No.

IN THE
SUPREME COURT OF THE UNITED STATES

SAINT-GOBAIN PERFORMANCE PLASTICS EUROPE,

Petitioner,

v.

BOLIVARIAN REPUBLIC OF VENEZUELA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

PETITION FOR A WRIT OF CERTIORARI

RAJAT RANA
ALSTON & BIRD LLP
90 PARK AVE
NEW YORK, NY 10016
(212) 210-9400

ALEXANDER A. YANOS
Counsel of Record
ALSTON & BIRD LLP
90 PARK AVE
NEW YORK, NY 10016
(212) 210-9400
alex.yanos@alston.com

Attorneys for Petitioner

QUESTION PRESENTED

Whether a District Court deciding a motion for default judgment may find service upon a foreign State pursuant to Article 15 of the Hague Service Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters and the Foreign Sovereign Immunities Act where the plaintiff actually delivered service papers to the State's Central Authority, its Foreign Ministry, and the Central Authority refused to deliver the papers to the Venezuelan Attorney General, a State organ to which the Venezuelan Central Authority should have delivered papers under Venezuela's internal law.

PARTIES TO THE PROCEEDING

Petitioner is Saint-Gobain Performance Plastics Europe, plaintiff and appellee below.

Respondent is the Bolivarian Republic of Venezuela, defendant and appellant below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 14.1(b)(ii), Saint-Gobain Performance Plastics Europe ("Saint-Gobain") discloses is a company organized under the laws of France, and the plaintiff in the proceedings before the District Court. Saint-Gobain is wholly owned by Société de Participations Financières et Industrielles, which is in turn wholly owned by Compagnie de Saint-Gobain. No other corporation owns 10% or more of Saint-Gobain's stock.

RELATED PROCEEDINGS

Pursuant to Supreme Court Rule 14.1(b)(iii), petitioners state that there are no proceedings directly related to this case in this Court.

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OTHER AUTHORITIES

Saint-Gobain Performance Plastics Europe ("Saint-Gobain") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia in this case.

OPINIONS BELOW

The January 25, 2022 opinion of the United States Court of Appeals for the District of Columbia Circuit reversing the district court's grant of Saint-Gobain's motion for summary judgment (App. 19a-30a) is reported at 23 F.4th 1036. The United States Court of Appeals for the District of Columbia Circuit's March 18, 2022 order denying Saint-Gobain's petition for rehearing *en banc* (App. 17a-18a) is not published in the Federal Reporter but is available at 2022 U.S. App. LEXIS 7269 / 2022 WL 828311. The United States Court of Appeals for the District of Columbia Circuit's March 18, 2022, order denying Saint-Gobain's petition for panel rehearing (App. 16a) is not published in the Federal Reporter but is available at 2022 U.S. App. LEXIS 7272. The February 1, 2021, opinion of the United States District Court for the District of Columbia granting Saint-Gobain's Motion for Summary Judgment (App. 19a-30a) is not published in the Federal Supplement but is available at 2021 U.S. Dist. LEXIS 18485 / 2021 WL 326079. The December 12, 2019, order of the United States District Court for the District of Delaware denying Saint-Gobain's motion for default and granting Venezuela's motion to transfer (App. 58a-87a) is not published in the Federal Supplement but is available at 2019 U.S. Dist. LEXIS 214167 / 2019 WL 6785504.[1]

[1] Saint-Gobain initially filed its complaint in the District of Delaware because that court had previously ruled that

JURISDICTION

The opinion of the court of appeals was issued on January 25, 2022. The court of appeals denied Petitioner's timely petition for panel rehearing or rehearing *en banc* on March 18, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1608(a) of Title 28 of the United States Code provides, in pertinent part:

> Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:
>
> (1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or
>
> (2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or
>
> (3) if service cannot be made under paragraphs (1) or (2), by sending a copy

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Venezuela's state oil company, Petróleos de Venezuela S.A. ("PDVSA"), which was subject to suit in Delaware, was Venezuela's alter ego. See *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela,* 333 F. Supp. 3d 380, 414 (D. Del. 2018), aff'd, 932 F.3d 126 (3d Cir. 2019). The proceedings were thereafter transferred to the District Court for the District of Columbia, where Saint-Gobain moved for summary judgment. See App. 84a.

> of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or
>
> (4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.
>
> As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

Saint-Gobain also includes as an appendix to this petition the complete text of the Hague Service

Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638 ("Hague Service Convention" or "Convention") (App. 1a-15a).

STATEMENT

I. Factual Background

This petition arises from Saint-Gobain's efforts to enforce an international arbitration award ("the Award") rendered against the Bolivarian Republic of Venezuela ("Venezuela") pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("the ICSID Convention"). Saint-Gobain initiated the arbitration against Venezuela under the terms of the France-Venezuela Bilateral Investment Treaty ("the Treaty") to recoup losses from Venezuela's 2011 expropriation of Saint-Gobain's interest in NorPro Venezuela C.A. ("NorPro"). App. 22a, 31a-32a.

After a four-day oral hearing, a tribunal of three arbitrators rendered a Decision on Liability and the Principles of Quantum finding that Venezuela breached the Treaty by expropriating Saint-Gobain's investment without paying compensation. App. 32a. Then, on November 3, 2017, the tribunal issued its Award and ordered Venezuela to pay Saint-Gobain compensation in the amount of $42 million. App. 32a.

Although Article 53(1) of ICSID Convention provides that the award "shall be binding," Venezuela has to date failed to honor its obligations to Saint-Gobain under the Award. To receive the amounted owed to it, Saint-Gobain initiated the award-enforcement proceedings subject to this appeal

in December 2018 before the U.S. District Court for the District of Delaware pursuant to 22 U.S.C. § 1650a ("Section 1650a"), the statute implementing the United States' obligations under the ICSID Convention. App. 22a, 33a. This appeal does not concern the integrity of the award or the merits of the district court's eventual confirmation of that award. This appeal solely concerns whether Saint-Gobain properly served Venezuela at the outset of the enforcement proceedings.

To serve Venezuela in the United States award-enforcement proceedings, Saint-Gobain looked to the Foreign Sovereign Immunities Act ("FSIA"). Section 1608(a) of the FSIA provides a cascading series of methods to serve foreign States or their political subdivisions. See 28 U.S.C. § 1608(a). If a special arrangement exists between a plaintiff and a foreign State or its subdivision, service shall be made pursuant to such an arrangement. 28 U.S.C. § 1608(a)(1). In the absence of such an agreement, the plaintiff should serve pursuant to an applicable international convention on service of judicial documents. 28 U.S.C. § 1608(a)(2). If no such international treaty applies or service is not possible, service should be made by delivery of the summons to the foreign sovereign's ministry of foreign affairs. 28 U.S.C. § 1608(a)(3). Finally, if service cannot be made by sending a copy of service papers to the ministry of foreign affairs, then service should be made by the Secretary of State via diplomatic channels, i.e., through the foreign State's ministry of foreign affairs. 28 U.S.C. § 1608(a)(4).

Saint-Gobain followed Section 1608 to the tee. No special agreement existed in this case, but there

was an applicable treaty: the Hague Service Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters and the Foreign Sovereign Immunities Act ("Hague Service Convention" or "Convention"). In accordance with Article 3 of the Convention, Saint-Gobain transmitted documents to Venezuela's designated Central Authority, Venezuela's Ministry of the Popular Power for External Relations (the "Foreign Ministry"). App. 33a, 51a, 84a; see also App. 2a (Convention, art. 2 (requiring each State party to the Convention to designate a Central Authority)); *ibid.* (Convention, art. 3 (allowing delivery of service papers to the Central Authority)); 28 U.S.C. § 1608(a)(2). Of note, this is the same entity that the FSIA would have allowed Saint-Gobain to serve if no applicable treaty existed, or where, as here, service was not possible because the State refused to comply with the Treaty. See 28 U.S.C. § 1608(a)(3).

There is no dispute that the Foreign Ministry received these documents. Employees of the Foreign Ministry, "T. Flores" and "I. Ruiz," signed confirming delivery on December 21 and December 27, 2018 respectively. App. 23a, 33a. However, Venezuela does not dispute that its Foreign Ministry did nothing with Saint-Gobain's papers, upon receipt. App. 25a. Under Article 5 of the Convention, upon receipt of Saint-Gobain's papers, Venezuela's Central Authority was required to deliver documents it received to their proper destination or explicitly refuse to serve them if: (1) Saint-Gobain's papers did not conform to the technical requirements of the Hague Service Convention; or (2) if the Central Authority deemed that service would otherwise offend Venezuela's sovereignty or security. See App. 2a-3a (Convention,

art. 5 ("the Central Authority . . . shall itself serve the document")); *ibid*. 2a (Convention, art. 3 (requiring service papers be attached to specific model request and furnished in duplicate)); *ibid*. (Convention, art. 4 (allowing the Central Authority to object to noncompliant requests)); *ibid.* 6a (Convention, art. 13 (allowing a State to reject service only if it "deems that compliance would infringe its sovereignty or security.")). Venezuela did neither.

Article 6 of the Convention required the Central Authority to issue Saint-Gobain "a certificate" stating either that the papers had been served or explaining the reasons why they were not. App. 3a-4a (Convention, art. 6). But Venezuela breached the Convention—it admits that it took no action upon receipt of the documents served by Saint-Gobain. No certificate was sent. Venezuela sat on the papers and refused to respond.

II. Procedural Background

In the wake of Venezuela's failure to observe its Treaty obligations, Saint-Gobain requested the Delaware District Court to enter default, which it did in June 2019. App. 30a-31a, 34a. Saint-Gobain then moved for the court to enter default filed a motion for default judgment, App. 23a, 34a, pursuant to Article 15 of the Hague Service Convention, which allows default judgment where: (*i*) service papers were "actual delivered to the defendant . . . by another method provided for by this Convention," and (ii) "the service or the delivery was effected in sufficient time to enable the defendant to defend." App. 7a-8a (Convention, art. 15). At the eleventh hour, Venezuela appeared before the District Court on August 7, 2019. App. 34a. Its appearance came ***eight***

months after Saint-Gobain delivered service papers to the Central Authority. App. 33a.

Venezuela then moved the court to vacate default and dismiss Saint-Gobain's complaint due to improper service. Venezuela argued that service was never perfected under the Convention since the Central Authority never returned an Article 6 certificate confirming service upon itself. App. 85a. On December 12, 2019, the Delaware District Court rejected Venezuela's argument, finding instead that the "Hague Service Convention . . . does not permit a foreign sovereign to feign non-service by its own failure to complete and return the required certificate." App. 84a-85a. Under Article 15's terms, the Delaware District Court then ruled that, "[b]y actually delivering to the defendant, i.e., the Republic, by serving the appropriate documents directly to the Central Authority designated by the Republic of Venezuela, Saint-Gobain served the Republic, notwithstanding the Republic's failure to provide Saint-Gobain a certificate." App. 85a (cleaned up). Despite finding the requirements of Article 15 fulfilled, the Delaware District Court vacated Venezuela's default and transferred Saint-Gobain's case to the United States District Court for the District of Columbia on venue grounds. App. 83a-84a.

Once before the District of Columbia, Saint-Gobain promptly moved for summary judgment to register and enforce the award. App. 30a, 33a. Venezuela, however, continued to argue that the court had no personal jurisdiction over it since its own Foreign Ministry had not issued a certificate confirming service on it. App. 31a, 34a-35a. Similar to the Delaware District Court, the D.C. District

Court rejected Venezuela's attempt to evade service. The court observed that "Article 15 provides that a default judgment may be given even in the absence of a completed certificate (presumably because service can inferred) when 'it is established that . . .[the writ of summons or an equivalent document] was actually delivered to the defendant or to his residence by another method provided for by this Convention . . . in sufficient time to enable the defendant to defend.'" App. 50a-51a. It then opined that the Delaware District Court had correctly found that service was made upon Venezuela under Article 15 of the Convention. App. 51a-57a. The court noted that having received Saint-Gobain's papers, the Venezuelan Central Authority "took no further action, despite being required to do so." App. 52a-53a. It then agreed with the Delaware District Court that the Hague Service Convention "does not permit a foreign sovereign to feign non-service by its own failure," particularly because "the Central Authority ***as part of the Republic itself, is also the party upon whom process is to be served***." App. 53a (emphasis added).

To reach its holding, the district court rejected two arguments Venezuela advanced for the first time in the proceedings:

First, Venezuela argued that Article 15 of the Convention could not have served as "an independent basis for service of process." App. 53a. The D.C. District Court was not persuaded. "[E]ffective service had been rendered in the context of evaluating a motion for default" before the Delaware District Court, "which the Republic [did] not dispute is a common action taken by courts and not contradicted

by the plain language of Article 15." App. 54a. The court also noted that, contrary to Venezuela's arguments otherwise, none of the Convention's legislative history "indicate[d] that the drafters intended to foreclose allowing service through Article 15[.]" App. 55a.

Second, Venezuela argued that Article 15 was never fulfilled since it requires the plaintiff to have served under another method prescribed by the Convention, and that service through the Central Authority under Article 5 in turn required the Central Authority to relay the papers to the proper defendant pursuant to the internal law of the receiving State. Applied to these facts, Venezuela argued that, under Venezuelan law, its own Foreign Ministry must have presented Saint-Gobain's service papers to the Venezuelan Attorney General. App. 53a, 55a-57a. Because its own Central Authority failed to serve the attorney general, Venezuela contended no service occurred. Again, the D.C. District Court agreed with the Delaware District Court. "[W]here the Central Authority was the party being served, no further action was required for service beyond actual delivery to the Central Authority" and concluded that "service was properly made on the Republic." App. 57a. The D.C. District Court then denied Venezuela's motion to dismiss and granted Saint-Gobain's motion for summary judgment, registering and enforcing the ICSID award. App. 56a-57a.

Venezuela thereafter appealed the D.C. District Court's decision. And the United States appeared as *amicus curiae* and espoused Venezuela's arguments that the district court had dismissed. See App. 19a. On January 25, 2022, a panel consisting of

three D.C. Circuit Court judges reversed both district courts' decisions. App. 20a, 28a-29a. It held that Article 15 of the Convention "is not a basis for obtaining personal jurisdiction" because Venezuela "appeared before both the Delaware district court and the District of Columbia district court to challenge the personal jurisdiction of the courts." App. 26a-27a. The panel sided with Venezuela and held that Saint-Gobain had not "completed service in compliance with Venezuelan law, which requires service on the Attorney General, nor identified another method of service under the Convention with which it complied." App. 27a. The court so held even though it is undisputed that Venezuela affirmatively was in control of whether the Attorney General would receive the documents in question and affirmatively decided not to deliver the documents to the Attorney General for no stated reason.

On February 24, 2022, Saint-Gobain filed a petition for panel rehearing or rehearing *en banc*, in which it argued that a panel rehearing was necessary to address the errors made by the panel. Alternatively, Saint-Gobain argued that rehearing *en banc* was necessary (*i*) to maintain uniformity of jurisprudence—having admitted that it had itself hindered service under the Hague Service Convention, the Court should have proceeded to find service was proper under Article 1608(a)(3) because the papers were admittedly delivered to the Foreign Ministry; and (*ii*) because the panel's decision involves a question of exceptional importance. On March 18, 2022, the panel denied the petition for panel rehearing. App. 16a. Saint-Gobain's petition for *en banc* hearing was also denied. App. 17a.

REASONS FOR GRANTING THE PETITION

The Hague Service Convention is a remarkable multilateral treaty signed with the intent to simplify service of process abroad all while ensuring that foreign defendants do in fact receive actual, timely notice. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 698 (1988). The "primary innovation" of the Convention is the establishment of Central Authorities in each State's government to facilitate service transmitted by foreign plaintiffs. *Ibid.* State parties to the Convention have determined that the treaty applies not only to service upon private individuals and entities located in a foreign State, but to service upon foreign States themselves. Hague Conference, Practical Handbook on the Operation of the Service Convention ¶ 23 (4th ed. 2016) ("Practical Handbook"). The Convention is not clear, however, as to how plaintiffs may serve foreign States through their Central Authorities.

The Court should grant this petition to not only consider for the first time the Hague Service Convention's application to service upon foreign States, but to also assess the ability of States to skirt their obligations under that treaty to avoid service. Granting the writ of certiorari is all the more important since litigants around the world are increasingly looking to the United States as a forum for the enforcement of foreign arbitration awards against sovereigns and the D.C. Circuit Court's decision would materially affect the availability of the United States as such a forum since it encourages foreign sovereigns to avoid responsibility for adverse awards that are valid and enforceable simply by refusing to honor their obligations under the Hague

Service Convention. The Court should grant the Petition and, upon hearing the merits, reverse the D.C. Circuit Court's opinion and affirm the findings to the district courts below.

I. This Petition Presents An Issue Of Fundamental Importance

This petition presents an issue of fundamental importance: whether a sovereign nation, when served under the terms of the Hague Service Convention, can breach its treaty obligations in an effort to avoid service of process upon itself. The effect of this issue cannot be clearer than what is apparent from the facts of this case. Saint-Gobain abided by the Hague Service Convention when it delivered compliant service papers to Venezuela's Central Authority, the Foreign Ministry. App. 33a–34a. Venezuela admitted below that the Foreign Ministry thereafter sat on those papers and failed to serve the Venezuelan Attorney General in accordance with Venezuela's domestic law or give reasons for not doing so. App. 25a.

This Court has noted the importance of the Hague Service Convention before. In *Volkswagenwerk Aktiengesellschaft v. Schlunk*, the Court took up the question of whether service upon a foreign defendant's domestic subsidiary was compatible with the Hague Service Convention. 486 U.S. 694 (1988). The Court found that it was. Because the plaintiff could effect proper service upon the foreign defendant in the United States, the Hague Service Convention did not apply. *Ibid.* at 707–708 ("Where service on a domestic agent is valid and complete under both state law and the Due Process Clause, our inquiry ends and the Convention has no

further implications."). More recently, in *Water Splash, Incorporated v. Menon*, the Court analyzed whether the Hague Service Convention prohibited service by mail and found that it did not: "Article 10(a) [of the Convention] . . . provides that, as long as the receiving state does not object, the Convention does not 'interfere with . . . the freedom' to serve documents through postal channels." 137 S. Ct. 1504, 1513 (2017). Combined, these cases presented opportunities to address the scope of the Hague Service Convention—both in terms of when and how the Convention applies to service on foreign entities. This case is no different. At minimum, this petition allows the Court for the first time to weigh in the scope of the Convention as applied to service upon foreign sovereigns. Even more specific, the Court may address whether the Convention allows sovereigns to evade service altogether.

While Saint-Gobain is a French entity, United States itself maintains great stake in this question as it, like France and Venezuela, is a party to the Hague Service Convention. What's more, the United States—and the District of Columbia in particular—increasingly finds itself as the forum for the enforcement of arbitration awards and judgments against foreign States. See, e.g., *Tethyan Copper Co. Pty v. Islamic Republic of Pakistan*, No. 1:19-cv-02424 (TNM) (D.D.C.); *Koch Mins. Sàrl v. Bolivarian Republic of Venezuela*, No. 17-cv-2559-ZMF (D.D.C), recons. denied sub nom. No. 17-CV-2559-ZMF, 2021 WL 3556565 (D.D.C. Feb. 22, 2021); *Infrared Env't Infrastructure GP Ltd. v. Kingdom of Spain*, No. 20-817 (JDB) (D.D.C.); *Cube Infrastructure Fund Sicav v. Kingdom of Spain*, No. 20-1708 (EGS) (D.D.C.); *RREEF Infrastructure (G.P.) Ltd. v. Kingdom of*

Spain, No. 1:19-cv-03783 (CJN) (D.D.C.); *Tenaris, S.A. v. Bolivarian Republic of Venezuela*, No. 1:18-cv-01373 (CJN) (D.D.C.); *Micula v. Government of Romania*, No. 17-cv-02332 (APM) (D.D.C.); *Levy v. Republic of Guinea*, No. 19-cv-2405 (DLF) (D.D.C.); *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, No. 18-2395 (JEB) (D.D.C.); *Teco Guat. Holdings, LLC v. Republic of Guatemala*, No. 17-102 (RDM) (D.D.C.); *Masdar Solar & Wind Cooperatiev U.A. v. Kingdom of Spain*, No. 18-2254 (JEB) (D.D.C.). The D.C. Circuit Court's opinion has effectively endorsed the perverse incentive for States to abuse both international and United States' domestic law. The results of that opinion will be largely felt for years to come. Already, at least one court has cited the lower court's opinion as a basis for denying service pursuant to the Hague Service Convention, albeit in the context of serving a State instrumentality. See *Isaac Indus. v. Petroquimica De Venez., S.A.*, No. 19-23113-CIV-SCOLA/GOODMAN, 2022 U.S. Dist. LEXIS 36803, at *17–19 (S.D. Fla. Mar. 1, 2022), R & R adopted by 2022 U.S. Dist. LEXIS 74192, at *2 (S.D. Fla. Apr. 21, 2022).

Amplifying the importance of this issue even further is the context of the merits of the underlying action. Saint-Gobain initiated this action to register and enforce a valid international arbitration award rendered pursuant to the ICSID Convention. Both the Convention and United States law mandate that proceedings such as these are a formality. See ICSID Convention, art. 54 (directing Contracting States to recognize ICSID arbitral awards and enforce pecuniary obligations imposed thereunder as if they were "a final judgment of a court"); 22 U.S.C. § 1650a (mandating the U.S. Courts enforce and register

ICSID awards with "the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States."). Indeed, there are literally no defenses available to Venezuela aside from service and jurisdiction. If the United States endorses a foreign sovereign's ability to dodge service by simply ignoring its own duties under the Hague Service Convention, it would allow those States to complicate or avoid altogether otherwise mandatory, summary obligations under the ICSID Convention. This effect is not abstract. Venezuela already has a long history of evading service and obfuscating otherwise summary proceedings to avoid an inevitable judgment. See *Koch Mins. Sàrl*, 514 F. Supp. 3d at 34 ("Venezuela has a documented history of playing a shell game: circumventing service by refusing to issue a certificate when the party to be served is the same *entity* that it has designated as its Central Authority.").

II. The Court Should Grant The Petition Because The D.C. Circuit Court's Decision Is Inconsistent With Federal Law And The Approach Taken By Other Federal Courts.

The Court should also grant this petition to resolve the inconsistencies that the D.C. Circuit Court's opinion creates with federal jurisprudence. Before this case, federal courts faced with the collision of a domestic plaintiff's access to the judicial system and a foreign State's evasion of service ruled in favor of domestic plaintiffs. Those courts aligned the purpose of the Hague Service Convention with the need for actual notice under Rule 4 of the Federal Rules of Civil Procedure. The opinion below is contrary to this trend, accepting a foreign State's self-

serving evasion of its obligations under the Hague Service Convention and allowing the foreign State to avoid its obligations by instructing the central authority to not deliver the papers. The inconsistency is all the greater since it places an emphasis on the fact that the Foreign Ministry received the papers but not the Attorney General—even though under the FSIA, service on the Foreign Ministry is sufficient.

Most notably, the D.C. Circuit Court's opinion conflicts with *Box v. Dallas Mexican Consulate General*, where the Fifth Circuit found that a plaintiff properly served Mexico under the Hague Service Convention upon delivering papers to Mexico's Central Authority despite never receiving the Article 6 confirmation certificate. 487 F. App'x 880, 886 (5th Cir. 2012). In that case, the Mexican Consulate acknowledged that the plaintiff had delivered the correct documents to the correct agency. It simply argued—as Venezuela did in the proceedings below—that service was not effected because the Mexican Central Authority had not issued a certificate of service under Article 6 of the Hague Service Convention. *Ibid.* at 885. In rejecting Mexico's argument, the Fifth Circuit emphasized the distinction between service upon a private individual or entity located in a foreign State and service upon the foreign State itself. *Ibid*. at 886. The Fifth Circuit correctly pointed out that attempts to "serve a complaint against foreign corporations rather than the foreign government itself, render[s] the certificate explaining service to the corporation more important than explaining service on itself." *Ibid.* The court also noted that it was not the plaintiff's fault that the Mexican authorities had failed to return a formal certificate, as required under the Convention. *Ibid.*

The Fifth Circuit's holding makes sense. The value of the Hague Service Convention's due process protections—such as, (*i*) the Central Authority relaying service in accordance with the internal law of the receiving State and (*ii*) the return of an Article 6 certificate confirming delivery of service—is obvious where service is sought upon a private individual or entity. Third parties located within a State may be difficult to locate or serve. Indeed, the drafters of the Convention were primarily concerned with "*notification au parquet*"—a method of "service of process on a foreign defendant by the deposit of documents with a designated local official." *Schlunk*, 486 U.S. at 703; see also Report of the U.S. Delegation to the 10th Session of the Hague Conference on Private International Law, Oct. 7–28, 1964, 52 Dep't State Bull. 265, 269 (Feb. 1965) (noting that, under notification au parquet, "[a] default judgment with no notice whatever is therefore not uncommon in ***personal*** actions") (emphasis added). But waiting for the Central Authority to relay service in accordance with its domestic law and thereafter returning a certificate to Saint-Gobain is duplicative if not irrelevant when attempting to serve the State itself. As Venezuela claims, its Foreign Ministry is simply supposed to forward documents to its Attorney General. In any event, the Central Authority is an arm of the State. They are one in the same. See *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 234–235 (D.C. Cir. 2003) ("[T]he Ministry of Foreign Affairs must be treated as the state. . . .").

To be sure: the Fifth Circuit's holding in *Box* was not made in isolation. It relied upon the Second Circuit's well-reasoned rule in *Burda Media, Inc. v. Viertel* "that service of process [is] properly perfected

under the Hague Convention, notwithstanding the failure of the Central Authority to return a Certificate, where the plaintiff attempt[s] in good faith to comply with the Hague Convention and the defendant ha[s] sufficient notice of the action such that no injustice would result." 417 F.3d 292, 301 (2d Cir. 2005). The Second Circuit's ruling found service even though the plaintiff in that case sought to effect service ***upon a company*** rather than the French State—a situation where the need for a certificate would be at its maxim. Nonetheless, the Second Circuit held that "the failure to comply strictly with the Hague Convention is *not* automatically fatal to effective service." *Ibid.* (citing *Greene v. Le Dorze*, No. CA 3-96-CV-590-R, 1998 WL 158632, at *2 (N.D. Tex. Mar. 24, 1998)). Rather, "the Hague Convention should be read together with Rule 4 [of the Federal Rules of Civil Procedure], which '***stresses actual notice, rather than strict formalism***.'" *Ibid.* (quoting *Fox v. Regie Nationale Des Usines Renault*, 103 F.R.D. 453, 455 (W.D. Tenn. 1984)) (emphasis added).

Together, the principles of *Box* and *Burda* have guided other federal courts, leading to similar holdings in relation to service upon foreign States, including service upon Venezuela. For example, in *Devengoechea v. Bolivarian Republic of Venezuela*, the Southern District of Florida held that "[s]ervice was effectuated on Venezuela, through its Central Authority under the Hague Convention . . . when it received the Summons, Complaint and transmittal documents." No. 12-CV-23743-PCH, 2014 U.S. Dist. LEXIS 188755, at *3 (S.D. Fla. Apr. 24, 2014). Similarly, in *Micula v. Government of Romania*, the D.C. District Court held that "Romania [could not]

invalidate proper service by wrongfully refusing to carry out its Article 6 obligations." No. 17-cv-02332 (APM), 2018 U.S. Dist. LEXIS 232429, at *12–13 (D.D.C. May 22, 2018). These decisions are in addition to the two district courts below that found that Saint-Gobain effected service upon Venezuela by actually delivering valid service papers to the Venezuelan Central Authority. See App. 30a–87a.

Furthermore, the Hague Service Convention Secretariat's Practical Handbook—a source extensively cited by Venezuela and the United States in the proceedings below—endorses these federal court decisions, confirming that service upon the Central Authority suffices to effect service on the State. See Practical Handbook ¶ 25 ("Courts in the United States also considered service upon Turkey and Argentina to be valid when addressed to the Central Authority of those states."). In doing so, the Practical Handbook cites *Ohntrup v. Makina ve Kimya Endustrisi Kurumu*, where the District Court for the Eastern District of Pennsylvania held that, "[u]pon their receipt of the Amended Complaint to Amend the Judgment, Summons and Form USM-94 following service by Plaintiff . . . [t]he Republic of Turkey and the Turkish Central Authority shall be deemed to have been properly and validly served." No. 76-742, 1992 U.S. Dist. LEXIS 271, at *3-4 (E.D. Pa. Jan. 9, 1992).

Combined, these federal courts align Federal Rule of Civil Procedure 4's emphasis of "actual notice, rather than strict formalism," *Fox*, 103 F.R.D. at 455, with the purpose of the Hague Service Convention: "to provide a simpler way to serve process abroad, to assure that defendants sued in foreign jurisdictions

would receive actual and timely notice of suit, and to facilitate proof of service abroad." *Schlunk*, 486 U.S. at 698. And the reasoning behind these cases easily comports to the facts of this case and supports the holdings of the two district courts below. Venezuela does not dispute that its Central Authority received the proper papers or that the papers themselves comported with the Convention's requirements. Furthermore, having joined the proceeding (albeit at the eleventh hour), Venezuela cannot claim that it had no actual notice. See *Box*, 487 F. App'x at 886 ("The Consulate does not dispute that Box sent the correct documents to the correct office, and the record indicates that both Mexico and the Consulate had notice of the lawsuit and an ability to defend."). Venezuela simply asserts that the formal requirements of Article 5 of the Hague Service Convention should have allowed the Central Authority to relay service to the Venezuelan attorney general—allowing the State to sit on service until it effectively served ***itself***.

Until the D.C. Circuit Court's lone decision, lower courts were aligned that a foreign State cannot claim improper service where its Central Authority had received the proper papers (and, as a result, the State had actual notice) yet refused to acknowledge. No other circuit has found that, where, as here, a foreign State's Central Authority received the correct papers, the foreign State may still claim that it was not properly served under the Hague Service Convention—neither Venezuela nor the D.C. Circuit Court have pointed to such a case. Instead, the D.C. Circuit Court purported to differentiate *Box* by stating that it analyzed Article 15(2), not Articles 5 or 15(1). App. 27a. But this is a distinction without a

difference. Whether discussing the default judgment mechanisms of Article 15(1) or 15(2), the Fifth Circuit's realization that a foreign State implicates far fewer due process concerns applies just the same. So too does the Second Circuit's reasoning that United States Courts should not allow the strict formal requirements of the Hague Service Convention to undermine actual notice of service of process.

If review is granted, this Court will provide needed guidance to both district and circuit courts as to whether foreign State defendants my evade service by seeking shelter under the Hague Service Convention's formalities.

III. The D.C. Circuit Court Decision Is Wrong

The Court should also grant this petition because the D.C. Circuit Court's opinion is wrong. The D.C. Circuit Court interpreted the Hague Service Convention in a manner that permits a litigant who actually received the documents served to fall back on its own failure to observe its own domestic law to allege that service was not perfected. This tin eared approach to treaty interpretation betrays the object and purpose of the Convention: simplifying and streamlining service of process abroad. See App. 1a (Convention, preamble).

Moreover, by concluding that Venezuela was not served until Venezuela's own Foreign Ministry delivered papers to Venezuela's Attorney General, the D.C. Circuit Court ignored the fact that Saint-Gobain followed the Hague Service Convention to the tee, whereas Venezuela blatantly disregarded its obligations under international law. In doing so, the D.C. Circuit Court created a loophole to the Convention—which, as discussed below, contradicts

the FSIA—whereby Venezuela may evade service by (allegedly) refusing to serve itself.

A. Treaty Interpretation Must Be Framed In The Context And Must Avoid Absurd and Futile Results.

As a gating matter, the D.C. Circuit Court prematurely concluded its treaty interpretation analysis. Yes, "treaty interpretation . . . must ***begin*** with the text," 24a (quoting *Schlunk*, 486 U.S. at 699) (emphasis added) (internal quotation marks omitted). But courts should also (*i*) read treaties along "the context in which the written words are used"[2] and (*ii*) interpret treaties to avoid "anomalous or illogical results." *Ehrlich v. Am. Airlines, Inc.*, 360 F.3d 366, 385 (2d Cir. 2004); see also *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 171 (1999) (avoiding construction of the Warsaw Convention that produced "anomalies"). Together, these tools support the guiding principle of treaty interpretation: to interpret terms "in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose." Restatement (Third) of the Foreign Relations Law of the U.S. § 325 (1987); *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 346 (2006) (quoting Restatement (Third) of Foreign Relations Law of the U.S. § 325(1) (1986)); see also *Lozano v. Montoya Alvarez*, 572 U.S. 1, 11 (2014) ("For treaties, which are primarily compact[s] between independent nations, our duty [i]s to ascertain the intent of the parties by looking to the document's ***text and context***) (emphasis added) (internal citations

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[2] *Societe Nationale Industrielle Aerospatiale v. United States Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522, 534 (1987) (quoting *Air France v. Saks*, 470 U.S. 392, 397 (1985)).

and quotation marks omitted).

The D.C. Circuit Court interpreted the text of Article 5 of the Hague Service Convention without taking into consideration the fact that the plain text of the Convention was drafted in the context of service upon foreign individuals and entities as opposed to foreign States themselves. See App. 2a-3a (Convention, art. 5(a)) ("The Central Authority . . . shall itself serve the document or shall arrange to have it served . . . - by a method prescribed by its internal law for the service of documents in domestic actions ***upon persons*** who are within its territory . . . .") (emphasis added); *ibid.* at 3a–4a (Convention, art. 6) (stating that the receiving State's Central Authority must deliver a certificate of service to the plaintiff including "the place and the date of service and the ***person*** to whom the document was delivered.") (emphasis added). As this Court has previously noted, "in common usage, the term 'person' does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude it." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64 (1989) (quoting *Wilson v. Omaha Tribe*, 442 U.S. 653, 667 (1979)). Thus, the mechanics of the Convention do not specifically address service upon foreign State governments themselves—a situation where, in extreme cases such as the one present here, the sovereign may have perverse incentives since the Central Authority will be tasked with fulfilling a task that its principal does not want it to fulfill.

In fact, the Convention's drafting history contains ***no*** discussion regarding service upon foreign sovereigns. 1 BRUNO A. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE § 4-1-4, at 155 (2000) ("Not only

does the Convention itself fail to address the question of service of process on sovereign states, but its negotiating history is silent as to whether the Convention machinery is available for service on foreign states.").[3] The D.C. Circuit Court's decision did not take the context of the Hague Service Convention's plain language into consideration. As a result, its interpretation of the Hague Service Convention leads to an anomalous result, effectively rendering the Convention's purpose futile. *Ehrlich*, 360 F.3d at 385.

First, under the D.C. Circuit Court's interpretation of the Convention, a foreign State may effectively avoid service by using its Central Authority, an arm of its own government (here, the Foreign Ministry), to filter out unwelcome service requests. This of course contradicts the Convention's object and purpose, which courts should consider when interpreting its provisions. See Restatement (Third) of the Foreign Relations Law of the U.S. § 325 (1987). The purpose of the Hague Service Convention "is to ***simplify***, ***standardize***, and ***generally improve*** the process of serving documents abroad." *Water Splash, Inc.,* 137 S. Ct. at 1507 (emphasis added); see also App. 1a (Convention, preamble) (The States signatory to the present Convention, [d]esiring to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time, [d]esiring to improve the organisation of mutual

[3] Perhaps because of this, Germany even asserted that service upon foreign States falls outside the scope of the Convention. Practical Handbook ¶ 23. Nonetheless, the predominant understanding is that the Convention does apply to service upon States. See *ibid.*

judicial assistance for that purpose by ***simplifying*** and ***expediting*** the procedure, [h]ave resolved to conclude a Convention to this effect and have agreed upon the following provisions . . .") (emphasis added).

Second, the D.C. Circuit Court's opinion artificially separates the Central Authority from the State itself. This cannot be the true—especially in this case where the Central Authority in question is the Venezuelan Foreign Ministry. The Foreign Ministry is part in parcel of Venezuela's government. The Court need look no further than the FSIA. Section 1608(a)(3) provides that service upon the sovereign's Ministry of Foreign Affairs is sufficient to serve a foreign State if service cannot occur pursuant to Sections 1608(a)(1) or (2). 28 U.S.C. § 1608(a)(3). Section 1608(a)(3) makes no distinction between sovereigns that treat the Ministry of Foreign Affairs as the correct recipient for international service of process and sovereigns that do require service to be delivered to another political subdivision (such as the Attorney General). Under Section 1608(a)(3), service is completed upon receiving a signed receipt from the ministry of foreign affairs. *Ibid.* (allowing service "by ***sending*** a copy of the summons and complaint and a notice of suit . . . by any form of mail ***requiring a signed receipt***, . . . to the head of the ministry of foreign affairs of the foreign state concerned") (emphasis added).

The Hague Service Convention also supports the fundamental principle that the Central Authority amounts to the State itself. After all, it is a stretch to say the least that an arm of the State may simultaneously receive service papers, review them for compliance, and ultimately claim ignorance as to

their contents. See App. 53a (the District Court noting that "the Central Authority as part of the Republic itself, is also the party upon whom process is to be served."). This is especially apparent considering that, pursuant to Article 13 of the Convention, States use their Central Authorities to object to service requests that are deemed to "infringe its sovereignty or security." App. 6a (Convention, art. 13).

B. The District Court Was Correct That Service Was Found Under Article 15.

In contrast to the D.C. Circuit Court's opinion, the holdings of both district courts below correctly found service based on Article 15 of the Hague Service Convention, thereby enforcing the object and purpose of the Convention while sanctioning Venezuela's attempt to skirt its own treaty obligations.

After Saint-Gobain moved for default judgment in the wake of Venezuela's refusal to acknowledge service, the District Court invoked Article 15 and found that, "[b]y 'actually deliver[ing] to the defendant,' i.e. the Republic, by serving the appropriate documents directly to the Central Authority designated by the Republic of Venezuela, Saint-Gobain served the Republic, notwithstanding the Republic's failure to provide Saint-Gobain a certificate." App. 85a. Although the Delaware court stopped short of entering default judgment, see App. 84a–85a, it established personal jurisdiction to decide the motion on the basis of Article 15. In doing so, it warned that "[t]he Convention . . . does not permit a foreign sovereign to feign non-service by its own failure to complete and return the required certificate." App. 84a-85a. The D.C. District Court

endorsed the Delaware District Court's finding, reasoning that "Article 15 provides that a default judgment may be given even in the absence of a completed certificate . . . when 'it is established that . . . [the writ of summons or an equivalent document] was actually delivered to the defendant . . . .'" App. 50a-51a. (quoting Hague Service Convention, art. 15(b)). As a result, "no further action was required for service beyond actual delivery to the Central Authority." App. 56a.

The district courts' decisions must be correct. To begin with, Article 15 may provide the basis for finding service by virtue of the fact that it also authorizes a court to enter a final default judgment. If Article 15 could not support a finding of service, the court would have no authority to enter a judgment in the first place. Furthermore, the district courts' decisions align with *Box* and *Burda Media*, aligning Article 15's requirement that service papers were "actually delivered" with Federal Rule of Civil Procedure's baseline requirement of actual notice. Lastly, the decisions' recognition of service promotes the object and purpose of the Hague Service Convention by finding service and preventing a foreign defendant from evading or otherwise complicating service of process. In doing so, the district courts also give effect to Article 15's function as "an indirect sanction against those who ignore" service pursuant to the Convention, such as pursuant to the terms of Article 5. See *Schlunk*, 486 U.S. at 705.

CONCLUSION

The Court should grant this Petition and, after hearing the merits of this case, reverse the D.C.

Circuit Court's opinion and affirm the findings to the district courts below.

Respectfully submitted,

June 16, 2022

RAJAT RANA
ALSTON & BIRD LLP
90 PARK AVE
NEW YORK, NY 10016
(212) 210-9400

ALEXANDER A. YANOS
Counsel of Record
ALSTON & BIRD LLP
90 PARK AVE
NEW YORK, NY 10016
(212) 210-9400

Attorneys for Petitioner

APPENDIX

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14. CONVENTION ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS[4]

(Concluded 15 November 1965)

The States signatory to the present Convention,

Desiring to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time,

Desiring to improve the organisation of mutual judicial assistance for that purpose by simplifying and expediting the procedure,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

Article 1

The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad. This Convention shall not apply where the address of the person to be served with the document is not known.

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[4] This Convention, including related materials, is accessible on the website of the Hague Conference on Private International Law (www.hcch.net), under "Conventions" or under the "Service Section". For the full history of the Convention, see Hague Conference on Private International Law, Actes et documents de la Dixième session (1964), Tome III, Notification (391 pp.).

CHAPTER I – JUDICIAL DOCUMENTS

Article 2

Each Contracting State shall designate a Central Authority which will undertake to receive requests for service coming from other Contracting States and to proceed in conformity with the provisions of Articles 3 to 6.

Each State shall organise the Central Authority in conformity with its own law.

Article 3

The authority or judicial officer competent under the law of the State in which the documents originate shall forward to the Central Authority of the State addressed a request conforming to the model annexed to the present Convention, without any requirement of legalisation or other equivalent formality.

The document to be served or a copy thereof shall be annexed to the request. The request and the document shall both be furnished in duplicate.

Article 4

If the Central Authority considers that the request does not comply with the provisions of the present Convention it shall promptly inform the applicant and specify its objections to the request.

Article 5

The Central Authority of the State addressed shall

itself serve the document or shall arrange to have it served by an appropriate agency, either –

a) by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or

b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed.

Subject to sub-paragraph *(b)* of the first paragraph of this Article, the document may always be served by delivery to an addressee who accepts it voluntarily.

If the document is to be served under the first paragraph above, the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed.

That part of the request, in the form attached to the present Convention, which contains a summary of the document to be served, shall be served with the document.

Article 6

The Central Authority of the State addressed or any authority which it may have designated for that purpose, shall complete a certificate in the form of the model annexed to the present Convention.

The certificate shall state that the document has been served and shall include the method, the place and the date of service and the person to whom the document was delivered. If the document has not been served,

the certificate shall set out the reasons which have prevented service.

The applicant may require that a certificate not completed by a Central Authority or by a judicial authority shall be countersigned by one of these authorities.

The certificate shall be forwarded directly to the applicant.

Article 7

The standard terms in the model annexed to the present Convention shall in all cases be written either in French or in English. They may also be written in the official language, or in one of the official languages, of the State in which the documents originate.

The corresponding blanks shall be completed either in the language of the State addressed or in French or in English.

Article 8

Each Contracting State shall be free to effect service of judicial documents upon persons abroad, without application of any compulsion, directly through its diplomatic or consular agents.

Any State may declare that it is opposed to such service within its territory, unless the document is to be served upon a national of the State in which the documents originate.

Article 9

Each Contracting State shall be free, in addition, to use consular channels to forward documents, for the purpose of service, to those authorities of another Contracting State which are designated by the latter for this purpose.

Each Contracting State may, if exceptional circumstances so require, use diplomatic channels for the same purpose.

Article 10

Provided the State of destination does not object, the present Convention shall not interfere with –

a) the freedom to send judicial documents, by postal channels, directly to persons abroad,

b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,

c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

Article 11

The present Convention shall not prevent two or more Contracting States from agreeing to permit, for the purpose of service of judicial documents, channels of transmission other than those provided for in the

preceding Articles and, in particular, direct communication between their respective authorities.

Article 12

The service of judicial documents coming from a Contracting State shall not give rise to any payment or reimbursement of taxes or costs for the services rendered by the State addressed.

The applicant shall pay or reimburse the costs occasioned by –-

a) the employment of a judicial officer or of a person competent under the law of the State of destination,

b) the use of a particular method of service.

Article 13

Where a request for service complies with the terms of the present Convention, the State addressed may refuse to comply therewith only if it deems that compliance would infringe its sovereignty or security.

It may not refuse to comply solely on the ground that, under its internal law, it claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not permit the action upon which the application is based.

The Central Authority shall, in case of refusal, promptly inform the applicant and state the reasons for the refusal.

Article 14

Difficulties which may arise in connection with the transmission of judicial documents for service shall be settled through diplomatic channels.

Article 15

Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that –

a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or

b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention, and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.

Each Contracting State shall be free to declare that the judge, notwithstanding the provisions of the first paragraph of this Article, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled –

a) the document was transmitted by one of the methods provided for in this Convention,

b) a period of time of not less than six months, considered adequate by the judge in the

particular case, has elapsed since the date of the transmission of the document,

c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

Notwithstanding the provisions of the preceding paragraphs the judge may order, in case of urgency, any provisional or protective measures.

Article 16

When a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and a judgment has been entered against a defendant who has not appeared, the judge shall have the power to relieve the defendant from the effects of the expiration of the time for appeal from the judgment if the following conditions are fulfilled –

a) the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal, and

b) the defendant has disclosed a prima facie defence to the action on the merits.

An application for relief may be filed only within a reasonable time after the defendant has knowledge of the judgment.

Each Contracting State may declare that the application will not be entertained if it is filed after the expiration of a time to be stated in the declaration, but which shall in no case be less than one year

following the date of the judgment.

This Article shall not apply to judgments concerning status or capacity of persons.

CHAPTER II – EXTRAJUDICIAL DOCUMENTS

Article 17

Extrajudicial documents emanating from authorities and judicial officers of a Contracting State may be transmitted for the purpose of service in another Contracting State by the methods and under the provisions of the present Convention.

CHAPTER III – GENERAL CLAUSES

Article 18

Each Contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence.

The applicant shall, however, in all cases, have the right to address a request directly to the Central Authority.

Federal States shall be free to designate more than one Central Authority.

Article 19

To the extent that the internal law of a Contracting State permits methods of transmission, other than those provided for in the preceding Articles, of

documents coming from abroad, for service within its territory, the present Convention shall not affect such provisions.

Article 20

The present Convention shall not prevent an agreement between any two or more Contracting States to dispense with –

a) the necessity for duplicate copies of transmitted documents as required by the second paragraph of Article 3,

b) the language requirements of the third paragraph of Article 5 and Article 7,

c) the provisions of the fourth paragraph of Article 5,

d) the provisions of the second paragraph of Article 12.

Article 21

Each Contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the following –

a) the designation of authorities, pursuant to Articles 2 and 18,

b) the designation of the authority competent to complete the certificate pursuant to Article 6,

c) the designation of the authority competent to receive documents transmitted by consular channels, pursuant to Article 9.

Each Contracting State shall similarly inform the Ministry, where appropriate, of –

a) opposition to the use of methods of transmission pursuant to Articles 8 and 10,

b) declarations pursuant to the second paragraph of Article 15 and the third paragraph of Article 16,

c) all modifications of the above designations, oppositions and declarations.

Article 22

Where Parties to the present Convention are also Parties to one or both of the Conventions on civil procedure signed at The Hague on 17th July 1905, and on 1st March 1954, this Convention shall replace as between them Articles 1 to 7 of the earlier Conventions.

Article 23

The present Convention shall not affect the application of Article 23 of the Convention on civil procedure signed at The Hague on 17th July 1905, or of Article 24 of the Convention on civil procedure signed at The Hague on 1st March 1954.

These Articles shall, however, apply only if methods of communication, identical to those provided for in these Conventions, are used.

Article 24

Supplementary agreements between Parties to the

Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention, unless the Parties have otherwise agreed.

Article 25

Without prejudice to the provisions of Articles 22 and 24, the present Convention shall not derogate from Conventions containing provisions on the matters governed by this Convention to which the Contracting States are, or shall become, Parties.

Article 26

The present Convention shall be open for signature by the States represented at the Tenth Session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 27

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 26.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 28

Any State not represented at the Tenth Session of the Hague Conference on Private International Law may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 27. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for such a State in the absence of any objection from a State, which has ratified the Convention before such deposit, notified to the Ministry of Foreign Affairs of the Netherlands within a period of six months after the date on which the said Ministry has notified it of such accession.

In the absence of any such objection, the Convention shall enter into force for the acceding State on the first day of the month following the expiration of the last of the periods referred to in the preceding paragraph.

Article 29

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for the territories mentioned in such an extension on the

sixtieth day after the notification referred to in the preceding paragraph.

Article 30

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 27, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 31

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 26, and to the States which have acceded in accordance with Article 28, of the following –

a) the signatures and ratifications referred to in Article 26;

b) the date on which the present Convention enters into force in accordance with the first paragraph of Article 27;

c) the accessions referred to in Article 28 and the dates on which they take effect;

d) the extensions referred to in Article 29 and the dates on which they take effect;

e) the designations, oppositions and declarations referred to in Article 21;

f) the denunciations referred to in the third paragraph of Article 30.

In witness whereof the undersigned, being duly authorised thereto, have signed the present Convention.

Done at The Hague, on the 15th day of November, 1965, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Tenth Session of the Hague Conference on Private International Law.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-7019 **September Term, 2021**

1:20-cv-00129-RC

Filed On: March 18, 2022

Saint-Gobain Performance Plastics Europe,

Appellee

v.

Bolivarian Republic of Venezuela,

Appellant

BEFORE: Rogers and Walker, Circuit Judges; and Edwards, Senior Circuit Judge

ORDER

Upon consideration of appellee's petition for panel rehearing filed on February 24, 2022, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/

Anya Karaman

Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-7019 **September Term, 2021**

1:20-cv-00129-RC

Filed On: March 18, 2022

Saint-Gobain Performance Plastics Europe,

Appellee

v.

Bolivarian Republic of Venezuela,

Appellant

BEFORE: Srinivasan, Chief Judge; Henderson, Rogers, Tatel, Millett, Pillard, Wilkins, Katsas, Rao, Walker, and Jackson*, Circuit Judges; and Edwards, Senior Circuit Judge

ORDER

Upon consideration of appellee's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/
Anya Karaman
Deputy Clerk

* Circuit Judge Jackson did not participate in this matter.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 15, 2021

Decided January 25, 2022

No. 21-7019

SAINT-GOBAIN PERFORMANCE PLASTICS EUROPE,

APPELLEE

v.

BOLIVARIAN REPUBLIC OF VENEZUELA,

APPELLANT

Appeal from the United States District Court for the District of Columbia

(No. 1:20-cv-00129)

Kent A. Yalowitz argued the cause for appellant. With him on the briefs were *E. Whitney Debevoise, Allon Kedem, Sally L. Pei,* and *Stephen K. Wirth.*

Lewis S. Yelin, Attorney, U.S. Department of Justice, argued the cause for *amicus curiae* United States. With him on the brief were *Brian M. Boynton,* Acting Assistant Attorney General, and *Sharon Swingle* and *Cynthia A. Barmore,* Attorneys.

Alexander A. Yanos argued the cause for appellee. With him on the brief was *Carlos Ramos-Mrosovsky.*

Before: ROGERS and WALKER, *Circuit Judges,* and EDWARDS, *Senior Circuit Judge.*

Opinion for the Court by *Circuit Judge* ROGERS.

ROGERS, *Circuit Judge:* The Bolivarian Republic of Venezuela appeals the district court's grant of summary judgment to Saint-Gobain Performance Plastics Europe upon determining it had properly served the Republic with court process pursuant to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638. Articles 2 to 6 of the Hague Convention require that a plaintiff request service from a Central Authority designated by the receiving state and receive a certificate of service from the Central Authority stating it has served the defendant by a method consistent with the state's internal law. Because Venezuelan law requires lawsuits against the Republic to be served on the Attorney General, and the Attorney General was never served, we reverse and remand the case to the district court.

I.

The Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1608, identifies four methods for serving a foreign state, in descending order of preference. Service is established (1) when service is made "in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision"; (2) "by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents"; (3) by sending a copy of the relevant documents to be "dispatched by the clerk of the court to the head of the ministry of foreign affairs

of the foreign state concerned"; and (4) by sending copies of the documents to be "dispatched by the clerk of the court to the Secretary of State [who] shall transmit one copy of the papers through diplomatic channels to the foreign state." *Id.* § 1608(a)(1)–(4). At issue here is the second option, as no special service arrangement existed between the parties.

The Hague Convention is an international agreement among the signatory sovereign states on service of judicial documents that the Preamble states is designed to "simplify[] and expedit[e] the procedure" for serving process abroad. It was ratified by the United States Senate on April 14, 1967. 113 CONG. REC. - SENATE, 9664-65 (1967). Article 2 requires signatory states to "designate a Central Authority which will undertake to receive requests for service coming from other Contracting States." Under Article 5, once the Central Authority receives a request for service, it must serve the documents "by a method prescribed by [the receiving state's] internal law" or "by a particular method requested by the applicant" that is compatible with that law. Article 6 requires the Central Authority to provide a certificate of service that conforms to a specified model. Paragraph 1 of Article 15, in turn, prohibits entry of a default judgment where the foreign defendant "has not appeared" until the document is served according to the receiving state's internal law or the documents are "actually delivered . . . by another method provided for by this Convention." Paragraph 2 provides that in the absence of a certificate of service, the entry of a default is permitted where:

> (a) the document was transmitted by one of the methods provided for in [the] Convention,

> (b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document, [and]
>
> (c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it . . . .

Saint-Gobain Performance Plastics Europe is a French corporation that held a 99.99% interest in NorPro Venezuela, C.A., a Venezuelan company that produced components for hydraulic fracturing. In March 2011, then-President Hugo Chávez of the Bolivarian Republic of Venezuela ordered expropriation of Saint-Gobain's interest. Based on protection against expropriation by the France-Venezuela Bilateral Investment Treaty of April 15, 2004, Saint-Gobain sought compensation and entered into arbitration with the Republic pursuant to the International Centre for Settlement of Investment Disputes ("ICSID") Convention. An arbitral tribunal found that the Republic had breached the Investment Treaty and in November 2017 awarded Saint-Gobain $42 million for the expropriation.

When the Republic failed to pay the award, Saint-Gobain in December 2018 filed a lawsuit in the United States District Court for the District of Delaware seeking to register and enforce the arbitral award pursuant to the ICSID Convention, specifically 22 U.S.C. § 1650(a), which grants federal district courts subject matter jurisdiction over actions to enforce ICSID arbitral awards. In the absence of a special arrangement for service by the parties, Saint-Gobain proceeded under the FSIA's second preferred

service option and on December 14, 2018, as Venezuelan law required sent requests for service with copies of its complaint and summons to the Republic's designated Central Authority. T. Flores and I. Ruiz signed for delivery of the requests for service on December 21 and 27, respectively. Saint-Gobain sought no further response from the Central Authority and received none. In June 2019, Saint-Gobain moved for a default judgment against the Republic. The Republic moved to dismiss for lack of personal jurisdiction, on the ground it had not properly been served, and for improper venue in Delaware.

The Delaware district court found that it had jurisdiction inasmuch as the Hague Convention "does not permit a foreign sovereign to feign non-service by its own failure to complete and return the required certificate." D. Del. Slip Op. at 2. Saint-Gobain had served the Republic pursuant to Article 15(1) when it "serv[ed] the appropriate documents directly to the Central Authority designated by the Republic." *Id.* at 22. Upon granting Venezuela's venue motion, the court transferred the case to the District of Columbia.

In the U.S. District Court for the District of Columbia, Saint-Gobain moved for summary judgment and the Republic moved to dismiss for lack of personal jurisdiction. The district court, treating the motion to dismiss as a motion for reconsideration of the Delaware district court's jurisdictional determination, denied the Republic's motion and granted summary judgment to Saint-Gobain. D.D.C. Slip Op. 2. The court agreed with the Delaware court that service was complete under Article 15 when Saint-Gobain submitted its requests for service because that interpretation was "reasonable and

consistent with the findings of other courts." D.D.C. Slip Op. 19–20 (citing *Box v. Dall. Mex. Consulate Gen.,* 487 Fed. App'x 880, 886 (5th Cir. 2012); *Devengoechea v. Bolivarian Republic of Venez.,* No. 12-cv-23743, 2014 WL 12489848 at *1 (S.D. Fla. Apr. 25, 2014); *Scheck v. Republic of Arg.,* No. 10-cv-5167, 2011 WL 2118795 at *3 (S.D.N.Y. May 23, 2011)). It ruled that Article 15 properly applied "in the context of evaluating a motion for default," *id.* at 21, and that requesting service from the Central Authority was sufficient in cases against a foreign sovereign state. *Id.* at 22–23. Absent other objections, summary judgment was therefore appropriate. *Id.* at 7–8, 24.

The Republic appeals, and our review of the district court's determination that it had personal jurisdiction over the Republic is *de novo. Shatsky v. Palestine Liberation Org.,* 955 F.3d 1016, 1036 (D.C. Cir. 2020); *Estate of Klieman v. Palestinian Auth.,* 923 F.3d 1115, 1123 (D.C. Cir. 2019).

II.

In cases of treaty interpretation, the Supreme Court has instructed that courts must "begin with the text," *Volkswagenwerk AG v. Schlunk,* 486 U.S. 694, 699 (1988) (internal quotations omitted), and that "[w]here the text is clear . . . [the courts] have no power to insert an amendment," *Chan v. Korean Air Lines, Ltd.,* 490 U.S. 122, 134 (1988). "To alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial," the Court explained, "would be on our part an usurpation of power, and not an exercise of judicial functions." *Id.* at 135 (quoting *In re The Amiable Isabella,* 19 U.S. (6 Wheat.) 1, 71 (1821)). Because the Hague Convention is a treaty, this law applies. *See Water Splash v.*

Menon, 137 S. Ct. 1504, 1508–09 (2017). Courts must also adhere to the plain text when interpreting the FSIA's requirements for service given the "sensitive diplomatic implications" of suits against foreign sovereigns. *Republic of Sudan v. Harrison,* 139 S. Ct. 1048, 1062 (2019); *see also Transaero, Inc. v. La Fuerza Aerea Boliviana,* 30 F.3d 148, 154 (D.C. Cir. 1994).

The plain text of Article 5 of the Hague Convention requires that the Central Authority serve the defendant "by a method prescribed by its internal law" or "by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed." Convention, art. 5. Because Saint-Gobain did not propose its own method of service, this court looks to the method of service prescribed by the law of the Republic to determine whether Article 5's requirements were met.

Under Venezuelan law, lawsuits against the Republic must be served on the Attorney General of the Republic. Organic Law of the Attorney General's Office, art. 95, *published in* Official Extraordinary Gazette No. 6.210, at 66 (Dec. 30, 2015) (Venez.). The parties do not dispute either that the Attorney General was not served or that Saint-Gobain did not receive a certificate of service from the Central Authority. Consequently, service was not completed under Article 5 of the Convention.

Saint-Gobain nonetheless contends that when the foreign defendant is a state, requesting service from the Central Authority suffices because the Central Authority is the state. Saint-Gobain Br. 26–27. This interpretation is unsupported by the plain text of the Convention. The Convention states in

Article 2 that the Central Authority receives requests for service, not that this constitutes legal service, and under Articles 4 and 13, the Central Authority retains the power to object to requests that do not comply with the Convention or that infringe the receiving state's sovereignty. Viewing the Central Authority as legally equivalent to a sovereign defendant would amend the Convention by effectively rendering irrelevant the signatory state's law in determining whether service is complete. The Convention specifies that service must be made either by a "method prescribed by [the receiving state's] internal law," or by a "method requested by the applicant, unless . . . incompatible with the law of the [receiving state]." Convention, art. 5. Because Venezuelan law requires service on the Attorney General in lawsuits filed against the Republic, that also is what the Convention requires. The interpretation of a treaty such as the Hague Convention is "governed by the text [of the Convention,] solemnly adopted by the governments of many separate nations," and the court has "no power to insert an amendment" where the "text is clear." *Chan*, 490 U.S. at 134. Saint-Gobain does not cite contrary authority.

Article 15(1), on which Saint-Gobain relies, is not a basis for obtaining personal jurisdiction here. Article 15(1) states that "[where] the defendant has not appeared, judgment shall not be given until it is established that — (a) the document was served by a method prescribed by the internal law of the State addressed, or (b) the document was actually delivered to the defendant . . . by another method provided for by this Convention." The Republic appeared before both the Delaware district court and the District of Columbia district court to challenge the personal

jurisdiction of the courts. Saint-Gobain has neither completed service in compliance with Venezuelan law, which requires service on the Attorney General, nor identified another method of service under the Convention with which it complied. Therefore, Saint-Gobain has not satisfied the requirements of either Article 5 or Article 15(1).

The District of Columbia district court cited with approval the Delaware district court's conclusion that the Hague Convention "does not permit a foreign sovereign to feign non-service by its own failure to complete and return the required certificate," noting such a conclusion was "reasonable and consistent with the findings of other courts." D.D.C. Slip Op. 19-20 (quoting D. Del. Slip Op. 21). The district court's reliance on unpublished decisions outside of this circuit is unpersuasive. *Id*. In *Devengoechea*, 2014 WL 12489848 at *1 (S.D. Fla. Apr. 25, 2014), the court provided no explanation for the conclusion that service on the Central Authority is alone sufficient to serve a foreign sovereign defendant. *Box*, 487 Fed. App'x at 886 (5th Cir. 2012), and *Scheck*, 2011 WL 2118795 at *3 (S.D.N.Y. May 23, 2011), concern service under Article 15(2), which is not at issue here, and do not interpret the text of Article 5. The district court's conclusion suggests that a foreign sovereign could not contest service once its Central Authority has received a request for service, but this does not comport with the plain text of Article 6 of the Convention. At no point does the Hague Convention modify Articles 5 or 15(1) to dispense with their requirements for service when the defendant is a state.

To the extent the district courts' rulings may be understood to suggest possible bad faith by the

Republic in failing to assure that its Central Authority actually served the Attorney General and notified Saint-Gobain that service had been made, the plain text of the Convention speaks for itself. Unlike in *Water Splash*, 137 S. Ct. at 1508, where the FSIA and the Hague Convention Article 10(a) were silent on use of mail "for the purpose of service," the Convention is not silent on the elements of service at issue and nowhere provides that these requirements are inapplicable when the defendant is a sovereign state. Even when "the equities of a particular case may seem to point in the opposite direction," the Supreme Court has required courts to adhere to the plain text of the FSIA and the Hague Convention in view of the "sensitive diplomatic implications." *Harrison*, 139 S. Ct. at 1062.

Notably, Saint-Gobain has alternative means of effecting service on the Republic. For example, the FSIA permits service through diplomatic channels where other methods have failed, 28 U.S.C. § 1608(a)(4), a channel that is also recommended by the Convention in case of "difficulties" or "exceptional circumstances." Convention, arts. 9, 14; *see also Water Splash*, 137 S. Ct. at 1508 (citing as well arts. 8, 11 & 19). Saint-Gobain objects only that "there is no indication of how long diplomatic service may take," Saint-Gobain Br. 35, but its claims of inconvenience do not affect how the courts are required by Supreme Court precedent to interpret the Convention. *Harrison*, 139 S. Ct. at 1062.

Accordingly, the court reverses the grant of summary judgment to Saint-Gobain and remands the case for the district court to afford Saint-Gobain the opportunity to effect service pursuant to the Hague Convention or otherwise as 28 U.S.C. § 1608 allows,

see FED. R. CIV. P. 4(j)(1).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAINT-GOBAIN PERFORMANCE PLASTICS EUROPE, Plaintiff, v. BOLIVARIAN REPUBLIC OF VENEZUELA, Defendant.	Civil Action No.: 20-129 (RC) Re Document Nos.: 43, 45

MEMORANDUM OPINION
GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT;
DENYING DEFENDANT'S CROSS-MOTION TO DISMISS

Decided February 1, 2021

I. INTRODUCTION

Plaintiff Saint-Gobain Performance Plastics Europe ("Saint-Gobain") initially filed this action in the United States District Court for the District of Delaware, seeking to register and enforce an arbitration award made pursuant to the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention" or "ICSID"), against Defendant the Bolivarian Republic of Venezuela ("the Republic"). The Republic did not appear, and Saint-Gobain moved

for a default judgment. The Republic then appeared to challenge Saint-Gobain's service of process, arguing that it had not been properly served under the Hague Service Convention, and that venue was also improper in the District of Delaware. Chief Judge Leonard P. Stark of the District Court in Delaware determined that Saint-Gobain had properly served the Republic under the Hague Service Convention, but agreed with the Republic that venue was improper in the District of Delaware and transferred the action to this Court. Saint-Gobain now brings a motion for summary judgment, asking this Court to enter a judgment registering and enforcing the arbitration award at issue. In response, the Republic has brought a cross-motion for dismissal, claiming the action must be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(5) for failure to properly effect service. Because Judge Stark has previously concluded that service of process was properly made in this action, the Republic's motion will be evaluated as a motion for reconsideration. The Court finds that Judge Stark's determination was correct, and does not constitute legal error. Accordingly, Saint-Gobain's motion for summary judgment is granted, while the Republic's cross-motion to dismiss is denied.

II. BACKGROUND

A. Factual Background

Plaintiff Saint-Gobain is a French corporation who held a 99.99% interest in NorPro Venezuela C.A., a Venezuelan company that manufactured components used in the fracking process. Pl.'s Statement of Material Facts ("Pl.'s SMF") ¶ 1, ECF No. 43-2. On March 29, 2011, Hugo Chávez, the then-president of Venezuela, ordered the expropriation of

Saint- Gobain's interest. Compl. ¶ 16, ECF No. 1; *see also* Yanos Decl. Ex. 3 ("Decision on Liability") ¶¶ 245–47, ECF No. 3-3. Because Saint-Gobain was protected under the France-Venezuela Bilateral Investment Treaty of April 15, 2004, Saint-Gobain and the Republic entered into arbitration to resolve the dispute. Pl.'s SMF ¶¶ 5, 7–8. Saint-Gobain filed a request for arbitration pursuant to the ICSID Convention, which was registered as ICSID Case Number ARB/12/13 of June 15, 2012.[1] *Id.* ¶¶ 9–10.

Pursuant to the ICSID Convention and Arbitration Rules, a Tribunal was formed to consider the dispute. Written submissions were made, and after a four-day oral hearing the Tribunal rendered, on December 30, 2016, a Decision on Liability and the Principles of Quantum, finding that the Republic had breached the France-Venezuela Bilateral Investment Treaty due to its acts of expropriation. *Id.* ¶ 11; *see also* Decision on Liability ¶ 908. The same Tribunal issued an award of $42 million to Saint-Gobain on November 3, 2017, which as of March 9, 2020 has accrued with interest to US$ 44,229,629.66. Pl.'s SMF ¶¶ 13, 28. The Republic does not contest that this award is final and binding. *See* Pl.'s Mot. Summ. J. Ex. 4 ("Status Conf. Tr.") at 5:25-6:3 (statement by the Republic's counsel asserting that "we are not going to challenge the merits of the arbitral award in this or any other court. The arbitral award— as a matter of

[1] Venezuela withdrew from the ICSID Convention on January 25, 2012, with the withdrawal taking effect roughly one-month after the registration of this dispute on July 25, 2012. This action, however, has no impact on this case as both parties gave their consent to arbitrate prior to Venezuela's withdrawal, and neither party disputes the Tribunal's jurisdiction over Saint-Gobain's claims. *See* Pl.'s SMF ¶ 6.

substance, the Republic is prepared to accept . . ."), ECF No. 43-7. However, the Republic has not yet paid any of the amounts owed under the award. Pl.'s SMF ¶ 27.

In December 2018, Saint-Gobain filed this action in the U.S. District of Court for the District of Delaware seeking registration of the award as a Foreign Judgment and enforcement of the award pursuant to 22 U.S.C. § 1650(a). *See* Compl. ¶¶ 30–38. Pursuant to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1969) ("Hague Service Convention" or "the Convention"), Saint-Gobain sought to serve the Republic with the summons and Complaint in this action. Pl.'s SMF ¶ 20. To this end, on December 14, 2018, Saint-Gobain sent via certified mail "(i) duly-executed USM-94 'Request for Service Abroad of Judicial or Extrajudicial Documents' forms in duplicate English and Spanish versions addressed to [the Republic], together with duplicate English and Spanish copies of: (ii) the summons and Complaint in this action, (iii) five supporting exhibits and (iv) notice of right to consent to trial before a magistrate judge, to the Central Authority designated by Venezuela for international service of process pursuant to the Hague Service Convention." *Id.* ¶ 21. On December 21, 2018 and December 27, 2018 these deliveries were signed for by T. Flores and I. Ruiz respectively, two individuals Saint-Gobain asserts were employees of the Venezuelan Foreign Ministry. *Id.* ¶ 22; *see also* Def.'s Response to Pl.'s Statement of Material Facts ¶ 22 (noting "the Republic disputes Plaintiff's characterization of these individuals as employees of the Foreign Ministry" as Saint-Gobain "has not come forward with any evidence or other information

supporting its assertion as to that relationship"), ECF No. 47. No further response or action from the Central Authority occurred after the packages were delivered. *See* Pl.'s SMF ¶ 23.[2]

Because of this lack of response, the clerk of the United States District Court for the District of Delaware entered a default against the Republic on June 12, 2019. Pl.'s SMF ¶ 23. Saint-Gobain moved for a default judgment on June 24, 2019. *Id.* ¶ 24. On August 7, 2019, counsel for the Republic opposed Saint-Gobain's motion for default and requested that the court vacate the clerk's entry of default, challenging Saint-Gobain's service of process under the Hague Service Convention and also arguing that venue was improper in Delaware.[3] *Id.* ¶ 25. On

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[2] Important to this timeline is the fact that shortly after the delivery of the documents in question, Venezuela devolved into political upheaval. In response to then-President Mr. Nicolas Maduro claiming victory in a presidential election many contend was fraudulent, the Venezuela National Assembly President Juan Guaidó assumed the Presidency of Venezuela on January 23, 2019. The United States has since recognized Mr. Guaidó as the legitimate President of Venezuela. *See* U.S. Sec'y of State Mike Pompeo, *U.S. Government Support for the Democratic Aspirations of the Venezuelan People*, U.S. Dep't of State (Feb. 5, 2019), https://2017-2021.state.gov/u-s-supports-democratic-aspirations-of-the-venezuelan-people/index.html. However, Mr. Maduro still controls the Ministry of Foreign Affairs and Ministry of Justice, though the courts of the United States are required to only recognize the Guaidó administration as the legitimate representative of Venezuela.

[3] Under the Foreign Sovereign Immunities Act ("FSIA"), actions to confirm arbitral awards levied against foreign sovereigns are most frequently to be filed in the Federal District Court for the District of Columbia. *See* 28 U.S.C. § 1391(f). Saint-Gobain brought the suit initially in the District of Delaware because that

December 12, 2019, Chief Judge Leonard P. Stark of the District Court in Delaware vacated the clerk's entry of default and denied Saint-Gobain's motion for default judgment, determining that while Saint-Gobain had properly served the Republic under the Hague Service Convention, venue was improper in the District of Delaware. *Id.* ¶ 26; *see also* Dec. 12, 2019 Mem. Order ("Stark Decision") at 21–22, ECF No. 39. Judge Stark transferred the action to this Court on January 16, 2020. Pl.'s SMF ¶ 26.

Saint-Gobain now brings a motion for summary judgment, asking this Court to enter a judgment registering and enforcing the award in question. *See* Pl.'s Mot. at 1. In response, the Republic has brought a cross-motion for dismissal, claiming that the action must be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(5), arguing that the actions taken under the Hague Service Convention failed to properly effect service in compliance with the FSIA. *See* Def.'s Cross Mot. to Dismiss Compl. ("Def.'s Mot.") at 1, ECF No. 45. Both of these motions have been fully briefed and are now ripe for decision.

III. LEGAL STANDARDS

A. Motion to Dismiss for Inadequate Service of Process

"Service of process, under longstanding

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court had previously ruled that Petroleso de Venezuela S.A., the Venezuelan state oil company, was Venezuela's alter ego and was subject to suit in Delaware. *See* Mem. Supp. of Pl.'s Mot. for Summ. J. ("Pl.'s Mot.") at 6, ECF No. 43-1 (citing *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, 333 F. Supp. 3d 380, 414 (D. Del. 2018)).

tradition in our system of justice, is fundamental to any procedural imposition on a named defendant." *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999). Accordingly, "[b]efore a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied." *Omni Cap. Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987). A "[r]ule 12(b)(5) motion is the proper vehicle for challenging the mode of delivery or the lack of delivery of the summons and complaint." *Candido v. District of Columbia*, 242 F.R.D. 151, 162 (D.D.C. 2007) (citing 5B C. Miller & A. Wright, Federal Practice & Procedure: Civil § 1353 (3d ed. 2006)); *see, e.g.*, *Bazarian Int'l Fin. Assocs., L.L.C. v. Desarrollos Aerohotelco, C.A.*, 168 F. Supp. 3d 1, 17 (D.D.C. 2016) (12(b)(5) motion to dismiss challenging service made in accordance with the terms of the Hague Convention). The burden to establish the validity of the purported service rests on "[t]he party on whose behalf service [was] made." *Light v. Wolf*, 816 F.2d 746, 751 (D.C. Cir. 1987) (quotations omitted).

B. Motion for Summary Judgment

Pursuant to the Federal Rules of Civil Procedure, summary judgment is appropriate where the "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant bears the initial burden of identifying portions of the record that demonstrate the absence of any genuine issue of material fact. *See* Fed. R. Civ. P. 56(c)(1); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A "material" fact is one capable of affecting the substantive outcome of the litigation, *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248

(1986), and a dispute is "genuine" if there is enough evidence for a reasonable jury to return a verdict for the non-movant, *see Scott v. Harris*, 550 U.S. 372, 380 (2007).

In response, the non-movant must identify specific facts in the record that reveal a genuine issue that is suitable for trial. *See Celotex*, 477 U.S. at 324. In determining whether a genuine issue exists, a court must refrain from making credibility determinations or weighing the evidence; rather, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255; *see also Czekalski v. Peters*, 475 F.3d 360, 363 (D.C. Cir. 2007) (citation omitted). "In order to establish that a fact is or cannot be genuinely disputed, a party must (a) cite to specific parts of the record—including deposition testimony, documentary evidence, affidavits or declarations, or other competent evidence—in support of its position, or (b) demonstrate that the materials relied upon by the opposing party do not actually establish the absence or presence of a genuine dispute." *United States v. Dynamic Visions, Inc.*, 220 F. Supp. 3d 16, 19–20 (D.D.C. 2016) (citing Fed. R. Civ. P. 56(c)(1)).[4]

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[4] This District has supplemented Rule 56 with Local Civil Rule 7(h), pursuant to which a party filing a motion for summary judgment must include a statement of material facts as to which that party contends there is no genuine dispute. *See Herbert v. Architect of Capitol*, 766 F. Supp. 2d 59, 63–64 (D.D.C. 2011). "The party opposing the motion must, in turn, submit a statement enumerating all material facts which the party contends are genuinely disputed." *Id.* at 63 (citing LCvR 7(h)(1)). This local rule "places the burden on the parties and their counsel, who are most familiar with the litigation and the record, to crystallize for the district court the material facts and relevant portions of the record." *Id.* at 63–64 (quoting *Jackson v.*

Summary judgment to confirm and enforce an ICSID arbitration award should be granted where the party seeking recognition or enforcement provides a copy of the award to the relevant court, *see* ICSID Convention Art. 54(2), and where there are no defenses to enforcement. *See, e.g.*, *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, 414 F. Supp. 3d 94, 101 (D.D.C. 2019). This is because courts have an "exceptionally limited" role in enforcing ICSID arbitral awards, which in this instance consists solely of ensuring that personal jurisdiction is proper. *Id.*; *see also Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 863 F.3d 96, 102 (2d Cir. 2017) ("[U]nder the Convention's terms, [member state's courts] may do no more than examine the judgment's authenticity and enforce the obligations imposed by the award."). When these preconditions are met, an ICSID award "shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several states." 22 U.S.C. § 1650a(a). Saint-Gobain has provided the Court with a copy of the Award certified by the Secretary-General, as required. *See generally,* Decision on Liability. The Republic does not dispute the Award's authenticity. Furthermore, there are no material facts in dispute. The Republic argues only that due to a defect in service of process, personal jurisdiction is lacking, and the Award cannot be confirmed. Def.'s Mot. at 1. It is this issue the Court will now review.

Finnegan, Henderson, Farabow, Garrett & Dunner, 101 F.3d 145, 151 (D.C. Cir. 1996)).

IV. ANALYSIS

A. Preliminary Issues

A number of procedural issues must be addressed before the Court proceeds to the substantive question in this case. Saint-Gobain asserts that the Republic is barred from bringing their current motion to dismiss on the grounds of waiver. Saint-Gobain also relies on the law-of-the-case doctrine to argue that this Court should abstain altogether from reconsideration of Judge Stark's determination that Saint-Gobain had properly served the Republic under the Hague Service Convention. Finally, Saint-Gobain contends that the Republic is barred from raising new arguments not previously brought before Judge Stark in his determination that service of process was properly made on the Republic. The Court considers each of these arguments in turn.

1. Waiver of 12(b)(5) Defense

The Court can quickly dispose of Saint-Gobain's first procedural argument, in which they argue that the Republic's Cross-Motion to Dismiss must be dismissed as untimely. *See* Pl.'s Reply in Support of Mot. for Summ. J. and Opp'n to Def.'s Cross-Mot. to Dismiss ("Pl.'s Opp'n") at 11, ECF No. 49. Saint-Gobain claims that "[the Republic] waived the jurisdictional defense based on improper service because it failed to properly assert this defense together with its cross-motion for dismissal based on improper venue before the Delaware district court." *Id.* at 3. The Republic calls this claim "false," given the contents of their initial motion to dismiss. Def.'s Reply in Support of Cross-Mot. to Dismiss ("Def.'s Reply) at 14, ECF No. 51. The Court agrees that this argument by Saint-Gobain is without merit.

Under the Federal Rules of Civil Procedure 12(g) and 12(h), a party will waive an insufficient service of process defense if they fail to raise this defense in their first motion to dismiss or responsive pleading. *See Candido v. District of Columbia*, 242 F.R.D. 151, 161 (D.D.C. 2007) ("If a party files a Rule 12(b) motion to dismiss, it may not subsequently assert any Rule 12(b) defenses that were available when the first Rule 12(b) motion was filed."); *see also Chatman-Bey v. Thornburgh*, 864 F.2d 804, 813 n.8 (D.C. Cir. 1988) ("[T]he defense of lack of service of process. . . is waived if not asserted in a timely manner.").

In accordance with the Federal Rules of Civil Procedure, the Republic's first brief filed in this matter in the Delaware District Court raised a defense based on improper service, noting that "Plaintiff has not served the complaint in compliance with the strict requirements of the Foreign Sovereign Immunities Act, and, as a consequence, there is no personal jurisdiction over the Republic at this time." Def.'s Mem. of Law in Opp'n to Pl.'s Mot. for Default J. ("Def.'s Default J. Opp'n") at 1, ECF No. 18. Saint-Gobain contends that this still constitutes waiver, because "[a]t that time. . . Venezuela raised a different jurisdictional defense to service," and not the "defense based on Article 5 of the Hague Convention which it debuts in this Court." Pl.'s Opp'n at 11. In short, Saint-Gobain argues that the Republic should be limited to only the specific service of process defense raised in their first motion. But this is not the law.[5]

[5] Saint-Gobain provides no support for this assertion in its brief, as the cases it cites stand for only the proposition that a failure to assert a waivable personal jurisdiction defense *in any form* in a party's first responsive briefing waives a party's ability to

The Federal Rules dictate only that a party must raise a defense of insufficient service of process in its first responsive motion, *see* Fed. R. Civ. P. 12((h)(1), which the Republic properly did, *see* Def.'s Default J. Opp'n at 1; *see also id.* at 10–17. The Republic devoted nearly half of its brief to Saint-Gobain's alleged failure to effect service under the Hague Convention—providing Saint-Gobain plenty of notice of its intent to rely on this defense. Furthermore, while the Republic does augment its prior arguments for lack of service by invoking Article 5 of the Hague Convention in this current round of briefing, it returns to its prior contention that service was not completed under Article 15. And in any case, a party is generally free to raise "new argument[s] to support . . . [a] consistent claim." *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (citing *Yee v. Escondido*, 503 U.S. 519, 534-35 (1992). Accordingly, there has been no waiver, and the Republic is free to proceed with its motion to dismiss based on insufficient service of process.

2. Law of the Case Doctrine

The next procedural matter to be resolved by this Court is if, as Saint-Gobain argues, the Court is bound by the law-of-the-case doctrine. Pl.'s Opp'n at 1, 4–5. Judge Stark of the District of Delaware, prior to transferring the case to this Court, issued an opinion concluding that "Saint-Gobain has served the

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assert such a defense later. *See* Pl.'s Opp'n at 11 (citing *Placide Ayissi-Etoh v. Fannie Mae*, 49 F. Supp. 3d 9, 12 (D.D.C. 2014) (deeming defense waived where "Defendants waited years to raise" the improper service defense in any capacity); *Nichols v. Vilsack*, 183 F. Supp. 3d 39, 41 (D.D.C. 2016) (describing general failure to raise defense despite its "availab[ility] when it filed its motion to dismiss Plaintiff's original complaint")).

Republic" under the Hague Service Convention. Stark Decision at 22. As a result, Saint-Gobain asserts that Judge Stark's previous determination must stand unless this Court determines it "was clearly erroneous and would work a manifest injustice." Pl.'s Opp'n at 4 (quoting *Kimberlin v. Quinian*, 199 F.3d 496, 500 (D.C. Cir. 1999)). In contrast, the Republic argues that the proper standard for their "request for reconsideration of a non-final order" under Federal Rule of Civil Procedure 54(b) is that this Court may grant their request "as justice requires," meaning if it is "necessary under the relevant circumstances." Def.'s Reply at 12–13 (citing *Ali v. Carnegie Inst. of Washington*, 309 F.R.D. 77, 80 (D.D.C. 2015)). While in effect the two standards have a great deal of overlap, the Court will review Judge Stark's decision pursuant to the Rule 54(b) standard, though the principles underlying the law-of-the-case doctrine still inform the Court's determination.[6]

The "'[l]aw-of-the-case doctrine' refers to a family of rules embodying the general concept that a court involved in later phases of a lawsuit should not re-open questions decided (i.e., established as the law of the case) by that court or a higher one in earlier phases." *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739 (D.C. Cir. 1995). The doctrine serves to "promote[] the finality and efficiency of the judicial process by 'protecting against the agitation of settled issues.'" *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988) (quoting 1B J. Moore, J.

[6] While not styled as such, the Republic effectively concedes that its cross-motion for dismissal is in effect a "request for reconsideration of [Judge Stark's] non-final order" brought pursuant to Federal Rule of Civil Procedure 54(b). Def.'s Reply at 12. The Court will accordingly treat it as such.

Lucas, & T. Currier, Moore's Federal Practice ¶ 0.404[1], p. 118 (1984)). The law-of-the-case doctrine also applies, as is relevant here, "to the decisions of a coordinate court in the same case." *Id.*

However, "'[a]dherence to the doctrine is not mandatory,' but rather left to the district court's sound discretion." *Beach TV Props., Inc. v. Solomon*, 324 F. Supp. 3d 115, 123 (D.D.C. 2018) (citing *Moore v. Hartman*, 332 F. Supp. 2d 252, 256 n.6 (D.D.C. 2004)); *see also Christianson*, 486 U.S. at 817 ("A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous and would work a manifest injustice.") (internal quotations omitted). In this way the doctrine acts not as a jurisdictional bar to review, but rather a general principal of judicial restraint. *See Messenger v. Anderson*, 225 U.S. 436, 444 (1912) (noting the doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power"). This is particularly true in regards to interlocutory orders, such as the non-final determination by Judge Stark at issue here, which "are not subject to the law-of-the-case doctrine and may always be reconsidered prior to final judgment." *Filebark v. U.S. Dep't of Transp.*, 555 F.3d 1009, 1013 (D.C. Cir. 2009) (quoting *Langevine v. District of Columbia*, 106 F.3d 1018, 1023 (D.C. Cir. 1997)).

The review of interlocutory orders is governed by Federal Rule of Civil Procedure 54(b), which provides that reconsideration should be granted "as justice requires." *Capitol Sprinkler Inspection, Inc. v. Guest Servs., Inc.*, 630 F.3d 217, 227 (D.C. Cir. 2011)

(quoting *Greene v. Union Mut. Life Ins. Co. of Am.*, 764 F.2d 19, 22–23 (1st Cir.1985)). While the standard is flexible, this Court has interpreted this language to allow reconsideration "of an interlocutory order only when the movant demonstrates (1) an intervening change in the law; (2) the discovery of new evidence not previously available; or (3) a clear error in the first order." *Coulibaly v. Tillerson*, 278 F. Supp. 3d 294, 301 (D.D.C. 2017). The moving party must also show that reconsideration is appropriate and that harm or injustice would result if reconsideration were denied. *Id.* at 302; *see also Cobell v. Norton*, 355 F. Supp. 2d 531, 540 (D.D.C. 2005).

But this is not to say that the law-of-the-case doctrine plays no role. Even though interlocutory orders are not "subject to" the law of the case doctrine, "nothing prevents the court from applying the rationales of that doctrine to guide a Rule 54(b) decision." *Moore v. Hartman*, 332 F. Supp. 2d 252, 256 (D.D.C. 2004). Consequently, courts have found that their discretion under Rule 54(b) is still "limited by the law of the case doctrine and subject to the caveat that where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again." *Singh v. George Washington Univ.*, 383 F. Supp. 2d 99, 101 (D.D.C. 2005) (citation omitted).

Against this backdrop, the parties dispute the proper standard of review that should be applied by this Court to evaluate Judge Stark's prior decision on the validity of service upon the Republic. Saint-Gobain posits that, "[i]n this Circuit, the law of the case may be revisited only in exceptional circumstances such as where 'there is an intervening change in the law or if the previous decision was

clearly erroneous and would work a manifest injustice.'" Pl.'s Opp'n at 4 (citing *Kimberlin v. Quinian*, 199 F.3d 496, 500 (D.C. Cir. 1999)). But as previously discussed, the law of the case doctrine is not binding on Judge Stark's interlocutory order. *See Filebark*, 555 F.3d at 1013. Accordingly, this Court will grant the Republic's 54(b) motion as "justice requires." *Coulibaly*, 278 F. Supp. 3d at 301; *Lyles v. District of Columbia*, 65 F. Supp. 3d 181, 188 (D.D.C. 2014). While this flexible standard accounts for a variety of considerations, based on the arguments presented the Court will evaluate if Judge Stark's prior decision was made in "error" and if "some harm. . . . [or] some sort of injustice will result if reconsideration is refused." *Coulibaly*, 278 F. Supp. 3d at 302 (citing *Stewart v. Panetta*, 826 F. Supp. 2d 176, 177 (D.D.C. 2011)).

3. The Republic's New Arguments

The final procedural matter raised by Saint-Gobain is their contention that the Republic is barred from raising new arguments in this round of briefing that were not previously brought before Judge Stark when he first considered this issue. *See* Pl.'s Opp'n at 5 (claiming the Republic "cannot ask the Court to revisit the Delaware Court's decision based on an argument [under Article 5 of the Hague Convention] that it failed to raise before that Court."). Contrary to Saint-Gobain's claims, however, in this Circuit a court can consider new arguments raised for the first time on a Rule 54(b) motion for reconsideration, though only if such an allowance is in the interest of justice.

"Rule 54(b)'s approach to the interlocutory presentation of new arguments as the case evolves . . . [is] flexible, reflecting the 'inherent power of the

rendering district court to afford such relief from interlocutory judgments as justice requires.'" *Cobell v. Jewell*, 802 F.3d 12, 25 (D.C. Cir. 2015) (citing *Greene v. Union Mut. Life Ins. Co. of Am.*, 764 F.2d 19, 22 (1st Cir. 1985) (Breyer, J.) (ellipsis omitted)). In light of this flexibility, the D.C. Circuit has determined that it is "unwarranted" for district courts to impose a flat bar on considering new arguments in reconsideration motions made under Rule 54(b). *Id.* That said, this Court has previously ruled that Rule 54(b) motions for reconsideration "cannot be used as an 'an opportunity to reargue facts and theories upon which a count has already ruled, nor as a vehicle for presenting theories or arguments that could have been advanced earlier.'" *Coulibaly*, 278 F. Supp. 3d at 301 (citing *Est. of Gaither v. District of Columbia,* 771 F.Supp.2d 5, 10 (D.D.C. 2011)). The Republic seeks a second bite at the apple regarding Judge Stark's previous decision on service, though as Saint-Gobain has noted, nothing prevented the Republic from raising arguments under Article 5 previously, given that all of the authorities the Republic invokes to make its argument existed at that time. *See* Pl.'s Opp'n at 5–6. However, given the governing standard, the Court will review the new arguments brought by the Republic to determine if allowing them to proceed is in the interest of justice.

B. Saint-Gobain Effected Service on the Republic Under the FSIA

The Court will now review Judge Stark's prior finding that the Republic was properly served under the Hague Service Convention, one of the approved methods for service on a foreign sovereign under the FISA. If there was service of process such that this Court can exercise personal jurisdiction over the

Republic, then the ICSID judgment must be enforced.[7]

1. Service on Foreign Sovereigns Under FSIA

Under 28 U.S.C. § 1330(b), this Court can exercise personal jurisdiction over a foreign state that is not entitled to sovereign immunity, such as the Republic, but only as long as effective service of process has been obtained under the strictures of the FSIA, 28 U.S.C. § 1608. *See also* H.R. Rep. No. 94-1487, at 23 (1976), 1976 U.S.C.C.A.N. 6604, 6622 ("[The FSIA] sets forth the exclusive procedures with respect to service on . . . a foreign state."); *Mobil Cerro Negro*, 863 F.3d at 100 ("ICSID award-creditors must pursue federal court judgments to enforce their awards against a foreign sovereign by filing a federal action on the award against the sovereign, [and] *serving the sovereign with process in compliance with the FSIA* . . . ") (emphasis added).

The FSIA describes four different methods, listed in descending order of favorability, that are available to plaintiffs to use to effect service on a foreign sovereign defendant. These include: (1) "by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision;" (2) "by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents;" (3) "by sending a copy of the summons

[7] Saint-Gobain asserts, and the Republic does not dispute, that this Court has subject matter jurisdiction pursuant to Article 54 of the ICSID Convention, which is incorporated into U.S. law at 22 U.S.C. § 1650a(a). Pl.'s Mot. at 9–11. Consequently, this opinion focuses solely on the disputed legal question of personal jurisdiction.

and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court of the head of the ministry of foreign affairs of the foreign state concerned;" and (4) if none of the first three methods are possible, a plaintiff may serve the necessary documents through diplomatic channels with the assistance of the Department of State. 28 U.S.C. § 1608(a)(1)-(4). A plaintiff "must attempt service by the first method (or determine that it is unavailable) before proceeding to the second method, and so on." *Angellino v. Al-Saud*, 681 F.3d 463, 465 (D.C. Cir. 2012) (citing *Ben-Rafael v. Islamic Republic of Iran*, 540 F. Supp. 2d 39, 52 (D.D.C. 2008)).

The first method of service detailed under 28 U.S.C. § 1608(a)(1) was not available in this case, as neither Saint-Gobain nor the Republic contend that they are party to any "special arrangement for service." Pl.'s Mot. at 12. The next available method under the FSIA dictates that service must be made "in accordance with an applicable international convention on service of judicial documents." 28 U.S.C. § 1608(a)(2). This method includes the Hague Service Convention, which is the method that Saint-Gobain asserts it employed. Pl.'s Mot. at 12.

The Hague Service Convention is a multilateral treaty designed to "simplify, standardize, and generally improve the process of serving documents abroad." *Water Splash, Inc. v. Menon*, 137 S. Ct. 1504, 1507 (2017). As is relevant to the matter at hand, member states, such as Venezuela, are required to establish a Central Authority to receive and process requests for service of documents from other

countries, and to effectuate such service. *See* Hague Service Convention art. 2, 5; *see also Walton v. Bilinski*, No. 2:15-cv-36, 2015 WL 9489610, at *2 (E.D. Mo. Dec. 30, 2015) (noting "a designated Central Authority" is "[t]he primary method for service of judicial documents abroad."). Pursuant to Article 5 and 6 of the Convention, once service has been effectuated, the Central Authority is then required to complete a certificate detailing the circumstances of service including the method, place and the date of service and the person to whom the document was delivered. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988). "If the document has not been served, the certificate shall set out the reasons which have prevented service." Hague Service Convention art. 6. Service is thus deemed "made" on the date of service set forth in the certificate of service provided by the Central Authority. *See* 28 U.S.C. § 1608(c)(2).

The Convention also provides under Article 15 an alternative method to ascertain that service has been made for the purpose of entering a default judgment, even in the situation where a Central Authority fails to complete and return the required certificate. *See Schlunk*, 486 U.S. 694, 705 (1988) (noting Article 15 was intended to be a "sanction against those who ignore" the Convention).[8] Judge

[8] The full text of Article 15 reads:

> Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that:
>
> a) the document was served by a method prescribed by the internal law of the State addressed for the service of

Stark provided that this provision is intended to prohibit "a foreign sovereign to feign non-service by its own failure to complete and return the required certificate." Stark Decision at 21. As is relevant here, Article 15 provides that a default judgment may be given even in the absence of a completed certificate (presumably because service can inferred) when "it is

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documents in domestic actions upon persons who are within its territory, or

b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention,

and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.

Each contracting State shall be free to declare that the judge, notwithstanding the provisions of the first paragraph of this article, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled -

a) the document was transmitted by one of the methods provided for in this Convention,

b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,

c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

Notwithstanding the provisions of the preceding paragraphs the judge may order, in case of urgency, any provisional or protective measures.

Hague Service Convention art. 15.

established that . . .[the writ of summons or an equivalent document] was actually delivered to the defendant or to his residence by another method provided for by this Convention . . . in sufficient time to enable the defendant to defend." Hague Service Convention art. 15(b).

In this matter, both parties agree (as did Judge Stark) that Saint-Gobain couriered papers to the Venezuelan Foreign Ministry, the Republic's designated Central Authority, but that the Central Authority never completed or returned the required certificate of service. *See e.g.,* Pl.'s Mot. at 6; Def.'s Mot. at 6; Stark Decision at 21. The issue is if this delivery alone is sufficient for service to be deemed completed. The Republic argues it is not. Saint-Gobain disagrees.

2. Judge Stark Correctly Found that Service Was Made Under Article 15 of the Convention.

In his December 12, 2019 order, Judge Stark determined that the Republic had been properly served by Saint-Gobain under Article 15 of the Convention. Stark Decision at 21. Article 15 permits a judgment to be issued after a writ of summons or equivalent document, which has been transmitted abroad for the purpose of service, "was actually delivered to the defendant. . . by another method provided for by this Convention." Judge Stark found that Saint-Gobain had fulfilled this requirement "[b]y 'actually deliver[ing] to the defendant,' i.e., the Republic, by serving the appropriate documents directly to the Central Authority designated by the Republic of Venezuela." Stark Decision at 22. At the time, the Republic argued that service was improper under the Hague Convention because delivery to

Venezuela's Central Authority only began the service process, which they contend was never completed because the Central Authority never returned a certificate confirming service. *See* Def.'s Default J. Opp'n at 13; *see also* Stark Decision at 21. Judge Stark disagreed and concluded service had been properly made in this instance, noting that the Hague Convention "does not permit a foreign sovereign to feign non-service by its own failure to complete and return the required certificate." Stark Decision at 21.

The Republic now argues that reconsideration of this decision is warranted because it was "clearly wrong." Def.'s Mot. at 22. It argues (for the first time), that Article 15 does not authorize service, and that Saint-Gobain failed to meet Article 15's express requirements by failing to deliver the summons in accord with procedures under Venezuelan law for service on the sovereign. Def.'s Reply at 6–7.

The Court agrees with Judge Stark's holding that service was made on the Republic under Article 15 of the Convention, given that his interpretation was reasonable and consistent with the findings of other courts. For example, in *Scheck v. Republic of Argentina*, the court found that Article 15 allowed for a conclusion that service was completed and jurisdiction over a sovereign state defendant was proper where the "Plaintiffs properly transmitted the documents to the [proper Central Authority]" that then refused to deliver and or provide a certificate for alleged deficiencies the court deemed "frivolous." *Scheck v. Republic of Arg.*, No. 10-cv-5167, 2011 WL 2118795 at *3 (S.D.N.Y. May 23, 2011). This is similar to what occurred in the instant case, though with less transparency to Saint-Gobain regarding the status of their service request. After delivery to the

Republic's Central Authority, the Central Authority took no further action, despite being required to do so. As Judge Stark determined, and the court in *Sheck* also recognized, "[t]he Hague Service Convention . . . does not permit a foreign sovereign to feign non-service by its own failure to complete and return the required certificate." Stark Decision at 21. This is particularly true given that, as is the case here, the Central Authority as part of the Republic itself, is also the party upon whom process is to be served. Other courts have found similarly. *See, e.g., Devengoechea v. Bolivarian Republic of Venez.*, No. 12-cv-23743, 2014 WL 12489848, at *1 (S.D. Fla. Apr. 25, 2014) ("Service was effectuated on Venezuela, through its Central Authority under the Hague Convention, on December 12, 2012, when it received the Summons, Complaint and transmittal documents."); *Box v. Dall. Mex. Consulate Gen.*, 487 Fed. App'x 880, 886 (5th Cir. 2012) (determining that pursuant to Article 15 of the Convention service of process occurred notwithstanding the failure of the Central Authority to issue a certificate, given it was "certainly not [Plaintiff's] fault that the authorities did not return a formal Certificate.") (citation omitted).

Against this backdrop, the Republic raises two new arguments for why the previous determination by Judge Stark was erroneous, including that (1) Article 15 cannot provide an independent basis for service of process, and (2) that the requirements of Article 15 were not met due to a failure to comply with internal Venezuelan law. Neither argument was presented to Judge Stark when this issue was first decided. As this Court has stated in the past, "a motion for reconsideration generally is not an opportunity for a party to relitigate an issue that was or should have

been raised at an earlier stage in the litigation." *See Paleteria La Michoacana, Inc. v. Productos Lacteos Tocumbo S.A. De C.V.*, 79 F. Supp. 3d 60, 72 (D.D.C. 2015) (citing *Singh v. George Washington Univ.*, 383 F. Supp. 2d 99, 101 (D.D.C. 2005)). This is because "motions for reconsideration enable courts to correct their own errors, not the litigants' errors." *Id.; see also Coulibaly*, 278 F. Supp. 3d at 301 (declining to allow a reconsideration motion to serve as a "vehicle for presenting theories or arguments that could have been advanced earlier."). And the Republic provides no explanation for why it did not raise these arguments in the first instance, or why it is "in the interests of justice" to consider them now. But regardless, this Court reviews these new arguments and finds that Judge Stark's conclusion is correct.

In order to argue that "Article 15 does not authorize service at all," Def.'s Mot. at 17, the Republic conducts a statutory analysis and invokes the legislative history of Article 15. Def.'s Reply at 4-7. The Republic contends that because there is no explicit authorization of service in the text of Article 15, and because the legislative history demonstrates that Article 15 was designed to prevent unfair entry of default judgments, it thus cannot be used as an independent method of service. *Id.* at 5. But this ignores that Judge Stark reached his conclusion that effective service had been rendered in the context of evaluating a motion for default, which the Republic does not dispute is a common action taken by courts and not contradicted by the plain language of Article 15. And as the Supreme Court and the D.C. Circuit have repeatedly noted, the plain terms of a statute cannot be muddied by legislative history. *See Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356,

2364 (2019); *see also Int'l Bhd. of Elec. Workers, Local Union No. 474, AFL-CIO v. N.L.R.B.*, 814 F.2d 697, 700 (D.C. Cir. 1987) ("[C]ourts have no authority to enforce alleged principles gleaned solely from legislative history that has no statutory reference point."). Second, even if the Court were to grant this inference, none of the legislative history cited indicates that the drafters intended to foreclose allowing service through Article 15, even if it was originally intended primarily to "eliminate notification au parquet." Def.'s Reply at 5–6.

The Republic's second argument— that Saint-Gobain has not met the requirements of Article 15— also fails to show error by Judge Stark. The Republic claims that the express terms of Article 15 were not met, Def.'s Reply at 7, because the summons documents were never "actually delivered [to the Republic]. . . *by another method provided for by this Convention*." Hague Service Convention art. 15 (emphasis added). This in effect resurrects the Republic's previously rejected argument that service of papers on the Central Authority does not equate to service on a state itself, without completion of a certificate under Article 6 of the Convention. Def.'s Mot. at 16.[9] But the cases the Republic relies on are

[9] After failing to succeed on their argument before Judge Stark that service was defective due to the lack of a completed certificate by the Central Authority, on this go-around the Republic makes much of the need under Venezuelan law to serve the Attorney General when commencing suit against the state itself. *See* Def.'s Mot. at 13–14; *see also* Def.'s Reply at 3 (arguing service could not be completed in accord with the requirements of Article 5 of the Convention due to "the absence of subsequent delivery [by the Central Authority] *in compliance with the internal law of the requested state*.") (emphasis added). But the authority the Defendant cites for this rule shows that it is the

inapposite, in that they only show that service of papers on a Central Authority does not equate to service on a third-party, which is all-together distinct from this situation where the Central Authority was the state that was served. *See, e.g., Cavic v. Republic of Serbia,* No. 8:16-cv-1910, 2018 WL 6038346, at *3 (C.D. Cal. Mar. 21, 2018) ("There is no evidence that [Plaintiff] has even initiated an attempt at proper service upon Serbia," where requests concerned a state-owned bank); *Samsung Elec. Co. v. Early Bird Sav.*, No. 13-cv-3105, 2014 WL 5139488, at *1 (S.D. Cal. Oct. 2, 2014) (requests to Chinese Central Authority concerned private Chinese corporations, not state sovereign). Judge Stark concluded that in this instance, where the Central Authority was the party being served, no further action was required for service beyond actual delivery to the Central Authority. *See* Stark Decision at 22. As previously detailed, other courts have come to similar conclusions. *See Scheck*, 2011 WL 2118795 at *3; *Box*, 487 Fed. App'x at 886; *Devengoechea*, 2014 WL

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responsibility of the Central Authority to take this step to have the attorney general notified. *See* Def.'s Mot. at 14 (citing *Rusoro Mining Ltd. v. Bolivarian Republic of Venez.*, No. 16-cv-2020 (D.D.C.), slip op. 10 (detailing how after being served, the Venezuelan Central Authority submitted a request for service to the Venezuelan court, who then arranged delivery to the Ministry of Foreign Affairs for service on the Attorney General). Thus, this defect is much the same as the failure to issue a certificate, in that it is an action within the control of the Central Authority, and could be manipulated to evade service, as Judge Stark feared. Because of the Court's shared concern with Judge Stark regarding the Republic's habit of evading service, *see* Pl.'s Opp'n at 8 n.5 (collecting cases demonstrating the Republic's evasion of service on itself under the Hague Service Convention), the Court rejects this argument.

12489848 at *1. And this Court agrees. In sum, the Republic has failed to show "clear errors of law which compel the court to change its prior position," *Nat'l Ctr. for Mfg. Sciences v. Dep't of Def.*, 199 F.3d 507, 511 (D.C. Cir. 2000), but regardless, this Court agrees with Judge Stark's prior determination that service was properly made on the Republic. Accordingly, the Republic's cross-motion for dismissal, treated as a motion for reconsideration, must be denied. Consequently, with jurisdiction being proper, the Court will register and enforce the award.

V. CONCLUSION

For the foregoing reasons, Saint-Gobain's Motion for Summary Judgment is **GRANTED** and the Republic's Motion for Dismissal is **DENIED**. An order consistent with this Memorandum Opinion is separately and contemporaneously issued.

Dated: February 1, 2021

RUDOLPH CONTRERAS
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

CRYSTALLEX INTERNATIONAL CORP., Plaintiff, v. PDV HOLDING INC., Defendant.	C.A. No. 15-cv-1082-LPS
CONOCOPHILLIPS PETROZUATA B.V., et al., Plaintiffs, v. PETROLEOS DE VENEZUELA S.A., et al., Defendants.	C.A. No. 16-cv-904-LPS
CRYSTALLEX INTERNATIONAL CORP., Plaintiff, v. PDV HOLDING INC., Defendant.	C.A. No. 16-cv-1007-LPS
CONOCOPHILLIPS PETROZUATA B.V., et al.,	

Plaintiffs, v. PETROLEOS DE VENEZUELA S.A., et al., Defendants.	C.A. No. 17-cv-28-LPS
CRYSTALLEX INTERNATIONAL CORP., Plaintiff, v. BOLIVARIAN REPUBLIC OF VENEZUEALA, Defendant.	C.A. No. 17-mc-151-LPS
SAINT-GOBAIN PERFORMANCE PLASTICS EUROPE., Plaintiff, v. BOLIVARIAN REPUBLIC OF VENEZUELA, et al., Defendants.	C.A. No. 18-cv-1963-LPS
OI EUROPEAN GROUP B.V., Plaintiff, v.	C.A. No. 19-cv-290-LPS

BOLIVARIAN REPUBLIC OF VENEZUELA, et al., Defendants.	

Decided December 12, 2019

MEMORANDUM ORDER

All of the numerous above-captioned actions relate to efforts to collect debts owed or allegedly owed by the Republic of Venezuela ("Venezuela" or "the Republic"). The case that has progressed furthest is *Crystallex International Corp. v. Bolivarian Republic of Venezuela*, 17-mc-151 ("*Crystallex Asset Proceeding*").[1] In the *Crystallex Asset Proceeding*, the Court issued an opinion in August 2018 holding that Crystallex had met its burden to prove that Petróleos de Venezuela S.A. ("PDVSA") is the alter ego of the Republic. *See Crystallex Asset Proceeding*, 333 F. Supp. 3d 380, 412, 414 ("*Crystallex* Aug. 9 Op."). The Court further held that the Republic's and PDVSA's jurisdictional immunities and immunities from attachment under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq.*, do not defeat Crystallex's claims. *See id.* at 414-21. Subsequently, in another opinion, the Court granted Crystallex's motion for writ of attachment. *See Crystallex Asset Proceeding*, 2018 WL 4026738 (D. Del. Aug. 23, 2018) ("*Crystallex* Aug. 23 Op."). The United States

[1] All citations to the docket index ("D.I.") are to the *Crystallex Asset Proceeding*, unless otherwise noted.

Marshals Service has served the writ. (*See* D.I. 96)

The Republic and PDVSA filed an interlocutory appeal in the Court of Appeals for the Third Circuit. (*See* D.I. 80) On November 23, 2018, while the appeal was being briefed, the Third Circuit stayed proceedings in this Court. (D.I. 129) ("[I]t is further ORDERED that all proceedings in the District Court are hereby stayed pending the merits panel's disposition of the petition for writ of mandamus and the consolidated appeals . . .") A week later, this Court issued its own stay order, staying proceedings in the *Crystallex Asset Proceeding* and in other actions[2] "until . . . the Third Circuit's disposition of the petition for writ of mandamus and the consolidated appeals." (D.I. 132)

On July 29, 2019, the Third Circuit issued an opinion affirming this Court. *See Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, 932 F.3d 126 (3d Cir. 2019) ("*Crystallex* App. Op.").[3] On September 30, 2019, while the Republic and PDVSA's

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[2] The other actions that were stayed as a result of this Court's November 30, 2018 order are: *Crystallex International Corp, v. PDV Holding Inc.*, C.A. No. 15-1082 ("*Crystallex I*"); *Crystallex International Corp, v. PDV Holding Inc.*, C.A. No. 16-1007 ("*Crystallex II*"); *ConocoPhillips Petrozuata B.V. v. Petróleos de Venezuela S.A.*, C.A. 16-904 ("*ConocoPhillips I*"); and *ConocoPhillips Petrozuata B.V. v. Petróleos de Venezuela S.A.*, C.A. 17-28 ("*ConocoPhillips II*").

[3] More particularly, as Crystallex has explained: "On July 29, 2019, the Third Circuit issued its order and judgment denying the appeal in *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, No. 18-2797, as well as denying as moot (i) the appeal in *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, No. 18-3124, and (ii) the petition for writ of mandamus filed in *In Re: Petróleos de Venezuela, S.A.*, No. 18-2889." (D.I. 139 at 1)

requests for rehearing were pending, the Third Circuit (without explanation) lifted its stay of this Court's proceedings. (*See* D.I. 136)

On October 11, 2019, this Court received a joint status report in the *Crystallex Asset Proceeding*. (*See* D.I. 139) Other status reports were thereafter provided in other actions. (*See Crystallex I* D.I. 115; *Crystallex II* D.I. 69; *ConocoPhillips I* D.I. 67; *ConocoPhillips II* D.I. 63) On November 13, 2019, the Court convened a consolidated, in-court status conference in all of the above-captioned actions to receive further input on how it should proceed. (*See Crystallex I* D.I. 118) ("Tr.") Then, on November 21, 2019, the Third Circuit denied the requests for rehearing.

Having reviewed all of the pertinent filings in all of these cases, and having carefully considered the comments provided at the November 13 status conference,

IT IS HEREBY ORDERED that:

1. The *Crystallex Asset Proceeding* is **STAYED** until the conclusion of proceedings in the Supreme Court (i.e., the latest of (if applicable) the expiration of the time to file a petition for a writ of certiorari ("cert. petition"), denial of such a petition, or conclusion of proceedings following grant of such petition) or further order of this or any other Court lifting the stay. The Court's decision to stay is **WITHOUT PREJUDICE** to Crystallex's opportunity to file a motion to lift the stay.

Federal Rule of Civil Procedure 62(c), which governs requests for a stay pending appeal, requires a court faced with a situation like the one before the

Court to consider "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *see also Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 658 (3d Cir. 1991) (applying *Hilton* factors and granting motion to stay). Applying this standard, the Court has determined that a stay until conclusion of proceedings in the Supreme Court is the best exercise of its discretion. While the Court cannot say that the Republic or PDVSA (both of which have indicated they will be filing a cert. petition (*see* D.I. 139 at 7) have made a strong showing they are likely to succeed on the merits, the Court does believe there is a greater-than-usual likelihood that their petition will be granted. (*See generally* Tr. at 25-27) (counsel for Republic discussing reasons Supreme Court may grant petition, including purported Circuit split and sensitive issues of international relations) More importantly, for reasons further explained below, the Court is persuaded that the Republic and PDVSA could be irreparably injured in the absence of a stay, yet a stay will not substantially injure the other parties (particularly Crystallex and other creditors) interested in the proceeding.[4] The Court also finds

[4] Crystallex asserts "there's a very real risk that we will be prejudiced severely if this case stalls and doesn't go anywhere after the Third Circuit has ruled" (Tr. at 20), but Crystallex has failed, at this point, to persuade the Court that this is correct. Crystallex is trying to collect money it is owed and it has attached property of the Republic (i.e., PDVSA's shares of Petróleos de Venezuela Holding ("PDVH")) in order to collect that debt. If the

that the public interest (including the public's interest in furthering the expressed foreign policy of the United States, as determined by the Executive Branch) strongly supports a stay.

Additionally, the following considerations (in no particular order) have factored into the Court's conclusion that its proceedings should be halted at this time:

A. Crystallex's lack of a license from the Office of Foreign Assets Control ("OFAC") and its failure to this point even to seek one.[5]

B. The uncertainty created by further proceedings, which could diminish the value of the Petróleos de Venezuela Holding ("PDVH") shares to be sold, as potential buyers cannot know with any confidence that a purchase and transfer of the shares can be consummated.[6]

Supreme Court proceedings do not alter the Third Circuit's instructions to this Court, the Court intends to proceed toward selling those shares. Crystallex's request for a bond (*see, e.g.*, Tr. at 20) is denied. (*See* Tr. at 37) (Republic: "They're fully secured for whatever the value is of those assets.").

[5] *See, e.g., Crystallex* App. Op. at 151 ("[A]ny attachment and execution against PDVSA's shares of PDVH would likely need to be authorized by the Treasury Department."); *id.* ("Whether that FAQ is legally binding, Crystallex has committed that it will seek clarification of the current license . . . and/or the issuance of an additional license to cover the eventual execution sale of the shares of PDVH once the [attachment w]rit has issued.") (internal quotation marks omitted; some alterations in original); *see also* Tr. at 24 (Crystallex acknowledging it has not yet sought OFAC license and does not believe it can until buyer of PDVSA's property is identified after bidding process).

[6] *See, e.g.*, Tr. at 36 (Republic: "If you start a process which is

C. The change in the regime of U.S. sanctions imposed on Venezuela and recent amendment of OFAC's policies and guidance.[7]

D. The change in the Boards of Directors at PDVSA, PDVH, CITGO Holding, Inc., and CITGO Petroleum Corp. ("CITGO"), and possible consequent changes in the relationship of PDVSA to the Republic.[8]

E. The change in the U.S.-recognized government of Venezuela.[9]

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designed to end up in a sale of these shares and there is a complete lack of certainty concerning whether or not that transaction can ever happen, it is going to severely depress the value of those shares."); Tr. at 39 (Republic: "[P]roceeding down with the sale process, all the way through essentially signing a contract to sale, waiting to find out whether they're going to get a license is going to substantially diminish the value that they're able to obtain . . . for the PDVH stock [which] will cause injury to Citgo Petroleum, a U.S. corporation with thousands of people employed.").

[7] *See, e.g.*, Tr. at 35 (Republic arguing: "The whole regime [of sanctions] has changed and the reasons for it have changed from being, in effect, punitive with respect to Venezuela to now being helpful to [it] in trying to preserve assets of Venezuela.").

[8] *See Jiménez v. Palacios*, 2019 WL 3526479 (Del. Ch. Aug. 2, 2019).

[9] *See* Tr. at 57 ("[N]ow we have a much more comprehensive blocking regime where the OFAC guidance is absolutely clear."); D.I. 139 at 8 ("On January 23, 2019, the President of the United States recognized Juan Guaidó as the interim president of Venezuela."). The Third Circuit has recognized the Guaidó regime "as authorized to speak and act on behalf of Venezuela" in these cases. *Crystallex* App. Op. at 135 n.2.

F. Issues of international affairs and United States foreign policy, which are within the purview of the Executive Branch.[10]

G. The Court's concern not to create a "run on the bank," that is, an influx of creditors to the Court, with negative consequences for the Republic, for U.S. policy (which favors an orderly transition of power in the Republic and a coordinated restructuring of its debts), and, potentially, this Court.[11]

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[10] The Republic, which did not appear in this Court's earlier proceedings but did intervene in the Third Circuit and has now entered an appearance here, as of October 10, 2019 (*see* D.I. 139 at 7), posits that "lifting the stay would undermine a foreign ally, worsen a grave humanitarian crisis, and tread on diplomatic sensitivities." (D.I. 139 at 7; *see also* Tr. at 63-64 ("[T]he foreign policy of the United States is that we want to encourage voluntary consensual restructuring in the cases of [our] foreign allies where they run into economic crisis. So the more we do to impede that, the worse it is for our nation's foreign policy."))

[11] *See* D.I. 139 at 11 ("Encouraged by the pendency of this case, a growing number of claimants are bringing piecemeal litigation against the Republic and PDVSA, attempting to seize their limited external assets or, at a minimum, outpace other similarly situated claimants."); *see also* Tr. at 31 ("So what is happening right now is on the one side, you have got a terrible crisis and a struggling government trying desperately to dislodge a despot and on the other side, you have a group of people, many of whom support the goals of the Guaidó government, support the intention to restore the economy, restore democracy, engage in a consensual restructuring, but they see what is happening in this courtroom and they feel that they cannot stand on the sidelines."); Tr. at 32 ("If the Court moves forward, it's creating, in essence, creating like a run on the bank. The more the Court moves forward, the more people are going to have to feel that they have no choice but to show up and try to elbow their way in in order to be in equal position so that they're not hurt, and that eventually will lead to a much more difficult voluntary

H. The humanitarian crisis in Venezuela, which has been described (by the Republic's own attorneys) as the worst on the planet other than in Syria.[12]

The Court recognizes that many (if not all) of these same considerations were recently presented to the Third Circuit, which nonetheless decided just two months ago to lift the stay it had imposed on this Court's proceedings. (*See* Tr. at 43) (Crystallex: "[E]very argument that you heard about the difficulties in Venezuela, about the sanctions, were all presented to the Third Circuit . . . [i]n opposition to our motion to lift the identical stay . . . . [Yet] the Third Circuit lifted [its] stay.") The Court of Appeals did not explain the reasoning for its stay decision. Nor did it, in this Court's view, dictate that this Court ***must*** now move forward, particularly when the Supreme Court is going to have an opportunity to review the Third Circuit's merits opinion, if it chooses to do so.

The Court also recognizes that, as the Third

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restructuring."); Tr. at 63 ("[T]he more the Court moves forward with cases against the Republic, the faster you will get new cases and other judges will get new cases because of the run on the bank problem, the mad scramble for assets problem.").

[12] *See, e.g.,* Tr. at 30-31 (Republic: "[T]he Republic of Venezuela is facing a massive humanitarian crisis. Other than Syria, it is the worst crisis on the Planet Earth at this time. People are going without food. People are leaving the country. People do not have enough medicine. They don't have electricity. It is a very bad situation, and the Republic is without significant resources to address that situation now."); *see also* 19-mc-290 D.I. 11 at 4 (Republic citing report that "Venezuela's gross domestic product [GDP] has plummeted nearly 50%" over past five years, which "is considered the biggest economic collapse in human history outside of war or state collapse and is double the size of the GDP drop in the United States during the Great Depression").

Circuit has pronounced, "Venezuela owes Crystallex from a judgment that has been affirmed in our courts. Any outcome where Crystallex is not paid means that Venezuela has avoided its obligations." *Crystallex* App. Op. at 149. Today's decision is not intended to permit Venezuela to accomplish such a result. Venezuela recognizes that it must pay what it owes. (*See, e.g.*, Tr. at 31) (counsel for Republic stressing that Guaidó government intends to engage in voluntary restructuring of all its debts) Instead, today's decision reflects the Court's attempt to carefully balance the many competing interests in a dynamic and internationally sensitive set of circumstances. Should Crystallex believe the Court's assessment is incorrect or an abuse of discretion, it can move to lift the stay – or seek to appeal this order.

The Republic has asked for a longer stay than the Court is granting. It seeks a stay "until somebody shows up with a license from OFAC saying that they're permitted to go forward." (Tr. at 29; *see also* D.I. 150 at 4 (arguing that cases should be stayed "until those parties [i.e., creditors] obtain a specific license from OFAC to proceed"))[13] Today's stay lasts

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[13] One of the multiple dynamic factors making the management of these cases all the more challenging is the (understandably) ongoing issuance of guidance from OFAC. Just this week, on December 9, 2019, OFAC responded to additional Frequently Asked Questions ("FAQ"), in a manner the Republic and PDVSA contend (correctly, in the Court's view) further supports the granting of at least some stay. (*See* D.I. 150) The new FAQs include the following:

> **808. Do I need a specific license from OFAC to file a suit in U.S. court against a person designated or blocked pursuant to Venezuela-related sanctions? Does a U.S. court, or its personnel, need a specific**

license from OFAC to hear such a case?

No. A specific license from OFAC is not ordinarily required to initiate or continue U.S. legal proceedings against a person designated or blocked pursuant to OFAC's Venezuela sanctions program, or for a U.S. court, or its personnel, to hear such a case. However, a specific license from OFAC is required for the entry into a settlement agreement or the enforcement of any lien, judgment, or other order through execution, garnishment, or other judicial process purporting to transfer or otherwise alter or affect property or interests in property blocked pursuant to the Venezuela Sanctions Regulations (31 C.F.R. Part 591). . . .

809. I hold a writ of attachment on shares of a Government of Venezuela entity whose property and interests in property are blocked pursuant to the Venezuela Sanctions Regulations. Am I authorized to prepare for and hold an auction or other sale of the shares, contingent upon the winning bidder obtaining a license from OFAC?

No. Parties who have attached shares of an entity whose property and interests in property are blocked pursuant to the Venezuela Sanctions Regulations (31 C.F.R. Part 591) must obtain a specific license from OFAC prior to conducting an auction or other sale, including a contingent auction or other sale, or taking other concrete steps in furtherance of an auction or sale. More generally, OFAC urges caution in proceeding with any step in furtherance of measures which might alter or affect blocked property or interests in blocked property. OFAC would consider license applications seeking to authorize such activities on a case-by-case basis. . . .

only until the completion of Supreme Court proceedings (subject to any further order of this or any other Court lifting the stay). The longer stay preferred by the Republic might be much longer indeed; it might even last forever, if Crystallex's speculation is correct that OFAC will not issue a license until a winning bidder has been identified (which cannot happen if this Court refuses to proceed with a sale until after a license is obtained).[14] A stay any longer than the one

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(D.I. 150-1)

Crystallex responded on December 11, 2019 by reiterating its position that the steps it proposes occur now – including requiring an answer to the writ and briefing how an eventual sale will be conducted without actually conducting such a sale – are still consistent with the OFAC guidance. (*See* D.I. 153) The Court recognizes that it has discretion to move forward in the manner Crystallex requests. However, for the reasons explained throughout this Order, the Court believes the most reasonable and appropriate exercise of its discretion is to not proceed until after litigation over the issues the Court has already resolved is concluded at the Supreme Court (one way or another). (*See also* 18-cv-1963 D.I. 38 (letter filed by creditor Saint-Gobain Performance Plastics Europe in response to Republic and PDVSA's December 9 letter); 19-mc-290 D.I. 25 (letter filed by creditor OI European Group B.V. in response to same))

[14] *See* Tr. at 24; *see also id.* at 66-68 (Crystallex: "There's no question that the U.S. Government knows what is going on here, but it's all somewhat hypothetical until we have a buyer identified and they can say, is this a good buyer? . . . OFAC is not going to be able to make that decision until they know who the party is and then we will do it. . . . [T]o ask them to take a position at this point in time in the abstract is really just asking them to, asking them for the purpose of causing additional delay here.").

Another creditor, OI European Group B.V. ("OI"), has sought a license from OFAC and (as far as the record reveals) that request is still pending. (*See, e.g.*, Tr. at 57-58) OI, like

the Court is entering today is not, at this time, warranted.

Given the Court's reasoning, it follows that now is not the appropriate time to require the Republic to answer the writ or for the Court to engage in the likely complicated and time-consuming effort to delineate the process for conducting a sale of the attached assets, both of which Crystallex requests be done expeditiously. (*See* D.I. 139 at 4-6; *see also generally id.* at 15 (CITGO observing that "[a] sale of privately-held stock of the magnitude at issue in this case is unprecedented")) Nor is now the appropriate time to litigate a motion to quash the writ or for reconsideration under Federal Rule of Civil Procedure 60(b), as the Republic and PDVSA suggest could also be done at this point. (*See id.* at 14) Instead, the legal issues presented by the Republic and PDVSA's appeal from this Court's August 2018 opinion should first receive their final determination with completion of the Supreme Court proceedings, however and whenever they end.

In the meantime, should Crystallex (or any other party, including any other creditor in the actions being stayed by this Order) believe it can persuade the Court that additional steps toward an eventual execution should be taken, it may so move. In the

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Crystallex, insists "if the stay isn't vacated in this court, then they certainly aren't going to do anything at OFAC and we are going to be stuck here for a long time." (*Id.* at 51)

As explained below, the Court is hopeful it will hear directly from some entity of the Executive Branch, perhaps including OFAC, so that it need not speculate whether OFAC will refrain from issuing a license until after the bidding process is completed.

absence of receiving and granting such a motion, this Court will await the conclusion of the Supreme Court process.

2. Further in the *Crystallex Asset Proceeding*, (a) Rosneft Trading S.A.'s motion to intervene (D.I. 100) is **GRANTED**; (b) CITGO's motion to intervene (D.I. 101) is **GRANTED**; (c) the Bondholders'[15] motion to intervene (D.I. 103) is **GRANTED**; and (d) PDVH's motion to extend its obligation to file a verified answer (D.I. 109) is **GRANTED**. After the stay is lifted, the parties should advise the Court as to their positions as to when an answer should be required.

Federal Rule of Civil Procedure 24(a)(2) provides:

> On timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

The Third Circuit has articulated four elements that must be established to permit intervention pursuant to Rule 24(a)(2): "(1) the application for intervention is

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[15] The "Bondholders" are BlackRock Financial Management, Inc. and its affiliates, on behalf of certain client funds and accounts under management, and Contrarian Capital Management, L.L.C., also on behalf of client funds and accounts that it manages, as holders of bonds issued by PDVSA. (*See* D.I. 103)

timely; (2) the applicant has a sufficient interest in the litigation; (3) the interest may be affected or impaired, as a practical matter by the disposition of the action; and (4) the interest is not adequately represented by an existing party in the litigation." *United States v. Terr. of V.I.*, 748 F.3d 514, 519 (3d Cir. 2014). "[T]he polestar for evaluating a claim for intervention is always whether the proposed intervenor's interest is direct or remote." *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 972 (3d Cir. 1998). The Third Circuit's approach favors "pragmatism" and "elasticity" over "rigid rules" or "narrow approach[es];" it further "favors intervention over subsequent collateral attacks." *Id.* at 970-71.

Each of the requirements is met by each of the proposed intervenors. The applications for intervention were timely, as they were consistent with the timing set out in the Court's August 23, 2018 Order. (D.I. 95 at 2) Each of the creditors (Rosneft and the Bondholders) has a sufficient interest to protect (i.e., an interest in collecting money owed to them by the Republic) that may be affected or impaired by the disposition of this action (if Crystallex collects $1.2 billion from the sale of PDVH shares, those assets will not be available to satisfy debts owed to others), which is not adequately represented by the existing parties in this litigation.

CITGO's interest is based on the fact that CITGO and its parent, CITGO Holding, Inc., are parties to various agreements that are secured by assets that could be impacted by the outcome of the *Crystallex Asset Proceeding*. Certain CITGO assets could be harmed by these proceedings (for reasons that are elaborated on in portions of CITGO's filings that are currently sealed). (*See, e.g.*, D.I. 101 at 3-6)

CITGO's interest is not adequately represented by any existing party in the litigation.

In considering all the relevant facts and circumstances, and preferring pragmatism and elasticity over rigidity, the Court can identify no prejudice to Crystallex in granting the intervention motions.

3. *Crystallex I* and *Crystallex II* will remain **STAYED** until completion of the Supreme Court proceedings in the *Crystallex Asset Proceeding* or further order of this or any other Court lifting the stay. (*See* C.A. No. 15-1082 D.I. 115) Only Rosneft opposes the continued stay, seeking instead dismissal, based on the purported futility of amendment of Crystallex's claim under the Delaware Uniform Fraudulent Transfer Act ("DUFTA"), 6 Del. C. § 1301 *et seq.*, given the Third Circuit's reversal of this Court's 2016 decision in *Crystallex I*, 213 F. Supp. 3d 683 (D. Del. 2016), *rev'd by Crystallex Int'l Corp. v. Petróleos de Venezuela, S.A.*, 879 F.3d 79 (3d Cir. 2018). The Court does not see any need to evaluate the futility of any proposed amendment at this time, particularly as *Crystallex I* and *Crystallex II* may become moot depending on what occurs in the *Crystallex Asset Proceeding*. (*See, e.g.*, Tr. at 47) (Crystallex explaining that it hopes to satisfy its judgment in *Crystallex Asset Proceeding*, thereby mooting *Crystallex I* and *II*)

4. *ConocoPhillips I* and *ConocoPhillips II* will remain **STAYED** until completion of the Supreme Court proceedings in the *Crystallex Asset Proceeding* or further order of this or any other Court lifting the stay. (*See* C.A. 16-904 D.I. 67) Only Rosneft opposes the continued stay, seeking dismissal instead, for the same reasons noted above in connection with

Crystallex I and *Crystallex II*. For the same reasons given above with respect to those cases, the Court also decides not to dismiss these *ConocoPhillips* cases.

5. OI, another creditor of the Republic, seeks an order granting a writ of attachment like the one granted to Crystallex in the *Crystallex Asset Proceeding*. (*See OI European Group, B.V. v. Bolivarian Republic of Venezuela*, 19-mc-290 D.I. 2) OI's principal contention is that the Court has already found that PDVSA is the Republic's alter ego, so the Republic and PDVSA are barred by the doctrine of collateral estoppel from relitigating this issue. (*See* 19-mc-290 D.I. 3 at 1, 8-14; *see also* Tr. at 51) ("[W]e're another secured creditor, precisely, or about to be, if the writ is granted, situated precisely as Crystallex was, except that we come second. And so under basic principles of collateral estoppel, the same rules should apply.") The Court disagrees. *See generally Crystallex* Aug. 9 Op. at 425 ("[T]he collateral estoppel effect of any ruling from this Court will be a matter to be decided by whatever . . . court is confronted with these issues at a later time.").

A party asserting collateral estoppel must prove the following elements: "(1) the issue sought to be precluded [is] the same as that involved in the prior action; (2) that issue [was] actually litigated; (3) it [was] determined by a final and valid judgment; and (4) the determination [was] essential to the prior judgment." *Nat'l R.R. Passenger Corp. v. Pa. Pub. Util. Comm'n*, 342 F.3d 242, 252 (3d Cir. 2003) (alterations in original).

The question of whether PDVSA can, under the present circumstances, be deemed an alter ego of the Republic is not identical to the issue decided in the

Crystallex Asset Proceeding, and has not been actually litigated and decided on the merits. *See Scooper Dooper, Inc. v. Kraftco Corp.*, 494 F.2d 840, 846 (3d Cir. 1974) ("It is well settled that changed factual circumstances [when they are "material" or "controlling"] can operate to preclude the application of collateral estoppel."). As the Republic persuasively argues: "things are not at all the same" as they were when the Court made its findings in the *Crystallex Asset Proceeding*. (Tr. at 55) "The relevant portion of PDVSA, which is the property in the U.S., is under different control under a new legal regime . . ., recognized by the U.S." (*Id.* at 55-56) Thus, the Court agrees with the Republic that "[t]he alter-ego status today was not actually litigated and necessarily decided in [the Court's] decision in August of 2018." (Tr. at 57)

Nor is it clear that the pertinent date as to which the Court must decide whether PDVSA was or is the alter ego of Venezuela in connection with OI's action is the same August 2018 date the Court analyzed in the *Crystallex Asset Proceeding*.[16] Instead, the pertinent date on which an alter ego relationship must exist (or must have existed) may well differ in different cases involving different creditors. The Court is not persuaded at this point that its finding of an alter ego relationship as of August 2018 is dispositive of whether such a relationship existed at

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[16] *See generally Crystallex* Aug. 9 Op. at 391 ("[T]he shares of PDVH . . . are, ***at this time***, really the property of Venezuela.") (emphasis added); *Crystallex* App. Op. at 150 (assessing "commercial use" element of FSIA attachment immunity analysis under "a totality-of-the-circumstances" standard "***at the moment*** the writ is executed") (emphasis added).

any other time.

Moreover, the Third Circuit expressly noted in its *Crystallex* Appellate Opinion: "On remand, Venezuela may direct to the District Court credible arguments to expand the record with later events." *Crystallex* App. Op. at 144; *see also Crystallex* Aug. 9 Op. at 424-25 ("[T]he record which has persuaded this Court that PDVSA and Venezuela should be treated as alter egos of one another may not be the same record that is created in some other action. Indeed, even in this case, the record may be supplemented in the next stage of the proceedings . . . which could potentially lead to different findings."); *id.* at 425 (identifying as "unsettled" whether "Venezuela, PDVSA, and/or any other entity [may] appear and seek to supplement the factual record already developed in this litigation and, if so, will such an entity attempt to (and if so, be permitted to) argue that additional evidence materially alters the Court's findings"). If even the *Crystallex Asset Proceeding* record may possibly be expanded, it must be that the Court has discretion in the non-Crystallex actions to consider a record other than (or in addition to) the record created in the *Crystallex Asset Proceeding*.

Yet another reason collateral estoppel will not be applied is that equitable principles disfavor its application in the circumstances presented here. "Even when the requirements of the general rule of collateral estoppel are satisfied, the Court must consider whether there are special circumstances present which make it inequitable or inappropriate to foreclose relitigation of a previously determined issue." *Nat'l R.R. Passenger Corp.*, 288 F.3d at 528; *see also Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330-31 (1979) ("[Where] the application of offensive estoppel

would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel."); *Smith v. Borough of Dunsmore*, 516 Fed. App'x 194 (3d Cir. 2013) (recognizing courts "have broad discretion to determine when to apply non-mutual offensive collateral estoppel") (internal quotation marks omitted). The same concerns that have persuaded the Court it is appropriate to stay these actions until conclusion of the Supreme Court proceedings likewise suggest that the equities do not favor the application of collateral estoppel that creditors, including OI, are seeking.

Since collateral estoppel does not apply, any creditor seeking to place itself in a situation similar to Crystallex will have to prove that PDVSA is and/or was the Republic's alter ego on whatever pertinent and applicable date.[17] In attempting to meet this burden, any creditor may be able to find support (perhaps strong support) in the record created in the *Crystallex Asset Proceeding* and the finding reached (and affirmed)[18] there. But that is a determination that will

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[17] At least with respect to ***execution*** of a writ, the Third Circuit has explained that a "totality-of-the-circumstances inquiry" applies. *Crystallex* App. Op. at 150. "[N]arrowing the temporal inquiry to [just] the day the writ is executed [would] unnecessarily leave[] room for manipulation." *Id.*; *see also id.* ("This analysis should include an examination of the uses of the property in the past as well as all facts related to its present use, with an eye toward determining whether the commercial use of the property, if any, is so exceptional that it is an out of character use for that particular property.") (internal citation and quotation marks omitted). It may be that the "temporal inquiry" with respect to immunity from suit and issuance of the writ (i.e., "extensive-control" analysis) calls for a similar totality analysis. The Court need not decide these issues at this point.

[18] The Third Circuit evidently found it easy to affirm this Court's

need to be made in each non-Crystallex case, at the appropriate time.

From all of the foregoing, it follows that a creditor like OI must prove, by a preponderance of the evidence, that PDVSA is the alter ego of Venezuela on and as of the pertinent date – just as Crystallex did in connection with its writ of attachment.[19] OI has failed to present any evidence other than attempting to rely on the record created in the *Crystallex Asset Proceeding*. As collateral estoppel does not apply, OI has failed to meet its burden of proof. Accordingly, OI's motion for a writ of attachment (19-mc-290 D.I. 2) is

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finding. *See, e.g.*, *Crystallex* App. Op. at 133 (noting that Venezuela did "not substantially contest the District Court's finding that it extensively controlled PDVSA"); *id.* at 144 (noting that outcome would have been the same even if clear and convincing evidence standard applied); *id.* at 146 ("PDVSA effectively conceded that Crystallex satisfied each factor under *Rubin* at oral argument"); *id.* at 152 ("[W]here a foreign sovereign exerts dominion over the instrumentality so extensive as to be beyond normal supervisory control . . . equity requires that we ignore the formal separateness of the two entities. This [case] clears that bar ***easily***.") (emphasis added); *see also id.* at 146 (noting that any "equitable basis" required to rebut presumption of separateness between Venezuela and PDVSA "is easily satisfied here").

[19] The Third Circuit noted Venezuela's argument that the "appropriate point of reference for the extensive-control analysis" is "the moment the writ is issued." *Crystallex* App. Op. at 144. For purposes of appellate review, the Third Circuit rejected the contention that it should analyze the extensive-control question as of a date different than the date this Court analyzed, as the Third Circuit's task was to review this Court's analysis. *See id.* While Venezuela "points to no authority for [its] proposition" that the only pertinent date is the date the writ is issued, *id.*, this Court does not (and need not at this point) decide which date is the pertinent date for undertaking an extensive-control analysis in any of the non-Crystallex cases.

DENIED.

Further, for the same reasons given above in connection with the *Crystallex Asset Proceeding*, 19-mc-290 is **STAYED** until completion of the Supreme Court proceedings in the *Crystallex Asset Proceeding* or further order of this or any other Court lifting the stay.

6. For the same reasons given above in connection with the *Crystallex Asset Proceeding*, *OI European Group B.V. v. Bolivarian Republic of Venezuela*, 19-cv-290, is **STAYED** until completion of the Supreme Court proceedings in the *Crystallex Asset Proceeding* or further order of this or any other Court lifting the stay. (*See also* Tr. at 60) (counsel for CITGO explaining this case is "basically tracking the *Conoco* civil cases and *Crystallex* civil cases")

7. Saint-Gobain Performance Plastics Europe ("Saint-Gobain") is another creditor of the Republic. *See Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, 18-cv-1963. Saint-Gobain has an International Centre for Settlement of Investment Disputes ("ICSID") award on which it seeks to collect. On December 5, 2019, the Court heard oral argument on Saint-Gobain's motion for entry of default judgment and the Republic and PDVSA's cross-motion to vacate the Clerk's entry of default.

For the reasons stated below, (a) Saint-Gobain's motion for default judgment (D.I. 11) is **DENIED**; (b) the Republic's and PDVSA's motions to vacate the entry of default are **GRANTED**; (c) the Republic's motion to transfer is **GRANTED** and this action as against the Republic will be **TRANSFERRED** to the United States District Court for the District of

Columbia, as the District of Delaware is not a proper venue; and (d) this action as against PDVSA is **DISMISSED**, as there has not been proper service.

Because the Court is granting the Republic and PDVSA's motion to vacate the Clerk's entry of default, for the reasons to be explained, it follows that the Court cannot grant Saint-Gobain's motion to enter a default judgment. *See Church-El v. Bank of N.Y.*, 2013 WL 1190013, at *4 (D. Del. Mar. 21, 2013) ("The Third Circuit and multiple district courts within the Circuit have recognized that an entry of default or a default judgment can be set aside if it was not properly entered at the outset, including circumstances where proper service of the complaint is lacking.") (citing cases); Fed. R. Civ. Proc. 55 (explaining that entry of default judgment involves two-step process, beginning with Clerk's entry of default). Further, there is "good cause" to set aside the default against the Republic because it will not prejudice Saint-Gobain (which presumably will have an opportunity after the case is transferred to continue to attempt to collect on its ICSID judgment); the Republic has a meritorious defense to proceeding here (i.e., improper venue); and the default was not the result of the Republic's "culpable conduct" but rather due (at least as it appears from the record) to the change in government in the Republic, the crises that nation is experiencing, and a vast amount of pending litigation confronting Venezuela. *See* Fed. R. Civ. Pro. 55(c); *see also Gold Kist, Inc. v. Laurinburg Oil Co.*, 756 F.2d 14, 19 (3d Cir. 1985).[20]

[20] The Court need not analyze whether there is "good cause" to set aside the default against PDVSA because the case against PDVSA is being dismissed.

The Court is vacating the Clerk's entry of default as to the Republic and transferring this action as against the Republic because venue is not proper in the District of Delaware. Saint-Gobain's contention that Delaware is a proper venue turns on two propositions: that PDVSA is "doing business" in Delaware (through PDVH) and that PDVSA is Venezuela's alter ego. (*See, e.g.*, 18-cv-1963 D.I. 21 at 9-11 (citing 28 U.S.C. § 1391(f)(3); *see also id.* D.I. 1 at 3 ¶ 5 (Saint-Gobain alleging: "Venue in this District is proper under 28 U.S.C. § 1391(f)(3) because Defendant PDVSA is an instrumentality of Venezuela that does business in Delaware through PDVH.")) Neither of these propositions has been established in this case.

First, in the *Crystallex Asset Proceeding*, this Court found that PDVSA has "used" PDVH stock "for a commercial activity" within the meaning of 28 U.S.C. § 1610, a finding affirmed by the Third Circuit, *see Crystallex* App. Op. at 149-50. Contrary to Saint-Gobain's contention, however, that finding does not equate to a finding that Venezuela (through PDVSA) is "doing business" in Delaware, as that term is understood in the context of 28 U.S.C. § 1391(f)(3). (*See* 18-cv-1963 D.I. 21 at 9-11) Instead, the "used . . . for a commercial activity" finding was based on the distinction between "a foreign government act[ing] . . . as a regulator of a market" and one acting "in the manner of a private player within it," *Crystallex* App. Op. at 150;[21] *see also Crystallex* Aug. 9 Op. at 418

[21] As the Third Circuit explained in the *Crystallex* Appellate Opinion:

> [T]he phrase commercial activity captures the distinction between state sovereign acts, on the one hand, and state commercial and private acts, on the other. [W]hen a foreign

(same), which is a different inquiry than whether the foreign government is "doing business." *See generally Vivadent (USA), Inc. v. Darby Dental Supply Co.*, 655 F. Supp. 1359, 1362 (D.N.J. 1987) ("[An entity] will be held to be 'doing business' for purposes of section 1391(c) if its activities within the district are such that its business has become localized and is in operation within the district so that some state would probably require the foreign corporation to be licensed as a condition precedent to doing that business.") (emphasis omitted). Not every "private player" act taken by a sovereign in the market constitutes "doing business" or would require a license.

Second, and for reasons already explained, Saint-Gobain (like OI) has not demonstrated that PDVSA is or was the alter ego of Venezuela as of the pertinent date.

The proper venue for this action as against the Republic is the United States District Court for the District of Columbia ("D.C. Court"). *See* 28 U.S.C. § 1391(f)(1) (FSIA provision requiring civil action against foreign state be brought in D.C. Court unless "a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated,"

> government acts, not as a regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are commercial within the meaning of the [Sovereign Immunities Act]. Commercial actions include those that . . . are the type of actions by which a private party engages in trade and traffic or commerce.

Crystallex App. Op. at 150 (internal citations, quotation marks, and emphasis omitted).

in another District). The Court will transfer (rather than dismiss) this action to the D.C. Court.

The case as against PDVSA is being dismissed because PDVSA has not been properly served. The FSIA permits four methods by which a plaintiff may effect service on a defendant foreign sovereign, the second of which is "in accordance with an applicable international convention on service of judicial documents." 28 U.S.C. § 1608(a)(2). Here, the applicable convention on service of judicial documents is the Hague Service Convention.[22] The Hague Service Convention requires member-states to establish a Central Authority to receive and process requests for service of documents from other countries, and to effectuate such service. *See* Hague Service Convention art. 2. Once service has been effectuated, the Central Authority is then required to complete a certificate detailing the circumstances of service or explaining why service was prevented, and return that certificate directly to the service applicant. *See* Hague Service Convention art. 6. Service is deemed to be "made" on the date of service set forth in the certificate of service provided by the Central Authority. *See* 28 U.S.C. § 1608(c)(2).

Saint-Gobain couriered service papers to the Venezuelan Foreign Ministry, which Venezuela has designated as its Central Authority, but the Central Authority never returned a completed certificate of service to Saint-Gobain. (18-cv-1963 D.I. 11 at 11-12) The Hague Service Convention contemplates such a situation and does not permit a foreign sovereign to

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[22] *See* Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163.

feign non-service by its own failure to complete and return the required certificate. For example, the first paragraph of Article 15 of the Hague Service Convention provides that a default judgment may be entered where "the document was ***actually delivered to the defendant*** or to his residence by another method provided for by this Convention." Hague Service Convention art. 15 (emphasis added).[23] Pursuant to this first paragraph of Article 15, the Court finds (based on the undisputed evidence) that Saint-Gobain has served the Republic. By "actually deliver[ing] to the defendant," i.e., the Republic, by serving the appropriate documents directly to the Central Authority designated by the Republic of Venezuela, Saint-Gobain served the Republic, notwithstanding the Republic's failure to provide Saint-Gobain a certificate.[24]

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[23] In other words, the first paragraph, by setting out that "judgment shall not be given until it is established" that at least one of the disjunctive conditions of paragraph 1 is met, provides that judgment ***may*** be given once such a condition is established.

The Republic reads the first paragraph of Article 15 as delineating a necessary but not independently sufficient condition for service. (*See, e.g.*, 18-cv-1963 Dec. 5, 2019 Tr. at 26-35, 57; *see also id.* D.I. 18 at 14-17) The Republic further contends that the conditions set out in the second paragraph of Article 15 must be found satisfied in order to find that the Republic has been served, in the absence of a completed certificate of service. (*See id.* Dec. 5, 2019 Tr. at 27) The Court disagrees. The second paragraph does not limit applicability of the first paragraph. Instead, it provides another manner of perfecting service despite a sovereign's failure to complete a certificate, "notwithstanding the provisions of the first paragraph." Hague Service Convention art. 15.

[24] The Republic's argument that personal jurisdiction is lacking is rejected, as it relies on the premise of improper service, which

The analysis is different for service on PDVSA. For the same reasons given above in connection with OI's motion, the Court finds that Saint-Gobain has failed at this point to meet its burden to prove that PDVSA is the alter ego of Venezuela as of the pertinent date in the *Saint-Gobain* action. Saint-Gobain has provided no evidence that PDVSA should be treated as the alter ego of the Republic other than pointing generally to the record and holding in the *Crystallex Asset Proceeding*. As Saint-Gobain has itself admitted, unless PDVSA is viewed as the alter ego of Venezuela, there has been no service on PDVSA. Therefore, the case as against PDVSA must be dismissed. (Consequently, the Court will not address PDVSA's other arguments for dismissal.)

8. Finally, the Court invites and would welcome any input that the Executive Branch of the United States Government would like to provide at any and all future stages of any of the above-captioned actions. If, as would be entirely acceptable to the Court, the Executive Branch wishes to provide input during the pendency of the stay of any of these actions, any party may provide a brief response to any such submission in a timely manner, notwithstanding the stay.

The Court will deliver a copy of this Order to the United States Attorney for the District of Delaware ("USAO") and requests that the USAO take reasonable efforts to ensure that copies of the Order are received by the pertinent offices within the United States Department of Justice. (*See* Tr. at 65, 70) (counsel for Republic suggesting this course of

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the Court has rejected. (*See* 18-cv-1963 D.I. 18 at 10-11)

action)[25]

December 12, 2019
Wilmington, Delaware

[Signature]
HONORABLE LEONARD P. STARK
UNITED STATES DISTRICT JUDGE

[25] The Court does not mean to suggest that it will automatically or necessarily defer to whatever views and preferences the Executive Branch may express. (*See generally* D.I. 153) (contending that certain readings of OFAC FAQs "would raise potential separation of powers concerns") But the Court does feel its analysis of the issues it must decide will be better informed if it hears directly from the Executive Branch.