

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**(ADDITIONAL FACILITY)**

IN THE PROCEEDING BETWEEN

**ANGLO AMERICAN PLC**

*(Claimant)*

-and-

**THE BOLIVARIAN REPUBLIC OF VENEZUELA**

*(Respondent)*

**ICSID Case No. ARB(AF)/14/1**

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**Dissenting Opinion of  
Prof. Dr. Guido Santiago Tawil**

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1. I agree with the findings of my distinguished colleagues with respect to the jurisdiction of the Arbitral Tribunal to decide the claims submitted by the Parties in this arbitration.
2. With regard to the decision on the merits, I cannot, unfortunately, concur with the majority on the alleged breach by the Respondent of Article 5 of the Treaty and the standard of fair and equitable treatment under Article 2(2) of the Treaty.
3. First, I do not share the view developed in paragraphs 347 to 353 of the Award that the "Processing Assets" formed part of the object of the concession granted to the Claimant. Although I agree that the Mining Titles shall be constructed in light of the provisions of the 1945 Mining Law,<sup>1</sup> it cannot be concluded from the Mining Titles or the aforementioned law that the activity related to the benefit or processing of the mineral extracted was included in the object of the concession.
4. In accordance with the Mining Titles, the object of the concession was the "exploitation of níquel de manto"<sup>2</sup> and granted the holder thereof *"the exclusive right to extract and take advantage of the mineral indicated above for a period of twenty years, as well as the other rights set forth in the Mining Law."*<sup>3</sup> In light of the 1945 Mining Law, the terms 'take advantage of' ("aprovechar" in Spanish) contained in the Mining Titles do not refer to the processing or benefit of the mineral, but to the legal requirement that mining exploitation be conducted for an economic purpose.
5. This is indicated in Articles 11, 13, 174, and 179 of the 1945 Mining Law<sup>4</sup> (which set forth, as the object of the concessions regulated therein, the exploration and exploitation

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<sup>1</sup> Award, ¶¶ 344 and 351.

<sup>2</sup> As set forth in the mining titles attached under Annexes C-3 and C-18. Similarly, the mining titles, attached as Annex C-5, stipulated the granting of a "concession for exploration and subsequent exploitation of níquel de manto."

<sup>3</sup> See Annexes C-3 and C-18. The mining titles, attached under Annex C-5, stipulated that these rights conferred "[on the concessionaire] the exclusive right to exploration of the lot for which the concession was granted and to exploitation of the parcels chosen and demarcated by it within the lot, pursuant to Article 180 of the Mining Law."

<sup>4</sup> Articles 11, 13, 174, and 179 of the 1945 Mining Law (Annex C-1) set forth the following: Article 11: "The Federal Executive may reserve, by means of Decree (...) the exploration and exploitation of any or all the substances mentioned in Article 2 throughout national territory or in the zone(s) to be determined in the respective Decree (...);" Article 13: "The right to exploit the minerals referred to in this Law can be acquired only through concessions granted by the Federal Executive in the manner set forth therein;" Article 174: "The concessions for the substances mentioned in Article 11 of this Law (...) shall cover the following categories: First: - For the exploration of lots determined by precise demarcations (...), with the concessionaire having the right to the exploitation of the parcels subsequently chosen and demarcated by it (...) Second.- For the exploitation of parcels or lots determined by precise demarcations in the concession permit itself (...) Third.- For the exploitation of the residual national reserves resulting from the performance of the concessions for exploration and subsequent exploitation mentioned in numbered paragraph 1 of this article;" Article 179: "The concession confers on the concessionaire (...) the exclusive right to exploration of the lot for which the concession was granted, and the right to obtain, for the purpose of its exploitation, the parcels chosen by it (...)" (underlining added by author).

of the minerals), Article 1 of Decree No. 2039 on the Reservation with regard to the Exploration and Exploitation of the Minerals on Venezuelan National Territory<sup>5</sup> (in which the Venezuelan State reserved the right to the exploration and exploitation of all the minerals on national territory), and the scope granted to the concept of exploitation by the Venezuelan Ministry of Mining and Hydrocarbons at the time of passage of the 1945 Mining Law.<sup>6</sup> Based on a unified interpretation of these elements, it can be sustained that the concessions granted under the 1945 Mining Law limited their object to the exploration and exploitation of minerals, and that the terms 'take advantage of' mentioned in the mining titles refer to the need for exploitation to take place for economic rather than merely research purposes (as indicated in the aforementioned opinion).

6. In my opinion, neither the fifth, eleventh, and twelfth clauses of the Mining Titles nor Articles 94 and 96 of the 1945 Mining Law (cited in paragraphs 351 and 352 of the Award) preclude this conclusion. The clauses of the abovementioned Mining Titles establish special advantages under Article 91 of the 1945 Mining Law but do not form part of the object of the concession. Similarly, none of the obligations set forth in those clauses lead to the conclusion that the processing or benefit of the minerals formed part of the object of the concession granted to the Claimant.
7. The Mining Titles did not prevent MLDN from processing the mineral through a third party or from carrying out this activity outside the concession zone. It does not seem to be in dispute that, in such situations, the processing or benefit of the mineral would not have formed part of the concession and, consequently, upon its expiry, the assets dedicated to that activity would not have reverted to the Respondent without compensation. If in such cases the assets linked to the processing or benefit of the mineral did not revert because they did not form part of the object of the concession, I

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<sup>5</sup> Article 1 of Decree No. 2039 on the Reservation of the Exploration and Exploitation of all the Minerals on Venezuelan National Territory (Annex BC-10) establishes "*the reservation with respect to the exploration and exploitation on national territory of all the minerals mentioned in Article 2 of the Mining Law that may not have been previously reserved*" (underlining added by author).

<sup>6</sup> See Annex BC-40, which states that the Ministry of Mining and Hydrocarbons maintained that "*if mineral extraction is to constitute the exploitation required by the Law, extraction must be for the clear purpose of economic utilization, present or future, which has already largely moved past the research phase of the substance or deposit and must be proportional to the nature and size thereof.*" This requirement was later included in Article 58 of the 1999 Mining Law (Annex C-19), which states: "*It is understood that a concession is in the exploitation phase when the substances covered by the concession are being extracted from the mines or the necessary action is being taken to do so, for the clear purpose of their economic utilization and in proportion to the nature of the substance and size of the deposit.*"

fail to see the reason for a finding to the contrary in a situation where the Claimant conducted that activity on its own within the concession zone, as happened in this case.

8. In addition, Article 94 of the 1945 Mining Law (cited in paragraph 351 of the Award) does not impose an obligation on the concessionaire that supports the view that the processing of the mineral was included in the object of the concession, and Article 96 of the 1945 Mining Law (cited in paragraph 352 of the Award) only refers to import duty exemptions and is thus not relevant to the matter at hand.
9. The foregoing leads me to conclude that the Processing Assets were non-reversionary assets and, as such, that Respondent should have compensated the Claimant for their value if it was attempting to take control of them. A similar conclusion can be reached, in my opinion, with respect to the assets included in the Inventory, as they involved raw materials, spare parts, and consumables associated with the processing of minerals. However, the assets used for mining tasks that formed part of the object of the concession should revert to the State with no compensation to the Claimant.
10. Second, I do not share the position taken by my distinguished colleagues with respect to the alleged violation of the standard of fair and equitable treatment related to non-issuance of the VAT CERTS.<sup>7</sup> Based on the provisions of Articles 38 and 43 of the VAT Law, it is not clear that the requirement imposed by SENIAT to deduct from the VAT return the amounts requested by way of tax credit recovery for exports is in line with the law.<sup>8</sup>
11. However, my disagreement with the majority does not lie there but on the way of assessing the factual circumstances specific to the case in that regard.
12. It was demonstrated that for almost ten years, SENIAT did not require the deduction from the VAT return of the refund amounts requested to recover tax credits for exports;<sup>9</sup>

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<sup>7</sup> Award, ¶¶ 459-472.

<sup>8</sup> According to Article 43 of the VAT Law (Annex C-21), the tax refund is provided at the time of issuance of the VAT CERTS, which can take place only when the appropriate request for the refund has been settled. Article 38 of the VAT Law states that the tax credit obtained from the difference between tax credits and tax debits must be carried over to the next tax period until the final deduction is made. These provisions, taken collectively, led to the reasonable conclusion that in the requests for VAT refunds, only the inclusion of officially recognized tax credits could be required and not those for which a decision was pending.

<sup>9</sup> See Annex C-236 and hearing, day 3, pages 560, 571, and 572, in which Ms. Villasmil (witness for the Respondent) confirmed that for almost 10 years, SENIAT accepted VAT recovery requests from MLDN and that the requirement imposed by SENIAT marked a change in the way SENIAT and MLDN had operated with respect to the recovery of tax credits.

that the change in position by SENIAT was based on an internal manual that was not published in the Official Gazette or communicated contemporaneously to the Claimant;<sup>10</sup> and that the Respondent did not provide a proper response to the formal requests from MLDN for the recovery of the VAT credits.

13. MLDN submitted more than 50 VAT recovery requests for periods dating back to October 2007,<sup>11</sup> of which the Respondent failed to expressly inform it of the reason for the change in the tax authorities conduct, and limited its actions to three written communications in July 2012,<sup>12</sup> in which it instructed MLDN to resubmit the VAT returns with the required deduction or explain, as applicable, why this deduction was not appropriate. MLDN responded to these communications explaining why, in its view, the deduction required by SENIAT should not be made,<sup>13</sup> but did not obtain a response from the authorities.<sup>14</sup>
14. Under those circumstances, the conduct of the Respondent was not consistent, free from ambiguity, and transparent, as required by the standard of fair and equitable treatment guaranteed under Article 2 (2) of the Treaty.<sup>15</sup> The authorities had the obligation to communicate properly to the taxpayer the change in the position held for almost ten years, and it would be expected that the Respondent would have settled the requests submitted by MLDN either contemporaneously or at the time of escalation of the conflict. Despite the repeated formal requests from MLDN, the Respondent decided to remain silent and did not communicate its position to the Claimant.<sup>16</sup> This leads me to

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<sup>10</sup> See the second witness statement of Ms. Villasmil, paragraph 11; hearing, day 3, page 575 (in which witness Villasmil confirmed that a copy of the manual in question was not provided to MLDN) and the second legal opinion of Canónico, paragraph 135.

<sup>11</sup> See the witness statement of Oscar Pérez, paragraph 18, and hearing, day 3, page 570.

<sup>12</sup> See Annexes R-36, C-198, and C-199 and hearing, day 3, page 576.

<sup>13</sup> See Annexes R-37, C-200, and C-201 and hearing, day 3, page 580.

<sup>14</sup> Witness Villasmil stated during the hearing that SENIAT did not provide a copy of the internal manual to MLDN, did not notify it of the change in administrative procedure, and did not respond to its communications sent in connection with the *actas de requerimiento* [records of request] (hearing, day 3, pages 575, and 582 to 584).

<sup>15</sup> The requirement to act in a consistent manner, free from ambiguity, and with transparency derived from the standard of fair and equitable treatment has been cited repeatedly in several cases. In this regard, see: *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, Award, Case No. ARB (AF)/00/2, May 29, 2003, ¶ 154 (Annex CLA-90); *Joseph Charles Lemire v. Ukraine*, Decision on Jurisdiction and Liability, Case No. ARB/06/18, January 14, 2010, ¶ 284 (Annex CLA-49); and *Saluka Investments BV (The Netherlands) v. The Czech Republic*, (UNCITRAL), Partial Award, March 17, 2006, ¶¶ 307-308 (Annex CLA-79).

<sup>16</sup> Despite stating that SENIAT had an obligation to issue well-founded, written decisions within 30 working days in order to respond to a request for [tax] recovery, witness Villasmil stated during the hearing that SENIAT did not respond to the communications sent by MLDN in connection with the *actas de requerimiento* because this was not the usual practice of the Venezuelan tax authorities (hearing, day 3, pages 549 to 551 and 582).



conclude that the Respondent did not demonstrate the consistency and transparency required by the standard of fair and equitable treatment set forth in the Treaty.

15. The fact that officials of the Respondent later verbally informed MLDN of the reasons for non-issuance of the VAT CERTS does not modify the abovementioned conclusion.<sup>17</sup> Given that the issue was subject to opinion -and that the tax authorities acted to the contrary for almost ten years- the change in position should be clear, well founded, and duly communicated to the taxpayer.
16. It was not the responsibility of MLDN to go to other officials or the local courts to seek confirmation that the position verbally communicated to it by an official represented the position of the Venezuelan State in this regard.<sup>18</sup> The principle is exactly the opposite. As MLDN repeatedly submitted formal requests to SENIAT, it was SENIAT the one that had the obligation to provide a proper response to those requests.<sup>19</sup>
17. In my opinion, the fact that the Claimant decided to challenge the silence of SENIAT in February 2015 does not change the Respondent's failure to act with due consistency and transparency.<sup>20</sup> As the legal experts of both Parties have agreed, under Venezuelan law, the authorities have an obligation to respond to the requests of individuals.<sup>21</sup> In systems such as Venezuela's, administrative silence does not constitute a tacit decision of the authorities; instead it is merely a legal fiction or presumption in favor of individuals intended to allow them to access other administrative bodies or courts (as applicable), should a citizen decide to invoke the silence for such purpose.<sup>22</sup> The mere fact that time periods elapsed without a decision does not relieve the authorities of their duty to respond—something that logically flows from the principle of publicity of State acts and

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<sup>17</sup> Award ¶ 463.

<sup>18</sup> Award ¶ 464.

<sup>19</sup> During the hearing, witness Villasmil further explained that she sent the communications from MLDN in connection with the *actas de requerimiento* to her superiors, but did not know whether they had responded to them (hearing, day 3, page 584).

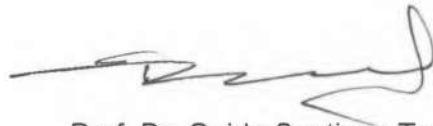
<sup>20</sup> Award ¶ 464.

<sup>21</sup> Second legal opinion of Brewer-Carías, ¶¶ 174 to 178; second legal opinion of Canónico, ¶ 149. Both experts agree that in the Venezuelan legal system, administrative silence has been designed to benefit citizens and that this right or guarantee applicable to individuals is derived from Article 51 of the Venezuelan Constitution.

<sup>22</sup> In this regard, systems such as Venezuela's (or Argentina's) differ from others where denial by means of silence is automatic and could be construed as a decision by the authorities. For this reason, it is said that in the former group "silence benefits citizens and not the authorities." I have addressed, on numerous occasions since 1988 onwards, the issue of administrative inaction and the techniques used to remedy this in comparative law. In this regard, see for example, Tawil, Guido Santiago, *Administración y Justicia*, Vol. I, Depalma, Buenos Aires, 1993, pages 288 et seq., among many others.

the republican form of government— and the alleged delay in challenging it—which, as explained, was not such in the case as it is only a legal fiction aimed at providing citizens with additional options for such challenges— could not justify or mitigate the Respondent's failure to act.

18. Given the decision reached by the majority on the Arbitral Tribunal, it is not appropriate for me to render an opinion on the damage alleged, the valuation method used, or the quantum of compensation requested.



Prof. Dr. Guido Santiago Tawil  
Arbitrator

Date: 18-12-18