KIRKLAND **ALERT**

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Recent U.S. Supreme Court Decision Underscores the Importance of Treaty Planning to Protect Overseas Investments

Seizures of multinational companies' assets in Venezuela have become all too common in recent years. The past weeks have brought two significant new developments, each of which highlights the importance of securing investment treaty protection — both in Venezuela specifically and in any nation where populism or unstable institutions lead to a high-risk investment climate.

Careful advice is needed to ensure that U.S. companies are able to access investment treaties to protect against expropriation and other illegal government interference overseas.

In April 2017, Venezuela again seized assets owned by a U.S. company, potentially portending a renewed round of expropriations targeting foreign companies with Venezuelan operations. This raises the question of what remedies U.S. companies would have if their assets are expropriated overseas. Because the United States lacks a treaty with Venezuela providing for international investment protection, American companies with Venezuelan operations will not have easily enforceable treaty protections against expropriation unless they structure their investments in Venezuela through an appropriate overseas subsidiary in a country that does have a treaty with Venezuela.

Historically, investors resorted to their own governments to seek diplomatic protection of their investments overseas, but the political climate often makes such government intervention unlikely. Even where an investment does have some treaty protection, not all treaties are equal. This is particularly true in Venezuela, which has withdrawn from the ICSID Convention that provides a framework for the resolution of international investment disputes. Careful advice is necessary to ensure that the arbitration provisions in a treaty remain enforceable; the ability to initiate non-ICSID arbitration will depend on the treaty's terms.

The most likely avenue for securing investment treaty protection in Venezuela is to utilize investment treaties that Venezuela has entered into with other countries that provide for enforcement of treaty protections through arbitration under the rules of UNCITRAL (an arm of the United Nations). The recent *Andarko* interim award upholding UNCITRAL arbitral jurisdiction under a Barbados-Venezuela investment treaty following Venezuela's denunciation of the ICSID demonstrates that such protection remains available to foreign investors. This requires careful planning, as many countries including the United States have not signed an investment treaty with Venezuela. In order to obtain this investment protection, investments must be properly structured before an investment dispute arises.

The U.S. Supreme Court's May 1, 2017, decision in *Republic of Venezuela v. Helmerich & Payne International Drilling Co.* further underscores the importance of

investment treaty protection, as the Court limited the circumstances in which companies can resort to U.S. courts to pursue remedies against expropriation. In that case, Venezuela seized oil rigs from the Venezuelan subsidiary of a U.S. oil company. The U.S. oil company and its Venezuelan subsidiary filed a lawsuit against Venezuela in the U.S. District Court for the District of Columbia claiming that Venezuela's expropriation was unlawful. The Foreign Sovereign Immunities Act ("FSIA") generally prevents U.S. courts from exercising jurisdiction against a foreign country, but, unlike many countries' sovereign immunity laws, contains an exception for cases involving property rights taken in violation of international law where the foreign agency or instrumentality engages in commercial activity in the United States. The district court dismissed the claims by the Venezuelan subsidiary but held that the claims asserted by the U.S. parent could proceed under the expropriation exception of the FSIA. The U.S. Court of Appeals for the District of Columbia Circuit held that the claims of both the parent and subsidiary could proceed because they presented a non-frivolous argument that the property was taken in violation of international law, which sufficed to invoke the expropriation exception and grant American courts jurisdiction. The Supreme Court reversed, holding that only an *actual* violation of international law in the seizure would suffice. While the Court did not decide whether the expropriation at issue violated international law, it did cite a number of international cases and treatises suggesting that international law generally does not provide a remedy for a state's seizure of its own nationals' property, and that a locally incorporated subsidiary is considered solely a national of that state.

Given the Court's ruling in *Venezuela v. Helmerich & Payne*, it seems likely that companies operating through local subsidiaries around the world may find it increasingly difficult to bring claims in U.S. courts for expropiatory actions taken abroad. Although that part of the decision is in *dicta* only, companies operating overseas may want to consider whether there are other corporate structures available that would preserve their right to invoke the expropriation exception to the FSIA.

In any event, these developments underscore the importance of considering treaty protection in structuring investments (whether future or existing) in higher-risk countries. Investor-state arbitration provides a much more certain remedy than either diplomatic protection or navigating the narrow path to U.S. jurisdiction under the exceptions to foreign sovereign immunity. Kirkland's experienced international arbitration counsel can assist you in structuring investments to maximize your protection under treaties before a dispute arises, and can help clients to assess the relative benefits of different transnational structures for your international operations.

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