IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CRYSTALLEX INTERNATIONAL CORPORATION, Petitioner, v. BOLIVARIAN REPUBLIC OF VENEZUELA, Respondent.	Civil Action No. 16-0661 (RC)

CRYSTALLEX INTERNATIONAL CORPORATION'S MOTION
FOR RELIEF PURSUANT TO 28 U.S.C. § 1610(c) AND 28 U.S.C. § 1963

Petitioner Crystallex International Corporation ("Crystallex") hereby moves for an order (i) pursuant to 28 U.S.C. § 1610(c), determining that a reasonable period of time has elapsed since this Court's March 25, 2017 Order confirming an arbitral award against Respondent Bolivarian Republic of Venezuela ("Venezuela") and entering judgment against Venezuela in the amount of $1,202,000,000 dollars plus pre- and post-award interest (the "Order"), such that Crystallex may seek to attach Venezuela's assets to aid in the execution of the court's judgment (the "Judgment"); and (ii) permitting, for good cause, Crystallex to register the Court's Judgment in other judicial districts of the United States, including the District of Delaware, pursuant to 28 U.S.C. § 1963.[1]

[1] On April 7, 2017, the Clerk of Court entered a "Judgment" on the docket in this case, Dkt. No. 33. This Court's March 25, 2017 Order, providing that "Judgment for Crystallex International Corp. is ENTERED," Dkt. No. 31, nevertheless constitutes the judgment of this Court under Federal Rule of Civil Procedure 58 and, correspondingly, for purposes of 28 U.S.C. § 1610(c). *See Kidd v. District of Columbia*, 206 F.3d 35, 39 (D.C. Cir. 2000). That said, the two-week interval between these two docket entries is immaterial in the context of Venezuela's refusal to honor an international arbitral award issued more than a year ago.

FACTUAL BACKGROUND

In this case, the award giving rise to Venezuela's liability and the basis for this Court's Judgment was issued more than a year ago, on April 4, 2016 (the "Award").[2] Because the Award is, by Venezuela's own agreement, itself final and legally binding, Venezuela has owed Crystallex $1.2 billion, plus pre- and post-award interest, independent of any further court proceeding, for nearly 13 months. *See* Agreement between the Government of Canada and the Government of Venezuela for the Promotion and Protection of Investments, Can.-Ven., July 1, 1996, art. XII(10), 2221 U.N.T.S. 7 ("An award of arbitration shall be final and binding.")[3]; *see also* Arbitration (Additional Facility) Rules of the International Centre for Settlement of Investment Disputes, art. 52(4) ("The award shall be final and binding on the parties.").[4]

Venezuela has refused to honor the Award. Following the issuance of the Award, Crystallex requested that Venezuela pay the Award immediately. Venezuela failed to do so. *See* Petition to Confirm Arbitral Award ¶ 38, ECF No. 1. On April 7, 2016, Crystallex accordingly brought an action in this Court to confirm the Award. On March 25, 2017, this Court rejected Venezuela's unfounded challenges, confirmed the Award, and directed Venezuela to pay Crystallex $1.2 billion, plus pre- and post-award interest. In light of this Court's order, on March 29, 2017, Crystallex again requested payment from Venezuela. *See* Letter from Elliot Friedman, Freshfields Bruckhaus Deringer, to Lawrence H. Martin, Foley Hoag LLP (Mar. 29, 2017).[5] Venezuela again ignored Crystallex's request.[6]

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[2] Attached as Exhibit 1 to the Declaration of Alexander A. Yanos ("Yanos Decl.") dated April 24, 2017.

[3] Yanos Decl., Ex. 2.

[4] Yanos Decl., Ex. 3.

[5] Yanos Decl., Ex. 4.

[6] Crystallex's Award against Venezuela was also confirmed by the Ontario Superior Court of Justice on July 20, 2016. *See* Yanos Decl., Ex. 5. Venezuela has had nine months to pay the Ontario court's judgment, but to date, has failed to do so.

Venezuela's failure to satisfy the Judgment (and the Award upon which the Judgment is based) is in keeping with Venezuela's declared policy of refusing to abide by arbitral awards, like the Award confirmed by this Court's Order, issued under the auspices of the World Bank's International Centre for Settlement of Investment Disputes ("ICSID"). As the late Venezuelan President Hugo Chávez declared while denouncing Venezuela's obligations under the "ICSID Convention"): "I repeat that we do not recognize any of the CIADI decisions, we will not acknowledge them."[7] There is no reason to believe that Venezuela's policy has changed or that it will now voluntarily pay the Judgment.

ARGUMENT

1. Relief Pursuant to 28 U.S.C. § 1610(c) Is Warranted.

Section 1610(c) of the Foreign Sovereign Immunities Act ("FSIA") provides that when a judgment has been entered against a foreign state, attachment of the foreign state's property in the United States in execution of the judgment is permitted once "the court has . . . determined that a reasonable period of time has elapsed following the entry of judgment . . . ." 28 U.S.C. § 1610(c). That determination is informed by such factors as "the procedures necessary for the foreign state to pay the judgment (such as the passage of legislation), evidence that the foreign state is actively taking steps to pay the judgment, and evidence that, like here, the foreign state is attempting to evade payment of the judgment." *Ned Chartering & Trading, Inc. v. Republic of Pakistan*, 130 F. Supp. 2d 64, 67 (D.D.C. 2001) (citing the legislative history of the FSIA at H.R. Rep. 1487, 94th Cong., 2d Sess. 1, 30 (1976)).

Courts, including those in this District, have repeatedly found a "reasonable" period of time to have passed for purposes of 28 U.S.C. § 1610(c) where the judgment creditor's motion

[7] Yanos Decl., Ex. 6. "CIADI" stands for "*Centro Internacional de Arreglo de Diferencias relativas a Inversiones"* – the Spanish acronym for ICSID.

was filed shortly after judgment. In *Ned Chartering*, this Court found that the few weeks that a motion had been pending was a "reasonable" period of time to begin execution of a judgment under the FSIA. *See* 130 F. Supp. 2d. at 67 (granting plaintiff's motion to proceed with execution six weeks after entry of judgment); *Gold Reserve v. Bolivarian Republic of Venezuela*, Civil Action No. 14-2014 (JEB), Order (D.D.C. Jan. 20, 2016) (granting petitioner's motion for an order pursuant to 28 U.S.C. § 1610(c) two months after entry of judgment); *see also Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, Civil Action No. H-01-0634, 2002 U.S. Dist. LEXIS 3976, at *6-7 (S.D. Tex. Jan. 24, 2002) (50 days); *Elliott Assocs., L.P. v. Banco de la Nacion*, No. 96 Civ. 7916 (RWS), 2000 U.S. Dist. LEXIS 14169, at *14 (S.D.N.Y. Sept. 29, 2000) (ten days); *Singleton v. Guangzhou Ocean Shipping Co.*, Civil Action No. 90-5063, 1994 U.S. Dist. LEXIS 17600, at *2 (E.D. La. Dec. 5, 1994) (finding that 60 days, the time given to foreign states to respond to a complaint under the FSIA, is "a rough estimate of the time that must be given to constitute a reasonable time pursuant to [28 U.S.C. § 1610(c)]"); *Gadsby & Hannah v. Socialist Republic of Romania*, 698 F. Supp. 483, 486 (S.D.N.Y. 1988) (two months).

In this case, one month has passed since this Court's Order confirming the Award, and more than a year has passed since the Award was first rendered. Venezuela has had ample time to satisfy its obligations to Crystallex, but has refused to do so. Venezuela's failure to satisfy its obligations to Crystallex is particularly concerning as the Award itself is final and legally binding upon Venezuela, and its enforcement has never been stayed.

Under these circumstances, one month following this Court's Order entering judgment against Venezuela is a more than reasonable period for Venezuela to finalize arrangements to pay the Award, or to make a representation to this Court that it intends to do so. Venezuela has

done neither. *See Gold Reserve v. Bolivarian Republic of Venezuela*, Civil Action No. 14-2014 (JEB), Order (D.D.C. Jan. 20, 2016); *Elliott Assocs., L.P.*, No. 96 Civ. 7916 (RWS), 2000 U.S. Dist. LEXIS 14169, at *14; *see also Karaha Bodas*, Civil Action No. H-01-0634, 2002 U.S. Dist. LEXIS 3976, at *6 (refusing to delay an order pursuant to 28 U.S.C. § 1610(c) beyond 50 days following confirmation of an arbitral award, where the foreign sovereign entity "[knew] the extent of its potential liability for over a year . . . , when the Arbitral Tribunal issued its final award" yet failed to make "arrangements even to attempt to satisfy the judgment in the event it became necessary to do so").

The need for an order finding that a reasonable period has passed and that Crystallex may seek to attach Venezuela's assets in aid of execution is even more acute in this case because of "evidence that [Venezuela] is attempting to evade" payment of the Judgment. *See Ned Chartering*, 130 F. Supp. 2d at 67 (ruling that a reasonable time had elapsed where, *inter alia*, there was "no evidence that the defendant [had] taken any steps towards the payment of its debt" and where there was "at least some evidence that the defendant [was] actually attempting to evade its obligation").

Indeed, consistent with its past public declaration that it will not comply with awards rendered by international arbitral tribunals, *see supra* at 3, Venezuela actively has taken steps to make the enforcement of the Award more difficult by transferring assets out of the United States without any consideration in return. Since the completion of the arbitration, Venezuela caused the Delaware subsidiaries of its wholly-owned subsidiary PDVSA to borrow $2.8 billion at 12 percent interest and then transfer that money out of the country for no consideration.

So committed is Venezuela to transferring its assets out of the United States, that when its indirect wholly-owned subsidiary, PDV Holding, Inc. ("PDVH")—which has been sued under

the Delaware Uniform Fraudulent Transfer Act by Crystallex and others for its role in fraudulently transferring billions of dollars out of the United States that otherwise would have been available for execution[8]—was asked by a United States District Court whether it would continue to transfer U.S.-based assets out of the country, PDVH's attorney refused to represent that it would refrain from directing such asset transfers to its direct and indirect parents in Venezuela. Instead, when invited by the Delaware Court to represent that it would continue maintain the status quo, PDVH's counsel refused to make such a commitment, claiming that because its parents (Venezuela and PDVSA) are sovereigns, it could continue to transfer assets out of the country with impunity:

> THE COURT: . . . [S]hould I infer anything from your silence in response to their concern that money is just going to keep leaving the country if I let this be delayed?
>
> MR. EIMER: Your Honor, I can't make any representations about that . . . Nor do I think the Court can stop it right now.

See Crystallex I, Hr'g Tr. 80:20-81:13, Dec. 20, 2016.[9]

On March 27, 2017, in response to this Court's order confirming the Award and directing entry of judgment in favor of Crystallex, PDVH informed the Delaware District Court that it remains prepared to dissipate U.S.-based assets at will. *See* Letter from Kenneth J. Nachbar, Morris, Nichols, Arsht & Tunnell LLP, to the Honorable Leonard P. Stark, U.S. District Court

[8] *See Crystallex International Corp. v. Petróleos de Venezuela, S.A., et al.*, Civil Action Number 15-1082-LPS, currently pending in the United States District Court for the District of Delaware ("*Crystallex I*"). Judge Stark of the U.S. District Court for the District of Delaware has already ruled that Crystallex stated a claim against PDVH for a violation of the Delaware Uniform Fraudulent Transfer Act. PDVSA's motion to dismiss the claims against it on sovereign immunity grounds is currently *sub judice*.

[9] Yanos Decl., Ex. 7. Crystallex disputes that a restraint of PDVH would be a restraint of sovereign assets, but PDVH's attempt to hide behind its parent is nonetheless telling of Venezuela's plans to frustrate creditors. *See Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003) (holding that indirect sovereign ownership is insufficient to trigger sovereign immunity).

for the District of Delaware (Mar. 28, 2017) (declaring on Venezuela's behalf that future asset transfers "are possible and permissible").[10]

In light of the foregoing, Crystallex respectfully requests that the Court enter an order pursuant to Section 1610(c) of the FSIA, so that Crystallex may promptly seek to enforce its judgment and attach Venezuela's assets in aid of execution while Venezuela's assets are still within the United States.

2. Relief Pursuant to 28 U.S.C. § 1963 Is Warranted.

For the same reasons, Crystallex also respectfully requests that this Court enter an order pursuant to 28 U.S.C. § 1963, granting Crystallex permission to register the Judgment in other judicial districts of the United States, including the District of Delaware.

Section 1963 provides that a "judgment in an action for the recovery of money or property entered in any . . . district court . . . may be registered . . . in any other district . . . . . when ordered by the court that entered the judgment for good cause shown." 28 U.S.C. § 1963.

This Court has held that "good cause" is established where the judgment debtor has no assets in the District of Columbia but does have assets in another jurisdiction. *See Non-Dietary Exposure Task Force v. Tagros Chemicals India, Ltd.*, 309 F.R.D. 66, 69 (D.D.C. 2015) ("Good cause can be established by an absence of assets in the judgment forum, coupled with the presence of substantial assets in the registration forum") (internal quotations omitted); *Spray*

[10] Yanos Decl., Ex. 8. PDVH, at Venezuela's direction, has acted on these threats in the past. Shortly after the Delaware District Court's decision upholding Crystallex's Delaware Uniform Fraudulent Transfer Act claim in *Crystallex I*, PDVH pledged 50.1% of its stock in its principal asset CITGO Holding, Inc.—the parent of CITGO Petroleum Corporation—for no consideration, as collateral for new bonds issued not by PDVH, but by PDVSA, Venezuela's alter ego. Within a week, PDVH pledged the remaining 49.9% of its stock in CITGO Holding as collateral for an agreement between PDVH's sister company, PDVSA Petróleos, S.A. ("PPSA"), and an affiliate of Russian oil giant Rosneft, which itself was executed to secure a loan to Venezuela. *See Crystallex International Corp. v. PDV Holding, Inc., et al.,* Civil Action Number 16-1007-LPS, currently pending in the United States District Court for the District of Delaware ("*Crystallex II*").

Drift Task Force v. Burlington Bio-Medical Corp., 429 F. Supp. 49, 51-52 (D.D.C. 2006) (finding "good cause to authorize the registration of this judgment in other U.S. District Courts" where judgment debtor "lack[ed] assets in the District of Columbia but possesse[d] assets elsewhere"). To date, Crystallex has been unable to identify any commercial assets belonging to Venezuela in the District of Columbia but believes that certain Delaware entities—in particular Venezuela's indirect subsidiaries, PDVH, CITGO Holding, and CITGO Petroleum, which it has used to transfer billions of dollars out of the United States—may have assets belonging to, or obligations owing to, Venezuela.[11]

Moreover, where, as here, the judgment debtor's words and actions have shown that it is highly unlikely to pay the Judgment—or even to post a bond—permission to register the judgment immediately is warranted. *See Non-Dietary Exposure*, 309 F.R.D. at 69 (finding "good cause to register the judgment elsewhere" where judgment debtor had "provided no assurance that it intend[ed] to pay the [underlying] arbitration award" but rather had "appear[ed] to have done exactly the opposite"); *Spray Drift*, 429 F. Supp. at 51 (granting permission to immediately register judgment confirming arbitral award in other districts where judgment debtor had "offered no assurances that it will pay the Award or comply with a court-ordered bond"); *see also Johns v. Rozet*, 143 F.R.D. 11, 12-13 (D.D.C. 1992) (finding good cause to permit immediate registration where the judgment creditor failed to meet the deadline for posting supersedeas bond ordered by the Court).

[11] Venezuela may have commercial assets in other jurisdictions as well. Crystallex intends to seek all appropriate discovery into Venezuela's commercial assets in the United States and worldwide. *See generally Republic of Argentina v. NML Capital, Ltd*., 573 U.S. __, 134 S.Ct. 2250 (2014). Federal Civil Rule 69(a)(2) authorizes Crystallex to seek discovery in aid of execution under both the Federal Rules of Civil Procedure and District of Columbia Law. *See, e.g.*, Fed. R. Civ. P. 30(b)(6); D.C. Sup. Ct. R. Civ. P. 69-I(b) ("The plaintiff may summon the defendant and, upon leave of Court, any other person to appear in court on a date certain and submit to oral examination respecting execution of any judgment rendered. Any person so summoned may, upon leave of Court, be required to produce papers, records or other documents at the examination.").

As outlined above, Venezuela has a demonstrated record of dissipating its own assets—as well as the assets of its Delaware-based subsidiaries—during the pendency of the Crystallex arbitration and related litigation. On April 21, 2017, Venezuela filed a notice of appeal in this matter without posting a supersedeas bond. Accordingly, this Court should find good cause to permit immediate registration of the Judgment in Delaware. *See Non-Dietary Exposure*, 309 F.R.D. at 69 (finding "good cause" where judgment creditor declared that "he ha[d] 'been unable to locate any assets of [debtor] in the District of Columbia,' but believe[d] '[debtor] ha[d] . . . substantial assets [in three other jurisdictions]'"); *Spray Drift*, 429 F. Supp. at 51-52 (noting that judgment creditor had "offered evidence indicating that "the 'good cause' provision" exists to "prevent[] debtors from utilizing the delay in execution of the judgment to remove property from another district, thus frustrating potential enforcement").

* * *

WHEREFORE, Crystallex respectfully requests that the Court enter an order pursuant to 28 U.S.C. § 1610(c) finding that a reasonable period of time has elapsed following this Court's Order and Entry of Judgment and pursuant to 28 U.S.C. § 1963 granting leave to Crystallex to register the Judgment in the District of Delaware immediately.[12] A proposed order is attached.

[12] Pursuant to LCvR 7(m), on April 24, 2017, the undersigned counsel for Crystallex contacted counsel for Venezuela to determine whether Venezuela would consent to the instant motion. Counsel for Venezuela have indicated that Venezuela does not consent.

Dated: April 25, 2017

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