

Why Venezuela's Bondholders Must Litigate, Not Arbitrate

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December 15, 2017, 11:55 AM EST

As more and more Venezuelan debt becomes past due, holders of the republic's \$36 billion of sovereign bonds[1] are faced with an interesting choice should they wish to exercise remedies.[2] The traditional response of an aggrieved bondholder would be to seek to obtain a judgment for missed payments (either before or after an acceleration of the bonds) under the law and in the courts made available to it under the applicable bond documentation. In the case of the republic's bonds, this would mean bringing a suit for nonpayment under New York law either in New York or London, where the republic has consented to jurisdiction, appointed an agent for service of process, and also waived any claim of an inconvenient forum, a right to trial by jury, and sovereign immunity.[3] Despite the fact that the republic's bond documentation includes these bondholder-friendly protections, some commentators have nonetheless proposed investment treaty arbitration as a preferred and plausible alternative to New York or London court litigation for those seeking to recover on their defaulted bonds. These commentators ground their recommendation on the perceived advantages an arbitral award subject to the ICSID[4] Convention offers over a New York or English court judgment, believing that such an award would permit them to seek enforcement worldwide on an accelerated time frame. This ICSID approach obtains its inspiration from an arbitration filed by tens of thousands of retail Argentine bondholders in which they established ICSID jurisdiction over claims for defaulted bonds and eventually received partial payment in settlement with Argentina last year.[5]



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For the reasons set forth below, we believe that court litigation offers a preferable alternative to treaty-based arbitration for Venezuela's bondholders looking to recover outstanding principal and interest. We first address the benefits offered by ICSID arbitration and explore how the Abaclat claimants fared in comparison to other Argentine bondholders who litigated claims in New York federal court and settled those claims with Argentina. We then explain why pursuing treaty arbitration would not appear to be preferable for Venezuela's sovereign bondholders. Our conclusions are relatively straightforward.

First, it is doubtful that an ICSID Convention tribunal would have jurisdiction over any bondholders' claims given Venezuela's 2012 denunciation of the ICSID Convention. Second, even if treaty arbitration were available other than under the ICSID Convention, that option would not be open to U.S. holders, and for other holders such proceedings would likely take far longer to obtain an award than it would

take to obtain a court judgment in the United States or England. Finally, the rationale cited by those recommending ICSID arbitration for republic bondholders, namely that United States sanctions may limit enforcement efforts within the United States thus making global enforcement efforts that much more important, is in our view questionable given the intent of those sanctions. In any event, enforcement of a New York or English court judgment outside the United States (as compared to the enforcement of an arbitral award) would not present any comparative timing disadvantages for aggrieved bondholders. Indeed, in many jurisdictions, such as within the European Union, we believe enforcement would be faster and more efficient than pursuing a non-ICSID arbitral award.

The Reasons for Pursuing ICSID Arbitration Were It Available to Holders of Venezuelan Bonds

Generally, there are two sources providing a claimant the right to have its disputes with a sovereign resolved via arbitration: (1) the claimant has a contract with the state that provides for arbitration; or (2) the claimant is a national of a country (“treaty country”) with whom the state (the “host state”) has entered into a treaty offering such nationals the right to arbitrate certain disputes with the host state.[6] As noted above, Venezuela’s fiscal agency agreements do not contain any provision to arbitrate disputes with bondholders; accordingly, to pursue arbitration, a republic bondholder will need to be a national of a treaty country.

Venezuela is a party to over 20 bilateral investment treaties, which offer nationals of the treaty countries the option to arbitrate claims against Venezuela if they believe the host state has violated the substantive provisions of the BIT with respect to an “investment” in the host state. Venezuela’s BITs generally provide for three different forms of arbitration: (1) arbitration under the ICSID Convention, (2) arbitration under the ICSID Additional Facility Rules, and (3) ad hoc arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

ICSID Awards

In the realm of investor-state arbitration, an award under the ICSID Convention (an “ICSID award”) is the “gold standard.” To pursue an ICSID arbitration over a BIT claim, Venezuela and the home state of the claimant would have to be contracting states to the ICSID Convention. The principal distinguishing feature of an ICSID award that gives it an advantage over a national court judgment or even other arbitral awards is the obligation of the 153 ICSID Convention contracting states[7] to “recognize an award rendered pursuant to [the] Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.”[8] This means that convention states’ courts are not permitted to examine the award’s merits, its compliance with international law, or the ICSID tribunal’s jurisdiction.[10] An ICSID award is thus not subject to the judicial recognition process under the New York Convention, the multilateral treaty which provides for enforcement of arbitral awards but provides limited grounds for local courts to resist recognition and enforcement of awards issued in other countries.[10]

ICSID Additional Facility and UNCITRAL Awards

Many of Venezuela’s BITs provide that in the event that access to the ICSID Convention is not available (i.e., because one of Venezuela or the treaty country is not party to such convention when proceedings are initiated), arbitration can take place under the ICSID Additional Facility arbitration rules. The Additional Facility arbitration rules allow ICSID to administer arbitration over disputes that fall outside the scope of the ICSID Convention because only one of the relevant states (either the host state or the home state of the investor) is a party to the ICSID Convention.

In the event that both ICSID Convention and the ICSID Additional Facility arbitration routes are not available to arbitrate the dispute, most, if not all, of Venezuela's BITs also provide as a final alternative ad hoc arbitration under the UNCITRAL rules.

Importantly, the ICSID Convention is not applicable to either an additional facility award or an UNCITRAL award and therefore neither benefit from the required recognition that an ICSID Convention award receives within the 153 contracting states.[11] Instead, an ICSID Additional Facility award and an UNCITRAL award, much like an international commercial arbitral award, must be judicially recognized and converted to a court judgment wherever enforcement is sought and is subject to the assertion of the defenses available under the New York Convention (and, when issued in the United States, the Federal Arbitration Act).[12] This leads to two principal differences in treatment between an ICSID award and a non-ICSID award even if they were otherwise identical.

The first difference is one of timing. The confirmation or recognition proceedings under the New York Convention for non-ICSID awards can last months (and with appeals over a year) in comparison to the more straightforward process for an ICSID award.[13] The second difference relates to the ability of a state to attack a non-ICSID award that finds the state liable or even an adverse decision on jurisdiction. Although challenging any international arbitral award is often an uphill battle, in some countries, state defendants may have a greater chance of success invoking the New York Convention's public policy exception than would a commercial party.

Thus, unlike an ICSID award, which is not subject to any public policy challenge, an ICSID Additional Facility award or UNCITRAL award is subject to such challenge. Accordingly, in comparison to an ICSID award, it is likely to take longer to confirm or recognize an ICSID Additional Facility award or an UNCITRAL award, and such a non-ICSID award is more vulnerable to challenge, including based on the award being contrary to the public policies of the state where recognition is sought.

The Abaclat Case

With that background, we turn back to the Abaclat case and the lessons it may offer Venezuelan bondholders. In Abaclat, up to 180,000 mostly retail holders of sovereign bonds brought claims in 2006 against Argentina following its 2001 sovereign debt crisis under the Argentina-Italy Bilateral Investment Treaty, which provided for arbitration under the ICSID Convention. In 2011, the Abaclat tribunal's decision on jurisdiction ruled that the Argentine government bonds constituted an "investment" for purposes of the Argentina-Italy BIT and the ICSID Convention and that a mass action by the more than 60,000 remaining claimants was otherwise proper under the ICSID Convention.

In January 2016, following the settlement by Argentina of a number of bondholder judgments issued by a New York federal court, Argentina settled the Abaclat proceeding before any merits award was issued and paid the agreed sum, thus necessarily before any Abaclat bondholder sought to enforce an ICSID award against assets of the Argentine republic. Thus, Abaclat does not in fact provide an example of using an ICSID award's enforceability features to attach or execute upon a sovereign's assets.

In terms of their economic recovery, the Abaclat claimants accepted 150 percent of the original outstanding principal of each bond tendered into the settlement plus a portion of the arbitration expenses.[14] In context, these terms were no more favorable than the terms Argentina offered to bondholders who obtained U.S. court judgments on their defaulted bonds. Nor did Argentina resolve the Abaclat claims any earlier than it resolved the claims of those holding U.S. court judgments.[15]

The absence of past precedent for use of an ICSID award to obtain a recovery on defaulted sovereign bonds is not itself a reason to reject the option in the right circumstances. However, in the section that follows, we address the reasons such a strategy would nonetheless typically be ill-advised for holders of Venezuelan bonds.

The Reasons Against Pursuing Treaty Arbitration Against Venezuela on Defaulted Bond Claims

It is Unlikely That ICSID Convention Jurisdiction Exists Against Venezuela At This Time

Given the enforcement advantages of an ICSID award, any claimant or creditor interested in pursuing arbitration would first explore the availability of arbitration under the ICSID Convention. That route, however, is likely now foreclosed. Venezuela acceded to the ICSID Convention in 1993. But, in January 2012, following the lead of Bolivia in 2007 and Ecuador in 2009, Venezuela formally denounced the ICSID Convention.[16] That withdrawal took effect six months later, in July 2012.[17] As of today, there is no affirmative support in investment treaty case law for the existence of ICSID jurisdiction over Venezuela with respect to an arbitration filed after 2012.[18] It is therefore unlikely that an ICSID Convention tribunal would have jurisdiction over claims yet to be brought by holders of Venezuelan bonds.

Pursuing an ICSID Additional Facility Award or UNCITRAL Award to Recover Unpaid Principal and Interest Would Not Appear to Offer Advantages Over Court Litigation for Venezuela's Bondholders

Even if it is no longer possible to obtain an ICSID award, at least some bondholders may still be able to bring claims against Venezuela and obtain an ICSID Additional Facility or UNCITRAL award. To proceed down this path:

- The bondholder would have to be a national from one of the more than 20 treaty countries (such as the United Kingdom or Canada) with whom Venezuela has an in-force BIT that provides for arbitration under the ICSID Additional Facility or UNCITRAL rules. Critically, the United States has no BIT or other treaty with Venezuela that would permit U.S. bondholders to pursue arbitration against Venezuela;
- The relevant BIT would have to treat the initial offering and/or secondary market purchase of Venezuelan bonds as a protected "investment;"[19]
- In light of recent scholarship and criticism of the *Abaclat* jurisdictional ruling,[20] a creditor would have to overcome the arguments that the New York choice of law and choice of forum provision in the Venezuela bonds negates bondholders having made an investment "in Venezuela;" and
- Pursuing any BIT arbitration is often a lengthy process, and it could take at least a couple of years to find out whether the tribunal has jurisdiction and, if the arbitration is divided into phases, even longer to obtain a merits award.[21]

The issues described above are not meant to be an exhaustive list of all potential hurdles that a holder of Venezuelan bonds wishing to pursue a BIT claim with respect to a bond default might face. But in doing the calculus as to whether pursuing a treaty-based remedy makes sense over a court-based

judgment, the fact that none of these issues would be present in the latter case would have to be considered. Typically obtaining a court judgment would be inexpensive and take between six to 12 months (in either New York or London), in part because of the straightforward nature of any litigation where the primary claim is based on nonpayment of the relevant bond. Moreover, if all the court is asked to do is issue a money judgment for outstanding principal and interest, Venezuela may have no reason to appeal such a court judgment, let alone any prospect of success on such an appeal.

Venezuelan bondholders may nonetheless legitimately ask whether the recent reported settlements of the arbitration awards and follow-on U.S. court judgments obtained by BIT claimants Gold Reserve and Crystallex at settlement amounts reportedly close to par demonstrate that Venezuela is more likely to settle a claim wrapped in the penumbra of a treaty-based award than a court money judgment. By way of background, these arbitral proceedings were commenced at a time when Canada (the home of Gold Reserve and Crystallex) was not yet a contracting state to the ICSID Convention, which resulted in those claimants pursuing and obtaining an ICSID Additional Facility award. Consequently, both claimants had to commence proceedings under the New York Convention in U.S. courts to obtain confirmation of their awards and a resulting court judgment. Those court judgments were then subject to appeal.

Ultimately, two years after receiving their arbitral awards, Gold Reserve and Crystallex were able to seek to enforce their U.S. court judgments. Keep in mind that today a Venezuelan bondholder holding defaulted republic bonds could seek a court judgment directly by suing Venezuela in New York and then seek to enforce that court judgment.

Venezuela has, to date, treated, and is likely to continue to treat, each case (whether under the ICSID Convention, the ICSID Additional Facility or the UNCITRAL rules) as *sui generis*, each with its own set of underlying facts, including the activities that gave rise to the claim, the size of the award, the aggressiveness of the creditor in pursuing collection, and how close the creditor actually gets to successfully attaching Venezuelan assets or making “bad law” from Venezuela’s perspective on whether the assets of PDVSA may be executed upon in satisfaction of a judgment against the republic.[22] We suspect that should bondholders bring BIT-based arbitration, Venezuela would be less inclined to settle such claims given the fact that the underlying issues and factual circumstances in any succeeding bondholder case would be difficult to distinguish, thus raising the stakes of such settlement.

Recognition of a U.S. Court Money Judgment Abroad is Not So Cumbersome as to Justify Investing in Arbitral Proceedings.

As discussed above, to the extent any Venezuelan creditor seeks to recover against republic or PDVSA assets located in the United States, a U.S. court judgment is of course the most readily enforceable instrument for that purpose.

It has been suggested, however, that despite sizeable assets in the United States indirectly owned by PDVSA, U.S. sanctions may preclude creditors of Venezuela or PDVSA from executing on those assets, therefore necessitating collection efforts abroad. The current sanctions aim to prevent U.S. persons and those subject to U.S. jurisdiction from providing, or otherwise facilitating the provision of, financing to the Venezuelan government, and prohibit the purchase (or action facilitating the purchase) of new debt or shares issued by the Venezuelan government (broadly defined), including state-owned enterprise such as PDVSA. We do not see the purpose or effect of U.S. sanctions as immunizing CITGO or other PDVSA assets from the reach of Venezuelan creditors. Moreover, there are mechanisms available to creditors under the sanctions regime to obtain licenses (or seek guidance) from the Office of Foreign

Assets Control if there are concerns regarding the scope of activities covered by such sanctions. Thus, we are less certain that enforcement efforts would necessarily have to be directed to countries outside the United States (although claimants may choose to go after assets and cash flows wherever they may be found).[23]

Even if attempted enforcement abroad were a certainty, that would still not lead to the conclusion that arbitration were advisable over court litigation. It is true that there is no international convention or treaty currently in effect with respect to recognition and enforcement of a U.S. court judgment abroad, unlike the New York Convention with respect to arbitral awards. Whether a foreign court would recognize a U.S. court judgment is a matter of the local law and procedure in that jurisdiction.[24] Given Venezuela's consent to jurisdiction and waiver of immunity before the New York courts, the uncontroversial nature of a judgment for outstanding principal and interest on an unpaid bond, and the absence of an award of punitive damages, the court judgment bondholders would likely receive should be amenable to recognition and enforcement abroad. It may take more time to adjudicate the U.S. court recognition suit abroad than it may have taken to obtain the U.S. judgment in the first place, but in comparison to the typical timeline of an arbitration under a BIT, holders of Venezuelan bonds should expect to be able to start enforcement proceedings in most relevant foreign countries sooner with a U.S. court judgment than if they pursued arbitration.

Moreover, if enforcement is anticipated in any country in the EU, the added burden of recognition could be mitigated by obtaining an English court judgment. Under the Recast Brussels Regulation, an English judgment can be recognized and enforced in other EU member states without any special procedures being required.[25] Also, given the liberal provisions of New York law with respect to the recognition of foreign court money judgments, an English judgment could be recognized and a New York judgment obtained likewise in a matter of months, which could then be used to commence enforcement efforts in the United States.[26]

Conclusion

For bondholders of certain nationalities with idiosyncratic circumstances, BIT arbitration against Venezuela may provide advantages over court litigation. But for the typical Venezuela bondholder looking to recover unpaid principal and interest following Venezuela's default on its sovereign bonds, court litigation is likely superior. Because Venezuela is no longer a contracting party to the ICSID Convention, an ICSID award against Venezuela is likely unavailable to any claimants. Even if other forms of treaty arbitration against Venezuela were still available to non-U.S. bondholders, recognizing a non-ICSID arbitral award would require a process not significantly more advantageous than the one governing the recognition of a U.S. court judgment. Although under the New York Convention, an arbitral award may be more readily recognized than a U.S. court judgment in foreign jurisdictions, pursuing the often lengthy and expensive process of treaty arbitration would prove worthwhile only if there were a significant chance that enforcement would have to be sought overseas, which we do not believe is the case, and even then we do not believe bondholders of the republic would necessarily be better off pursuing such arbitration in lieu of a court judgment. Rather, Venezuela's bondholders would be better off obtaining a U.S. court judgment, which, though not without its own uncertainties, would likely provide a more efficient and reliable path to an eventual recovery (should they find assets that are capable of being attached, restrained or executed upon).

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authors thank Emily Michael for her assistance with this article.

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[1] By “bondholders,” we refer to the holders of a security entitlement with respect to bonds issued by Venezuela.

[2] Unlike holders of Petróleo de Venezuela S.A. (PDVSA) bonds, holders of republic debt can seek redress for defaulted payments without having to involve a trustee since the republic debt was issued through a Fiscal Agency Agreement. This article does not address the litigation or arbitration of any claims with respect to PDVSA bonds.

[3] See, e.g., Fiscal Agency Agreement Among the Bolivarian Republic of Venezuela, Banco Central de Venezuela, Deutsche Bank AG and Bankers Trust Company § 14(a) (July 25, 2001) (“The Issuer agrees that any suit, action or proceeding against it or its properties, assets or revenues with respect to this Agreement ... shall be brought exclusively in the Supreme Court of the State of New York, County of New York; in the United States District Court for the Southern District of New York; in the courts of England that sit in London; or in the courts of Venezuela that sit in Caracas.”).

[4] The International Centre for Settlement of Investment Disputes. ICSID is an international institution, established by the Convention of the Settlement of Investment Disputes between States and Nationals of Other States (the “ICSID Convention”), under whose authority arbitration panels may be convened to adjudicate disputes between investors of one member state and another member state as one mechanism of investor-state dispute settlement.

[5] *Abaclat and Others v. The Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011).

[6] Domestic investment legislation of certain countries may offer a right to arbitrate certain disputes with the state, but the 2014 Venezuelan Law on Foreign Investments does not provide bondholders with such an option.

[7] Database of ICSID Member States, <https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx>.

[8] ICSID Convention art. 54(1). In the United States a federal statute directs that “[t]he pecuniary obligations imposed by such an [ICSID Convention] award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States.” 26 U.S.C. § 1650a.

[9] ICSID Convention awards are subject only to a limited review, known as an annulment proceeding, by an ad hoc committee of different arbitrators. Such review is limited to specific enumerated grounds that address the violation of fundamental legal principles. Article 52(1), ICSID Convention, enumerating the grounds for annulment as: (1) the tribunal was not properly constituted; (2) the tribunal has manifestly exceeded its powers; (3) there was corruption on the part of a member of the tribunal; (4) there has been a serious departure from a fundamental rule of procedure; or (5) the award has failed to state the reasons on which it is based.

[10] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) art. III (Jun. 10, 1958).

[11] ICSID Additional Facility Rules, art. 3 (“Since the proceedings envisaged by Article 2 are outside the jurisdiction of the Centre, none of the provisions of the Convention shall be applicable to them or to ... awards ... which may be rendered therein.”).

[12] Claimants Gold Reserve Inc. and Crystallex International Corp., both Canadian companies, were relegated to arbitrating their BIT claims under the Additional Facility rules because although Venezuela and Canada entered into their BIT in 1982, Canada did not ratify the ICSID Convention until 2013. As a consequence, both claimants were required to go through confirmation or recognition proceedings with respect to their awards under the New York Convention in the United States, Canada and the Netherlands.

[13] As noted, the enforcement of an ICSID award is provisionally stayed upon the filing of an annulment request that is coupled with a request for a stay, but that stay is subject to review by the annulment committee and can be terminated or continued upon conditions.

[14] Press Release, Task Force Argentina, Task Force Argentina Announces Final Argentina Settlement for Italian Bondholders (Apr. 22, 2016), available at http://www.tfargentina.it/download/TFA%20Comunicato%2022%20aprile%202016_eng.pdf.

[15] Indeed, after Argentina declined to pay voluntarily ICSID awards based on “fair and equitable treatment” claims under its BITs arising out of the 2001 economic crisis that led it to default on its bonds, treaty claimants were forced to seek to enforce their awards judicially. To date, no holder of an ICSID award against Argentina arising from the 2001 crisis has realized any recovery from judicial enforcement efforts; each award that was resolved was settled by Argentina.

[16] Press Release, Gobierno Bolivariano de Venezuela, Gobierno Bolivariano denuncia convenio con Ciadi (Jan. 25, 2012), available at http://guyana.embajada.gob.ve/index.php?option=com_content&view=article&id=243:gobierno-bolivariano-denuncia-convenio-con-ciadi&catid=3:noticias-de-venezuela-en-el-mundo&Itemid=19&lang=es.

[17] Although Venezuela’s denunciation did not affect proceedings that were pending as of the denunciation in January 2012, tribunals have reached differing conclusions about whether ICSID Convention jurisdiction exists over claims filed after the denunciation but before July 2012, when the withdrawal became effective. For an analysis of the cases that have addressed this jurisdictional issue, see Luke Eric Peterson, “Analysis: What Have We Learned From The First Wave Of Post-Denunciation ICSID Claims Against Venezuela — And Why Do Investors Keep Suing Venezuela There?” Investment Arbitration Reporter (Nov. 30, 2017), available at <http://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/>.

[18] The sole support for the notion of continuing ICSID Convention jurisdiction over Venezuela is in the separate opinion of the chair of the tribunal in Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/20, Separate Opinion by Christer Söderlund (Apr. 3, 2017). He suggested that consent to ICSID arbitration contained in a BIT should survive as long

as the applicable BIT remains in force, but he expressed no opinion whether a tribunal would have jurisdiction or not, as that was not ultimately an issue in Blue Bank because there the request for arbitration, filed within the six month notice period between January and July 2012, was considered timely. Blue Bank, Award, ¶¶ 56, 120 (Apr. 26, 2017). On Nov. 13, 2017, a different ICSID tribunal considered and rejected the logic of the separate opinion in Blue Bank. *Fábrica de Vidrios los Andes CA and Owens-Illinois de Venezuela CA v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/21, Award (Nov. 13, 2017). This tribunal determined that Venezuela's consent to ICSID Convention jurisdiction under the BIT was conditioned on its status as a member of the convention as of the time of the dispute. *Fábrica de Vidrios*.

[19] In *Poštová Banka AS and Istrokapital SE v. The Hellenic Republic*, ICSID Case No. ARB/13/8, Award, ¶ 304 (Apr. 9, 2015), the tribunal relied on the fact that “[t]he language in the Slovakia-Greece BIT ... is significantly different from the one that led the Abaclat ... tribunal[] to conclude that government bonds were investments under the Argentina-Italy BIT” to reject the view that the purchase of Greek-law government bonds constituted an “investment” for purposes of the Slovakia-Greece BIT. The majority of the *Poštová Banka* tribunal also found that the bonds did not qualify as an “investment” for purposes of Article 25(1) of the ICSID Convention. *Id.* ¶ 350.

[20] See, e.g., Zachary Douglas, *Property, Investment and the Scope of Investment Protection Obligations*, in *The Foundations of International Investment Law: Bringing Theory Into Practice* 363 (Zachary Douglas, Joost Pauwelyn, & Jorge E. Viñuales eds., 2014).

[21] The ICSID case list available on its website confirms that it can take up to five years from filing to receive a ruling on jurisdiction in BIT cases and even longer to obtain a subsequent merits award. See ICSID Cases, <https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx>.

[22] See Richard J. Cooper and Boaz S. Morag, “Venezuela's Imminent Restructuring and the Role Alter Ego Claims May Play in this Chavismo Saga,” *Social Science Research Network* (Nov. 9, 2017), available at <https://ssrn.com/abstract=3068455>.

[23] CITGO (a Delaware corporation, wholly owned by PDV Holdings, which in turn is owned by PDVSA) is commonly viewed as Venezuela's most valuable asset in the United States, and as such multiple judgment creditors of Venezuela are already seeking to attach its shares. Whether or not these creditors will be able to enforce their judgments against CITGO will depend in part on whether its ultimate parent company, PDVSA, is an “alter ego” of Venezuela. The issue is currently being litigated in Delaware. See *Crystallex International Corp. v. Bolivarian Republic of Venezuela*, No. 17-mc-00151-LPS (D. Del. 2017).

[24] The Hague Choice of Court Convention is in effect in the countries of the European Union, as well as in Singapore and Mexico. See HCCH Members, <https://www.hcch.net/en/states/hcch-members>. That convention provides that a judgment given by a court of a contracting state, to which the parties agreed such as in a consent to jurisdiction clause in a Fiscal Agency Agreement, will be recognized and enforced in other contracting states. The United States signed the convention in 2009 but has yet to ratify it. Although ratification by the United States does not appear to be imminent, should it occur, it would streamline the process and provide greater certainty as to the recognition of U.S. court judgments in those other contracting states.

[25] The enforcement of an English judgment is subject to the right of the judgment debtor to apply for recognition to be refused on one of a few enumerated grounds.

[26] Indeed, another Canadian BIT claimant, Rusoro Mining Ltd., obtained its ICSID Additional Facility award against Venezuela on Aug. 22, 2016, and filed proceedings under the New York Convention to have that award recognized in the United States on Oct. 10, 2016, and in Canada on Jan. 25, 2017. The U.S. award recognition action is still pending, but the Canadian court issued a judgment recognizing the award on April 25, 2017. On Dec. 5, 2017, apparently anxious to commence enforcement efforts in the United States, Rusoro filed an action in New York state court to recognize the Canadian court judgment recognizing the arbitral award, thereby essentially seeking to bypass the U.S. award recognition proceeding that has been pending for over a year without decision. United States courts give arbitral award and foreign judgment holders the flexibility of proceeding either under the award or a foreign court judgment recognizing that award. See *Comm'ns Imp. Exp. S.A. v. Republic of the Congo*, 757 F.3d 321, 332-33 (D.C. Cir. 2014); *Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala*, 989 F.2d 572, 582-83 (2d Cir. 1993).