School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law
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Decision Name and Date: Crystallex International Corporation v. Bolivarian Republic of Venezuela, No. 1:16-CV-00661-RC (D.D.C. Mar. 25, 2017) – Enforcement Proceedings of Arbitration Award

Case Report by: Ilektra Athanasiou-Ioannou**, Editor: Diego Luis Alonso Massa***

Summary:

In the Decision rendered on March 25, 2017, the US District Court for the District of Columbia ("the Court") confirmed in favor of Crystallex International Corporation ("Crystallex", "Petitioner") the 2016 ICSID Additional Facility Arbitration Award in the amount of USD 1.386 billion against the Bolivarian Republic of Venezuela ("Venezuela", "Respondent"): specifically, the Court granted Crystallex's petition to confirm, and denied Venezuela's cross-motion to vacate, the Award; for these reasons, the Court denied Petitioner's motion for a pre-judgment bond as moot. In the Memorandum Opinion accompanying the Court's Order, the Court held that arbitrability issues were delegated to the Tribunal by clear and unmistakable evidence based on the language of the Canada-Venezuela Bilateral Investment Treaty ("Canada-Venezuela BIT", the BIT)[1] and the arbitration rules, and therefore deferentially reviewed the Tribunal's decisions. The Court held that the Tribunal did not exceed its powers under Article V(1)(c) of the New York Convention by ruling on certain claims or using certain calculation methods. Additionally, the Court refused to vacate the award based on Article V(2)(b) of the New York Convention, finding that its confirmation was not contrary to public policy. Finally, the Court rejected Venezuela's independent argument that the award is in manifest disregard of the law, casting doubt on whether that doctrine is even "still good law."

Main issues: Enforcement of ICSID AF Award – Article 45, ICSID Additional Facility Rules; doctrine of *competence-competence* – Foreign Sovereign Immunities Act; jurisdiction of U.S. courts for enforcement proceedings – Standard of review of arbitral awards by U.S. courts: deferential standard – New York Convention; grounds for refusal of enforcement – Article V(1)(c): decision on matters beyond the scope of the submission to arbitration – Article V(2)(b): award contrary to public policy – Federal Arbitration Act §§10,11 ; grounds for vacatur, modification or correction – Manifest disregard of the law as ground for non-enforcement

United States District Judge: Rudolph Contreras

[1] Namely, the 1996 "Agreement Between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments".

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Digest:

1. Relevant Facts and Procedural Dates

On March 25, 2017, the US District Court for the District of Columbia granted Canadian gold mining company Crystallex's request to confirm an ICSID Additional Facility Award[2] against the Bolivarian Republic of Venezuela in the amount of USD 1.386 billion[3] –comprising of USD 1.202 billion plus pre- and post- award interest[4], and constituting one of the largest awards ever faced by the State. The Award was rendered in 2016 by a tribunal comprising of Laurent Levy (Chair), John Y. Gotanda (Claimant's Appointee) and Laurence Boisson de Chazournes (Respondent's Appointee) under the Canada-Venezuela BIT pursuant to ICSID's Additional Facility Rules[5]. The Award had already been confirmed in Ontario in July 2016 by way of a default judgment,[6] but enforcement in the U.S. had been pending since April 2016.

The dispute arose out of Crystallex's investment in one of the world's largest undeveloped gold deposits, the Las Cristinas mine. Due to its decision to invest in the gold mine, Crystallex entered into the Mine Operating Contract ("MOC") in 2002 with the Corporación Venezolana de Guyana[7]. Following a series of actions by Venezuela on Crystallex's investment over time, the investor initiated arbitration proceedings in 2011 claiming that Venezuela had breached the Canada-Venezuela BIT by (i) denying Cyrstallex's investments "fair and equitable treatment" and (ii) expropriating Crystallex's investments[8]. In April 2016, the Tribunal, affirming its

[2] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (April 4, 2016)
[3] Memorandum Opinion, p. 31
[4] Memorandum Opinion, pp. 1 and 7, footnote 9
[5] Memorandum Opinion, p. 5
[6] *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, 2016 ONSC 4693 ¶¶ 1, 11, 43 (Can. Ont. Sup. Ct. J.); see Memorandum Opinion, p. 7, footnote 10
[7] Memorandum Opinion, p. 1
[8] Memorandum Opinion, p. 5

jurisdiction, unanimously held that Venezuela had breached the BIT[9] and awarded Crystallex USD 1.202 billion, a figure achieved by averaging the results of two different calculations[10], swelling to USD 1.386 billion with interest. In the same month, Crystallex petitioned the U.S. District Court for the District of Columbia to confirm the Award under the 1958 New York Convention ("the New York Convention"), as incorporated into the Federal Arbitration Act ("FAA"), while Venezuela moved to vacate the award[11].

Challenging the Award, Venezuela (i) disputed the Tribunals jurisdiction to hear the investor's allegedly contractual claim, as well as both methods used by the Tribunal for the calculation of damages (invoking Article V(1)(c) of the New York Convention); (ii) alleged that the Award violated the U.S. public policy by "interfering with its sovereign right to regulate the environmental impact of industrial activities" (invoking Article V(2)(c) of the New York Convention); and, finally, (iii) argued that the Tribunal manifestly disregarded the law.

2. The Court's Analysis

2.1. Court's Jurisdiction & Legal Standard of Review

2.1.1. The Court's Jurisdiction over the Petition

Beginning by addressing its competence, the Court held that it had jurisdiction over Crystallex's petition under Section 1605 of the Foreign Sovereign Immunities Act ("FSIA")[12]; specifically, under the exception in §1605(a)(6) the Court is granted jurisdiction over actions to confirm an award made pursuant to an arbitration agreement governed by an international treaty[13]. Consequently, the Court had jurisdiction over the petition, since Crystallex had proven a) Venezuela's agreement to arbitrate via the Canada-Venezuela BIT, b) that the Award requested to be confirmed is based on the aforementioned BIT, and c) that the Award is governed by the New York Convention[14].

2.1.2. The Appropriate Legal Standard of Review of the Arbitral Award

Subsequently, upon examining the appropriate standard of review, the Court noted that when reviewing both international as well as domestic arbitral awards, courts apply a deferential standard of review in accordance with the emphatic federal policy favouring arbitration[15]. Quoting *TermoRio S.A. E.S.P. v. Electranta S.P.*[16], the Court added that it may refuse to enforce the Award under the New York Convention only on the grounds explicitly set forth in Article V of the Convention[17].

[9] Memorandum Opinion, p. 5
[10] Memorandum Opinion, pp. 6-7
[11] Memorandum Opinion, p. 7
[12] Memorandum Opinion, p. 8
[13] Memorandum Opinion, p. 8
[14] Memorandum Opinion, p. 9
[15] Memorandum Opinion, pp. 9-10
[16] *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 935 (D.C. Cir. 2007)
[17] Memorandum Opinion, p. 11

2. The Court's Findings on the Alleged Grounds for Vacatur of the Award

The Court, mindful of the narrow scope of its review[18] upon vitiating one by one the Venezuela's arguments ruled the following:

2.1. No Excess of Powers by the Tribunal per Article V(1)(c) New York Convention

According to Venezuela, the Tribunal had exceeded its powers under Article V(1)(c) of the Convention: specifically, it had exceeded the scope of Venezuela's consent to arbitrate by a) considering claims that were actually contract violations rather than treaty violations and b) using valuation methods that departed from the BIT's instructions[19].

Before considering the State's objections, the Court determined the amount of deference to grant to the Tribunal's determination of its scope: accordingly, the Court held that when the parties explicitly agree that the tribunal should decide the scope of its own inquiry, the courts should review that determination deferentially[20]. Additionally, the determination that questions of arbitrability were submitted to the tribunal required clear and unmistakable evidence[21]. Thus, as to Venezuela's arguments that the Court should apply a *de novo* review rather than a deferential review, because questions of consent to arbitrate are an exception to the standard rule of deference[22], the Court ruled that by explicitly consenting to the ICSID Additional Facility Rules - which grant tribunals the power to rule on their own competence - via signing the Canada-Venezuela BIT[23], Venezuela had "clearly and unmistakably assigned the question of arbitrability to the Tribunal"[24]. In light of the above, the Court - quoting *First Options of Chicago, Inc. v. Kaplan*[25] - decided that it should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances[26], and held as follows:

2.1.1. The Tribunal's Identification of Treaty Claims

The Court held that the Tribunal had only referred to Venezuela's MOC with Crystallex to show how the State violated the treaty and not to assess the State's adherence to its terms under the contract[27]. Moreover, Venezuela had not shown any authority for the claim that the simultaneous existence of contract claims serves to remove arbitral jurisdiction from related treaty violations[28]. In any case, the Court found that under any standard, Venezuela's argument was bound to fail[29]: The Tribunal had already rejected the State's claims deciding that Crystallex had challenged not merely contractual breaches, but also sovereign activity by

[18] Memorandum Opinion, p. 11
[19] Memorandum Opinion, p. 12
[20] Memorandum Opinion, p. 12
[21] Memorandum Opinion, p. 13
[22] Memorandum Opinion, p. 12
[23] See BIT, art. XII(4)
[24] Memorandum Opinion, pp. 13-15
[25] *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995)
[26] Memorandum Opinion, p. 16
[27] Memorandum Opinion, p. 17
[28] Memorandum Opinion, p. 17, footnote 18
[29] Memorandum Opinion, p. 19, footnote 22

Venezuela and its instrumentalities[30]. Therefore, the Court declined to disturb any of the Tribunal's conclusions applying the deferential standard of review[31].

2.1.2. The Tribunal's Methodology for Calculating the Award

Turning to damages, and applying for the same reasons as above a deferential review[32], the Court held that both valuation methods applied by the Tribunal, namely the stock market method and the market multiples method, did not warrant setting aside the award[33]:

2.1.2.3. Stock Market Method

Venezuela objected to the Tribunal's consideration of the last date before Venezuela's first wrongful actions when applying the stock-market method in the damages analysis[34]. According to Venezuela, since the "last clean date" was not the date of the expropriation, the Tribunal acted in excess of its powers, because a) there were no such wrongful acts preceding the expropriation and b) the BIT prohibited considering any date prior to the date of expropriation[35]. The Court rejected both arguments as follows:

First, the Tribunal's ruling that losses should be assessed from the "last clean date" at which the stock price was not affected by the State's actions, even before the date of expropriation, in order to determine the high-end of the damages scale, was a conclusion on the merits which the Court would not review[36]. The question of the existence of wrongful acts prior to the expropriation had already been decided by the Tribunal, which identified fair and equitable treatment breaches, thus it constituted an unpermitted review of the merits[37]. Second, since Venezuela had violated other treaty protections as well, the Tribunal was justified to adapt the damages analysis to ensure full reparation, a standard based on both the text of the BIT, as well as international law[38]. Thus, any error which the Tribunal might have committed, although the Court found none, did not rise past the level of a serious error to justify setting aside the Award[39].

2.1.2.4. Market Multiples Method

Likewise, the Court approved the Tribunal's calculation that led to the low-end figure of the damages scale, rejecting arguments that the Tribunal used improper assumptions in the market multiples method because the Tribunal had relied on projections it elsewhere rejected[40]. The Court was satisfied that any alleged error by the Tribunal, even if serious, would not suffice to set aside the award. According to the Court, delving into the specific reasoning used by the Tribunal would defeat the purpose of arbitration in the first place[41].

[30] Memorandum Opinion, pp. 18-19
[31] Memorandum Opinion, p. 19
[32] Memorandum Opinion, p. 20
[33] Memorandum Opinion, pp. 20-21
[34] Memorandum Opinion, p. 21
[35] Memorandum Opinion, pp. 21, 23
[36] Memorandum Opinion, p. 23
[37] Memorandum Opinion, p. 23
[38] Memorandum Opinion, pp. 24-25
[39] Memorandum Opinion, p. 25
[40] Memorandum Opinion, pp. 26-27
[41] Memorandum Opinion, p. 27

2.2. No Harm to Public Policy per Article V(2)(b) New York Convention

Venezuela's efforts to set aside the award by relying on the alleged "public policy of the United States that States have the sovereign right to regulate the environmental impact of industrial activities" also failed[42].

First, the Court noted the Tribunal's serious doubts on whether environmental concerns truly motivated the State's actions against Crystallex[43]. Furthermore, the Court pointed out that there was no risk of a public policy violation in confirming the Award: holding Venezuela to the terms of its own treaty by ordering it to compensate the investor for the results of its inequitable treatment and expropriation would not violate the U.S.' basic notions of morality or justice – the threshold required to warrant setting aside an award on public policy grounds[44].

2.2.1. No Manifest Disregard of the Law by the Arbitrators

The Court rejected Venezuela's independent challenge under manifest disregard of the law, under which Venezuela reframed its above analyzed allegations – namely, that the Tribunal improperly upheld jurisdiction over contract claims and that it used defective valuation methods[45]. The Court explained that under U.S. law, a "manifest disregard of the law" occurs when the arbitrators are well aware of a legal principle clearly applicable to the case, but decided not to apply it anyway[46]. Although it was mentioned in the Court's opinion that it is debatable whether such ground may set aside an award[47], the Court found that it was unnecessary to resolve this debate, since Venezuela's claims would still not be successful: The Court decided that the Tribunal engaged with the law and answered Venezuela's objections, thus there was no manifest disregard of the law.

3. The Court's Decision

The Court ultimately dismissed Venezuela's challenge and confirmed the Award. In light of these final findings, Crystallex's request for Venezuela to post a pre-judgment bond was denied as moot[48].

[42] Memorandum Opinion, p. 27
[43] Memorandum Opinion, p. 28
[44] Memorandum Opinion, p. 28
[45] Memorandum Opinion, pp. 30-31
[46] Memorandum Opinion, p. 29
[47] Memorandum Opinion, p. 29, footnote 31
[48] Memorandum Opinion, p. 31