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Cover Page Footnote

J.D. Candidate 2019 at Loyola Law School, Los Angeles. B.A. in History 2015, U.C. Santa Cruz. This paper is a student note written primarily in 2017-18. I would like to thank Professor Hiro Aragaki and James Trotter for their time and advice. Thank you also to the members of ILR. I have enjoyed working with you all over the past two years.

Venezuela Undermines Gold Miner Crystallex's Attempts to Recover on Its ICSID Award

SAM WESSON*

I. INTRODUCTION

This article follows an investment dispute that arose after the Venezuelan government refused to grant a Canadian mining company an environmental permit. Its refusal effectively denied the company its rights to mine Las Cristinas, one of the largest proven gold deposits in the world.¹ The denial came after Crystallex International Corporation (“Crystallex”) had spent over 500,000,000 United States Dollars (“USD”) getting Las Cristinas to the “shovel-ready stage.”² In response to Venezuela’s expropriation of the mine, an International Centre for Settlement of Investment Disputes (“ICSID”) tribunal awarded Crystallex 1,200,000,000 USD in compensation in 2016 (the “Award”).³ In November 2017, Crystallex set aside that compensatory award, enforceable now, for a settlement in installments from a country facing

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1. Crystallex Int’l Corp. v. Bolivarian Republic of Venez., ICSID Case No. ARB(AF)/11/2, Award, ¶ 7 (Apr. 4, 2016) [hereinafter Crystallex Int’l Corp, ICSID Award.]. See *Corporate Profile*, CRYSTALLEX, <http://www.crystallex.com/Company/CorporateProfile/default.html> (last visited Sept. 7, 2018).

2. Crystallex Int’l Corp, ICSID Award, ¶ 195.

3. *Id.* ¶ 961.

insolvency, and then Venezuela reneged on the settlement.⁴ This article will explore why the parties likely made these moves. The short answer: Venezuela in its current political, economic, and legal position is largely incompatible with the ICSID system, meaning that for Crystallex and for Venezuela's other claimant creditors, the only thing that is certain about collecting on an ICSID award is that they must pay their legal fees.

Crystallex is a mining company based out of Toronto, Canada.⁵ The company was traded publicly on the OTCB Marketplace until 2011.⁶ Its founders formed the company to develop and operate gold mines in South America.⁷ The expropriated Las Cristinas site served as Crystallex's biggest investment and potential reward.⁸ In 2011, when the Venezuelan government under Hugo Chávez nationalized the gold industry and took back Las Cristinas, it put Crystallex into bankruptcy.⁹ Crystallex responded by initiating arbitration against Venezuela at ICSID.¹⁰ Upon securing its Award in 2016, the company secured litigation financing from a hedge fund to gain the funds necessary to collect on that Award in the United States.¹¹

Crystallex now has registered its Award in the United States.¹² However, it has not yet succeeded in executing on Venezuelan assets as of March 2019.¹³ Back in November of 2017, Venezuela and Crystallex reached a settlement agreement for payment of an undisclosed sum in exchange for Crystallex dropping its execution efforts.¹⁴ Yet, as of July

4. See Shayna Posses, *Venezuela, Crystallex Deal Ok'd In \$1.2B Mine Row*, LAW 360 (Nov. 27, 2017), <https://www.law360.com/articles/988254/venezuela-crystallex-deal-ok-d-in-1-2b-mine-row>; *infra* Part VI.

5. See *Corporate Profile*, *supra* note 1.

6. See *Crystallex Informed of TSX Delisting*, CRYSTALLEX (Dec. 07, 2011), <http://www.crystallex.com/News/PressReleases/PressReleaseDetails/2011/Crystallex-Informed-of-TSX-Delisting1127584/default.html>.

7. *Corporate Profile*, *supra* note 1.

8. *Id.* See Reuters, *Crystallex files for bankruptcy*, FIN. POST (Dec. 23, 2011), <http://business.financialpost.com/commodities/mining/crystallex-files-for-bankruptcy>.

9. *Crystallex files for bankruptcy*, *supra* note 8.

10. Crystallex Int'l Corp., ICSID Award, ¶ 61.

11. See *Litigation Funding Paves Way for Crystallex's \$1.4B Award Against Venezuela*, BENTHAM IMF BLOG (Apr. 6, 2016), [https://www.benthamimf.com/blog/blog-full-post/bentham-imf-blog/2016/04/06/third-party-funding-paves-way-for-crystallex-s-\\$1.4b-award-against-venezuela](https://www.benthamimf.com/blog/blog-full-post/bentham-imf-blog/2016/04/06/third-party-funding-paves-way-for-crystallex-s-$1.4b-award-against-venezuela).

12. *Crystallex Int'l Corp. v. Bolivarian Republic of Venez.*, 244 F. Supp. 3d 100, 122 (D.D.C. 2017).

13. Tom Hals, *Crystallex pursues Citgo as Venezuela misses settlement payment*, REUTER (Dec. 21, 2017), <https://www.reuters.com/article/venezuela-crystallex/crystallex-pursues-citgo-as-venezuela-misses-settlement-payment-idUSL1N1OL2BG>.

14. See Jonathan Wheatley, *Crystallex reaches settlement in legal fight with Venezuelan government*, FIN. TIMES (Nov. 24, 2017), <https://www.ft.com/content/1526fb0d-ece1-30e8-93eb-889be393cd0d>.

2018, Crystallex was still awaiting Venezuela's first substantial payment.¹⁵ Meanwhile, Crystallex continued to litigate against Venezuela in multiple United States district and circuit courts, as it attempted to execute on Venezuela's assets.¹⁶ Notably, Crystallex is now attempting to execute on the assets of the Venezuela state-owned oil company's subsidiaries.¹⁷ Venezuela's many claimants and creditors are watching this litigation closely because it will determine the fate of billions of dollars of Venezuela-related assets held in the United States. Simultaneously, Venezuela and the governments of ICSID-contracting member states are watching Crystallex's precedent-setting effort to execute on Venezuelan assets in the United States. The precedent set by Crystallex and Venezuela in this matter may affect how the execution of investor-state arbitration awards will be conducted in the future. Now (March 2019), Crystallex is getting closer to the assets of this incompatible state. Yet, this fight is far from over.

"Incompatible state" is the term that I am using to describe states, like Venezuela, who cooperate with the ICSID proceedings but are unwilling or unable to pay out on awards, i.e., "defiant" but "compliant" states. These states use a mixture of political and legal maneuvers to simultaneously comply with their obligations under Bilateral Investment Treaties ("BITs") and the ICSID Convention and, yet, avoid honoring judgments decided against them. A state's transition from conforming contracting state to incompatible state can happen as quickly as when there is a downturn in the economy or a change in the regime. An incompatible state will have high volumes of pending or outstanding ICSID decisions against it, which renders ICSID's enforcement and execution mechanism ineffective. When that happens, it leaves a state participating in the ICSID process without the intent or ability to honor the outcome. It follows that incompatible states pose an obstacle to the efficacy of ICSID-backed foreign direct investment because without a mechanism that allows investors to effectively execute on the assets of an

15. Hals, *supra* note 13.

16. See, e.g., Melissa Daniels, *Crystallex Urges DC Circ. To Uphold \$1.2B Venezuela Award*, LAW 360 (Sept. 25, 2017), <https://www.law360.com/articles/967262/crystallex-urges-dc-circ-to-uphold-1-2b-venezuela-award>; Shayna Posses, *Venezuela Again Urges DC Circ. To Nix OK of \$1.2B Award*, LAW 360 (Oct. 30, 2017), <https://www.law360.com/articles/979512/venezuela-again-urges-dc-circ-to-nix-ok-of-1-2b-award>; Christopher Crosby, *Venezuela Says Mining Co. Can't Claim \$1.4B In BNY Funds*, LAW 360 (Oct. 17, 2017), <https://www.law360.com/articles/975393/venezuela-says-mining-co-can-t-claim-1-4b-in-bny-funds>; Natalie Olivo, *Venezuelan Oil Co. Decries Bid For Stock In \$1.2B Award Row*, LAW 360 (Aug. 17, 2017), <https://www.law360.com/articles/955224/venezuelan-oil-co-decries-bid-for-stock-in-1-2b-award-row>.

17. Hals, *supra* note 13; see *infra* Part V.

incompatible state, ICSID does not back up the investor. Therefore, while ICSID provides the investor with an award, the investor is left on its own to battle a sovereign in the United States legal system where sovereign immunity and corporate law favor the sovereign over the investor, which lowers the utility of the ICSID award.

This article is divided into five substantive parts. Part II will provide background on the applicable law, establishment and development of ICSID, and the use of bilateral treaties before it makes a comparison between Argentina and Venezuela. Part III will provide an overview of the expropriation and the resulting dispute in *Crystallex v. Venezuela*. Part IV will provide information on the Award and the law governing the registration, enforcement, and execution of an award in the United States. Part V will explore the gap between what the ICSID dispute mechanism should do and how it deals with incompatible states, such as Argentina and Venezuela. Part VI will provide an update on the progress of the dispute as of March 2019. Part VII concludes the note.

II. ICSID FACES AN UNANTICIPATED SET OF CHALLENGES TO ITS EFFICACY OVER A HALF-CENTURY AFTER ITS FOUNDING

Part II will emphasize the vital role ICSID plays in backing foreign direct investment and argue that Venezuela is dangerous to ICSID's efficacy. This Part will begin with the history of international investment. It will provide background on the establishment and development of ICSID and will include an overview of bilateral investment treaties. With this foundation, we will see how ICSID's solution worked until Argentina's actions following the Argentine financial crisis challenged ICSID's efficacy. Finally, this Part will compare Argentina's situation with the current situation in Venezuela and argue that Venezuela poses a larger challenge to the ICSID system's efficacy than Argentina did in the 2000s.

A. *The Washington Convention Corrected a Misalignment of Incentives Between States and Investors*

Part II (A) provides an overview of the state of foreign direct investment before the existence of international investor-state arbitration. We will first identify the parties, the host state, the investor, and the investor's state. We will then look at each party's incentives because their incentives did not align before the establishment of the ICSID Convention. After that, we will look at what each party gained, retained, and conceded when it joined the ICSID system of alternative dispute resolution. This section will show how foreign direct investment worked

before the ICSID Convention and how it should work under the ICSID Convention.

i. The Actors Involved in Foreign Investment Had Misaligned Incentives Pre-ICSID

It is important to understand the actors and their incentives to appreciate the problem that the drafters of the ICSID Convention wanted to resolve. The first actor was the host state that sought private capital. In the 1960s, many developing countries in Latin America, Asia, and Africa sought to invest more capital than their populations saved.¹⁸ And, while these countries often “possessed a wealth of natural resources, such as mineral deposits, many countries lacked the capital, technology or know-how to exploit these resources.”¹⁹ The answer was foreign investment.²⁰ Foreign investment involves “capital flows from one country to another, granting extensive ownership stakes in domestic companies and assets” and the investor will have “an active role in management of its investment.”²¹ Yet, in a post-colonial world, the people of these countries valued their state’s sovereignty and feared the lack of independence and foreign exploitation that could result from foreign capital investment.²² These fears were reflected in the terms offered by developing host states to foreign investors in the period leading up to the ICSID Convention in 1965. The opportunities included terms lacking local legislative protection and requiring disputes to be settled in the host state’s court.²³ These terms provided the host state with leverage over the investor.

The second actor was the foreign investor. The foreign investors had an entirely different set of incentives than the host state. Investors from places such as the United States and Canada looked for investment

18. See KENNETH J. VANDEVELDE, *BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION* 11-14 (2010).

19. See IMF, *Macroeconomic Policy Frameworks for Resource-Rich Developing Countries*, Policy Papers (Aug. 24, 2012), <https://www.imf.org/en/Publications/Policy-Papers/Issues/2016/12/31/Macroeconomic-Policy-Frameworks-for-Resource-Rich-Developing-Countries-PP4698> [hereinafter IMF, *Macroeconomic Policy Frameworks for Resource Rich Developing Countries*].

20. See INT’L BAR ASS’N, *ECONOMIC DEVELOPMENT, FOREIGN INVESTMENT AND THE LAW: ISSUES OF PRIVATE SECTOR INVOLVEMENT, FOREIGN INVESTMENT AND THE RULE OF LAW IN A NEW ERA* 5 (Robert Pritchard ed. 1996) [hereinafter *ECONOMIC DEVELOPMENT FOREIGN INVESTMENTS AND THE LAW*].

21. See *Foreign Investment*, INVESTOPEDIA, <https://www.investopedia.com/terms/f/foreign-investment.asp> (last visited Sept. 7, 2018).

22. See KENNETH J. VANDEVELDE, *BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION* 11 (2010).

23. See *id.*

opportunities abroad to increase diversification and total return.²⁴ Individuals and companies investing abroad likely tolerated higher levels of risk than domestic investors because they believed that certain foreign markets carry an acceptable level of risk that was compensated by the risk premium.²⁵ The risks associated with foreign direct investment included being subject to a foreign government's legal system when resolving investment disputes.²⁶ By the 1960s, communism had spread across Europe and to parts of Asia, which made regime change another risk associated with foreign direct investment.²⁷ Traditionally, investors feared the seizure or expropriation of their foreign investments,²⁸ and socialist regime change likely compounded that fear.²⁹ The increased risk to a potential investment meant that investors demanded more legal safeguards from a host state.³⁰ Investors desired protection for their investments.

The third actor was the investor's state. The investor's state often engaged in diplomatic relations with the host state.³¹ When an investment dispute arose between a host state and an investor that could not be resolved amicably in the host state, the investor's only recourse was to urge its own state to act in the International Court of Justice ("ICJ").³² Arguably, the investor's state had little interest in bringing an action that would jeopardize its relationship with the other government for the sake of an investor, which made the likelihood of action at the ICJ negligible. Thus, the system was ineffective because the investors and the investor's state had conflicting interests in the treatment of the host state.

24. See Maurice Obstfeld & Alan M. Taylor, *Globalization and Capital Markets*, in GLOBALIZATION IN HISTORICAL PERSPECTIVE 121 (Michael D. Bordo, Alan M. Taylor & Jeffrey G. Williamson eds., 2003); Joseph Nguyen, *The 3 Biggest Risks Faced by International Investors*, INVESTOPEDIA (May 7, 2018), <https://www.investopedia.com/articles/basics/11/biggest-risks-international-investing.asp>; VANDEVELDE, *supra* note 22, at 11.

25. Nguyen, *supra* note 24.

26. See SURYA P. SUBEDI, INTERNATIONAL INVESTMENT LAW: RECONCILING POLICY AND PRINCIPLE 30 (2d ed. 2012); DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS 358 (3rd ed. 2015).

27. See VANDEVELDE, *supra* note 22, at 42-43.

28. See CHOW & SCHOENBAUM, *supra* note 26, at 358.

29. See VANDEVELDE, *supra* note 22, at 42-43.

30. See SUBEDI, *supra* note 26, at 28.

31. See CHOW & SCHOENBAUM, *supra* note 26, at 358-62.

32. The International Court of Justice provided a forum for state-to-state disputes, which included disputes where a host state wronged another state's subject. Charity L. Goodman, *Uncharted Waters: Financial Crisis and Enforcement of ICSID Awards in Argentina*, 28 U. PA. J. INT'L ECON. L. 449 (2007).

In sum, the three parties involved in foreign direct investment in the 1960s had misaligned incentives resulting from conflicting desires. The host state wanted foreign investment on the condition that it could retain jurisdiction over investment disputes and not cater to foreign investors in its domestic law. The investor wanted access to investment opportunities available only in developing countries but with some legal safeguards for the investment, such as a fair forum for dispute resolution. Finally, the investor's state served as a reluctant advocate for wronged investors at the ICJ. The fact that the investor's state operates to serve the interests of the nation rather than the interests of an individual investor makes the ICJ an unsuitable forum for investment dispute resolution. The parties needed an alternative forum that would align the incentives of the parties while requiring concessions from all of them.

ii. The World Bank Created the ICSID as a Solution to Align the Parties' Incentives to Benefit All Involved in Foreign Investment

The ICSID Convention cured the misalignment of incentives between states and investors by creating a neutral forum for dispute resolution. The next few paragraphs will highlight what each party gained, retained, or lost by participating in the ICSID system.

The World Bank solved the problem by creating a "neutral forum" where investors could bring investment disputes against a host country.³³ The World Bank sponsored a multilateral treaty known as the ICSID Convention or Washington Convention.³⁴ The sponsors believed that, "the provision of a mechanism for the settlement of investment disputes would promote the flow of foreign investment into developing countries and thereby promote economic development."³⁵ The ICSID Treaty established the rules and a mechanism to achieve these ends, with the International Centre for the Settlement of Investment Disputes ("ICSID") functioning as the mechanism.³⁶ ICSID should be seen as the World Bank's solution to the issues of international investment described above. This solution required give-and-take from each party and produced an alternative forum for investor-state arbitration.

The investor gained access to a neutral forum that did not rely on the existing domestic legal system. This forum elevated investors to

33. See MARGARET L. MOSES, *THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 231 (2nd ed. 2012).

34. *Id.*

35. M. SORNARAJAH, *THE SETTLEMENT OF FOREIGN INVESTMENT DISPUTES* 164 (2000).

36. See MOSES, *supra* note 33, at 231.

actors at the international level.³⁷ Before, international law did not recognize individual investors before ICSID gave them a platform.³⁸ ICSID likely lowered the investor's risk of expropriation or unfair treatment without recourse because investors could compel arbitration at ICSID. An investor awarded compensation for unfair treatment or expropriation could enforce its award in any contracting state.³⁹ Thus, this neutral forum generated investor confidence by lowering an investor's risk of expropriation without compensation and by minimizing unfair treatment towards the investor by the host state.⁴⁰ The investors retained the risk of expropriation *with* compensation and faced the difficulty of bringing a sovereign to task, which are risks explored later.⁴¹ Furthermore, investors lost any immunity that came from not being an international actor. As an international actor, the investor could be brought to arbitration by the host country for breaching its obligations to the host country.⁴²

The host state gained access to foreign direct investment. Foreign investment brings capital, technology, and other know-how to developing countries.⁴³ As an ICSID member state privy to this inflow of foreign investment, the host state gained a competitive advantage on its neighbors.⁴⁴ To the early adopters of the ICSID Convention, ICSID gave a developing country a leg up over competition without requiring the country to drastically alter its legal or political system to cater to foreign

37. SORNARAJAH, *supra* note 35, at 165.

38. *Id.*

39. Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 54, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159, [hereinafter ICSID Convention] (entered into force Oct. 14, 1966)

40. SUBEDI, *supra* note 26, at 30.

41. *See infra* Parts V-VI.

42. ICSID Convention, *supra* note 39, art. 36.

43. *See* Kimberly Amadeo, *Foreign Direct Investment, Its Pros, Cons and Importance to You*, BALANCE (Jan. 15, 2018), <https://www.thebalance.com/foreign-direct-investment-fdi-pros-cons-and-importance-3306283>.

44. You should consider the marketplace for foreign direct investment to understand why a developing country would become a contracting party to the ICSID Convention. As mentioned above, many developing countries required foreign capital to overcome a deficiency in national savings. Economics 101 tells us the following: when these countries entered the global market, they became competing suppliers of investment opportunities. Between two similarly-situated suppliers, the country that allowed an investor to bypass its legal system opting for a neutral forum for investment disputes provided the more attractive business opportunity. To the early adopters of the ICSID Convention, ICSID gave a developing country a leg up over competitors without requiring the country to drastically alter its legal or political system to cater to foreign investors. Thus, ICSID gave some developing states a competitive advantage, which eventually would turn into something that was necessary for a state to do to compete in the marketplace.

investors.⁴⁵ The host state retained its ability to expropriate for a public purpose in exchange for compensation.⁴⁶

By opting into the alternative forum for investors, the host state retained its sovereignty in a few senses. First, the host state retained control of its domestic legal system. Second, the host state's legislators did not need to cater to foreign investors in its domestic law. Third, the host state retained its sovereign immunity when courts of contracting states executed ICSID awards against the host state's foreign held assets.⁴⁷ The host state conceded its control over foreign investors' disputes,⁴⁸ and—without that control—its ability to expropriate foreign investments with impunity. However, if developing countries offered a potential investor an alternative to their own legal systems, investors would be “encouraged to invest in such states.”⁴⁹ The improved “investment climate” in the state benefited both the host country and investor.⁵⁰

The investor's state also would become a contracting party to the ICSID Convention. It can be argued that the state gained neutrality because it no longer needed to pick a side in a dispute between an investor and another state. The state would retain its freedom to focus on its own foreign policy interests rather than acting as the investor's champion at the ICJ. Yet, as a contracting party to ICSID, the investor's state conceded some of its control over who could bring an ICSID award to its courts. The investor's state lost control because the ICSID convention requires contracting parties to “recognize” and “enforce” ICSID awards against investors or states as if they were final judgments in the domestic legal system.⁵¹

iii. The Result is the Modern ICSID System

The ICSID Convention established an “independent, depoliticized and effective dispute-settlement institution.”⁵² The organization provides parties with the means of settling disputes through arbitration or fact-

45. See generally VANDEVELDE, *supra* note 22.

46. Agreement between the Government of the Republic of Venezuela and the Government of Canada for the Promotion and Protection of Investments, Can.-Venez., art. V, July 1, 1996, 2221 U.N.T.S. 1 [hereinafter Can.-Venez. BIT] (entered into force Jan. 28, 1998).

47. See *infra* Part V.

48. See *infra* Part II. B.

49. SUBEDI, *supra* note 26, at 30.

50. See JESWALD W. SALACUSE, *THE LAW OF INVESTMENT TREATIES* 102 (2d ed. 2015).

51. ICSID Convention, *supra* note 39, art. 54.

52. *About ICSID*, ICSID, <https://icsid.worldbank.org/en/Pages/about/default.aspx> (last visited Sept. 8, 2018).

finding based out of the World Bank in Washington D.C.⁵³ Every dispute is brought before an independent “Arbitration Tribunal” that will allow each side to present evidence and put forward legal arguments to inform the Tribunal’s decision.⁵⁴ A 2017 study by the law firm Allen & Overy found the average arbitration row (ICSID and other arbitration panels) lasts 4 years.⁵⁵ And the average ICSID Tribunal costs exceed 920,000 USD, when including “arbitrators’ fees,” “expenses” and “institutional charges.”⁵⁶ On average, a party spends 6,019,000 USD on legal fees to bring or 4,855,000 USD to defend against an investor-state row.⁵⁷ This sum included money spent on attorney’s fees, experts, and witnesses.⁵⁸ For a wronged investor or state, this system has traditionally been worth the cost because it provides a forum to resolve disputes in front of a neutral body and the finality of a binding judgment enforceable in any ICSID contracting state.

B. States Use Bilateral Treaties and ICSID to Encourage Foreign Direct Investment Between Equally Eager Investors and Developing Nations

Part II (B) will explain that investment treaties compliment the ICSID solution. After the World Bank established the ICSID forum, individual contracting states needed to establish investment treaties among themselves that would generate the substantive law and select ICSID as the forum for future investor-state disputes. The first section will highlight the rise in the use of bilateral investment treaties (“BITs”) in tandem with ICSID. The next section will highlight the Canada-Venezuela BIT that provides the substantive law and a forum selection clause for the Crystallex row. With the guarantees that Venezuela afforded Canadian investors in mind, the reader will be equipped to appraise Crystallex’s claims of “expropriation without compensation” and a breach of the promise of “fair and equitable treatment” (“FET”).

53. See *About ICSID*, *supra* note 52; *Contacts—Headquarters*, WORLD BANK, <http://www.worldbank.org/en/about/contacts> (last visited Sept. 26, 2018).

54. See *About ICSID*, *supra* note 52.

55. Matthew Hodgson & Alastair Campbell, *Investment Treaty Arbitration: cost, duration and size of claims all show steady increase*, ALLEN & OVERY: PUBLICATIONS (Dec. 14, 2017), <http://www.allenoverly.com/publications/en-gb/Pages/Investment-Treaty-Arbitration-cost-duration-and-size-of-claims-all-show-steady-increase.aspx>.

56. Hodgson & Campbell, *supra* note 55.

57. *Id.*

58. *Id.*

i. The Rise of Bilateral Investment Treaties Made ICSID Popular

BITs elevated ICSID to relevancy in the 1990s.⁵⁹ BITs gave ICSID jurisdiction over hundreds of investor-state contractual relationships.⁶⁰ The ICSID project began to gain momentum as the proliferation of bilateral and multi-lateral investment treaties between developed and developing countries encouraged investment in the latter countries.⁶¹ As of 2017, there were over 2,300 BITs in force.⁶² Of all the cases registered at ICSID, BITs provided ICSID jurisdiction in 59.8% of the disputes.⁶³ One hundred sixty-two nations have signed on as contracting parties to the ICSID convention.⁶⁴ In fact, the number of disputes registered with ICSID varied from none to four per year in the 1970s through the early 1980s before increasing and taking off in the late-1980s and 1990s.⁶⁵ ICSID hosted an average of forty-two disputes per year in the 2010s.⁶⁶ These facts suggest that BITs worked to promote investors' access to ICSID, and increased the popularity of ICSID investor-state arbitration.

The substantive law that the ICSID Tribunal employs comes from a BIT. The substance of BITs deal “exclusively with foreign investment” and seek “to create an international legal framework to govern investments by the nationals of one country in the territory of another.”⁶⁷ A BIT will likely be a single document.⁶⁸ Finally, each BIT follows a similar framework and shares key provisions.⁶⁹

ii. The Can.-Venez. BIT Provides the Substantive Law and Forum for the Crystallex Row

The Canada-Venezuela BIT of 1996 that features in the Crystallex v. Venezuela dispute resembles a prototypical BIT. The following articles

59. SORNARAJAH, *supra* note 35, at 167-68.

60. *See id.* at 168; *International Investment Agreements Navigator*, UNCTAD: INV. POL'Y HUB, <http://investmentpolicyhub.unctad.org/IIA> (last visited Dec. 21, 2017); International Centre for Settlement of Investment Disputes [ICSID], *The ICSID Caseload-Statistics*, Issue 2017-1 (2017), [https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-1%20\(English\)%20Final.pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-1%20(English)%20Final.pdf) (last visited Dec. 21, 2017) [hereinafter *ICSID 2017-1 Caseload-Statistics*].

61. *See* SORNARAJAH, *supra* note 35, at 167; *ICSID 2017-1 Caseload Statistics*, *supra* note 60, at 18.

62. *International Investment Agreements Navigator*, *supra* note 60.

63. *ICSID 2017-1 Caseload Statistics*, *supra* note 60, at 18.

64. *Database of ICSID Member States*, ICSID, <https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx> (last visited Sept. 8, 2018).

65. *ICSID 2017-1 Caseload Statistics*, *supra* note 60, at 18.

66. *Id.*

67. *See* SALACUSE, *supra* note 50, at 100.

68. *See id.* at 141.

69. *See id.*

provide the relevant points of procedural and substantive law relevant to foreign investors in Venezuela. The articles also generate the causes of action available to those investors and submit the parties to jurisdiction at ICSID. By reading the following articles of the Canadian-Venezuelan dispute you will understand the blackletter law applicable to Crystallex's dispute and appreciate the substance of a prototypical investment treaty.

Article I of the treaty puts forward key definitions about investment.⁷⁰ Article 1(f) defines investment as, "any kind of asset owned or controlled by an investor of one Contracting Party either directly or indirectly, including through an investor of a third state, in the territory of the other Contracting Party in accordance with the latter's laws."⁷¹ Investment includes "(i) movable and immovable property and any related property rights . . . (vi) rights, conferred by law or under contract, to undertake any economic and commercial activity, including any rights to search for, cultivate, extract or exploit natural resources."⁷² The definition of investment is important for subject matter jurisdiction under ICSID. The organization is a center for *investment* disputes only.⁷³ Similarly, the parties stipulated as to who counts as an investor.⁷⁴ Investor means "any natural person possessing the citizenship of Canada in accordance with its laws; or any enterprise incorporated or duly constituted in accordance with applicable laws of Canada, who makes the investment in the territory of Venezuela."⁷⁵ As a result, how the parties define investment dictates which types of enterprises will be protected by the BIT and granted an alternative dispute resolution forum.

Article II and Article VII make certain guarantees about the establishment, acquisition, and protection of a foreign investment.⁷⁶ The host country makes two guarantees about the investments of the other state, guaranteeing "fair and equitable treatment" and full "protection and security."⁷⁷ These causes of action are featured in the Crystallex dispute.

Article V deals with expropriation.⁷⁸ Investments of foreign investors "shall not be nationalized, expropriated or subjected to measures having an effect equivalent to nationalization or expropriation."⁷⁹ If the country does expropriate the investment, certain

70. Can.-Venez. BIT, *supra* note 46, art. I.

71. *Id.*

72. *Id.*

73. *See generally id.*

74. *Id.*

75. *Id.*

76. *Id.* arts. II, V, VII.

77. *Id.*

78. *Id.* art. V.

79. *Id.*

procedural safeguards regulate expropriation.⁸⁰ The expropriation must be for a “public purpose.”⁸¹ The decision to expropriate that investment must be made in a “nondiscriminatory manner” and by “due process of law.”⁸² Crucially, the investors must be granted “adequate and effective compensation.”⁸³ The value of compensation shall be based on the genuine value of the investment immediately before the expropriation or at the time the proposed expropriation became public knowledge.⁸⁴ The compensation and interest will be paid “without delay” after the expropriation.⁸⁵ We will see that adequate compensation without delay forms the crux of the Crystallex dispute.

Article XII addresses the settlement of disputes between an investor and the host state and provides the forum selection clause.⁸⁶ First, the parties will attempt to settle the dispute amicably between themselves.⁸⁷ If that cannot happen, then the dispute may be submitted by the investor to arbitration.⁸⁸ Article XII(4) provides that the dispute may be submitted to arbitration at ICSID if both states are contracting parties to the ICSID convention.⁸⁹ Venezuela and Canada are both contracting parties to ICSID.⁹⁰

Article XII (9) sets out the award.⁹¹ The award can be monetary damages and interest or restitution of property, or both.⁹² The contracting party can opt for damages instead of specific performance.⁹³ We will see that claimants prefer monetary damages over restitution, especially when the investment climate in the country changes. Article XII (10) proclaims the award of arbitration shall be final and binding, which mirrors the language in Article 54 of the ICSID Convention.⁹⁴

80. *Id.*

81. *Id.*

82. *Id.* arts. V, VII.

83. *Id.*

84. *See id.*

85. *Id.*

86. *Id.* art. XII.

87. *Id.*

88. *Id.*

89. *See id.*

90. ICSID, *List of Contracting States and Other Signatories of the Convention*, WORLD BANK (Aug. 27, 2018), <https://icsid.worldbank.org/en/Documents/icsiddocs/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf> [hereinafter ICSID, *List of Contracting States*].

91. Can.-Venez. BIT, *supra* note 46, art. XII.

92. *Id.*

93. *Id.*

94. *Id.* *See infra* Part IV.

C. The 2001 Financial Crisis Created Unanticipated Challenges for ICSID Dispute Resolution When Argentina Undermined an Assumption of the ICSID Convention

The following paragraphs detail a brief history of Argentina and provide a foil for a later discussion of modern Venezuela. Argentina existed as a member of the international investment community before its economy crashed in 2001.⁹⁵ This section will highlight how Argentina responded to various ICSID claimants during its economic crisis and in the years following the crisis. Argentina's simultaneous participation in ICSID disputes and criticism of the system left investors in an odd place. An investor that brought a claim at ICSID expected a tough fight because Argentina would use every procedural and substantive challenge to defend and delay against a finding for the investor. However, once the tribunal granted the investor an award, Argentina would cease to participate in the process. The result was a decline in investors' confidence in Argentina, and arguably even a decline in investors' confidence in ICSID itself. The problem of Argentina complying with ICSID disputes while choosing not to pay out on awards posed a novel issue for investors.

i. A Brief History of Argentina's Economic and Global Affairs

Argentina opened itself up to foreign investment in the 1990s and Argentina's president began to privatize entire industries, including the public utilities sectors.⁹⁶ For example, the government signed an Argentina-United States BIT.⁹⁷ Argentina's free trade policies resulted in an inflow of foreign capital into the Argentine economy.⁹⁸ Yet, the globalization of Argentina's domestic markets was cut short by a financial crisis.

In 2001, Argentina's economy collapsed.⁹⁹ In the decade before the crash, the Argentine government had been borrowing heavily from foreign sources.¹⁰⁰ Foreign debt totaled approximately 140,000,000,000

95. See *Argentina- United States of America BIT (1991)*, UNCTAD: INV. POL'Y HUB, <http://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/162> (last visited Sept. 8, 2018).

96. *A decline without parallel*, THE ECONOMIST (Feb. 28, 2002), <https://www.economist.com/node/1010911>.

97. *Argentina- United States of America BIT*, *supra* note 95.

98. *A decline without parallel*, *supra* note 96.

99. GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 1 (2007).

100. *Argentina Total External Debt*, TRADING ECON., <https://tradingeconomics.com/argentina/external-debt> (last visited Sept. 8, 2018).

USD by the end of 2001.¹⁰¹ At the same time, Argentina had pegged its peso to the US Dollar.¹⁰² This practice, however, was unsustainable and Argentinians knew that the one to one ratio would not last forever.¹⁰³ And so Argentinians rushed to their banks to exchange their pesos for dollars.¹⁰⁴ The bank run led to protests.¹⁰⁵ The protests led to political resignations.¹⁰⁶ And, the political instability plunged Argentina further into economic and social crisis.¹⁰⁷ Gross domestic product (GDP) per capita dropped by nearly 20%, leaving 55% of Argentinians in poverty.¹⁰⁸ The change in the economy left Argentina insolvent and in crisis.

ii. Foreign Investors Row With Argentina at ICSID

The Argentine crisis presented a challenge not only to Argentina's creditors but also to foreign investors. Any foreign investor would have initiated arbitration proceedings, hoping to recover but knowing that Argentina had defaulted on over 140,000,000,000 USD of public debt.¹⁰⁹ Yet, wronged investors still sought enforcement through ICSID arbitration.

Argentina denounced claims and mounted defenses in ICSID.¹¹⁰ In the aftermath of the crisis, Argentina rowed with wronged investors in ICSID tribunals. Argentina denounced the actions of the investors and ICSID while it participated in tribunals.¹¹¹ Argentina, as the respondent, sought to complicate recovery throughout the arbitration process through a tactic of denying and delaying the process.¹¹² This tactic made any investor's dispute with Argentina expensive, long, and uncertain.¹¹³

Argentina would comply with ICSID proceedings while utilizing procedural grounds to challenge awards.¹¹⁴ As Charity Goodman aptly

101. See Iris van de Wiel, *The Argentine Crisis 2001/2002*, RABOBANK (2013), <https://economics.rabobank.com/publications/2013/august/the-argentine-crisis-20012002-/>.

102. HARTEN, *supra* note 99, at 1.

103. Wiel, *supra* note 101.

104. See *id.*

105. See *id.*

106. *Chronology: Argentina's turbulent history of economic crises*, REUTERS (July 30, 2014, 10:55AM), <https://www.reuters.com/article/us-argentina-debt-chronology/chronology-argentinas-turbulent-history-of-economic-crises-idUSKBN0FZ23N20140730>.

107. *Chronology: Argentina's turbulent history of economic crises*, *supra* note 106.

108. Miguel Kiguel, *Argentina's 2001 Economic and Financial Crisis: Lessons for Europe*, in THINK TANK 20: BEYOND MACROECONOMIC COORDINATION DISCUSSIONS IN THE G-20 7 (2011), https://www.brookings.edu/wp-content/uploads/2016/06/11_think_tank_20.pdf.

109. *A decline without parallel*, *supra* note 96.

110. See Goodman, *supra* note 32, at 449.

111. See *id.* at 479.

112. See Goodman, *supra* note 32, at 480.

113. See generally *id.*

114. *Id.* at 449.

pointed out in a 2007 comment, Argentinian officials publicly condemned the notion of paying foreign investors during a time of economic crisis.¹¹⁵ Yet, Goodman stated, “Argentina has indicated it will honor the Convention and use the narrow procedural grounds available to it to challenge these awards.”¹¹⁶ In effect, it postponed payment on the awards.¹¹⁷ Furthermore, while Articles 53 and 54 of the ICSID Convention call for contracting states to recognize and enforce ICSID awards as final, Argentina officials claimed a right to review awards in its own court system “if they disturb public order.”¹¹⁸ This action would deprive the investor of the neutrality and the finality guaranteed by ICSID. These delay tactics proved costly to investor claimants trying to collect from Argentina.

Investor confidence in Argentina and ICSID is lower than before the crisis. On Argentina’s post-crisis posture, Goodman stated that “Argentina is left balancing immediate issues of societal welfare with longer issues of shoring up foreign investor confidence in Argentina. It is not remotely settled which interest will win out.”¹¹⁹ Ten years on, we know that Argentina prioritized societal welfare. The Argentine economy has been growing at an average rate of 8% per year since the crisis.¹²⁰ However, these crucial gains came at the cost of Argentina’s international reputation because Argentina failed to fulfil its obligations to its creditors and ICSID claimants. Today, “Argentina has remained cut off from foreign capital markets and is considered a pariah by most investors.”¹²¹ Yet, Argentina did not disaffirm the ICSID treaty.¹²² The fact that Argentina has been cut off from international capital markets has very likely stunted the country’s rising GDP.

iii. Argentina Thwarted Claimants and Defied ICSID

In summary, 1990s Argentina encouraged the privatization of many industries and sought to encourage foreign direct investment in the Argentine economy. Argentina became a party to ICSID and numerous investment treaties that selected ICSID as its forum. In the early 2000s, Argentina’s economy collapsed, and the country became insolvent soon

115. *See id.* at 479.

116. *Id.* at 480.

117. *Id.*

118. ICSID Convention, *supra* note 39, arts. 53-54; Goodman, *supra* note 32, at 469.

119. Goodman, *supra* note 32, at 481.

120. Kiguel, *supra* note 108, at 7.

121. *Chronology: Argentina’s turbulent history of economic crises*, *supra* note 106.

122. *Database of ICSID Member States*, ICSID, <https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx> (last visited Sept. 8, 2018).

after. Foreign investors subject to the BITs filed claims through ICSID, which Argentina denounced as against the public interest and resisted at ICSID. Argentina then delayed payment on awards rendered against it by ICSID tribunals. This legal tactic eroded investor confidence in Argentina even though Argentina remained a party to ICSID and participated in disputes up until the award. Because investors lost confidence in Argentina, a contracting party to ICSID, it reflected poorly on the ICSID system, a system itself created to protect an investor's expectation of a neutral forum where they could dispute with states and be compensated by those states when they deserve it.

iv. How Argentina Undermined Key Assumptions of the ICSID Convention and What Argentina Can Tell Us About Venezuela Today

Argentina is important here for two reasons. First, the Argentine Crisis created unanticipated challenges for ICSID dispute resolution because Argentina undermined a fundamental premise upon which the ICSID Convention functioned. Argentina's response to the ICSID claims after the Argentine Crisis undermined the notion that a contracting state would honor awards rendered against it. Argentina's inability and unwillingness to honor awards rendered against it undermined the assumption that ICSID provided investments adequate protection from actions of the host state. Furthermore, Argentina demonstrated an effective defense strategy within the parameters of the ICSID rules, which thwarted claimants' expectations by delaying any payment on some awards and settling other awards.

Second, Argentina provides an interesting comparison to Venezuela today. As of this writing, Venezuela's claimants and creditors face many of the same challenges that Argentina's creditors faced in the 2000s. Venezuela is teetering in bankruptcy and has many foreign creditors and claimants at ICSID.¹²³ And, by the looks of it, Venezuela is using Argentina's ICSID playbook by actively delaying and challenging claimants at ICSID. Yet, in many ways, Venezuela presents a bigger challenge to its claimants and to ICSID than Argentina did before it. Therefore, Venezuela is not another Argentina. Instead, Venezuela is a tougher adversary to wronged investors, and it is currently incompatible with the ICSID system.

123. Javier Ferrero, *Venezuela versus the ICSID Convention*, GLOBAL ARB. NEWS (Feb. 24, 2015), <https://globalarbitrationnews.com/venezuela-versus-icsid-convention-20120422/>; *How Long Can Venezuela Avoid Default*, THE ECONOMIST (Nov. 4, 2017), <https://www.economist.com/news/americas/21730895-south-americas-insolvent-left-wing-champion-has-been-star-sovereign-bond-markets-how-long>.

D. Venezuela: The Rise of an Incompatible State

This portion is about Venezuela and its rise as a state incompatible with ICSID. The first three paragraphs show how Venezuela flipped from embracing ICSID and foreign investment to rejecting them. This section will provide a history of Venezuela's political, economic, and foreign policy in three snapshots: the 1990s, the 2000s, and the 2010s. Venezuela's transformation illustrates why Venezuela, like Argentina, will likely ruin investor's expectations at ICSID.¹²⁴ Like Argentina in the 2000s, Venezuela is nearly insolvent and has adopted Argentina's litigation strategy of delaying or challenging awards, which makes arbitration costly, lengthy, and uncertain for potential creditors.¹²⁵ Furthermore, Venezuela poses a greater chance of thwarting investor's expectations at ICSID than Argentina because its government does not care about the international investment system and because it benefits from participating in ICSID disputes to protect the foreign assets of its state-owned oil enterprises' foreign assets.¹²⁶ For these reasons, the ICSID system will likely fail to deliver the compensation investors expect from Venezuela because the government is making itself incompatible with ICSID.

i. Venezuela in the 1990s: Globalization Under Andrés Pérez

First, it is important to look at the Venezuela that joined ICSID and the globalization movement in the 1990s. In the 1990s, Venezuela operated under a democratic style of government.¹²⁷ Carlos Andrés Pérez of the left-leaning Democratic Action Party held the Presidency.¹²⁸ While a democracy, Venezuelans experienced a chaotic political and economic situation in the 1990s.¹²⁹ President Pérez dealt with an economic downturn and fought off two coup attempts by Colonel Hugo Chávez during his presidency.¹³⁰ Yet, President Pérez's government eagerly participated at the international level and showed a willingness to embrace globalization.¹³¹ The government borrowed money from the

124. *How Long Can Venezuela Avoid Default*, *supra* note 123.

125. *See id.*

126. Ferrero, *supra* note 123.

127. *Venezuela profile - Timeline*, BBC (Nov. 1, 2017), <http://www.bbc.com/news/world-latin-america-19652436>.

128. *Id.*

129. *Id.*

130. *Id.*

131. *See ICSID, List of Contracting States*, *supra* note 90; Paul Lewis, *Venezuela Gets Big I.M.F. Credit, Backing Market Reforms*, NY TIMES, (July 13, 1996) <http://www.nytimes.com—/1996/07/13/world/venezuela-gets-big-imf-credit-backing-market-reforms.html>; *Canada-*

International Monetary Fund during its economic downturn in the early 1990s.¹³² The Venezuelan government joined the ICSID Convention in 1993.¹³³ And, in 1996, the government would sign the Canada-Venezuela Bilateral Investment Treaty.¹³⁴ These three actions reflected the Venezuelan government's willingness to embrace international institutions and globalization. And so, the Venezuela that joined the international investment community embraced globalization, perhaps to remedy its domestic economic and political instability. This instability did not make Venezuela unsuitable for international investment. The ICSID system was created to provide stability for foreign investors within a host state.¹³⁵ Investors willing to enter the Venezuelan economy could bypass the local legal system and arbitrate with Venezuela at ICSID.¹³⁶ And, as an active participant in the international community, investors likely believed that Venezuela would cooperate at ICSID proceedings because 1990s Venezuela embraced foreign direct investment and ICSID as a solution to its economic instability.

ii. Venezuela in The 2000s: Socialism Under Chávez

Next, it is important to look at Venezuela under Hugo Chávez. The Venezuelan people elected Hugo Chávez in 1998.¹³⁷ President Chávez led the “Bolivarian Revolution,” a “socialist political program,” under the banner of the United Socialist Party of Venezuela (the “PVSU”).¹³⁸ The PVSU altered Venezuela's democratic system of government by changing the constitution and by passing an enabling law in 2000.¹³⁹ With this power, President Chávez worked to end corruption and to increase spending on social programs.¹⁴⁰ He financed the latter by tapping into the state-run oil company to fund his spending on healthcare, subsidized

Venezuela, Bolivarian Republic of BIT (1996), UNCTAD: INV. POL'Y HUB, <http://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/809> (last visited Sept. 8, 2018).

132. Lewis, *supra* note 131.

133. See Sergey Ripinsky, *Venezuela's Withdrawal From ICSID: What it Does and Does Not Achieve*, IISD: INV. TREATY NEWS (Apr. 13, 2012), <https://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/>.

134. See Can.-Venez. BIT, *supra* note 46.

135. See generally SUBEDI, *supra* note 26, at 30.

136. See *id.*

137. *Timeline: Venezuela's tumultuous history*, ALJAZEERA (Apr. 3, 2013), <http://www.aljazeera.com/indepth/features/2012/09/201292121430533264.html>.

138. See Brian A. Nelson, *Hugo Chávez: President of Venezuela*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Hugo-Chávez> (last updated July. 24, 2018).

139. See Nelson, *supra* note 138.

140. See *id.*

food, and education.¹⁴¹ The high prices of oil in the mid-2000s meant that the oil-producing country could divert its oil profits into these expensive social programs without issue.¹⁴² After his re-election in 2006, President Chávez began to nationalize entire industries, and, by the time of his death in 2013, the government had nationalized much of its agriculture, oil, and gold industries.¹⁴³ Venezuela's status as a party to ICSID and a party to many bilateral investment treaties failed to deter Chávez's regime from expropriating foreign investments.¹⁴⁴ Yet, the ill-effects of Chávez's meddling in the operation of the state-owned oil company and the nationalization of many private businesses were not immediate. Instead, Venezuelans enjoyed an increase in the standard of living during Chávez's tenure from 1998–2013.¹⁴⁵ At the international level, Chávez's government publicly contemplated pulling out of ICSID because of the mounting number of claims resulting from Chávez's expropriations of whole industries.¹⁴⁶ Under Chávez, Venezuela transformed from a willing participant in economic globalization to a government that nationalized many of its big industries.¹⁴⁷ This Venezuela represented the sort of sovereign against which the ICSID system was designed to combat by protecting investments against expropriation and biased adjudication.¹⁴⁸ But Venezuela would transform once again under President Maduro in present times.

iii. Venezuela in Present Times: Authoritarianism Under Maduro

Venezuela under President Maduro is not a democracy. President Chávez chose Maduro as his successor in 2013.¹⁴⁹ Since then, Maduro's

141. See *id.*; MARK WEISBROT & LUIS SANDOVAL, CTR. FOR ECON. & POLICY RESEARCH, THE VENEZUELAN ECONOMY IN THE CHÁVEZ YEARS 2 (2007), cepr.net/documentations/publications/venezuela_2007_07.pdf.

142. See WEISBROT & SANDOVAL, *supra* note 141, at 2; *Historical Crude Oil Prices and Price Chart*, INVESTMENT MINE, <http://www.infomine.com/investment/metal-prices/crude-oil/all/> (last visited Jan. 20, 2018).

143. See Nelson, *supra* note 138; *Factbox: Venezuela's nationalizations under Chávez*, REUTERS (Oct. 7, 2012), <https://www.reuters.com/article/us-venezuela-election-nationalizations/factbox-venezuelas-nationalizations-under-chavez-idUSBRE89701X20121008>.

144. See José de Córdoba, *Chávez Takes Steps to Exit Global Forum*, WALL ST. J. (Sept. 13, 2011), https://www.wsj.com/articles/SB10001424053111903285704576560760106674594?mod=googlenews_wsj.

145. See Charlie Devereux & Raymond Colitt, *Venezuelans' Quality of Life Improved in UN Index Under Chavez*, BLOOMBERG (Mar. 6, 2013), <https://www.bloomberg.com/news/articles/2013-03-07/venezuelans-quality-of-life-improved-in-un-index-under-chavez>.

146. De Córdoba, *supra* note 144.

147. See *Factbox: Venezuela's nationalizations under Chávez*, *supra* note 143.

148. See SUBEDI, *supra* note 26, at 30-32.

149. See *Venezuela Profile-Timeline*, *supra* note 127.

party, the PVSU, has controlled all branches of government.¹⁵⁰ President Maduro and the party continue to follow Chávez's nationalistic and social policies.¹⁵¹ These policies have stifled the free market.¹⁵² Without capitalism, Venezuela continues to rely on its oil exports as its chief source of income;¹⁵³ oil exports have consistently counted for almost all of Venezuela's exports and nearly half of the government's revenue.¹⁵⁴ This reliance became an issue when oil prices dropped over 40% in 2014.¹⁵⁵ Additionally, the state owned oil company, *Petróleos de Venezuela, S.A.* ("PDVSA"), has become less efficient at producing oil since the government under Chávez took control of its operations.¹⁵⁶ Taken together, the drastic drop in revenue from oil exports has left the Venezuelan economy in shambles;¹⁵⁷ since 2014, the Venezuelan economy has been in recession.¹⁵⁸

Compared to 2000s Argentina, Venezuela is much worse off. The Economist recently cited three university studies estimating that 82% of Venezuelan households live in poverty compared to 48% in 1998 before

150. See Michael McCarthy, *6 things you need to know about Venezuela's political and economic crisis*, WASH. POST (May 18, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/05/18/6-things-you-need-to-know-about-venezuelas-political-and-economic-crisis/?utm_term=.a46f2978a8ef; Zeeshan Aleem, *How Venezuela went from a rich democracy to a dictatorship on the brink of collapse*, VOX (Sept. 19, 2017), <https://www.vox.com/world/2017/9/19/16189742/venezuela-maduro-dictator-chavez-collapse>.

151. See Siddhartha Mahanta, *How Much Longer Can Venezuela Go On Like This?*, THE ATLANTIC (Oct. 29, 2016), <https://www.theatlantic.com/international/archive/2016/10/venezuela-maduro-chavez-protest-caracas/505874/>.

152. *2017 Index of Economic Freedom: Venezuela*, HERITAGE, <https://www.heritage.org/index/country/venezuela> (last visited Sept. 8, 2018); *Venezuela: Foreign Investment*, SANTANDER: TRADEPORTAL, <https://en.portal.santandertrade.com/establish-overseas/venezuela/investing> (last visited Sept. 8, 2018).

153. See McCarthy, *supra* note 150.

154. See *The World Factbook: Venezuela*, CENT. INTELLIGENCE AGENCY [CIA], <https://www.cia.gov/library/publications/the-world-factbook/geos/ve.html> (last visited Feb. 10, 2018).

155. See *Why the oil price is falling*, THE ECONOMIST (Dec. 8, 2014), <https://www.economist.com/blogs/economist-explains/2014/12/economist-explains-4>.

156. See Lucia Kassai & Sheela Tobben, *Venezuelan Oil Output Heads to 29-Year Low*, BLOOMBERG (Nov. 10, 2017), <https://www.bloomberg.com/news/articles/2017-11-10/venezuelan-oil-output-heads-to-29-year-low-as-cash-crunch-grows>.

157. See *id.*

158. See Dep't for Int'l Trade, *Doing Business in Venezuela: Venezuela trade and export guide*, GOV.UK, <https://www.gov.uk/government/publications/exporting-to-venezuela/exporting-to-venezuela> (last updated Oct. 20, 2017) [hereinafter U.K. Dep't for Int'l Trade, *Doing business in Venezuela*].

Chávez.¹⁵⁹ “Venezuela’s GDP in 2017 is 35% below 2013 levels.”¹⁶⁰ Essentially, present day Venezuela is poorer and less accountable than the Venezuela of the 1990s or 2000s.

iv. Venezuela is Incompatible With ICSID

Venezuela is in a unique position from an international standpoint. The government has denounced the international investment system and ICSID.¹⁶¹ It has repatriated much of its foreign reserves.¹⁶² Now, the government stands to default on its sovereign debt,¹⁶³ and its potential liabilities to ICSID claimants number in the billions of dollars.¹⁶⁴ One would think that the government would recede from the international system. Yet, Venezuela is a member of the Organization of the Petroleum Exporting Countries (“OPEC”).¹⁶⁵ As a result, Venezuela’s state-owned oil company, PDVSA, cannot operate without having assets abroad.¹⁶⁶ So, while the Venezuelan government denounced the ICSID convention in 2012,¹⁶⁷ it continues to participate at ICSID, perhaps for fear of claimants executing on its oil company’s foreign assets.¹⁶⁸ This reality forces the Venezuelan government to actively participate in the ICSID system; a system that the country’s government openly denounces.¹⁶⁹ The result is a government that has an incentive to participate in ICSID disputes to

159. See *Will Venezuela’s dictatorship survive?*, THE ECONOMIST (Mar. 9, 2017), <https://www.economist.com/news/americas/21718572-how-steal-country-will-venezuelas-dictatorship-survive>.

160. See Ricardo Hausmann, *Venezuela’s economic decline is sharper than the US Great Depression*, WORLD ECON. F. (July 31, 2017), <https://www.weforum.org/agenda/2017/07/venezuela-s-economic-decline-is-sharper-than-the-us-great-depression>.

161. See Ripinsky, *supra* note 133.

162. See *As Emerging Markets Currencies Collapse, Gold is Being Mobilized*, BULLIONSTAR.COM, <https://www.bullionstar.com/blogs/ronan-manly/tag/banco-central-de-venezuela/> (last visited Sept. 26, 2018).

163. See John Paul Rathbone & Robin Wigglesworth, *Venezuela slips deeper into crisis after default*, FIN. TIMES (Nov. 14, 2017), <https://www.ft.com/content/7f066afc-c8cf-11e7-ab18-7a9fb7d6163e>.

164. See ALBERTO J. ROJAS & JUAN LORENZO MALDONADO, CREDIT SUISSE, VENEZUELA: ICSID CASES, A POTENTIAL RISK ON THE HORIZON 1 (2015), https://research-doc.credit-suisse.com/docView?language=ENG&format=PDF&source_id=csplusesearchhcp&document_id=1051398411&serialid=jhnSujb3ggfXbmTG1%2BBuJRKjsiaPuPMomPDIV0D6JOA%3D.

165. See OPEC: *Member Countries*, ORG. PETROLEUM EXPORTING COUNTRIES [OPEC], http://www.opec.org/opec_web/en/about_us/25.htm (last visited Sept. 8, 2018).

166. See *Venezuela asks its creditors to renegotiate its vast debt*, THE ECONOMIST (Nov. 3, 2017), <https://www.economist.com/news/americas/21731019-presidents-mysterious-announcement-raises-more-questions-it-answers-venezuela-asks>.

167. ICSID, *List of Contracting States*, *supra* note 90, at 5.

168. See Richard Cooper & Boaz Morag, *Crystallex’s Implications For Holders Of Venezuelan Debt*, LAW 360 (Jan. 9, 2018), [https://etron.lls.edu:2195/articles/999954/crystallex-s-implications-for-holders-of-venezuelan-debt;Venezuela asks its creditors to renegotiate its vast debt](https://etron.lls.edu:2195/articles/999954/crystallex-s-implications-for-holders-of-venezuelan-debt;Venezuela%20asks%20its%20creditors%20to%20renegotiate%20its%20vast%20debt), *supra* note 169.

169. Ripinsky, *supra* note 133.

protect its foreign held assets. Yet, it has little incentive to honor awards for fear of its international reputation or pay out of respect for its obligations as a former party to the ICSID convention—a system it has denounced.¹⁷⁰ For this reason, Venezuela is incompatible with the ICSID system.

v. Venezuela is More Dangerous to Investors Than Argentina

It is helpful to compare Argentina in the 2000s to Venezuela today to understand why the ICSID system of dispute resolution and award will not work with Venezuela. Like Argentina following its 2000 economic crisis, Venezuela is facing insolvency.¹⁷¹ Insolvency means that any ICSID claimant trying to recover will be up against two obstacles. First, a claimant will be up against a country with few attachable assets at home or abroad. Second, a claimant will be competing with the country's other creditors, whether they are sovereign debt holders or otherwise. This crowded field reduces the chances for, and the amount of, any potential recovery against Venezuela. In addition, Venezuela, like Argentina before it, has been an active participant in the ICSID dispute process.

It is evident that Venezuela is using Argentina's ICSID method: deny and delay.¹⁷² Venezuela has denied wrongdoing at every step of the arbitration and enforcement process and delayed enforcement by using every procedural and substantive challenge available.¹⁷³ The results have been good for both countries.¹⁷⁴ It is good in the sense that the countries succeeded in postponing payment on ICSID awards for years, denying expropriated investors financial relief and discouraging future claimants from trying themselves.¹⁷⁵ For example, Argentina had not paid CMS Energy, its first claimant to receive an ICSID award following the 2001 Argentine crisis, as of 2009.¹⁷⁶ That was eight years after the crisis, four years after the award, and two years after a review of that award.¹⁷⁷ This example shows that Argentina's efforts to resist payment from within the

170. *See id.*

171. *See Venezuela asks its creditors to renegotiate its vast debt*, *supra* note 168.

172. *See Posses*, *supra* note 16.

173. *Crystallex Int'l Corp*, ICSID Award, ¶¶ 426, 485.

174. *See Come and get me: Argentina is putting international arbitration to the test*, THE ECONOMIST (Feb. 18, 2012), <http://www.economist.com/node/21547836>; *Argentina settles five investment treaty awards*, ALLEN & OVERY (Nov. 7, 2013), <http://www.allenoverly.com/publications/en-gb/Pages/Argentina-settles-five-investment-treaty-awards.aspx>.

175. *See Argentina settles five investment treaty awards*, *supra* note 174.

176. *See Come and get me: Argentina is putting international arbitration to the test*, *supra* note

177. *See Luke Eric Peterson, Argentine crisis arbitration awards pile up, but investors still wait for a payout*, BILATERALS.ORG (June 25, 2009), <http://bilaterals.org/?argentine-crisis-arbitration&lang=fr>.

ICSID system worked successfully. Argentina did not settle with CMS Energy until 2013.¹⁷⁸ As we will later explore through the Crystallex case, Venezuela might be taking a similar path in the present day. In sum, the ICSID system will likely fail to deliver what investors expect they are owed from Venezuela.

There are some notable differences between Venezuela and Argentina that would further affect Venezuela's status as an ICSID participant. In addition to the similarities with Argentina's economic situation and litigation strategy, Venezuela has followed through and denounced the ICSID system.¹⁷⁹ Argentina disapproved of the alternative dispute process during its financial hardships, but it remained a contracting party to ICSID.¹⁸⁰ This inaction indicates that Argentina cared about its international reputation. Venezuela's government does not seem to care about its international standing among "Western" states or about alienating foreign investors to the same degree as Argentina.¹⁸¹ This point is evidenced by Venezuela's denouncement of ICSID.¹⁸² Traditionally, a contracting member's regard for its international standing acts as a soft check ensuring a host state pays out on awards.¹⁸³ Without regard for its international standing, the Venezuelan government is less likely to pay out.¹⁸⁴ Next, the chance of Venezuela complying is lower because its government has denounced the ICSID Convention because its leaders disagreed with the principles behind it.¹⁸⁵ Venezuela is also less likely to pay out because it probably does not fear being shunned by the international community for failing to honor the ICSID awards because the country is already heavily sanctioned by large players, such as the United States.¹⁸⁶ In this respect, Venezuela is less compatible with the ICSID system than Argentina. This incompatibility poses a challenge for Venezuela's claimants and for the ICSID system in general.

178. See Herbert, Smith & Freehills LLP, *Argentina settles five outstanding investment treaty arbitration claims in historic break with its anti-enforcement stance*, LEXOLOGY (Oct. 14, 2013), <https://www.lexology.com/library/detail.aspx?g=5546cffa-46d3-4421-a47d-e86817ace4e5>.

179. ICSID, *List of Contracting States*, *supra* note 90, at 5.

180. *Id.* at 1; Wiel, *supra* note 101.

181. See Ripinsky, *supra* note 133.

182. See Ferrero, *supra* note 123.

183. See MOSES, *supra* note 33, at 238; Georges R. Delaume, *ICSID Arbitration Proceedings*, 4 INT'L TAX & BUS. LAW 218, 229 (1986).

184. See Delaume, *supra* note 183, at 229; see generally MOSES, *supra* note 33, at 238.

185. See Ripinsky, *supra* note 133.

186. See Delaume, *supra* note 183, at 229; see, e.g., Matt Spetalnick et al., *U.S. Considering broad oil sanctions on Venezuela-source*, REUTERS (Feb. 28, 2018), <https://www.reuters.com/article/us-venezuela-usa-sanctions-exclusive/exclusive-u-s-considering-broad-oil-sanctions-on-venezuela-source-idUSKCN1GD3LR>.

Another difference between Venezuela and Argentina is that Venezuela is more resource-abundant than Argentina.¹⁸⁷ This fact is significant for two reasons. First, resource-abundant developing countries operate around their wealth of natural resources. Venezuela happens to sit on the world's largest proven oil reserves.¹⁸⁸ In addition to oil, the country has a wealth of minerals, such as gold deposits.¹⁸⁹ Resource-rich developing countries often need foreign companies with the capital and knowhow to exploit these reserves—these host countries are particularly attractive for foreign direct investment in the energy and mining sectors.¹⁹⁰ As a result, these developing countries host more foreign investors, and those investors rely on ICSID to protect their substantial, immobile investments.¹⁹¹ For investors in natural resources within Venezuela, Chávez's expropriation of entire sectors left foreign investors dependent on ICSID for protection and compensation.¹⁹² Because of the nature of these investments, the amount in controversy was much larger than it was in Argentina.¹⁹³ Venezuela expropriated investments worth billions rather than millions of dollars.¹⁹⁴ Furthermore, the number of these high value claimants far exceeded the number of high value claimants against Argentina.¹⁹⁵ This fact matters because this amount constitutes the dollar figure that ICSID will be strained to protect on behalf of these investors, dollars that must be collected from Venezuela, a country that is less willing to be collected from than Argentina.

Second, Venezuela being resource rich has important implications for Venezuela's exposure to execution attempts on assets abroad. A state-owned oil company, such as PDVSA, likely needs assets in other countries to continue its operations overseas. These assets then become targets for the sovereign's creditors and claimants abroad. Notwithstanding legal fictions between a sovereign and a state-owned enterprise, the exposure of these foreign-held assets incentivizes Venezuela to vigorously defend against execution attempts in a way that

187. Crystallex Int'l Corp, ICSID Award, ¶ 6.

188. See Matthew DiLallo, *This OPEC Country has the Largest Proven Oil Reserves*, FOX BUS. (Apr. 22, 2017), <http://www.foxbusiness.com/markets/2017/04/22/this-opeccountry-has-largest-proven-oil-reserves-and-it-not-saudi-arabia.html>.

189. Crystallex Int'l Corp, ICSID Award, ¶ 6.

190. See *ICSID 2017-1 Caseload Statistics*, *supra* note 60, at 1.

191. See *id.*

192. See DiLallo, *supra* note 188.

193. See *e.g.*, Crystallex Int'l Corp, ICSID Award, ¶ 6 (finding Venezuela owed Crystallex over \$1,202,000,000,000); *Argentina settles five investment treaty awards*, *supra* note 174 (writing about five Argentinian ICSID awards ranging from \$165,000,000 down to \$2,800,000).

194. See *generally*, Crystallex Int'l Corp, ICSID Award, ¶6.

195. ROJAS & MALDONADO, *supra* note 164, at 1; *Come and get me: Argentina is putting international arbitration to the test*, *supra* note 174.

Argentina did not because it lacked state-owned enterprises operating abroad. There are two conclusions that can be drawn from this discussion. First, Venezuela has an incentive to thwart the execution of awards on its assets to a high cost. Second, Venezuela's creditors, unlike Argentina's creditors, may have another source of treasure from which to take their award, the state petrol company's assets. This feat will require litigation and favorable new case law that whittles away at the legal fiction that separates the sovereign from its state-owned enterprises' subsidiaries.¹⁹⁶ This note will touch on these ideas more in Part V.

vi. Venezuela Poses a Threat to the ICSID System and International Investment in Developing Countries

Venezuela's participation in the ICISD system may have adverse consequences if Venezuela succeeds at not compensating investors from whom the Venezuela government has expropriated investments. There exist other contracting parties to ICSID much like Venezuela.¹⁹⁷ These parties are developing countries that are rich in natural resources or host quickly expanding markets. The countries' current leaders may advocate for globalization and encourage foreign investment. However, as seen with Venezuela, a downturn in the economy or a regime change can lead to an entirely different climate in the host state. In Venezuela, socialism led to nationalization and the expropriation of massive amounts of foreign direct investment.¹⁹⁸ If Venezuela manages to use the ICSID system to thwart compensation of the expropriated investors in Venezuela, that will set a precedent for contracting parties to ICSID worldwide. So far, the ICSID system has provided wronged investors with an alternative forum and a way to collect on a host state's foreign assets. The rest of this article will explore whether the owners of investments expropriated by Venezuela's government will be able to rely on this system to be compensated or if Venezuela's keen participation in the process and attempts to delay will undermine investors' expectations of protection and compensation.

To summarize, Venezuela plays by the rules while it stalls—at every chance it gets—by putting up procedural or litigation-related roadblocks. Meanwhile, Venezuela's government has been repatriating its assets, distancing itself from its oil company's assets, and bracing to default on

196. See Cooper & Morag, *supra* note 168.

197. See ICSID, *List of Contracting States*, *supra* note 90; IMF, *Macroeconomic Policy Frameworks for Resource-Rich Developing Countries*, *supra* note 19 (listing resource rich countries that include ICSID contracting parties on pages 48 and 49).

198. *Factbox: Venezuela's nationalizations under Chávez*, *supra* note 133.

its foreign debt. Venezuela's stance and status make it incompatible with the ICSID system. This incompatibility could lead to trouble for many investors relying on ICSID to recover from Venezuela post-Chávez. Crystallex's struggles illustrate this point.

III. THE ICSID DISPUTE RESOLUTION PROCESS IS EQUIPPED TO HANDLE MATTERS BETWEEN INVESTORS AND UNCOOPERATIVE STATES UP TO THE AWARD STAGE AS SHOWN BY CRYSTALLEX V. VENEZUELA

Part III will state the facts of the dispute that arose between Crystallex and the Venezuelan government over the right to exploit Las Cristinas and its vast gold deposits. This Part also highlights the ICSID dispute, the claims, and the Tribunal's award. Part III concludes by analyzing the upsides and downsides of ICSID arbitration for the parties in this dispute.

A. This Dispute Arises from Venezuela's Expropriation of Las Cristinas Mine from Crystallex

The *Crystallex v. Venezuela* fight originates from disputed rights to land in a forested region of the State of Bolívar in the Guayana region of southeast Venezuela.¹⁹⁹ The "Las Cristinas" area sits within the Imataca National Forest Reserve.²⁰⁰ This land sits on some of the largest proven gold deposits in the world.²⁰¹ However, when Crystallex acquired the rights to exploit any mineral reserves under Las Cristinas, few knew about the rich gold deposits, that is, other than illegal miners.²⁰² These miners' unsavory ventures encouraged the government to reclaim the mineral rights to Las Cristinas from the previous owner in 2002.²⁰³

The redistribution of the mining rights brings our parties into the mix.²⁰⁴ Venezuela's Ministry of Energy and Mines ("Ministry of Mines") administered the government's natural resources at the national level.²⁰⁵ The *Corporación Venezolana de Guayana* (the "CVG") operated at the state level as a state-run corporation for Guayana.²⁰⁶ The government chartered CVG to grow the economy of the region.²⁰⁷ In this case, the Ministry of Mines entered into an administrative agreement with CVG

199. *Crystallex Int'l Corp.*, ICSID Award, ¶ 6.

200. *Id.*

201. *Id.* ¶¶ 6, 54.

202. *Id.* ¶¶ 10, 196.

203. *Id.* ¶¶ 10-11.

204. *Id.* ¶¶ 7-18.

205. *Id.*

206. *Id.* ¶ 7.

207. *Id.*

concerning the Las Cristinas deposits in April of 2002.²⁰⁸ This agreement left CVG in charge of partnering with a company to exploit the land.²⁰⁹

In turn, CVG executed a Mine Operation Contract (“MOC”) with Crystallex that September.²¹⁰ The MOC highlighted the rights and obligations of both parties.²¹¹ In short, Crystallex was to develop the mine at its own expense, invest in the local community, and provide \$15 million in consideration.²¹² In exchange, Crystallex would receive “the proceeds deriving from the sale of its gold production.”²¹³ This process would require Crystallex to satisfy many regulatory requirements.²¹⁴ The MOC obligated CVG to help see Crystallex through the process by obtaining the requisite permits and by acting as the intermediary between the Canadian miners and Venezuela’s mining and environmental agencies.²¹⁵ The parties satisfied their obligations without issue from 2002–2007, allowing Crystallex to request *Autorización Para Afectar Recursos Naturales* (the “Permit”).²¹⁶

Crystallex could not begin operations until the Ministry of Environment issued a permit authorizing mining.²¹⁷ However, this permitting application came last. The Permit would have followed the Ministry’s approval of the Environmental Impact Statement.²¹⁸ Yet, the Ministry did not issue the Permit in 2007, and from June 2007, the parties waited on the Ministry’s decision.²¹⁹ Shortly thereafter, the global recession started.²²⁰ In April 2008, the Ministry denied Crystallex’s Permit application.²²¹ After that, the Ministry denied Crystallex’s motion for reconsideration on the Permit.²²² What should have been a routine approval had turned into the Ministry’s denial for environmental reasons and a concern for the indigenous people.²²³

208. *Id.* ¶¶ 15-16.

209. *Id.* ¶¶ 16-17.

210. *Id.* ¶ 18.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* ¶ 21 (listing the requirements: securing Land Occupation Permits, drafting a Feasibility Study, preparing an Environmental Impact Study, posting a construction compliance guarantee bond, and paying environmental taxes).

215. *Id.* ¶ 19.

216. *Id.* ¶¶ 21, 42.

217. *Id.* ¶ 21.

218. *Id.*

219. *Id.* ¶¶ 42-44.

220. *See generally* JOHAN A. LYBECK, A GLOBAL HISTORY OF THE FINANCIAL CRASH OF 2007–10 (2011) (chronicling each important day in the global financial crisis of 2007 to 2010).

221. *Id.* ¶ 44.

222. *Id.* ¶ 46.

223. *Id.* ¶ 44.

President Chávez and other leaders made public statements about Las Cristinas while Crystallex fought to secure the Permit.²²⁴ Some of the exhibits presented by Crystallex to ICSID highlight the public statements made about Las Cristinas in 2008.²²⁵ For example, in September 2008, *El Universal* quoted President Chávez telling the public, “In Guayana, we are taking back big mines, and one of them is one of the biggest in the world . . . it’s gold!”²²⁶ In November, the Minister of Mines said that the “State would take back, operate, and manage the Las Cristinas mine,” formerly owned by Crystallex within a year (2009).²²⁷ At this time, Crystallex’s MOC agreement was in effect, and the Ministry of Environment continued corresponding with Crystallex about its efforts to obtain the Permit.²²⁸ In 2010, Chávez announced that Las Cristinas had been handed over to transnational companies but that “the revolutionary government recuperated it” because “these mineral resources [were] for the Venezuelan people, [and] not for transnationals.”²²⁹

CVG rescinded its MOC with Crystallex in February 2011.²³⁰ The CVG rescinded through a clause that granted permission to rescind the contract when all activity ceased for a year.²³¹ Crystallex could not act without the Permit.²³² Crystallex *could* file a Request for Arbitration against Venezuela with the ICSID per Article XII of the BIT.²³³ And so, Crystallex filed its request that same week.²³⁴

B. The Tribunal Ruled on the Merits and Awarded Crystallex 1,202,000,000 USD

February 2011 marked the start of a five-year dispute between Crystallex and Venezuela at ICSID.²³⁵ The proceeding began with Venezuela’s jurisdictional challenges to ICSID having jurisdiction over the dispute. Recall that Part II of this article covered the Canada-Venezuela BIT in which the parties opted for ICSID as the forum of choice.²³⁶ This option allowed the Tribunal to resolve all jurisdictional

224. *Id.* ¶¶ 47-58.

225. *Id.* ¶¶ 50-56.

226. *Id.* ¶¶ 50.

227. *Id.* ¶¶ 51.

228. *Id.* ¶¶ 46, 53.

229. *Id.* ¶ 58.

230. *Id.* ¶ 59.

231. *Id.*

232. *Id.* ¶ 21.

233. Can.-Venez. BIT, *supra* note 46, art. XII.

234. Crystallex Int’l Corp, ICSID Award, ¶ 61.

235. *Id.*

236. Can.-Venez. BIT, *supra* note 46, art. XII.

issues quickly.²³⁷ Crystallex made three claims based on Venezuela's failure to comply with its guarantees under the Canada-Venezuela BIT.²³⁸ The Tribunal found for Crystallex on two counts in its April 2016 Award (the "Award").²³⁹ The Award stated that Venezuela owed Crystallex 1,202,000,000 USD plus interest.²⁴⁰

Crystallex succeeded on the merits for two out of its three claims against Venezuela.²⁴¹ The claims came from law established in the Canada-Venezuela BIT discussed earlier on.²⁴² First, Crystallex claimed that Venezuela denied it "Fair and Equitable Treatment" ("FET") under Article II(2).²⁴³ Second, Crystallex claimed that Venezuela denied the investment "Full Protection and Security" under Article II(2).²⁴⁴ Finally, Crystallex claimed that Venezuela expropriated its investment under Article VII(1).²⁴⁵ The Tribunal found that Venezuela had violated its promise to treat Crystallex "fairly and equitably" and found that Venezuela had expropriated its investment.²⁴⁶

The Tribunal's analysis of the FET claim hinged on the Ministry of Environment's denial of the Permit.²⁴⁷ The Tribunal began by explaining that the FET clause protected Crystallex's legitimate expectations against arbitrariness, a lack of transparency, and inconsistent government actions.²⁴⁸ Crystallex had a legitimate expectation that the Permit would be reviewed fairly after the company met the requirements and posted its bond.²⁴⁹ And Venezuela "engaged in arbitrary conduct in denying the Permit and rescinding the MOC."²⁵⁰ The vague reasons for denial indicated a lack of transparency.²⁵¹ Thus, Venezuela's actions in denying the Permit violated the FET clause of the BIT treaty.²⁵²

Next, the Tribunal decided that Venezuela had expropriated Crystallex's investment without just compensation.²⁵³ Article VII(1) of

237. Crystallex Int'l Corp, ICSID Award, ¶ 426.

238. *Id.* ¶¶ 7, 485.

239. *Id.* ¶ 961.

240. *Id.*

241. *Id.*

242. *Id.* ¶ 1; *see generally* Can.-Venez. BIT, *supra* note 46, art. XII.

243. Can.-Venez. BIT, *supra* note 46, art. II; Crystallex Int'l Corp, ICSID Award, ¶ 485.

244. Can.-Venez. BIT, *supra* note 46, art. II; Crystallex Int'l Corp, ICSID Award, ¶ 485.

245. Crystallex Int'l Corp, ICSID Award, ¶ 485.

246. *Id.* ¶ 961.

247. *Id.* ¶ 623.

248. *Id.* ¶ 543.

249. *Id.* ¶ 557.

250. *Id.* ¶ 623.

251. *Id.* ¶¶ 590-91.

252. *Id.* ¶ 623.

253. *Id.* ¶¶ 674-688, 714, 718.

the treaty provides “that any expropriation must be carried out (i) for public purposes, (ii) under due process of law, (iii) in a non-discriminatory manner and (iv) against prompt, adequate and effective compensation.”²⁵⁴ The denial of the Permit and rescission of the MOC constituted an expropriation of Crystallex’s investment.²⁵⁵ The Tribunal respected (i) the public purpose of the expropriation to “reclaim” the mine for the people and (ii) found no due process concerns.²⁵⁶ The Tribunal’s expropriation analysis leant the earlier FET analysis (iii) to find discrimination.²⁵⁷ However, the dispositive issue came from the failure of Venezuela to provide Crystallex any compensation.²⁵⁸ The Tribunal found (iv) that no “adequate and effective compensation” had been provided to Crystallex.²⁵⁹ And so, the Tribunal set about calculating “the genuine value of the investment” at the time of expropriation.²⁶⁰

The Tribunal awarded Crystallex 1,202,000,000 USD in damages in April of 2016.²⁶¹ The Tribunal determined Crystallex’s reparations by calculating the fair market value of the investment at the time of expropriation.²⁶² The Tribunal used the average of the Stock Market Approach and the Market Multiples Approach to come up with 1,202,000,000 USD.²⁶³ That figure represents the fair market value of the investment at the time when Venezuela denied the Permit, making the valuation date April 13, 2008.²⁶⁴ Up to the award stage, the BIT and Tribunal functioned to provide Crystallex the protection it expected from the system.

C. The Dispute Highlights the Advantage of Pursuing Five Years of ICSID Arbitration but also the Substantial Costs Connected to ICSID Arbitration

To sum up this section, Crystallex worked from 2002 to 2007 to prepare mining Las Cristinas.²⁶⁵ Crystallex surveyed the gold reserves, complied with regulatory filings, and invested in the local community at

254. *Id.* ¶ 711; Can.-Venez. BIT, *supra* note 46, art. VII.

255. Crystallex Int’l Corp, ICSID Award, ¶¶ 674-688, 714.

256. *Id.* ¶¶ 712, 715 n. 995.

257. *Id.* ¶ 715.

258. *Id.* ¶¶ 716-17.

259. *Id.* ¶¶ 716-17.

260. *Id.* ¶ 660.

261. *Id.* ¶ 961.

262. *Id.* ¶ 853.

263. *Id.* ¶ 917.

264. *Id.* ¶ 855.

265. *Id.* ¶¶ 21-43, 195.

a cost of over 500,000,000 USD.²⁶⁶ Venezuela denied Crystallex a Permit in 2008.²⁶⁷ With a hostile political climate in Venezuela, Crystallex brought its expropriation claim at ICSID by way of the Canadian-Venezuelan BIT.²⁶⁸ The ICSID Tribunal granted Crystallex 1,202,000,000 USD in damages for Venezuela's expropriation of its investment in 2016.²⁶⁹ Crystallex left five years of arbitration armed with a billion dollar award but incurred over 30,000,000 USD in legal fees and 1,000,000 USD in arbitration fees.²⁷⁰ Possessing the Award, Crystallex found a litigation financier willing to fund the collection stage of the process, in exchange for 35% of any return.²⁷¹ Concurrently, Venezuela paid over 14,000,000 USD in legal fees and 974,000 USD in arbitration fees.²⁷² In hindsight, Venezuela's greater-than-14,000,000 USD payment was money well spent as Venezuela bought itself another four years to avoid paying out for expropriating Las Cristinas. After all, an ICSID award is just a piece of paper, . . . and Crystallex still had to collect.

IV. CRYSTALLEX REGISTERED ITS AWARD IN THE U.S. COURT WITHOUT ISSUE; EXECUTING ON VENEZUELA'S ASSETS IS THE PROBLEM

Crystallex chose to register its Award in the United States.²⁷³ Section Six of the ICSID Convention provides for the recognition and enforcement of an award.²⁷⁴ Within Section Six, Article 53 provides that the "award shall be binding on all parties and shall not be subject to appeal."²⁷⁵ Article 54 provides that a contracting state must also recognize that an award is binding on the parties.²⁷⁶ It also provides that a state must enforce any monetary damages imposed by that award as if the damages came from a final judgment from a domestic court.²⁷⁷ Here, Article 53 binds Venezuela and Crystallex to the results of the Award.²⁷⁸ And Venezuela cannot appeal the substance of the decision in its own court or in the court of another contracting state.²⁷⁹ Crystallex had the ability to

266. *Id.* ¶¶ 21-45, 195.

267. *Id.* ¶ 44.

268. *Id.* ¶ 1.

269. *Id.* ¶ 961.

270. *Id.* ¶ 949.

271. *Litigation Funding Paves Way for Crystallex's \$1.4B Award Against Venezuela*, *supra* note 11, at 1.

272. Crystallex Int'l Corp, ICSID Award, ¶ 950.

273. *Crystallex Int'l Corp*, 244 F. Supp. 3d at 105.

274. ICSID Convention, *supra* note 39, arts. 53-55.

275. *See id.* art. 53.

276. *See id.* art. 54.

277. *See id.*

278. *See id.* art. 53.

279. *See id.*

register the Award in any contracting state.²⁸⁰ Crystallex chose to register its award in the United States, a contracting party to ICSID.²⁸¹ Crystallex likely chose to register in the United States because of the amount of business the Venezuelan state oil companies' subsidiaries do in the United States.²⁸² Judge Rudolph Contreras of the United States District Court for the District of Columbia recognized the Award in March of 2017.²⁸³ The Court's recognition of the Award satisfied the United States' obligations as a contracting party to ICSID under Article 54.²⁸⁴ The recognition also allowed Crystallex access to other UNITED STATES jurisdictions in its quest to seek enforcement.²⁸⁵ For Crystallex, registration placed it closer to collecting from Venezuela. For Venezuela, Venezuelan counsel could not do much to stop the recognition mechanism because it is well defined by the ICSID Convention.²⁸⁶ And so, while Venezuela could not appeal the Award or its recognition in the United States, Venezuela could bring other actions to frustrate Crystallex's efforts to collect.

The United States' recognition of the Award does not guarantee a payout. There exists a distinction between the "recognition or enforcement" of an award and the "execution" of an award.²⁸⁷ Article 54(c) says that, "execution of the award shall be governed by the laws concerning the execution of judgments in force in the state in whose territories such execution is sought."²⁸⁸ "ICSID itself has no formal role in the recognition and enforcement of an award under the ICSID Convention."²⁸⁹ Article 55 clarifies that ICSID does not override domestic law related to the execution of money damages against a sovereign's assets.²⁹⁰ And so, for Crystallex to execute its Award on specific Venezuelan assets held in the United States, Crystallex's attorneys must navigate United States' sovereign immunity law.

Under United States Federal Law, "the property in the United States of a foreign state shall be immune from attachment arrest and

280. *See id.* art. 54.

281. Database of ICSID Member States, *supra* note 122.

282. *See infra* Part VI.

283. *Crystallex Int'l Corp.*, 244 F. Supp. 3d at 122.

284. ICSID Convention, *supra* note 39, art. 54.

285. *See Miner Crystallex inches forward in legal dispute with Venezuela*, REUTERS (June 12, 2017), <https://www.reuters.com/article/venezuela-crystallex-idUSL1N1J90UP>.

286. ICSID Convention, *supra* note 39, art. 54.

287. *Id.* arts. 54-55; MOSES, *supra* note 33, at 237.

288. *See* ICSID Convention, *supra* note 39, art. 54(3).

289. *Recognition and Enforcement*, ICSID, <https://icsid.worldbank.org/en/Pages/process/Recognition-and-Enforcement-Convention-Arbitration.aspx> (last visited Sept. 8, 2018).

290. ICSID Convention, *supra* note 39, art. 55; *Recognition and Enforcement*, *supra* note 289.

execution.”²⁹¹ Sovereign immunity applies to both foreign states and the agencies or instrumentalities of the foreign state.²⁹² An agency or instrumentality of a foreign state includes any entity that is “a separate legal person,” and that is “an organ of a foreign state” or “a majority of whose shares or other ownership interest is owned by a foreign state,” and that is neither a citizen of the UNITED STATES nor is created under the laws of a third country.²⁹³ Here, the foreign state subject to sovereign immunity would be Venezuela. Additionally, Venezuela’s state-owned oil company, PDVSA, is considered to be a state instrumentality and is afforded sovereign immunity. So we know that generally Venezuelan assets are shielded by sovereign immunity in the United States. Section 1610, however, provides specific exceptions that may apply in Crystallex and Venezuela’s situation.

Congress provided exceptions to a sovereign’s immunity from attachment or execution in 28 U.S.C. § 1610.²⁹⁴ The exception that applies here is found in § 1610(a)(6) and is as follows:

(a) The property in the United States of a foreign state used for a commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States . . . if, (6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision of the arbitral agreement.²⁹⁵

This exception contains several notable elements. The property must be used for a “commercial activity in the United States.”²⁹⁶ “A ‘commercial activity’ means either a regular course of commercial conduct or a particular commercial transaction or act.”²⁹⁷ If a sovereign has property in the United States and uses that property in the United States for a commercial activity, then the exception to sovereign immunity applies and the property is executable.²⁹⁸ In a similar spirit, the property of a state instrumentality that engages in commercial activity may also lose sovereign immunity and that renders it executable.²⁹⁹ This commercial-activity-related property can be distinguished from a

291. 28 U.S.C.S. § 1609 (LEXIS through P.L. No. 115-230).

292. 28 U.S.C.S. § 1603(a) (LEXIS through P.L. No. 115-230).

293. 28 U.S.C.S. § 1603(b).

294. 28 U.S.C.S. § 1610 (LEXIS through P.L. No. 115-230).

295. 28 U.S.C.S. § 1610(a)(6).

296. 28 U.S.C.S. § 1610(a).

297. 28 U.S.C.S. § 1603(d).

298. 28 U.S.C.S. § 1610(a).

299. 28 U.S.C.S. § 1610(b).

sovereign's property used for a public activity, i.e., when the assets would be used to conduct the government's over-sea operations.³⁰⁰ Next, § 1610(a)(6) says that a judgment from an arbitral award can be executed on a sovereign's assets used for a commercial activity.³⁰¹ In the Crystallex matter, any property that Venezuela has in the United States that is used for a commercial activity in the United States is executable. However, that is not true of the property of Venezuela's state instrumentality, PDVSA, because that entity does not operate in the United States. Instead, the PDVSA operates in the United States through its corporate subsidiaries incorporated in Delaware.³⁰²

Delaware corporate law requires PDVSA's Delaware subsidiaries to be treated as independent from PDVSA and Venezuela.³⁰³ PDVSA is the parent company of PDV Holding Inc., a Delaware Corporation.³⁰⁴ PDV Holding Inc. is the parent company of CITGO Holding, Inc.³⁰⁵ CITGO Holding, Inc. currently owns 100% of the capital stock of Citgo Petroleum Corporation and 100% of the LLC interests of several other petroleum companies operating in the United States.³⁰⁶ The Oklahoma-based Citgo Petroleum Corporation generated "\$42.3 billion and earnings before interest, taxes, depreciation, and amortization (EBITDA) in 2013"³⁰⁷ The point being that Venezuela, through its state-owned oil company subsidiaries, has a wealth of assets in the United States. Crystallex cannot easily execute on the property of PDVSA's subsidiaries under the current law.³⁰⁸ The law forces Crystallex to either enforce on Venezuelan assets subject to § 1610(a)(6) or push the boundaries of the law by attempting to execute on assets related to the PDVSA's subsidiaries. Crystallex did both.

In sum, sovereign immunity presented a challenge for Crystallex in its effort to execute its Award on Venezuelan assets in the United States

300. 28 U.S.C.S. § 1603(d).

301. 28 U.S.C.S. § 1610(a)(6).

302. *ORGANIGRAMA: Petróleos de Venezuela, S.A.* [Organization Chart: *Petróleos de Venezuela, S.A.*], PDVSA, http://www.pdvsa.com/index.php?option=com_content&view=article&id=6537&Itemid=570&lang=es (last visited Feb. 4, 2018) (Venez.).

303. *Wallace v. Wood*, 752 A.2d 1175, 1175 (Del. Ch. 1999).

304. *Organization Chart: Petróleos de Venezuela, S.A.*, *supra* note 302.

305. *See id.*

306. *See Rating Action: Moody's downgrades ratings of CITGO Petroleum and CITGO Holding*, MOODY'S INV. SERV. (Nov. 7, 2017), https://www.moodys.com/research/Moodys-downgrades-ratings-of-CITGO-Petroleum-and-CITGO-Holding—PR_375010.

307. *See Citgo Holding Inc: Company Profile*, BLOOMBERG, <https://www.bloomberg.com/profiles/companies/5368Z:US-citgo-holding-inc> (last visited Feb. 04, 2018); *CITGO No Longer on the Market*, CSP DAILY NEWS (Jan. 21, 2015), <http://www.cspdailynews.com/industry-news-analysis/corporate-news/articles/citgo-no-longer-market>.

308. *Wallace*, 752 A.2d at 1183.

as the United States sovereign immunity law provided a potent strategy of avoidance for Venezuela. This dynamic presents a challenge for an ICSID claimant dealing with an incompatible state—a challenge that is explored in Part V.

V. THE ICSID SYSTEM FOR ENFORCEMENT STRUGGLES TO INCENTIVIZE INCOMPATIBLE STATES TO HONOR JUDGEMENTS

The ICSID system struggles to incentivize or force incompatible states to pay up on Awards rendered against them. This Part will focus on the payment of ICSID awards by sovereign states. First, we will look at the ideal situation. Second, we will look at how states have traditionally complied. Third, we will look at what happened when Argentina could not pay and refused to honor judgments against it. Finally, we will examine how Venezuela created a situation which the ICSID framers did not anticipate: the execution of awards against a defiant but “compliant” state.

A. *Ideally, a State Honors the ICSID Judgment Against It*

Ideally, a state honors an ICSID award recognized against it in any contracting state’s legal system. Margaret Moses pointed out several reasons for this assumption in *International Commercial Arbitration*.³⁰⁹ First, states voluntarily contracted to join ICSID in the hopes of benefiting from foreign investment.³¹⁰ Second, states that want to continue to receive the benefits of foreign direct investment should comply to maintain their reputation internationally.³¹¹ Moses observed that states that want to continue to receive the benefit of World Bank loans would not shirk the World Bank’s arbitration center’s awards.³¹² Moreover, “a state’s noncompliance with an ICSID award exposes that state to various sanctions set forth in the Convention.”³¹³

B. *Traditionally, States Did Honor ICSID Awards*

Traditionally, states have honored ICSID judgments rendered against them.³¹⁴ Speaking in the mid-1980s, the late Georges Delaume, a senior legal advisor to ICSID, stated that “in practice . . . the problems

309. MOSES, *supra* note 33.

310. *See id.* at 9.

311. *See id.* at 238.

312. *See id.*

313. ICSID Convention, *supra* note 39, art. 64; MOSES, *supra* note 33; Delaume, *supra* note 183.

314. *See* MOSES, *supra* note 33.

attendant to the doctrine of sovereign immunity . . . are only theoretical” because “no ICSID award to date has been the object of enforcement proceedings.”³¹⁵ Delaume, encouraged by states’ active participation in ICSID proceedings, believed that a state’s participation in arbitration would lead to its “increased willingness either to comply with the award or to reach a settlement with the investor.”³¹⁶ So states voluntarily opted for ICSID, rowed in ICSID, and honored ICSID judgments to preserve their international reputations and to access to foreign capital.³¹⁷ That generally proved to be the case until Argentina’s financial crisis of 2001.³¹⁸

C. *Lately, Argentina Could Not Pay and Avoided Honoring Awards*

The expectation that all states would willingly pay out on an ICSID award crashed alongside the Argentine economy in 2001. Insolvent Argentina disapproved of the ICSID system and indicated that it would put the interests of its people before those of foreign investors.³¹⁹ Argentina pioneered several “diversionist tactics” and “succeeded in avoiding payment of every award rendered in favor of investors.”³²⁰ Argentina’s leaders unapologetically put Argentina before the sanctity of the ICSID system.³²¹ To Argentina, considerations such as preserving its international reputation, paying out for the sake of fairness, or even its long-term access to foreign capital markets, fell to the wayside of its domestic goal of supporting its people by restoring its economy.³²²

Argentina had little choice but to challenge, evade, and eventually settle ICSID claims against it. The economy had crashed and many people lived in poverty.³²³ In 2007, Charity Goodman wrote about how economic crisis and states like Argentina posed a threat to ICSID.³²⁴ In 2018, Venezuela poses an even more serious threat. The Venezuelan government nationalized many industries and expropriated foreign investments while a wealthy country under Chávez.³²⁵ In 2012, it

315. See Delaume, *supra* note 183.

316. See *id.*

317. See MOSES, *supra* note 33.

318. Goodman, *supra* note 108, at 453.

319. *Id.* at 479.

320. See Ferrero, *supra* note 123; Goodman, *supra* note 108, at 480.

321. Ferrero, *supra* note 123; Goodman, *supra* note 108, at 480.

322. Ferrero, *supra* note 123; Goodman, *supra* note 108, at 480.

323. HARTEN, *supra* note 97, at 1-2.

324. Goodman, *supra* note 108, at 449.

325. *The World Bank In Venezuela: Overview*, WORLD BANK, <http://www.worldbank.org/en/country/venezuela/overview> (last visited Dec. 21, 2017).

denounced the ICSID Convention to stop future claims.³²⁶ Since that time, the government's policies have resulted in its economic collapse.³²⁷ As of Quarter 4 of 2017, Venezuela was practically insolvent; Venezuela was not insolvent at the time of the expropriation in 2007 nor at the time that Crystallex received its Award in 2016.³²⁸ Yet, while facing insolvency, Venezuela still actively disputes claims against it, using many of the legal tactics that Argentina implemented successfully to delay payment and force settlement.³²⁹ Venezuela's political and economic status combined with its vigorous avoidance of paying ICSID awards makes Venezuela incompatible with ICSID.

D. Now, Venezuela Created a Situation that the ICSID Framers Did Not Anticipate: The Execution of Awards Against a "Defiant" but "Compliant" State

Crystallex first settled with the Venezuelan government for an undisclosed amount on November 23, 2017.³³⁰ Under the agreement, Crystallex agreed to suspend its efforts to enforce the Award.³³¹ The settlement came after Crystallex made several attempts to execute on Venezuelan assets located in the United States.³³² This effort required multi-front litigation in several United States federal district courts, including in the District of Columbia, New York, and Delaware.³³³ Venezuela used procedural and substantive tactics to defend and delay payment on the 1,202,000,000 USD award.³³⁴ While Venezuela resisted the ICSID award enforcement proceedings, its government scraped together enough money to make payments on its sovereign debt and the debt owed by its oil company, PDVSA.³³⁵ In November 2017, Venezuela became insolvent on its sovereign debt.³³⁶ The wealthy Venezuela that expropriated Crystallex's investment ten years earlier no longer existed, which left Crystallex with little choice but to ditch the ICSID system and to settle.

326. ICSID, *List of Contracting States*, *supra* note 90.

327. HARTEN, *supra* note 97, at 1.

328. *How Long Can Venezuela Avoid Default*, *supra* note 123.

329. *See supra* Part II.

330. Wheatley, *supra* note 13.

331. *See Posses*, *supra* note 4.

332. *How Long Can Venezuela Avoid Default*, *supra* note 116; *see Posses*, *supra* note 4.

333. Crosby, *supra* note 15; Olivo, *supra* note 15.

334. Daniels, *supra* note 15; Posses, *supra* note 16.

335. *How Long Can Venezuela Avoid Default*, *supra* note 123.

336. *Id.*

After the author submitted this note in March 2017, Crystallex and Venezuela's dispute continued in court and to make headlines.³³⁷ As of March 2018, Crystallex continues its efforts to execute on Venezuelan assets.³³⁸ In August 2018, a Delaware District Court allowed Crystallex seize shares in PDV Holding, Inc.³³⁹ As mentioned in Part IV, PDV Holding, Inc. is a subsidiary of PDVSA and the parent company of Citgo, and Citgo is a profitable company with United States-based assets.³⁴⁰ Venezuela appealed this "landmark" decision to the Third Circuit.³⁴¹ The decision triggered a flurry of action as Venezuela's other creditors as well as its bondholders scramble to secure their interests in Venezuela's "largest U.S. asset."³⁴² Another interested party in the Third Circuit case is Venezuelan opposition leader Juan Guaidó.³⁴³ Guaidó objects to Crystallex's seizure of the state-owned oil company's subsidiary's assets on foreign policy grounds.³⁴⁴ So the defiant but compliant state continues on, and the end is not in sight.

VII. CONCLUSION

The result of *Crystallex v. Venezuela* is unclear. Yet, one thing is clear. The ICSID system in its current form does not provide wronged

337. See generally Caroline Simson, *Citgo Ruling Has Queued Up Brawl Over Venezuelan Assets*, LAW 360 (Aug. 23, 2018), <https://www.law360.com/articles/1076307/citgo-ruling-has-queued-up-brawl-over-venezuelan-assets> (landmark decision in Crystallex execution effort); Caroline Simson, *Crystallex, Venezuela Ink Deal Over \$ 1.2B Award*, LAW 360 (Nov. 26, 2018) <https://www.law360.com/articles/1104684/crystallex-venezuela-ink-deal-over-1-2b-award> (Venezuela and Crystallex settle, again); Caroline Simson, *Venezuela Breached Deal Over \$1.2B Award, Crystallex Says*, LAW 360 (Dec. 11, 2018), <https://www.law360.com/articles/1110117/venezuela-breached-deal-over-1-2b-award-crystallex-says> (Venezuela allegedly breaches terms of settlement); Kaitlyn Burton, *Venezuela, Crystallex Spar Over \$1.2B Award Appeal*, LAW 360 (Jan. 23, 2019), <https://www.law360.com/articles/1120102/venezuela-crystallex-spar-over-1-2b-award-appeal> (Third Circuit appeal); Philip Reeves, *U.S. Recognizes Opposition Leader as Venezuela's Head of State*, NPR (Jan. 24, 2019), <https://www.npr.org/2019/01/24/688110246/u-s-recognizes-opposition-leader-as-venezuelas-head-of-state> (U.S. supports Juan Guaidó after he declares himself Venezuela's president); Caroline Simson, *New Sanctions Throw Wrench At Venezuela's Creditors*, LAW 360 (Jan. 29, 2019), <https://www.law360.com/articles/1123571/new-sanctions-throw-wrench-at-venezuela-s-creditors> (U.S. sanctions PDVSA); Caroline Simson, *Guaidó Wants In On 3rd Circ. \$1.2B Crystallex Award Row*, LAW 360 (March. 4, 2019), <https://www.law360.com/articles/1134694/guaido-wants-in-on-3rd-circ-1-2b-crystallex-award-row> (Guaidó attempts to intervene in Crystallex suit).

338. Burton, *supra* note 337; *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, No. 18-2797 (3rd Cir. 2019).

339. Simson, *Citgo Ruling Has Queued Up Brawl Over Venezuelan Assets*, *supra* note 337.

340. See *supra* Part IV; Simson, *Citgo Ruling Has Queued Up Brawl Over Venezuelan Assets*, *supra* note 337.

341. Simson, *Citgo Ruling Has Queued Up Brawl Over Venezuelan Assets*, *supra* note 340.

342. *Id.*

343. Simson, *Guaidó Wants In On 3rd Circ. \$1.2B Crystallex Award Row*, *supra* note 337.

344. See *id.*

investors with all the tools they need to effectively execute ICSID awards against incompatible states. The current system allows each contracting party to keep its laws regarding the execution on a sovereign's assets. For Venezuela, ICSID's inadequate execution system coupled with United States sovereign immunity and corporate law proved effective tools to undermine Crystallex's efforts to collect its reward. For Crystallex, the ICSID system assisted the company from its initial investment up until the Award. For the execution process, however, the ICSID system left Crystallex alone to dig deep in search of novel legal grounds within the United States legal system . . . and, with the Third Circuit decision, it may have struck gold.