



# ARTICLE

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## *The position of Chinese investors*

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On the 24<sup>th</sup> of January 2012, Venezuela reported its withdrawal from the Washington Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States. The withdrawal took effect from the 24<sup>th</sup> of July 2012. Thus, Venezuela abandoned what was named ICSID arbitration, through which conflicts that might surge between receptor States of international investments and foreign investors could be resolved. The American country justified its decision through the questionable allegations that in ICSID arbitration the ruling was almost always in favour of the plaintiff foreign investor and that, from the perspective of the Venezuelan Constitution, the submission of the State to said arbitration was unconstitutional.

Undoubtedly the decision made by Venezuela, which is in line with its other actions, has important consequences for foreigners who have invested or are preparing to invest in the country, since as well as manifesting a determined stance on the reception of foreign capitals, it prohibits foreign investors from one of the principle legal

instruments needed to protect their interests.

This reality must be kept in mind by Chinese investors, who in recent times have decidedly staked claims in Venezuela, the receptor of 70% of investments in Latin America made by the giant Asian power. Accordingly we must remember that China lacks a bilateral Agreement for the Reciprocal Protection and Promotion of Investments (APPRI) with Venezuela. The latter has made 27 APPRIs with a great variety of States, some as far away as Iran or Vietnam, but it currently has not made a pact of this nature with China.

Traditionally, APPRIs are very similar to one another and much of their content coincides. They place special emphasis upon references to the solution of controversies between the two signatory States and particularly upon the resolution of differences that might arise between one State and the investors of the other. With regard to the arising of a problem as such, as a primary method in order to resolve the controversy they normally propose a friendly agreement and if this is not achieved during a certain amount of time, the investor can

choose to submit the issue to the relevant Court of the State which is receiving the investment, to institutional arbitration, almost always ICSID if possible, or failing that to the ICSID Additional Facility or *ad hoc* arbitration frequently conforming to the Rules of Arbitration of the UNCITRAL. Thus APPRIIs form a clear and secure legal framework of great practical utility. From this perspective it would be incredibly convenient for China to soon make an APPRI with Venezuela, and even more so if we keep in mind the fact that both States have notable experience in concluding agreements of this nature with other countries.

Having arrived at this point we must remember that while the current situation persists, Chinese investors in Venezuela are not completely unprotected and they continue to be able to utilize several instruments in order to legally protect their interests. Firstly, they can evoke the protection afforded to them by the Law of Promotion and Protection of Investments (Decree No 356, 3<sup>rd</sup> October 1999) of Venezuela, which guarantees access to litigations considered by current Venezuelan legislation and then further recourse to the Venezuelan National Court or Arbitral Court (Articles 22 and 23). Another

possibility would mean turning to the ICSID Additional Facility; indeed, according to the provisions in the Regulation of the 27<sup>th</sup> September 1978 the Secretariat of the ICSID can allow the intervention of the Facility in certain arbitrations which would normally remain outside its area of expertise. However, it must be taken in account that the procedures carried out in this way are notably different to genuine ICSID arbitration, as they end up being radically conditioned by the laws of the location in which the procedure takes place. Equally they can make use of the services provided by the Multilateral Guarantees Agency (MIGA) and even ensure cover for their risks by taking out a policy with an insurance company.

We cannot end there without a final consideration in light of which everything previously said must be considered. The current Venezuelan and Chinese governments have an excellent relationship, and both consider themselves partners of a strategic nature. It is possible that this political position of firm friendship between the two nations provides security, if not in a *de jure* then in a *de facto* sense, of high quality and tenability for Chinese investors who are operating in Venezuela or who intend to do so in the future.

## FOR MORE INFORMATION

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