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When the Bell Doesn't Save You: Favianca and Jurisdiction After ICSID Denunciation

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This Post analyzes the recent award in Fábrica de Vidrios Los Andes, C.A. & Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela ("Favianca"). This is the first award to rely on Article 72 of the ICSID Convention to decline jurisdiction over a claim filed after Venezuela had noticed it would denounce the ICSID Convention but before the 6-month period set out in Article 71 of the ICSID Convention had elapsed.

It is not uncommon for treaties to establish a delay between the time a State withdraws from the treaty and the time that withdrawal becomes effective. Indeed this is the default solution established by Article 56(2) of the Vienna Convention. That Article provides that when a treaty lacks withdrawal provisions, withdrawal is still possible in some cases, but always requires at least one year's prior notice prior to the withdrawal becoming effective.

And if the treaty confers jurisdiction on an international court or tribunal, it is not uncommon for potential claimants to rush to file their claims before denunciation becomes effective. Every potential litigant is trying to get saved by the bell. The Claimants in Favianca were no exception: they filed their request for arbitration on 20 July 2012 – just five days before Venezuela's denunciation of the ICSID Convention became effective.
Investor-State tribunals and international courts have previously dealt with these types of claims. In most cases those courts and tribunals have affirmed jurisdiction. Yet the Favianca Tribunal reached an opposite conclusion. It held that Venezuela's prior denunciation of the ICSID Convention meant that consent to arbitration could not be perfected after denunciation and thus declined jurisdiction.

The Favianca Award: A Brief Overview

The Tribunal's decision was based on its interpretation of Articles 71 and 72 of the ICSID Convention. Specifically, the Tribunal concluded that the Convention established a "division of labor" between the two articles. Article 71 provides that "denunciation shall take place six months after receipt of such notice." While Article 72 states that notice of denunciation "shall not affect the rights or obligations … of that State … arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received."

In the Tribunal's view, the two articles have separate purposes. On the one hand, Article 71, is directed to States as contracting parties to the ICSID Convention. On the other hand, Article 72 is directed to States as parties in ICSID arbitrations (para. 269). Based on this division of labor, the Tribunal held that the effect of Venezuela's denunciation of the Convention on its consent to arbitrate was governed by Article 72, not Article 71.
Therefore, the Tribunal focused on Article 72's reference to "consent to the jurisdiction." It then drew a distinction between unilateral consent – that given exclusively by the State through a BIT – and perfected consent – crystallized when the potential claimant accepts the State's offer to arbitrate (para. 274).

This distinction between the two types of consent led the Tribunal to conclude that a State's consent to ICSID arbitration only extended throughout the 6 months period in cases of perfected consent (para. 282). In practice, this means when the claimants filed either a request for arbitration or at least a notice of dispute before denunciation.
The Favianca Tribunal's interpretation of the Convention is detailed and thorough. The issues it tackled are complicated and have divided scholars. Yet the award departs from the interpretation of other tribunals. And the Tribunal's distinction between the roles of Articles 71 and 72 is debatable. After all, the essential purpose of the Convention is dispute resolution. What other purposes would a State have to join the Convention other
than participating in ICSID Arbitrations?

More importantly, it seems to miss the overarching policy objectives pursued by Article 71 of the Convention: precluding States from opportunistically withdrawing from a treaty without previously granting potential claimants enough time to bring their claims. Instead, the Favianca Tribunal allowed Venezuela to, in practical terms, denounce the ICSID Convention with immediate effects.

Other Tribunals' Position

Several tribunals had already addressed cases filed against Venezuela during the 6-month period before its denunciation of the ICSID Convention became effective. Several of these cases were not analogous to Favianca, as the claimants had filed notices of disputes before denunciation (and thus had perfected consent to arbitration before denunciation).
But not always. The Tribunals in Venoklim, Rusoro Mining, Blue Bank, and Transban held that claims filed within the 6-month window were valid. Note, however, that some dismissed the claims on other grounds and that Rusoro was under Additional Facility Rules.
For example, the Tribunal in Blue Bank concluded that it had jurisdiction over claims filed within the six months that follow the notice of denunciation. The Blue Bank Tribunal held that otherwise the sentence "the denunciation shall take effect six months after receipt of such notice" in Article 71 of the Convention would be deprived of effet utile (paras. 117-119).

The president of the Blue Bank Tribunal, Christer Söderlund, issued an insightful separate opinion analyzing Article 72 of the Convention. Söderlund views Article 72 in its historical context: a time before States entered into BITs. Thus, he concludes that

Article 72 does not apply when States have consented to arbitration through a BIT, as in those cases States have "undertaken … the obligation to submit to international arbitration … for the duration of the treaty." (para. 41).

For its part, the Venoklim Tribunal considered that Article 72 of the Convention could not be interpreted as establishing a specific rule that would give denunciation of the Convention immediate effect. The Venoklim Tribunal held that such a derogation from the general rule of Article 71 of the Convention would go against "the common sense" of that rule (para. 62, my translation).

Post-Denunciation Claims Before Other International Courts

International courts have also addressed claims filed between a State's denunciation of a treaty and the date withdrawal becomes effective. They have tended to affirm jurisdiction over those claims. Of course, these courts have not faced treaty provisions akin to Articles 71 and 72 of the ICSID Convention; but their stance is still useful to understand the underlying principles at stake.

The ICJ has addressed analogous situations. After the ICJ decided Territorial and Maritime Dispute (Nicaragua v. Colombia) in 2012, Colombia purported to immediately withdraw from the Pact of Bogotá, the treaty that established the Court's jurisdiction. The Pact, however, required a one-year notice period before denunciation became effective. Before the expiry of that one-year period, Nicaragua submitted two further disputes to the Court. Colombia challenged the Court's jurisdiction, arguing that its denunciation of the Pact of Bogotá had been done with "immediate effects." The objection was not successful.

Instead, the Court in Alleged Violations of Soverign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia) held that, because the Pact "requires one year's notice in order to terminate the treaty, any notification of denunciation begins to take effect immediately in the sense that the transmission of that notification causes the one-year period to begin." (at para. 46).

The most expansive position to jurisdiction after denunciation is perhaps the Inter-American Court's. The American Convention on Human Rights provides that denunciation only becomes effective one year after notice. The Inter-American Court, however, has considered that it retains jurisdiction over any dispute that took place during the time the American Convention was in force. The Inter-American Court has applied this in cases brought against Trinidad & Tobago and Venezuela, two States that have denounced the American Convention.
For instance, in Constantine et al. v. Trinidad & Tobago, a case brought almost two years after Trinidad had denounced the American Convention, the Court affirmed its jurisdiction and held that "The facts … occurred prior to the effective date of the State's denunciation. Consequently, the Court has jurisdiction." (at para. 28). The Court reached a similar conclusion in Granier v. Venezuela (at para. 14).

Jurisdiction Post-Denunciation: Policy Considerations

There are also important policy considerations for including the expiration of a notice period before denunciation of a treaty enters into force. Without that notice period,

States may elect to strategically denounce a treaty conferring jurisdiction to an international court or tribunal when it plans to take an action that it suspects will lead to international claims.

Thus, by strategically withdrawing from a treaty, a State may insulate itself from international responsibility. Treaty provisions requiring some time before withdrawal becomes effective do not completely bar that possibility. But they make it more difficult.
Provisions like Article 71 of the ICSID Convention are meant to avoid that. The Favianca Tribunal, however, was not persuaded by those concerns. Moreover, as shown by Söderlund's separate opinion in Blue Bank, the Favianca Tribunal's interpretation is anchored in a potentially anachronistic reading of Article 72. That interpretation allowed Venezuela to effectively denounce the ICSID Convention with immediate effects.

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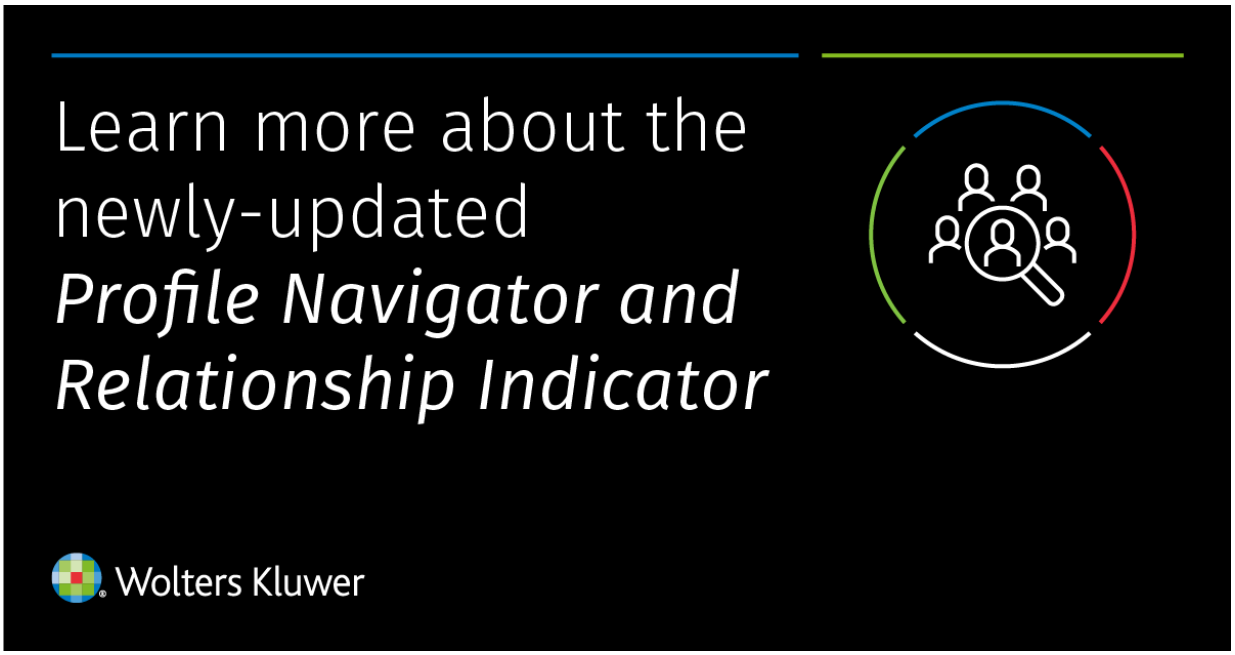

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