IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CRYSTALLEX INTERNATIONAL CORPORATION,
8 King Street East, Suite 1201
Toronto, Ontario M5C 1B5
Canada,

Petitioner,

v.

BOLIVARIAN REPUBLIC OF VENEZUELA,
Ministerio del Poder Popular para Relaciones Exteriores
Oficina de Relaciones Consulares
Avenida Urdaneta
Esquina de "Carmelitas" a "Puente Llaguno"
Edificio anexo a la Torre "MRE"
Caracas, 1010
República Bolivariana de Venezuela,

Respondent.

Civil Action No. 16-661

PETITION TO CONFIRM ARBITRAL AWARD

Petitioner Crystallex International Corporation ("Petitioner" or "Crystallex"), by and through the undersigned counsel, hereby petitions this Court for an Order: (i) confirming, recognizing, and enforcing the final award (the "Award")[1] rendered by an arbitral tribunal (the "Tribunal") on April 4, 2016 in an arbitration (the "Arbitration") between Petitioner and Respondent the Bolivarian Republic of Venezuela ("Respondent" or "Venezuela"), pursuant to the Arbitration (Additional Facility) Rules of the International Centre for Settlement of Investment Disputes (the "ICSID Additional Facility Arbitration Rules"), and the July 1, 1996

[1] A duly-certified copy of the Award is attached as Exhibit 1 to the Declaration of Michael Lacovara ("Lacovara Decl.") filed concurrently with and in support of this Petition.

Agreement between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments; (ii) entering judgment in Petitioner's favor against Respondent in the amount of the Award plus pre- and post-Award interest awarded therein, post-judgment interest pursuant to 28 U.S.C. § 1961, and the costs of this proceeding; and (iii) awarding Petitioner such other and further relief as this Court may find just and proper.

Parties, Jurisdiction, and Venue

1. The Arbitration was seated in Washington, D.C. and the Award was rendered in Washington, D.C. Petitioner brings this proceeding under Chapters 1 and 2 of the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* (the "FAA") and the United Nations Convention for the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (the "New York Convention") to confirm a final arbitration award issued in its favor and against Respondent in its entirety.

2. Petitioner Crystallex is a gold mining company incorporated in Canada, with its head office in Toronto, Ontario. Petitioner's registered address is 8 King Street East, Suite 1201, Toronto, Ontario M5C 1B5.

3. Respondent the Bolivarian Republic of Venezuela is a foreign state within the meaning of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d), and 1602-11.

4. This Court has subject matter jurisdiction over this proceeding pursuant to 28 U.S.C. § 1330(a) because a foreign state does not enjoy sovereign immunity from a proceeding brought to confirm: (i) an arbitral award where "the arbitration takes place or is intended to take place in the United States," 28 U.S.C. § 1605(a)(6)(A); or (ii) an arbitral award that "is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards," 28 U.S.C. § 1605(a)(6)(B). The place of the

arbitration and the Award was Washington, D.C. and, because the arbitration concerned property expropriated in Venezuela and an international treaty (*inter alia*), the Award is subject to the New York Convention, which is in force in the United States. *See* 9 U.S.C. § 201.

5. This Court also has subject matter jurisdiction over this proceeding pursuant to 9 U.S.C. § 9, because it is "the United States court in and for the district within which" the Award was made, as well as pursuant to 9 U.S.C. § 203, which provides that any "proceeding falling under the [New York] Convention shall be deemed to arise under the laws and treaties of the United States," and, consequently, under 28 U.S.C. § 1331.

6. This Court may exercise personal jurisdiction over the Respondent pursuant to 28 U.S.C. § 1330(b).

7. Venue is proper in this district pursuant to 9 U.S.C. §§ 9 and 204 and 28 U.S.C. § 1391(f)(4).

The Arbitration Agreement

A. Respondent's Consent to Arbitration

8. As set forth in the Award at paragraphs 445 through 457, Respondent consented to arbitrate its disputes with Canadian investors such as Petitioner through a bilateral investment treaty, the July 1, 1996 Agreement between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments (the "BIT"), which entered into force on January 28, 1998.[2]

9. Respondent's consent is found at Article XII of the BIT. Specifically, Article XII(5) provides:

[2] Lacovara Decl., Ex. 2.

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

10. Respondent is defined in the BIT as a "Contracting Party." *See* BIT at 1 (referring to "[t]he Government of Canada and the Government of Venezuela, hereinafter referred to as the 'Contracting Parties'"). As is further set out below and in the Award at paragraphs 445 through 457 and 471 through 484, Petitioner submitted its claim to arbitration in accordance with the provisions of Article XII of the BIT and the tribunal had jurisdiction over the dispute. Article XII(5) therefore represents Respondent's written consent to arbitration.

B. Petitioner's Consent to Arbitration

11. The Award notes that it is undisputed that Petitioner is a protected investor under the BIT with the right to commence arbitration against Respondent. Article I(g)(ii) of the BIT defines an "investor" to include "any enterprise incorporated or duly constituted in accordance with applicable laws of Canada, who makes the investment in the territory of Venezuela and who does not possess the citizenship of Venezuela." Article I(a)(i) of the BIT defines an "enterprise" to include "any entity constituted or organized under applicable law, . . . including any corporation . . . ." Petitioner is a corporation incorporated under the laws of Canada. Article I(f) of the BIT defines an "investment" to mean "any kind of asset owned or controlled by an investor of one Contracting Party either directly or indirectly . . . in the territory of the other Contracting Party in accordance with the latter's laws." This definition includes "movable and immovable property and any related property rights," *id.* art. I(f)(i), and "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," *id.* art. I(f)(vi). *See* Award ¶¶ 426-27.

12. As the Tribunal found, Petitioner's investment-based claims against Respondent were properly submitted to arbitration under the ICSID Additional Facility Arbitration Rules[3] in accordance with Article XII of the BIT. *See id.* ¶¶ 445-57, 471-84.

13. Under Article XII(3) of the BIT, an investor may submit a dispute to arbitration if it has: (i) consented in writing thereto; (ii) waived its right to initiate or continue any other proceedings in certain alternative forums in relation to the alleged breach of the BIT; and (iii) initiated the arbitration within three years of the date on which the investor acquired (or should have acquired) knowledge of the alleged breach and knowledge of incurred loss or damage.[4]

14. The Tribunal found that Petitioner satisfied each of these requirements. *Id.* ¶ 484. On November 24, 2008, Petitioner delivered to Venezuela a Notice of Dispute,[5] in which Crystallex expressed its unconditional consent pursuant to Article XII(3) of the BIT to submit the dispute to arbitration. On February 16, 2011, Petitioner confirmed that no other related proceedings were pending before the courts or tribunals of Venezuela and waived its right to initiate any such proceedings. *See Crystallex International Corporation v. The Bolivarian Republic of Venezuela*, Request for Arbitration, 16 February 2011 ("Request for Arbitration") ¶ 127.[6] Both of these documents were filed within the specified three-year time period, which began in April 2008. *See id.* ¶ 126; Award ¶ 455.

15. The Tribunal noted that it was undisputed that Petitioner properly commenced arbitration under the ICSID Additional Facility Arbitration Rules. Award ¶ 427. Article XII(4)(b) of the BIT provides that an investor may submit a dispute to arbitration under the ICSID Additional

[3] Lacovara Decl., Ex. 3.

[4] Article XII(3) also requires an investor to satisfy additional conditions if the matter involves taxation. *See* BIT art. XII(3)(c). As the Arbitration did not concern matters of taxation, this requirement did not apply to Petitioner.

[5] Lacovara Decl., Ex. 4.

[6] Lacovara Decl., Ex. 5.

Facility Arbitration Rules if "either the disputing Contracting Party [Venezuela] or the Contracting Party of the investor [Canada], but not both, is a party to the ICSID Convention." At the time the Arbitration was initiated, Venezuela was a party to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, also known as the "ICSID Convention," but Canada was not.[7]

Summary of the Underlying Dispute

16. Petitioner is a gold mining company incorporated in Canada.

17. Petitioner's claims in the Arbitration arose from Venezuela's breach of its BIT obligations towards the Petitioner's investment in the Las Cristinas project ("Las Cristinas"), one of the largest undeveloped gold deposits in the world. Award ¶¶ 6, 878. Las Cristinas is located in Venezuela's Bolivar State. *Id.* ¶ 6.

18. Petitioner acquired the rights to develop Las Cristinas in 2002 through a Mine Operating Contract ("MOC") entered into between itself and the Corporación Venezolana de Guayana ("CVG"), a Venezuelan government agency. The CVG is controlled by the Venezuelan Ministry of Mines. *See id.* ¶¶ 16-18.

19. As the Tribunal found, Crystallex invested hundreds of millions of dollars to make Las Cristinas "shovel-ready," and to comply with social and community obligations associated with the project. *See id.* ¶¶ 912-15; *see also id. ¶¶* 21-42.

20. However, before work on the construction of the mine could commence, Venezuela abruptly announced that it would not provide Crystallex with the final permit needed. *Id.* ¶¶ 43-

[7] *See* Lacovara Decl., Ex. 6, International Centre for Settlement of Investment Disputes, List of Contracting States and other Signatories of the Convention 1, 5. Venezuela denounced the ICSID Convention on January 24, 2012. *See id.* at 5. Under Article 72 of the ICSID Convention, Venezuela's denunciation did "not affect the rights or obligations . . . arising out of consent to the jurisdiction of [ICSID] given . . . before" that denunciation. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 72, *opened for signature* March 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159.

45. Three years later, following numerous announcements by the Venezuelan President of his plan to take control of the Las Cristinas mine, Venezuela terminated the MOC, complaining that Crystallex had ceased work on the project for more than one year – even though it was the refusal to issue a permit which caused Crystallex to be unable to proceed. *See id.* ¶¶ 50-59. As explained in the Award:

> [T]he conjunction and progression of acts performed by different [Venezuelan] governmental organs, starting from the actions surrounding the denial of the Permit, continuing with the announcements that Venezuela would "take back" Las Cristinas, and ending with the repudiation of the MOC, had the effect of substantially depriving Crystallex of the economic use and enjoyment of its investment, and ultimately rendered it entirely useless.

Id. ¶ 708.

The Arbitration

21. Petitioner commenced the Arbitration by submitting a Request for Arbitration to ICSID, which ICSID received on February 17, 2011. Award ¶ 64; *see* Request for Arbitration. The Request for Arbitration was registered by the Secretary-General of ICSID, pursuant to the ICSID Additional Facility Arbitration Rules, on March 9, 2011.[8] Award ¶ 65.

22. In the Request for Arbitration, Petitioner charged Respondent with multiple breaches of its obligations under the BIT and requested an award of restitution of Crystallex's investments, compensation plus interest, other relief as the Tribunal considered appropriate, and the legal fees and costs incurred by Petitioner in the arbitral proceedings. *See* Request for Arbitration ¶ 140.

23. A three-member arbitral Tribunal was constituted on October 5, 2011. Award ¶ 68. Dr. Laurent Lévy, a Brazilian and Swiss national, was appointed President of the Tribunal with the agreement of both parties. Professor John Y. Gotanda, Dean of Villanova University School of

[8] A more detailed summary of the procedural history of the Arbitration is available on the ICSID website. *See* ICSID, Case Details, *Crystallex International Corporation v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2), https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB(AF)/11/2&tab=PRD (last accessed April 7, 2016).

Law and a United States national, was appointed arbitrator by Petitioner, and Justice Florentino Feliciano, a Filipino national, was appointed arbitrator by Venezuela. *Id.* ¶ 67.

24. Respondent was represented by counsel throughout the Arbitration, namely the Attorney-General of Venezuela and attorneys based in Washington, D.C. from the law firm of Foley Hoag LLP. *Id.* ¶ 4.

25. The legal seat of the Arbitration was Washington, D.C. *Id.* ¶ 71.

26. The first session of the Tribunal was held in Washington, D.C. on December 1, 2011. *Id.* ¶ 70.

27. The Tribunal held a partial hearing on jurisdiction and the merits from November 11 through November 18, 2013. *Id.* ¶ 110.

28. On November 18, 2013, part-way through the hearing on jurisdiction and the merits, Venezuela filed a proposal seeking to disqualify its own appointed arbitrator, Justice Feliciano. *Id.* ¶ 113. The Arbitration was immediately suspended. On December 11, 2013, Justice Feliciano resigned from the Tribunal. *Id.* ¶ 115.

29. The Tribunal was reconstituted on December 19, 2013. *Id.* ¶ 117. Its members were Dr. Laurent Lévy as President, Professor John Gotanda, and Professor Laurence Boisson de Chazournes, a French and Swiss national appointed by Venezuela to fill the vacancy left by Justice Feliciano. *Id.* ¶¶ 116-17.

30. From February 16 through February 19, 2014, the Tribunal held the remainder of the hearing on jurisdiction and the merits. *Id.* ¶ 120. On November 22, 2014, the Tribunal held an additional hearing on *quantum* (*i.e.*, damages). *Id.* ¶ 148.

31. The proceedings were declared officially closed on December 24, 2015. *Id.* ¶ 157. By that time, as the Tribunal noted in the Award, Venezuela had waived or abandoned any of its objections to the procedural fairness of the arbitration. *Id.* ¶ 167.

32. The Tribunal issued the Award on April 4, 2016. The Tribunal's ruling was unanimous.

33. The Tribunal's unanimous Award was the culmination of an arbitration proceeding that lasted over five years. During that time, the parties submitted over 2000 pages of written pleadings, 23 witness statements, 20 reports by damages and other experts, and over 1900 exhibits and legal authorities. The parties also participated in eleven days of hearings, at which they made legal submissions and cross-examined witnesses before the Tribunal.

The Arbitral Award

34. The resulting Award is 264 pages long and consists of 961 separate, numbered paragraphs.

35. The dispositive section of the Award finds, in relevant part, that "Venezuela has breached Article II(2) of the Treaty by failing to accord the Claimant's investments in Venezuela fair and equitable treatment," and that "Venezuela has breached Article VII(1) of the Treaty by expropriating the Claimant's investments in Venezuela." Award ¶ 961.

36. The Tribunal concluded that Venezuela's conduct with respect to Petitioner's investment

> was not due to a *bona fide* dispute about the Parties' obligations under the MOC or its performance by Crystallex. It was devised to give effect to [Venezuela's] unconcealed political agenda in respect of mining generally, and the Las Cristinas mine in particular. The termination [of the MOC], for which the statements of Venezuela's President and Ministers provided the true rationale, was an attempt by Venezuela to "recover the mine", without payment of any compensation.

Id. ¶ 705.

37. The Award orders Venezuela to pay to the Petitioner compensation for its Treaty breach in the amount of $1.202 billion; plus pre-award interest "at the rate of the 6-month average U.S.

Dollar LIBOR + 1%, compounded annually," calculated from April 13, 2008 until April 4, 2016; and post-award interest "at the rate of the 6-month average U.S. Dollar LIBOR + 1%, compounded annually," calculated from April 4, 2016 until the date of full payment. *Id.* ¶ 961. The total amount owed by Venezuela under the Award amounts at present to approximately $1.4 billion.

38. Petitioner has requested that Venezuela pay the Award but Venezuela has failed to do so.

39. The Award was rendered in Washington, D.C., and arose out of a legal relationship that is commercial within the meaning of the New York Convention. The Award is non-domestic within the meaning of Article I(1) of the New York Convention and 9 U.S.C. § 202. *See supra* ¶ 4.

40. Pursuant to Article XII(10) of the BIT, the Award is "final and binding" on Venezuela. In addition, Article 52(4) of the ICSID Additional Facility Arbitration Rules provides that an award "shall be final and binding on the parties." The Award is therefore final and binding within the meaning of the New York Convention and Chapters 1 and 2 of the FAA.

THE AWARD MUST BE CONFIRMED

41. Petitioner repeats and re-alleges the allegations in paragraphs 1 through 40 as if set forth fully herein.

42. Section 9 of the FAA provides that if an award is not vacated, modified or corrected, "the United States court in and for the district" where the award was made "must grant" an order confirming that award. *See* 9 U.S.C. § 9. The Award has not been vacated, modified or corrected. None of the grounds for vacatur of the Award enumerated in 9 U.S.C. § 10 or for modification of the Award enumerated in 9 U.S.C. § 11 apply in this case.

43. Section 207 of the FAA provides that a court "shall confirm" an award covered by the New York Convention "unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in [the New York] Convention." 9 U.S.C. § 207. None of the New York Convention grounds for denying recognition and enforcement of an award apply in this case.[9]

44. Article IV of the New York Convention provides that a party applying for recognition and enforcement of an award "shall, at the time of the application, supply: (a) [t]he duly authenticated original award or a duly certified copy thereof; [and] (b) [t]he original agreement [to arbitrate] referred to in article II or a duly certified copy thereof." A copy of the Award, as authenticated and transmitted by the arbitral tribunal, is accordingly submitted herewith.

45. The parties' agreement to arbitrate is found in Article XIII of the BIT and in Petitioner's submission of its claim to arbitration by accepting the standing offer to arbitrate investors' claims found in the BIT.[10] *See supra ¶¶* 8-15.

46. For the foregoing reasons, Petitioner is entitled to an order confirming, recognizing, and enforcing the Award pursuant to 9 U.S.C. §§ 9 and 207, as well as pursuant to Article IV of the New York Convention.

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[9] *See Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, Civil Action No. 14-02014-JEB, 2015 WL 7428532, at *4 (D.D.C. Nov. 20, 2015) ("[T]he FAA affords the district court little discretion in refusing or deferring enforcement of foreign arbitral awards." (quoting *Belize Social Development Ltd. v. Government of Belize*, 668 F.3d 724, 727 (D.C. Cir. 2012))); *see also Argentine Republic v. National Grid PLC*, 637 F.3d 365, 369 (D.C. Cir. 2011) ("Confirmation proceedings under the Convention are summary in nature, and the court must grant the confirmation unless it finds that the arbitration suffers from one of the defects listed in the Convention."). A party resisting confirmation "bears the heavy burden" of establishing that one of the enumerated grounds for denying confirmation in Article V of the New York Convention applies. *Gold Reserve*, 2015 WL 7428532, at *4; *see also Republic of Argentina v. BG Group PLC*, 715 F. Supp. 2d 108, 116 (D.D.C. 2010) ("[T]he showing required to avoid summary confirmation of an arbitration award is high . . . ." (quoting *Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp.*, 103 F.3d 9, 12 (2d Cir. 1997))).

[10] *See Chevron Corp. v. Republic of Ecuador*, 949 F. Supp. 2d 57, 66-67 (D.D.C. 2013), *aff'd* 795 F.3d 200 (D.C. Cir. 2015) ("Because the BIT constitutes Ecuador's 'standing offer' to arbitrate, all Chevron must show is that it was a U.S. 'company or national' that submitted an 'investment dispute' in order for the Court to find it had a binding arbitration agreement with Ecuador."); *see also* BIT art. XII(6)(a)(ii) ("The consent given under paragraph (5), together with either the consent given under paragraph (3), or the consents given under paragraph (12), shall satisfy the requirements for . . . an 'agreement in writing' for purposes of Article II of the [New York Convention].").

WHEREFORE, Petitioner prays that the Court enter an Order pursuant to 9 U.S.C. §§ 9 and 207, as well as Article IV of the New York Convention:

(a) confirming, recognizing, and enforcing the Award against Venezuela;

(b) entering judgment against Venezuela in an amount equal to the full amount of the Award, $1.202 billion, plus (i) pre-Award interest through April 4, 2016, amounting to $184,663,586.22; (ii) post-Award interest as provided by the arbitral tribunal, accruing through the date of this Court's confirmation Order; (iii) post-judgment interest, pursuant to 28 U.S.C. § 1961, accruing thereafter through the date of payment; as well as (iv) the costs of this proceeding; and

(c) granting such other and further relief as may be just and proper.

A proposed order is attached.

Dated: April 7, 2016
New York, N.Y.

Respectfully submitted,

/s/ Michael Lacovara
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