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# Litigation

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## VENEZUELA WITHDRAWS FROM THE WORLD BANK'S INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

The World Bank received, on January 24, 2012, “written notice of denunciation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) from the República Bolivariana de Venezuela”.<sup>1</sup> As further reported on the ICSID website, “the denunciation will take effect six months after the receipt of Venezuela’s notice, i.e., on July 25, 2012”.<sup>2</sup> It has been reported that Venezuela premised its denunciation on the position that international arbitration of oil and gas disputes is inconsistent with the Venezuelan constitution of 1999.<sup>3</sup>

ICSID is an arbitration institution with more than 140 member states. ICSID makes available a forum for the settlement of disputes between host states and international investors. Submission of disputes to ICSID arbitration requires an independent consent to arbitration by the host state and by the investor. Currently, most state consents to ICSID arbitration are included in bilateral investment treaties, or BITs, that extend international legal protections to foreign investors, such as the guarantee of full and prompt compensation for expropriation. Most investors consent to arbitration by their submission of a BIT dispute to ICSID arbitration. To date, there are 140 pending arbitrations at ICSID, and 225 ICSID arbitrations have been concluded.<sup>4</sup>

It is reported that a recent ICC award against PDVSA, the Venezuelan national oil company, in favor of an ExxonMobil subsidiary was the catalyst for Venezuela’s

For further information about this Client Alert, please contact:

Michael D. Nolan  
202-835-7524  
mnolan@milbank.com

Edward Baldwin  
202-835-7547  
ebaldwin@milbank.com

You may also contact any member of Milbank’s Litigation Group. Contact information can be found at the end of this Client Alert. In addition, if you would like copies of our other Client Alerts, please visit our website at [www.milbank.com](http://www.milbank.com) and choose “Client Alerts” under “News.”

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1 ICSID News Release, *Venezuela Submits a Notice under Article 71 of the ICSID Convention*, dated January 26, 2012, available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement100> (last visited January 27, 2012)(the “ICSID News Release”).

2 ICSID News Release.

3 Ernesto Tovar, *Gobierno de Chávez aceptó al Ciadi como tribunal en 2001*, El Universal News Report, dated January 27, 2012, available at <http://tiempolibre.eluniversal.com/economia/120127/gobierno-de-chavez-acepto-al-ciadi-como-tribunal-en-2001> (hereinafter “Tovar”) (“The Ministry of Foreign Affairs stated this week in a communique that ‘Constitution of the Bolivarian Republic of Venezuela of 1999 invalidates, in its spirit and by its terms, the provisions of this [the ICSID Convention]’(authors translation); Reuters News Release, *Venezuela oficializó su salida del Ciadi*, dated January 25, 2012, available at <http://www.el-nacional.com/noticia/19635/18/Gobierno-denuncia-convenio-con-Ciadi.html> (last visited January 25, 2012).

4 [icsid.worldbank.org](http://icsid.worldbank.org) (the “ICSID Website”).

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decision to withdraw from the ICSID Convention.<sup>5</sup> ExxonMobil is also seeking compensation from Venezuela in an independent ICSID arbitration.<sup>6</sup> The ICC award initially had been touted as a victory by PDVSA and the Venezuelan government because the ICC Tribunal awarded ExxonMobil only \$747 million on a reported claim by Exxon of \$7 billion.<sup>7</sup> But, as has been reported in public arbitration fora, a reason for the damages amount appears to have been a function of the contractual damages provisions. The damages provision, for example, appears to have referenced the price of oil significantly below today's market price.<sup>8</sup> ExxonMobil therefore may be able to recover in the ICSID arbitration the difference between the ICC award and its true economic loss, reported to be in excess of \$19 billion.<sup>9</sup> Currently, an additional 16 ICSID claims are pending against Venezuela<sup>10</sup> with a reported aggregate claim value in excess of \$21 billion.<sup>11</sup>

Venezuela's withdrawal from the ICSID Convention should not have any formal legal effect on pending ICSID proceedings.<sup>12</sup> The ICSID Convention does not allow Venezuela unilaterally to walk away from its commitments, even if that is what Venezuela wishes to do, given the flood of claims against it and the promise of additional claims. Commentators are in agreement that claimants in existing proceedings will continue to benefit from Venezuela's consent to ICSID arbitration – and from the robust enforcement mechanisms for awards in the ICSID Convention.<sup>13</sup>

There is some disagreement, however, as to the possible effect of Venezuela's withdrawal from the ICSID Convention on claims that have not yet been filed. The minority view is that after receipt by the World Bank of a denunciation of the ICSID Convention, all "offers" made by Venezuela to arbitrate at ICSID made in bilateral investment treaties can no longer be invoked.<sup>14</sup> This minority view is inconsistent with the text of the ICSID Convention, which provides a 6-month sunset period for any denunciation to take legal effect.<sup>15</sup> As reported on the ICSID website, the denunciation "will take effect six months after the receipt of Venezuela's notice, i.e., on July 25, 2012".<sup>16</sup> As an example, the ICSID Secretariat registered claims filed against Bolivia in and even after the 6-month period following Bolivia's denunciation.<sup>17</sup> Registration of such disputes by the ICSID Secretariat supports the view that, at a minimum, new claims against Venezuela can be submitted to ICSID arbitration during the 6-month period.

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- 5 See, e.g., *Venezuela closes chapter on compensation to Exxon Mobil*, El Universal News Report, dated January 10, 2012, available at <http://www.eluniversal.com/economia/120110/venezuela-closes-chapter-on-compensation-to-exxon-mobil> (last visited January 27, 2012).
- 6 *Mobil Corporation and others v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/27).
- 7 Nathan Crooks & Corina Pons, *Exxon Gets 'Disappointing' \$750 Million After Venezuela Seizure*, Bloomberg News Report, dated December 31, 2011, available at <http://www.bloomberg.com/news/2012-01-01/exxon-gets-disappointing-750-million-after-venezuela-assets-seizure.html> (last visited January 27, 2012).
- 8 See Mark Kantor, *How Damages Were Calculated in Mobil Cerro Negro v. PDVSA*, Email to OGEMID List Serve, dated January 18, 2012 (explaining that "under the joint venture's Association Agreement the lost revenues for the heavy crude oil production from the project are founded on the 2006 price of Brent oil (\$27/barrel), adjusted for quality differences between Brent and heavy oil, and then further adjusted for each year of the damages computation based on an inflation adjuster employing the US GDP deflator, not on the actual prices of either Brent or heavy oil for the years subsequent to 1996.")
- 9 Michael Goldhaber, *Arbitration Scorecard 2011*, dated June 2011 (reporting the claim value in the ICSID case as "up to \$20 billion").
- 10 ICSID Website. In addition, Venezuela faces 4 claims filed under the ICSID "Additional Facility" from Canadian investors. Other cases have been reported as being close to filing but have not yet appeared on the ICSID Website as having been registered.
- 11 Chavez wants out of ICSID again, Financial Times Blog, dated September 13, 2011, available at <http://blogs.ft.com/beyond-brics/2011/09/13/chavez-wants-out-of-icsid-again/#axzz1iykCEkii>. The figure reported in the blog does not include cases filed after the September 13, 2011 reporting date.
- 12 See, e.g., ICSID Convention, at Art. 25(1), Nolan/ Sourgens, at 17-19.
- 13 Michael Nolan & Frédéric Sourgens, *The Interplay between State Consent to ICSID Arbitration and Denunciation of the ICSID Convention: The (Possible) Venezuela Case Study* Transnational Dispute Management, Sept. 2007, at 17-19 (hereinafter "Nolan/Sourgens"); see also May 2007 Client Alert.
- 14 Nolan/ Sourgens, at 17-19; see also May 2007 Client Alert.
- 15 ICSID Convention, at Art. 71; see also May 2007 Client Alert.
- 16 ICSID News Release.
- 17 ICSID received Bolivia's denunciation of the ICSID Convention on May 2, 2007. See Bolivia Release. On October 31, 2007, ICSID registered a request for arbitration by E.T.I. *E.T.I. Euro Telecom Internacional N.V. v. Plurinational State of Bolivia* (ICSID Case No. ARB/07/28). Later, in 2010, ICSID registered another dispute against Bolivia, more than 2 years after the denunciation of the Convention. *Pan American Energy LLC v. Plurinational State of Bolivia* (ICSID Case No. ARB/10/8). For context, see UNCTAD, *Denunciation of the ICSID Convention and BITs: Impact on Investor-State Claims*, IIA Issues Note 2 (December 2010), available at [http://www.unctad.org/en/docs/webdiaeia20106\\_en.pdf](http://www.unctad.org/en/docs/webdiaeia20106_en.pdf) (last visited January 27, 2012). The "date of consent" in the E.T.I case was complicated by the fact that E.T.I submitted alternative dates of consent, namely the date of its submission of the Request for Arbitration (October 17, 2007) or the date of a written communication accepting Bolivia's request for arbitration asserted to have occurred on April 30, 2007 (days prior to the denunciation). See E.T.I.'s Request for Arbitration, at ¶¶ 19-20, available at <http://www.scribd.com/doc/916345/071012-ETI-Request-for-Arbitration-1> (last visited January 27, 2012).

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It appears that the better reasoned view is that denunciation of the ICSID Convention cannot vitiate Venezuela's consent to ICSID arbitration even after the expiration of the 6-month period.<sup>18</sup> The typical way to commence an ICSID arbitration against Venezuela has been through the invocation of bilateral investment treaties in which Venezuela consented to submission of disputes to ICSID by investors of the other treaty state.<sup>19</sup> These treaties have long sunset periods, some running for 15 years.<sup>20</sup> While these treaties are in force, or in their sunset period, the consent to arbitration they provide should remain undisturbed.<sup>21</sup> This conclusion is supported by an express provision in the ICSID Convention: denunciation "shall not affect the rights or obligations under this Convention of that State ... arising out of consent to the jurisdiction of the Centre given by [that State] before such notice was received by the depositary".<sup>22</sup> Recent statements by Venezuelan officials that denunciation of the ICSID Convention requires renegotiation of existing bilateral investment treaties supports this interpretation of the ICSID Convention.

It is reported that Venezuela's notice of denunciation of the ICSID Convention was premised in part on its assertion that international arbitration of disputes relating to strategic assets is unconstitutional.<sup>23</sup> This assertion may have implications for contractually based arbitration against Venezuela and state entities. It can be expected that Venezuela, PDVSA and other Venezuelan state entities may argue, for example, that arbitration clauses in contracts they have signed should be held void for incapacity: It is to be expected that objections of this kind may be raised by Venezuela in pending proceedings, as well as when adverse arbitral awards are sought to be enforced. Resolution of such possible objections by Venezuela will depend upon the specific arbitration clause at issue in each case. But, as a general rule, parties will be able to make strong arguments that such incapacity and arbitrability arguments must fail – as they have failed in the past when raised by other state-owned entities.<sup>24</sup>

Venezuela – in a joint statement with Bolivia, Ecuador, Nicaragua and Cuba – initially threatened to withdraw from all World Bank and the IMF agreements, including ICSID.<sup>25</sup> Since that time, Bolivia withdrew from the ICSID Convention in 2007, and Ecuador did so in 2009.<sup>26</sup> Venezuela repeated that it would withdraw from ICSID in 2011, and again in early January 2012.<sup>27</sup> Cuba, notwithstanding the May 2007 joint statement, has never been a member state of the ICSID Convention.<sup>28</sup>

18 Nolan/ Sourgens.

19 Nolan/ Sourgens.

20 Nolan/ Sourgens, at fn. 95.

21 Nolan/ Sourgens.

22 ICSID Convention, at Art. 72.

23 Tovar.

24 *Sojuznefteexport (SNE) (USSR) v. JOC Oil Ltd. (Bermuda)*, 3 Court of Appeal of Bermuda (July 7, 1989), XV Y.B. COMM. ARB. 384 (1990); Paul E. Mason and Mauricio Gomm-Santos, *New Key to Arbitration in Latin-America*, 25 J. Int'l Arb. 31, 35(2008).

25 Nolan/ Sourgens, at 1.

26 ICSID News Release, *Bolivia Submits a Notice under Article 71 of the ICSID Convention*, dated May 16, 2007, available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement3> (last visited January 27, 2012) ("Bolivia Release"); ICSID News Release, *Ecuador Submits a Notice under Article 71 of the ICSID Convention*, dated July 9, 2009, available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement20> (last visited January 27, 2012).

27 Jose de Cordoba, *Chávez Takes Steps to Exit Global Forum*, Wall Street Journal News Report, available at [http://online.wsj.com/article/SB10001424053111903285704576560760106674594.html?mod=googlenews\\_wsj](http://online.wsj.com/article/SB10001424053111903285704576560760106674594.html?mod=googlenews_wsj) (last visited January 27, 2012); Ernesto Tovar, *Venezuela risks disputes with other States over Exxon case*, El Universal News Report, dated January 14, 2012, available at <http://www.eluniversal.com/economia/120114/venezuela-risks-disputes-with-other-states-over-exxon-case> (last visited January 27, 2012).

28 Nolan/Sourgens, at 1.

Please feel free to discuss any aspect of this Client Alert with your regular Milbank contacts or with any member of our Litigation and Arbitration Group listed below.

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### New York

Wayne M. Aaron	212-530-5284	waaron@milbank.com
Thomas A. Arena	212-530-5328	tarena@milbank.com
Sander Bak	212-530-5125	sbak@milbank.com
James N. Benedict, <i>Chair</i>	212-530-5696	jbenedict@milbank.com
James G. Cavoli	212-530-5172	jcavoli@milbank.com
Christopher E. Chalsen	212-530-5380	cchalsen@milbank.com
Scott A. Edelman, <i>Firm Vice Chairman</i>	212-530-5149	sedelman@milbank.com
Christopher J. Gaspar	212-530-5019	cgaspar@milbank.com
David R. Gelfand	212-530-5520	dgelfand@milbank.com
Douglas W. Henkin	212-530-5393	dhenkin@milbank.com
Michael L. Hirschfeld	212-530-5832	mhirschfeld@milbank.com
Lawrence T. Kass	212-530-5178	lkass@milbank.com
Atara Miller	212-530-5421	amiller@milbank.com
Sean M. Murphy	212-530-5688	smurphy@milbank.com
Daniel Perry	212-530-5083	dperry@milbank.com
Stacey J. Rappaport	212-530-5347	srappaport@milbank.com
Richard Sharp	212-530-5209	rsharp@milbank.com
Alan J. Stone, <i>Practice Group Leader</i>	212-530-5285	astone@milbank.com
Errol B. Taylor	212-530-5545	etaylor@milbank.com
Fredrick M. Zullo	212-530-5533	fzullo@milbank.com

### Washington, DC

David S. Cohen	202-835-7517	dcohen2@milbank.com
Robert J. Koch	202-835-7520	rkoch@milbank.com
Andrew M. Leblanc	202-835-7574	aleblanc@milbank.com
Michael D. Nolan	202-835-7524	mnolan@milbank.com

### Los Angeles

Linda Dakin-Grimm	213-892-4404	ldakin-grimm@milbank.com
Robert J. Liubicic	213-892-4525	rliubicic@milbank.com
Jerry L. Marks	213-892-4550	jmarks@milbank.com
Mark Scarsi	213-892-4580	mscarsi@milbank.com

### London

Tom Canning	44-20-7615-3047	tcanning@milbank.com
Julian Stait	44-20-7615-3005	jstait@milbank.com