IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KOCH MINERALS SÀRL
Chemin Des Primeveres 45
Fribourg, 1700
Switzerland

KOCH NITROGEN INTERNATIONAL SÀRL
Chemin de Primeveres 45
Case Postale 592
Fribourg, 1701
Switzerland,

Plaintiffs,

v.

BOLIVARIAN REPUBLIC OF VENEZUELA;
Ministerio del Poder Popular para Relaciones Exteriores
Oficina de Relaciones Consulares
Avenida Urdaneta
Esquina Carmelitas a Puente Llaguno
Piso 1 del Edificio Anexo a la Torre MRE
Caracas, 1010
República Bolivariana de Venezuela,

Defendant.

Civil Action No: 17-cv-02559-DAR

KOCH MINERALS SÀRL AND KOCH NITROGEN INTERNATIONAL SÀRL'S RESPONSE TO DEFENDANT BOLIVARIAN REPUBLIC OF VENEZUELA'S MOTION TO SET ASIDE THE CLERK'S ENTRY OF DEFAULT AND TO DISMISS THE COMPLAINT FOR LACK OF PERSONAL JURISDICTION

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

BACKGROUND 2

I. The Koch Parties Properly Served Venezuela In Accordance With The Hague Convention. 6

A. No Certificate Of Service Is Required When Serving A State. 6

B. The Hague Convention Permits Service On Venezuela By Courier. 11

II. Article 15 Of The Hague Service Convention Confirms That A Default Judgement May Be Entered When Service Papers Were "Actually Delivered" To A Defendant Pursuant To The Convention. 12

III. There Is No Good Cause To Set Aside The Clerk's Entry Of Default. 15

A. The Koch Parties Will Be Prejudiced If Default Is Set Aside. 15

B. The Default Resulted From Venezuela's Culpable Conduct. 16

C. Venezuela Fails To Present A Meritorious Defense. 17

CONCLUSION 18

TABLE OF AUTHORITIES

CASES

Bowen v. Georgetown Univ. Hosp.,
488 U.S. 204 (1988).....10

**Box v. Dall. Mexican Consulate Gen.*,
487 F. App'x 880 (5th Cir. 2012).....7–8, 15

Burda Media, Inc. v. Viertel,
417 F.3d 292 (2d Cir. 2005).....7, 8

**Devengoechea v. Bolivarian Republic of Venez.*,
No. 12-CV-23743-PCH, 2014 U.S. Dist. LEXIS 188755 (S.D. Fla. Apr. 24, 2014).....7

Fox v. Regie Nationale des Usines Renault,
103 F.R.D. 453 (W.D. Tenn. 1984).....7, 8

Jouanny v. Embassy of France,
220 F. Supp. 3d 34 (D.D.C. 2016).....4

**Marschhauser v. Travelers Indemnity Co.*,
145 F.R.D. 605 (S.D. Fla. 1992).....11–12, 14, 15

Mezerhane v. República Bolivariana De Venezezuela,
No. 11-23983-CIV-COOKE/TUR, 2013 U.S. Dist. LEXIS 196802 (S.D. Fla. Mar. 19, 2013).....8–9

Micula v. Gov't of Romania,
No. 17-cv-2332 (APM) (D.D.C. July 13, 2018).....10

Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezezuela,
863 F.3d 96 (2d Cir. 2017).....16

OI European Grp. B.V. v. Bolivarian Republic of Venezezuela,
2019 U.S. Dist. LEXIS 85128 (D.D.C. May 21, 2019).....3, 18

Republic of Sudan v. Harrison,
139 S. Ct. 1048 (2019).....8

Richardson v. Attorney General of the British Virgin Islands, No. 2008-144, 2013 U.S. Dist. LEXIS 117763 (D.V.I. Aug. 20, 2013).....9–10

TECO Guatemala Holdings, LLC v. Republic of Guatemala,
No. CV 17-102 (RDM), 2018 U.S. Dist. LEXIS 168518, 2018 WL 4705794 (D.D.C. Sept. 30, 2018).....3

**Tidewater Inv. SRL v. Bolivarian Republic of Venezuela*,
2018 U.S. Dist. LEXIS 211469 (D.D.C. 2018) 3, 16

Transaero, Inc. v. La Fuerza Aerea Boliviana,
30 F.3d 148 (D.C. Cir. 1994) 9

Water Splash, Inc. v. Menon,
137 S. Ct. 1504 (2017) 12

RULES & REGULATIONS

Federal Rule of Civil Procedure 4 .....3, 8

Federal Rule of Civil Procedure 55(b) 6

ICSID Administrative and Financial Regulation 14(3)(e) 5

Local Rule 7(g) 18

STATUTES

22 U.S.C § 1650a 1, 3, 15, 18

28 U.S.C. § 1608 .....3, 4, 5, 6, 8, 9

Federal Arbitration Act (9 U.S.C. 1 et seq.) 3, 18

INTERNATIONAL TREATIES

Convention on the Settlement of Investment Disputes Between States and
Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270 .....1, 2, 3, 5, 16, 17

The Hague Convention on the Service Abroad of Judicial and Extrajudicial
Documents in Civil and Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361,
658 U.N.T.S. 163 1–18

OTHER AUTHORITIES

Restatement (3d) of the Foreign Relations Law of the U.S., § 208, cmt. a (1987) 10

Koch Minerals Sàrl ("KOMSA") and Koch Nitrogen International Sàrl ("KNI") (collectively "the Koch Parties"), respectfully submit this Response in Opposition to the Motion to Set Aside the Clerk's Entry of Default and to Dismiss the Complaint for Lack of Personal Jurisdiction filed by the Bolivarian Republic of Venezuela ("Venezuela"). Venezuela's motion is meritless. It is a transparent effort to delay the enforcement of the Koch Parties' ICSID Award (the "Award") and it should be rejected.

Ten years ago, Venezuela took the Koch Parties' interest in a Venezuelan fertilizer plant known as "FertiNitro" without compensation. The Koch Parties then brought arbitration proceedings at the International Center for Settlement of Investment Disputes ("ICSID") to compel Venezuela to provide compensation for that unlawful act. Two years ago, a distinguished arbitral tribunal issued the Award in favor of the Koch Parties. Two months later, the Koch Parties commenced the instant action so that this Court would give that ICSID Award "the same full faith and credit as if [it] were a final judgment of a court of general jurisdiction of one of the several States" (as required by the ICSID Convention and 22 U.S.C § 1650a). Shortly thereafter, the Koch Parties properly served Venezuela in accordance with the provisions of the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters ("Hague Convention"). Despite, as is undisputed in this case, having received the court papers more than 18 months ago, Venezuela ignored this proceeding and, as a result, the Clerk entered a default. Now, two days before a scheduled hearing on the Koch Parties' Motion for Entry of Default Judgment, Venezuela has appeared seeking to set aside the Clerk's entry of default. Venezuela's motion is without merit.

Venezuela does not deny its obligation to comply with the ICSID Award, suggest any substantive defenses to payment, or allege that it never received notice of this action. Instead,

Venezuela asks the Court to set aside the default because, after its Foreign Ministry (the Ministry Venezuela designated as its Central Authority for purposes of the Hague Convention) received service in the form required by the Hague Convention and delivered by a private courier, it never issued a certificate confirming service on itself. In other words, although Venezuela does not dispute actual receipt of the papers in question at the place and in the form required by the Hague Convention, Venezuela seeks to further delay honoring its obligation to pay the Award because of its own refusal (again) to comply with the law.

Venezuela's arguments should not be countenanced because: (*i*) the Koch Parties properly served Venezuela through its Central Authority in a manner fully consistent with the Hague Convention; and because (*ii*) neither the Hague Convention nor the Foreign Sovereign Immunities Act ("FSIA") permits Venezuela to avoid being sued in the United States by simply ignoring papers that were properly delivered to it. Because Venezuela's arguments necessarily fail, and because no good cause exists to set aside the default entered in this case, Venezuela's Motion should be denied, and the Award given full faith and credit as if it were a final judgment of one of the United States.

BACKGROUND

The Koch Parties initiated these proceedings to enforce the 2017 Award issued by an arbitral tribunal (the "Tribunal") constituted pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention" or the "Convention"). ECF # 1; First Yanos Decl. ¶¶ 2–3. [1] The enforcement of ICSID awards occurs

[1] In this brief, "First Yanos Decl." refers to the Declaration of Alexander A. Yanos, dated May 9, 2019 (ECF # 21); "Second Yanos Decl." refers to the Declaration of Alexander A. Yanos, dated May 16, 2019, in support of the Koch Plaintiffs' Motion for Entry of Default Judgment; and "Third Yanos Decl." refers to the Declaration of Alexander A. Yanos, dated August 16, 2019, attached to this Response Memorandum.

outside of the Federal Arbitration Act. *See* 22 U.S.C. § 1650a(a) ("The Federal Arbitration Act (9 U.S.C. 1 et seq.) shall not apply to enforcement of awards rendered pursuant to the [ICSID] Convention."). Instead, 22 U.S.C. § 1650a precludes substantive or procedural review of ICSID awards, providing that "[t]he pecuniary obligations imposed by such an 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." *See also Tidewater Inv. SRL v. Bolivarian Republic of Venezuela*, 2018 U.S. Dist. LEXIS 211469, *16 (D.D.C. 2018) ("[T]he language of § 1650a appears to envision no role for this Court beyond ensuring its own jurisdiction over this action and the validity of Tidewater's entitlement to any unpaid claims under the Award."); *OI European Grp. B.V. v. Bolivarian Republic of Venez.*, 2019 U.S. Dist. LEXIS 85128, *12-13 (D.D.C. May 21, 2019) ("[a] member state is 'not permitted to examine an ICSID award's merits, its compliance with international law, or the ICSID tribunal's jurisdiction to render the award;' all it may do is 'examine the judgment's authenticity and enforce the obligations imposed by the award.'") (quoting *TECO Guat. Holdings, LLC v. Republic of Guatemala*, No. CV 17-102 (RDM), 2018 U.S. Dist. LEXIS 168518, 2018 WL 4705794, at *2 (D.D.C. Sept. 30, 2018)).[2]

After commencing this proceeding, the Koch Parties moved to serve Venezuela. Under the FSIA, service upon a foreign state must take place in accordance to 28 U.S.C. § 1608. Fed. R. Civ. P. 4(j)(1). Section 1608(a) allows for service in four circumstances:

> The preferred method of service is for a plaintiff to deliver 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. In the absence of such special arrangement, the second way to accomplish service is to deliver a copy of the

[2] Under the ICSID Convention, the only place Venezuela could have attempted to challenge the Award is before an annulment committee constituted under the auspices of ICSID. Venezuela initially sought annulment of the Award but then abandoned the effort, such that the annulment proceedings has been suspended for the past four months. *See infra.*

> summons and complaint 'in accordance with an applicable international convention on service of judicial documents. Failing the first two methods, a plaintiff may arrange for the clerk of the court to send a copy of the summons and complaint and a notice of suit to the head of the ministry of foreign affairs of the foreign state. Lastly, a plaintiff may request the clerk of the court to send two copies of the summons and complaint and a notice of suit to the Secretary of State, who then sends the papers via diplomatic channels to the foreign state.

Jouanny v. Embassy of France, 220 F. Supp. 3d 34, 38–39 (D.D.C. 2016) (discussing 28 U.S.C. § 1608(a)). Here, an "applicable international convention" provides for service upon Venezuela: the Hague Convention, to which both the United States and Venezuela are signatories. Under the Hague Convention, each signatory state must "designate a Central Authority which will undertake to receive requests for service" from other signatory states. Hague Convention, art. 2. Venezuela designated the Office of Consular Relations of Venezuela's Ministry of the Popular Power for External Relations (*Ministerio del Poder Popular para Relaciones Exteriores*) ("Foreign Ministry") as its Central Authority under the Hague Convention. Third Yanos Decl., Ex. 1.

On January 11, 2018, the Koch Parties couriered their summons and complaint in the form required by the Hague Convention to the Foreign Ministry, where it was received on January 25, 2018. First Yanos Decl., Ex. 2. The summons and complaint were signed for by "K. Ordones," an employee of the Foreign Ministry. *See id*. At this point, service was complete. However, after the Tribunal issued a Decision on Rectification in Venezuela's favor and reducing the principal amount of the Award,[3] the Koch Parties amended their complaint and, out of an abundance of caution, served Venezuela a second time, again in the form required by the Hague Convention. *Id.*

[3] *See* First Yanos Decl., ¶ 8.; ECF # 7, Ex. 2.

¶¶ 8–9.[4] This second round of service was completed on June 13, 2018, with signed acknowledgment by another Foreign Ministry employee, Mr. Jose Vera. *Id*., Ex. 5.[5]

On August 8, 2018, Venezuela applied to annul the Award pursuant to Article 52(5) of the ICSID Convention, which was registered on August 17, 2018. Second Yanos Decl., Ex. 3 ¶¶ 1, 3**.** Upon registration of the application, an automatic stay of enforcement went into place. *Id*. ¶ 3. However, after Venezuela refused to cover the advanced expenses of the annulment proceedings or prosecute its annulment case,[6] an *ad hoc* committee appointed by the Secretary-General of ICSID lifted the stay of enforcement of the Award. *See Id.*¶ 36.

By May of 2019, despite the Koch Parties having successfully served process under the Hague Convention twice, Venezuela had yet to appear. Accordingly, on May 9, 2019, the Koch Parties moved for entry of default, (ECF # 21), which the Clerk of Court granted on May 14, 2019, (ECF # 24). On May 16, 2019, the Koch Parties moved for default judgment pursuant to 28 U.S.C. § 1608 and Federal Rule of Civil Procedure 55(b). ECF # 25.

---

[4] On both occasions, the Koch Parties couriered: (*i*) a duly-executed and notarized USM-94 "Request for Service Abroad of Judicial or Extrajudicial Documents" in duplicate English and Spanish versions, together with duplicate English and Spanish copies of: (*ii*) the original Complaint in this action, (*iii)* two supporting exhibits, (*iv*) summons, (*v*) civil cover sheet, and (*vi*) 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. First Yanos, Decl., Ex. 1.

[5] Venezuela's objection that neither signatory appears on the list of contact persons for Venezuela's central authority" on the Hague Convention website is meritless. *See* ECF # 30-1 at 8 n. 11. As acknowledged on the Venezuelan "Central Authority & Practical Information" page on the Hague Convention website, Venezuela's Central Authority is the Foreign Ministry, not a specific individual employed by that Ministry. *See* Third Yanos Decl., Ex. 1.

[6] ICSID Administrative and Financial Regulations, Regulation 14(3)(e) ("the applicant [for annulment] shall be solely responsible for making the advance payments [to ICSID] . . . to cover expenses following the constitution of the [*ad hoc*] Committee.").

I. The Koch Parties Properly Served Venezuela In Accordance With The Hague Convention.

A. No Certificate Of Service Is Required When Serving A State.

Venezuela claims that this Court lacks personal jurisdiction because the Koch Parties did not properly execute service pursuant to § 1608(a). ECF # 30-1, at 9–13. Venezuela is wrong. The Koch Parties properly served Venezuela in strict adherence to the Hague Convention—not once, but twice. First, on January 11, 2018, the Koch Parties transmitted the summons and complaint by way of courier to Venezuela's Central Authority, the Foreign Ministry. First Yanos Decl. ¶ 5. The papers were delivered on January 25, 2018, as evidenced by the signature of a Ministry employee, K. Ordones. *Id.*, Ex. 2. Although it was not necessary to do so, the Koch Parties again served Venezuela after filing an Amended Complaint (ECF # 7) in the wake of the Tribunal's decision to reduce the principal amount of the Award. First Yanos Decl. ¶¶ 8–10. This second service was again accepted by another Venezuelan Foreign Ministry employee, Mr. Jose Vera, on June 13, 2018. *Id.*, Ex. 5.

Despite the above papers having been twice actually delivered to the Foreign Ministry in the form required by the Hague Convention, Venezuela insists that service was ineffective because the Venezuelan Foreign Ministry did not return a certificate confirming that it served the papers that were served to it ***on itself***. Venezuela's argument makes no sense given the nature of this case, the operation of the Hague Convention, and the relevant case law.

Crucially, the Hague Convention is not solely—or even primarily—a mechanism for serving process on States. Rather, in the ordinary course, the Hague Convention allows a private litigant in one state to serve process on a private litigant in another state, with the assistance of the receiving State's Central Authority. The Hague Convention thus primarily contemplates that a Central Authority's role will be in making service on *third parties*. In that context, the Central

Authority's certificate serves an important function as proof of service. *See* Hague Convention, art. 6 (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.") (emphasis added). When serving a third party, the value of a certificate as proof of service is obvious: litigants—especially those abroad—may not otherwise acknowledge having been served.[7]

The same cannot be said here. Once the summons and complaint, transmitted in the form required by the Hague Convention, were received by Venezuela's Central Authority (Foreign Ministry) there was no further action for the Central Authority to certify taking: there was no third party to serve because Venezuela was itself the party to be served. Therefore, once the papers were delivered, nothing more was required. "Service was effectuated on Venezuela, through its Central Authority under the Hague Convention . . . when it received the Summons, Complaint and transmittal documents." *Devengoechea v. Bolivarian Republic of Venez.*, No. 12-CV-23743-PCH, 2014 U.S. Dist. LEXIS 188755, at *3 (S.D. Fla. Apr. 24, 2014). Any other rule would undermine the proper functioning of the Hague Convention and the FSIA's service scheme. Indeed, far from "creat[ing] appropriate means to ensure that judicial . . . documents to be served abroad shall be brought to the notice of the addressee in sufficient time," *see* Hague Convention, preamble, Venezuela's rule would allow a State to frustrate service on itself by the simple expedient of refusing to acknowledge that it had happened. There is no reason to read such a moral hazard into the Convention or the FSIA's service scheme. *See Box v. Dall. Mexican Consulate Gen.*, 487 F. App'x 880, 886 (5th Cir. 2012) (reasoning that a certificate is "more important" when serving a

[7] Despite the value of a certificate of service in the context of serving third parties, federal district courts have repeatedly found service on a third party under the Hague Convention to have been effective without a certificate. *See*, *e.g.*, *Burda Media, Inc. v. Viertel*, 417 F.3d 292, 301–02 (2d Cir. 2005) (finding that a certificate is not essential to proper service); *Fox v. Regie Nationale des Usines Renault*, 103 F.R.D. 453, 455 (W.D. Tenn. 1984) (same).

third party); *see also Burda Media, Inc. v. Viertel*, 417 F.3d 292, 301 (2d Cir. 2005) (the Hague Convention "should be read together with Rule 4, which 'stresses actual notice, rather than strict formalism.'") (quoting *Fox*, 103 F.R.D. at 455).[8]

Venezuela's authorities are not to the contrary. Venezuela relies heavily upon *Republic of Sudan v. Harrison*, 139 S. Ct. 1048 (2019), and *Mezerhane v. República Bolivariana De Venezuela*, No. 11-23983-CIV-COOKE/TUR, 2013 U.S. Dist. LEXIS 196802, at *10 (S.D. Fla. Mar. 19, 2013), to allege that the Koch Parties' service was ineffective under the Hague Convention. ECF # 30-1, at 10–11. Venezuela's reliance on these cases is misplaced.

Harrison has nothing to do with the Hague Convention, but analyzed § 1608(a)(3) of the FSIA, which allows parties to serve through the clerk of court. *Harrison*, 139 S. Ct. at 1055 ("The question before us concerns the meaning of §1608(a)(3)."). In *Harrison*, the Court found that service under §1608(a)(3) should have been on the foreign ministry, but plaintiffs served an embassy instead. *Id*. at 1054.[9]

In *Mezerhane*, the district court found that service of process was not perfected under the Hague Convention where no certificate of service was returned. 2013 U.S. Dist. LEXIS 196802, at *10. While the court in *Mezerhane* did not appreciate the distinction between service on the

[8] Venezuela's assertion, *see* ECF # 30-1 at 12, that service under the FSIA may only be deemed completed "as of the date indicated on the executed certificate of service issued by the central authority" is not an accurate reading of the FSIA. In fact, the FSIA contemplates that service on a sovereign may be proved in different ways. *See* 28 U.S.C. § 1608(c)(2) (providing that service pursuant to 28 U.S.C. § 1608(a)(1), (2), or (3) "shall be deemed to have been made . . . as of the date of receipt indicated in the certification, signed and returned postal receipt, ***or other proof of service applicable*** to the method of service employed")(emphasis added).

[9] Notably, the Supreme Court in *Harrison* observed that under §1608(a)(2) "service is deemed to have occurred on the date shown on a document signed by the person who received it from the carrier" and that "Congress presumably thought that the individuals who signed for the service packet could be trusted to ensure that the service packet is handled properly and expeditiously." *See Harrison*, 139 S. Ct. at 1059.

State and on a third party, it is also important to observe that the court in that case did not believe that Venezuela was attempting to frustrate service of process and noted that Venezuela had actually executed service on other, government-linked defendants:

> Plaintiff's contention that the Venezuelan government is deliberately frustrating service of process in this case is undermined by the Venezuelan Central Authority's response to Plaintiff's inquiries regarding the status of service, and the actual execution of service upon Defendant SUDEBAN.
>
> Although the Venezuelan Central Authority has not issued a certificate complying with the form and content proscribed in Article 6 of The Hague Service Convention, Plaintiff has received communication from the Venezuelan Central Authority seeking additional time to serve the Defendants. Therefore, with additional time, the proper certification is likely forthcoming.

Id. at *9-10. Venezuela has taken no such steps here.

Venezuela's citations (ECF # 30-1 at 11) to *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148 (D.C. Cir. 1994) and *Richardson v. Attorney General of the British Virgin Islands*, No. 2008-144, 2013 U.S. Dist. LEXIS 117763 (D.V.I. Aug. 20, 2013) are also unavailing. In *Transaero*, the plaintiff failed to serve process on the Bolivian Air Force pursuant to the FSIA because it confused the provisions governing service "on a foreign state" with those governing service on "agencies or instrumentalities" of foreign states. *See Transaero,* 30 F.3d at 151 (D.C. Cir. 1994) ("The nub of the dispute is whether the Bolivian Air Force counts as a 'foreign state' or rather as an 'agency or instrumentality' under section 1608."). In *Richardson*, Hague Convention service was not effective on the British Virgin Islands because, unlike this case, the plaintiffs did not serve the Central Authority. *See Richardson*, 2013 U.S. Dist. LEXIS 117763, *35-36 (Hague Convention service on the British Virgin Islands was ineffective under 28 U.S.C. § 1608(a)(2) because the correct Central Authority was the Registrar of the Supreme Court rather

than the Attorney General). Neither of these authorities has any bearing on the issues before the Court in this case.

Finally, Venezuela also relies on several statements from the United States government. These do not prove as much as Venezuela might like. The United States' Statement of Interest in *Micula* says little more than that the United States Government prefers to be served through its Central Authority rather than mail through its embassies. ECF # 30-2 (Statement of Interest of the United States 3-4, *Micula v. Gov't of Romania*, No. 17-cv-2332 (APM) (D.D.C. July 13, 2018)). In turn, the Department of Justice's statement concerning "*Service of Judicial Documents on the United States Government Pursuant to the Hague Service Convention*" should receive little deference, having been prepared, in context, by a prospective litigant.[10] *Cf. Bowen v. Georgetown Univ. Hosp*., 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate."). In any case, Venezuela does not identify any similar reservations that it has made with respect to Hague Convention service upon its own Central Authority.[11]

---

[10] U.S. Dep't of Justice, Office of Int'l Judicial Assistance, *Service of Judicial Documents on the United States Government Pursuant to the Hague Service Convention* (Jan. 2, 2018) , *available at* https://www.justice.gov/civil/page/file/1036571/download (last visited Aug. 16, 2019). This statement also perplexingly declares that "the U.S. Central Authority . . . is not the legal representative or agent of the U.S. Government." *Id.* That cannot be correct when the U.S. Central Authority is in fact an office of the Department of Justice.

[11] Venezuela alludes in its brief to the United States' having transferred recognition from the Maduro regime to the government of Interim President Guaido in late January of 2019. ECF # 30-1, at 3–4. Venezuela does not explain the relevance of this change but, for the avoidance of doubt, the Koch Parties note that this change has no effect on the effectiveness of service that was completed prior to the change in government. Crucially, the Koch Parties served a *State*, not a specific *government*. It is settled international law that a new government inherits the legal obligations incurred for the State by a prior regime. *See* Restatement (3d) of the Foreign Relations Law of the U.S., § 208, cmt. a (1987) ("When the state ceases to exist, its capacities, rights, and duties terminate. They are not affected by a mere change in the regime or in the form of government or its ideology"). Mr. Guaido's government inherited all obligations and liabilities incurred by the former Maduro administration—including the Award at the center of this case.

B. The Hague Convention Permits Service On Venezuela By Courier.

Venezuela also argues that service under the Hague Convention on its Central Authority cannot be made through mailing the summons and complaint. ECF # 30-1, at 12. Venezuela bases its argument on its reservation to Article 10(a) of the Hague Convention. ECF # 30-1, at 12. Of note, the Koch Parties did not "mail" their service papers, but couriered them to the Foreign Ministry. First Yanos Decl. ¶¶ 5, 10. More importantly, however, Article 10(a)'s service-by-mail provision does not apply to service on a State, through its Central Authority; it applies only to instances where a plaintiff serves a third-party directly, cutting out the Central Authority. This is apparent from the text of the provision: "Provided the State of destination does not object, the present Convention shall not interfere with . . . the freedom to send judicial documents, by postal channels, directly to ***persons*** abroad." Hague Convention, art. 10(a) (emphasis added). It follows that when states object to service by mail pursuant to Article 10(a), they do so in order to ensure that service is conducted *through* the Central Authority under the Hague Convention. That is exactly what the Koch Parties did here. An objection to service by mail cannot be reasonably construed to apply to mail—let alone to courier delivery—to the Central Authority itself. Indeed, Venezuela itself publishes the contact address of its Central Authority on the website of the Secretariat of the Hague Convention. Third Yanos Decl., Ex. 1.

The case of *Marschhauser v. Travelers Indemnity Co*., 145 F.R.D. 605 (S.D. Fla. 1992) is particularly instructive. There, a U.S. plaintiff's counsel transmitted service papers to the Israeli Central Authority by Federal Express. *Id*. at 607. Israel argued that service was improper because Israeli law required service to be performed by a judicial officer, and because Israel had previously objected to service under Article 10 of the Hague Convention. *Id*. at 608-09. The court rejected

both arguments, holding first that whether service complied with Article 3 of the Hague Convention turned on whether transmittal was proper under the law of the requesting state—the United States. *Id*. Because the Federal Rules of Civil Procedure permit counsel to effectuate service by transmitting materials themselves, the plaintiff's service complied with Article 3 of the Hague Convention. *Id*. The court went on to reject the argument that Israel's objection to service under Article 10 was in any way relevant to whether the plaintiff had properly served Israel's Central Authority:

> Article 10 only provides for alternative means of service and for the sending of documents, and it has no bearing on Articles 3-6, which prescribe the normal method of service under the Convention. In this case, Marschhauser did not try to serve process under Article 10 by hiring a foreign attorney or official to serve process. Marschhauser simply followed the normal method for serving process through Israel's central authority.

Id. at 609 (internal citations and quotations omitted).

Venezuela's reliance on *Water Splash, Inc. v. Menon*, 137 S. Ct. 1504 (2017) is also inapposite. *See* ECF # 30-1, at 12. There, the Supreme Court vacated a decision by the Texas Court of Appeals, which had erroneously held that the Hague Convention prohibited service by mail. *Menon*, 137 S. Ct. at 1507–08. The Supreme Court broadly held that, "in cases governed by the Hague Service Convention, service by mail is permissible if two conditions are met: first, the receiving state has not objected to service by mail; and second, service by mail is authorized under otherwise-applicable law." *Id.* at 1513. Crucially, *Menon* involved service on a foreign national—the case has nothing to do with service on a sovereign through the very Central Authority it has designated pursuant to the Hague Convention.

II. Article 15 Of The Hague Service Convention Confirms That A Default Judgement May Be Entered When Service Papers Were "Actually Delivered" To A Defendant Pursuant To The Convention.

Venezuela argues that the Koch Parties are precluded from obtaining a default judgment in the absence of a certificate by operation of Article 15 of the Hague Convention. *See* ECF # 30-1, at 14–15. Venezuela is again mistaken. In fact, Article 15 allows default judgment to be entered against any defendant as to whom "actual delivery" of service papers consistent with the Hague Convention has been achieved, irrespective of whether or not the relevant Central Authority provides a certificate of service.

Article 15 has two paragraphs, the first of which provides that:

> 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.[12]

Hague Convention, art. 15(1) (emphasis added). Put simply, Article 15's first paragraph confirms that a default judgment may be granted so long as the necessary documents were "actually delivered to the defendant" by a method provided for by the Convention. That is the case here: service was accepted by the Central Authority designated by Venezuela pursuant to the Hague

[12] Venezuela pointedly ignores Article 15(1)(b), incorrectly suggesting that if service is not accomplished pursuant to Article 15(1)(a) ("by a method prescribed by the internal law of the State addressed"), then a default is available only pursuant to Article 15(2). *See* ECF # 30-1 at 14-15. Here, a default judgment is available consistent with Article 15(1)(b) of the Hague Convention. Article 15(1) also requires "that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend." Venezuela does not deny that it had time to defend following service.

Convention. *See* First Yanos Decl, Exs. 2, 5; *see also* Hague Convention art. 5 (noting that "the document may always be served by delivery to an addressee who accepts it voluntarily").

Venezuela, however, focuses exclusively on the second paragraph of Article 15, which states:

> 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.

Hague Convention, art. 15(2) (emphasis added). Paragraph 2 exists "notwithstanding" the requirements of Paragraph 1. It does not add to the prior paragraph's preconditions for a default judgment where "service" or "actual delivery" have been made to a defendant, but recognizes an *alternative* set of preconditions for default judgment that will apply "notwithstanding" a litigant's ability to show no more than that service was *attempted* where the document was "transmitted" and sufficient time has elapsed. *See Marschhauser*, 145 F.R.D. at 608 (recognizing that the two paragraphs of article 15 represent alternative paths to a default judgment in the absence of a certificate, and that the first paragraph allows for a default judgment if "the plaintiff demonstrates

that actual or substituted service was made on the defendant.").[13]

Logically, Article 15 will have more relevance in a scenario where a litigant has sought service on a third party defendant through a State's Central Authority but cannot force that foreign government to act or prove that service was made or the papers "actually delivered." *See Box*, 487 F. App'x at 886 (distinguishing service on a corporation from service on the state itself). Paragraph 2 of Article 15 is irrelevant in this case. The Koch Parties did not merely transmit papers for service on a third party, but actually served and confirmed actual delivery of the papers on Venezuela through its Central Authority. *See* First Yanos Decl, Exs. 2, 5.

III. There Is No Good Cause To Set Aside The Clerk's Entry Of Default.

With service and venue established, the Court should deny Venezuela's request to set aside the entry of default and grant the pending Motion for Default Judgment for "good cause." Here, the factors weigh strongly against Venezuela because: (i) a set-aside would prejudice the Koch Parties and impede the operation of 22 U.S.C. § 1650a, pursuant to which enforcement of ICSID awards is a summary proceeding; (ii) Venezuela's default resulted from its culpable conduct; and (iii) Venezuela has not meritorious defenses to the enforcement of the Award.

A. The Koch Parties Will Be Prejudiced If Default Is Set Aside.

First and foremost, the default should not be set aside due to the prejudice that the Koch Parties would experience as a result. It has been just short of a decade since the unlawful expropriation of the Koch Parties' investment in FertiNitro and almost two years since the Tribunal

[13] The United States' declaration pursuant to Article 15(2) of the Hague Convention, *see* ECF # 30-1 at 7 n. 10, thus establishes an alternative basis for a default judgment consistent with the Hague Convention. It does not foreclose entry of a default consistent with Article 15(1) where the conditions of that paragraph ("service consistent with the law of the receiving State" or "actual delivery") have been satisfied. Venezuela's conflation of the two paragraphs of Article 15 accordingly misreads the Convention. *See Marschhauser*, 145 F.R.D. at 608.

issued its Award. Amended Compl. ¶¶ 13, 17. The prejudicial nature of this delay is acute where proceedings to enforce ICSID awards are summary by statutory design: no inquiry into the merits of the Award is made. *See Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 863 F.3d 96, 117 (2d Cir. 2017) (noting that courts do not assess the substantive merits of an ICSID award).

Venezuela argues that no plaintiff can suffer prejudice if service of process was never proper to begin with. ECF # 30-1, at 17. But for the reasons already explained at length above, the Koch Parties *did* properly serve Venezuela pursuant to the FSIA and the Hague Convention.

B. The Default Resulted From Venezuela's Culpable Conduct.

The prejudicial delay the Koch Parties will suffer derives from Venezuela's willful, culpable conduct.[14] As a matter of law, Venezuela's international law obligation is to pay ICSID awards without the Koch Parties having need to seek relief from any court. *See* ICSID Convention Article 53(1) ("The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.").

Rather than abide by its international obligations, however, Venezuela has long been notorious for using delay as a litigation strategy. *See, e.g.*, *Tidewater Inv. SRL v. Bolivarian Republic of Venez*., 2018 U.S. Dist. LEXIS 211469, *12, 2018 WL 6605633 (D.D.C. 2018) (noting Venezuela's delay caused by its failure to comply with the Hague Convention). These tactics are blatant and unconscionable. In this case, Venezuela moved to annul the Award pursuant to ICSID

[14] Venezuela's filing of a Notice of Appearance and of Motion to Set Aside the Clerk's Entry of Default and to Dismiss the Complaint for Lack of Personal Jurisdiction immediately before the hearing on Koch's Motion for Entry of Default Judgment shows that Venezuela has been monitoring the file and could have timely appeared.

Convention on August 8, 2018, obtained a stay of enforcement, but then failed to make a single payment to cover ICSID's expenses or to pursue its annulment application. *See* Second Yanos Decl., Ex. 3. Yet Venezuela successfully obtained eight months of delay, until the stay was ultimately lifted on April 1, 2019. *Id.* Venezuela used the same delaying tactic in another case brought by a French investor to enforce another ICSID award, obtaining a stay by formally commencing an annulment proceeding, but then failing to pay costs or seriously pursue the annulment application. *See* Third Yanos Decl., Ex. 2. Although that proceeding was administratively terminated earlier this week (on August 15, 2019), Venezuela's tactics again achieved months of delay. *See* Third Yanos Decl., Ex. 3. The Court should not indulge such tactics in this case.

C. Venezuela Fails To Present A Meritorious Defense.

Finally, Venezuela argues that it has presented a meritorious defense by establishing an argument for lack of personal jurisdiction. ECF # 30-1, at 16–17. Venezuela also points to the fact that the Award is subject to annulment proceedings. *Id.* at 17. For the reasons stated above, Venezuela's personal jurisdiction argument is without merit. The Koch Parties were properly served Venezuela through the Hague Convention. As for the annulment proceedings, the Court need not concern itself with annulment proceedings that Venezuela has actively ignored and where the ICSID *ad hoc* committee charged with considering Venezuela's bid for annulment has lifted the stay on enforcement, explicitly allowing the Koch Parties to enforce their Award. *See* Second Yanos Decl., Ex. 3. The mandatory stay has been lifted, it is past time for the Koch Parties' to be compensated for the illegal expropriation committed by Venezuela.

Thus, all of Venezuela's available defenses will be conclusively decided on the instant motion. If Venezuela was effectively served pursuant to the Hague Convention and the FSIA (as

it was) irrespective of the Venezuelan Central Authority's non-issuance of a certificate, then Venezuela is properly subject to personal jurisdiction. Given that the Award at issue is an ICSID Award, there will then be nothing else to decide.[15] *See* 22 U.S.C. § 1650a ("The pecuniary obligations imposed by . . . 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. The Federal Arbitration Act (9 U.S.C. 1 et seq.) shall not apply to enforcement of awards rendered pursuant to the convention.").[16]

CONCLUSION

For the reasons set forth above, no grounds exist for setting aside the Koch Parties' Motion for Default Judgement. The Koch Parties therefore respectfully requests that the Court enter an Order granting Default Judgment recognizing and enforcing the ICSID Award.

[15] For this reason, the Koch Parties see no reason for Venezuela to be required to file a verified answer pursuant to Local Rule 7(g). Once Venezuela's objections to service are rejected, judgment should enter automatically pursuant to 22 U.S.C. § 1650a because the Award is entitled to full faith and credit.

[16] Venezuela's suggestion (ECF # 30-1 at 17) that judgment should not be entered because post-judgment interest should be at a statutory rate is meritless. In *OI European Group*, the district court announced that "[b]ecause 22 U.S.C. § 1650a requires this Court to confirm an arbitral award obtained under ICSID, and the sole issue raised in defendant's opposition pertains to the applicable post-judgment interest rate, the Court will enter judgment for plaintiff." *See OI European Grp. B.V. v. Bolivarian Republic of Venez*uela, 2019 U.S. Dist. LEXIS 85128, *2 (D.D.C. May 21, 2019). Thus, the Court may extend full faith and credit to the Award pursuant to subject to 22 U.S.C. § 1650a and, if it deems necessary, entertain separate briefing on the appropriate post-judgment rate. Venezuela does not appear to contest that the appropriate post-*Award* rate (i.e., the rate applicable to non-payment of the principal amount of the Award from the date of the Award through the date of this Court's prospective judgment) is the rate awarded by the Tribunal.

Dated: August 16, 2019
New York, New York

Respectfully submitted,

Alex Yanos (Bar No. NY0219)
Carlos Ramos-Mrosovsky (Bar No. 986363)
Rajat Rana (Bar No. 1032596)
ALSTON & BIRD LLP
90 Park Avenue
New York, NY 10016
Tel: 212-210-9400
Fax: 212-210-9444
alex.yanos@alston.com
carlos.ramos-mrosovsky@alston.com
rajat.rana@alston.com

Counsel for Koch Minerals Sàrl and Koch Nitrogen International Sàrl