

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES  
ADDITIONAL FACILITY**

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**In the Matter of**

**AIR CANADA,**

Claimant

v.

**THE BOLIVARIAN REPUBLIC OF VENEZUELA,**

Respondent

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**REQUEST FOR ACCESS TO THE ADDITIONAL FACILITY AND  
REQUEST FOR ARBITRATION**

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December 16, 2016

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*Air Canada v. Venezuela*  
Request for Access to the  
Additional Facility and  
Request for Arbitration  
Page 1

**TABLE OF CONTENTS**

**I. PARTIES TO THE DISPUTE .....2**

**II. BRIEF SUMMARY OF THE INVESTMENT DISPUTE .....4**

**A. Air Canada’s Successful Operation in Venezuela Prior to  
Venezuela’s Treaty Breaches .....4**

**B. Venezuela Failed to Allow the Repatriation of Air Canada’s Funds .....8**

**C. Venezuela Breached the Treaty and International Law .....11**

**III. JURISDICTION UNDER THE BIT .....14**

**A. Claimant Qualifies as an “Investor” that Made an “Investment” .....14**

**B. This Is a Legal Dispute Arising Directly Out of an Investment and  
Concerning Breaches of the BIT .....14**

**C. The Dispute May Be Submitted to Arbitration.....14**

**IV. REQUEST FOR ACCESS TO THE ADDITIONAL FACILITY .....16**

**V. PROCEDURAL MATTERS .....19**

**VI. CONCLUSION .....20**

**VII. REQUEST FOR RELIEF .....20**

1. Air Canada (“**Air Canada**” or “**Claimant**”) hereby requests (i) access to the International Centre for Settlement of Investment Disputes Additional Facility (“**Additional Facility**”), and (ii) the institution of an arbitration proceeding against the Bolivarian Republic of Venezuela (“**Venezuela**” or “**Respondent**”) under the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (“**AF Rules**”). Claimant files this Request for Arbitration pursuant to (i) the Agreement between the Government of Canada (“**Canada**”) and the Government of the Republic of Venezuela for the Promotion and Protection of Investments (“**BIT**” or “**Treaty**”),<sup>1</sup> and (ii) the AF Rules and ICSID Arbitration (Additional Facility) Rules (“**AF Arbitration Rules**”).

#### **I. PARTIES TO THE DISPUTE**

2. In accordance with Article 3(1)(a) of the AF Arbitration Rules, Claimant hereby designates each party to the dispute and states their addresses.

3. Claimant Air Canada is a company established under the laws of Canada and, thus, qualifies as a protected investor under Article I(g)(ii) of the Treaty.<sup>2</sup> Its contact address is:

7373 Cote-Vertu Blvd. West  
Saint-Laurent, Quebec  
Canada, H4S 1Z3

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<sup>1</sup> The Governments of Canada and Venezuela signed the Treaty in Caracas on July 1, 1996, and it entered into force on January 28, 1998. A copy of the BIT is attached as Claimant’s Exhibit 1 (“CEX-1”).

<sup>2</sup> A copy of a document demonstrating Claimant’s registration as a Canadian corporation is attached as CEX-2.

*Air Canada v. Venezuela*  
Request for Access to the  
Additional Facility and  
Request for Arbitration  
Page 3

4. King & Spalding represents Claimant in this proceeding.<sup>3</sup> All correspondence and communications with Claimant should be directed to Claimant's counsel as follows:

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5. The Respondent is the Bolivarian Republic of Venezuela. The governmental authority likely to represent Venezuela in this proceeding is the *Procuraduría General de la República*, which is located at the following address:

*Procuraduría General de la República*  
Av. Los Ilustres, cruce con calle Francisco Lazo Martí,  
Urb. Santa Monica,  
Caracas, Distrito Capital,  
Venezuela

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<sup>3</sup> As Article 3(1)(e) of the AF Arbitration Rules require, Claimant “has taken all necessary internal actions to authorize [this] request.” See copy of Claimant’s Power of Attorney to King & Spalding, attached as CEX-3, and Note from Air Canada’s Chief Legal Officer, Mr. David J. Shapiro, attached as CEX-4.

*Air Canada v. Venezuela*  
Request for Access to the  
Additional Facility and  
Request for Arbitration  
Page 4

## II. BRIEF SUMMARY OF THE INVESTMENT DISPUTE

6. Air Canada is Canada's flag carrier and one of the twenty largest airlines in the world. A member of the Star Alliance network, Air Canada is the largest provider of scheduled passenger services in the Canadian and the Canada-U.S. markets, as well as in the international market to and from Canada.

7. After flying to and from Venezuela's capital city, Caracas, for almost ten years, Air Canada (i) was forced to suspend its flights between Toronto and Caracas in March 2014, (ii) has been unable to repatriate over US\$ 50 million in earnings (without interest) from ticket sales within Venezuela, and (iii) incurred additional losses, each as a result of Respondent's violations of the Treaty and international law.

### A. Air Canada's Successful Operation in Venezuela Prior to Venezuela's Treaty Breaches

8. On June 26, 1990, Canada and Venezuela entered into the Air Transport Agreement between the Government of Canada and the Government of Venezuela (the "ATA").<sup>4</sup> The ATA granted Air Canada rights to conduct certain international air services in Venezuela, including flying across Venezuelan territory, landing in Venezuela for "non-traffic" purposes (*e.g.*, mechanical difficulties and maintenance), and landing in Venezuela for the purpose of picking up and discharging international passengers, cargo, and mail while operating specified routes.<sup>5</sup> In addition, the ATA expressly granted Air Canada the right to repatriate its earnings in Venezuela. It states:

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<sup>4</sup> Air Transport Agreement between the Government of Canada and the Government of Venezuela, signed on June 26, 1990, CEX-5. In accordance with Article V of the ATA, Canada designated Air Canada as an airline that would benefit from the rights provided in the agreement (*see* Canadian Transportation Agency's website: <https://www.otc-cta.gc.ca/eng/transport-agreements>, CEX-6)

<sup>5</sup> ATA, Article III, CEX-5.

*Air Canada v. Venezuela*  
Request for Access to the  
Additional Facility and  
Request for Arbitration  
Page 5

Each designated airline shall have the right to convert and remit to its country on demand earnings obtained in the normal course of its operations. Conversion and remittance shall be permitted at the foreign exchange market rates for current rates prevailing at the time of transfer and shall not be subject to any charges except normal service charges collected by banks for such transactions. Such transfers of earnings shall be carried out on the basis of reciprocity in accordance with the national legislation in effect at the time of the transfer in each country, under legislative and regulatory conditions no less favourable than those applied to any other foreign airline operating international air services to and from the territory of the other Contracting Party.<sup>6</sup>

9. Air Canada closely followed the negotiation of the ATA and, in fact, it attended the negotiations of the agreement as an observer.

10. In 1989, in light of the imminent agreement between both governments, Air Canada domiciled a local branch in Venezuela.<sup>7</sup> Until 2004, Air Canada's activities in Venezuela primarily consisted of promoting Canada as a destination and marketing Air Canada flights between North American destinations.<sup>8</sup>

11. In mid-2004, as part of its strategy to further develop its presence in Latin America by operating flights to and from the region, Air Canada decided to begin a non-stop route between Lester B. Pearson International Airport in Toronto, Canada, and Aeropuerto Internacional de Maiquetía Simón Bolívar in Caracas, Venezuela. Air Canada timed the flights to and from Caracas to offer passengers convenient connections at Toronto's international airport (Air Canada's primary hub) to and from other destinations served by Air Canada in Canada, the United States, Europe, and Asia.

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<sup>6</sup> ATA, Article XXI(2), CEX-5.

<sup>7</sup> See Certificate issued by the Registry of Commerce dated Oct. 24, 1989, CEX-7.

<sup>8</sup> Air Canada has had a long-standing presence in Venezuela. Starting in the late 1970s and for almost a decade, Air Canada served the once popular vacation destination, Margarita Island, in Venezuela.

*Air Canada v. Venezuela*  
Request for Access to the  
Additional Facility and  
Request for Arbitration

Page 6

12. On June 25, 2004, just seven weeks after Air Canada's request, Venezuela's National Institute for Civil Aviation ("INAC"), acting under the ATA, issued Administrative Order No. 060, which permitted Air Canada to operate as a commercial airline in Venezuela and to provide regular transportation service between Caracas and Toronto.<sup>9</sup>

13. On July 2, 2004, Air Canada began operating the Toronto-Caracas-Toronto route, with a frequency of three weekly flights, typically using 120-seat Airbus 319 aircraft. For the next decade, Air Canada prided itself on being the only Canadian carrier offering scheduled service between Canada and Venezuela.<sup>10</sup>

14. Air Canada invested significant resources to establish and conduct its operations in Venezuela. Air Canada allocated an aircraft and personnel to the route and entered into several contracts with providers, including a contract with a General Sales Agent, a concession for an office and deposit at the Caracas airport, which was granted by a Government agency, ramp and luggage load and unload services, catering, and security, among others. Notably, Air Canada's operations in Venezuela indirectly employed approximately 80 individuals.

15. Air Canada's investment in the Toronto-Caracas-Toronto route was a success. The client base for the route was quite diversified and included tourists as well as business travelers involved in the oil and gas sector. In addition, Air Canada's efforts stimulated market demand from what the airline industry commonly describes as "visiting friend and family" passengers.

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<sup>9</sup> Administrative Order No. 060, Instituto Nacional de Aviación Civil, Ministerio de Infraestructura, dated June 25, 2004, CEX-8.

<sup>10</sup> With the exception of a few months in 2005 and 2007, during which Air Canada operated to Venezuela as a one-stop via Port of Spain, Trinidad and Tobago, Air Canada's flights to and from Caracas were non-stop.

*Air Canada v. Venezuela*  
Request for Access to the  
Additional Facility and  
Request for Arbitration

Page 7

16. Due to seasonal increases in demand, Air Canada would increase the flight frequency from three to five weekly flights during certain periods of the year. In fact, by 2013, the passenger “load factor” for the Toronto-Caracas-Toronto route was approximately 85%, one of the highest in the company. The passenger load factor, expressed as a percentage that compares the passenger-kilometers flown with the seat-kilometers available, is a key factor in considering a route’s success, as it measures how much of an airline’s passenger-carrying capacity is actually used on that route.

17. However, one of the challenges that Air Canada faced from the beginning of its operations in Venezuela was the fact that Venezuela required Air Canada to transact in-country ticket sales only in the local currency, Bolivars. Air Canada sold tickets on the flights to and from Caracas directly through its website and its local office in Venezuela as well as through travel agencies throughout the world. The significant majority of the proceeds obtained from the Caracas flights resulted from sales in Venezuela, while the rest pertained to out-of-country sales. As a result, the majority of the proceeds resulting from the ticket sales were generated in Venezuela in Bolivars and remained there until the Government approved the conversion of the funds into hard currency and permitted their repatriation.

18. Venezuela required Air Canada to apply for authorization in order to acquire hard currency (in this case, US Dollars) with its Bolivars and repatriate the hard currency to the company’s headquarters in Canada.<sup>11</sup> In practice, this meant that Venezuela forced Air Canada to keep the proceeds from local ticket sales in Bolivars in Venezuelan bank accounts until it obtained Government approval to exchange the funds into US Dollars and repatriate those funds to Canada.

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<sup>11</sup> CADIVI Ruling No. 23, Article 2, CEX-9.



*Air Canada v. Venezuela*  
Request for Access to the  
Additional Facility and  
Request for Arbitration

Page 8

19. Because of the deterioration of the Venezuelan economy, the impact of high inflation, and the devaluation of the local currency, it was critical for Air Canada to be able to convert its proceeds into hard currency and repatriate US dollars on a regular basis and without delay. As explained above, most of the proceeds resulted from in-country sales and, therefore, a delay in repatriating the proceeds severely harmed the economics of the Toronto-Caracas-Toronto route.

20. Since it started operating the Toronto-Caracas-Toronto flights in 2004, Air Canada repatriated more than US\$ 90 million from Venezuela. However, beginning in 2012, the Government's delays in allowing Air Canada to convert and repatriate its proceeds had a severe impact on the economics of the route, ultimately forcing the company to suspend its flights to and from Caracas. The following subsection describes the Government's conduct that led to the suspension of Air Canada's flights.

**B. Venezuela Failed to Allow the Repatriation of Air Canada's Funds**

21. On February 5, 2003, President Hugo Chavez (i) established the *Comisión de Administración de Divisas* ("CADIVI"), an exchange control agency, (ii) ordered that the purchase and sale of foreign currency in Venezuela would be centralized in the Venezuelan Central Bank, and (iii) provided that the Central Bank and the Ministry of Finance<sup>12</sup> would determine the applicable official exchange rate through Exchange Rate Agreements ("*Convenios Cambiarios*") from time to time.<sup>13</sup>

22. In April 2003, CADIVI issued Ruling No. 23 to regulate Authorizations for Currency Acquisition (*Autorización de Adquisición De Divisas* or "AADs") by foreign airlines. Ruling No. 23 allowed foreign airlines like Air Canada to periodically submit

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<sup>12</sup> The full name of the Ministry is Ministry of People's Power for Economy, Finance, and Public Banking.

<sup>13</sup> Decree No. 2,302, dated Feb. 5, 2003, Article 2, CEX-10.

*Air Canada v. Venezuela*  
Request for Access to the  
Additional Facility and  
Request for Arbitration  
Page 9

AADs to exchange Bolivars earned from ticket sales in Venezuela for US Dollars.<sup>14</sup> The airlines could then expatriate their earnings in a hard, convertible currency.<sup>15</sup>

23. Access to foreign currency under CADIVI was subject to terms and conditions established in Exchange Rate Agreements executed between the Venezuelan Central Bank and the Ministry of Finance. The applicable rate varied through the years from 2,150 Bolivars per US Dollar in 2003 (which, after the 2007 “revaluation” of the Bolivar became 2.15 Bolivars per US Dollar) to 6.30 Bolivars to 1 US Dollar by the time of Air Canada’s last AAD in early 2014.

24. From the outset of its operations in Venezuela, Air Canada relied on the Ruling No. 23 regime to exchange Bolivars earned through local ticket sales into US Dollars and to repatriate its earnings.

25. Beginning in 2013, however, Venezuela ignored Air Canada’s properly submitted AADs, simply refusing to act on the company’s requests to exchange Bolivars for US Dollars, thereby preventing Air Canada from converting and repatriating its earnings. Specifically, up to the present date, Venezuela has refused to process fifteen AADs submitted by Air Canada in relation to domestic ticket sales between October 2012 and December 2013.<sup>16</sup>

26. On January 22, 2014, CADIVI issued Ruling No. 124, which stated that Venezuela would process foreign airlines’ AADs at a less favorable exchange rate (which

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<sup>14</sup> CADIVI Ruling No. 23, Article 2, CEX-9.

<sup>15</sup> Air Canada would submit its AADs before an official exchange rate agent (Banco Mercantil), which would process the authorization, receive the funds from the Government, and transfer them to Air Canada’s bank account out of the country.

<sup>16</sup> See Air Canada Requests Nos. 17319004, 17319142, 17319325, 17319490, 17919683, 17319919, 17320990, 17321189, 17321350, 17321425, 17415372, 17494025, 17779096, 17781897, and 17807874, all attached as CEX-11.

*Air Canada v. Venezuela*  
Request for Access to the  
Additional Facility and  
Request for Arbitration  
Page 10

at the time was approximately 11 Bolivars to 1 US Dollar).<sup>17</sup> In any case, Venezuela continued to refuse to allow Air Canada to convert and expatriate its earnings (at any rate), which severely hindered the company's investments in Venezuela by precluding it from realizing any return on the investments and making it impossible for the company to continue its operations.

27. Aware of the consequences of its conduct, the Government of Venezuela approached Air Canada and other airlines with a view to negotiating a settlement agreement. Specifically, at a meeting with Air Canada and other foreign airlines in late November 2013, the President of INAC, Mr. Pedro González Díaz, emphasized the Government's intention to honor its obligations and pay what amounted to an accumulating debt toward the airlines. At that meeting, Mr. González Díaz suggested the possibility of compensating Air Canada and other airlines with payments in jet fuel or Government bonds. Air Canada was open to the possibility of reaching a settlement in order to continue operating its very successful route. However, the Government never moved forward with its proposal.

28. As a result of its acts and omissions, Venezuela has prevented Air Canada from exchanging approximately 330 million Bolivars earned through local ticket sales into US Dollars and repatriating those earnings. As of December 2013, the amount would have totaled in excess of US\$ 50,618,073 (without interest) if conversion had been allowed. Since then, the funds have continued to lose value as the Venezuelan economy and currency continue to deteriorate.<sup>18</sup>

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<sup>17</sup> CADIVI Ruling No. 124, dated Jan. 22, 2014, Article 12, CEX-12.

<sup>18</sup> In addition, the Government restricted Air Canada's ability to sell tickets for flights between airports outside of Venezuela, among other measures.

*Air Canada v. Venezuela*  
Request for Access to the  
Additional Facility and  
Request for Arbitration

Page 11

29. As a result of Venezuela's conduct, on March 15, 2014, Air Canada suspended flights to and from Venezuela.<sup>19</sup> That suspension continues to this day and has caused considerable losses in relation to what was previously a very profitable route.

30. In order to preserve its reputation and honor its commitments to passengers with bookings after flights were suspended, Air Canada was forced to reroute passengers through other airlines and reimburse others in cash. This endeavor not only entailed a considerable logistical effort, but also caused Air Canada additional losses in excess of US\$ 10 million.

31. Furthermore, the Toronto-Caracas-Toronto route was from the outset part of Air Canada's business strategy to expand its services in relation to Latin America. The Government's refusal to allow Air Canada to convert and repatriate the proceeds resulting from the vast majority of the sales for that route not only prevented Air Canada from continuing with its successful operation in Venezuela, but also hindered the company's strategy to expand in Latin America and to further develop Toronto as a hub for passengers traveling to and from the region internationally, beyond Canada.

**C. Venezuela Breached the Treaty and International Law**

32. Venezuela's refusal to process Air Canada's AADs breached its obligations under the ATA and Administrative Order No. 060 to allow Air Canada to convert and repatriate its earnings and to effectively operate in the country, severely damaged Air Canada's investments in Venezuela, and violated Venezuela's obligations under the Treaty and international law.

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<sup>19</sup> The last Air Canada flight departed Toronto on Saturday, March 15, 2014, and Caracas on Sunday, March 16, 2014.

*Air Canada v. Venezuela*  
Request for Access to the  
Additional Facility and  
Request for Arbitration  
Page 12

33. Specifically, Venezuela has breached the following obligations under the Treaty and related rules of international law:

- (i) to “accord investments or returns of investors of the other Contracting Party fair and equitable treatment and full protection and security” (Article II(2));
- (ii) not to “nationalize[], expropriate[] or subject[] to measures having an effect equivalent to nationalization or expropriation” the “[i]nvestments or returns of” Air Canada, “except for a public purpose, under due process of law, in a non-discriminatory manner and against prompt, adequate, and effective compensation” (Article VII(1));
- (iii) to accord investments and returns of investors “treatment no less favourable than that which, in like circumstances, it grants to investments or returns of investors” of any third State or its own investors (Articles III(1) and IV(1));
- (iv) to accord investors, “as regards their expansion, management, conduct, operation, use, enjoyment, sale or disposal of their investments or returns, treatment no less favourable than that which, in like circumstances, it grants to investors” of any third State or its own investors (Articles III(2) and IV(2)); and
- (v) to “guarantee to an investor of the other Contracting Party the unrestricted transfer of investments and returns” (Article VIII(1)), and to effect such transfers “without delay in the convertible currency in which the capital was originally invested or in any other convertible currency agreed by the investor and the Contracting Party concerned” (Article VIII(2)).

*Air Canada v. Venezuela*  
Request for Access to the  
Additional Facility and  
Request for Arbitration  
Page 13

34. Venezuela has further breached two obligations that Claimant invokes through the Treaty's most-favored nation provision in Article III(1) to the extent that they afford Claimant a more favorable treatment:

- (i) to "observe any obligation it may have entered into with regard to the treatment of investments of nationals or companies of the other Contracting Party," contained in Article 2(2) of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Venezuela for the Promotion and Protection of Investments, which entered into force on August 1, 1996, among other Bilateral Investment Treaties concluded by Venezuela; and
- (ii) to guarantee the unrestricted transfer of funds at the latest within two months from the date of the request for transfer, in accordance with Article 5 and the Protocol of the Agreement between the Federal Republic of Germany and the Republic of Venezuela for the Promotion and Protection of Investments, which entered into force on October 16, 1998.

35. In addition, Venezuela's conduct has breached its obligations under "applicable rules of international law," including the ATA.<sup>20</sup>

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<sup>20</sup> Article XII(7) states: "A tribunal established under this Article shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law...."

In accordance with Article XXI of the ATA, Venezuela has an obligation to allow Air Canada to repatriate its earnings under conditions "no less favourable than those applied to any other foreign airline operating international air services to and from the territory" of Venezuela. Claimant, thus, invokes the Agreement between the Kingdom of the Netherlands and the Republic of Venezuela for Air Services (CEX-13), to the extent it provides a more favorable treatment with respect to the repatriation of funds. In particular, Air Canada invokes Article 10(2) of the Netherlands-Venezuela Air Services Agreement, which provides as follows: "If applicable, the airlines of the Contracting Parties shall receive approval for such transfer within at most thirty (30) days of application, into a freely convertible currency, at the rate of exchange for conversion of local currency, as at the date of sale."

*Air Canada v. Venezuela*  
Request for Access to the  
Additional Facility and  
Request for Arbitration  
Page 14

### **III. JURISDICTION UNDER THE BIT**

#### **A. Claimant Qualifies as an “Investor” that Made an “Investment”**

36. Air Canada qualifies as an “investor” under Article I(g) of the Treaty, which defines a Canadian “investor” in relevant part as “any enterprise incorporated or duly constituted in accordance with applicable laws of Canada, who makes the investment in the territory of Venezuela and who does not possess the citizenship of Venezuela.”

37. Under Article I(f) of the Treaty, Air Canada’s activities, operations, and assets in Venezuela qualify as “investments,” as they included, among other things: (i) “movable and immovable property and any related property rights;” (ii) “money, claims to money, and claims to performance under contract having a financial value;” (iii) goodwill; and (iv) “rights conferred by law or under contract to undertake any economic and commercial activity.”

#### **B. This Is a Legal Dispute Arising Directly Out of an Investment and Concerning Breaches of the BIT**

38. As the previous section explains, this dispute concerns the failure of Venezuela to observe its obligations under the BIT and international law *vis-à-vis* Claimant and its investments in Venezuela. The acts and omissions of Venezuela constitute breaches of the BIT’s standards of treatment, as well as related rules of international law, as described above.

39. Venezuela’s violations of BIT provisions, as well as its violations of international law, involve Claimant’s legal rights and entitle Claimant to legal remedies. The present dispute is a classic legal dispute arising directly out of an investment.

#### **C. The Dispute May Be Submitted to Arbitration**

40. Article XII(1) of the BIT provides that a Canadian investor may submit to arbitration any dispute between Venezuela and the investor “relating to a claim by the

*Air Canada v. Venezuela*  
Request for Access to the  
Additional Facility and  
Request for Arbitration  
Page 15

investor that a measure taken or not taken by [Venezuela] is in breach of the [Treaty], and that the investor has incurred loss or damage by reason of, or arising out of, that breach.” That is precisely what Air Canada claims in this arbitration.

41. Article XII(2) of the BIT provides that a dispute may be submitted to arbitration if it has not been settled amicably “within a period of six months from the date on which it was initiated.” In this context, “a dispute is considered to be initiated” when an investor has delivered notice in writing to the other party alleging a breach of the BIT and that the investor has incurred loss or damage as a result of the breach.

42. Air Canada delivered written notice of this dispute to Venezuela on June 15, 2016.<sup>21</sup> No amicable settlement has been reached. Consequently, Air Canada is entitled to submit this dispute to arbitration on or after December 15, 2016.

43. In accordance with Article XII(3)(a) of the BIT, Air Canada consented to arbitration in its notice letter of June 15, 2016, and it does so again here. In regard to Article XII(3)(b), Air Canada has not commenced any other proceedings in relation to the measures of Venezuela that are at issue in this dispute, and it expressly waives its right to initiate any such proceedings.

44. Finally, in accordance with Article XII(3)(d) of the BIT, not more than three years have elapsed between the date of Air Canada’s notice letter and the date on which Air Canada first acquired, or should have first acquired, knowledge of Venezuela’s breaches and knowledge that the company incurred losses from those breaches.

45. For the foregoing reasons, Air Canada is entitled to submit this dispute to arbitration under Article XII(4) of the Treaty at the present time, and it hereby does so.

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<sup>21</sup> Air Canada letter of June 15, 2016, attached as CEX-14.



*Air Canada v. Venezuela*  
Request for Access to the  
Additional Facility and  
Request for Arbitration  
Page 16

**IV. REQUEST FOR ACCESS TO THE ADDITIONAL FACILITY**

46. Article XII of the BIT provides:

4. The dispute may, by the investor concerned, be submitted to arbitration under:

(a) The International Centre for the Settlement of Investment Disputes (ICSID), established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington 18 March 1965 (ICSID Convention), provided that both the disputing Contracting Party and the Contracting Party of the investor are parties to the ICSID Convention;

or

(b) the Additional Facility Rules of ICSID, provided that either the disputing Contracting Party or the Contracting Party of the investor, but not both, is a party to the ICSID Convention; or

In case neither of the procedures mentioned above is available, the investor may submit the dispute to an international arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

5. Each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration in accordance with the provisions of this Article.

6. (a) The consent given under paragraph (5), together with either the consent given under paragraph (3), or the consents given under paragraph (12) shall satisfy the requirements for

written consent of the parties to a dispute for purposes of Chapter II (Jurisdiction of the Centre) of the ICSID Convention and for purposes of the Additional Facility Rules

*Air Canada v. Venezuela*  
Request for Access to the  
Additional Facility and  
Request for Arbitration

Page 17

47. As discussed below, Canada is a Contracting Party to the ICSID Convention, but Venezuela is not. Consequently, Air Canada submits this dispute to arbitration under the Additional Facility Rules as provided by Article XII(4)(b) of the Treaty.

48. Under Article 4(1) of the AF Rules, “[a]ny agreement providing for ... arbitration proceedings under the Additional Facility in respect of ... future disputes requires the approval of the Secretary-General.” The parties may apply for that approval “at any time prior to the institution of proceedings” by submitting (i) a copy of the agreement to arbitrate, and (ii) any additional information that the Secretariat may reasonably request.

49. Claimant respectfully requests the Secretary-General’s approval for access to the Additional Facility in accordance with Articles 2(a) and 4 of the AF Rules. Attached as CEX-1 is a copy of the agreement to arbitrate (Article XII of the BIT, reproduced in part above). In addition, in accordance with Article 4(1) of the AF Rules, Claimant shall provide the ICSID Secretariat with any additional information that it may reasonably request.

50. Under Article 4(2) of the AF Rules, the Secretary-General shall give her approval if (i) she is satisfied that the requirements of Article 2(a) of the AF Rules are fulfilled, and (ii) “both parties give their consent to the jurisdiction of the Centre under Article 25 of the Convention (in lieu of the Additional Facility) in the event that the jurisdictional requirements *ratione personae* of that Article shall have been met at the time when proceedings are instituted.”

51. With respect to the first requirement, Article 2(a) of the AF Rules stipulates as follows:

*Air Canada v. Venezuela*  
Request for Access to the  
Additional Facility and  
Request for Arbitration

Page 18

The Secretariat of the Centre is hereby authorized to administer, subject to and in accordance with these Rules, proceedings between a State ... and a national of another State, falling within the following categories:

(a) ... arbitration proceedings for the settlement of legal disputes arising directly out of an investment which are not within the jurisdiction of the Centre because either the State party to the dispute or the State whose national is a party to the dispute is not a Contracting State...

52. The present dispute satisfies this provision. As Section III.B explains, this is a legal dispute under a BIT arising directly out of Air Canada's investments in Venezuela. In addition, Canada has been a member of the ICSID Convention since December 1, 2013.<sup>22</sup> By contrast, Venezuela is not a member of the ICSID Convention. Thus, the present dispute satisfies the requirement that "either the State party to the dispute or the State whose national is a party to the dispute is not a Contracting State."<sup>23</sup>

53. Claimant's request also meets the second requirement in Article 4(2) of the AF Rules. Indeed, the Treaty is specifically designed to satisfy this requirement. Articles XII(4), XII(5), and XII(6)(a)(i) of the BIT contain Venezuela's unconditional consent to arbitration under the ICSID Convention in the event that the jurisdictional requirements *ratione personae* under the ICSID Convention are met, as well as Venezuela's unconditional consent to arbitration under the AF Rules in the event those requirements are not met (the case here). As previously noted, Claimant consented to arbitration under the provisions of the Treaty in its notice letter of June 15, 2016, and it does so again here.

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<sup>22</sup> See Database of ICSID Member States, CEX-15.

<sup>23</sup> This is consistent with Article XII(4) of the BIT, which provides for arbitration under the AF Rules "provided that either the disputing Contracting Party or the Contracting Party of the investor, but not both, is a party to the ICSID Convention." (CEX-1)

*Air Canada v. Venezuela*  
Request for Access to the  
Additional Facility and  
Request for Arbitration  
Page 19

54. For the foregoing reasons, Claimant respectfully requests that ICSID's Secretary-General grant Air Canada access to the Additional Facility and register this arbitration under the AF Rules.<sup>24</sup>

## V. PROCEDURAL MATTERS

55. There is no agreement between the parties regarding the number of arbitrators or the method of their appointment. Consequently, the arbitral tribunal should be appointed in accordance with Article 6(1) of the AF Arbitration Rules, which provides:

In the absence of agreement between the parties regarding the number of arbitrators and the method of their appointment, the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the President of the Tribunal, appointed by agreement of the parties, all in accordance with Article 9 of these Rules.

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<sup>24</sup> The ICSID Secretariat has granted access to the Additional Facility in at least other five disputes under the BIT: (i) *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela* (ICSID/ARB(AF)/12/5), (ii) *Crystallex International Corporation v. Bolivarian Republic of Venezuela* (ICSID/ARB(AF)/11/2), (iii) *Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela* (ICSID/ARB(AF)/11/1), (iv) *Gold Reserve Inv. v. Bolivarian Republic of Venezuela* (ICSID/ARB(AF)/09/1), and (v) *Vanessa Ventures Ltd. v. Bolivarian Republic of Venezuela* (ICSID/ARB(AF)/04/6). See ICSID case database (available at <https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx?aprl=CD21,CD18>), CEX-16.

Article 3(1)(c) of the AF Arbitration Rules provides that the request for arbitration shall “indicate the date of approval by the Secretary-General pursuant to Article 4 of the Additional Facility Rules of the agreement of the parties providing for access to the Additional Facility.” However, Article 4(1) of the AF Rules allows the parties to apply for access to the Additional Facility “at any time prior to the institution of proceedings.” In addition, as the ICSID website explains, “the Request for Arbitration can be submitted concurrently with an Application for Access in respect of an existing dispute.” (“How to File an Application for Access and Request – Additional Facility Arbitration,” available at: <https://icsid.worldbank.org/ICSID/ICSID/HowToFileReq.jsp#AF>, CEX-17; see also “Overview of Arbitration Under the ICSID Additional Facility,” available at: <https://icsid.worldbank.org/apps/ICSIDWEB/process/Pages/Overview-ICSID-Additional-Facility-Arbitration.aspx>, CEX-18)

*Air Canada v. Venezuela*  
Request for Access to the  
Additional Facility and  
Request for Arbitration  
Page 20

56. Pursuant to Articles 19 and 20 of the AF Arbitration Rules, Claimant proposes Paris, France, as the place of arbitration. Claimant will agree to the tribunal sitting in Washington, D.C., or any other suitable location.

57. Pursuant to Article 30(1) of the AF Arbitration Rules, Claimant selects English as the procedural language for the arbitration.

58. Claimant submits this request in six (6) signed original paper copies, as well as an electronic copy, which are accompanied by payment of the lodging fee.

## **VI. CONCLUSION**

59. For the reasons set forth above, Claimant respectfully requests that the Secretary-General of ICSID promptly (i) grant access to the Additional Facility, and (ii) register this arbitration against the Bolivarian Republic of Venezuela.

## **VII. REQUEST FOR RELIEF**

60. Claimant requests an award granting it the following relief:
- (i) a declaration that the dispute is within the jurisdiction of the tribunal;
  - (ii) a declaration that Venezuela has breached its obligations under the BIT and international law with respect to Claimant's investments;
  - (iii) compensation to Claimant for all damages it has suffered, to be further developed and quantified in the course of this proceeding;
  - (iv) all costs of this proceeding, including (but not limited to) Claimant's attorneys' fees and all costs associated with the tribunal and the conduct of the proceeding;

*Air Canada v. Venezuela*  
Request for Access to the  
Additional Facility and  
Request for Arbitration  
Page 21

- (v) pre- and post-award compound interest until the date of Venezuela's final satisfaction of the award; and
- (vi) any other relief the tribunal deems fit and proper.

Dated: December 16, 2016

Respectfully submitted,



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