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# Principia

## Nota Editorial

¡Bienvenido a *Principia*!

Desde el Centro de Investigación y Estudios para la Resolución de Controversias ("CIERC") nos complace presentar la quinta edición de *Principia*.

En *Principia* continuamos con nuestra misión de difundir conocimiento académico de calidad sobre los medios alternativos de solución de controversias. Para lograrlo, invitamos a excelentes autores de diversas edades, nacionalidades y experiencias, lo cual le da al lector la posibilidad de acceder a una gran variedad de visiones y enfoques.

En esta entrega contamos con una espléndida entrevista a la profesora Catharine Titi, que nos da una visión única del Grupo de Trabajo III de la Comisión de Naciones Unidas sobre Derecho Mercantil (UNCITRAL) y lo que significa para el arbitraje de inversión.

Veremos también un artículo del profesor Allan Brewer-Carías, el cual presenta una perspectiva histórica de la evolución de la visión que del Estado Venezolano sobre el arbitraje en el derecho público.

Luego, contamos con un artículo donde Carolina Alcalde Ross y Javier Nicolás Cañas Henríquez hacen un interesante estudio y análisis de la infracción al orden público bajo la Ley Modelo UNCITRAL.

También se explorará la aplicación del principio kompetenz-kompetenz en la jurisprudencia norteamericana y de España con la contribución de Javier Íscar de Hoyos.

Veremos cómo recientes cambios legislativos en México pueden ponerlo en una situación similar a la de España en el contexto de reclamaciones en arbitraje de inversión de la mano de Carlos Molina Esteban.

Con un enfoque teórico, Alejandro Ramírez Padrón nos da una visión de distintas teorías que buscan dar explicación a la fuente de legitimidad y validez del arbitraje internacional.

Finalmente, profesor Claudio Salas, Maria Camila Hoyos, y Soledad Peña abordan las consecuencias jurídicas y prácticas de la denuncia y el retiro de Venezuela de la Convención CIADI.

Agradecemos a todos los miembros del Consejo Editorial y demás revisores que hacen que *Principia* sea posible.

¡Nos vemos en el No. 6!

**Magdalena Maninat Lizarraga**
Directora Editorial de *Principia*

# Contenido

# The Sound and Fury of Venezuela's ICSID Denunciation•

Claudio Salas*, Maria Camila Hoyos**, and Soledad Peña***

Principia No. 5–2021 pp 139-158

**Resumen:** Este artículo aborda las consecuencias jurídicas y prácticas de la denuncia y el retiro de Venezuela de la Convención CIADI. Han pasado casi diez años desde que Venezuela notificó su retiro de la Convención CIADI y, desde entonces, se han emitido una serie de decisiones contradictorias por parte de tribunales que intentan resolver la cuestión de *cuándo* se retira efectivamente el consentimiento del Estado a la jurisdicción del CIADI. Para determinar las consecuencias jurídicas de la denuncia de Venezuela, los autores analizan los diferentes enfoques adoptados por los tribunales en la última década. A continuación, los autores evalúan las consecuencias prácticas de la denuncia, incluyendo las alternativas disponibles para los inversionistas después de que tuvo lugar la denuncia, y si se cumplieron los objetivos políticos de Venezuela subyacentes a su denuncia. Este artículo concluye que la denuncia de Venezuela al CIADI fue más un acto lleno de ruido y de furia, que un paso con serias consecuencias jurídicas y prácticas.

**Abstract:** This article discusses the legal and practical consequences of Venezuela's denunciation and withdrawal from the ICSID Convention. Almost ten

• This article represents the personal views of the authors and not those of Wilmer Cutler Pickering Hale and Dorr LLP.

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years have passed since Venezuela gave notice of its withdrawal from the ICSID Convention and a series of contradictory decisions have since been issued by tribunals trying to resolve the question of *when* state consent to ICSID jurisdiction is effectively withdrawn. To determine the legal consequences of Venezuela's denunciation, the authors discuss the different approaches taken by tribunals during the last decade. The authors then assess the practical consequences of the denunciation, including the alternatives available to investors afterwards and whether Venezuela accomplished the political goals underlying its denunciation. This paper concludes that Venezuela's ICSID denunciation was more sound and fury than a step with serious legal and practical consequences.

**Palabras Claves:** Convención CIADI, denuncia, partes contratantes, arbitraje internacional de inversión, retiro del consentimiento, consentimiento mutuo, consentimiento perfeccionado, doctrina Calvo

**Keywords:** ICSID Convention, denunciation, contracting parties, international investment arbitration, consent withdrawal, mutual consent, perfected consent, Calvo doctrine.

**Summary: I. Introduction, II. Historical background, III. The legal effects of denunciation, A. Relevant ICSID Convention Articles, B. Approaches to determining when a State's withdrawal of consent to arbitrate becomes effective, 1. First Approach: Consent is withdrawn the moment that a written denunciation is submitted to the World Bank, i. First Approach as conceived by Professor Christoph Schreuer, ii. Fábrica de Vidrios v. Venezuela, 2. Second Approach: Withdrawal of consent will only be effective after the six-month period of article 71 expires, i. Blue Bank v. Venezuela, ii. Transban v. Venezuela, iii. Venoklim v. Venezuela, iv. Rusoro v. Venezuela, 3. Third approach: Withdrawal of consent is only effective when the international investment agreement expires, 4. Current status of the approaches taken by tribunals in the last decade. Is the matter still unsettled?, IV. The practical effects of denunciation, V. Conclusion**

## I. Introduction

On the occasion of the upcoming 10th anniversary of Venezuela's denunciation of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("ICSID Convention"), this article provides an assessment of its consequences by examining its effects from both a legal and practical perspective. We begin by tracing the historical roots of Venezuela's ratification and denunciation of the ICSID Convention. We then examine the legal consequences of denunciation by analyzing the approaches that arbitral tribunals have taken to the question of *when* a state's consent to ICSID jurisdiction is effectively withdrawn. On the practical side, we examine the recourses investors had in light of the denunciation and whether Venezuela succeeded in achieving its political goals in denouncing the ICSID Convention. We conclude that while Venezuela's denunciation of the ICSID Convention has led to some interesting (and contradictory) investment treaty decisions, as a practical matter it has been no more than sound and fury with few consequences.

## II. Historical background

The ICSID Convention has a fraught history in Latin America. When first proposed in 1964, the draft ICSID Convention was rejected by all 19

Latin American countries[1]. The region's refusal (known as "The No of Tokyo") was based on the assertion that the legal and constitutional systems in Latin American countries guaranteed the same rights and protections to their own nationals as to foreign investors – therefore, granting foreign investors an alternative forum impermissibly discriminated against national investors[2].

The region's solidarity in rejecting the draft ICSID Convention had deep historical roots. During the nineteenth and early twentieth centuries, the abuse of diplomatic protection to resolve disputes between Latin American countries and foreign investors along with the occasional armed intervention by the investor's home state[3] led to Latin American states limiting diplomatic protection and forcing foreign investors to resolve their disputes in national courts[4]. This principle was enshrined in the Calvo Doctrine[5], which was adopted by many Latin American countries and embodied in their Constitutions. Venezuela was no exception[6].

After the Second World War, many countries in Latin America sought to develop their economies by pushing "domestic production facilities to

[1] *See* Aron Broches, *The Convention on the Settlement of Investment Disputes between States and nationals of other States* (Leyden: Recueil de Cours, 1972), 348.

[2] *See* Antonio Parra, *The History of ICSID* (Oxford University Press, 2012), 67-8.

[3] In some instances when European investors believed they were owed compensation, European countries sent "warships to moor off the coast of the host states until reparation was forthcoming." Diana Marie Wick, "The Counter-Productivity of ICSID Denunciation and Proposals for Change," *The Journal of International Business & Law* no. 11 Iss. 2 (2012): 250. This so-called gunboat diplomacy was practiced "especially against the states in South America." *Id.* In one example, the well-known "Jecker" claim, a Swiss-French bank loaned Mexico the nominal amount of 75 million francs, of which Mexico received less than 4 million francs. The nonpayment of 100 percent of this loan was the justification used by the French government to send its army to intervene in Mexico in 1861-1862. *See* Ibrahim Shihata, "Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA," *ICSID Review Foreign Investment Law Journal* (1986): 1. *See also*, Rodrigo Polanco Lazo, "Is There a Life for Latin American Countries After Denouncing the ICSID Convention?" *Transnational Dispute Management*, no. 11 Iss 1 (2014): 3.

[4] *See* Wick, "The Counter-Productivity of ICSID Denunciation and Proposals for Change," 251.

[5] The Calvo Doctrine, named after the Argentinian diplomat and jurist Carlos Calvo, first appeared in an 1896 treatise by Mr. Calvo. The doctrine sought to eliminate diplomatic protection for foreign citizens and replace this protection with equal legal treatment for both nationals and aliens in state courts. According to Calvo "it is certain that aliens who establish themselves in a country have the same rights to protection as nationals, but they ought not to lay claim to a protection more extended." James Baker and Lois Yoder, "ICSID and the Calvo Clause a Hindrance to Foreign Direct Investment in LDCs," *Journal on Dispute Resolution* (1989): 90. Furthermore, he emphasized that the recognition of contrary international principles would result in allowing "an exorbitant and fatal privilege, especially favourable to the powerful states and injurious to the weaker nations, establishing an unjustifiable inequality between nationals and foreigners" and that this would contradict the fundamental concept of territorial sovereignty. *Id.*

[6] *See* Wick, "The Counter-Productivity of ICSID Denunciation and Proposals for Change," 251.

manufacture goods that were formerly imported."[7] This lasted until around 1990, when most countries opened their economies under the Economic Commission for Latin America and the Caribbean (ECLAC, or CEPAL for its Spanish acronym) recommendations that emphasized the importance of foreign direct investment ("FDI") for the region's economic development[8]. In order to attract FDI, Latin American countries ratified bilateral investment treaties ("BITs") and the ICSID Convention[9]. From the late 1980s onwards, more than 27 Latin American and Caribbean countries concluded a total of 366 BITs (93 per cent of which were signed in the 1990s)[10]. Venezuela ratified the ICSID Convention on June 1, 1995.

In February 1999, the pendulum in Venezuela swung again when President Hugo Chavez assumed the presidency. During his first term, Venezuela nationalized several industries, and expropriated and seized assets in the telecommunications, mining, and hydrocarbons sectors[11]. After Chavez's subsequent presidential victory in December 2006, he also nationalized the cement industry, steel plants, the wholesale fuel sector, and banks (including Venezuela's third biggest bank, Banco de Venezuela) among others[12]. President Chavez believed Latin America should achieve both political and economic independence from foreign powers, including by nationalizing foreign owned corporations and distancing Venezuela from the United States, western oil companies, the International Monetary Fund and the World

[7] *See* Werner Baer, "Industrialization in Latin America: Successes and Failures," *The Journal of Economic Education*, no. 2 (Spring 1984): 124.

[8] *See* Rudolf Dotzer and Cristoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2012), 71.

[9] *See* Polanco Lazo, "Is There a Life for Latin American Countries After Denouncing the ICSID Convention?," 4. *See also,* Wick, "The Counter-Productivity of ICSID Denunciation and Proposals for Change," 252.

[10] *See* "Bilateral Investment Treaties 1959-1999", *United Nations Conference on Trade and Development*, 2000, 15-16. *See also*, Victoria Aranda, "Bilateral Investment Treaties Quintupled During the 1990s," *UNCTAD Press Release*, December 15, 2000, https://unctad.org/press-material/bilateral-investment-treaties-quintupled-during-1990s.

[11] *See* Wick, "The Counter-Productivity of ICSID Denunciation and Proposals for Change," 247.

[12] *See, e.g.* "Venezuela: Nationalizations drive FDI fears," *The New York Times*, September 9, 2008, https://www.nytimes.com/2008/09/09/news/09iht-09oxan-FDI.16014084.html.

Bank[13]. In his words, "[t]he nation should recover its ownership of strategic sectors, all of that which was privatized, let it be nationalized."[14]

As a result, Venezuela was one of the most frequent respondents in investor state cases, often responding to claims of direct and indirect expropriation. Venezuela became the second most recurrent ICSID arbitration respondent in the region (after Argentina) with 21 ICSID cases pending by 2012[15].

On January 24, 2012 Venezuela submitted its written notice to withdraw from the ICSID Convention[16]. Among the reasons stated in its withdrawal notice, Venezuela alleged that the ICSID Convention contravened two provisions of Venezuela's 1999 Constitution: article 151 (which prohibited international claims with respect to public interest contracts[17]) and article 301 (which incorporated the Calvo doctrine). Moreover, Venezuela asserted that ICSID arbitration was biased in favor of multinational corporations and violated the host country's sovereignty[18].

President Chavez was also a proponent of the Alianza Bolivariana de los Pueblos de Nuestra América (ALBA), which promotes regional integration and protection of social

[13] David Conklin, "Hugo Chavez was No Outlier." *Harvard Business Review*, March 7, 2013, https://hbr.org/2013/03/hugo-chavez-was-no-outlier. *See also,* Justin Dargin, "Investor-State Relations in The Chavez Age; The Nature of Resource Nationalism in the 21st Century," *Harvard Kennedy School Belfer Center Publications* (Spring 2010): 40.

[14] Dargin, "Investor-State Relations in The Chavez Age; The Nature of Resource Nationalism in the 21st Century," 40-41.

[15] *See* "Venezuela withdraws from ICSID," *Thomson Reuters Practical Law*, January 31, 2012, https://uk.practicallaw.thomsonreuters.com/2-517-5244.

[16] *See* "Venezuela Submits a Notice under Article 71 of the ICSID Convention," *ICSID News Releases*, January 26, 2012, https://icsid.worldbank.org/news-and-events/news-releases/venezuela-submits-notice-under-article-71-icsid-convention

[17] Article 151 of the Venezuelan constitution provides "In the public interest contracts, unless inapplicable by reason of the nature of such contracts, a clause shall be deemed included even if not expressed, whereby any doubts and controversies which may raise concerning such contracts and which cannot be resolved amicably by the contracting parties, shall be decided by the competent courts of the Republic, in accordance with its laws and shall not on any grounds or for any reason give rise to foreign claims." Constitution of the Bolivarian Republic of Venezuela, February 19, 2009, article 151 (Free translation from Spanish: "En los contratos de interés público, si no fuere improcedente de acuerdo con la naturaleza de los mismos, se considerará incorporada, aun cuando no estuviere expresa, una cláusula según la cual las dudas y controversias que puedan suscitarse sobre dichos contratos y que no llegaren a ser resueltas amigablemente por las partes contratantes, serán decididas por los tribunales competentes de la República, de conformidad con sus leyes, sin que por ningún motivo ni causa puedan dar origen a reclamaciones extranjeras.").

[18] *See* James Otis and Jaime Martínez, "BITs in Pieces: The effectiveness of ICSID Jurisdiction after the ICSID Convention Has Been Denounced," *Journal of International Arbitration* 29, no. 4 (2012): 440.

rights. During a summit of ALBA held in 2007, member countries proclaimed their intent to withdraw from ICSID "to guarantee their sovereign right to regulate foreign investment on their national territories and reject diplomatic and media pressure exercised by some multinational companies (...) which resist the application of sovereign rules by threatening countries with initiating international arbitration."[19] Furthermore, Venezuela is a member of Unión de Naciones Suramericanas ("UNASUR"), which proposes the creation of a regional arbitration center as an alternative to ICSID. In short, Venezuela's denunciation was more than just a legal strategy to prevent future claims; it also sought to position Venezuela as a regional leader in the regulation of foreign investment disputes.

Venezuela did not, however, terminate its BITs. While in 2008 Venezuela did terminate its BIT with the Netherlands, alleging that the Netherlands-Venezuela BIT had been used for treaty shopping[20], no other BITs were terminated since then and to date Venezuela has 25 BITs in force[21].

## III. The legal effects of denunciation

After Venezuela's denunciation of the ICSID Convention, several investors filed ICSID claims against Venezuela within the ensuing six-month period. And five tribunals have addressed the issue of *when* Venezuela's consent to ICSID arbitration was effectively withdrawn. The question does not have a straightforward answer, as evidenced by its leading to three different approaches: (1) consent is effectively withdrawn when the denunciation notice is submitted to the World Bank; (2) consent is effectively withdrawn only after the expiration of the six-month period provided in article 71 of the ICSID Convention; and (3) consent is effectively withdrawn only with the expiration of the sunset or survival clause in the relevant BIT incorporating ICSID arbitration. Unsurprisingly, the ad hoc committee in *Fábrica de Vidrios v.*

[19] Polanco Lazo, "Is There a Life for Latin American Countries After Denouncing the ICSID Convention?" 11.

[20] *See,* Wick, "The Counter-Productivity of ICSID Denunciation and Proposals for Change," 251.

[21] *See* International Investment Agreements Navigator, "Bolivarian Republic of Venezuela, Bilateral Investment Treaties," Investment Policy Hub UNCTAD, https://investmentpolicy.unctad.org/international-investment-agreements/countries/228/venezuela-bolivarian-republic-of (accessed June 7, 2021)

*Venezuela* recently found that tribunals have arrived at contradictory decisions and that the issue remains unsettled[22].

### *A. Relevant ICSID Convention Articles*

Three articles of the ICSID Convention are relevant to denunciation.

Article 25(1) provides requirements for jurisdiction:

> The jurisdiction of the Centre 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. When the parties have given their consent, no party may withdraw its consent unilaterally[23].

Per article 25(1) the three fundamental conditions to access ICSID jurisdiction are (i) the consent of the parties, (ii) the identity of the parties (*ratione personae*), and (iii) the nature of the dispute (*ratione materiae*)[24]. Furthermore, the consent of the parties must be mutual and in writing. While article 25 addresses *who* must give consent and *how*, it does not establish *when* consent is perfected[25].

Article 71 provides for denunciation as an option:

> Any Contracting State may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice[26].

Article 71 addresses the right that state parties have to withdraw from the Convention. However, as discussed below, it is disputed whether Article 71 addresses the issue of when consent *to arbitration* is withdrawn by a state.

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[22] *See* Lisa Bohmer, "Analysis: Reasons revealed as to why an Ad Hoc Committee has upheld restrictive reading of ICSID denunciation provisions; citing lack of stare decisis doctrine, committee sees no basis to annul award that diverged from others," *IA Reporter*, November 27, 2019, https://www.iareporter.com/articles/analysis-reasons-revealed-as-to-why-an-ad-hoc-committee-has-upheld-restrictive-reading-of-icsid-denunciation-provisions-citing-lack-of-stare-decisis-doctrine-committee-sees-no-basis-to-annul-award/

[23] ICSID Convention, article 25(1.)

[24] *See* Georges Rene Delaume, "Convention on the Settlement of Investment Disputes Between States and Nationals of Other States," *The International Lawyer,* no. 1 (1966): 64, 68.

[25] "Consent of the parties must exist when the Centre is seized (Articles 28(3) and 36(3) but the Convention does not otherwise specify the time at which consent should be given". Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 43.

[26] ICSID Convention, article 71. Article 73 establishes that "[i]nstruments of ratification, acceptance or approval of this Convention and of amendments thereto shall be deposited with the Bank which shall act as the depositary of this Convention. The depositary shall transmit certified copies of this Convention to States members of the Bank and to any other State invited to sign the Convention." ICSID Convention art. 73.

Article 72 explains the effect of denunciation:

> Notice by a Contracting State pursuant to Articles 70 or 71 shall not affect the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary[27].

Article 72 addresses the consequences of denunciation and, along with article 71, is relevant to *when* consent is withdrawn by a state.

### *B. Approaches to determining when a State's withdrawal of consent to arbitrate becomes effective*

Tribunals and academics have adopted three different theories as to when a state's withdrawal from the ICSID Convention effectively withdraws its consent to ICSID arbitration. A first approach ("First Approach") posits that according to articles 71 and 72 of the ICSID Convention, a contracting state withdraws its consent to ICSID arbitration at the exact same moment that it submits its written denunciation to the World Bank[28]. A second approach ("Second Approach") posits that, according to article 71, there is a six-month window from when the written denunciation is submitted to the World Bank until the withdrawal of its consent to arbitrate takes effect. A third approach ("Third Approach") posits that if the contracting state has denounced the ICSID Convention, according to articles 71 and 72, but has also entered into an international investment agreement ("IIA") that provides for ICSID arbitration, the sovereign state's consent to ICSID arbitration will remain in effect until the IIA (including any sunset or survival clause) expires regardless of the state's denunciation.

#### 1. First Approach: Consent is withdrawn the moment that a written denunciation is submitted to the World Bank

Under the First Approach, a contracting state's withdrawal of consent to ICSID arbitration is effective the moment the denunciation is submitted in writing to the ICSID depositary.

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[27] ICSID Convention, article 72.

[28] This approach has been supported by Professor Christoph Schreuer. *See* Christoph Schreuer, "Denunciation of the ICSID Convention and Consent to Arbitration," in *The Backlash against Investment Arbitration: Perceptions and Reality*, ed. Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung, and Claire Balchin (The Hague: Kluwer Law International, 2010.)

### i. First Approach as conceived by Professor Christoph Schreuer

Professor Schreuer bases his approach to consent on two fundamental points. First, Professor Schreuer argues that an offer to arbitrate by a contracting state in a domestic law or an IIA is a unilateral offer from which no rights or obligations can arise. According to Professor Schreuer, consent is reciprocal and comes into existence when all parties to a dispute agree to arbitration in writing in accordance with article 25 of the ICSID Convention[29].

Second, according to Professor Schreuer, although article 71 establishes in principle that a denunciation of the Convention is only effective after six months, article 72 "contains a different rule on the effective date of the denunciation with respect to consent."[30] Professor Schreuer argues that the withdrawal of consent occurs when denunciation is received by the ICSID depositary and that from such date onwards, investors can no longer consent to arbitration because the state withdrew its offer to consent before consent was perfected[31].

### ii. Fábrica de Vidrios v. Venezuela

*Fábrica de Vidrios v. Venezuela*[32] is the only reported case to adopt Professor Schreuer's approach and to rely on article 72 of the ICSID Convention to decline jurisdiction. Claimants filed their request for arbitration on July 20, 2012, just a few days before the expiration of the six-month period following denunciation. Venezuela challenged the tribunal's jurisdiction on several grounds including article 72, arguing that mutual consent must be established prior to denunciation. Claimants argued that a contracting state's unilateral consent subsisted until the expiration of the six-month period following the denunciation and thus, since the request for arbitration was filed during that pe-

[29] Christoph Schreuer, "Consent to Arbitration," in *The Oxford Handbook of International Investment Law,* ed. Christoph Schreuer, Federico Ortino, and Peter Muchlinsky (Oxford: Oxford University Press, 2008), 1087.
[30] Schreuer, "Denunciation of the ICSID Convention and Consent to Arbitration," 355.
[31] *See Id.*
[32] *See* Fábrica de Vidrios Los Andes, C.A. & Owens-Illinios de Venezuela, C.A. v. Bolivarian Republic of Venezuela, ICSID Case No ARB/12/21, Award (November 13, 2017) (hereinafter "Fábrica de Vidrios Award.")

riod, consent was validly perfected while Venezuela was a contracting state.

The tribunal made three key determinations in concluding that it did not have jurisdiction over the dispute because consent to the jurisdiction of the Centre had not been perfected prior to denunciation[33].

First, the tribunal rejected claimants' argument that Venezuela's unconditional consent to ICSID in the BIT was "impervious to Venezuela's actions taken in respect of its obligations under the ICSID Convention."[34] The tribunal concluded that a BIT cannot alter the scope of a contracting state's rights or obligations under the Convention, and that ICSID arbitration is only available if both the conditions established under the BIT and the ICSID Convention have been satisfied[35].

Second, the tribunal stated that the meaning of "consent" in article 72 refers to perfected consent and not unilateral consent. Thus, the state's consent to ICSID arbitration can only be extended throughout the six-month period in cases of prior perfected consent[36].

Third, the tribunal held that the objective of articles 71 and 72 is to regulate denunciation to "ensure that the resulting divorce is as orderly as possible while protecting vested rights under any existing arbitration agreement."[37] The tribunal added that if article 72's purpose was interpreted to preserve additional agreements to arbitrate, then a state could be subject to "an unlimited and unforeseeable number of future ICSID arbitrations for decades after its denunciation comes into effect."[38] The approach taken by the tribunal has been criticized as missing "the overarching policy objectives pursued by Article 71 of the Convention: precluding states from opportunistically withdrawing from a treaty without previously

[33] *See* Fábrica de Vidrios Award, para. 282.
[34] Fábrica de Vidrios Award, para. 261.
[35] *See* Fábrica de Vidrios Award, para. 261-2.
[36] *See* Fábrica de Vidrios Award, paras. 277-8. *See also,* Manuel Casas, "When the Bell Doesn't Save You: Favianca and Jurisdiction After ICSID Denunciation," *Kluwer Arbitration Blog*, January 5, 2018, http://arbitrationblog.kluwerarbitration.com/2018/01/05/bell-doesnt-save-favianca-jurisdiction-icsid-denunciation/.
[37] Fábrica de Vidrios Award, para. 285.
[38] Fábrica de Vidrios Award, para. 289.

granting potential claimants enough time to bring their claims."[39]

### 2. Second Approach: Withdrawal of consent will only be effective after the six-month period of article 71 expires

Under the Second Approach, a withdrawal of consent under the ICSID Convention by a contracting state is effective only after the six-month period provided in article 71 of the ICSID Convention expires. The advocates of the Second Approach argue that the ICSID Convention establishes a gradual withdrawal, and that the opposite conclusion would "strip article 71 of the ICSID Convention of any practical meaning and *effet utile*."[40] A proponent of this approach, Emmanuel Gaillard, states that:

> When the investor has accepted the state's general consent prior to the receipt of the notice of denunciation by the centre or within the six-month period set forth in Article 7[1], the effectiveness of the existing rights and obligations should raise little difficulty as the host state is still a contracting party at those times (...) In both these situations, the investor is protected by Article 25(1) of the convention, which defines jurisdiction and provides that '[w]hen the parties have given their consent, no party may withdraw its consent unilaterally.'[41]

Another commentator argues that even though "article 72 refers expressly to consent given before a notice of denunciation is received, the provision does not foreclose the possibility of accepting the offer after the denunciation," because there is no express prohibition on such acceptance in article 72 or elsewhere in the ICSID Convention[42].

The majority of the tribunals to decide the issue have adopted the Second Approach.

#### i. Blue Bank v. Venezuela

In *Blue Bank v. Venezuela*[43], Venezuela contended that the tribunal lacked jurisdiction because Venezuela "had already voluntarily exercised its right to denounce the ICSID Convention and, thus, had

[39] Casas, "When the Bell Doesn't Save You: Favianca and Jurisdiction After ICSID Denunciation."
[40] Victorino Tejera, "Unraveling ICSID's Denunciation: Understanding the Interaction Between Articles 71 and 72 of the ICSID Convention," *ILSA Journal of International & Comparative Law* 20, no.3 (2014): 431.
[41] Emmanuel Gaillard, "The Denunciation of ICSID Convention," *New York Law Journal* 237, no. 122 (June 2007): 2-3.
[42] Tejera, "Unraveling ICSID's Denunciation: Understanding the Interaction Between Articles 71 and 72 of the ICSID Convention," 433.
[43] *See* Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/20, Award (April 26, 2017) (hereinafter "Blue Bank Award"), paras. 46-7.

withdrawn its consent to the submission of disputes to the jurisdiction of the Centre."[44] Venezuela claimed that "once its notice of denunciation of the Convention was given under article 71 on 24 January 2012, its unilateral consent to submit to arbitration also lapsed pursuant to article 72."[45]

The Tribunal rejected Venezuela's arguments holding that "a denunciation of the ICSID Convention takes effect only after the expiry of six months from the date of receipt of the notice of denunciation by the depositary."[46] The Tribunal held that any other interpretation "would render the reference to a six-month time period devoid of any meaning and would run directly contrary to the principle of *effet utile* (ut res magis valeat quam pereat)."[47]

### ii. Transban v. Venezuela

In *Transban v. Venezuela*[48], the tribunal concluded it lacked jurisdiction *ratione personae* over claimant. However, in *dicta*, the tribunal dismissed Venezuela's objection to ICSID jurisdiction due to its alleged withdrawal of consent, which Venezuela claimed was immediate and effective from the moment that the ICSID depositary received its notice to denounce the ICSID Convention.

The tribunal explained that nothing in article 72 suggests that investors could not consent to arbitration during the six-month period provided by article 71[49]. The majority concluded that:

> If the denouncing state has given its consent to the jurisdiction of the Centre before notifying the depositary of its denunciation of the Convention, and if an investor has given its consent in writing when the Convention was still in force for the denouncing state, the mutual consent of both parties is in existence and constitutes a binding arbitration agreement[50].

The tribunal held that since claimant filed notice of proceedings when Venezuela was still a party to the Convention, on the last day of the

[44] Blue Bank Award, para. 51 (a.).
[45] *Id.*
[46] Blue Bank Award, para. 119.
[47] *Id.*
[48] *See* Transban v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/24, Award (November 22, 2017) (hereinafter "Transban Award.")
[49] *See* Transban Award, para. 83.
[50] Transban Award, para. 84.

six-month window, claimant's expression of consent was timely[51].

### iii. Venoklim v. Venezuela

In *Venoklim v. Venezuela*[52], the tribunal declined jurisdiction due to lack of *ratione personae* jurisdiction over claimants[53]. However, in *dicta*, the Tribunal concluded that denunciation did not foreclose jurisdiction over claims submitted after notification of denunciation but before the end of the six-month period[54]. The tribunal held that consent under "Article 72 is (...) that of the State itself, i.e. the simple unilateral offer of arbitration, and not the consent of the state perfected by the investor's acceptance of that offer when it submits its request for arbitration."[55] The Tribunal went on to conclude that under the principle of legal certainty investors cannot be denied the right to benefit from that six-month period to accept the state's offer and file their claims[56]. A contrary interpretation of this article "would violate basic principles of legal certainty because no investor would know beforehand when a state will withdraw consent to ICSID Convention."[57]

### iv. Rusoro v. Venezuela

*Rusoro Mining Ltd v. Venezuela*[58] dealt with a claim for alleged unlawful expropriation under the Canada-Venezuela BIT. The claimant filed the case under the ICSID Additional Facility, which was an option provided under the BIT. However, for a case to be filed under the ICSID Additional Facility, at least one of the parties needs to be a contracting

[51] *See* Transban Award, para. 94.

[52] *See* Venoklim Holding B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/22, Award (April 3, 2015) (hereinafter "Venoklim Award.")

[53] *See* Venoklim Award, para. 163.

[54] *See* Venoklim Award, para. 65-8.

[55] Venoklim Award, para. 65 (Free translation from Spanish: "[E]l consentimiento al que se refiere el Artículo 72 es, en este caso, el del Estado en sí, es decir la simple oferta unilateral de arbitraje, y no el consentimiento del Estado perfeccionado con la aceptación del inversionista de dicha oferta al presentar su solicitud de arbitraje. Entenderlo de otra manera, sería contrario al principio de seguridad jurídica, el cual exige que el inversionista goce de un periodo de seis meses contados a partir del recibo de la notificación de la denuncia según el Artículo 71 del Convenio CIADI.").

[56] *See* Clovis Trevino, "Attempt to Access BIT through Portal of Domestic Law Falls Short; Tribunal Appears to Split Over Propriety of Locals Using Foreign Entities to Sue their Own State," *IA Reporter*, April 7, 2015, https://www.iareporter.com/articles/attempt-to-access-bit-through-portal-of-domestic-law-falls-short-tribunal-appears-to-split-over-propriety-of-locals-using-foreign-entities-to-sue-their-own-state/

[57] Venoklim Award, para. 63 (Free translation from Spanish: "... llevaría a la violación de principios básicos de seguridad jurídica, porque ningún inversionista podría saber de antemano en qué momento un Estado va a denunciar el Convenio CIADI.").

[58] *See* Rusoro Mining Inc. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/12/5, Award (August 22, 2016) (hereinafter "Rusoro Award.")

state of the ICSID Convention. Since Canada was not at that time an ICSID contracting state, the question before the tribunal was whether Venezuela was still a contracting party during the six-month window following the denunciation of the Convention[59]. While this is a different question than that of withdrawal of consent to arbitrate, the tribunal cited *Venoklim* and endorsed its conclusions[60].

### 3. Third approach: Withdrawal of consent is only effective when the international investment agreement expires

The Third Approach regarding the effective withdrawal of consent by a contracting state posits that consent is not withdrawn until any sunset or survival clause in the investment agreement expires. As a proponent of this approach, Oscar M. Garibaldi argues that:

> [I]f the treaty provides consent to ICSID jurisdiction, (...) the consent will be binding on the State and hence irrevocable, unless the treaty itself provides otherwise. The irrevocability of such consent flows not from the ICSID Convention, which as we have seen says nothing about the conditions for valid withdrawal, but from the binding force of the treaty, which in turn results from the rule pacta sunt servanda under general international law. (...) Therefore, as long as the obligations of the treaty remain in effect for the denouncing State, any attempt by it to withdraw its consent given in the treaty would be ineffectual[61].

Emmanuel Gaillard also agrees with this approach but only if a state's consent in the applicable treaty is unqualified, in which case that consent "should not be affected by the denunciation of the ICSID Convention."[62] He adds:

> This interpretation is in conformity with both the text and the purpose of Article 72, which is to avoid the situation where a state unilaterally frustrates its undertaking to submit to ICSID arbitration, even where such undertaking is contained in a treaty which remains in existence for years after the denunciation of the ICSID Convention[63].

While the Third Approach has not carried the day in any of the five cases discussed above, it featured in the

[59] *See* Rusoro Award, para. 260. *See also*, Hugh Carlson, Anton Chaevitch, and Elizabeth Snodgrass, "Chapter 14: Three Notable Issues from the Venezuela Experience," in *International Arbitration in Latin America: Energy and Natural Resources Disputes*, ed. Gloria Maria Álvarez, Melanie Riofrio Piché and Felipe Sperandio (The Hague: Kluwer Law International, 2021), 332.
[60] *See* Rusoro Award, para. 267.
[61] Oscar M. Garibaldi, "On the Denunciation of the ICSID Convention, Consent to Jurisdiction, and the Limits of the Contract Analogy," *Transnational Dispute Management 1,* (2009): 26.
[62] Emmanuel Gaillard, "The Denunciation of ICSID Convention," 2-3.
[63] Emmanuel Gaillard, "The Denunciation of ICSID Convention," 2-3.

separate opinion in *Blue Bank v. Venezuela*. In that opinion, Christer Söderlund, the President of the tribunal, agreed with the rest of the tribunal that the investor's consent was timely since it was given within the six-month window following the denunciation. However, he went a step further and adopted the Third Approach.

Mr. Söderlund questioned the appropriateness of the offer-acceptance model when interpreting an international investment agreement such as a BIT. In the first place, he criticized a literal interpretation of article 25 that requires consent from the disputing state and investor because "when the text of the Convention was conceived (...) the notion of an inter-State investment treaty was not contemplated in a way so as to accommodate the exigencies of consent given by way of an inter-state undertaking."[64]

Second, he agreed that article 72 requires perfected consent, but he posited that the relevant consent is not between the state and the investor but the consent of the states that entered into a BIT to submit to international arbitration disputes at the behest of third-party investors. Mr. Söderlund argued that "[s]uch consent (whether regarded as unilateral or mutual) will remain in effect for the duration of the BIT."[65] Thus, Mr. Söderlund argued that "a notice of denunciation of the ICSID Convention is of no consequence for consent given by a state party in a BIT in relation to another state."[66]

As one commentator observes, under Mr. Söderlund's model the contract to arbitrate is between the two sovereign states while the investor is a third-party beneficiary to the contract[67]. Consequently, instead of considering the arbitration clause within the BIT a "standing offer" it is considered a "procedural right" that is secured for the third-party beneficiary. Moreover, this right is available to an investor until the expiration of sunset or survival clause in the BIT because it is a recognized principle of law that rights conferred

[64] Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/20, Mr. Christer Söderlund Separate Opinion (April 3, 2017) (hereinafter "Blue Bank Separate Opinion"), para. 36.
[65] Blue Bank Separate Opinion, para. 45.
[66] *Id.*
[67] Anuraag Rajagopalan, "Denunciation of ICSID Convention: Re-Visiting Mr. Soderlund's Separate Opinion," *Kluwer Arbitration Blog,* May 31, 2020, http://arbitrationblog.kluwerarbitration.com/2020/05/31/denunciation-of-icsid-convention-re-visiting-mr-soderlunds-separate-opinion/.

to a beneficiary cannot be altered without their consent[68].

### 4. Current status of the approaches taken by tribunals in the last decade. Is the matter still unsettled?

The *Fábrica de Vidrios v. Venezuela* award discussed above was subject to an annulment proceeding. The ad hoc committee upheld the award that declined jurisdiction over the dispute on the basis of Venezuela's denunciation of the ICSID Convention[69]. In so doing, it confirmed that the question of when consent to arbitrate is withdrawn remains unsettled.

Claimants filed for annulment in March 2018 claiming that the tribunal's decision amounted to a manifest excess of powers, and that it failed to state the reasons on which the award was based. Particularly, claimants argued that the tribunal's interpretation of the BIT, as well as articles 71 and 72 of the ICSID Convention, was unreasonable and that it failed to properly address claimants' argument and evidence that it accepted Venezuela's offer to arbitrate before the denunciation became effective, *i.e.*, during the six-month window post denunciation.

The ad hoc committee reasoned that the tribunal had clearly explained its position that article 71 addressed Venezuela as a contracting state while article 72 addressed Venezuela as a potential party to ICSID arbitration, and that, therefore, article 72 protects the right to pursue arbitration only for foreign investors which had accepted Venezuela's offer to arbitrate before Venezuela submitted its notice to withdraw from ICSID. The Committee explained that whether or not it agreed with this interpretation, the tribunal's explanation was reasonable. The Committee added that "while previous decisions had reached opposite conclusions, there is no doctrine of stare decisis in interna-

[68] *See Id.*

[69] Although the decision is not yet public, the Committee's reasoning has become available. *See* Lisa Bohmer, "ICSID Ad Hoc Committee upholds 2017 award which had declined jurisdiction due to Venezuela's denunciation of the ICSID Convention," *IA Reporter*, November 25, 2019, https://www.iareporter.com/articles/icsid-ad-hoc-committee-upholds-2017-award-which-had-declined-jurisdiction-due-to-venezuelas-denunciation-of-the-icsid-convention/. *See also*, Bohmer, "Analysis: Reasons revealed as to why an Ad hoc Committee has upheld restrictive reading of ICSID denunciation provisions; citing lack of stare decisis doctrine, committee sees no basis to annul award that diverged from others."

tional law."[70] The committee also stated that even if it agreed that it would be desirable to ensure consistency of arbitral decisions, an inconsistency with previous awards could not warrant annulment of the award. Thus, the committee concluded that the tribunal had not manifestly exceeded its powers[71].

Hence, the correct approach regarding *when* consent to arbitrate is effectively withdrawn as a result of denunciation remains unsettled. While most tribunals have adopted the Second Approach by allowing the investors to file arbitrations during the six-month period post denunciation, there is still at least one recorded tribunal holding that the effective date of withdrawal of consent is the same date as the submission of the notice to withdraw from the ICSID Convention. Moreover, while the Third Approach adopted by Mr. Söderlund has only been featured in his *Blue Bank* opinion and in academic discussions, it may be that future tribunals will adopt his approach.

## IV. The practical effects of denunciation

As a practical matter, Venezuela did not generally achieve its goal of evading the ICSID system (except in the case of *Fábrica de Vidrios v. Venezuela* discussed above). During the six-month post denunciation period, a total of nine new ICSID cases were filed against Venezuela. From the time when the six-month period ended onwards, an equal number of ICSID cases have been filed against Venezuela. To date Venezuela still has 16 cases pending at ICSID, 7 of them under the Additional Facility Rules[72].

This is different than what happened when Bolivia and Ecuador denounced the Convention. In those cases, after denunciation, the majority of investors brought their claims under the UNCITRAL Rules[73]. The main reason Venezuela is different lies in the uncommon language of

[70] Bohmer, "Analysis: Reasons revealed as to why an Ad hoc Committee has upheld restrictive reading of ICSID denunciation provisions; citing lack of stare decisis doctrine, committee sees no basis to annul award that diverged from others."
[71] *See Id.*
[72] *See* "Cases Database," ICSID Website, last time visited June 1, 2021, available at https://icsid.worldbank.org/cases/case-database.
[73] *See* Luke Erik Peterson, "Analysis: What have we learned from the first wave of post – denunciation claims against Venezuela- and why do investors keep suing Venezuela there?," *IA Reporter*, November 30, 2017, https://www.iareporter.com/articles/analysis-what-have-we-learned-from-the-first-wave-of-post-denunciation-icsid-claims-against-venezuela-and-why-do-investors-keep-suing-venezuela-there/

many of the BITs Venezuela ratified. Some of Venezuela's BITs reserve the availability of UNCITRAL arbitration to situations where ICSID is not available. At least one UNCITRAL tribunal has already declined jurisdiction when there was a reasonable prospect that the ICSID Secretariat would have registered the claim[74]. Moreover, some Venezuela BITs provide for UNCITRAL arbitration only where ICSID Arbitration *and* arbitration under ICSID's Additional Facility are not available. Therefore, if the investor's home country is an ICSID contracting state, then Venezuela's withdrawal does not prevent an investor from bringing the claim under the Additional Facility Rules[75].

Thus, to a great degree, Venezuela has not been able to escape ICSID, which administers arbitrations under the Additional Facility. Moreover, arbitration proceedings under the ICSID Convention and the ICSID Additional Facility Rules are very similar, since most of the provisions that apply to Additional Facility arbitrations are almost identical to those that apply to ICSID arbitrations[76].

Venezuela has, it is true, escaped the ICSID Convention rules regarding the annulment and enforcement of awards. Unlike an award under the ICSID Arbitration Rules, an award rendered under the Additional Facility Rules, like those rendered under the UNCITRAL Rules, is subject to review in the national courts of the place of arbitration or of the state in which the investor seeks enforcement. However, in practice this does not confer significant benefits on states because, as one commentator observes, the setting aside of awards is typically limited to "the very rare instances of gross transgressions, such as lack of notice, excess of jurisdiction, unarbitrability, or an award in conflict with public policy. The grounds for refusing recognition and enforcement under the New

[74] This was the case of Nova Scotia Power Incorporated (Canada) v. Bolivarian Republic of Venezuela, ICSID Case No. ARB (AF)/11/1, Award (April 30, 2014.)

[75] Peterson, "Analysis: What have we learned from the first wave of post – denunciation claims against Venezuela- and why do investors keep suing Venezuela there?" ("Because of the continued availability of arbitration under the ICSID Additional Facility, and the ICSID-privileging language found in many Venezuelan BITs, the country's denunciation of the ICSID Convention has not had the same dramatic effects as was seen in relation to Bolivia and Ecuador when those countries divorced from the ICSID system.").

[76] *See* "Procedure in ICSID Additional Facility arbitration and other ADR mechanisms," *Thomson Reuters Practical Law*,
https://uk.practicallaw.thomsonreuters.com/8-629-0711

York Convention are similar."[77] Therefore, having forced investors to use the ICSID Additional Facility rather than the ICSID Arbitration Rules has likely not provided significant benefit to Venezuela.

## V. Conclusion

The fact that Venezuela still faces a considerable number of arbitrations both under the ICSID Arbitration Rules and the ICSID Additional Facility, that the BITs ratified by Venezuela which favor ICSID arbitration are still in force (and moreover contain lengthy sunset or survival clauses), and that Venezuela may continue to face arbitrations under the ICSID Additional Facility Rules (or even the ICSID Arbitration Rules) in the years ahead, show that the denunciation of the ICSID Convention was more a political display than an act with wide-ranging consequences. Venezuela and other states that take issue with ICSID arbitration will need to work collaboratively to come up with a system that better meets their concerns. If the Venezuela experience is any indication, denouncing the ICSID Convention by itself will not provide much satisfaction.

Having said that, the sound and fury of Venezuela's denunciation of the ICSID Convention has provided food for thought for tribunals and academics alike. If any future denunciations do occur, these issues will be relevant once again.

[77] Wick, "The Counter-Productivity of ICSID Denunciation and Proposals for Change," 278.