

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

CRYSTALLEX INTERNATIONAL
CORPORATION,

Plaintiff-Appellee,

v.

BOLIVARIAN REPUBLIC OF
VENEZUELA,

Defendant-Appellant.

Nos. 18-2797, 18-3124

(D. Del. No. 17-mc-151)

MOTION FOR LEAVE TO INTERVENE AND TO STAY PROCEEDINGS

The Bolivarian Republic of Venezuela (“the Republic”) respectfully requests the Court’s leave to intervene in the above-captioned consolidated appeals and further requests a 120-day stay of proceedings, to and including Monday, July 1, 2019. A 120-day stay is necessary to allow the newly installed government of Juan Guaidó, Interim President of the Republic, sufficient time to evaluate its position in this and other cases involving the Republic currently pending in U.S. courts. The Republic seeks this relief as a matter of international comity and in recognition of its unprecedented political, social, and economic circumstances. Such relief is particularly warranted in this case, which concerns control of the Republic’s

strategic assets and threatens judicial interference with the Executive Branch's foreign policy objectives.

BACKGROUND

A. The Republic Was Not Served and Did Not Appear in the District Court.

On April 7, 2017, the U.S. District Court for the District of Columbia entered judgment confirming an arbitral award against the Republic in the amount of \$1,202,000,000. On June 19, 2017, Plaintiff-Appellant Crystallex International Corp. ("Crystallex") registered the judgment in the U.S. District Court for the District of Delaware. D.I. 1.¹

On August 14, 2017, Crystallex moved for a writ of attachment *feri facias* to attach the shares of PDV Holding, Inc. (PDVH), which are wholly owned by Petróleos de Venezuela, S.A. (PDVSA), the national oil company of Venezuela. D.I. 3-1. Through PDVH, PDVSA indirectly owns CITGO Petroleum Corp., the U.S.-based petroleum company. *Id.* at 61 n.36. There is nothing in the record demonstrating that either the registration of judgment or the motion for attachment *feri facias* were served upon the Republic. And the Republic did not appear before the District Court.

¹ While these proceedings were pending, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the confirmation of the arbitral award.

PDVSA, however, intervened and moved to dismiss. D.I. 14; D.I. 25. On August 10, 2018, the District Court denied PDVSA's motion to dismiss and granted Crystallex's motion for attachment *feri facias*. D.I. 83. The court acknowledged that the Republic had not appeared and instead treated Crystallex and PDVSA as the "parties" for the purpose of the motions and related proceedings. *Id.* at 2 & n.1; *see also id.* at 27–28.² But the court specifically contemplated that—if the Republic did appear—it could “seek to quash the writ” by “argu[ing] that additional evidence materially alters the Court’s findings.” *Id.* at 75.

PDVSA timely appealed the District Court's order granting attachment under the collateral order doctrine. JA-1. On November 23, 2018, this Court stayed all proceedings in the District Court pending disposition of the consolidated appeals.

B. The Republic and Crystallex Have Executed a Settlement Agreement.

In September 2018, while this appeal was pending, the Republic and Crystallex entered into an agreement to settle this and other litigation. *See*

² Citations to the district court's opinion are to the Bates Stamp pagination in D.I. 83.

PDVSA's Opp. to Mot. to Expedite Oral Arg., Facchinetti Decl. (Doc. 3113121203). PDVSA was not a party to the agreement.

Pursuant to the Settlement Agreement, the Republic made a payment of \$425,000,000 to Crystallex. *Id.* The agreement further provided for a "Temporary Stay Period" (until January 10, 2019), during which the parties would suspend litigation. *Id.*, Ex. 1, § 2. The Agreement contemplated that, during the Temporary Stay Period, the Republic would provide Crystallex with certain collateral and execute and deliver "Final Settlement Documentation" further documenting the Republic's deferred payment obligations. *Id.* § 3. The Agreement required the Final Settlement Documentation to "be in form and substance satisfactory to Crystallex in its commercially reasonable judgment." *Id.* § 3(b).

The parties now dispute whether the Settlement Agreement has been breached by PDVSA's failure to stay proceedings in this Court. *See, e.g.*, Crystallex's Mot. to Expedite Oral Arg. at 2–3; PDVSA's Opp. to Mot. to Expedite Oral Arg., Facchinetti Decl., Ex. 7. But neither Crystallex nor the Republic have invoked the Settlement Agreement's dispute resolution clause, which provides for exclusive jurisdiction in New York state and federal courts, *id.*, Ex. 1, § 14–15, nor have the parties otherwise reached a mutually agreed conclusion on the current status of the Settlement Agreement.

C. President Trump Has Recognized Interim President Juan Guaidó as the Rightful Representative of the Republic.

Since January 10, 2019, National Assembly President Juan Guaidó has acted as interim President of Venezuela pursuant to Article 233 of the Venezuelan Constitution. On January 23, 2019, following a public statement by President Guaidó ratifying the application of Article 233, U.S. President Donald Trump issued a statement officially recognizing Mr. Guaidó as interim President of Venezuela and rejecting the legitimacy of the Maduro regime.³

In response to President Trump's recognition of President Guaidó, former president Maduro purported to expel all American diplomatic personnel from Venezuela. Secretary of State Pompeo rejected Mr. Maduro's assertion of political and diplomatic authority, stating that "[t]he United States does not recognize the Maduro regime as the government of Venezuela."⁴ He explained "the United States does not consider former president Nicolás Maduro to have the legal authority to break diplomatic relations with the United States" and that "the United

³ The White House, *Statement from President Donald J. Trump Recognizing Venezuelan National Assembly President Juan Guaido as the Interim President of Venezuela* (Jan. 23, 2019), available at <https://www.whitehouse.gov/briefings-statements/statement-president-donald-j-trump-recognizing-venezuelan-national-assembly-president-juan-guaido-interim-president-venezuela/>.

⁴ U.S. Dep't of State, Press Statement, *Continuing U.S. Diplomatic Presence in Venezuela* (Jan. 23, 2019), available at <https://www.state.gov/secretary/remarks/2019/01/288545.htm>.

States maintains diplomatic relations with Venezuela and will conduct our relations with Venezuela through the government of interim President Guaidó, who has invited our mission to remain in Venezuela.”⁵

On February 25, Vice President Pence reiterated the position of the United States: “President Guaidó, President Donald Trump asked me to be here today to deliver a simple message to you and to the people of Venezuela: *Estamos con ustedes*. We are with you 100 percent. We stand with you in America, along with all the nations gathered here today, and we will keep standing with you until democracy and your *libertad* are restored.”⁶

Under applicable U.S. law, President Trump’s recognition of President Guaidó as the rightful representative of the Republic is dispositive, and only President Guaidó or his representatives may assert the interests of the Republic in U.S. courts.⁷ The decision of the Executive Branch to recognize a party as the rightful representative of the government of a foreign state is conclusive and binding on U.S. courts. *See Guaranty Trust Co. v. United States*, 304 U.S. 126,

⁵ *Id.*

⁶ The White House, *Remarks by Vice President Pence to the Lima Group, Bogota, Colombia* (Feb. 25, 2019), available at <https://www.whitehouse.gov/briefings-statements/remarks-vice-president-pence-lima-group-bogota-colombia/>.

⁷ Arnold & Porter has been engaged and instructed by the Guaidó government to represent the Republic in this litigation.

138 (1938); *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015); *see also* Restatement (Third) of Foreign Relations Law § 204 (“Under the Constitution of the United States the President has exclusive authority to recognize or not to recognize a foreign state or government.”). And only the representatives of a government that has been recognized by the United States have standing to sue in U.S. courts or otherwise can avail themselves of the U.S. judicial system. *See Pfizer v. Government of India*, 434 U.S. 308, 319–20 (1978). Where competing factions within a foreign government both seek to assert the interests of the foreign state, courts must recognize only that faction which has been recognized by the Executive Branch as rightfully representing the foreign state. *Republic of Panama v. Air Panama Internacional, S.A.*, 745 F. Supp. 669, 672–76 (S.D. Fla. 1988).

D. The United States Has Imposed Sanctions on PDVSA.

On January 28, 2019, the U.S. Treasury Department’s Office of Foreign Assets Control (OFAC) imposed new comprehensive sanctions against PDVSA by adding it to the List of Specially Designated Nationals and Blocked Persons (SDN).⁸ Treasury Secretary Mnuchin explained that the United States intended to “continue to use the full suite of its diplomatic and economic tools to support

⁸ *See* U.S. Dep’t of the Treasury, Press Release, *Treasury Sanctions Venezuela’s State-Owned Oil Company Petroleos de Venezuela, S.A.* (January 28, 2019), available at <https://home.treasury.gov/news/press-releases/sm594>.

Interim President Juan Guaidó, the National Assembly, and the Venezuelan people’s efforts to restore their democracy.”⁹ Secretary Mnuchin further stated that the purpose of the sanctions was to “prevent further diverting of Venezuela’s assets by Maduro and preserve these assets for the people of Venezuela. The path to sanctions relief for PDVSA is through the expeditious transfer of control to the Interim President or a subsequent, democratically elected government.”¹⁰ Secretary of State Pompeo likewise described the sanctions as intended to “preserve the core pillar of Venezuela’s national assets for the people and a democratically elected government.”¹¹

The designation of PDVSA as an SDN means that, with few exceptions, U.S. persons may not engage in any transactions or dealings with or involving PDVSA or entities in which it holds, directly or indirectly, a 50% or greater interest. Under the new sanctions, any funds used to purchase oil from PDVSA that come within U.S. jurisdiction will be diverted into blocked accounts.¹² The

⁹ *Id.*

¹⁰ *Id.*

¹¹ U.S. Dep’t of State, Press Statement, *Sanctions Against PDVSA and Venezuelan Oil Sector* (Jan. 28, 2019), available at <https://www.state.gov/secretary/remarks/2019/01/288623.htm>.

¹² See U.S. Dep’t of the Treasury, *Issuance of a New Venezuela-related Executive Order and General Licenses; Venezuela-related Designation* (Jan. 28, 2019), available at <https://www.treasury.gov/resource-center/sanctions/OFAC->
(footnote continued on next page)

U.S. government has stated its intention to make those funds available only to President Guaidó or his representatives, or a future democratically elected government.¹³

E. President Guaidó Has Appointed an Independent Board of Directors to Gain Control of the Citgo Entities.

On February 8, 2019, President Guaidó exercised his constitutional and statutory authority to appoint an *ad hoc* administrative board to represent PDVSA in its capacity as shareholder of PDVH for the limited purpose of appointing a new, independent board of directors of PDVH. The administrative board, acting by unanimous written consent in its capacity as sole shareholder of PDVH, appointed new directors of PDVH. Through similar corporate actions, new officers and directors were appointed at CITGO Holding, Inc., and CITGO Petroleum Corporation (together with PDVH, the “CITGO Entities”).

(footnote continued from previous page)

Enforcement/Pages/20190128.aspx; see also Executive Order 13,857, 84 Fed. Reg. 509 (Jan. 25, 2019).

¹³ See *Treasury Sanctions Venezuela’s State-Owned Oil Company*, *supra*, note 8; *Sanctions Against PDVSA and Venezuelan Oil Sector*, *supra*, note 11.

DISCUSSION

I. The Court Should Grant the Republic’s Motion to Intervene to Protect Its Assets and to Assert the Interests of the Venezuelan People.

This Court has discretion to permit intervention at the appellate stage in “exceptional circumstances” and for “imperative reasons.” *In re Grand Jury Investigation Into Possible Violations of Title 18, U. S. Code, Sections 201, 371, 1962, 1952, 1951, 1503, 1343 & 1341*, 587 F.2d 598, 601 (3d Cir. 1978); *see also Gonzalez v. Reno*, No. 00-11424-D, 2000 WL 502118, at *1 (11th Cir. Apr. 27, 2000) (permitting intervention on appeal after briefing had concluded and oral argument had been scheduled). This Court should exercise that discretion here, for several reasons.

First, this case concerns the Republic’s strategic assets and “raise[s] sensitive issues concerning the foreign relations of the United States.” *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983). Courts “recognize the need for special sensitivity in areas such as our government’s foreign relations conduct,” and act with caution where “a court’s pronouncements on certain subjects may conflict with the Executive’s and embarrass this country’s conduct of its foreign policy.” *Eain v. Wilkes*, 641 F.2d 504, 515 (7th Cir. 1981). Here, the Executive Branch has explained that its policies, including new sanctions aimed at PDVSA, are intended to “preserve the core pillar of Venezuela’s national assets for

the people and a democratically elected government.”¹⁴ This litigation threatens judicial interference with those important foreign policy objectives. *Cf. World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1165–66 (D.C. Cir. 2002) (“[I]t is clear that judicial scrutiny of sovereign decisions allocating the benefits of oil development would embarrass the political branches of our government in the conduct of foreign policy.” (quoting *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404, 408 (9th Cir. 1983))).

Second, the case implicates the Republic’s sovereignty and immunity from suit in U.S. courts. The District Court determined (1) that PDVSA is an alter ego of the Republic and not immune from suit, and (2) that the shares of stock in PDVH—which the court treated as an asset of the Republic itself—are not immune from execution and attachment. In other words, the District Court concluded that the Republic is not immune from suit and that the Republic’s assets are not immune from execution and attachment. The consequences of these decisions are of vital importance to the Republic. The decision in this case could adversely affect the ability of President Guaidó to complete the transition of the Republic to democracy. The Republic, under President Guaidó’s leadership, is determined to evaluate its rights and responsibilities dispassionately and bearing in mind the best

¹⁴ *Sanctions Against PDVSA and Venezuelan Oil Sector*, *supra*, note 11; *see also Treasury Sanctions Venezuela’s State-Owned Oil Company*, *supra*, note 8.

interests of the Republic and its stakeholders, but cannot do so without adequate time.

Third, this appeal raises complex questions of subject-matter and personal jurisdiction, including foreign-sovereign immunity, immunity from execution and attachment, and lack of personal jurisdiction for insufficient service under the Foreign Sovereign Immunities Act (FSIA). This Court has a duty to assure itself of its jurisdiction, and the Republic's views on these questions will be of interest to the Court. *See Elliott Indus. Ltd. P'ship v. BP Am. Prod. Co.*, 407 F.3d 1091, 1104 (10th Cir. 2005) (permitting intervention on appeal to challenge subject-matter jurisdiction); *Duplan v. Harper*, 188 F.3d 1195, 1203 (10th Cir. 1999) (similar).

Fourth, President Guaidó's assumption of the presidency has brought about and will likely continue to bring about a substantial change in the factual circumstances at issue in this litigation, including with regard to PDVSA's and the CITGO Entities' independence vis-à-vis the Republic. On February 8, 2019, President Guaidó appointed an *ad hoc* administrative board of PDVSA, which has exercised its authority to appoint a new, independent board of directors of PDVH and new officers and directors have been appointed at each of the CITGO Entities. This measure is a step to preserve the CITGO Entities' independence, according to new provisions recently enacted by the National Assembly, the Republic's legitimate legislative authority. Additional changes are expected, in light of

PDVSA's status as an SDN and the intention of President Trump and other Executive Branch leadership to assist President Guaidó to effect historic change in Venezuela. Such changes may have an important bearing on the District Court's analysis, such as its determination that the Republic exercised day-to-day control over PDVSA. As the United States now recognizes President Guaidó's government, the District Court's analysis appears at a minimum not to account for the current situation.

Fifth, due to this Court's existing stay of proceedings in the District Court, intervention here is the only way for the Republic to assert its interests at this time. Although the Republic is the named defendant in the underlying District Court proceedings, it was not served as required under the FSIA. The District Court has been divested of jurisdiction, and this Court stayed all proceedings in that court. Intervention is thus the only mechanism available by which the Republic can assure itself that its interests will be protected at this time in the Court of Appeals.

Sixth, the present circumstances in Venezuela are truly "exceptional" and justify this Court's exercise of discretion to permit the Republic to intervene at this stage of proceedings. President Guaidó's assumption of the presidency under Article 233 was unprecedented. It marks a sea-change in Venezuelan politics and governance, and the transition will likely have far-reaching political, economic, and social consequences, both within the Republic and internationally. The

Executive Branch's recognition of Interim President Guaidó as the only legitimate representative of the Republic is equally important and has binding legal consequences in the United States. This transition is particularly relevant to the Republic's motion to intervene because all of the proceedings before the District Court and the principle briefing on appeal were conducted during the prior administration, which had an antagonistic relationship with the United States.

Finally, intervention should be granted as a matter of international comity flowing from the exceptional humanitarian, economic, and political circumstances confronting the Republic. International comity, in this sense, "refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court*, 482 U.S. 522, 544 n.27 (1987). As this Court has repeatedly explained:

It is not a rule of law, but one of practice, convenience, and expediency. Although more than mere courtesy and accommodation, comity does not achieve the force of an imperative or obligation. Rather, it is a nation's expression of understanding which demonstrates due regard both to international duty and convenience and to the rights of persons protected by its own laws. Comity should be withheld only when its acceptance would be prejudicial to the interest of the nation called upon to give it effect.

Philadelphia Gear Corp. v. Philadelphia Gear de Mexico, S.A., 44 F.3d 187, 192 (3d Cir. 1994) (quoting *Remington Rand v. Business Sys. Inc.*, 830 F.2d 1260, 1267

(3d Cir. 1987), quoting, in turn, *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971)). The D.C. Circuit has likewise explained in ordering a default of a foreign sovereign vacated: “When a defendant foreign state has appeared and asserts legal defenses ... it is important that those defenses be considered carefully and, if possible, that the dispute be resolved on the basis of all relevant legal arguments.” *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1552 (D.C. Cir. 1987).

II. A 120-Day Stay of Proceedings Is Necessary for the New Government to Evaluate Its Position in this Litigation.

President Guaidó is currently staffing his government with the necessary legal advisors to evaluate the Republic’s position in this and other litigation in the United States. In these fluid circumstances, adequate time is necessary to ensure that the Republic is able to make fully informed decisions that protect the interests of the Republic during this crucial moment in Venezuela’s history. To that end, the Republic respectfully requests that the court stay all proceedings in the consolidated appeals for 120 days.

A relatively brief stay of proceedings is not likely to prejudice Crystallex, and the balance of the equities strongly favors the Republic. First, the Republic and Crystallex have entered into a settlement agreement, and the Republic has proven its good faith by making an initial payment of \$425,000,000—roughly one third of the judgment. Second, this dispute has been pending in various forums for

years; a delay of four months can hardly be deemed significant under the circumstances. The Republic's interests in a stay, moreover, are exceptionally strong. This case involves the Republic's strategic assets, implicates the Republic's sovereignty and immunity from suit and from execution and attachment, and threatens to undermine important foreign policy determinations by the Executive Branch. A stay would permit the new government of President Guaidó time to evaluate these complex issues and to determine appropriate steps necessary to protect the interests of the Republic before this Court and/or the District Court.¹⁵

* * *

PDVSA consents to the motion; Crystallex opposes.

The Republic reserves its rights to raise any and all arguments or defenses—including sovereign immunity, lack of subject-matter jurisdiction, lack of personal jurisdiction, failure to effect service as required by the Foreign Sovereign Immunities Act, and changed factual circumstances—both in this Court and in the District Court.

¹⁵ The Court of Appeals for the District of Columbia Circuit recently granted the Republic a similar 120-day extension of time in which to file its opening brief in an appeal from the confirmation of a different arbitral award. *See* Clerk's Order [1773506], *Rusoro Mining Corp. v. Bolivarian Republic of Venezuela*, No. 18-7044 (D.C. Cir. Feb. 14, 2019).

CONCLUSION

For the foregoing reasons, the Court should grant the Republic's motion for leave to intervene and to stay proceedings, and enter a 120-day stay of proceedings, to and including Monday, July 1, 2019.

Respectfully submitted,

Dated: March 1, 2019

/s/ Paul J. Fishman

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CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2019, I electronically filed the foregoing document with the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: March 1, 2019

/s/ Stephen K. Wirth
Stephen K. Wirth

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing document complies with Federal Rules of Appellate Procedure 27(d)(2)(A) and 32(g)(1) because it contains 3,174 words. I further certify that the foregoing document complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)–(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

Dated: March 1, 2019

/s/ Stephen K. Wirth
Stephen K. Wirth