONES

SEGUNDA OPINIÓN LEGAL COMPLEMENTARIA DE ALLAN R. BREWER-CARÍAS

20 SEPTIEMBRE 2016

Quien suscribe, Allan R. Brewer-Carías, declaro, según mi leal saber y entender, que lo que escribo de seguidas es cierto y correcto:

1. El día 24 de abril de 2015 emití una Opinión Legal (mi ***Primera Opinión Legal***) y el día 13 de mayo de 2016 emití una Opinión Legal Complementaria (mi ***Opinión Legal Complementaria***) como experto independiente sobre cuestiones de derecho venezolano en el caso iniciado por Anglo American plc (***Anglo American*** o el ***Demandante***) contra la República Bolivariana de Venezuela (la ***República*** o ***Venezuela***) como resultado de ciertas medidas adoptadas en contra de su inversión en Minera Loma de Níquel, C.A. (***MLDN***), cuyo contenido ratifico aquí en su totalidad.

2. En la presente opinión complementaria (mi ***Segunda Opinión Legal Complementaria***) me refiero a ciertas cuestiones legales referidas por la República en su Dúplica sobre los Méritos (la ***Dúplica***), de fecha de 29 de agosto 2016 y por su experto legal el Dr. Alejandro Canónico en su Segunda Opinión Legal de fecha de 26 de agosto de 2016 (la ***Segunda Opinión Legal***

Canónico), que se relacionan exclusivamente con aspectos planteados en la reconvención formulada por la República contra Anglo American por supuestos incumplimientos en el pago de impuestos de explotación por parta de MLDN. Los temas que discuto en esta Opinión incluyen:

3. ***Primero****,* conforme al derecho venezolano, no es posible, en principio, que un tribunal pueda conocer y decidir sobre los reclamos por responsabilidad formulados contra una empresa que sea accionista controlante de otra empresa subsidiaria controlada, por los actos realizados por esta última. La ley venezolana sólo prevé la "despersonalización de la sociedad mercantil" a través del denominado "levantamiento del velo de la personalidad jurídica" en aquellos casos en que ello sea necesario para garantizar el cumplimiento de determinadas obligaciones ante actuaciones ilícitas o cuando la utilización abusiva de la personalidad societaria constituya un acto de simulación.

4. ***Segundo***, el cobro ejecutivo de impuestos por parte de la Administración Tributaria, solo es posible en relación con "cantidades líquidas y exigibles", es decir, aquellas cantidades en relación con las cuales ya se ha determinado mediante un acto administrativo firme la certeza respecto de su existencia y su cuantía. No es posible pretender dicho cobro ejecutivo, tal como sostiene la República, respecto de cantidades determinadas en actos administrativos que no han adquirido firmeza, por estar pendientes de decisión los recursos ejercidos contra los mismos.

5. ***Tercero***, la decisión judicial de la Sala Político Administrativa del Tribunal Supremo No. 917 con fecha 29 de julio de 2015 que declaró sin lugar el recurso interpuesto por MLDN contra la decisión del MIBAM de 18 de abril de 2008 ratificando el Acta de Reparo No. MIBAM-DGFCM-CCF-005-07 de 21 de febrero de 2007, sobre ajustes fiscales relacionados con el impuesto de explotación de 2006, sólo tiene fuerza de cosa juzgada en relación al caso específico; por tanto, sus efectos no se extienden ni aplican automáticamente a los otros recursos pendientes de MLDN contra otros reparos fiscales en relación con la aplicación retroactiva de la Fórmula de 2007 por el MIBAM, tal como pretende la República.

6. ***Cuarto***, contrario a lo indicado por la República y el Dr. Canónico, el silencio administrativo en Venezuela ha sido establecido únicamente como garantía de los administrados a quienes la Ley Orgánica de Procedimientos Administrativos y el Código Orgánico Tributario les confiere la posibilidad de defenderse, mediante el ejercicio de los recursos correspondientes, una vez vencido el plazo establecido para que la Administración emita su

decisión. De ninguna manera puede entenderse que la posibilidad que tiene el administrado de ejercer un recurso para reclamar contra la inacción de la Administración, invocando el silencio administrativo, excusa a la Administración de su obligación de decidir los recursos que se interpongan contra sus actos.

7. ***Quinto***, el Oficio que estableció la Fórmula de 2009 violó una serie de importantes principios de derecho administrativo relativos a la formación de los actos administrativos y al procedimiento administrativo; entre ellos, el principio de la competencia que deben tener legalmente asignada los funcionarios o entes que deben dictarlos. En particular, contrario a lo sostenido por la República, la Dirección de Planificación y Economía Minera del MIBAM carecía de facultades para fijar la metodología para el cálculo del impuesto de explotación en la Fórmula de 2009; además, la Fórmula de 2007 había sido establecida por el Ministro titular del MIBAM, y su modificación bajo la Fórmula de 2009 (sin perjuicio de la ilegalidad intrínseca de dicha Fórmula) debió hacerse por el propio Ministro, y no por un funcionario de jerarquía inferior.

I. SOBRE LA AUSENCIA DE LEGITIMACIÓN PASIVA DE ANGLO AMERICAN PARA SER DEMANDADA POR RECONVENCIÓN POR LA REPÚBLICA

8. En su Segunda Opinión, el Dr. Canónico alegó que resultaría "viable" bajo supuestas "normas de derecho civil venezolano, vinculadas con la responsabilidad", imputarle responsabilidades contractuales o extracontractuales a Anglo American por las acciones u omisiones de su subsidiaria MLDN[1]. De esa manera, el Dr. Canónico pretende argumentar la existencia de una supuesta legitimación pasiva de Anglo American para ser demandada en reconvención por Venezuela. Este análisis es errado.

9. En mi Primera Opinión Legal Complementaria, dejando a salvo expresamente que no daba opinión sobre el tema de la competencia de la jurisdicción arbitral en el tema de la reconvención planteada por la República en este caso, indique mi criterio de que conforme al derecho venezolano, no es posible en principio que un tribunal pueda conocer y decidir sobre los reclamos por responsabilidad formulados contra una empresa que sea accionis-

[1] [Fuente]parágrafos 163, 164

ta controlante de otra empresa subsidiaria controlada, por los actos realizados por esta última.[2]

10. En ese contexto, sin embargo, también indiqué que en forma excepcional, se había venido construyendo una reciente doctrina legal y jurisprudencial tendiente a permitir la "despersonalización de la sociedad" a través del denominado "levantamiento del velo de la personalidad jurídica," permitiéndose en algunos casos expresos que se pueda demandar a la empresa controlante por responsabilidad o cumplimiento de obligaciones de una empresa subsidiaria controlada, con el objeto de "garantizar el cumplimiento de determinadas obligaciones ante actuaciones ilícitas y que mediante la utilización abusiva de la personalidad societaria constituyan actos de simulación."[3]

11. Conforme a la doctrina jurisprudencial sentada por la Sala Constitucional del Tribunal Supremo de Justicia en la sentencia Nº 903 de 14 de mayo de 2004 (Caso *Transporte SAET C.A*.) que mencioné en mi Primera Opinión Legal Complementaria,[4] quedó entonces precisado en el ordenamiento venezolano que para que un juez pueda proceder a realizar un proceso de despersonalización societaria o de levantamiento del velo de la personalidad jurídica, y admitir una demanda judicial formulada contra una empresa controlante por actos realizados por una empresa controlada, tiene que existir una disposición legal expresa que lo autorice, o tiene que estar comprobada judicialmente que se ha utilizado la personalidad jurídica como un hecho abusivo, constitutivo de un acto de simulación y, por tanto, de carácter ilícito.[5]

12. En su Segunda Opinión el Dr. Canónico presenta una teoría según la cual existiría conforme al derecho civil venezolano la posibilidad de exigir responsabilidad contra una empresa matriz por actos cometidos por su subsidiaria, en razón de la existencia de un supuesto "interés" de la matriz en la disputa o demanda subyacente. Según el Dr. Canónico, a la luz del interés económico común que puede haber en las "unidades económicas de gestión empresarial conformadas por un conjunto de empresas"[6] sería posible sim-

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2 (parágrafo 186)

3 (parágrafo 187).

4 (parágrafo 187)

5 (parágrafos 188-190)

6 (Canónico, parágrafo 161)

plemente determinar cuál de las empresas sería "la verdadera parte interesada",[7] y por tanto, sin más, permitir accionar contra dicha compañía matriz. Sin embargo, el Dr. Canónico no explica con ninguna claridad qué teoría jurídica o normas concretas permitirían tal conclusión.

13. En cualquier caso, la posición avanzada por el Dr. Canónico carece de cualquier base. El "interés" común de las empresas no es lo que permite el levantamiento del velo, sino la existencia de una previsión legal expresa para garantizar el funcionamiento de grupos empresariales, como existen por ejemplo en materia de empresas de seguro, empresas bancarias o en materia de obligaciones laborales. Alternativamente, el velo puede ser levantado en caso que se determine judicialmente que la personalidad jurídica dentro de dichos grupos se ha utilizado en forma ilícita, para evadir obligaciones, como mecanismo de simulación, o para otros fines ilícitos, o en general, como lo reconoce expresamente el propio Dr. Canónico, "ante actuaciones abusivas y/o ilícitas de uno de los miembros de ese grupo otorgándoles potestades a los jueces para resolver conflictos donde se condene a sujetos distintos de los originalmente obligados. [8] .

14. Esas son las opciones en el derecho venezolano, precisamente como expresa el Dr. Canónico "vinculadas con la responsabilidad", para levantar el velo societario. Pero de ninguna manera se permite, como pretende el Dr. Canónico, bajo un supuesto "amplio abanico de opciones", poder proceder a demandar en el derecho venezolano a una persona jurídica que no es responsable de los actos por los cuales se la demanda, siendo en cambio otra persona la autora de los mismos.[9] Y ningún sentido tiene, por supuesto, tratar de justificar la posibilidad contraria, como lo hace el Dr. Canónico, en previsiones del Código Civil que se refieren a otros supuestos y tienen otros propósitos, como es el caso del enriquecimiento sin causa (art. 1184 Código Civil), la gestión de negocios (art. 1184 Código Civil);[10] y la relativa a la responsabilidad del guardián por los actos de sus sirvientes o dependientes (art. 1193 Código Civil);[11] y mucho menos, en supuestas teorías respecto de "grupos societarios" sobre supuestas "autorizaciones globales expresas o tácitas para que determinadas sociedades del grupo actúen como centralizadoras

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7 (Canónico, 160, 161)

8 (Canónico, 162)

9 (Canónico 163)

10 (Canónico 164)

11 (Canónico 166)

de un contrato del cual derivan beneficios u obligaciones para otros integrantes del mismo grupo y por supuesto de la casa matriz."[12]

15. En definitiva, la posibilidad de despersonalización societaria o levantamiento del velo, por las importantes implicancias que de ella se derivan, es una cuestión que la ley y la jurisprudencia han tradicionalmente tratado con extrema cautela. Su ámbito de aplicación está claramente definido, a casos en los cuales, a los efectos de garantizar el funcionamiento de determinados grupos, la ley expresamente permita hacer responsable a una empresa por los actos de otra; o cuando se compruebe que la personalidad jurídica creada para alguna empresa del grupo es para cometer una simulación o un acto ilícito. Nada de ello ocurre en el caso de Anglo American y sus supuestas obligaciones tributarias, las cuales, por lo demás, se rigen por lo establecido en el Código Orgánico Tributario y las demás leyes fiscales que les son aplicables conforme a principios de derecho público, a las cuales no se pueden aplicar las prescripciones del derecho privado como las que rigen las obligaciones entre partes privadas

16. Por todo lo anteriormente expuesto, al contrario de lo que afirma el Dr. Canónico, no resulta viable desde la perspectiva del derecho venezolano, imputarle responsabilidad alguna a Anglo American por supuestas obligaciones tributarias de MLDN. Y menos aún, cuando las mismas no se refieren a cantidades líquidas y exigibles, tal como explico en la sección a continuación.

II. SOBRE LA NO EXIGIBILIDAD DE TRIBUTOS QUE SE ENCUENTRAN EN PROCESO DE IMPUGNACIÓN ADMINISTRATIVA O JUDICIAL

17. En su Dúplica, la República sostiene que MLDN está obligada a pagar los impuestos de explotación liquidados, aun cuando los actos respectivos que los hayan determinado hayan sido oportunamente impugnados y los recursos estén pendientes de decisión. Supuestamente, argumenta la República que ello sería posible pues "la demandante no ha demostrado que su obligación de pagar los impuestos está suspendida por ningún período", considerando erradamente que "en tal caso, la obligación tributaria 'es líquida y exigible'"[13]. En igual sentido, el Dr. Canónico argumenta en su Segunda Opi-

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12 (Canónico 165)

13 (Canónico 543)

nión Legal que "los actos administrativos son títulos ejecutivos susceptible de cobro, y por tanto líquidos y exigibles […] y que en ningún momento se exige que el acto administrativo en cuestión esté firme" [14],, no estando suspendidos en el caso los efectos de los actos impugnados[15].

18. Esa posición, en mi criterio, es errada conforme al derecho venezolano, según el cual, y como lo expresé en mi Primera Opinión Complementaria, la Administración Tributaria conforme al artículo 290 del Código Orgánico Tributario, sólo puede proceder al cobro ejecutivo de tributos cuando se trate de "cantidades líquidas y exigibles," que es cuando se puede considerar que las mismas son efectivamente "debidas" o "adeudadas" por el contribuyente"[16]; a éstos se los puede considerar legalmente como "deudores"[17] y se puede proceder a demandar su pago.

19. Esta condición esencial de que las cantidades sean "exigibles" sólo se cumple, contrariamente a lo expresado por la República y el Dr. Canónico, cuando dichas cantidades "debidas" hayan adquirido certeza, es decir, que hayan adquirido certidumbre y no pueden ser cuestionadas. Ello, en el ámbito del derecho administrativo y tributario, solo tiene lugar cuando los correspondientes actos administrativos que las determinen quedan firmes, ya sea por vencimiento de los lapsos legales previstos para su impugnación (es decir, se vuelven inimpugnables), o cuando una vez impugnados, se dicta la correspondiente decisión definitiva del recurso en vía administrativa o judicial. De allí el principio de la inexigiblidad de la obligación tributaria, como lo argumenta Carlos Weffe, "hasta la *firmeza definitiva* del acto determinati-

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14 (Canónico 188, 193)

15 (Canónico 194, 196)

16 La misma condición de "líquidos y exigibles" debe existir cuando se proponga compensación de créditos fiscales con obligaciones tributarias del contribuyente, en cuyo caso tanto los créditos como las obligaciones deben ser líquidos y exigibles" (art. 49).

17 Blanco Uribe indica que "es perfectamente justificable que el legislador califique al demandado de deudor," solo cuando "el fundamento de la demanda es un título ejecutivo, en el supuesto que nos ocupa un acto administrativo *definitivamente firme en la sede administrativa, contentivo de obligaciones exigibles*, por estar liquidadas o determinadas concluyentemente y ser de plazo vencido." Véase Alberto Blanco Uribe, "Juicio ejecutivo o enrevesamiento jurídico. Violación Sistemática de Derechos Humanos," Ponencia *Jornadas Venezolanas de Derecho Tributario 2012*, p. 9 (publicada en *30 Años Codificación del Derecho Tributario en Venezuela, Tomo II, Asociación venezolana de Derecho Tributario*, Caracas *2012*).

vo", lo que sólo se logra ya "sea porque no ha sido impugnado por el sujeto pasivo o porque, ejercidos como hayan sido los recursos contra el acto determinativo tributario de oficio, éstos hayan sido infructuosos, de manera que la legalidad del acto haya sido confirmada judicialmente."[18]

20. Tal como lo explica con claridad Alberto Blanco Uribe, la obligación tributaria solo puede considerarse "exigible," cuando haya "sido concluyentemente determinada," y ello ocurre sólo cuando "el acto administrativo contentivo de las obligaciones tributarias, que ha de fungir como documento fundamental de la demanda en juicio ejecutivo, se encuentre definitivamente firme." [19] En otros términos, un reclamo tributario sólo puede ser *exigible* cuando el:

> "acto administrativo que determina tributos, liquida intereses moratorios o impone sanciones de naturaleza pecuniaria (multas) […] se encuentra *definitivamente firme*, por no haber sido impugnado en la sede administrativa a través del recurso jerárquico, o como resultado de la denegatoria del referido recurso, no recurrida en la sede judicial."[20]

21. Como lo ha expresado la Sala Político Administrativa del Tribunal Supremo de Justicia en sentencia No 1.939 de 28 de noviembre de 2007, al referirse a la intimación para el cobro ejecutivo de deudas tributarias, ésta sólo procede respecto de "obligaciones tributarias *previamente determinadas y definitivamente firmes*."[21]

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[18] Véase Carlos E. Weffe H., "De la naturaleza del acto determinativo tributario. "Nuevas " reflexiones sobre viejos problemas," en Laura Louza y Serviliano Abache (Coordinadores), *El mito de la presunción de legitimidad del acto administrativo y la tutela judicial en el contencioso tributario*, Funeda, Editorial Jurídica Venezolana, Caracas 2016, p. 433.

[19] Véase Alberto Blanco Uribe, "Juicio ejecutivo o enrevesamiento jurídico. Violación Sistemática de Derechos Humanos," Ponencia *Jornadas Venezolanas de Derecho Tributario 2012*, p. 3 (publicada en *30 Años Codificación del Derecho Tributario en Venezuela, Tomo II, Asociación venezolana de Derecho Tributario*, Caracas *2012*).

[20] Véase Alberto Blanco Uribe, "Juicio ejecutivo o enrevesamiento jurídico. Violación Sistemática de Derechos Humanos," *Ponencia Jornadas Venezolanas de Derecho Tributario 2012*, p. 1 (publicada en *30 Años Codificación del Derecho Tributario en Venezuela, Tomo II, Asociación venezolana de Derecho Tributario*, Caracas *2012*).

[21] Véase en http://historico.tsj.gob.ve/decisiones/spa/noviembre/01939-281107-2007-2007-0841.HTML

22. Ese es el sentido, sin duda, de la condición que establece el COT de que las cantidades sean "líquidas y exigibles" para que los tributos se consideren "adeudados" (art 290) o "debidos" (art. 221, 291) por el contribuyente, y para que, por tanto, puedan ser objeto del cobro ejecutivo por parte la Administración Tributaria.

23. La condición es, además, indispensable para que se pueda dar el paso previo al cobro ejecutivo por la Administración Tributaria, que es la formulación de la correspondiente intimación de pago conforme al procedimiento establecido en el Código (arts. 221 y ss.), y eventualmente, para que la Administración Tributaria pueda proceder "contra los bienes y derechos del deudor," y específicamente pueda proceder a embargar dichos bienes y derechos (arts. 223, 291).

24. La exigencia de que sólo pueden ser objeto de cobro ejecutivo las cantidades líquidas y exigibles, que resulten de actos administrativos firmes o que han adquirido firmeza, ha sido corroborada por Serviliano Abache Carvajal, cuando afirma, con razón, que: "la obligación tributaria siendo *ex lege* y surgiendo en un momento del acaecimiento del hecho imponible, no será *exigible* hasta tanto no se haya determinado de manera *definitivamente firme* el contingente crédito. La razón estriba en su *certeza y cuantificación*."[22]

25. La clara posición en doctrina sobre esta cuestión fue corroborada por la Sala Político Administrativa del Tribunal Supremo de Justicia en la sentencia No. 317 de 11 de marzo de 2008 (caso: *Fisco Nacional vs. PDVSA Petróleos S.A.*), [23] en un caso precisamente en el cual quien alegó el principio era una empresa filial de PDVSA, al decidir una apelación intentada por el Fisco Nacional contra una sentencia de un tribunal superior en una demanda de cobro ejecutivo que el Fisco había incoado contra la filial de PDVSA. En el caso, la empresa precisamente alegó que sólo cuando el acto administrativo de la Administración Tributaria de liquidación de impuestos fuera un acto administrativo firme, es que las deudas tributarias

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[22] Serviliano Abache Véase Serviliano Abache, "La solución determinativa tributaria. Su naturaleza jurídica en cuatro argumentos," en Laura Louza y Serviliano Abache (Coordinadores), *El mito de la presunción de legitimidad del acto administrativo y la tutela judicial en el contencioso tributario*, Funeda, Editorial Jurídica Venezolana, Caracas 2016, p. 210..

[23] Véase en http://historico.tsj.gob.ve/decisiones/spa/Marzo/00317-12308-2008-2006-1106.html .

podían considerarse como líquidas y exigibles, y por tanto podían ser objeto de un cobro ejecutivo conforme al COT.

26. En su sentencia, el Tribunal Supremo indicó que se hacía "imprescindible ***verificar, en el caso de autos, la firmeza de los actos administrativos utilizados como título ejecutivo***," para luego concluir señalando que:

> "Del oficio Nº 279/2007 remitido por el referido Juzgado el 24 de enero de 2008 se pudo evidenciar que los actos administrativos presentados con carácter de título ejecutivo en el juicio de intimación incoado por el Fisco Nacional contra PDVSA Petróleo, S.A., ***son los mismos recurridos ante ese órgano jurisdiccional, que la causa se encuentra en estado de sentencia, y que en el mencionado expediente, la empresa intimada discute la legalidad de "los actos administrativos, cuyo pago pretende la Administración Tributaria***".
>
> A este respecto, cabe señalar que tal como lo afirmara el apoderado judicial de la sociedad mercantil PDVSA Petróleo, S.A., las referidas planillas, así como la determinación de multa e intereses moratorios, ***no son actos administrativos contentivos de obligaciones líquidas y exigibles a favor del Fisco Nacional y no tienen el carácter de título ejecutivo, pues como consta de autos, no están definitivamente firmes***, ***al haber hecho uso la referida empresa de los medios de impugnación*** (inicialmente en sede administrativa el solicitar la revisión de oficio del acto, y posteriormente en sede jurisdiccional al interponer el recurso contencioso tributario), a objeto de ejercer su derecho constitucional a la defensa."[24]

27. En cuanto a la "doctrina," sin duda contradictoria y además contraria a lo que regula el COT, que supuestamente emanaría de la sentencia de la Sala Político Administrativa del Tribunal Supremo de Justicia No. 46 de

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[24] Véase en http://historico.tsj.gob.ve/decisiones/spa/Marzo/00317-12308-2008-2006-1106.html Como lo expresó Alberto Blanco Uribe, si la interpretación jurisprudencial establecida en esta sentencia en favor de PDVSA Petróleos S.A. "fuese de aplicación a todos en la práctica de estrados, estaríamos en un Estado de Derecho, respetuoso de los derechos humanos." Véase Alberto Blanco Uribe, "Juicio ejecutivo o enrevesamiento jurídico. Violación Sistemática de Derechos Humanos," *Ponencia Jornadas Venezolanas de Derecho Tributario 2012*, p. 11 (publicada en *30 Años Codificación del Derecho Tributario en Venezuela, Tomo II, Asociación venezolana de Derecho Tributario*, Caracas *2012*).

20 de enero de 2010 (Caso *Alnova C.A.*) [25], y que cita el Dr. Canónico en su Segunda Opinión Legal[26], la misma consideramos que no puede utilizarse como supuesto punto de referencia en este caso. En efecto, dicha sentencia no es relativa a un tema de *cobro ejecutivo de impuestos*, sino que se refiere única y exclusivamente a un caso de *cobro ejecutivo de multas fiscales*, es decir, resultantes de actos administrativos que no son de liquidación de impuestos sino que dictados como consecuencia de la imposición de sanciones fiscales por la Administración Tributaria al contribuyente por incumplimientos a las disposiciones del COT, conforme a su artículo 94. Por ello, la sentencia no puede servir de referente para este caso, en el cual lo que la República lo que está demandando *no son cantidades que resultan de la imposición de multas, sino cantidades de impuestos de explotación minera* supuestamente adeudados por MLDN.

28. Por otra parte, debe advertirse que en la sentencia citada no se sienta doctrina alguna que contradiga el principio de que la firmeza del acto administrativo de liquidación de impuestos es el que le da el carácter de cantidad líquida y exigible al impuesto que se determina en el mismo. En la sentencia, en efecto, no hay argumento alguno interpretativo de lo que a juicio de la Sala Político Administrativa pudiera significar la condición de que las cantidades que pueden ser objeto de cobro ejecutivo tengan que ser "cantidades líquidas y exigibles."

29. Tampoco hay en la sentencia argumento alguno en el cual la Sala fundamente que se aparta de la interpretaciones ya sentadas anteriormente, como específicamente en el caso de la sentencia antes citada del caso PDVSA Petróleo S.A. de 2008; ni hay en la sentencia argumento alguno que contradiga el principio aceptado por la propia Sala Político Administrativa en las múltiples sentencias citadas en este caso, de que las cantidades líquidas y exigibles en materia de impuestos solo pueden resultar de actos administrativos definitivamente firmes, porque los mismos no se hayan impugnado o porque los recursos intentados contra los mismos se hayan decidido.

30. La sentencia de la Sala Político Administrativa, en su esencial, se limita a considerar un argumento estrictamente de orden procesal en el procedimiento contencioso tributario, diferente al que se discute en este caso, y

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[25] AC-60.

[26] (Canónico 190).

que se refiere a Sala Político Administrativa en la sentencia, a solo considerar - aun cuando en forma errada - , y es el de considerar que supuestamente, la única causal de inadmisibilidad del cobro ejecutivo de cantidades demandadas por el Fisco, sería que se hubiese dictado la "suspensión de efectos de los actos administrativos" cuando estos hubieren sido recurridos, acordada por la autoridad que conoce de su impugnación, lo cual no es cierto.

31. En la materia relativa a liquidación de impuestos, por tanto, priva la doctrina de la Sala Político Administrativa senada en el caso mencionado de PDVSA Poet;oleos S.A., en la cual se declaró, así, inadmisible la ejecución de créditos fiscales intentada por el Fisco, por no estar el acto de determinación del impuesto definitivamente firme, no siendo las cantidades demandadas líquidas y exigibles. Como lo resumió el profesor Humberto Romero Muci, la sentencia del Tribunal "declaró con lugar la apelación contra la decisión de un tribunal contencioso tributario que admitió un juicio ejecutivo contra dicha empresa pública, ***argumentando que pendiente el proceso contencioso tributario de anulación, el acto de liquidación no tiene carácter de título ejecutivo, por no estar definitivamente firme.***"[27]

32. En resumen, conforme a la norma del artículo 290 del Código Orgánico Tributario, en la legislación tributaria venezolana las decisiones que adopte la Administración Tributaria que impongan obligaciones a los contribuyentes, sólo pueden cobrarse mediante cobro ejecutivo cuando las mismas hayan adquirido firmeza, una vez que los recursos intentados contra los mismos hayan sido decididos, que es cuando pueden considerarse como líquidos y exigibles.

33. En consecuencia, en relación con las supuestas obligaciones tributarias de MLDN por impuestos de explotación cuyo cobro en la reconvención ante el Tribunal arbitral la República demanda a Anglo American plc., las mismas sólo podrían ser cobradas por la vía de cobro ejecutivo conforme al COT, cuando se decidan finalmente los recursos administrativos y contencioso administrativos intentados contra los actos administrativos de fijación

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[27] Humberto Romero Muci advirtió que se trata de un precedente que se aplicó "para enervar una obvia injusticia en contra de la conocida empresa pública." Véase Humberto Romero Muci, "Evolución (o *involución*) jurisprudencial en el Contencioso Tributario," *Jornadas Domínguez Escovar,* Barquisimeto, 16 de marzo de 2013 (publicado en *XXXVIII Jornadas J.M. Domínguez Escovar*. *Avances Jurisprudenciales del Contencioso Administrativo en Venezuela*, Instituto de Estudios Jurídicos "Ricardo Hernández Álvarez", Barquisimeto, Paredes Libros, Caracas, 2013).

de las fórmulas para el cálculo de los impuestos de explotación. Mientras ello no suceda, es totalmente improcedente pretender iniciar el procedimiento de cobro ejecutivo o formular una demanda de cobro de impuestos, incluso por vía reconvención, como ha sucedido en este caso.

34. Por otra parte, el régimen legal del Código Orgánico Tributario que solo permite el cobro ejecutivo de deudas tributarias líquidas y exigibles, en nada se ha afectado ni ha cambiado por la reforma efectuada en 2014 respecto de los efectos suspensivos o no suspensivos de los recursos contra los actos tributarios. El COT de 2001 establecía el principio de los efectos suspensivos del recurso jerárquico (art. 247), y en cambio, el efecto no suspensivo del recurso contencioso tributario (art. 263), lo cual fue cambiado en la reforma de 2014, al establecerse en general el efecto no suspensivo en relación con todos los recursos (arts. 257 y270). Es decir, el hecho de que el Código de 2014 establezca el principio general de que los recursos administrativos (art. 257) y contencioso tributarios (art. 270) que se intenten contra los actos de la Administración Tributaria no tienen carácter suspensivo, no cambia ni afecta la ineludible exigencia de que sólo puede procederse al cobro ejecutivo de impuestos cuyas cantidades sean líquidas y exigibles, lo que no varió en la reforma.

35. En todo caso, la no suspensión de efectos de los recursos que se prevé el COT de 2014 es un principio establecido en general, para toda la gama de actos que en cualquier forma pueda afectar los derechos de los contribuyentes, como son por ejemplo, los que enumeraba el Código de 2001 en su artículo 247 al referirse a las sanciones, tales como "la clausura de establecimientos, comisos o retención de mercaderías, aparatos, recipientes, vehículos, útiles, instrumentos de producción o materias primeras, y suspensión de expendios de especies fiscales y gravados." Pero ello no afecta el régimen establecido respecto del cobro ejecutivo de los actos que determinen tributos. Es decir, si bien el Código dispone que el ejercicio de los recursos administrativos y contencioso tributarios en Venezuela no tiene efectos suspensivos (arts. 257 y 270 COT), a los efectos de cobro ejecutivo de impuestos el mismo Código establece que solo procede cuando sean exigibles, es decir, cuando los actos administrativos impugnados se pueden considerar como actos definitivamente firmes, susceptibles de ejecución; y estas disposiciones especiales privan sobre cualquier otra que pueda establecerse de carácter general, como la relativa al principio de la no suspensión de efectos de los recursos.

36. Por tanto, respecto de estos actos de la Administración Tributaria que determinen tributos, e independientemente de los efectos no suspensivos

que puedan tener los recursos que se intenten contra los mismos; lo que es claro es que su ejecución, materializada en el cobro ejecutivo de las cantidades que establezcan, solo es posible, conforme al mismo COT, cuando las mismas sean líquidas y exigibles, lo que solo se puede materializar cuando se hayan decidido los recursos intentados y resulten de actos administrativos firmes, que son los que pueden establecer dichas cantidades "líquidas y exigibles," que son las que pueden ser objeto de cobro ejecutivo.

37. Deducir y aceptar la posibilidad del cobro ejecutivo de cantidades determinadas de tributos que no sean líquidas y exigibles, es decir, que no estén establecidas con certeza en actos administrativos firmes, sería contrario a lo establecido en los artículos 221, 290 y 291 del mismo COT. Ello implicaría, además, darle preferencia sobre esas normas especiales a las previsiones generales de los artículos 252 y 270 del COT, lo cual es inadmisible en el ordenamiento jurídico venezolano, pues ello vulneraría el principio de progresividad respecto de las garantías de los derechos humanos (art. 19 de la Constitución), en este caso, del de acceso a la justicia y el derecho a la tutela judicial efectiva,[28] del derecho al debido proceso,[29] del derecho a la presunción de inocencia,[30] del derecho a la igualdad de las partes en el proceso como consecuencia del derecho general a la igualdad,[31] y del derecho a la integridad del patrimonio[32] de los contribuyentes.[33]

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28 Artículo 26: "Toda persona tiene derecho de acceso a los órganos de administración de justicia para hacer valer sus derechos e intereses, incluso los colectivos o difusos, a la tutela efectiva de los mismos y a obtener con prontitud la decisión correspondiente".

29 Artículo 49: "El debido proceso se aplicará a todas las actuaciones judiciales y administrativas…".

30 Artículo 49, numeral 2: "Toda persona se presume inocente mientras no se pruebe lo contrario".

31 Artículo 21, numeral 1: "Todas las personas son iguales ante la ley, y en consecuencia: 1. No se permitirán discriminaciones fundadas en la raza, el sexo, el credo, la condición social o aquellas que, en general, tengan por objeto o por resultado anular o menoscabar el reconocimiento, goce o ejercicio en condiciones de igualdad, de los derechos y libertades de toda persona".

32 Artículos 115: "Se garantiza el derecho de propiedad. Toda persona tiene derecho al uso, goce, disfrute y disposición de sus bienes. La propiedad estará sometida a las contribuciones, restricciones y obligaciones que establezca la ley con fines de utilidad pública o de interés general. Sólo por causa de utilidad pública o interés social, mediante sentencia firme y pago oportuno de justa indemnización, podrá ser declarada la expropiación de cualquier clase de bienes", 116: "No se decretarán ni ejecu-

38. En consecuencia, ningún efecto puede tener respecto al posible cobro ejecutivo de tributos, el principio de la no suspensión de efectos de los recursos que se interpongan contra los actos que los establezcan, porque dicho cobro ejecutivo solo procede, previa intimación al contribuyente, cuando las cantidades respectivas objeto de cobro sean líquidas y exigibles, condición que sólo puede derivar de que los actos administrativos que las establezcan hayan quedado definitivamente firmes.

III. SOBRE LA INEXISTENCIA DE PRECEDENTES JUDICIALES OBLIGATORIOS EN VENEZUELA, EXCEPTO EN MATERIA DE INTERPRETACIÓN CONSTITUCIONAL

39. En su Dúplica, la República indica que en virtud de la sentencia la Sala Político Administrativa del Tribunal Supremo No. 917 de 29 de julio de 2015,[34] dictada en uno de los recursos interpuestos por MLDN específicamente en relación con los impuestos de explotación de 2006, "las deudas para los años 20021 2005 también son líquidas y exigibles" [35] . Al respecto, comienzo por advertir, que al hacer esta afirmación, la República parece confirmar que la única deuda "liquida y exigible" en este caso era la referida a la sentencia citada (respecto del año 2006), que al dictarse produjo la firmeza del acto administrativo que la determino. Por otra parte, debe señalarse que la pretensión de la República de extender los efectos de la deci-

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tarán confiscaciones de bienes sino en los casos permitidos por esta Constitución. Por vía de excepción podrán ser objeto de confiscación, mediante sentencia firme, los bienes de personas naturales o jurídicas, nacionales o extranjeras, responsables de delitos cometidos contra el patrimonio público, los bienes de quienes se hayan enriquecido ilícitamente al amparo del Poder Público y los bienes provenientes de las actividades comerciales, financieras o cualesquiera otras vinculadas al tráfico ilícito de sustancias psicotrópicas y estupefacientes" y 317: "..Ningún tributo puede tener efecto confiscatorio".

33 Véase sobre las violaciones a los derechos constitucionales de los contribuyentes que podría ocasionar el cobro ejecutivo de obligaciones tributarias no exigibles, lo expuesto por Alberto Blanco Uribe, "Juicio ejecutivo o enrevesamiento jurídico. Violación Sistemática de Derechos Humanos," *Ponencia Jornadas Venezolanas de Derecho Tributario 2012*, pp. 18 ss. (publicada en *30 Años Codificación del Derecho Tributario en Venezuela, Tomo II, Asociación venezolana de Derecho Tributario*, Caracas *2012*).

34 Véase (anexo BC-102). Igualmente en: http://historico.tsj.gob.ve/decisiones/spa/julio/180166-00917-30715-2015-2011-0139.HTML

35 Párrafos 545.

sión judicial sobre el impuesto de 2006, respecto de los otros casos judiciales pendientes para los años 2002 a 2005,[36] es totalmente extraño al derecho venezolano.

40. Es decir, de ninguna manera puede interpretarse bajo derecho Venezolano que la sentencia de la Sala Político Administrativa del Tribunal Supremo de fecha 29 de julio de 2015, tenga carácter vinculante para los otros casos referidos a los ejercicios de 2002 a 2005, aún cuando en dichos casos se discutan cuestiones similares o idénticas a las resueltas en la sentencia en cuestión.

41. En Venezuela, como en general sucede en todos los sistemas judiciales, la sentencias dictadas por los tribunales de la jurisdicción ordinaria y de las otras jurisdicciones como la contencioso administrativa, no tienen el carácter de precedente que pueda considerarse como de carácter obligatorio para otros casos, pudiendo incluso el propio tribunal que las dictó cambiar el criterio establecido.

42. En realidad, las únicas sentencias que en Venezuela tienen efectos vinculantes son las que conforme al artículo 335 de la Constitución puede dictar la Sala Constitucional del Tribunal Supremo de Justicia en materia de interpretación constitucional, actuando específicamente como Jurisdicción Constitucional, y siempre que así lo exprese formalmente la Sala en el texto de la sentencia, calificando los efectos de la misma como vinculantes para las otras Salas del Tribunal Supremo de Justicia y para los demás tribunales. Ninguna otra decisión judicial, ni siquiera las dictadas por las otras Salas del Tribunal Supremo de Justicia, tienen carácter vinculantes ni el valor de precedente obligatorio.

43. Por tanto, la decisión No. 917 de 29 de julio de 2015 dictada por la Sala Político Administrativa respecto del recurso contencioso tributario interpuesto por MLDN, no tiene efectos de cosa juzgada sino sólo en el caso concreto, y no es en forma alguna vinculante para ningún Tribunal, no pudiendo considerarse como precedente obligatorio para ningún Tribunal, incluidas la propia Sala Político Administrativa del Tribunal Supremo de Justicia, y el Tribunal Arbitral.

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36 Párrafos 546-550 de la Dúplica

IV. SOBRE LA AUSENCIA DE DECISIÓN DE LOS RECURSOS ADMINISTRATIVOS Y LOS EFECTOS DEL SILENCIO ADMINISTRATIVO

44. La República, en su Dúplica[37] se refirió al tema del llamado silencio administrativo negativo, y sostiene que el silencio administrativo tendría en este caso el efecto de dar firmeza a los actos administrativos en cuestión, al punto de llegar a afirmar que "el pago [de los reparos fiscales] se vuelve exigible por aplicar el silencio administrativo a los recursos jerárquicos interpuestos para las planillas de 2010-2012."

45. Noto primeramente que aquí nuevamente la República parece confirmar que mientras no exista una decisión firme, así sea tácita de los recursos, las deudas tributarias no pueden ser "exigibles". Pero en realidad, lo que debe quedar claro aquí es que el silencio administrativo negativo en Venezuela no produce ningún acto administrativo firme. Tal como lo expliqué en mi Primera Opinión Complementaria, en lo que está conforme y concuerda el Dr. Canónico en su Segunda Opinión Legal[38] la figura del silencio administrativo sólo se ha establecido como garantía de los administrados a quienes la Ley Orgánica de Procedimientos Administrativos, en general (art. 4), y el Código Orgánico Tributario, en particular (art. 255 COT 2001; art. 262 COT 2014), les confiere, ante la ausencia de decisión expresa de sus recursos, el poder considerar que los mismos se han resuelto negativamente a los solos efectos de permitirles intentar "el recurso inmediato subsiguiente" (art. 4 LOPA); es decir, les confiere el derecho de ejercer recursos contra la tácita negativa de su pretensión que deriva del transcurso del lapso establecido legalmente para la decisión.

46. Siendo el silencio administrativo una garantía establecida legalmente a favor de los administrados, éstos tienen el derecho de esperar por la decisión expresa de la Administración, por todo el tiempo que lo juzguen necesario, no estando obligados, en forma alguna, a tener que considerar denegada su solicitud o recurso y tener que ejercer recursos contra la carencia de decisión expresa, a lo cual no están obligados. Como lo expresó la Sala Político Administrativa en sentencia No. 836 de 9 de julio de 2015[39] al resol-

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37 (parágrafo 561.)

38 (Canónico 149).

39 Véase en http://historico.tsj.gob.ve/decisiones/spa/julio/179345-00836-9715-2015-2014-1117.HTML

ver un recurso contencioso tributario y referirse al artículo 255 del COT de 2011, y constatar que en el caso había operado "la figura del silencio administrativo negativo con ocasión de no haber decidido el órgano recaudador el recurso jerárquico dentro del lapso de Ley, considerando que:

> "Tal proceder encuentra su asidero jurídico en el artículo 255 del Código Orgánico Tributario de 2001, aplicable *ratione temporis*, pues de la citada norma se desprende que Administración Tributaria de no decidir el recurso jerárquico dentro de los sesenta (60) días continuos estatuidos en el artículo 244 *eiusdem*, el recurso administrativo se entenderá denegado, *quedando abierta la posibilidad del contribuyente de recurrir de esa denegatoria tácita ante la jurisdicción contencioso tributaria y, que en caso de no hacerlo, el recurrente podrá esperar la decisión expresa a su petición administrativa*, la cual una vez resuelta -de tener interés- podrá impugnarla ante el Tribunal competente como ocurrió en la causa objeto de examen."[40]

47. Tal como lo señalé en mi Primera Opinión Legal Complementaria, esta garantía otorgada por la Ley a los administrados (en este caso, a los contribuyentes) como consecuencia, no significa en forma alguna que la Ley considere el solo transcurso del tiempo como una forma que tiene la Administración para decidir los recursos, pues por más que transcurra el tiempo del silencio, la Administración sigue obligada a decidir, es decir, a emitir una decisión expresa. Como lo expresa el Dr. Canónico en su Segunda Opinión Legal, "por disposición constitucional y legal la Administración está en la obligación de responder frente a las solicitudes o peticiones de los particulares y esta es precisamente la premisa que justifica la teoría del silencio administrativo como garantía de los particulares." [41] .

48. Esto significa que los actos administrativos de determinación de impuestos, al estar impugnados mediante recursos, durante todo el tiempo en el cual éstos estén pendientes de decisión, no son actos administrativos firmes, y las cantidades en ellos indicados no son líquidas y exigibles, carácter que solo podrán adquirir una vez decididos los recursos administrativos correspondientes mediante actos definitivamente firmes. La firmeza de un acto administrativo, por tanto, en ningún caso puede derivarse del silencio de la

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[40] Véase en http://historico.tsj.gob.ve/decisiones/spa/julio/179345-00836-9715-2015-2014-1117.HTML

[41] (Canónico 149).

Administración en decidir los recursos intentados contra el mismo; sino como lo indica y reconoce el mismo Dr. Canónico, solo se produce si el contribuyente no intenta los recursos subsiguientes. Dice en efecto Canónico, que si no se formulan los recursos "los actos tributarios adquirirán firmeza y podrán ser exigibles de inmediato," [42] lo que significa que si el contribuyente formula los recursos correspondientes, el acto impugnado no adquiere firmeza y las cantidades determinadas en el mismo no pueden ser exigidas

49. Es decir, como ha sido establecido a lo largo de esta Segunda Opinión Legal Complementaria, las cantidades liquidadas solo se tornan en exigibles, una vez que los actos administrativos que las determinan adquieran firmeza. Mientras los recursos estén pendientes de decisión, los actos administrativos no adquieren firmeza. Asimismo, si los recursos "quedan pendientes por tanto tiempo" como se anota en el parágrafo 561 de la Dúplica, ello lo único que podría es originar responsabilidad de los funcionarios por omisión, pero nunca podría considerarse que la Administración ha decidido, o excusar su obligación de hacerlo.

V. SOBRE LA ILEGALIDAD EN EL DICTADO DE LA FÓRMULA DE 2009

50. Tal como lo expliqué en mi Primera Opinión Legal Complementaria, al referirme al Oficio No DGPEM-020-09 de 26 de enero de 2009 del Director General de Planificación y Economía Minera del MIBAM, dirigido a MLDN, que estableció la Fórmula de 2009 para el cálculo del impuesto de exportación,[43] el acto administrativo contenido en el mismo, está viciado de nulidad pues se dictó en violación de los principios más elementales del derecho administrativo relativo a la formación de los actos administrativos y al procedimiento administrativo.

51. En primer lugar, dicho acto violó el principio fundamental de la competencia de los funcionarios para poder actuar, conforme al cual, para que un funcionario pueda dictar un acto administrativo válido, ante todo tiene que tener atribuida legalmente y en forma expresa la competencia para ello. Así lo establece Ley Orgánica de la Administración Pública,[44] al disponer que

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42 Canónico 198.

43 (parágrafo. 239)

44 Ley Orgánica de la Administración Pública, **Anexo BC-[]**,.

> Artículo 26: "Toda competencia atribuida a los órganos y entes de la Administración Pública será de obligatorio cumplimiento y ejercida bajo las condiciones, límites y procedimientos establecidos; será irrenunciable, indelegable, improrrogable y no podrá ser relajada por convención alguna, salvo los casos expresamente previstos en las leyes y demás actos normativos. Toda actividad realizada por un órgano o ente manifiestamente incompetente, o usurpada por quien carece de autoridad pública, es nula y sus efectos se tendrán por inexistentes. Quienes dicten dichos actos, serán responsables conforme a la ley, sin que les sirva de excusa órdenes superiores."

52. En cuanto a la Ley Orgánica de Procedimientos Administrativos,[45] la misma complementa la anterior al disponer que:

> Artículo 18.7 Todo acto administrativo deberá contener:"[…] 7. Nombre del funcionario o funcionarios que los suscriben, con indicación de la titularidad con que actúan, e indicación expresa, en caso de actuar por delegación, del número y fecha del acto de delegación que confirió la competencia."

53. El mencionada acto administrativo de modificación de la Fórmula de 2007, estableciendo la Fórmula de 2009, conforme a esas normas, está viciado de ilegalidad por haber violado dicho principio, pues el Director General de Planificación y Economía Minera del MIBAM no tenía asignada competencia alguna para poder dictarlo, ni el Ministro le había delegado atribución alguna para poder dictarlo, lo que por lo demás se reafirma en el propio texto del Oficio, donde se confirma que ninguna de las normas que el Director invocó como supuesta base legal del mismo, para dictar el acto administrativo le atribuían tal competencia.[46]

54. Ello vicia al acto administrativo, además, por violar lo dispuesto en el artículo 9 de la Ley Orgánica de Procedimientos Administrativos que exige que los actos administrativos indiquen necesariamente, "los fundamentos legales del acto." Al indicar normas que no le dan fundamento legal al acto dictado, el mismo está igualmente viciado de ilegalidad.

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45 Ley Orgánica de Procedimientos Administrativos, Anexo C-[],.

46 Decreto Nº 3.547 de 28 de marzo de 2005, en *Gaceta Oficial* Nº 38.155, de 30 de marzo de 2005, **Anexo BC-[ ].** (artículos. 15, 20 y 21 del Reglamento Orgánico del Ministerio del Ministerio)

55. Por otra parte, si hubiese sido el caso, como lo indicó el experto Solano en su Informe,[47] de que supuestamente el Director General, al dictar el acto contenido en el Oficio, estaba actuando por "delegación del Ministro," porque éste supuestamente había "delegado" en el Director General "la competencia y la firma" para modificar la Fórmula para establecer el impuesto de explotación, el acto administrativo de nuevo estaría viciado de ilegalidad pues de haber sido tal el caso, el funcionario estaba obligado de acuerdo con el artículo 18.7 antes citado de la Ley Orgánica de Procedimientos Administrativos, en el marco de la base legal del acto, a indicar expresamente "el número y fecha del acto de delegación que confirió la competencia," lo que no se expresó en el Oficio; simplemente porque la delegación de competencia para dictarlo nunca ocurrió. (Redacción)

56. En efecto, no es cierto que el Ministro hubiese delegado en el Director General la competencia para dictar los actos administrativos de establecimiento de la fórmula para el cálculo del impuesto de explotación, como se ha alegado sin fundamento y ambiguamente –al confundirse la delegación de firma de los actos relativos a competencias propias del Director, con una supuesta delegación de atribuciones por parte del Ministro que nunca ocurrió; y mucho menos cierto es que ello hubiese estado contenido en la Resolución No. 267-2006 de 19 de julio de 2006, publicada en *Gaceta Oficial* No. 38.486 de 26 de julio de 2006.

57. Esa Resolución, es sólo la Resolución mediante la cual el Ministro hizo el nombramiento del funcionario (Javier Fernando Medina Cordero) como Director general de Planificación y Economía Minera, y no es, en forma alguna, una Resolución mediante la cual el Ministro haya delegado competencia alguna a su cargo en el funcionario nombrado. Lo único que indica la Resolución respecto del nombrado, después de designarlo Director General, es que de acuerdo con el Reglamento de Delegación de Firmas, se le delega "la competencia y la firma *de los documentos que conciernen y competen a la Dirección a su cargo*." Ello no es en forma alguna, una delegación de competencias o atribuciones adicional a las que tiene asignadas la Dirección conforme al Reglamento Orgánico del Ministerio, que son las que "conciernen y competen" a la misma; sino sólo la precisión de que el Director General podrá firmar, sin necesidad de llevar los puntos al Ministro, los actos administrativos relativos a asuntos *que conciernen y competen a la Dirección a su cargo* y nada más. Ello, por lo demás, lo reconoce la República en la Dú-

[47] (párrafo 19)

plica, al expresar que los documentos que puede firmar el Director general son los relativos a asuntos que "competen a la Dirección a su cargo" [48] . Y como resulta de la lectura del Reglamento Orgánico del Ministerio, en ninguna de sus normas, y en general en ninguna norma del ordenamiento jurídico que rige el Ministerio de Energía y Minas se faculta a la Dirección de Planificación y Economía Minera para fijar la metodología para el cálculo del impuesto de explotación, es decir, para dictar el acto administrativo como el que contiene la Fórmula 2009.

58. Por ello, se observa que como quizás el Dr. Canónico no puede afirmar que el Director General, al contrario supuestamente si tendía competencia para dictar la Fórmula de 2009, solo afirmó en definitiva, que dicho Director General lo que tenía era "competencia" solo para "notificar" la Fórmula de 2007 (parágrafo 181), es decir, "para suscribir tal acto" [49] refiriéndose al de "notificación," porque obviamente el Director General no tenía competencia para emitir dicho acto de modificación del que en su momento fue adoptado por el Ministro, contentivo en la Fórmula 2009,.

59. En todo caso, no es posible asimilar, como impropiamente lo hace el Dr. Canónico[50], el acto de "notificación" (mero acto de trámite) que pueda hacer al administrado un funcionario inferior de un acto administrativo dictado por un órgano superior, (mero acto de trámite), con la decisión en sí misma (administrativo definitivo), y mucho menos identificar o querer asimilar, como si se tratara de la misma "declaración de voluntad" del Director General, el acto de trámite de notificar la Fórmula de 2007, que adoptó el Ministro mediante acto administrativo definitivo, con la adopción por dicho Director de la Fórmula de 2009, que era un acto definitivo para el cual no tenía competencia para dictarlo, estando por ello viciado de ilegalidad.

60. Por tanto, el hecho de que dicho Director General haya sido el funcionario que hubiese "notificado" al administrado el contenido de la decisión del Ministro adoptada en el Punto de Cuenta No. *091301* de 25-04-2007, mediante Oficio No. DGPEM-280 de 28 de mayo de 2007, estableciendo la Fórmula de 2007, no lo convierte en autor de dicho acto el cual sin duda fue dictado por el propio Ministro Por ello, el hecho de haber notificado como acto de trámite la Fórmula de 2007, no permite deducir o justificar competencia alguna para poder posteriormente modificar dicho acto (acto definiti-

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48 (parágrafo 556).

49 (Canónico 182).

50 (Canónico 182).

vo) que correspondía hacer al Ministro, como lo sugiere el Dr Canónico[51] y el mismo experto Solano en su Informe[52]. En materia de procedimiento administrativo un funcionario inferior puede notificar al interesado el acto dictado por el funcionario superior, pero ello, obviamente no autoriza al funcionario inferior, posteriormente a modificar el acto del superior.

61. En este caso de las Fórmulas para el cálculo del impuesto de explotación, es indubitable que fue el Ministro el funcionario quien decidió establecer la Fórmula de 2007, y ello lo hizo al conocer de un "punto de cuenta" (que es la terminología usada en la Administración Pública para indicar la forma como los funcionarios inferiores elevan al superior los asuntos que son de la competencia del superior), que le elevó el Director de Planificación y Economía Minera, conforme a los estudios que a esta Dirección competen realizar en la materia,[53] y que precisamente, por carecer dicha Dirección de competencia para decidir y adoptar actos administrativos en ese asunto, dicho Director General lo elevó ante el Ministro, para su decisión. Y así ocurrió, al aprobar el "punto de cuenta" que le sometió el Director General en 2007, adoptando entonces la Fórmula de 2007. Su aprobación por el Ministro, que una vez que se notificó a los interesados, hizo que el "punto de cuenta" dejase de ser "un documento de trabajo interno" como lo identificó el experto Solano[54], y pasó a ser el texto formal contentivo de una decisión o acto administrativo adoptado por el Ministro

62. En consecuencia, la Fórmula de 2007, sin duda fue dictada mediante un acto administrativo definitivo por el Ministro, en la forma antes mencionada, a propuesta del Director General que le elevó el asunto en un punto de cuenta; razón por la cual, el Director General al carecer de competencia para dictar el acto, también carecía de competencia para modificarlo. En consecuencia, como lo expresé en mi Segunda Opinión Legal,[55] "dado que la Fórmula de 2007 estableciendo la metodología de cálculo del impuesto

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51 (Canónico 181).

52 Parágrafo 19, Parágrafo 556 de la Dúplica.

53 Como lo indicó el Dr. Canónico, citando el artículo 24.1 del reglamento Orgánico del Ministerio, a la Dirección le que le compete es "coordinar la formulación y evaluación de los lineamientos de política de planes y programas del sector minero" (parágrafo 180), pero carece de competencia para decidir sobre las fórmulas para establecer el impuesto de explotación.

54 Parágrafo 20.

55 (parágrafo 239)

de explotación había sido establecida por el Ministro a cargo del MIBAM en 2007, su modificación a través de la Fórmula de 2009 por parte de un funcionario de inferior jerarquía" implicó una violación al principio de legalidad, de la competencia y de la base legal del acto, y además, la violación del principio de la jerarquía de los actos administrativos.

63. En efecto, la aprobación de la Fórmula de 2009 por un Director del MIBAM vició dicho acto administrativo de ilegalidad, por violación de dicho principio de jerarquía de los actos administrativos establecido en el artículo 13 de la Ley de Procedimientos Administrativos que dispone que "ningún acto administrativo podrá violar lo establecido en otro de superior jerarquía." De ello resulta que conforme a la ley venezolana, ningún acto administrativo puede violar lo establecido en otro de jerarquía superior, como sucedió en este caso, en el cual habiéndose establecido y aprobado la Fórmula de 2007 por el propio Ministro en un "punto de cuenta" que le sometió el Director General, la misma fue ilegalmente modificada por un funcionario inferior, que era dicho Director General, sin tener competencia para ello.

64. Finalmente, la aprobación de la Fórmula de 2009 sin seguir los mismos formalismos que fueron aplicados en la aprobación de la Fórmula de 2007, en particular, su sometimiento a la decisión del Ministro, adicionalmente como lo expresé en mi Primera Opinión Legal Complemenatria,[56] violó el principio general del procedimiento administrativo conocido como del "paralelismo de las formas", conforme al cual, las modalidades mediante las cuales los órganos de la Administración Pública pretendan modificar o extinguir una situación jurídica antes establecida, deben ser idénticas a las que se emplearon para crearla, salvo, naturalmente, una expresa disposición en contrario.

65. Por otra parte, en mi Primera Opinión Legal Complementaria expresé que si bien se podía considerar que el impuesto de explotación tal como está regulado en la Ley de Minas no puede considerarse en sí mismo confiscatorio, "ha sido mediante un acto administrativo emanado incluso de un funcionario incompetente del MIBAN, que al cambiar ilegalmente en 2009 la fórmula de cálculo del mismo, le ha dado carácter confiscatorio, tal como resulta de lo explicado por la Sra. Rebecca Charlton, en su declaración testimonial ante el Tribunal" [57].

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[56] (parágrafo 239),

[57] (parágrafo 247),

66. En efecto, un impuesto debe considerarse confiscatorio, no sólo cuando, con el mismo se absorba "una parte sustancial del derecho de propiedad del contribuyente" o se le prive al contribuyente "*de la posibilidad de usar, gozar, disfrutar y disponer de cualquiera de sus bienes, en desconocimiento de su real capacidad contributiva,"* como se precisó en la sentencia de la Sala Constitucional del Tribunal Supremo de Justicia N° 307 de fecha 6 de marzo de 2001, a la cual hice referencia en mi Primera Opinión Legal Complementaria (parágrafo 247), y a la cual se limita el comentario del Dr. Canónico en su Segunda Opinión Legal (parágrafo 187), sino también, como lo expliqué con todo detalle al analizar en 1990 las protecciones constitucionales y legales contra las tributaciones confiscatorias en el derecho comparado,[58] cuando el tributo es irrazonable, o su imposición viola los derechos fundamentales del contribuyente, entre otros, las garantía de la legalidad tributaria y de la igualdad, como es precisamente el caso del impuesto de exportación a MLDN que resultó de la aplicación de la Fórmula de 2009.

67. Por tanto, además de los argumentos expuestos por la Sra. Rebecca Charlton, antes indicados, sobre la incidencia del tributo en la empresa, ha sido precisamente su irrazonabilidad, y el haber sido impuesto por un acto administrativo lo que lo hace confiscatorio. Al estudiar el tema comparativamente en el trabajo antes mencionado, aparte de concluir que en general, incluso en los países donde hay una prohibición constitucional expresa como la que existe en la Constitución española (art. 31.3: "el sistema tributario […] en ningún caso podrá tener un carácter confiscatorio") o en la venezolana (art. 317: "Ningún tributo puede tener efecto confiscatorio."), para establecer la confiscatoriedad de los tributos no hay reglas absolutas, debiendo estudiarse el tema en cada caso, de acuerdo a los parámetros de razonabilidad del impuesto, tal como por ejemplo se ha desarrollado ampliamente en la jurisprudencia argentina,[59] donde se ha sentado el principio resumido por Linares Quintana, de que "un impuesto es confiscatorio cuando el monto de su tasa

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[58] Véase Allan R. Brewer-Carías, "Las protecciones constitucionales y legales contra las tributaciones confiscatorias" en *Revista de Derecho Público,* Nº 57-58, Editorial Jurídica Venezolana, Caracas, enero-junio 1994, pp. 5-24. Este trabajo es la versión en castellano de la Ponencia General que presenté en el XIII Congreso Internacional de Derecho Comparado en Montreal en 1990. Véase: "Les protections constitutionnelles et légales contre les impositions confiscatoires", *Rapports Généraux XIIIe Congres International*, Académie Internationale de Droit Comparé, Montreal 1990, pp. 795-824

[59] *Idem*. p. 8

sea "irrazonable."[60] Igualmente, la confiscatoriedad del impuesto deriva de la violación de la legalidad del impuesto, de manera que como lo exprese en 1990, "cualquier impuesto establecido mediante un acto del Ejecutivo o de cualquier autoridad distinta al legislador no sólo es inconstitucional, sino fundamentalmente confiscatorio."[61]

68. Y eso es precisamente lo que se ha denunciado en este caso, que mediante un acto administrativo emanado incluso de un funcionario incompetente, como era el Director General de Planificación y Economía Minera del MIBAN, violando todos los principios fundamentales de legalidad, competencia, base legal, jerarquía de los actos administrativos y paralelismo de las formas, cambió ilegalmente en 2009 la fórmula de cálculo del impuesto que había establecido su superior jerárquico, el Ministro del ramo, distorsionando las reglas en la materia establecidas en la Ley, aplicable solo a MLDN, y por tanto violando el principio de igualdad, que es otra de las garantías contra la no confiscatoriedad de los tributos,[62] todo lo cual le dio carácter confiscatorio al impuesto.

Afirmo que lo que he expresado en esta Segunda Opinión Legal Complementaria es, según mi leal saber y entender, cierto y correcto.

Nueva York, 20 de septiembre de 2016

Allan R. Brewer-Carías

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60 Francisco Linares Quintana, *Tratado de la Ciencia del Derecho Constitucional*, 2ª edición, Tomo 5, Buenos Aires, p. 313, citado en *Idem,* nota 21, p. 8.

61 *Idem*, p. 10

62 Idem, p. 17 ss..

PART FIVE

ON THE PRINCIPLES REATED TO THE EXPROPRIATION PROCEEDING

14.

ICSID CASE NO. ARB/12/13. *SAINT-GOBAIN PERFORMANCE PLASTICS EUROPE* (CLAIMANT) -v- *THE BOLIVARIAN REPUBLIC OF VENEZUELA* (RESPONDENT)

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

LEGAL EXPERT OPINION OF ALLAN R. BREWER-CARÍAS

10 JUNE 2014

I, ALLAN R. BREWER-CARÍAS, hereby declare that the following is true and correct:

1. I have been a member in good standing of the Venezuelan Federal District Bar since 1963. Since 1973, I have been a partner of *Baumeister & Brewer,* a law firm located at Torre América, PH, Avenida Venezuela. I specialize in public law, particularly constitutional, administrative, and public economic law, which includes mining and hydrocarbons law. Currently, I am a resident of the United States of America, in the city of New York, NY.

I. INTRODUCTION

A. Qualifications

2. In 1962, I received my law degree from *Universidad Central de Venezuela* (Central University of Venezuela). I performed post-graduate

studies in France, at the then University of Paris (1962-1963), and in 1964 I received a Doctorate in Law (D.J.) from the Central University of Venezuela.

3. I began teaching Administrative and Constitutional law at the Central University of Venezuela in 1963. During the academic years 1972-1974, I was Visiting Scholar at Cambridge University (Center of Latin American Studies), U.K., and during the academic year 1985-1986, I was a Professor at Cambridge University, where I held the Simón Bolivar Chair, teaching a course entitled "Judicial Review in Comparative Law" in the ELM Program of the Faculty of Law, while a Fellow of Trinity College. In 1990, I was an Associate Professor at the University of Paris II (Panthéon- Assas) in the 3° Cycle Course, where I taught a course entitled "*La Procedure Administrative Non Contentieuse en Droit Compare*" (Principles of Administrative Procedure in Comparative Law). Since 1998, I have also taught in the Administrative Law Masters program at El Rosario University, and at *Externado de Colombia University*, both in Bogotá, Colombia, on the subject of "*Principios del Procedimiento Administrativo en América Latina*" (Principles of Administrative Procedure in Latin America), and of "*El Modulo Urbano de la Ciudad Colonial Hispanoamericana*" (The Urban Model of the Hispanic American Colonial Cities). In 1998, I gave a series of lectures at the University of Paris X (Nantèrre), the subject of which was entitled "*Droit économic au Vénézuéla*" (Economic Law in Venezuela) as an Invited Professor. Between 2002 and 2004, I was a Visiting Scholar at Columbia University in the City of New York. In 2006, I was appointed Adjunct Professor of Law at Columbia University Law School, where I taught seminars on *Judicial Protection of Human Rights in Latin America* and *Constitutional Comparative Law Study on the Amparo Proceeding* during the Fall 2006 and Spring 2007 Semesters.

4. I am a member of the Venezuelan Academy of Social and Political Sciences and served as its President from 1997 to 1999. Since 1982, I have been a member of the *International Academy of Comparative Law*, and I served as its Vice President from 1982 to 2010. I am a member of the *Société de Legislation Comparée* (Society of Comparative Legislation) in Paris. In 1981, I was awarded the Venezuelan Social Sciences National Prize.

5. I have published many books and articles on Venezuelan law. Of particular relevance to the issues arising in this case, I have published extensively on Venezuela's administrative law and expropriation law. My recent works include *Administrative Law in Venezuela* (2013) and *Constitutional Law in Venezuela* (2012). With respect to the expropriation law in particular, I have published the leading commentary in 1966, titled *La expropiación por causa de utilidad pública o interés social (jurispridencia – doctrina administrative – legislación)* (Expropriation for reasons of public utility or social interest (jurisprudence – administrative doctrine – legislation)). I also published, the book *Jurisprudencia de la Corte Suprema 1930-1974 y Estudios de Derecho Administrativo* (Jurisprudence of the Supreme Court 1930-1974 and Studies of Administrative Law) (6 Volumes), Volume VI of which is titled: *La Propiedad y la Expropiación por causa de utilidad pública e interés social* (Property and Expropriation for reasons of public and social utility). I was also the coordinator and co-author of the book *Ley de Expropiación por causa de utilidad pública o social* (Expropriation Law for reasons of public or social utility), published in 2002, which includes comments on the Law currently in force.

B. Scope of Opinion

6. This opinion is rendered in connection with the Claimant's Request for Provisional Measures in ICSID Case No. ARB/12/13, *Saint-Gobain Performance Plastics Europe v. The Bolivarian Republic of Venezuela* (the ***ICSID Arbitration***). Pursuant to that Request for Provisional Measures, the Claimant seeks to enjoin proceedings currently underway in the First Court of First Instance in Civil, Corporate and Agrarian Matters of the Second Circuit of the Judicial Circumscription of the State of Bolivar brought pursuant to Claim dated April 18, 2012, submitted by PDVSA Industrial against Norpro Venezuela (the ***Venezuelan Court Proceedings***).

7. Freshfields Bruckhaus Deringer US LLP, counsel to the Claimant, has asked me to render an opinion on the following issues:

   i. Whether the subject matter of the ICSID Arbitration and the Venezuelan Court Proceedings is the same.

ii. Whether enjoining the Venezuelan Court Proceedings will prejudice the rights of third parties under Venezuelan law.

8. As a practicing lawyer, specialized in constitutional and administrative law, I offer this declaration and opinion based on my experience and knowledge of Venezuelan law, accumulated during more than fifty years of legal academia and practice, the latter mainly in Venezuela. This opinion is also based on my review of several documents provided to me by counsel to the Claimant. I have listed the key documents that form the basis of this opinion in **Appendix A**.

II. JUDICIAL PROCEDURE FOR EXPROPRIATION UNDER VENEZUELAN LAW

9. The Expropriation Law for Reasons of Public or Social Purposes, published in the Official Gazette No. 37.475, dated July 1, 2002 (amended) (*Ley de Expropiación por Causa de Utilidad Pública o Social*) (the ***Expropriation Law***) applies to all expropriations in Venezuela, except where a specific law or Treaty overrides some or all of its provisions.

10. Expropriation, as defined in Article 115 of the Venezuelan Constitution,[1] as well as Article 2 of the Expropriation Law,[2] is understood by

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[1] "***Artículo 115. Se garantiza el derecho de propiedad***. Toda persona tiene derecho al uso, goce, disfrute y disposición de sus bienes. La propiedad estará sometida a las contribuciones, restricciones y obligaciones que establezca la ley con fines de utilidad pública o de interés general. ***Sólo por causa de utilidad pública o interés social, mediante sentencia firme y pago oportuno de justa indemnización, podrá ser declarada la expropiación de cualquier clase de bienes***." Constitution of the Bolivarian Republic of Venezuela (1999), Article 115 (**Exhibit R-15**).

[2] "*Artículo 2º*. La expropiación es una institución de derecho público, mediante la cual el Estado actúa en beneficio de una causa de utilidad pública o de interés social, ***con la finalidad de obtener la transferencia forzosa del derecho de propiedad o algún otro derecho de los particulares, a su patrimonio, mediante sentencia firme y pago oportuno de justa indemnización***." Ley de Expropiación por causa de utilidad pública o social (***Expropriation Law***), Article 2 (**Exhibit R-4**). This Law replaced the previous one of 1947, although following the same principles: *Gaceta Oficial* Nº 22.458 of 6 November 1947, modified by Decree Law Nº 184 of 25 April 1958, *Gaceta Oficial* Nº 25.642 of 25 April 1958.

Venezuelan law to be an "extraordinary means to acquire property."[3] Expropriation is conceived as a public law institution which must be "subjected by the legislator to the compliance of specific formalities,"[4] the purpose of which is to ensure the compulsory transfer to the State of private property or of any other private right by means of a judicial decision and the prompt payment of just compensation.

11. As stated by the Venezuelan Supreme Court (the ***Supreme Court***) in 1965, "expropriation is developed through a special procedure *whose essential purpose is to achieve the transfer of property of the expropriated good*" from private hands to the State.[5] The Supreme Court later confirmed that "any expropriation supposes just compensation"; therefore, the function of the expropriation court *is limited to declaring the need for the State to acquire the whole or part of the property, or any other right, to establish the value of the expropriated good, and assure its payment to the expropriated party*.[6]

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3 As defined by the Federal and Cassation Court since 1948: "La expropiación es un medio extraordinario de adquirir, sometido por el Legislador al cumplimiento de determinadas formalidades; ella es una institución de derecho público en el cual no tienen aplicación los principios del derecho común […]" "dada la naturaleza extraordinaria del derecho a expropiar, es de fundamental interés público el que se verifique la expropiación con estricta sujeción a las disposiciones de la ley que la reglamenta" y que con el procedimiento el Tribunal declare "la necesidad de adquirir el todo o parte de la propiedad." Decision of the Federal and Cassation Court, 29 October 1948, *Compilación Legislativa 1948-1949*, Anuario 1948, p. 789 (*See* Allan R. Brewer-Carías, *Jurisprudencia de la Corte Suprema 1930-1974 y Estudios de Derecho Administrativo, Volume VI, La Propiedad y la Expropiación por causa de utilidad pública e interés social*, Ediciones del Instituto de Derecho Público, Facultad de Derecho, Universidad Central de Venezuela, Caracas 1979, pp. 394- 395) (***Jurisprudencia de la Corte Suprema***) (**Appendix B**).

4 *Id.*

5 "La expropiación se desenvuelve a través de un procedimiento especial cuyo objeto esencial es llegar a la transferencia de dominio del bien expropiado." Decision of the Politico-Administrative Chamber, Supreme Court of Justice, 24 February 1965, *Gaceta Oficial* No. 27676 of 24 February 1965, p. 205.971, (***Jurisprudencia de la Corte Suprema,*** pp. 348 – 350) (**Appendix B**).

6 En juicio de expropiación "la función del Juez se limita a la declaratoria de la necesidad de adquirir el todo o parte de la propiedad, o algún otro derecho, al correspondiente avalúo y al pago, puesto que toda expropiación supone una justa compensación." Decision of the Politico-Administrative Chamber, Supreme Court

12. The Expropriation Law protects private property rights by requiring a detailed procedure for the State to take possession of the expropriated assets, which may not be transferred to the State until compensation is paid. This expropriation procedure has five parts:

(i) *First*, the National Assembly must declare through a statute that specific activities or assets are considered to be of public interest or social purpose (*utilidad pública o social*) (Articles 7.1 and 13).

(ii) *Second*, the Executive Power must issue and publish in the *Official Gazette* a decree declaring the need to acquire specific assets (*i.e.*, land) to develop specific activities previously declared of public or social purpose (Article 5; Article 7.2). Upon the publication of this decree, compensation is due to the owner of the expropriated property (Article 2).

(iii) *Third*, the Expropriating Entity must commence an amicable settlement procedure conducted under Venezuelan administrative law (Article 22).

(iv) *Fourth*, if no amicable agreement is reached, the Expropriating Entity must commence a judicial expropriation process. The court will declare the need to acquire the property or any other right (Article 34) and determine, with the help of an Evaluation Committee (Article 19), the amount of the compensation for the expropriation (Articles 34-44), and provide for its payment (Article 45).

(v) *Finally*, only after payment of just compensation ordered by the court, the Expropriating Entity may take possession of the expropriated property (Article 45).

13. According to the Expropriation Law, the Expropriating Entity may only take possession of the expropriated assets before paying the definitive

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of Justice, 10 June 1968, in *Gaceta Forense* No. 60, 1968, pp. 173-174 (p. 374). *See also* Decision of the Politico-Administrative Chamber, Supreme Court of Justice, 29 April 1969, in *Gaceta Forense* No. 64, 1969, pp. 133-134 (***Jurisprudencia de la Corte Suprema,*** p. 427) (**Appendix B**).

due compensation in urgent cases through the procedure of the "anticipatory occupancy." Even then, it may only take possession after posting the value of those assets (as determined in the proceeding before the court) with the court (Article 56).

14. I understand that, contrary to the requirements of the Expropriation Law, in the present case, the Expropriating Entity took possession of Norpro Venezuela's assets prior to the commencement of the procedures outlined above, and thus, prior to the determination and payment of compensation. As a result, the only outstanding purpose of the ongoing judicial proceedings in Venezuela is to set the amount of compensation due for the expropriation which already occurred. Once the compensation is set by the court currently seized of the matter, that decision on compensation will be binding and enforceable in Venezuela.

15. It is my understanding that the claim in the ICSID Arbitration is also for compensation in relation to the same assets that are the subject of the Venezuelan Court Proceedings. It is my further understanding that the subject matter of the ICSID Arbitration is the compensation owed to the Claimant in respect of the expropriation of the same assets that are the subject of the Venezuelan Court Proceedings.

16. Based on these understandings, it is my opinion that the subject matter of the ICSID Arbitration and the subject matter of the Venezuelan Court Proceedings is identical.

III. THIRD PARTY RIGHTS IN VENEZUELAN EXPROPRIATION PROCEEDINGS

A. Parties Which May Participate in Expropriation Proceedings

17. Article 26 of the Expropriation Law mandates that the court publish an order summoning parties with an interest in the property being expropriated to participate in the judicial expropriation proceeding. Interested parties include the "alleged owners, holders, tenants, creditors and, in general, anyone who *might have any rights over the asset* concerned." This includes third parties, even those unknown at the time of

the summons, which allegedly possess rights regarding the object of the expropriation.[7]

18. In order to participate in the judicial expropriation proceeding, a third party must file before the court "proof of his right regarding the object of the expropriation, a requirement without which he cannot file any claim."[8] This documentary proof of a claim, if needed, might first need to be obtained from the courts of ordinary civil jurisdiction; in such cases, only after presenting its case and obtaining such proof from the general civil courts may a third party present a claim in the judicial ex-

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7 This concept makes the most sense with respect to real property, which is the basis upon which the Expropriation Law was originally drafted. Decision of the Politico-Administrative Chamber, Supreme Court of Justice, 10 June 1963, in *Gaceta Forense* No. 40, 1963, pp. 340-343 (***Jurisprudencia de la Corte Suprema,*** pp. 422, 423). The Court has decided that ("[que no] deben tenerse como partes en este proceso, tanto las personas mencionadas en la solicitud, como las desconocidas que comparecen en virtud de la citación oficiosa contenida en los Edictos públicos, por el solo hecho de su comparecencia," except when they allege rights with regard to the expropriated assets.) (**Appendix B**).

In a particular expropriation procedure, the Supreme Court argued that "as it is established that in the present case the parties were only the expropriating entity (*Compañía Anónima Centro Simón Bolívar C.A.*) and the company Nelson SA that is the expropriated person, the Municipality of the Federal District does not have standing in order to demand the nullity and reposition of the procedure of expropriation." Decision of the Politico-Administrative Chamber, Supreme Court of Justice, 12 March 1970, in *Gaceta Forense* No. 67, 1970, pp. 253-254 (***Jurisprudencia de la Corte Suprema,*** p. 389) ("Y como de autos consta que son partes en el presente proceso únicamente la Compañía Centro Simón Bolívar C.A., entidad expropiante, y la empresa Nelson S.A., que es la persona expropiada, no tiene, la Municipalidad del Distrito federal, cualidad para pedir la nulidad y la reposición del presente proceso de expropiación.") (**Appendix B**).

8 "Para poder hacerse parte o hacer oposición en el juicio de expropiación, es necesario que quien tal pretensión tenga, traiga a los autos la prueba de su derecho a la cosa sobre que versa la expropiación, requisito sin el cual no podría hacerse uso de ningún alegato." Decision of the Politico-Administrative Chamber, Supreme Court of Justice, 10 June 1963, in *Gaceta Forense* No. 40, 1963, pp. 340-348 (***Jurisprudencia de la Corte Suprema,*** p. 422) (**Appendix B**).

propriation proceeding.[9] The court considering the expropriation claim must then examine the claim and, if applicable, admit it.[10]

B. Matters Excluded from the Jurisdiction of the Expropriating Court

19. The Supreme Court of Justice has emphasized that the scope of the jurisdiction of the expropriation courts is limited. The expropriating court "can only decide on matters related to the expropriation in itself, without being able to decide in the expropriation proceeding questions that are ruled by general or specific provisions of the jurisdiction of the first instance courts.[11] Under the Expropriation Law, expropriated parties may only oppose the expropriation on two grounds:[12] (a) illegality

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9 In the case of questions regarding property, "Tales cuestiones exigen la prueba de hechos que con propiedad deben ser presentados y probados ante los jueces de la jurisdicción ordinaria. Y es con posterioridad a la decisión de la expresada esfera judicial que vendrán los autos a este Supremo Tribunal a fin de decidir a quién y en qué forma corresponde hacer el pago." Decision of the Politico-Administrative Chamber, Supreme Court of Justice, 29 April 1969, in *Gaceta Forense* No. 64, 1969, pp. 133-134 (***Jurisprudencia de la Corte Suprema,*** p. 428) (**Appendix B**).

10 In order to admit or not admit a person as a party in the expropriation procedure, "debe aducir la prueba del derecho de propiedad o de otro derecho real sobre la cosa, prueba que tendrá que ser fundamentalmente documental, ser examinada por el tribunal y admitida como fehaciente." Decision of the Politico-Administrative Chamber, Supreme Court of Justice, 26 April 1965, *Gaceta Oficial* No. 27.738.17 May 1965, p. 206.468 (***Jurisprudencia de la Corte Suprema,*** p. 426). *See also* Decision of the Federal and Cassation Court, 28 February 1935, Memoria 1936, pp. 172-175 (***Jurisprudencia de la Corte Suprema,*** pp. 396-397) ("[…] para poder hacer oposición a las solicitudes de expropiación es necesario que quien la intente aduzca la prueba de su derecho a la cosa sobre que versa la expropiación y que sin este requisito no podrá hacerse uso de ninguna defensa.") (**Appendix B**).

11 On matters of the expropriation proceeding, "la unidad del proceso queda integrada por la decisión de aquellas cuestiones que se refieran a la expropiación en sí, sin que se puedan decidir en el juicio de expropiación, cuestiones que interesen o deban regirse por las reglas generales o específicas de la competencia de los Tribunales de Instancia." Decision of the Federal and Cassation Court, Federal Chamber, 1 February 1947, *Memoria 1947,* pp. 122-124 (***Jurisprudencia de la Corte Suprema,*** p. 544) (**Appendix B**).

12 It is not within the expropriation court's competence to determine who is the owner or has a right regarding the expropriated property. As the Supreme Court ruled: "[…] tal sería una cuestión de dominio, que es ajena al procedimiento de expropia-

(violation of law), or (b) requesting total, rather than partial, expropriation where partial expropriation would make the expropriated land useless or improper for the use to which it is devoted (Article 30).[13]

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ción y que no podría, en consecuencia, a causa de esa limitación legal mencionada, ser dilucidada en el proceso mismo de expropiación, dentro del cual sólo admite la Ley la oposición por causas expresamente señaladas." Decision of the Politico-Administrative Chamber, Supreme Court of Justice, 30 March 1960, in *Gaceta Forense* No. 27, 1968, p. 168 (***Jurisprudencia de la Corte Suprema,*** pp. 420- 421) (**Appendix B**).

13 As was very clearly decided by the Supreme Court, according to the special provisions that are applicable to expropriation proceedings, in addition to decisions on the need to expropriate determined assets, on their evaluation and on the payment of compensation, "the expropriation courts can only decide the opposition to the expropriation claim based on violation of the law, or on the fact that the expropriation must be total, because the partial expropriation makes the land useless or makes it improper for its given use; the expropriation courts are not able to decide other claims filed by interested persons related with property rights […] regarding the assets being expropriated." Decision of the Politico-Administrative Chamber, Supreme Court of Justice, 24 April 1963, in *Gaceta Forense* No. 40, 1963, p. 153 (***Jurisprudencia de la Corte Suprema,*** p. 421) ("De conformidad con las normas especiales que rigen el procedimiento expropiatorio, los Tribunales sólo pueden decidir las oposiciones a la solicitud de expropiación que se funden en violación de ley, o en que la expropiación debe ser total, pues la parcial inutiliza la finca o la hace impropia para el uso a que está destinada; no puede, en consecuencia, el órgano jurisdiccional, entrar a decidir otros alegatos de los interesados relativos, como en el presente caso, a derechos de propiedad sobre el inmueble cuya expropiación se ha demandado.") (**Appendix B**).

Consequently, Supreme Court jurisprudence since 1947 has held that one must not mix the opposition to the claim for expropriation, which can only be brought by parties claiming rights to the expropriated assets, "with the ordinary procedural means that such persons have in order to obtain the judicial declaration of their rights or credits and their payment. The first is part of the expropriation proceeding, the second are to be decided between the expropriated party and its creditors, without intervention of the expropriating entity that has only to deposit the price over which claims can be filed, without interruption of the expropriating proceeding." Decision of the Federal and Cassation Court, Federal Chamber, 1 February 1946, in *Memoria* 1947, pp. 122-124 (***Jurisprudencia de la Corte Suprema,*** p. 544) ("No debe confundirse la oposición a la solicitud de expropiación a que se refiere el artículo 24 de la ley respectiva, oposición que pueden formular las personas que tuvieren un derecho real sobre la cosa expropiada, y que se limita exclusivamente a los motivos señalados en forma taxativa en el artículo 23 *ejusdem*, con las vías procesales ordinarias que tienen esas mismas personas para lograr el reconocimiento de

20. Apart from addressing these claims, the expropriating court has no jurisdiction to decide any other controversies among individuals, or between a third party and the expropriated party, even when they are related to the expropriated assets.[14] Consequently, even in such cases the expropriating court may not rule on rights or controversies related to the expropriated property because to do so would represent an improper invasion of the jurisdiction of other courts.[15] As pointed out by the Su-

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sus derechos o créditos y el pago correspondiente. La primera integra el juicio mismo de expropiación, las segundas se deciden entre el expropiado y sus acreedores, sin intervención del expropiante, quien debe únicamente consignar el precio sobre el cual se ejercerán las acciones de éstos, las cuales "no interrumpirán el juicio de expropiación ni podrán impedir sus efectos," a tenor de lo dispuesto en el artículo 6 de la Ley respectiva.") (**Appendix B**).

14 For instance, the Supreme Court has ruled that privilege creditors as mortgage creditors cannot pretend that "the exceptional judicial competence on expropriation matters could reach the point to decide, in the same process, on the existence, liquidity, and maturity of the respective credits, on which matters decisions from the courts of first instance must be taken." Decision of the Federal and Cassation Court, Federal Chamber, 1 February 1947, *Memoria 1947,* pp. 122-124 (***Jurisprudencia de la Corte Suprema,*** p. 544) ("Los derechos de los acreedores se trasladan al precio, por mandato del artículo 7 de la citada Ley de Expropiación y 1.865 del Código Civil, para el caso de los acreedores privilegiados o hipotecarios, quienes no deben pretender que la competencia excepcional de la Corte en los procesos de expropiación llegue hasta decidir, en el mismo proceso, acerca de la existencia, liquidez y exigibilidad de sus respectivos créditos, sobre cuyos particulares debe recaer decisión de los Tribunales de Instancia.") (**Appendix B**).

15 In other words, as pointed out by the Supreme Court, "it is not allowed for the expropriating court to decide on matters different to those established in the Law," for which there exist different procedures and tribunals. Decision of the Politico-Administrative Chamber, Supreme Court of Justice, 26 April 1965, *Gaceta Oficial* No. 27.738.17 May 1965, p. 206.468 (***Jurisprudencia de la Corte Suprema,*** pp. 425-426) ("No está permitido al Juzgador entrar a decidir otras cuestiones diferentes a las que la ley señala, ya que, para las mismas, existen procedimientos y Tribunales diferentes. En tal sentido no es de la competencia de este Supremo Tribunal conocer y decidir sobre las defensas opuestas en el curso de este procedimiento en torno a quién o quiénes corresponde la propiedad de parte de los bienes cuya expropiación se ha solicitado." El juez de la expropiación debe "dejar a la jurisdicción ordinaria la determinación sobre la procedencia o improcedencia de los derechos de propiedad o de otra naturaleza que se aleguen o se pretendan sobre los bienes acerca de los cuales versa la solicitud de expropiación.") (**Appendix B**).

See also Decision of the Politico-Administrative Chamber, Supreme Court of Justice, 12 December 1963, *Gaceta Oficial* No. 905 Extra.4 May 1963, pp. 26-27

preme Court, allowing individuals to use this expropriation procedure to resolve judicial claims involving the parties to a judicial expropriation proceeding (as opposed to the expropriated assets), instead of seeking resolution through general civil courts, would "pervert" the expropriation, an institution that is founded on the subordination of individual interests to the collective interest.[16]

21. According to the Supreme Court: "The Law does not prevent the filing of actions on property matters regarding the assets or land that has been expropriated, but those actions must be filed before ordinary courts … without interrupting the expropriation proceeding of affecting its effects."[17] That is, any matter regarding property rights and ancillary

(***Jurisprudencia de la Corte Suprema,*** p. 425) ("[H]a sido jurisprudencia, ya reiterada, constante y uniforme, tanto de la extinguida Corte Federal, como de este Supremo Tribunal, que la Sala ratifica en esta oportunidad, considerar que el Juez o Tribunal de la Expropiación es incompetente para juzgar, conjuntamente con el procedimiento expropiatorio, las controversias suscitadas en el mismo, entre particulares, que aleguen derechos sobre la cosa objeto de la misma expropiación. Por manera que no podría la Sala, sin arrebatar a otros Tribunales su propia competencias sobre la materia, entrar a dirimir, en esta litis, las controversias que respecto de la propiedad de las tierras objeto de la expropiación se han suscitado en su secuela."); Decision of the Politico-Administrative Chamber, Supreme Court of Justice, 1 February 1967, in *Gaceta Forense* No. 55, 1968, pp. 55-56 (***Jurisprudencia de la Corte Suprema,*** p. 426); Decision of the Politico-Administrative Chamber, Supreme Court of Justice, 23 January 1969, in *Gaceta Forense* No. 63, 1969, p. 56 (***Jurisprudencia de la Corte Suprema,*** p. 427); Decision of the Politico-Administrative Chamber, Supreme Court of Justice, 11 June 1969, in *Gaceta Forense* No. 64, 1969, pp. 299 (***Jurisprudencia de la Corte Suprema,*** p. 428); Decision of the Politico-Administrative Chamber, Supreme Court of Justice, 24 April 1973, *Gaceta Oficial* No. 16135 Extra, 26 September 1973, p. 33 (***Jurisprudencia de la Corte Suprema,*** p. 429) (**Appendix B**).

16 Decision of the Politico-Administrative Chamber, Supreme Court of Justice, 16 June 1963, in *Gaceta Forense* No. 40, 1963, pp. 340-343 (***Jurisprudencia de la Corte Suprema,*** pp. 424) ("Permitir que los particulares hagan uso en esta emergencia de los recursos del juicio ordinario, sería pervertir la institución misma de la expropiación, fundada en la subordinación del interés individual al interés colectivo y dejar sin efecto el principio de que ninguna persona puede tener derechos irrevocablemente adquiridos contra una Ley de Utilidad Pública o Social.") (**Appendix B**).

17 Decision of the Politico-Administrative Chamber, Supreme Court of Justice, 30 March 1960, in *Gaceta Forense* No. 27, 1968, pp. 168 (***Jurisprudencia de la Corte Suprema,*** p. 421) ("La Ley no impide que se intenten acciones reales sobre el fundo que se trata de expropiar; pero esas acciones han de incoarse en procesos ordinarios,

matters related to the expropriated assets must be resolved and decided by the ordinary civil courts that are the only courts with jurisdiction to examine claims relating to property[18] and the only courts competent to rule on those property rights.[19]

22. As a result, judicial expropriation proceedings are not the exclusive, or even appropriate, forum for resolution of such conflicts or rights. Any claim that a third party may have against the "expropriated party" with respect to the expropriated assets must first be filed before the ordinary commercial or civil courts, not the judicial proceedings initiated under Article 22 of the Expropriation Law.[20] Only after their rights have been definitively proven in the civil ordinary courts, which have exclusive competence over such claims,[21] may third parties seek compensation

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sin que, en ningún caso, y de acuerdo con el artículo 7 de la Ley de la materia, se interrumpa el juicio de expropiación ni impida sus efectos.") (**Appendix B**).

18 The Supreme Court in 1968, regarding claims made in an expropriation procedure by the proprietor and third parties with mortgage credit, held that "[l]as precitadas cuestiones y su decisión implican materias acerca de la propiedad o de los accesorios del bien expropiado, las que no corresponde ciertamente resolver a esta Sala en un juicio de naturaleza como es el de la expropiación […]. Tales cuestiones exigen la prueba de hechos que, con propiedad deben ser presentados y probados ante los jueces de la jurisdicción ordinaria." Decision of the Politico-Administrative Chamber, Supreme Court of Justice, 10 June 1968, in *Gaceta Forense* No. 60, 1968, pp. 173-174 (***Jurisprudencia de la Corte Suprema,*** p. 374) (**Appendix B**).

19 Decision of the Politico-Administrative Chamber, Supreme Court of Justice, 10 June 1963, in *Gaceta Forense* No. 40, 1963, pp. 340-348 (***Jurisprudencia de la Corte Suprema,*** p. 422) ("En todo caso, sería la sentencia del correspondiente juicio ordinario que en último término podría declarar esos derechos que se alegan.") (**Appendix B**).

20 Decision of the Politico-Administrative Chamber, Supreme Court of Justice, 16 June 1963, in *Gaceta Forense* No. 40, 1963, pp. 340-343 (***Jurisprudencia de la Corte Suprema,*** p. 424) ("El Juez de Primera Instancia, no podia pronunciarse sobre la validez o nulidad de los derechos alegados por las personas que comparecieron en virtud de la citación, ni sobre la legitimidad de estas últimas, por ser ella materia extraña al procedimiento especial de la expropiación.") (**Appendix B**).

21 Decision of the Politico-Administrative Chamber, Supreme Court of Justice, 16 June 1963, in *Gaceta Forense* No. 40, 1963, pp. 340-343 (***Jurisprudencia de la Corte Suprema,*** p. 423) ("Con relación a lo expuesto, la Corte observa que la discusión planteada respecto a la personería de quienes intervienen en este proceso, es materia que no puede decidir el Juez de la expropiación sin invadir el fuero de los Tribunales ordinarios, a quienes compete de manera exclusiva, el conocimiento de

only regarding the amount due to the expropriated party to be paid in the judicial expropriation proceedings[22] (Article 11, Expropriation Law).

C. Limitations on Third Party Participation in Expropriation Proceedings and the Exclusion of any "*Tercería*" Claim

23. The aforementioned has a direct procedural consequence for judicial expropriation proceedings, limiting any third party intervention to those individuals which can claim rights regarding the expropriated assets. Such parties must provide proof of these rights, obtained, if necessary, through judgments of the ordinary civil courts, before they may enforce their sole right in the expropriation proceeding: to be paid for these recognized rights with part of the amount to be paid to the expropriated party as compensation for the expropriated assets, once the amount is entrusted with the court.

24. The Supreme Court has declared that the expropriation court cannot rule on third party property rights or other rights because: (*a*) those third parties are participating in the procedure only as a result of the judge's public summons (*edicto*); (*b*) as such, those third parties have argued problems regarding assets that are the object of the expropriation procedure; (*c*) addressing such claims is outside the scope of the expropriation proceeding, which is a special action and should not be mixed in with ordinary civil matters; and (*d*) third parties can only claim their rights (as a preferred creditor) regarding the expropriated assets on the amount to be paid as compensation to the expropriated party. This compensation is entrusted with the court (Article 45, Expropriation Law) to guarantee their rights.[23]

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los problemas relacionados con la procedencia o improcedencia de las acciones y defensas opuestas por los interesados referidas como están todas ellas a cuestionar los títulos y linderos de la finca cuya expropiación se pide.") (**Appendix B**).

22 Expropriation Law, Article 11 (**Exhibit R-4**).

23 Decision of the Politico-Administrative Chamber, Supreme Court of Justice, 3 December 1969, *Gaceta Oficial* No. 1447, 15 December 1969, p. 6 (***Jurisprudencia de la Corte Suprema,*** p. 429) ("la Corte observa que nada puede decidir respecto a los derechos inmobiliarios de los Sucesores de Nicasio Guache, Inversiones Santa Cruz y Comercial Nueva Esparta por las razones siguientes: a) porque las personas

25. The Supreme Court has acknowledged that the expropriation procedure established in the Expropriation Law characterized by its celerity, does not allow any claim on "*demanda en tercería.*"[24] As a matter of principle, therefore, it is not procedurally proper for a party to file an action against the expropriated party in an expropriation proceeding, including a "*demanda en tercería*," which I understand has been filed by Outstaffing Corporation in the proceeding of expropriation of the assets of Norpro Venezuela.[25]

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nombradas son terceros que intervienen en el proceso en virtud del edicto de emplazamiento librado por el Juez; b) porque en tal condición, ellas, así como los representados por el defensor de oficio, han planteado problemas de propiedad sobre los fundos cuya expropiación se pide; c) porque conflictos de esta índole están fuera del ámbito del juicio de expropiación que no permite la acumulación de la acción especial que en él se ejerce con la acción ordinaria que pretende hacerse valer en el caso; d) porque los terceros colocados en la situación procesal aludida sólo pueden, por la vía del juicio ordinario, hacer valer sus pretensiones sobre el precio que es la garantía exclusiva de sus derechos.") (**Appendix B**). *See also* Expropriation Law, Article 45 (**Exhibit R-4**).

24 "El procedimiento especial de expropiación pautado en el Título III de la Ley de Expropiación por Causa de Utilidad Pública o Social, caracterizado por las condiciones de celeridad que le son inherentes, no permite dentro de él, la *demanda de tercería*. La referida Ley confiere facultad, a los terceros que se crean con derecho sobre el precio de lo expropiado, para proceder en la forma estatuida en los artículos 42, 44 y 45 *ejusdem* en defensa de sus intereses." Decision of the Politico-Administrative Chamber, Supreme Court of Justice, 21 January 1963, in *Gaceta Forense* No. 39, 1963, p. 31 (***Jurisprudencia de la Corte Suprema,*** p. 431) (**Appendix B**).

25 To be clear, it is my understanding that Outstaffing Corporation is not a preferred creditor and does not hold a lien on any assets or property of Norpro Venezuela. Accordingly, such a claim – which is not with respect to any rights in the expropriated assets, but relates to a debt allegedly owed by Norpro Venezuela – is not appropriately brought in the expropriation proceeding. Such a claim, if valid, should be brought directly against Norpro Venezuela under the terms of the parties' agreement, or in absence of such regulation, before the courts of ordinary jurisdiction. Third interested party writ (*tercería*) presented by Outstaffing Corporation, dated May 22, 2013 (excerpt) (**Exhibit R-072**).

26. As stated by the Supreme Court, any other procedure would mean inserting a procedural institution for the resolution of private interests into the public law structure of the expropriation procedure.[26]

27. For the avoidance of doubt, any claim that Outstaffing Corporation might have against Norpro Venezuela would not be prejudiced by the termination of the judicial expropriation proceedings.[27] The current proceeding is meant to deal with matters completely separate from claims for the payment of debts of an investor whose investment has been expropriated.

I remain available to answer any additional questions the Tribunal might have.

Dated: June 10, 2014

New York, NY

I affirm that the foregoing is true to the best of my knowledge.

Allan R. Brewer-Carías

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[26] Decision of the Federal and Cassation Court, Federal Chamber, 1 February 1946, *Memoria 1947* pp, 122-124 (p. 545). Similarly: Decision of the Federal and Cassation Court, 1 February 1947, *Actuaciones 1948*, p. 124 (***Jurisprudencia de la Corte Suprema,*** p. 556) ("Lo anteriormente expuesto desvirtúa, a la vez, el calificativo de "tercería" que se quiere aplicar a la intervención del acreedor hipotecario en este juicio, calificación que, por lo demás, es improcedente, ya que con ella se pretende incrustar, sin que se den los sustentos especiales previstos en la Ley, una institución procesal en que se ventilan intereses privados, en una estructura de derecho público eminente como es la del juicio de expropiación por causa de utilidad pública.") (**Appendix B**).

[27] Outstaffing Corporation may still submit its claim to a forum with jurisdiction to hear the dispute. This would allow Norpro Venezuela the appropriate opportunity to defend itself against Outstaffing Corporation – a possibility not afforded by the judicial expropriation proceeding given that Outstaffing Corporation is not and could not be made a party to that proceeding.

15.

ICSID CASE NO. ARB/12/13: *SAINT-GOBAIN PERFORMANCE PLASTICS EUROPE* (CLAIMANT) -v- *THE BOLIVARIAN REPUBLIC OF VENEZUELA* (RESPONDENT)

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

SECOND LEGAL EXPERT OPINION OF ALLAN R. BREWER-CARÍAS

11 JUNE 2014

I, ALLAN R. BREWER-CARÍAS, hereby declare that the following is true and correct:

28. I have been a member in good standing of the Venezuelan Federal District Bar since 1963. Since 1973, I have been a partner of *Baumeister & Brewer*, a law firm located at *Torre América, PH, Avenida Venezuela*. I specialize in public law, particularly constitutional, administrative, and public economic law, which includes mining and hydrocarbons law. Currently, I am a resident of the United States of America, in the city of New York, NY.

IV. INTRODUCTION

A. Qualifications

29. In 1962, I received my law degree from *Universidad Central de Venezuela* (Central University of Venezuela). I performed post-graduate studies in France, at the then University of Paris (1962-1963), and in 1964 I received a Doctorate in Law (D.J.) from the Central University of Venezuela.

For a detailed description of my previous teaching experience and publications, I refer you to my previous declaration dated June 10, 2014. In addition to my academic endeavors, I am a practicing lawyer and a member of the Venezuelan Academy of Social and Political Sciences, where I served as President from 1997 to 1999. In 1981, I was awarded the Venezuelan Social Sciences National Prize.

31. As noted in my previous declaration, I have published many books and articles on Venezuelan law. Of particular relevance to the issues arising in this case are my work on Venezuela's administrative law and expropriation law, which includes my recent books *Administrative Law in Venezuela* (2013) and *Constitutional Law in Venezuela* (2012). With respect to the expropriation law in particular, I have published the leading commentary in 1966, titled *La expropiación por causa de utilidad pública o interés social (jurispridencia – doctrina administrative – legislación)* (Expropriation for reasons of public utility or social interest (jurisprudence – administrative doctrine – legislation)). I also published the book *Jurisprudencia de la Corte Suprema 1930-1974 y Estudios de Derecho Administrativo* (Jurisprudence of the Supreme Court 1930-1974 and Studies of Administrative Law), (6 volumes), Volume VI of which is titled: *Propiedad y la Expropiación por causa de utilidad pública e interés social* (Property and Expropriation for reasons of public or social utility). I was also the coordinator and co-author of the book *Ley de Expropiación por causa de utilidad pública o social* (Expropriation Law for reasons of public or social utility), published in 2002, which includes comments on the Law currently in force. On matters of administrative procedure, I published the leading commentary in 1982, titled *El derecho administrativo y la Ley Orgánica de Procedimientos Administrativos* (Administrative Law and the Organic Law on Administrative Procedure). I also published the book *Prin-*

cipios del procedimiento administrativo (1992), and *Principios del Procedimiento administrativo en Latinoamérica* (Principles of Administrative Procedure in Latin America) (2003).

B. Scope of Opinion

32. This opinion is rendered in connection with the Claimant's Reply in ICSID Case No. ARB/12/13, *Saint-Gobain Performance Plastics Europe v. The Bolivarian Republic of Venezuela* (the ***ICSID Arbitration***). Pursuant to that Reply, the Claimant seeks damages for the expropriation of its investment in Norpro Venezuela, C.A. (***Norpro Venezuela***).

33. Freshfields Bruckhaus Deringer US LLP, counsel to the Claimant, has asked me to render an opinion on the following issues:

    i. Whether Venezuela has complied with the Venezuelan Constitution and other applicable laws in connection with the expropriation of Saint-Gobain's investment in Norpro Venezuela.

    ii. The appropriate administrative procedure for the issuance of VAT reimbursement certificates to Norpro Venezuela.

34. As a practicing lawyer, specialized in constitutional and administrative law, I offer this declaration and opinion based on my experience and knowledge of Venezuelan law, accumulated during more than fifty years of legal academia and practice, the latter mainly in Venezuela. This opinion is also based on my review of several documents provided to me by counsel to the Claimant. I have listed the documents received from counsel to the Claimant that are relevant to this opinion in **Appendix A**.

V. Judicial Procedure for Expropriation under Venezuelan Law

A. Applicable Law

35. Under Venezuelan law, Article 115 of the Constitution,[1] after expressing that "private property is guaranteed" and defining the content of

[1] "*Artículo 115. Se garantiza el derecho de propiedad*. Toda persona tiene derecho al uso, goce, disfrute y disposición de sus bienes. La propiedad estará sometida a

property rights, establishes that expropriation of any kind of asset can only be declared for a public purpose or social interest by means of a definitive judicial decision and the timely payment of just compensation.

36. The Expropriation Law for Reasons of Public or Social Purposes, published in the Official Gazette No. 37.475, dated July 1, 2002 (amended) (*Ley de Expropiación por Causa de Utilidad Pública o Social*) (the ***Expropriation Law***) governs expropriations in Venezuela.[2] Under the Venezuelan Constitution, as well as the Expropriation Law, expropriation is a public law institution which may be used only as an extraordinary means for the State to acquire private property.[3] Under Venezuelan law, the Expropriation Law applies to all expropriations effected by the Venezuelan government, except where a specific law or Treaty overrides some or all of its provisions. Here, the "Agreement between the Government of the French Republic and the Government of the Bolivarian Republic of Venezuela on Reciprocal Encouragement and

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las contribuciones, restricciones y obligaciones que establezca la ley con fines de utilidad pública o de interés general. *Sólo por causa de utilidad pública o interés social, mediante sentencia firme y pago oportuno de justa indemnización, podrá ser declarada la expropiación de cualquier clase de bienes.*" Constitution of the Bolivarian Republic of Venezuela (1999), Article 115 (**Exhibit R-19**) (emphasis added). On matters of expropriation as a guarantee of private property, the 1999 Constitution is generally consistent with the guarantees afforded in the previous Constitutions of 1947 and 1961.

2 The 2002 Expropriation Law amended the previous Law of 1947, while preserving the general principles and orientation as a guarantee of the right to property contained in the previous statute of 1947, published in *Gaceta Oficial* Nº 22.458 of 6 November 1947, modified by Decree Law Nº 184 of 25 April 1958, *Gaceta Oficial* Nº 25.642 of 25 April 1958. Expropriation Law for Reasons of Public or Social Purposes, published in the Official Gazette No. 37.475, dated July 1, 2002 (**Exhibit R-4**). Consequently, all the related jurisprudence developed by the Supreme Court in the preceding decades, including those cited and quoted in this Opinion, remain valid and applicable.

3 "*Artículo 2º*. La expropiación es una institución de derecho público, mediante la cual el Estado actúa en beneficio de una causa de utilidad pública o de interés social, *con la finalidad de obtener la transferencia forzosa del derecho de propiedad o algún otro derecho de los particulares, a su patrimonio, mediante sentencia firme y pago oportuno de justa indemnización*." Expropriation Law, Article 2 (**Exhibit R-4**).

Protection of Investments," signed July 2, 2001 and entered into force on April 15, 2004, published in the Official Journal of the French Republic No. 102, April 30, 2004, and in the Official Gazette of the Bolivarian Republic of Venezuela No. 37,896, March 11, 2004 (the ***Treaty***) is such a *lex specialis*. Therefore, to the extent there is any discrepancy between the terms of the Expropriation Law and the Treaty, the Treaty is applicable.

37. Nevertheless, as a matter of Venezuelan law, in general terms, the Expropriation Law and the Treaty are not inconsistent because both require fair, prompt, and adequate compensation to be paid for any expropriation at the time that the State takes possession of the property that the State seeks to expropriate. To be clear, this means that until compensation is paid, the State cannot take possession of the expropriated assets, absent certain urgent circumstances.

38. Under the Expropriation Law, in order to execute a lawful expropriation, the following steps must be carried out in order:

(i) *First*, the National Assembly must declare by statute that the specific activities or assets to be expropriated are of public interest or social purpose (*utilidad pública o social*) (Articles 7.1 and 13).

(ii) *Second*, the Executive must issue and publish in the *Official Gazette* a decree declaring the need to acquire specific assets or activities for the previously-specified public or social purpose (Articles 5 and 7.2). It may also appoint a State entity to carry out the expropriation (the ***Expropriating Entity***).[4]

(iii) *Third*, the Expropriating Entity must commence an administrative amicable settlement procedure (Article 22).

(iv) *Fourth*, if no amicable agreement is reached, the Expropriating Entity must commence a judicial expropriation process in which the court affirms the need to require the specified property or right (Article 34), after the evaluation of the assets by

[4] Upon the publication of this decree, compensation is due to the owner of the expropriated property. Expropriation Law, Article 2 (**Exhibit R-4**).

an Evaluation Commission (Article 19), determines the terms, conditions and compensation for the expropriation (Articles 34-44), and provides for its payment (Article 45).

(v) *Finally*, the Expropriating Entity may take possession of the expropriated property only after the Evaluating Commission has established just compensation and (Article 34) upon its payment, as ordered by the court (Article 45).

39. According to these provisions, the most significant guarantee of private property rights in an expropriation is that the State may not occupy or take over private property before the expropriated assets have been valued by the Evaluation Commission and the State has paid just compensation in cash.

40. Pursuant to the Expropriation Law, the Expropriating Entity may only take possession of the expropriated assets before paying due compensation in urgent cases through an "anticipatory occupation" procedure. Even then, it may only take possession after posting the value of the assets to be expropriated with the court (Article 56) – such value to be determined by an Evaluation Commission in the context of a judicial proceeding.

B. Limited Regime for the Anticipatory Occupation of Expropriated Assets

41. To facilitate public order and the prompt execution of public policy, when a transfer of private property is considered *indispensable and urgent*, and no amicable agreement has been reached with the owner, the Expropriation Law provides that the State may request the anticipatory occupation of the expropriated assets (*ocupación previa*) through a judicial expropriation proceeding.[5] Such an anticipatory occupation re-

[5] The anticipatory occupation regime (*ocupación previa*) was established "by the legislator as a system of procedural guaranties in order to safeguard the interests or rights that could be affected by such measure." The procedure for the anticipatory occupation has the purpose of "anticipar algunos de los efectos de la expropiación mediante un procedimiento expeditivo, en el cual el avalúo del bien expropiado y la consignación de la indemnización estimada por los avaluadores, en conjunción con la inspección ocular a que se refiere el artículo 52 de la Ley de la materia, integran un sistema de garantías procesales establecidas por el Legislador para salvaguardar

quires two preconditions: (i) "the valuation of the expropriated asset by an Evaluation Commission; and [(ii)] the entrusting in the court of an amount equivalent to such just valuation."[6]

42. In particular, procedures applicable to an "anticipatory occupation" are set forth in Article 56 of the Expropriation Law.[7] Pursuant to Article 56, anticipatory occupation is only available where: (i) the public purpose or social interest justifying the expropriation is among those included in Article 14 of the Expropriation Law; (ii) the Executive authority performing the expropriation has qualified it as "urgent," that is "pressing," or "compelling"[8]; (iii) the Evaluation Commission estab-

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los intereses o derechos que pudieren ser afectados por la medida." Decision of the Politico-Administrative Chamber, Supreme Court of Justice, 12 May 1969, in *Gaceta Forense* No. 64, 1969, pp. 157-159 (*See* in Allan R. Brewer-Carías, *Jurisprudencia de la Corte Suprema* 1930-*1974 y Estudios de Derecho Administrativo*, Volume VI, *La Propiedad y la Expropiación por causa de utilidad pública e interés social*, Ediciones del Instituto de Derecho Público, Facultad de Derecho, Universidad Central de Venezuela, Caracas 1979, (***Jurisprudencia de la Corte Suprema***, p. 366)) (**Appendix B**).

6 "La Ley subordina, sin embargo, el ejercicio de ese derecho al cumplimiento de dos requisitos previos: el avalúo del bien de cuya expropiación se trate por una comisión constituida en la forma prevista en el artículo 16 ejusdem, y la consignación de una cantidad igual al monto del justiprecio realizado por los miembros de dicha comisión. Cumplidos esos requisitos, el Tribunal de la causa puede acordar la ocupación previa." Decision of the Politico-Administrative Chamber, Supreme Court of Justice, 12 May 1969, in *Gaceta Forense* No. 64, 1969, pp. 162-164 (***Jurisprudencia de la Corte Suprema***, p. 362) (**Appendix B**).

7 The regulation of the "anticipatory" occupation in the Expropriation Law, "no quiere decir que el procedimiento de la ocupación sea independiente del juicio de expropiación ni que puedan sustanciarse en procesos legales distintos. […] En consecuencia, la expropiación y la ocupación no son juicios independientes el uno del otro que deban, por esta razón, acumularse en un momento dado, para evitar el riesgo de que se dicten sentencias contrarias o contradictorias en un mismo asunto, o sobre asuntos que tengan entre sí conexión. La ocupación es tan sólo una incidencia peculiar del juicio de expropiación, inconfundible con los casos a que se refiere el Artículo 222 del C. de P.C." Decision of the Politico-Administrative Chamber, Supreme Court of Justice, 1 February 1962, in *Gaceta Forense* No. 35, 1963, pp. 70-72 (***Jurisprudencia de la Corte Suprema***, pp. 358-359) (**Appendix B**).

8 "[…] urgency that is, precisely, what justifies and explains the anticipated occupation procedure." Decision of the Politico-Administrative Chamber, Supreme Court of Justice, 15 February 1968, in *Gaceta Forense* No. 59, 1968, p. 113 ("[…]

lished in Article 19 has, at the request of the Expropriating Entity, evaluated the assets and established the amount of the compensation; (iv) the anticipatory occupation has been requested before the expropriation court by the Expropriating Entity, after the expropriation claim has been filed; (v) the Expropriating Entity has deposited the amount of the compensation, as determined by the Evaluation Commission, with the expropriation court; (vi) the expropriation court has previously notified the expropriated party of the amount posted in court according to Article 27, which, if no opposition is made, can be accepted by the expropriated party; and (vi) after such notification, the expropriation court formally decrees or authorises the anticipatory occupation of the expropriated assets.

43. In cases of anticipatory occupation, the amount of compensation determined by the Evaluation Commission and deposited with the court is not definitive. Instead, it is assessed as an "advanced deposit of the probable amount"[9] in order to permit the anticipatory occupation under urgent circumstances, while, at the same time, providing some assurance to the expropriated party for the payment of just compensation. As explained by the Supreme Court, it is "a guarantee for the expropriated party and not the definitive just valuation of the assets."[10] While the amount of compensation made for such purpose cannot be chal-

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urgencia que es, precisamente, lo que justifica y explica el procedimiento de la ocupación previa.") (***Jurisprudencia de la Corte Suprema***, p. 373) (**Appendix B**).

9 In case of urgency, the general provisions on expropriation impose the need that "se haga un avalúo provisional del inmueble, y que, antes de la ocupación, se consigne en el Tribunal el monto de ese avalúo […] siendo la consignación, en el caso de ocupación previa, un depósito adelantado del precio probable del inmueble." Decision of the Politico-Administrative Chamber, Supreme Court of Justice, 21 November 1961, in *Gaceta Forense* No. 34, 1961, pp. 101-102 (***Jurisprudencia de la Corte Suprema***, p. 360) (**Appendix B**).

10 "En cuanto a la cantidad consignada, según el avalúo de los peritos, cabe observar que dicha cantidad a los fines del artículo 51 de la citada Ley de Expropiación, constituye una garantía para el expropiado, y no el justiprecio definitivo." Decision of the Politico-Administrative Chamber, Supreme Court of Justice, 30 January 1968, in *Gaceta Forense* No. 59, 1968, p. 71 (***Jurisprudencia de la Corte Suprema***, p. 373) (**Appendix B**). In the same sense: Decision of the Politico-Administrative Chamber, Supreme Court of Justice, 15 February 1968, in *Gaceta Forense* No. 59, 1968, p. 113 (***Jurisprudencia de la Corte Suprema***, p. 373) (**Appendix B**).

lenged by any of the parties, the expropriated party can always accept the amount deposited for the anticipatory occupation as the just compensation amount for the expropriation of its assets.

44. For the avoidance of doubt, the final expropriation of private property by the State always requires the prior payment of just compensation in cash. The Supreme Court has emphasized the constitutional guarantee of private property rights: "The Constitution requires that expropriation cannot be made without previous payment of the corresponding compensation, combining in that way the public interest with the right to property."[11] Consequently, as the same Supreme Court has affirmed: "The payment of the compensation being, from the legal point of view, the fact that determines the transfer of the property, it is when such compensation takes place that the expropriation is perfected." The Court also clarified that the judicial decision in the expropriation proceeding is merely declarative – compensation is the essential prerequisite for expropriation.[12]

C. The Law for the Defense of Persons Regarding the Access to Goods and Services Was Unconstitutionally Applied To Norpro Venezuela

45. Decree 8.133 of March 29, 2011, ordering the compulsory acquisition of the assets of Norpro Venezuela C.A., purports to have been issued

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11 "La Constitución quiere que no se expropie sin el previo pago de la indemnización correspondiente, conjugando así el interés público con el derecho de propiedad." Decision of the Federal and Cassation Court, Federal Chamber, 12 April 1950, in *Gaceta Forense* No.4, 1950, pp. 135-136 (***Jurisprudencia de la Corte Suprema***, p. 542) (**Appendix B**).

12 "The judicial decision issued in the expropriation proceeding is no more than declarative, being the expropriation only materialized when the essential condition of 'previous compensation' imposed in the constitutional provision on the matter is fulfilled." Decision of the Federal and Cassation Court, Federal Chamber, 9 May 1949, in *Gaceta Forense* No.2, 1949, pp. 27-28 ("Caracterizado el pago de la indemnización, jurídicamente, como el hecho que determina la transferencia de la propiedad, es cuando éste se verifica, que se perfecciona el procedimiento expropiatorio. La sentencia dictada en el juicio expropiatorio no es más que declarativa llegando sólo a materializarse la expropiación al ser cumplida la condición esencial de "indemnización previa" exigida en el precepto constitucional que rige la materia.") (***Jurisprudencia de la Corte Suprema***, p. 550) (**Appendix B**).

based on the declaration of public purpose established in the Hydrocarbons Law (Article 4) and Gaseous Hydrocarbons Law (Article 4), according to the provisions of the Expropriation Law and Article 6 of the Law for the Defense of Persons regarding the Access to Goods and Services (***Law for the Defense of Persons***).[13]

46. The Law for the Defense of Persons has the specific purpose of assuring the defense, protection and safeguard of individual and collective rights to have access to the goods and services generally related to the satisfaction of primary needs, and mainly related to the rights to life and to health (Article 1). For this reason, according to Article 3, the following activities are subject to its provisions: (i) agreements with suppliers of goods and services related to the letting of goods, service contracts and any other business of economic interest; and (ii) a monopoly, speculation, boycott or other act that affects food or goods that have been declared as required for the satisfaction of primary needs,[14] by any person in the distribution, production and consumption chain.[15] With regard to these activities, Article 6 declares of public purpose and

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13 Decree No. 8,133, published in Official Gazette No. 39,644 on 29 March 2011 (**Exhibit C-40**); *Ley para la Defensa de las Personas en el Acceso a los Bienes y Servicios* (Law for the Defense of Persons regarding the Access to Goods and Services), *Gaceta Oficial* No 39.358, 1 February 2010 (the ***Law for the Defense of Persons***) (**Appendix C**).

14 "*Artículo* 5. Se consideran bienes y servicios de primera necesidad aquellos que por esenciales e indispensables para la población, atienden al derecho a la vida y a la seguridad del Estado, determinados expresamente mediante Decreto por el Presidente o Presidenta de la República, en Consejo de Ministros." Law for the Defense of Persons, Article 5 (**Appendix C**).

15 "*Artículo* 3. Quedan sujetos a las disposiciones de la presente Ley, todos los actos jurídicos celebrados entre proveedoras o proveedores de bienes y servicios, y las personas organizadas o no, así como entre éstas, relativos a la adquisición o arrendamiento de bienes, a la contratación de servicios prestados por entes públicos o privados, y cualquier otro negocio jurídico de interés económico, así como, los actos o conductas de acaparamiento, especulación, boicot y cualquier otra que afecte el acceso a los alimentos o bienes declarados o no de primera necesidad, por parte de cualquiera de los sujetos económicos de la cadena de distribución, producción y consumo de bienes y servicios, desde la importadora o el importador, la almacenadora o el almacenador, el transportista, la productora o el productor, fabricante, la distribuidora o el distribuidor y la comercializadora o el comercializador, mayorista y detallista.") Law for the Defense of Persons, Article 3 (**Appendix C**).

social interest all the goods necessary to accomplish activities of production, manufacture, import, gathering, transport, distribution and trade of goods and services that are regulated in the statute, that is, those goods and services related to the satisfaction of primary needs, and mainly related to the rights to life and to health.

47. The Law for the Defense of Persons is not applicable to the expropriation of Norpro Venezuela. As the Expropriation Decree itself declares in Articles 1 and 2, the assets of Norpro Venezuela which were expropriated relate to the production of high performance industrial ceramic expansive agents used to raise the productivity of hydrocarbon and gas deposits – an industry completely unrelated to those protected by the Law for the Defense of Persons. Application of this law to the expropriation of Norpro Venezuela is therefore unlawful and unconstitutional because it contradicts the Constitutional guarantee to private property.[16]

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[16] This argument is without reference to more troublesome problems with the constitutionality of the Law for the Defense of Persons itself. For example, Article 6 of the Law (which provides for the "urgent" occupation and expropriation of private assets), provides, contrary to the private property rights guaranteed under the Expropriation Law, that the State may occupy and assume the temporary operation or seizure of the assets, pending the expropriation proceeding, through the immediate possession, operation, administration and use of the industry, building, installations, transport, distribution and services by the expropriating entity, "in order to guarantee the provision of goods and services to the collectivity." The Law also provides that compensation for expropriations pursuant to Article 6 may be reduced in order to pay fines and damages owed to the State by the expropriated party. ("*Artículo 6*. […] En todo caso, el Estado podrá adoptar la medida de ocupación, operatividad temporal e incautación mientras dure el procedimiento expropiatorio, la cual se materializará mediante la posesión inmediata, puesta en operatividad, administración y el aprovechamiento del establecimiento, local, bienes, instalaciones, transporte, distribución y servicios por parte del órgano o ente competente del Ejecutivo Nacional, a objeto de garantizar la disposición de dichos bienes y servicios por parte de la colectividad. […] Parágrafo único: En los casos de expropiación, de acuerdo a lo previsto en este artículo, se podrá compensar y disminuir del monto de la indemnización lo correspondiente a multas, sanciones y daños causados, sin perjuicio de lo que establezcan otras leyes.") Law for the Defense of Persons, Article 6 (**Appendix C**).

D. The Administrative Occupation of Norpro Venezuela's Assets Is Unconstitutional and Illegal

48. On April 4, 2011, PDVSA Industrial S.A., as Expropriating Entity, issued a notice,[17] declaring the "establishment of a preventive measure to occupy and temporarily operate" according to Article 112.1 of the Law for the Defense of Persons. Like the Expropriation Decree itself, expropriating Norpro Venezuela through this notice was unlawful. Specifically, as discussed above, Venezuela did not satisfy the requirements of the Constitution and the Expropriation Law providing for the prior payment of compensation before the actual occupation of the assets of Norpro Venezuela.

49. The Executive and the Expropriation Entity have used the provisions of the Law for the Defense of People in a manner that is inapplicable to the case.[18]

E. The Judicial Occupation of Norpro Venezuela Assets is Unconstitutional and Illegal

50. Likewise, the expropriation claim filed on April 18, 2012,[19] in which the Expropriating Entity formally requested that the expropriation court issue a "preliminary provisional measure" of occupation (*medida cautelar de ocupación)* (injunction to occupy) of Norpro Venezuela's assets, based on Article 589 of the Civil Procedural Code, was also illegal. This is because the procedure described in Articles 585-589 of the Civil Procedural Code, contrary to what is required by the applicable Expropriation Law, does not require the entity seeking the judicial oc-

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17 Public Notice to Norpro Venezuela regarding initiation of amicable procedure, accompanied with the publications on the newspapers *Últimas Noticias* and *Nueva Prensa de Guayana*, dated June 24, 2011 (English translation) (**Exhibit R-20**).

18 *See also* Antonio Canova González, Luis Alfonso Herrera Orellana, Karina Anzola Spadano, *¿Expropiaciones o vías de hecho? (La derogación continuada del derecho fundamental de propiedad en la Venezuela actual),* Funeda, Caracas, 2009, p. 107 (**Appendix D**).

19 Claim dated April 18, 2012, Submitted by PDVSA Industrial against Norpro Venezuela, before the First Court of First Instance in Civil, Corporate and Agrarian Matters of the Second Circuit of the Judicial Circumscription of the State of Bolivar (English translation) (excerpt) (**Exhibit R-23**).

cupation of certain assets to previously deposit the amount of the compensation. This is not permitted under the Expropriation Law and is contrary to the general guarantee to property set forth in the Constitution. [20] Moreover, because PDVSA Industrial was already in posses-

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[20] Regardless of whether lower Venezuelan courts have applied Articles 585-589 of the Civil Procedural Code (**Appendix E**) to issue preliminary injunctions for the occupation of expropriated assets, the Supreme Court has always considered that in the event of an expropriation, the procedure set out in the Expropriation Law must be applied. Decision of the Politico-Administrative Chamber, Supreme Court of Justice, 2 October 1986, ratified in decision No. 1902 of 21 December 1999 (*Revista de Derecho Público*, No. 77-80, Editorial Jurídica Venezolana, Caracas 1999, pp. 438) ("El desarrollo y reglamentación del dispositivo constitucional antes mencionado tiene su medio de expresión en la Ley de Expropiación por Causa de Utilidad Pública o Interés Social, donde se contemplan las normas a las cuales ha de ceñir su conducta el ente expropiante al hacer uso de ese precepto constitucional.") (**Appendix F**).

The fundamental purpose of the expropriation procedure is to guarantee the payment of just compensation to the owner of the expropriated asset. In this regard, the specific procedure mandated by the Expropriation Law differs from the ordinary civil procedure. Decision of the Politico-Administrative Chamber, Supreme Court of Justice, 11 October 1995 (*Revista de Derecho Público*, No. 63-64, Editorial Jurídica Venezolana, Caracas 1995, p. 489) ("El procedimiento expropiatorio difiere en grado sumo del ordinario, y tiene como objetivos fundamentales garantizar al propietario del bien expropiado el pago de una justa indemnización por la desposesión de que es objeto […].") (**Appendix G**). The special nature of expropriation means that other statutes, including procedural provisions of the Supreme Court of Justice statute, are not applicable in the context of expropriation to the extent that they differ from or contradict the Expropriation Law. Decision of the First Court on Administrative Contentious, 27 March 2003 (*Revista de Derecho Público*, No. 93-96, Editorial Jurídica Venezolana, Caracas 2003, p. 363) ("[E]l procedimiento de expropiación, dada su especial naturaleza, se encuentra regulado en la Ley Especial, es decir, en la Ley de Expropiación por Causa de Utilidad Pública o Interés Social, por lo que no resultan aplicables las normas previstas en la Ley Orgánica de la Corte Suprema de Justicia para la impugnación de los actos administrativos de efectos particulares.") (**Appendix H**).

Consequently, on matters related to anticipatory occupation of an expropriated asset, the general procedural provisions of the Civil Procedural Code regarding preliminary injunctions (Articles 585-589) cannot be applied. As has been stated by the First Court on Administrative Contentious Proceedings, if the prior payment of the estimated amount of compensation has not been made, granting such anticipatory occupation would violate Article 51 of the Expropriation Law (Decision of the First Court on Administrative Contentious, 26 June 1995 (*Revista de Derecho Público*, No. 63-64, Editorial Jurídica Venezolana, Caracas 1995, p. 491) ("[…] mien-

sion of the expropriated assets, the purported legal basis for this claim (Civil Procedural Code Articles 585-589 and Articles 6 and 112.1 of the Law for the Defense of Persons) was improper.

51. In addition, Article 111 of the Law for the Defense of Persons provides that provisional judicial measures of occupation of expropriated assets are available only in situations of danger or harm to the individual, or where collective interests in access to goods and services are at stake, especially those goods and services that are "*inherent to the rights to life, to health and to dwelling.*"[21] Such rights are, of course, irrelevant to the expropriation of the assets of Norpro Venezuela.

52. Even if the Law of the Defense of Persons were applicable in this case, which it is not, the relevant expropriating entity must make the double showing of *fumus boni juris* (presumption of a sufficient legal basis) and *periculum in mora* (danger in delay) in order to justify a petition

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tras ésta [pago compensación] no se efectúe, no puede acordarse en la presente causa la ocupación previa solicitada, sin infringir el citado artículo 51. Norma esta que a los fines indicados dispone: '... siempre que el expropiante consigne'... 'la cantidad en que hubiere sido justipreciado el inmueble.'") (**Appendix I**). That is why the Supreme Court, despite acknowledging the anticipatory occupation of expropriated assets as a right of the expropriating entity, has considered that such right "is subordinated to the compliance of the conditions established in the law, such as the previous evaluation, the judicial inspection and the posting of the amount of the evaluated compensation, in order to commence the public or social purpose work that under the premise of 'urgency,' must be accomplished." Decision No. 6127 of the Politico-Administrative Chamber, Supreme Tribunal of Justice, 9 November 2005 (*Revista de Derecho Público*, No. 104, Editorial Jurídica Venezolana, Caracas 2005, p. 135) ("[…] es un derecho del ente expropiante a ocupar anticipadamente el inmueble objeto de expropiación, el cual se encuentra subordinado al cumplimiento de los presupuestos exigidos por la Ley, tales como el avalúo previo, la inspección judicial y la consignación del monto reflejado en el avalúo, con el fin de dar inicio a la obra de utilidad pública o social, que bajo la premisa de *"urgencia"* debe realizarse.") (**Appendix J**).

21 "A los efectos de la presente Ley, el peligro de daño, como requisito para adoptar la medida preventiva, viene dado por el interés individual o colectivo para satisfacer las necesidades en la disposición de bienes y servicios de calidad de manera oportuna, especialmente aquellos inherentes al derecho a la vida, a la salud y a la vivienda. La presunción de buen derecho se origina en el derecho del pueblo a la construcción de una sociedad justa y amante de la paz." Law for the Defense of Persons, Article 111 (emphasis added) (**Appendix C**).

for preliminary judicial measures. The Expropriation Decree alleged "urgency" to justify the expropriation, but PDVSA Industrial failed to identify any basis for urgency in its application for a *medida cautelar de ocupación* (injunction to occupy).[22] And while the court's June 20, 2012 decision makes reference to the alleged delay and additional costs that would be imposed on the State's petroleum industry,[23] these justifications do not qualify as "urgent" under the Expropriation Law because there is no reason justifying the "pressing" or "compelling" need for requesting the judicial occupation, particularly since the assets were already occupied by the same entity. Consequently, this request for preliminary occupation of the assets of Norpro Venezuela was baseless. Nevertheless, in violation of Article 115 of the Constitution and the protections of the Expropriation Law, the June 20, 2012 expropriation court decision granted PDVSA Industrial S.A., as Expropriating Entity, possession of the expropriated asset, without imposing on PDVSA Industrial the prior obligation to pay compensation for the expropriation in cash.

53. Moreover, by invoking Articles 585-589 of the Civil Procedural Code, the expropriation court violated the provisions of the Expropriation Law (Article 56) concerning the anticipatory occupation of the expropriated assets during the judicial procedure, which is only possible after the payment of compensation. In this way the expropriation court and the Expropriating Entity avoided complying with the obligation established in the Expropriation Law to deposit preliminary compensation, in the amount determined by the Evaluation Commission, prior to occupation.

F. Conclusions

54. As described above, contrary to the requirements of the Expropriation Law, in this case the Expropriating Entity took possession of Norpro

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22 Instead, PDVSA Industrial invoked procedural privileges of the Republic applicable to public enterprises. Injunction to Occupy (*Medida Cautelar de Ocupación*) Norpro Venezuela dated June 20, 2012, issued by the First Court of First Instance in Civil, Corporate and Agrarian Matters of the Second Circuit of the Judicial Circumscription of the State of Bolivar, pp. 67-68 (**Appendix C** to the First Legal Expert Opinion of Allan R. Brewer-Carías).

23 *Id*.

Venezuela's assets prior to the commencement of the procedures required by law and without either paying just compensation or, at the very least, depositing the just compensation determined by an Evaluation Commission with the court. Moreover, the basis for the early occupation of the expropriated property does not meet the "urgency" requirements for anticipatory occupation under the Expropriation Law.

55. It is my opinion that failure to follow the appropriate procedures as dictated by the Expropriation Law has resulted in the unconstitutional and unlawful expropriation of Norpro Venezuela's assets under Venezuelan law. Moreover, because the procedures followed for the expropriation of the assets of Norpro Venezuela were fundamentally at variance with the terms of the Expropriation Law, this expropriation will remain unlawful even if the Venezuelan courts order payment of just compensation.

VI. VALUE ADDED TAX REIMBURSEMENT UNDER VENEZUELAN LAW

A. Procedure for the Recovery of VAT Credits

56. As an exporter of goods, Norpro Venezuela is entitled to recover VAT credits accumulated through the purchase of goods and services related to its exports pursuant to a recovery procedure detailed in Article 43 of the *Ley que establece el Impuesto al Valor Agregado* (***Value Added Tax Law***).[24] The Value Added Tax Law establishes the right of taxpayers exporting goods or services of national production to recover fiscal credits derived from business activities.

57. The recovery of such fiscal credits is achieved through the issuance of VAT reimbursement certificates (***CERTS***) (the ***Recovery Procedure***).[25] Article 43 of the Value Added Tax Law sets forth the details of the Recovery Procedure: exporters file monthly requests with SENIAT[26] for recovery of VAT credits based on exports during that period, which

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[24] Ley que establece el Impuesto al Valor Agregado, Decreto Ley Nº 5.212 26 de febrero de 2007, *Gaceta Oficial* Nº 38.632 del 26 de febrero de 2007 (***Value Added Tax Law***), Article 43 (**Exhibit R-41**).

[25] Value Added Tax Law, Articles 43 and 45 (**Exhibit R-41**).

[26] In Spanish, "Servicio Nacional Integrado de Administración Aduanera y Tributaria."

> SENIAT must accept or reject within thirty (30) days from its receipt (Organic Taxation Code, Article 200).[27] Any failure by SENIAT to reply to the taxpayer's request for VAT credits within 30 business days may be considered by the interested petitioner as a tacit dismissal of the petition which permits him, at his discretion, to challenge this tacit decision before the special taxation courts.[28]

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27 "*Artículo 43*. Los contribuyentes ordinarios que realicen exportaciones de bienes o servicios de producción nacional, tendrán derecho a recuperar los créditos fiscales soportados por la adquisición y recepción de bienes y servicios con ocasión de su actividad de exportación. […] El procedimiento para establecer la procedencia de la recuperación de los créditos fiscales, así como los requisitos y formalidades que deban cumplir los contribuyentes, serán desarrollados mediante Reglamento. […] La Administración Tributaria deberá pronunciarse sobre la procedencia o no de la solicitud presentada en un lapso no mayor de treinta (30) días hábiles, contados a partir de la fecha de su recepción definitiva, siempre que se hayan cumplido todos los requisitos que para tal fin disponga el Reglamento. […] En caso que la Administración Tributaria no se pronuncie expresamente sobre la solicitud presentada dentro del plazo previsto en este artículo, el contribuyente o responsable podrá optar, en cualquier momento y a su solo criterio, por esperar la decisión o por considerar que el vencimiento del plazo aludido equivale a la denegatoria de la solicitud, en cuyo caso podrá interponer el recurso contencioso tributario previsto en el Código Orgánico Tributario." Value Added Tax Law, Article 43 (**Exhibit R-41**).

28 In addition to the general rule regarding administrative procedure, the Organic Taxation Code establishes specific regulations for Public Administration agencies competent on matters of taxation which also guarantee the right to petition and obtain a prompt and adequate response. Article 153 of the Organic Taxation Code regulates "procedures" on matters of taxation (Chapter III) and provides that the Public Tax Administration is obliged to issue a decision regarding any petition filed by an interested party within a term of thirty (30) days from its filing, except where the Code or other provisions on taxation provide another term. The same provision also establishes that any delay, omission, distortion or noncompliance with this obligation is to be punished by means of disciplinary, administrative or criminal penalty. Código Orgánico Tributario, *Gaceta Oficial* N° 37.305 del 17 de octubre de 2001 (the ***Organic Taxation Code***) ("*Artículo 153*. La Administración Tributaria está obligada a dictar resolución a toda petición planteada por los interesados dentro del plazo de treinta (30) días hábiles contados a partir de la fecha de su presentación, salvo disposición de este Código o de leyes y normas en materia tributaria. Vencido el plazo sin que se dicte resolución, los interesados podrán a su solo arbitrio optar por conceptuar que ha habido decisión denegatoria, en cuyo caso quedan facultados para interponer las acciones y recursos que correspondan. Parágrafo Único: El retardo, omisión, distorsión o incumplimiento de cualquier disposición normativa por parte de los funcionarios o empleados de la Administración Tributa-

58. Once it is determined that VAT credits are owing, recovery of such credits is achieved through the issuance of CERTS corresponding to the credit amount requested by the taxpayer and approved by SENIAT.

59. Separately, under Venezuelan law, the right to petition and obtain a prompt and adequate response from the Public Administration is guaranteed by the Constitution.[29] This right is enshrined in general statutes relating to administrative procedure, which provide for a specific term in which the Public Administration must issue a response, as well as special statutes regulating procedures applicable to special areas of Public Administration.[30]

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ria, dará lugar a la imposición de las sanciones disciplinarias, administrativas y penales que correspondan conforme a las leyes respectivas.") (**Appendix K**).

[29] Article 51 of Venezuelan's 1999 Constitution declares that all persons have the "right to petition" before any authority or public servant on matters of their respective jurisdiction, adding also the right of all petitioners to receive "prompt and adequate response." Constitution of the Bolivarian Republic of Venezuela (1999) ("Artículo 51. Toda persona tiene el derecho de representar o dirigir peticiones ante cualquier autoridad, funcionario público o funcionaria pública sobre los asuntos que sean de la competencia de éstos, y a obtener oportuna y adecuada respuesta. Quienes violen este derecho serán sancionados conforme a la ley, pudiendo ser destituidos del cargo respectivo.") (**Exhibit R-19**).

[30] The Organic Law on Administrative Procedure of 1981 establishes the general rule on this issue. Ley Orgánica de Procedimientos Administrativos, *Gaceta Oficial* N° 2.818 Extraordinario de 1-7-1981 (the ***Organic Law on Administrative Procedure***), Article 5 (requiring a response within 20 days for general requests) ("Artículo 5°. A falta de disposición expresa toda petición, representación o solicitud de naturaleza administrativa dirigida por los particulares a los órganos de la administración pública y que no requiera sustanciación, deberá ser resuelta dentro de los veinte (20) días siguientes a su presentación o a la fecha posterior en la que el interesado hubiere cumplido los requisitos legales exigidos. La administración informará al interesado por escrito, y dentro de los cinco (5) días siguientes a la fecha de la presentación de la solicitud, la omisión o incumplimiento por éste de algún requisito.") and Article 60 (permitting four months to respond in cases requiring additional documentary or testimonial evidence) ("Artículo 60. La tramitación y resolución de los expedientes no podrá exceder de cuatro (4) meses, salvo que medien causas excepcionales, de cuya existencia se dejará constancia, con indicación de la prórroga que se acuerde. La prórroga o prórrogas no podrán exceder, en su conjunto, de dos (2) meses.") (**Appendix L**).

B. Value of VAT Credits

60. Pursuant to the Recovery Procedure, SENIAT issues CERTS for the amount of VAT credit owed to the taxpayer. The taxpayer may then either: (a) apply these credits to the payment of any national taxes;[31] or (b) sell or assign the CERTS on the secondary market.

61. The VAT credit balance in favor of Norpro Venezuela at the time of its expropriation would have been properly reflected in its books as "tax credits" (*créditos fiscales*), since the company had a legal right to request recovery of the value of those credits in the form of CERTS and a firm expectation that it would be entitled to recover the corresponding amount under the Value Added Tax Law.

I remain available to answer any additional questions the Tribunal might have.

Dated: June 11, 2014

New York, NY

I affirm that the foregoing is true to the best of my knowledge.

Allan R. Brewer-Carías

31 Value Added Tax Law, Article 43 (**Exhibit R-41**).