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

3. Id. ¶ 961.
insolvency, and then Venezuela reneged on the settlement. 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. The company was traded publicly on the OTCB Marketplace until 2011. Its founders formed the company to develop and operate gold mines in South America. The expropriated Las Cristinas site served as Crystallex’s biggest investment and potential reward. In 2011, when the Venezuelan government under Hugo Chávez nationalized the gold industry and took back Las Cristinas, it put Crystallex into bankruptcy. Crystallex responded by initiating arbitration against Venezuela at ICSID. 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.

Crystallex now has registered its Award in the United States. However, it has not yet succeeded in executing on Venezuelan assets as of March 2019. 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. Yet, as of July

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5. See *Corporate Profile*, supra note 1.
8. *Id.* See *Crystallex files for bankruptcy*, supra note 8.
11. See *Jonathan Wheatley, Crystallex reaches settlement in legal fight with Venezuelan government*, FT. TIMES (Nov. 24, 2017), https://www.ft.com/content/1526fb0d-ece1-30e8-93eb-889be393cd0d.
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2018, Crystallex was still awaiting Venezuela’s first substantial payment.\textsuperscript{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.\textsuperscript{16} Notably, Crystallex is now attempting to execute on the assets of the Venezuela state-owned oil company’s subsidiaries.\textsuperscript{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

\textsuperscript{15} Hals, supra note 13.


\textsuperscript{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. 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.” The answer was foreign investment. 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.” 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. 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. 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

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23. See id.
opportunities abroad to increase diversification and total return.  
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.  
The risks associated with foreign direct investment included being subject to a foreign government’s legal system when resolving investment disputes.  
By the 1960s, communism had spread across Europe and to parts of Asia, which made regime change another risk associated with foreign direct investment.  
Traditionally, investors feared the seizure or expropriation of their foreign investments, and socialist regime change likely compounded that fear.  
The increased risk to a potential investment meant that investors demanded more legal safeguards from a host state.  
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.  
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”).  
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.

27. See VANDEVELDE, supra note 22, at 42-43.
28. See CHOW & SCHOPENBAUM, 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 & SCHOPENBAUM, supra note 26, at 358-62.
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

34. Id.
36. See MOSES, supra note 33, at 231.
actors at the international level. Before, international law did not recognize individual investors before ICSID gave them a platform. 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. 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. The investors retained the risk of expropriation with compensation and faced the difficulty of bringing a sovereign to task, which are risks explored later. 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.

The host state gained access to foreign direct investment. Foreign investment brings capital, technology, and other know-how to developing countries. As an ICSID member state privy to this inflow of foreign investment, the host state gained a competitive advantage on its neighbors. 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 investors.

37. SORNARAJAH, supra note 35, at 165.
38. Id.
40. SUBEDI, supra note 26, at 30.
41. See infra Parts V-VI.
42. ICSID Convention, supra note 39, art. 36.
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.
The host state retained its ability to expropriate for a public purpose in exchange for compensation. By opting into the alternative forum for investors, the host state retained control over foreign investors’ disputes, and—without that control—it was able 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.” The improved “investment climate” in the state benefited both the host country and investor.

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.

iii. The Result is the Modern ICSID System

The ICSID Convention established an “independent, depoliticized and effective dispute-settlement institution.” The organization provides parties with the means of settling disputes through arbitration or fact-
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. A 2017 study by the law firm Allen & Overy found the average arbitration row (ICSID and other arbitration panels) lasts 4 years. And the average ICSID Tribunal costs exceed 920,000 USD, when including “arbitrators’ fees,” “expenses” and “institutional charges.” 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. This sum included money spent on attorney’s fees, experts, and witnesses. 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”).

54. See About ICSID, supra note 52.
56. Hodgson & Campbell, supra note 55.
57. Id.
58. Id.
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i. The Rise of Bilateral Investment Treaties Made ICSID Popular

BITs elevated ICSID to relevancy in the 1990s. BITs gave ICSID jurisdiction over hundreds of investor-state contractual relationships. 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. As of 2017, there were over 2,300 BITs in force. Of all the cases registered at ICSID, BITs provided ICSID jurisdiction in 59.8% of the disputes. One hundred sixty-two nations have signed on as contracting parties to the ICSID convention. 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. ICSID hosted an average of forty-two disputes per year in the 2010s. 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.” A BIT will likely be a single document. Finally, each BIT follows a similar framework and shares key provisions.

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.
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.
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. Article I(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.” 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.” The definition of investment is important for subject matter jurisdiction under ICSID. The organization is a center for investment disputes only. Similarly, the parties stipulated as to who counts as an investor. 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.” 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. The host country makes two guarantees about the investments of the other state, guaranteeing “fair and equitable treatment” and full “protection and security.” These causes of action are featured in the Crystallex dispute.

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

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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. The expropriation must be for a “public purpose.” The decision to expropriate that investment must be made in a “nondiscriminatory manner” and by “due process of law.” Crucially, the investors must be granted “adequate and effective compensation.” 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. The compensation and interest will be paid “without delay” after the expropriation. 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. First, the parties will attempt to settle the dispute amicably between themselves. If that cannot happen, then the dispute may be submitted by the investor to arbitration. Article XII(4) provides that the dispute may be submitted to arbitration at ICSID if both states are contracting parties to the ICSID convention. Venezuela and Canada are both contracting parties to ICSID.

Article XII (9) sets out the award. The award can be monetary damages and interest or restitution of property, or both. The contracting party can opt for damages instead of specific performance. 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.

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.
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. 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. For example, the government signed an Argentina-United States BIT. Argentina’s free trade policies resulted in an inflow of foreign capital into the Argentine economy. Yet, the globalization of Argentina’s domestic markets was cut short by a financial crisis.

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

97. Argentina- United States of America BIT, supra note 95.
98. A decline without parallel, supra note 96.
USD by the end of 2001. At the same time, Argentina had pegged its peso to the US Dollar. This practice, however, was unsustainable and Argentinians knew that the one to one ratio would not last forever. And so Argentinians rushed to their banks to exchange their pesos for dollars. The bank run led to protests. The protests led to political resignations. And, the political instability plunged Argentina further into economic and social crisis. Gross domestic product (GDP) per capita dropped by nearly 20%, leaving 55% of Argentinians in poverty. 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. Yet, wronged investors still sought enforcement through ICSID arbitration.

Argentina denounced claims and mounted defenses in ICSID. 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. Argentina, as the respondent, sought to complicate recovery throughout the arbitration process through a tactic of denying and delaying the process. This tactic made any investor’s dispute with Argentina expensive, long, and uncertain.

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

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102. HARTEN, supra note 99, at 1.
103. Wiel, supra note 101.
104. See id.
105. See id.
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.\textsuperscript{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.”\textsuperscript{116} In effect, it postponed payment on the awards.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{120} However, these crucial gains came at the cost of Argentina’s international reputation because Argentina failed to fulfill 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.”\textsuperscript{121} Yet, Argentina did not disaffirm the ICSID treaty.\textsuperscript{122} The fact that Argentina has been cut off from international capital markets has very likely stunted the country’s rising GDP.

\textbf{i.ii. 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

\begin{thebibliography}{9}
\bibitem{115} See id. at 479.
\bibitem{116} Id. at 480.
\bibitem{117} Id.
\bibitem{118} ICSID Convention, supra note 39, arts. 53-54; Goodman, supra note 32, at 469.
\bibitem{119} Goodman, supra note 32, at 481.
\bibitem{120} Kiguel, supra note 108, at 7.
\bibitem{121} Chronology: Argentina’s turbulent history of economic crises, supra note 106.
\end{thebibliography}
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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. 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.

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. 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. 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. 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. Carlos Andrés Peréz of the left-leaning Democratic Action Party held the Presidency. While a democracy, Venezuelans experienced a chaotic political and economic situation in the 1990s. President Peréz dealt with an economic downturn and fought off two coup attempts by Colonel Hugo Chávez during his presidency. Yet, President Peréz’s government eagerly participated at the international level and showed a willingness to embrace globalization.

125. See id.
126. Ferrero, supra note 123.
128. Id.
129. Id.
130. Id.
International Monetary Fund during its economic downturn in the early 1990s. The Venezuelan government joined the ICSID Convention in 1993. And, in 1996, the government would sign the Canada-Venezuela Bilateral Investment Treaty. 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. Investors willing to enter the Venezuelan economy could bypass the local legal system and arbitrate with Venezuela at ICSID. 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. President Chávez led the “Bolivarian Revolution,” a “socialist political program,” under the banner of the United Socialist Party of Venezuela (the “PVSU”). The PVSU altered Venezuela’s democratic system of government by changing the constitution and by passing an enabling law in 2000. With this power, President Chávez worked to end corruption and to increase spending on social programs. He financed the latter by tapping into the state-run oil company to fund his spending on healthcare, subsidized

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132. Lewis, supra note 131.
134. See Can.-Venez. BIT, supra note 46.
135. See generally SUBEDI, supra note 26, at 30.
136. See id.
137. See Nelson, supra note 138.
138. See id.
food, and education. 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. 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. 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. 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. 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. Under Chávez, Venezuela transformed from a willing participant in economic globalization to a government that nationalized many of its big industries. This Venezuela represented the sort of sovereign against which the ICSID system was designed to combat by protecting investments against expropriation and biased adjudication. 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. Since then, Maduro’s

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146. De Córdoba, supra note 144.
147. See Factbox: Venezuela’s nationalizations under Chávez, supra note 143.
149. See Venezuela Profile-Timeline, supra note 127.
party, the PVSU, has controlled all branches of government. President Maduro and the party continue to follow Chávez’s nationalistic and social policies. These policies have stifled the free market. Without capitalism, Venezuela continues to rely on its oil exports as its chief source of income; oil exports have consistently counted for almost all of Venezuela’s exports and nearly half of the government’s revenue. This reliance became an issue when oil prices dropped over 40% in 2014. 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. Taken together, the drastic drop in revenue from oil exports has left the Venezuelan economy in shambles; since 2014, the Venezuelan economy has been in recession.

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

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153. See McCarthy, supra note 150.


157. See id.

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

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161. See Ripinsky, supra note 133.


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-ab18-7eb9bf7d6163e.


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


169. Ripinsky, supra note 133.
Venezuela Undermines Crystallex

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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{173} The results have been good for both countries.\textsuperscript{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.\textsuperscript{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.\textsuperscript{176} That was eight years after the crisis, four years after the award, and two years after a review of that award.\textsuperscript{177} This example shows that Argentina’s efforts to resist payment from within the

\textsuperscript{170}. See id.
\textsuperscript{171}. See Venezuela asks its creditors to renegotiate its vast debt, supra note 168.
\textsuperscript{172}. See Posses, supra note 16.
\textsuperscript{173}. Crystallex Int’l Corp, ICSID Award, ¶¶ 426, 485.
\textsuperscript{175}. See Argentina settles five investment treaty awards, supra note 174.
\textsuperscript{176}. See Come and get me: Argentina is putting international arbitration to the test, supra note 177.
ICSID system worked successfully. Argentina did not settle with CMS Energy until 2013. 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. Argentina disapproved of the alternative dispute process during its financial hardships, but it remained a contracting party to ICSID. 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. This point is evidenced by Venezuela’s denouncement of ICSID. Traditionally, a contracting member’s regard for its international standing acts as a soft check ensuring a host state pays out on awards. Without regard for its international standing, the Venezuelan government is less likely to pay out. 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. 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. 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.

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Another difference between Venezuela and Argentina is that Venezuela is more resource-abundant than Argentina. 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. In addition to oil, the country has a wealth of minerals, such as gold deposits. 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. As a result, these developing countries host more foreign investors, and those investors rely on ICSID to protect their substantial, immobile investments. For investors in natural resources within Venezuela, Chávez’s expropriation of entire sectors left foreign investors dependent on ICSID for protection and compensation. Because of the nature of these investments, the amount in controversy was much larger than it was in Argentina. Venezuela expropriated investments worth billions rather than millions of dollars. Furthermore, the number of these high value claimants far exceeded the number of high value claimants against Argentina. 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

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-opec-country-has-largest-proven-oil-reserves-and-it-not-saudi-arabia.html.
189. Crystalex 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., Crystalex Int’l Corp, ICSID Award, ¶ 6 (finding Venezuela owed Crystalex 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, Crystalex 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. 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. 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. If Venezuela manages to use the ICISD system to thwart compensation of the expropriated investors in Venezuela, that will set a precedent for contracting parties to ICSID worldwide. So far, the ICISD 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. The “Las Cristinas” area sits within the Imataca National Forest Reserve. This land sits on some of the largest proven gold deposits in the world. 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. These miners’ unsavory ventures encouraged the government to reclaim the mineral rights to Las Cristinas from the previous owner in 2002.

The redistribution of the mining rights brings our parties into the mix. Venezuela’s Ministry of Energy and Mines (“Ministry of Mines”) administered the government’s natural resources at the national level. The Corporación Venezolana de Guayana (the “CVG”) operated at the state level as a state-run corporation for Guayana. The government chartered CVG to grow the economy of the region. 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. This agreement left CVG in charge of partnering with a company to exploit the land.

In turn, CVG executed a Mine Operation Contract (“MOC”) with Crystallex that September. The MOC highlighted the rights and obligations of both parties. In short, Crystallex was to develop the mine at its own expense, invest in the local community, and provide $15 million in consideration. In exchange, Crystallex would receive “the proceeds deriving from the sale of its gold production.” This process would require Crystallex to satisfy many regulatory requirements. 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. The parties satisfied their obligations without issue from 2002–2007, allowing Crystallex to request Autorización Para Afectar Recursos Naturales (the “Permit”).

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

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.
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. Some of the exhibits presented by Crystallex to ICSID highlight the public statements made about Las Cristinas in 2008. 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!” 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). 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. 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.”

CVG rescinded its MOC with Crystallex in February 2011. The CVG rescinded through a clause that granted permission to rescind the contract when all activity ceased for a year. Crysta could not act without the Permit. Crystallex could file a Request for Arbitration against Venezuela with the ICSID per Article XII of the BIT. And so, Crystallex filed its request that same week.

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. 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. 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. Crystallex made three claims based on Venezuela’s failure to comply with its guarantees under the Canada-Venezuela BIT. The Tribunal found for Crystallex on two counts in its April 2016 Award (the “Award”). The Award stated that Venezuela owed Crystallex 1,202,000,000 USD plus interest.

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

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

Next, the Tribunal decided that Venezuela had expropriated Crystallex’s investment without just compensation. 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. In 2008, Venezuela denied Crystallex a Permit in way of the Canadian-Venezuelan BIT. The ICSID Tribunal granted Crystallex 1,202,000,000 USD in damages for Venezuela’s expropriation of its investment in 2016. 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. Possessing the Award, Crystallex found a litigation financier willing to fund the collection stage of the process, in exchange for 35% of any return. Concurrently, Venezuela paid over 14,000,000 USD in legal fees and 974,000 USD in arbitration fees. 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. CRYSTALEX 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. Section Six of the ICSID Convention provides for the recognition and enforcement of an award. Within Section Six, Article 53 provides that the “award shall be binding on all parties and shall not be subject to appeal.” Article 54 provides that a contracting state must also recognize that an award is binding on the parties. 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. Here, Article 53 binds Venezuela and Crystallex to the results of the Award. And Venezuela cannot appeal the substance of the decision in its own court or in the court of another contracting state. 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.\textsuperscript{280} Crystallex chose to register its award in the United States, a contracting party to ICSID.\textsuperscript{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.\textsuperscript{282} Judge Rudolph Contreras of the United States District Court for the District of Columbia recognized the Award in March of 2017.\textsuperscript{283} The Court’s recognition of the Award satisfied the United States’ obligations as a contracting party to ICSID under Article 54.\textsuperscript{284} The recognition also allowed Crystallex access to other UNITED STATES jurisdictions in its quest to seek enforcement.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{288} “ICSID itself has no formal role in the recognition and enforcement of an award under the ICSID Convention.”\textsuperscript{289} Article 55 clarifies that ICSID does not override domestic law related to the execution of money damages against a sovereign’s assets.\textsuperscript{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

\begin{thebibliography}{99}
\bibitem{280} See \textit{id.} art. 54.
\bibitem{281} Database of ICSID Member States, \textit{supra} note 122.
\bibitem{282} See infra Part VI.
\bibitem{283} \textit{Crystallex Int’l Corp}, 244 F. Supp. 3d at 122.
\bibitem{284} ICSID Convention, \textit{supra} note 39, art. 54.
\bibitem{285} See Miner Crystallex inches forward in legal dispute with Venezuela, \textit{REUTERS} (June 12, 2017), https://www.reuters.com/article/venezuela-crystallex-idUSL1N1J90UP.
\bibitem{286} ICSID Convention, \textit{supra} note 39, art. 54.
\bibitem{287} \textit{Id.} arts. 54-55; MOSES, \textit{supra} note 33, at 237.
\bibitem{288} See ICSID Convention, \textit{supra} note 39, art. 54(3).
\bibitem{290} ICSID Convention, \textit{supra} note 39, art. 55; Recognition and Enforcement, \textit{supra} note 289.
\end{thebibliography}
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

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293. 28 U.S.C.S. § 1603(b).
297. 28 U.S.C.S. § 1603(d).
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. 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. 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.

Delaware corporate law requires PDVSA’s Delaware subsidiaries to be treated as independent from PDVSA and Venezuela. PDVSA is the parent company of PDV Holding Inc., a Delaware Corporation. PDV Holding Inc. is the parent company of CITGO Holding, Inc. 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. The Oklahoma-based Citgo Petroleum Corporation generated “$42.3 billion and earnings before interest, taxes, depreciation, and amortization (EBITDA) in 2013 . . . .” 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. 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).
305. See id.
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. First, states voluntarily contracted to join ICSID in the hopes of benefiting from foreign investment. Second, states that want to continue to receive the benefits of foreign direct investment should comply to maintain their reputation internationally. 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. Moreover, “a state’s noncompliance with an ICSID award exposes that state to various sanctions set forth in the Convention.”

B. Traditionally, States Did Honor ICSID Awards

Traditionally, states have honored ICSID judgments rendered against them. 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.” 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.” So states voluntarily opted for ICSID, rowed in ICSID, and honored ICSID judgments to preserve their international reputations and to access to foreign capital. That generally proved to be the case until Argentina’s financial crisis of 2001.

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. Argentina pioneered several “diversionist tactics” and “succeeded in avoiding payment of every award rendered in favor of investors.” Argentina’s leaders unapologetically put Argentina before the sanctity of the ICSID system. 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.

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. In 2007, Charity Goodman wrote about how economic crisis and states like Argentina posed a threat to ICSID. 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. In 2012, it

315. See Delaume, supra note 183.
316. See id.
317. See MOSES, supra note 33.
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.
denounced the ICSID Convention to stop future claims. Since that time, the government’s policies have resulted in its economic collapse. 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. 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. 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. Under the agreement, Crystallex agreed to suspend its efforts to enforce the Award. The settlement came after Crystallex made several attempts to execute on Venezuelan assets located in the United States. This effort required multi-front litigation in several United States federal district courts, including in the District of Columbia, New York, and Delaware. Venezuela used procedural and substantive tactics to defend and delay payment on the 1,202,000,000 USD award. 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. In November 2017, Venezuela became insolvent on its sovereign debt. 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.
331. 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 to 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

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.
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.