

January 27, 2012

## Venezuela Withdraws From ICSID

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### President Hugo Chavez Follows Through on Threats to Abandon the Widely-Used Investor-State Arbitral Forum

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#### SUMMARY

On January 24, 2012, the Government of Venezuela formally denounced the ICSID Convention, triggering its withdrawal from the investor-State arbitration forum. Venezuela's decision follows the withdrawal of Bolivia and Ecuador from the Convention in 2007 and 2009, respectively. Venezuela's withdrawal will take formal effect in six months. While pending ICSID proceedings will not be affected by the decision, Venezuela's denunciation carries important consequences for both current and prospective foreign investors in Venezuela.

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#### VENEZUELA FORMALLY DENOUNCES THE ICSID CONVENTION

Venezuela's decision to withdraw from the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention"), the international treaty that established the International Centre for the Settlement of Investment Disputes ("ICSID"), was not surprising. President Hugo Chavez threatened to withdraw as early as 2007, and said so again earlier this month, but it had not been clear whether and when he would carry through on the threats. Pursuant to Article 71 of the ICSID Convention, Venezuela's denunciation does not take effect until six months after the date of the World Bank's receipt of the formal notice. Notwithstanding this six-month provision, however, Venezuela's decision may have immediate consequences for certain investors.

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#### IMPLICATIONS FOR PENDING AND UNFILED CLAIMS AGAINST VENEZUELA

Under Article 72 of the ICSID Convention, a country's denunciation of the Convention does not affect rights or obligations "arising out of consent to the jurisdiction of [ICSID] given by [the country] before [the notice of denunciation] was received." This provision makes clear that Venezuela's denunciation will not affect any of the proceedings against Venezuela that are currently pending before ICSID tribunals.

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There is some uncertainty as to the effect of denunciation on disputes not yet brought. A State's agreement to the ICSID Convention does not by itself constitute acceptance of arbitration in any given case. The State must extend what is commonly thought of as an "offer" to arbitrate and the investor must "accept" that offer. Where the offer and acceptance occur together—as is the case in investment contracts containing an agreement to arbitrate disputes before ICSID—the State's subsequent denunciation of the ICSID Convention should not affect the investors' right to arbitrate disputes before an ICSID tribunal. A State may, however, extend the "offer" in domestic investment legislation or a bilateral investment treaty ("BIT"). In these situations, the investor must "accept" the offer, typically by a formal written acceptance or by initiating ICSID proceedings. Regardless of how consent is effected, where mutual consent occurs prior to denunciation, the State's denunciation of the Convention should not preclude the investor from instituting ICSID proceedings at a later date.<sup>1</sup>

Where the investor has not consented to jurisdiction prior to the State's denunciation, the effect of the denunciation depends on the interpretation of Article 72. Some noted commentators have argued that Article 72 makes consent to ICSID jurisdiction irrevocable only where both parties consented prior to the State's denunciation, on the theory that an "offer" to arbitrate can be unilaterally withdrawn.<sup>2</sup> Others contend that Article 72 applies broadly to keep in force "offers" of consent to ICSID jurisdiction that remain outstanding on the date of denunciation—including ICSID clauses in BITs, which would under this approach remain effective for as long as the BIT remains in force.<sup>3</sup> No arbitral tribunal has yet decided the issue.<sup>4</sup> In view of the uncertainty, it may be prudent for investors in Venezuela who have not yet consented to ICSID jurisdiction to do so prior to the effective date of Venezuela's denunciation.<sup>5</sup>

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### DO BITS OFFER ADDITIONAL PROTECTION?

BITs commonly offer investors additional protection from the immediate effects of a country's denunciation of the ICSID Convention. Many BITs provide alternatives to ICSID arbitration. The Venezuela-United Kingdom BIT, for example, provides for arbitration under the ICSID Convention and also under the rules of the United Nations Commission on International Trade Law (UNCITRAL) and

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<sup>1</sup> CHRISTOPH H. SCHREUER ET AL., *THE ICSID CONVENTION: A COMMENTARY* 1278-80 (2d ed. 2009).

<sup>2</sup> *Id.* at 1280-81; Julien Fouret, *Denunciation of the Washington Convention and Non-Contractual Investment Arbitration: "Manufacturing Consent" to ICSID Arbitration?*, 25 *JOURNAL OF INTERNATIONAL ARBITRATION* 1, 82-3 (2008).

<sup>3</sup> See, e.g., Emmanuel Gaillard, *The Denunciation of the ICSID Convention*, *NEW YORK LAW JOURNAL*, Jun. 26, 2007, at 3, 7-8.

<sup>4</sup> The issue has been raised in pending disputes with Ecuador and Bolivia. In one case, the parties resolved the issue by agreement, *Corporación Quiport S.A. v. Republic of Ecuador*, ICSID Case No. ARB/09/23, and in the other the tribunal has not yet ruled, *Pan American Energy LLC v. Plurinational State of Bolivia*, ICSID Case No. ARB/10/8.

<sup>5</sup> It should be noted that some commentators maintain that it is already too late to consent once the denunciation has been announced, despite the fact that it is not effective for another six months, but this too has not been resolved. See SCHREUER, *supra* note 1, at 1280-81; Fouret, *supra* note 2, at 83.

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ICSID's "Additional Facility" (which governs arbitration when only one party is a State or citizen of a State that is party to the ICSID Convention).<sup>6</sup> These provisions mean that, regardless of whether the investor has accepted ICSID arbitration prior to any relevant cutoff date, the investor will have viable alternatives to ICSID arbitration.

Venezuelan officials in recent weeks have also suggested that its BITs will need to be "renegotiated." If these threats result in termination of some of the country's BITs, the protections of the BITs, including access to ICSID, typically continue for 10 or 15 years after termination as to investments made prior to termination.<sup>7</sup>

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### IMPLICATIONS FOR FUTURE INVESTMENTS IN VENEZUELA

The withdrawal from ICSID, while it has been forecast for some time, complicates the structuring of new investments in Venezuela, particularly if BIT protection is not available. It also is likely that Venezuela will follow up with other measures to restrict the ability of foreign investors to invoke international arbitration for disputes with sovereign entities. For example, before Ecuador denounced the ICSID Convention, it adopted a new constitution that severely restricted the Government's ability to utilize international arbitration as a means of resolving disputes. Should Venezuela take a similar approach, investors may have considerable difficulty in obtaining relief if new investments are expropriated on tax, environmental, or other public policy grounds. These restrictions have posed significant challenges for investors attempting to structure foreign investments in Ecuador in the last few years.

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<sup>6</sup> Venezuela-United Kingdom Bilateral Investment Treaty, Art. 8(2).

<sup>7</sup> *E.g.*, Venezuela-Spain Bilateral Investment Treaty, Art. 12(2) (10 years); Venezuela-Netherlands Bilateral Investment Treaty, Art. 14(3) (15 years).

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