No. 21-1574

# 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*

## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI


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## ARGUMENT

This Court should grant the petition filed by Saint-Gobain Performance Plastics Europe ("Saint-Gobain). At its core, the opposition reluctantly submitted by the Bolivarian Republic of Venezuela's ("Venezuela"), admits that Saint-Gobain properly delivered papers in relation to an action to enforce an arbitration award against Venezuela on Venezuela's own Foreign Ministry—the entity that Venezuela designated as its Central Authority under 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"). Venezuela further admits that it's Foreign Ministry never delivered the papers to Venezuela's Attorney General, in breach of Venezuela's obligations under the Hague Service Convention. Nevertheless, Venezuela continues to ask the courts of the United States to penalize Saint-Gobain for that failure. Review of the D.C. Circuit Court's opinion is appropriate because the D.C. Circuit Court's Opinion effectively: (*i*) sanctions Venezuela's breach of its obligations under the Hague Service Convention; and (*ii*) encourages other recalcitrant sovereign debtors to follow Venezuela's example as a means of delaying or avoiding suits in the primary forum designated for suits against sovereigns by the Foreign Sovereign Immunities Act ("FSIA").

### I. The Issue of Whether Saint-Gobain Properly Served Venezuela Pursuant to the Hague Service Convention is Properly Before the Court.

As set forth in the petition, the question

presented is as follows: whether a district court, after the entry of default, may determine that service upon a foreign State was completed, pursuant to Article 15 of the Hague Service Convention, where the plaintiff actually delivered service papers to the State's Central Authority. Pet. at i.

Venezuela says that the petition mischaracterizes the issue decided below. Opp. 12. However, the Delaware District Court's initial decision, finding that service was completed on Venezuela, was issued after an entry of default and its analysis was based on the terms of Article 15 of the Hague Service Convention, which governs motions for default judgment. In particular, the Delaware District Court held:

> Pursuant to this first paragraph of Article 15 [of The Hague Service Convention], 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."

Pet. App. 85a.

After the case was transferred to the D.C. District Court, that court also recognized that the Delaware District Court's decision was predicated on the prior entry of default against Venezuela, stating that, "[o]n 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.* at 34a–35a. The D.C. District Court then framed its decision confirming service as one reviewing the Delaware District Court's "prior finding." *Id.* at 35a. As a result, the D.C. District Court's decision is rooted in the same context as the Delaware District Court's decision.

Similarly, in response to Venezuela's appeal to the D.C. Circuit, Saint-Gobain framed the issue in it appellate brief exactly as it did in the petition now pending before this Court:

> Whether a District Court deciding a motion for default judgment may find service upon a State pursuant to Article 15 of the Hague Convention and the FSIA where the plaintiff actually delivered service papers to the State's Central Authority, its Foreign Ministry.

See Brief of Plaintiff-Appellee, *Saint-Gobain Performance Plastics Europe v. Bolivarian Rep. of Venez.*, 2021 U.S. D.C. CIR. BRIEFS LEXIS 1225, at *5 (July 2. 2021). And the D.C. Circuit Court's opinion addressed Saint-Gobain's perspective on the issue, assessing both Article 5 and 15 of the Hague Convention in turn. See Pet. App. 25a–27a.

## II. The Second and Fifth Circuits' Opinions Retain Persuasive Value And Conflict With The D.C. Circuit Court's Opinion.

Venezuela next misunderstands the persuasive value of the Second and Fifth Circuits' opinions in *Burda Media, Inc. v. Viertel*, 417 F.3d 292 (2d Cir. 2005), and *Box v. Dallas Mexican Consulate General,* 487 F. App'x 880 (5th Cir. 2012). See Opp. 13–15. These cases include persuasive analyses as to why the technicalities of the Hague Service Convention cannot overshadow its stated purpose of streamlining and simplifying service abroad.

At root of Saint-Gobain's argument is *Burda Media*'s holding that "the failure to comply strictly with the Hague Convention is *not* automatically fatal to effective service." 417 F.3d at 301. As the Second Circuit noted, the Hague Convention "carefully articulates the procedure which a litigant must follow in order to perfect service abroad, [but] it does not prescribe the procedure for the forum Court to follow should an element of the procedure fail." *Ibid.* (quoting *Fox v. Regie Nationale Des Usines Renault*, 103 F.R.D. 453, 455 (W.D. Tenn. 1984)). This is the exact predicament that the Delaware and D.C. District Courts found themselves in. But *Burda Media* stood as a valid solution to an unjust problem. If the Court focuses on the presence of actual knowledge to the defendant rather than the technical requirements ripe for abuse, it may insert a backstop otherwise missing from the Hague Service Convention, all while preserving the Convention's primary purpose "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."

*Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 698 (1988).

Similarly, *Box*, though unpublished, has persuasive value in its similarities to this case. There, Mexico argued that, "although Box sent the correct documents to the correct agency, the Hague Convention requires the foreign state to issue a certificate ***indicating service on itself***, which Mexico never did in this case." 487 F. App'x at 885 (emphasis added). In analyzing the conundrum of a foreign State leaving a plaintiff on hold to certify that it served itself, the Fifth Circuit's opinion provides two takeaways that are incompatible with the D.C. Circuit Court's opinion and worthy of this Court's consideration.

First and foremost is that the Fifth Circuit understood that service upon a foreign State implicates far fewer due process concerns than service upon a third party located within a State. It differentiated other cases declining to recognize service where no certificate was returned, stating that "the plaintiffs [in those cases] sought to serve a complaint against foreign corporations rather than the foreign government itself, rendering the certificate explaining service to the corporation more important than explaining service on itself." *Id.* at 886. The second takeaway is that the deficiencies in service under the Hague Service Convention's strict terms were of no fault of the plaintiff. Adopting a quote from *Burda Media*, the Fifth Circuit noted that "[i]t was certainly not [Box's] fault that the [Mexican] authorities did not return a formal Certificate." *Ibid.* (quoting *Burda Media, Inc.*, 417 F.3d at 301) (quotation marks omitted). Nor did "[t]he Consulate . . . dispute that Box sent the correct documents to the

correct office." *Ibid*. As a result, service was assumed without fear of sacrificing the foreign State defendant's rights under the Convention.

Together, these cases formed a basis that led lower courts to look to actual notice rather than technical deficiencies. And the D.C. Circuit Court's opinion, if left to stand, would do the opposite—effectively encouraging sovereigns bent on avoiding compliance with arbitration awards to delay actions in the United States by breaching their obligations under the Hague Service Convention.[1]

## III. Venezuela's Own Conduct Highlights The Importance Of This Petition.

Venezuela's opposition does nothing to address the significant ramifications if the D.C. Circuit Court's opinion.

First, there is what Venezuela does not say. Venezuela does not refute the fact that Saint-Gobain followed the Hague Service Convention by delivering the correct papers to Venezuela's Central Authority, the Foreign Ministry. See Opp. 6. Nor can Venezuela defend its failure to carry through with its own treaty obligations. Even accepting Venezuela's argument that service was not completed until its Foreign Ministry/Central Authority served the Venezuelan attorney general, Venezuela cannot escape the fact that the reason that never happened is Venezuela's

[1] Venezuela argues that *Box*'s and *Burda Media*'s focus on the presence or absence of an Article 6 certificate—not the underlying service—sufficiently separates it from the facts of this case. Opp. 14–15. But this assumes that the Central Authority is not part and parcel of the foreign State. And even so, the underlying reasoning of the cases apply with great force here. The State cannot make hay of the Convention by ignoring its obligations in the wake of a requesting party's adherence to all the formalities.

own breach of the Hague Service Convention.

While Venezuela alludes to the effects of the 2019 political upheaval resulting in the transition of government from Nicolas Maduro to Juan Guaidó, (Opp. 7, 26), that fact has no relevance to these proceedings. As the opposition recognizes, Saint-Gobain delivered its service papers to the Foreign Ministry ***before*** Mr. Guaidó asserted his claim as president of Venezuela. *Ibid.* Venezuela therefore acknowledges it received Saint-Gobain's service papers through its Foreign Ministry at a time it was under control of the same Venezuelan government recognized by the United States. This fact is critical. It is axiomatic that a State's legal obligations survive changes in government and that new governments inherit legal obligations incurred under former administrations.[2] It follows that the United States' recognition of Mr. Guaidó's administration ***after*** Saint-Gobain completed its part under the Hague Service Convention is totally irrelevant.

Venezuela's silence regarding the core of this dispute—its own breach of the Convention—reveals the contorted nature of Venezuela's position. It at

[2] See *Lehigh Valley R. Co. v. State of Russia*, 21 F.2d 396, 401 (2d Cir.) ("A monarchy may be transformed into a republic, or a republic into a monarchy; absolute principles may be substituted for constitutional, or the reverse; but, though the government changes, the nation remains, with rights and obligations unimpaired."), *cert. denied*, 275 U.S. 571 (1927); *Trans-Orient Marine Corp. v. Star Trading & Marine, Inc.*, 731 F. Supp. 619, 621 (S.D.N.Y. 1990) ("International law sharply distinguishes the succession of state, which may create a discontinuity of statehood, from a succession of government, which leaves statehood unaffected. It is generally accepted that a change in government, regime or ideology has no effect on that state's international rights and obligations because the state continues to exist despite the change.") (citing Restatement (3d) of the Foreign Relations Law of the United States, § 208, cmt. a.), *aff'd* 925 F.2d 566 (2d Cir. 1991).

once argues that the Convention must be adhered to but allows for no repercussions for its own antecedent breach of the same Convention—even though that breach was the cause of the alleged failure to complete service. See Opp. 17 (stating it was "petitioner's failure" to complete service); *id.* at 23. This convoluted argument demonstrates why the D.C. Circuit's Opinion must be reversed and aligned to the Second Circuit's maxim that "the failure to comply strictly with the Hague [Service] Convention is *not* automatically fatal to effective service." *Burda Media, Inc.*, 417 F.3d at 301.

Then, there is what Venezuela does say. Venezuela repeatedly asserts that the main difference between this case and those properly invoking Article 15, thus allowing assumptions of service, is the fact that Venezuela eventually appeared. See Opp. 12, 13–14, 15, 17. In Venezuela's perspective, this fact separates this case from the well-reasoned opinions of the Fifth and Second Circuits, (Opp. 13–15), and renders Article 15 as a whole inapplicable, (Opp. 17). But Venezuela's opposition ignores the central fact animating the decisions in both district courts: Venezuela's appearance came after the entry of default.

As in *Box* and *Burda Media*, Saint-Gobain stood before the District Court with signed receipts confirming delivery of papers to the correct party. Here, that happens to not only be Venezuela's Central Authority, but 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 applicable treaty. See 28 U.S.C. § 1608(a)(3). As in *Box* and *Burda*, the District Courts then found that

Article 15 permitted entry of default judgment. The fact that Venezuela waited until after the entry of default changes nothing.

The reality of the situation lays bare Venezuela's argument that Article 15 cannot have the implied effect of finding valid service. See Opp. 16–17. *Of course* Article 15 acts as a means to confirm service.[3] In order to enter default, a court must necessarily have jurisdiction over the defendant—a necessary element of which is proper service. This is why Article 15 includes a requirement to prove "actual delivery." Pet. App. 7a. It does not rewrite the treaty or otherwise tread on the power of the Executive branch to understand that the Judiciary branch's exercise of the power to enter judgment necessarily recognizes validity of service at the same time.

## IV. Saint-Gobain Should Not Be Forced To Serve Venezuela Diplomatically.

Venezuela's opposition closes by assuring the Court that no review is necessary when Saint-Gobain could simply serve Venezuela diplomatically. Opp. 26.

To begin with, Saint-Gobain is under no obligation to serve Venezuela in the manner most convenient to the State. If anything, *Venezuela* is obligated to accept service through all of the methods it expressly agreed to respect when signing the Hague Service Convention. See Pet. App. 1a (Convention

[3] Venezuela states that Article 15 operates as a sanction against the requesting party. Opp. 20. Article 15 is a sanction that takes into account *both* parties' interest. See III Conférence de la Haye de Droit International Privé, *Actes et Documents de la Dixième Session* 363 (1964), https://perma.cc/5Sn2-TKUB. While requesting parties are sanctioned with a stay of proceedings until adequate notice is made, responding parties are also sanctioned when that notice is ignored with a default judgment. *Ibid*; see also *Schlunk*, 486 U.S. at 705.

preamble stating that "[t]he States signatory to the present Convention . . . have agreed upon the following provisions").

Furthermore, if Saint-Gobain were to serve Venezuela diplomatically—and assuming Venezuela timely accepted that service—it would moot Saint-Gobain's petition, leaving the D.C. Circuit Court's opinion standing. This would effectively leave a loophole in federal jurisprudence to allow recalcitrant States to effectively delay or avoid altogether United States legal proceedings, even where the requesting party properly abided by the text and requirements of the Hague Service Convention. The Hague Service Convention would be reduced to a shell-game of service—a paper of empty promises. As Venezuela admits, (Opp. 27), diplomatic service is the backstop of the FSIA, available where international conventions on service fail. See 28 U.S.C. § 1608(a)(2), (4).[4]

Saint-Gobain will not be party to Venezuela's degradation of the Hague Service Convention. It stands in the best position to challenge Venezuela's breach of its international obligations so that other parties are not forced with the decision of wading down the long appellate path Saint-Gobain has so far weathered or chasing Venezuela through a rabbit hole of alternative service channels. The fact that Saint-Gobain is holding Venezuela to its obligations rather than chasing illusory alternatives is no reason for this Court to deny the petition.

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[4] Perhaps unsurprisingly, Venezuela attempts to skip over another valid avenue of service under the FSIA—service upon a State's ministry of foreign affairs—simply stating that it is irrelevant. Opp. 23 n. 9; see also 28 U.S.C. § 1608(a)(3).

## CONCLUSION

The Court should grant the 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.

Respectfully submitted,

August 31, 2022

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