

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF DELAWARE

CRYSTALLEX INTERNATIONAL
CORPORATION,

Plaintiff,

v.

BOLIVARIAN REPUBLIC OF VENEZUELA,

Defendant.

C.A. No. 17-mc-00151-UNA

**OPENING BRIEF IN SUPPORT OF
PLAINTIFF CRYSTALLEX INTERNATIONAL CORPORATION'S
MOTION FOR AN ORDER AUTHORIZING THE ISSUANCE OF
A WRIT OF ATTACHMENT *FIERI FACIAS* PURSUANT TO 28 U.S.C. § 1610(C)**

OF COUNSEL:

Robert L. Weigel
Jason W. Myatt
Rahim Moloo
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, New York 10166
(212) 351-4000

Raymond J. DiCamillo (#3188)
Jeffrey L. Moyer (#3309)
Travis S. Hunter (#5350)
RICHARDS, LAYTON & FINGER, P.A.
One Rodney Square
920 North King Street
Wilmington, Delaware 19801
(302) 651-7700
dicamillo@rlf.com
moyer@rlf.com
hunter@rlf.com

Attorneys for Plaintiff

Dated: August 14, 2017

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
SUMMARY OF ARGUMENT	4
STATEMENT OF FACTS	5
I. The Arbitration Award And Judgment	5
II. PDVSA: Venezuela’s Alter Ego	7
A. Venezuela Caused PDVSA’s Incorporation To Implement Policy	8
B. Venezuela And PDVSA Share Common Directors And Officers	9
C. Venezuela Exercises Complete Day-To-Day Control Over PDVSA	11
D. Venezuela Exercises Economic Control Over PDVSA	12
E. Venezuela Uses PDVSA’s Assets As Its Own	16
F. Venezuela Is The Real Beneficiary Of PDVSA’s Conduct	17
1. Venezuela Uses PDVSA To Achieve Its Social Goals	17
2. Venezuela Uses PDVSA To Achieve Domestic Political Goals	18
3. Venezuela Uses PDVSA To Achieve Its Foreign Policy Goals	20
4. Venezuela Uses PDVSA To Expropriate Private Investments	21
G. Venezuelan Courts View PDVSA As An Arm Of Venezuela	23
III. PDVSA’s Ownership Of PDVH	24
ARGUMENT	24
I. Legal Standards Governing Crystallex’s Motion	24
A. Operative Delaware Provisions As Incorporated By Rule 69	24
B. FSIA Section 1610(c)	25
II. Crystallex Satisfies The Requirements Set Forth In FSIA Section 1610	26
A. Crystallex’s Judgment Is Based On An Order Confirming An Arbitral Award And The Confirming Court Already Has Found That A Reasonable Period Of Time Has Elapsed Since Entry Of Judgment	26
B. Venezuela—Through Its Alter Ego PDVSA—Owns Property In the United States	26
1. PDVSA Is Venezuela’s Alter Ego	28
a. Venezuela Exercises Complete Control Over PDVSA	28

TABLE OF CONTENTS

(continued)

	<u>Page</u>
b. Venezuela Used Its Control Over PDVSA To Commit A Fraud	31
2. PDVSA Owns PDVH Stock, Which Is Located In Delaware As A Matter Of Law.....	33
C. PDVSA’s Shares Of PDVH Are Being Used For A Commercial Purpose In The United States.....	33
CONCLUSION.....	35

TABLE OF AUTHORITIES

	<u>Page(s)</u>
Cases	
<i>In re 650 Fifth Ave.</i> , No. 08 Civ. 10934(KBF), 2014 WL 1516328 (S.D.N.Y. Apr. 18, 2014), <i>vacated on other grounds and remanded sub nom. Kirschenbaum v. 650 Fifth Ave. & Related Properties</i> , 830 F.3d 107 (2d Cir. 2016)	34
<i>ABC Sewer Cleaning Co. v. Foxco, Inc.</i> , No. Civ. A. No. 90-1934, 1990 WL 139391 (E.D. Pa. Sept. 21, 1990)	27
<i>Alberta Sec. Comm’n v. Ryckman</i> , No. N13J-02847, 2015 WL 2265473 (Del. Super. Ct. May 5, 2015), <i>aff’d</i> , 127 A.3d 399 (Del. 2015)	33
<i>Alejandro v. Telefonica Larga Distancia de Puerto Rico, Inc.</i> , 183 F.3d 1277 (11th Cir. 1999)	27
<i>Anderman v. Fed. Republic of Austria</i> , 256 F. Supp. 2d 1098 (C.D. Cal. 2003)	34
<i>Aurelius Capital Partners, LP v. Republic of Argentina</i> , No. 08 Civ. 10934 (KBF), 2009 WL 755231 (S.D.N.Y. Mar. 12, 2009), <i>rev’d and vacated on other grounds</i> , 584 F.3d 120 (2d Cir. 2009).....	34
<i>Bayer & Willis Inc. v. Republic of Gambia</i> , 283 F. Supp. 2d 1 (D.D.C. 2003)	27, 28
<i>Bridas S.A.P.I.C. v. Gov’t of Turkmenistan</i> , 447 F.3d 411 (5th Cir. 2006)	29, 30, 31, 32
<i>Conn. Bank of Commerce v. Republic of Congo</i> , 440 F. Supp. 2d 346 (D. Del. 2006).....	26
<i>Crystallex Int’l Corp. v. Petróleos de Venezuela, S.A.</i> , 213 F. Supp. 3d 683 (D. Del. 2016).....	6
<i>D’Angelo v. Petroleos Mexicanos</i> , 378 F. Supp. 1034 (D. Del. 1974).....	33
<i>Dale v. Colagiovanni</i> , 443 F.3d 425 (5th Cir. 2006)	29

TABLE OF AUTHORITIES

(continued)

	<u>Page(s)</u>
<i>De Letelier v. Republic of Chile</i> , 748 F.2d 790 (2d Cir. 1984).....	34
<i>First Nat’l City Bank v. Banco Para El Comercio Exterior de Cuba</i> , 462 U.S. 611 (1983).....	28, 31
<i>Flatow v. Islamic Republic of Iran</i> , 308 F.3d 1065 (9th Cir. 2002)	27
<i>Flatow v. Islamic Republic of Iran</i> , 67 F. Supp. 2d 535 (D. Md. 1999), <i>aff’d</i> , 225 F.3d 653 (4th Cir. 2000)	27
<i>Kensington Int’l Ltd. v. Republic of Congo</i> , No. 97 CIV. 6124 (JGK), 2007 WL 1032269 (S.D.N.Y. Mar. 30, 2007)	29, 30, 32
<i>Kingsland Holding, Inc. v. Bracco</i> , CIV. A. No. 14817, 1996 WL 104257 (Del. Ch. Mar. 5, 1996).....	28, 33
<i>LNC Invs., Inc. v. Democratic Republic of Congo</i> , 69 F. Supp. 2d 607 (D. Del. 1999).....	25, 35
<i>Local Union No. 626 United Bhd. Of Carpenters & Joiners of Am. Pension Fund v. Delmarva Concrete Corp.</i> , No. Civ.A 02-648, 2004 WL 350452 (E.D. Pa. Feb. 24, 2004)	27
<i>Republic of Argentina v. Weltover, Inc.</i> , 504 U.S. 607 (1992).....	33
<i>Strick Corp. v. Thai Teak Prod. Co.</i> , 483 F. Supp. 1210 (E.D. Pa. 1980)	27
<i>TMR Energy Ltd. v. State Prop. Fund of Ukraine</i> , 411 F.3d 296 (D.C. Cir. 2005)	29
<i>U.S. Fid. and Guar. Co. v. Braspetro Oil Servs. Co.</i> , 199 F.3d 94 (2d Cir. 1999).....	30
<i>U.S. Fid. and Guar. Co. v. Braspetro Oil Servs. Co.</i> , No. 97 CIV. 6124(JGK), 1999 WL 307666 (S.D.N.Y May 17, 1999), <i>aff’d</i> , 199 F.3d 94 (2d Cir. 1999).....	28
<i>UMS Partners, Ltd. v. Jackson</i> , Nos. 94J-12-159H-17-076, 95E-01-043, 1995 WL 413395 (Del. Super. Ct. June 15, 1995).....	25, 33

TABLE OF AUTHORITIES

(continued)

	<u>Page(s)</u>
<i>Wilmington Tr. Co. v. Barron</i> , 470 A.2d 257 (Del. 1983)	25, 35
Statutes	
8 <i>Del. C.</i> § 169	33
8 <i>Del. C.</i> § 324	25, 35
10 <i>Del. C.</i> § 5031	25, 35
28 U.S.C. § 1603	34
28 U.S.C. § 1610	<i>passim</i>
28 U.S.C. § 1963	7
Other Authorities	
H.R. REP. NO. 94-1487, 1976 U.S.C.C.A.N. 6604 (1976)	34
Rules	
Del. Superior Court Civil Rule 4(a)	35
Fed. R. Civ. P. 69	25, 27
Local Rule 69.1	1

Plaintiff and Judgment Creditor Crystallex International Corporation (“Crystallex”) respectfully submits this opening brief in support of its motion, pursuant to Section 1610(c) of the Foreign Sovereign Immunities Act (“FSIA”), 28 U.S.C. § 1610(c), for an order authorizing the Clerk of the Court to issue a writ of attachment *feri facias* (“*fi. fa.*”)—in accordance with the Federal Rules of Civil Procedure and the Delaware Code—against the shares of Delaware corporation PDV Holding, Inc. (“PDVH”), which are owned by Petróleos de Venezuela S.A. (“PDVSA”)—alter ego of Defendant and Judgment Debtor Bolivarian Republic of Venezuela (“Venezuela”).¹

INTRODUCTION

Venezuela expropriated Crystallex’s assets without compensation in violation of both an express treaty and international law. Venezuela ultimately gave the assets it took from Crystallex to PDVSA—the wholly-owned corporate vehicle through which the Venezuelan Government controls its oil industry—for no consideration. PDVSA, in turn, sold 40% of Crystallex’s stolen assets to the Venezuelan Central Bank for approximately \$2.4 billion or . No compensation was paid to Crystallex.

Crystallex was awarded approximately \$1.2 billion (plus interest) by an arbitration panel appointed under the auspices of the International Centre for Settlement of Investment Disputes (“ICSID”), an arm of the World Bank. Crystallex’s arbitral award was confirmed by the United States District Court for the District of Columbia (the “D.C. Court”), and a judgment of \$1.2

¹ In accordance with Local Rule 69.1, Crystallex submits a proposed writ of attachment *feri facias*, as well as a praecipe, with this motion. *See* Exs. 1, 2. References to “Ex. []” are to the exhibits attached to the Declaration of Jason Myatt, dated August 14, 2017 (“Myatt Decl.”). Crystallex is providing notice of this motion to Venezuela, PDVSA, and PDVH. *See* Myatt Decl. ¶ 3.

billion, plus prejudgment interest (the “Judgment”), was entered.² After Venezuela failed to pay the Judgment for more than 60 days, the D.C. Court issued an order pursuant to Section 1610(c) of the FSIA authorizing Crystallex to begin enforcement actions in the United States. To date, Crystallex has registered the D.C. Court’s Judgment with this Court and the Southern District of New York.

Although the matter is not free from doubt, certain case law suggests that Crystallex should obtain a separate Section 1610(c) order each time it seeks to enforce against specific assets instead of relying on the original Section 1610(c) order issued out of the D.C. Court. Accordingly, Crystallex has obtained three separate orders from the Southern District of New York authorizing Crystallex to serve restraining notices and a writ of execution against Venezuelan assets that may be located at five different banking institutions. To date, no money has been paid in satisfaction of the Judgment. By its instant Section 1610(c) motion, Crystallex asks this Court to authorize its fourth attempt to execute on the Judgment by permitting the Clerk of the Court to issue a writ of attachment *fi. fa.* for service on Delaware corporation PDVH in order to attach its shares, which belong to Venezuela through Venezuela’s alter ego PDVSA.

Crystallex’s requested writ of attachment *fi. fa.* is the standard way by which a judgment creditor may enforce a federal judgment against corporate shares in a Delaware corporation belonging to a judgment debtor, and, if any party has a claim to the shares at issue, that party can raise the issue with the Court after the writ is served. The D.C. Court already has determined that Venezuela had sufficient time to voluntarily pay this Judgment, and Venezuela’s motion to

² The Judgment is in the amount of \$1.202 billion, plus pre-award interest from April 13, 2008 to April 4, 2016 at a rate of the 6-month average U.S. Dollar LIBOR plus 1%, compounded annually.

stay execution has been denied. Thus, the only question on this motion is whether the specific assets sought to be attached by this motion—shares of a Delaware corporation that ultimately owns CITGO Petroleum (“CITGO”), the oil refining company—are subject to execution. As commercial assets belonging to Venezuela and located in the United States, they are.

Although PDVSA is the nominal owner of the PDVH shares that Crystallex seeks to execute upon, as PDVSA repeatedly tweets, “PDVSAesVenezuela” (literally, “PDVSA is Venezuela”).³ PDVSA is so extensively controlled by the Venezuelan Government that it is impossible to say where one ends and the other begins. Venezuela created PDVSA by Presidential decree to implement Government policy, owns all of its shares, runs its day-to-day operations, and uses its money as the Government’s own. No less an authority than the Venezuelan Supreme Court has held that PDVSA is part of the Public National Administration.

Not only do Government ministers and employees serve as officers and directors of PDVSA, but the Government directly hires and fires even low-level PDVSA employees based on whether they are loyal to the current regime. This is not a secret, but an announced policy to guarantee State control over PDVSA. The Government controls to whom PDVSA sells oil; the quantity of oil that PDVSA can sell, at what price, and when; and even if PDVSA will be paid for its oil. The Government uses PDVSA as a foreign policy tool to gain support for its foreign policy among its Caribbean neighbors by requiring PDVSA to sell oil to various countries at favorable prices and with extended payment terms. The Government dictates where and at what rates PDVSA can convert its dollars into local currency—requiring PDVSA to exchange dollars for a fraction of their actual value—and uses PDVSA as a “piggy bank” to further the regime’s

³ See Ex. 3.

socialist agenda by funding numerous programs that have nothing to do with running an oil company.⁴

In addition, it would work an injustice to allow Venezuela to claim that this Court should honor a separate juridical existence for PDVSA, particularly when Venezuela itself recognizes that PDVSA is an arm of the State and when PDVSA received the very assets that Venezuela unlawfully expropriated from Crystallex, which gave rise to the Judgment. Not only did PDVSA receive the expropriated asset, it paid for Venezuela's defense in the very arbitration in which Crystallex's right to recovery was determined. Venezuela should not be permitted to benefit from the fact that it transferred the assets that it unlawfully expropriated from Crystallex to another entity that it created, and controls.

In short, PDVSA is right: "PDVSA es Venezuela." Accordingly, PDVSA's assets are Venezuela's and are available for execution to satisfy Crystallex's judgment.

SUMMARY OF ARGUMENT

1. Crystallex satisfies all the requirements set forth in Section 1610(c) of the FSIA.
2. Crystallex's Judgment is based on an order confirming an arbitral award, and the confirming court already has concluded that a reasonable period of time has elapsed since judgment was entered.
3. Venezuela owns property in Delaware through its alter ego, PDVSA. It is appropriate for this Court to determine that PDVSA is Venezuela's alter ego in the context of this post-judgment enforcement proceeding and based on Crystallex's evidence that Venezuela (1) incorporated PDVSA to implement Government policy; (2) shares common directors and

⁴ Ex. 41.

officers with PDVSA; (3) exercises day-to-day control over PDVSA; (4) exercises economic control over PDVSA and uses its revenue for political purposes; (5) uses PDVSA's property as its own; (6) is the real beneficiary of PDVSA's conduct; (7) legally views PDVSA as an arm of the State; and (8) gave the assets it took from Crystallex to PDVSA for no consideration.

4. PDVSA's shares of PDVH are located in Delaware and are being used for a commercial purpose.

STATEMENT OF FACTS

I. The Arbitration Award And Judgment

After Crystallex, a Canadian gold producer, had spent hundreds of millions of dollars developing its exclusive interest in Las Cristinas, an extremely valuable gold reserve in Venezuela, the Venezuelan Government unlawfully expropriated Crystallex's rights.⁵ In 2011, following the completion of the expropriation, Crystallex commenced an arbitration against Venezuela in Washington, D.C. pursuant to a bilateral investment treaty between Canada and Venezuela.⁶ In April 2016, Crystallex obtained a \$1.2 billion award—plus pre-award interest of approximately \$200 million—against Venezuela from the arbitration tribunal.⁷ Crystallex immediately sought confirmation of that award in the United States District Court for the District of Columbia.⁸ Venezuela appeared in that action and challenged the award.⁹

⁵ See Ex. 4 ¶¶ 718, 878.

⁶ See Exs. 4, 5.

⁷ See Ex. 4 ¶ 961.

⁸ See Ex. 6.

⁹ See *id.*

During the pendency of the arbitration and even during the confirmation action, Venezuela, and its direct and indirect wholly-owned subsidiaries, acted to transfer assets out of the United States in an effort to hinder and delay creditors like Crystallex. While the arbitration was pending, Venezuela and its alter ego, PDVSA, caused CITGO Holding Inc. (“CITGO Holding”) to borrow \$2.8 billion at 12% interest and then transferred those funds out of the United States through a dividend from CITGO Holding to PDVH to PDVSA for no consideration. In November 2015, Crystallex commenced a fraudulent transfer action before this Court against PDVSA, PDVH, and CITGO Holding based on that transaction. *Crystallex Int’l Corp. v. Petróleos de Venezuela, S.A.*, C.A. No. 1:15-cv-01082-LPS (D. Del. Nov. 23, 2015).

After Chief Judge Stark of this Court found that Crystallex had stated a viable fraudulent transfer claim against PDVH in that action, such that PDVH might be subject to post-judgment restraints on further transfers of its assets, *see Crystallex Int’l Corp. v. Petróleos de Venezuela, S.A.*, 213 F. Supp. 3d 683, 692–93, 696 (D. Del. 2016)—and after Crystallex had obtained its arbitral award and commenced its confirmation proceeding in the District of Columbia—Venezuela and its subsidiaries orchestrated additional transactions designed to extract further value out of CITGO and repatriate funds to Venezuela. Specifically, PDVH agreed to encumber all of its shares of CITGO Holding—for no consideration to PDVH and for PDVSA’s sole benefit—as collateral for bonds that PDVSA issued and a loan that PDVSA received. These further fraudulent transfers are the subject of a second action that Crystallex brought against Venezuela’s subsidiaries in October 2016 before this Court. *Crystallex Int’l Corp. v. PDV Holding, Inc.*, C.A. No. 1:16-cv-01007-LPS (D. Del. Oct. 28, 2016).

On March 25, 2017, the D.C. Court issued a decision confirming the arbitral award against Venezuela, rejecting Venezuela’s challenges to the award, and directing entry of

judgment in Crystallex’s favor in the amount of \$1.202 billion, plus interest.¹⁰ Judgment was entered on April 7, 2017.¹¹

Because Venezuela is a foreign sovereign, Crystallex moved the D.C. Court for relief pursuant to Section 1610(c) of the FSIA and 28 U.S.C. § 1963, asking that court to determine that a reasonable period of time had elapsed since entry of the Judgment such that Crystallex could seek to attach Venezuela’s assets in execution of the Judgment and to permit Crystallex to register the Judgment in other judicial districts of the United States.¹² On June 9, 2017, the D.C. Court granted Crystallex’s motion in full.¹³ Venezuela failed to post a bond and its subsequent motion to stay execution of the Judgment was denied on August 8, 2017.¹⁴

Crystallex registered its Judgment against Venezuela in the Southern District of New York on June 15, 2017,¹⁵ and in Delaware on June 19, 2017, D.I. 1. Crystallex has since sought and obtained from the Southern District of New York two orders under Section 1610(c)—on June 30, 2017 and July 5, 2017—to restrain certain of Venezuela’s assets, and a third such order—on July 25, 2017—for a writ of execution against additional assets, all pursuant to New York’s judgment enforcement procedures. *See* Myatt Decl. ¶ 14.

II. PDVSA: Venezuela’s Alter Ego

“PDVSA es Venezuela” literally translates to “PDVSA is Venezuela.” PDVSA recently

¹⁰ *See* Exs. 6, 7.

¹¹ *See* Ex. 7.

¹² *See* Ex. 8.

¹³ *See id.* at 5.

¹⁴ *See* Ex. 9 at 6.

¹⁵ *See* Ex. 10.

made this assertion more than one hundred times on its Twitter feed.¹⁶ It has done so for good reason. PDVSA is both legally and factually the alter ego of Venezuela, and its assets can properly be treated as Venezuela's assets.

A. Venezuela Caused PDVSA's Incorporation To Implement Policy

PDVSA's creation was mandated by Presidential decree pursuant to Venezuela's Nationalization Law enacted in 1975.¹⁷ PDVSA is a State company directed to "comply with and implement the policy on hydrocarbons enacted by the National Executive Branch."¹⁸ PDVSA's intertwined relationship with the Government has been enshrined in Venezuela's Constitution, which mandates that Venezuela retain all shares of PDVSA "[f]or reasons of economic and political sovereignty and national strategy."¹⁹ Indeed, according to former Minister of People's Power for Oil and Mining ("Oil Minister") and PDVSA President Rafael Ramírez, PDVSA "is not a company designed to generate profits. [It] is a national company."²⁰ The Venezuelan Supreme Court has recognized the "importance of PDVSA from the economic, social and constitutional viewpoint" of Venezuela,²¹ and has stated that "there is no doubt" that PDVSA "falls within the framework of the general structure of [the] National Public Administration,"²² enjoying all of the "privileges" of the Venezuelan State.²³

¹⁶ See Ex. 3.

¹⁷ See Exs. 11, 12; see also Declaration of Jose Ignacio Hernandez, dated August 13, 2017 ("Hernandez Decl.") ¶ 9.

¹⁸ Ex. 13; see also Ex. 14; Hernandez Decl. ¶ 14.

¹⁹ Ex. 15; see also Hernandez Decl. ¶ 15.

²⁰ Ex. 97.

²¹ Ex. 16; see also Hernandez Decl. ¶ 16.

²² Ex. 17; see also Hernandez Decl. ¶ 16.

B. Venezuela And PDVSA Share Common Directors And Officers

Many of PDVSA's executives and directors are senior Government personnel who are able to control the company from within. Its directors are appointed by Presidential decree,²⁴ as are its vice-presidents and members of its shareholder council.²⁵ Several Government Ministers are on PDVSA's board of directors, and Government officials regularly hold parallel roles within PDVSA's management.²⁶

Significantly, Venezuela's Oil Minister has almost always also been PDVSA's President and Director. Up until recently, Eulogio Del Pino was both the Oil Minister and President of PDVSA,²⁷ and before him Rafael Ramírez held both posts.²⁸ In January 2017, Nelson Martinez left his post as Chief Executive Officer of PDVSA's indirect subsidiary, CITGO, and took over as Oil Minister.²⁹ Mr. Martinez also recently was asked by Venezuela's President to take over the job of President of PDVSA.³⁰ In addition to being run by the same person, the Ministry of

[Footnote continued from previous page]

²³ Ex. 18; *see also* Hernandez Decl. ¶ 16. Venezuelan courts have similarly concluded that the Constitutional references to PDVSA confirm its "public nature" and its place at the top of the "hierarchically organized entities that are in charge of public tasks." *See* Hernandez Decl. ¶ 27, n.43.

²⁴ *See* Ex. 13; Hernandez Decl. ¶ 28. In January 2017, President Nicolás Maduro appointed PDVSA's entire Board. *See* Ex. 19.

²⁵ *See* Ex. 13; Hernandez Decl. ¶ 28.

²⁶ *See* Ex. 21.

²⁷ *See* Exs. 20, 21; Hernandez Decl. ¶ 29.

²⁸ *See* Ex. 22; Hernandez Decl. ¶ 29.

²⁹ *See* Ex. 23; Hernandez Decl. ¶ 29.

³⁰ *See* Ex. 24; Hernandez Decl. ¶ 29.

People's Power for Oil and Mining ("Oil Ministry") and PDVSA share the same offices.³¹

PDVSA's current board of directors was appointed by Government Decree No. 2.703.³² Delcy Eloina Rodríguez Gomez, a current Director of PDVSA and PDVSA's Vice President of Foreign Affairs, also was Venezuela's Foreign Affairs Minister until June 21, 2017 (when she resigned to run for a position in Venezuela's Constituent Assembly, of which she was recently named President).³³ Other PDVSA directors include Rodolfo Clemente Marco Torres (Venezuela's Food Minister), and Ricardo Menendez Prieto (Venezuela's Planning Minister).³⁴ Current Venezuelan President Nicolás Maduro also created a new post, Executive Vice-President of PDVSA, and appointed Rear Admiral Maribel del Carmen Parra de Mestre to the position.³⁵

Simón Alejandro Zerpa Delgado,³⁶ who is a Director of PDVSA and PDVSA's Vice-President of Finance, is also the President of Fondo Nacional para el Desarrollo Nacional ("FONDEN")—a social development fund having nothing to do with the business of an oil company, but to which PDVSA is forced to contribute billions of dollars each year.³⁷ Mr. Delgado was also commissioner of the Venezuelan Chinese Fund (through which funds received

³¹ See Ex. 25 (listing PDVSA's address); Hernandez Decl. ¶ 30 n.50.

³² See Ex. 19; Hernandez Decl. ¶ 31.

³³ See Exs. 19, 26, 27; Hernandez Decl. ¶ 31. Ms. Rodriguez also has been placed in charge of PDVSA America, S.A., PDV Caribe, S.A. and PDV Europa, S.A. See Ex. 21.

³⁴ See Ex. 19; Hernandez Decl. ¶ 31.

³⁵ See Exs. 18, 28; Hernandez Decl. ¶ 33.

³⁶ Mr. Delgado is currently the subject of sanctions issued by the United States government in connection with his role in Venezuelan governmental corruption, a sign that the Executive Branch of the U.S. Government appears to find no meaningful distinction between Venezuela, PDVSA, and FONDEN. See Ex. 29; Hernandez Decl. ¶ 32.

³⁷ See Exs. 19, 30; see also Hernandez Decl. ¶ 32.

from China—in exchange for PDVSA’s oil—are invested in Venezuela).³⁸

These senior Government officials make no meaningful effort to separate their roles as members of Venezuela’s executive branch and as senior managers and directors of PDVSA.³⁹

C. Venezuela Exercises Complete Day-To-Day Control Over PDVSA

Unlike an ordinary shareholder, Venezuela controls PDVSA’s operations on a day-to-day basis. Indeed, the Government’s domination over PDVSA is total. The Government hires and fires even low-level employees, and it tells PDVSA to whom it must sell oil and for what price. This is no secret—one of PDVSA’s stated objectives is to “guarantee control by the State over [PDVSA].”⁴⁰ PDVSA’s website also publicly admits that it is “subordinated to the Venezuelan state.”⁴¹ For example:

- The Government has a long history of hiring and firing PDVSA personnel for political reasons. In 2003, the Government directly fired approximately 18,000 PDVSA employees, nearly 40% of the company’s workforce at the time, because they opposed the Government.⁴² Former Venezuelan President Hugo Chávez personally and publicly fired a number of PDVSA executives and forcibly retired 12 other employees on live television.⁴³ Such acts continue today, as evidenced by PDVSA’s threats to its employees that they would be fired if they did not support the current regime in Venezuela’s July 30, 2017 elections.⁴⁴
- Under Venezuelan law, it is the Oil Ministry, not PDVSA, that is responsible for formulating, regulating, and controlling the “policies and planning” related to hydrocarbons activity.⁴⁵

³⁸ See Ex. 30; Hernandez Decl. ¶ 32.

³⁹ See generally Hernandez Decl. ¶¶ 28–33.

⁴⁰ See Ex. 60; see also Ex. 31; Hernandez Decl. ¶ 35.

⁴¹ Ex. 32; see also Hernandez Decl. ¶ 36.

⁴² See Hernandez Decl. ¶ 21; Declaration of Dr. Roberto Rigobon, dated August 14, 2017 (“Rigobon Decl.”) ¶ 11.

⁴³ See Exs. 33, 34; Hernandez Decl. ¶ 21.

⁴⁴ See Ex. 35.

⁴⁵ Ex. 36; see also Hernandez Decl. ¶ 19.

Thus, by official decree, PDVSA acts under the direct supervision of the Sector Vice-Presidency of Economy, which coordinates all the activities related to oil and mining, and the Oil Ministry.⁴⁶ Indeed, PDVSA admitted that Venezuela's National Executive Branch "exercises control of [PDVSA's] production and export of oil," and "grants the rights and mining areas as established [under Venezuela's] Hydrocarbons Law."⁴⁷

- Venezuela designates PDVSA's oil production levels by official decree.⁴⁸
- Venezuela dictates the severely discounted price at which PDVSA must sell its product to Venezuelan citizens.⁴⁹ As PDVSA explained in a 2011 debt offering, "[t]he Venezuelan government, rather than the international market, determines the price of products . . . sold by us through our affiliates in the domestic market."⁵⁰ Indeed, the current price of gasoline in Venezuela is 1 Bolivar per liter, approximately 1/30th of a penny, at the Venezuelan official exchange rate for private-sector operations.⁵¹
- Venezuela forces PDVSA to "sell" oil to third parties for no, or *de minimis*, consideration. For example, through an agreement known as "Petrocaribe," Venezuela commits PDVSA to selling oil to select Caribbean and Latin American nations at substantial discounts (often without requiring any payment from the counterparties for 10 to 20 years) and/or on preferential payment terms, without seeking or receiving PDVSA's consent or even having PDVSA execute the agreements (*see* Section F.3 *infra*).
- PDVSA repeatedly warned bondholders that it could give no assurances that Venezuela would not "impose further material commitments upon us or intervene in our commercial affairs in a manner that will adversely affect our operations, cash flow and financial results."⁵²

D. Venezuela Exercises Economic Control Over PDVSA

Venezuela uses PDVSA "as a piggy bank" to further the State's economic interests.⁵³

⁴⁶ *See* Ex. 37; Hernandez Decl. ¶ 19.

⁴⁷ Ex. 38; *see also* Ex. 39; Hernandez Decl. ¶ 20.

⁴⁸ *See* Ex. 39; Rigobon Decl. ¶ 38.

⁴⁹ *See* Ex. 38; Rigobon Decl. ¶¶ 38-40.

⁵⁰ Ex. 40 at 14.

⁵¹ *See* Rigobon Decl. ¶ 40.

⁵² Ex. 40 at 16; *see also* Rigobon Decl. ¶ 16(b).

⁵³ Ex. 41; *see also* Hernandez Decl. ¶ 46.

One need look no further than PDVSA's own statements and admissions to determine that Venezuela not only controls PDVSA but is completely economically reliant on PDVSA.⁵⁴ For example, PDVSA's own President declared in 2016 that PDVSA is the "economic pillar of the Nation."⁵⁵ PDVSA has warned investors for years that Venezuela imposes financial commitments on PDVSA that achieve Venezuela's objectives but negatively affect PDVSA's commercial affairs, operations, and cash flow. For example, as recently as September 2016, PDVSA warned bondholders that:

- PDVSA could make no assurances that Venezuela would not "impose further material commitments upon us or **intervene in our commercial affairs in a manner that will adversely affect our operations, cash flow and financial results.**"
- PDVSA could "offer no assurance that changes in Venezuelan law or the implementation of policies by the Venezuelan government will not **affect our operations, cash flow and financial results.**"
- PDVSA's "**Business Plan is based on . . . key initiatives approved by the government of Venezuela.**"
- PDVSA is "**controlled by the Venezuelan government, which ultimately determines our capital investment and other spending programs.**"
- "[i]n circumstances involving a conflict of interest between Venezuela, as our sole owner, and the holders of the New Notes, Venezuela may exercise the rights arising from its ownership interest in a manner that would **benefit Venezuela's interests above our own interests, which may, in turn, have a negative effect on our financial condition and results of operations.**"⁵⁶

More specifically, PDVSA has admitted that Venezuela requires it to make significant financial contributions to Government social programs that have nothing to do with the

⁵⁴ Venezuela's Supreme Court has recognized that PDVSA "play[s] a main role in [the] national economy." Ex. 42; *see also* Hernandez Decl. ¶ 16.

⁵⁵ Ex. 43.

⁵⁶ Ex. 44 at 28, 29, 89 (emphasis added); *see also* Rigobon Decl. ¶ 16.

hydrocarbons industry and that adversely affect its commercial operations. For example,

PDVSA admitted that:

- the Venezuelan “government requires us to make **significant financial contributions to social programs, including transfers to FONDEN**, as well as requiring us to fund specific projects.”
- PDVSA could make no assurances that Venezuela would “not require us to increase our **financial contributions to social programs**” and that “[a]ny actual or anticipated changes or downgrades in Venezuela’s credit ratings could affect the market value of” notes that PDVSA was offering.
- Venezuela “as our sole owner, may cause us to pursue certain macroeconomic and **social objectives that may adversely affect our results of operations and financial condition.**”
- “in the past the Venezuelan government **required us to acquire several electricity generation and distribution companies, as well as certain food companies.**”
- the “government may require that we **increase our social contribution payments**, or it may require us to divert a portion of our crude oil production to electricity companies in Venezuela, which would, in both cases, materially adversely affect our results of operations, cash flow and financial condition.”⁵⁷

PDVSA’s warnings are not just theoretical scenarios: PDVSA in fact has been forced to contribute billions of dollars per year to off-budget Government programs that have little to no oversight.⁵⁸ The vehicle for much of this hidden funding is FONDEN, whose director, Simón Alejandro Zerpa Delgado, is also a Director and the Vice-President of Finance at PDVSA.⁵⁹ As PDVSA admitted in its financial statements, it contributed more than USD 34 billion to FONDEN from 2010 to 2016.⁶⁰ Venezuela also has required PDVSA to contribute more than USD 48 billion from 2010 to 2016 to other Government programs that are unrelated to PDVSA’s

⁵⁷ Ex. 44 at 26, 29, 31 (emphasis added); *see also* Rigobon Decl. ¶ 16.

⁵⁸ *See* Rigobon Decl. ¶¶ 18–29.

⁵⁹ *See* Ex. 19; *see also* Rigobon Decl. ¶¶ 23–26; *see also* Hernandez Decl. ¶¶ 32, 45–47.

⁶⁰ *See* Rigobon Decl. ¶ 25.

commercial operations (*e.g.*, contributions to sports, infrastructure, and agriculture).⁶¹

Venezuela demands that PDVSA contribute billion of dollars each year in the form of (1) **royalties**, (2) **taxes**, including an extraction tax, export registration tax, and income tax, and (3) **dividends**.⁶² PDVSA's financial statements show that its total contributions to the Venezuelan budget from 2010 to 2016 were more than USD 119 billion.⁶³

PDVSA also funds the State through the Government's manipulation of the Venezuelan Central Bank's foreign exchange system.⁶⁴ When PDVSA converts currency into Venezuelan Bolivars, it is required to do so at an artificially low U.S. Dollar to Bolivar exchange rate (approximately 1/500th of the market rate).⁶⁵ The Government then can exchange these dollars at more favorable rates, which serves to further leverage PDVSA's revenues for the sole benefit of the State (and to the detriment of PDVSA).⁶⁶

Venezuela likewise uses PDVSA as a tool to further State economic goals through the repayment of Government loans. For example, Venezuela has entered into numerous agreements with China, pursuant to which PDVSA acts "on behalf of the Bolivarian Republic of Venezuela" to repay China.⁶⁷ Under those agreements, in exchange for substantial investments in

⁶¹ *See id.* ¶ 28.

⁶² *See id.* ¶ 20.

⁶³ *See id.* ¶ 20.

⁶⁴ *See id.* ¶ 26; Exs. 45, 46. FONDEN was created by governmental decree, which stated that "the remainder of foreign currency obtained by means of export of hydrocarbons, gases and others will be transferred to the Fund." Ex. 47.

⁶⁵ *See* Ex. 48; Rigobon Decl. ¶ 26.

⁶⁶ *See* Ex. 48; Rigobon Decl. ¶ 26.

⁶⁷ Ex. 49 at Clauses 2.1, 2.2, 2.3, 3.3.1, 5.2, 6.1.1(A), and 6.1.1(B); *see also* Rigobon Decl. ¶¶ 34–37.

Venezuela, Venezuela directs PDVSA to sell millions of barrels of oil to China on economically disadvantaged terms.⁶⁸ To date, China has advanced over \$50 billion to Venezuela in exchange for oil and fuel from PDVSA, but PDVSA has received no remuneration.⁶⁹ The Government has similarly committed PDVSA to other loan-for-oil agreements with Russia.⁷⁰

E. Venezuela Uses PDVSA's Assets As Its Own

Venezuela regularly uses PDVSA's assets as its own. In addition to using PDVSA's revenues for all sorts of Government purposes as outlined above and below—including using PDVSA's funds for contributions to the Government's budget, FONDEN, and other Government programs that are unrelated to the hydrocarbons industry, and repaying Government debt—the Government uses PDVSA's assets as if the Government owned them in additional ways. For example:

- In the underlying arbitration with Crystallex, *PDVSA*—which was not a party to the arbitration—paid ICSID's administrative fees *directly* on Venezuela's behalf. Upon receipt of the funds, ICSID made a point of confirming that the money was truly intended for Venezuela's use. Venezuela then expressly confirmed PDVSA's money was paid in satisfaction of Venezuela's obligations.⁷¹
- The Venezuelan Government directs the use of PDVSA's aircraft to benefit the Government's political objectives. Press reports detail the use of PDVSA airplanes for travel by Venezuelan officials, such as Elias Jaua, former Vice President of Venezuela under Chávez.⁷² Venezuela also makes PDVSA aircraft available to politicians from countries that are friendly to Venezuela. The Venezuelan Government reported that, in September 2015, Colombian guerilla leader Rodrigo Londoño Echevierri, a top commander in the Fuerzas

⁶⁸ See Exs. 50-53; *see also* Rigobon Decl. ¶ 34.

⁶⁹ See Rigobon Decl. ¶ 37.

⁷⁰ See *id.* ¶ 37. It is estimated that the oil-for-loan obligations from PDVSA to both Russia and China as of 2017 total more than USD 55 billion. *See id.*

⁷¹ See Declaration of Robert A. Fung, dated August 10, 2017 (“Fung Decl.”) ¶¶ 3-5; Fung Decl. Exs. 1, 2.

⁷² See Ex. 54.

Armadas Revolucionarias de Colombia (FARC), travelled on a Venezuelan airplane to Havana. Venezuelan media reports stated that the aircraft belonged to PDVSA.⁷³ PDVSA jets also have been used to transport former Honduran president Manuel Zelaya to Washington, D.C.⁷⁴ Venezuela also has “lent” three PDVSA airplanes to the Cuban Government, where they have been used to transport President Raúl Castro and Vice President Miguel Díaz Canel.⁷⁵

- As recently as April 2017, Venezuela used PDVSA trucks as physical barriers to prevent anti-Government demonstrators from gathering.⁷⁶

F. Venezuela Is The Real Beneficiary Of PDVSA’s Conduct

1. Venezuela Uses PDVSA To Achieve Its Social Goals

In 2002, the National Executive increased its control over PDVSA through a series of reorganizations, which led the company to be called, informally, the “New PDVSA.”⁷⁷ As a result of this transformation, PDVSA’s corporate mission was expanded beyond the hydrocarbons industry to take on a more political role.⁷⁸ PDVSA openly admits that the “New PDVSA” is “subordinated to the Venezuelan State and deeply committed to the true owner of the oil: the Venezuelan people.”⁷⁹ Former PDVSA President and Venezuelan Oil Minister, Rafael Ramírez Carreño, confirmed that PDVSA is “subject to the Venezuelan state and [an] instrument

⁷³ See Ex. 55.

⁷⁴ See Ex. 56.

⁷⁵ See Ex. 57.

⁷⁶ See Ex. 58.

⁷⁷ Hernandez Decl. ¶ 34; *see also* Exs. 38, 59.

⁷⁸ See Hernandez Decl. ¶¶ 39-47. The Government’s increased control over PDVSA and its affiliates is established in both the Government’s and PDVSA’s strategic plans. The Government’s six-year “Homeland Plan” for 2013-2019 has its “Historical Objective Number 1” that the State “[m]aintain and guarantee control by the State over [PDVSA].” Ex. 60. Similarly, the PDVSA Strategic Socialist Plan 2016-2015 confirmed that PDVSA should be transformed into a “Socialist and Revolutionary PDVSA.” Ex. 61 at 33-34.

⁷⁹ Ex. 62; *see also* Hernandez Decl. ¶ 36.

of liberation of our beloved Venezuelan people.”⁸⁰ PDVSA itself acknowledged that it is “an essential tool in the service of the Venezuelan State.”⁸¹

To this end, PDVSA funds programs in Venezuela that have nothing to do with its business. For example, through PDVSA Agricola S.A., PDVSA is used to implement the Government’s Strategic Plan for Agricultural Development.⁸² The Government forces PDVSA to spend money to subsidize Venezuela’s agriculture, industrial infrastructure, and produce sectors.⁸³ Similarly, the Government compels PDVSA to subsidize housing through PDVSA Desarrollos Urbanos S.A.⁸⁴ In 2010, the Government requested that PDVSA contribute more money for housing projects. Then-President Chávez stated, “I will do my best to find the money. Call Rafael Ramírez (the president of PDVSA). I will find a lot of money through this source.”⁸⁵ In response, PDVSA took on additional debt.⁸⁶ That same year, President Chávez announced that revenues from a \$3 billion bond offering of PDVSA would be used to finance a housing program.⁸⁷

2. Venezuela Uses PDVSA To Achieve Domestic Political Goals

PDVSA is used as a tool to generate support for the Government domestically. President Maduro has expressly directed PDVSA employees to vote in favor of the Government in

⁸⁰ Ex. 38.

⁸¹ Ex. 63; *see also* Hernandez Decl. ¶ 36.

⁸² Hernandez Decl. ¶ 41; *see also* Ex. 64.

⁸³ *Id.* ¶ 41.

⁸⁴ *Id.*; *see also* Ex. 21.

⁸⁵ Rigobon Decl. ¶ 27; Ex. 65.

⁸⁶ Rigobon Decl. ¶ 27; *see also* Ex. 40.

⁸⁷ *See* Rigobon Decl. n.39; Ex. 65.

upcoming assembly elections, or otherwise risk losing their jobs.⁸⁸ The company itself has used its social media presence to disseminate propaganda on behalf of the Venezuelan state and the Maduro regime.⁸⁹ The banner heading of PDVSA's Twitter page is a photograph of Hugo Chávez, holding a beaker of oil and surrounded by PDVSA employees.⁹⁰ And PDVSA regularly tweets messages in support of the Government. In recent weeks, for example, PDVSA repeatedly used the hashtag "#PDVSAesVenezuela," which translates literally to "PDVSA is Venezuela."⁹¹ PDVSA's acts to support the Government are not limited to generalized messages of unity. For example, on October 16, 2006, division managers in the electric distribution division of PDVSA agreed to "drive out critics of the Chávez government," agreeing that "[t]hose who are not with Chávez must not be in PDVSA."⁹²

Moreover, Venezuela directs PDVSA's oil activities domestically. The Government designates those production levels by official decree, and regulates the prices at which that oil should be sold within Venezuela.⁹³ The Government recently increased the price of low-grade fuel from 0.07 Bolivars to 1 Bolivar (or, 1/30th of a penny).⁹⁴ Just last week, PDVSA released

⁸⁸ See Ex. 66; see also Rigobon Decl. n.6.

⁸⁹ See, e.g., Exs. 67, 68.

⁹⁰ Ex. 69.

⁹¹ Ex. 3. For example, on July 17, 2017, PDVSA tweeted "PDVSAesVenezuela" no less than 127 times. See *id.*

⁹² Ex. 70 ("All individuals (from leaders down) that are not identified with the process will be assigned to irrelevant activities, overtime will be eliminated for them and they will be taken out of activities on Saturday and Sunday. Those who are not with Chávez must not be in PDVSA.").

⁹³ See Ex. 39; Ex. 81 at 23; see also Rigobon Decl. ¶ 38.

⁹⁴ See Rigobon Decl. ¶ 40.

its 2016 audited financial statements (audited by KPMG’s Venezuelan affiliate), in which it revealed for the first time that, in 2016, PDVSA “requested” and subsequently received a subsidy from the Government that “corresponds to the difference between production costs and regulated petrol and diesel fuel prices in the national market.”⁹⁵ The subsidy was not granted as a matter of right but purely at the Government’s discretion, and it did not cover PDVSA’s lost profits. KPMG called this flow of funds between the State and PDVSA “an unusual transaction” and “key audit issue.”⁹⁶ Indeed, this transaction shows that funds flow between PDVSA and the Government in unconventional ways and at the sole discretion of the State. Ultimately, PDVSA simply exists to advance the Government’s political objectives.

3. Venezuela Uses PDVSA To Achieve Its Foreign Policy Goals

PDVSA’s own website confirms that PDVSA exists to “[s]upport the geopolitical positioning of Venezuela internationally.”⁹⁷ PDVSA’s role in Venezuela’s foreign policy is demonstrated by how it has been utilized to run an organization known as Petrocaribe, which exists to implement a program designed to increase “solidarity” between Venezuela, members of the Caribbean Community, and members of the Bolivarian Alliance for the Americas. Through Petrocaribe, Venezuela commits PDVSA to selling oil to select Caribbean and Latin American nations at substantial discounts (often not requiring any payment for 10 to 20 years and/or on

⁹⁵ *Id.*; Ex. 98.

⁹⁶ Rigobon Decl. ¶ 40; Ex. 98.

⁹⁷ Ex. 71.

preferential payment terms)—without seeking or receiving PDVSA’s consent or even having PDVSA execute the agreements.⁹⁸

Venezuela benefits politically in return for offering PDVSA’s oil on favorable payment terms. For example, in June, certain Caribbean countries, all of which were indebted to Venezuela under Petrocaribe, blocked an international resolution—backed by the United States, Mexico, Argentina, Canada, Brazil, and 15 other major countries—that would have condemned the Venezuelan Government.⁹⁹ Essentially, this program is a form of state aid to neighboring countries that Venezuela seeks to influence. Even when these Petrocaribe “sales” are repaid, the money is given to Venezuela, not to PDVSA.¹⁰⁰

4. Venezuela Uses PDVSA To Expropriate Private Investments

After expropriating Crystallex’s interest in Las Cristinas, Venezuela gave those assets to PDVSA for no consideration.¹⁰¹ The project remained fallow, and PDVSA later sold 40% of its

⁹⁸ See Exs. 72–74, 77. As part of this regime, Venezuela has entered into Energetic Cooperation Agreements with Antigua and Barbuda, Bahamas, Belize, Cuba, Dominica, Dominican Republic, Granada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Nicaragua, Saint Kitts and Nevis, Saint Vincent and Grenadines, Saint Lucia, and Suriname. See also Rigobon Decl. ¶¶ 31–33; Hernandez Decl. ¶¶ 49–50.

⁹⁹ See Rigobon Decl. ¶ 32; see also Ex. 76.

¹⁰⁰ Ex. 77.

¹⁰¹ Following the expropriation, the Government created three new mining blocks, including one entitled Sifontes Sur, that contain the Las Critinas site. Exs. 78–80. The rights to mine all three blocks were transfer to PDVSA by Presidential Decree in February 2013. Ex. 79. PDVSA created a new indirect subsidiary Corporación Venezolana de Minería, S.A. (“CVM”) to take title to the transferred mining rights, which were then transferred to yet another PDVSA entity Empresa Nacional Aurífera, S.A. (“ENA”). Ex. 81. Months later, the Venezuelan Central Bank forgave billions of dollars of PDVSA debt in exchange for 40% of PDVSA’s shares of ENA. Exs. 81–82.

interests in Las Cristinas to the Venezuelan Central Bank for approximately \$2.4 billion.¹⁰² PDVSA also is designated as the entity through which Venezuela achieves certain other expropriations—a power reserved to the sovereign.¹⁰³ For example, Venezuela, through PDVSA, expropriated 11 drilling rigs, in order to “boost Oil domestic production and strengthen [Venezuela’s] Full Petroleum Sovereignty policy.”¹⁰⁴ PDVSA also assisted with the expropriation of a Venezuelan cement company,¹⁰⁵ as well as the expropriation of the interests of certain subsidiaries of Exxon Mobil Corporation through Decree No. 5200 in Venezuela.¹⁰⁶

By official decrees, Venezuela has officially designated PDVSA as the expropriating entity including, for example: (1) the acquisition of land for the development of State-sponsored housing programs,¹⁰⁷ (2) Venoco and other lubricants companies,¹⁰⁸ and (3) Norpro Venezuela, a producer of proppants used in hydraulic fracturing and subsidiary of French company Saint-Gobain.¹⁰⁹ Given PDVSA’s role in the expropriation of Norpro Venezuela, an ICSID tribunal found that “all of PDVSA’s actions with regard to [Norpro Venezuela’s] plant can and have to be

¹⁰² Exs. 81–82; *see also* Hernandez Decl. ¶ 25.

¹⁰³ Ex. 83, Article 6 (“The National Executive Branch shall be able to decree the total or partial expropriation of shares or assets of companies that perform the services referred to in the preceding articles, in accordance with that which is established in the Law of Expropriation due to the Cause of Social or Public Utility. The expropriating entity shall be [PDVSA] or the subsidiary that it designates.”); *see also* Hernandez Decl. ¶ 22.

¹⁰⁴ Ex. 84; *see also* Hernandez Decl. ¶ 23.

¹⁰⁵ *See* Hernandez Decl. ¶ 23; *see also* Ex. 85.

¹⁰⁶ *See* Hernandez Decl. ¶ 24.

¹⁰⁷ Ex. 86. *See also* Ex. 83, Article 6.

¹⁰⁸ Ex. 87. *See also* Ex. 83, Article 6; Hernandez Decl. ¶ 23.

¹⁰⁹ Ex. 88. *See also* Ex. 83, Article 6; Hernandez Decl. ¶ 23.

attributed to [Venezuela].”¹¹⁰ Expropriation is a sovereign, rather than a commercial, act.

In addition to its expropriation activities, Venezuela also has used PDVSA to fund the purchase of large companies in other Venezuelan industries—and, as with its other uses of PDVSA, these purchases provided no consideration or remuneration of any kind to PDVSA.¹¹¹ In 2011, PDVSA could not “assure” its debt investors “that the government of Venezuela will not require us to . . . purchase other businesses” in the future.¹¹²

G. Venezuelan Courts View PDVSA As An Arm Of Venezuela

Venezuela and PDVSA are treated as one and the same under Venezuelan law.¹¹³ Pursuant to Venezuela’s statutes, PDVSA is considered a State company, controlled by the National Executive Branch.¹¹⁴ The Hydrocarbons Organic Law reaffirms that PDVSA hydrocarbons activities are dictated by the National Executive.¹¹⁵ Based on this relationship between Venezuela and PDVSA, Venezuela’s Supreme Court has stated that “there is no doubt, and this is reaffirmed by the Constitution of the Bolivarian Republic of Venezuela, that [PDVSA] falls within the framework of the general structure of [the] National Public Administration.”¹¹⁶ Venezuela’s Supreme Court also stated that it was “a well-known fact” that PDVSA “play[s] a main role in [the] national economy, and that the possible allocation of its

¹¹⁰ Ex. 99 ¶ 460; *see also* Hernandez Decl. n.36.

¹¹¹ Ex. 40 at B-35; *see also* Ex. 89.

¹¹² Ex. 40 at 17. The President of Venezuela also ordered PDVSA Agricola to transfer certain assets to another State company, “Corporacion de Desarrollo Agricola, S.A.” *See* Ex. 90.

¹¹³ Hernandez Decl. ¶ 7.

¹¹⁴ Ex. 14; Hernandez Decl. ¶ 10.

¹¹⁵ Ex. 36; Hernandez Decl. ¶ 14.

¹¹⁶ Ex. 17; Hernandez Decl. ¶ 16.

assets ultimately affects the Nation’s assets.”¹¹⁷ Just last year, the Venezuelan Supreme Court halted a pending investigation against PDVSA noting the “serious or difficult to repair injuries that would be caused to [PDVSA] and even to the Republic” had the investigation continued.¹¹⁸

III. PDVSA’s Ownership Of PDVH

There is no dispute that PDVSA wholly owns PDVH, which is incorporated in Delaware.¹¹⁹ In recent financial statements, PDVSA represented that it retained a 100% interest in PDVH.¹²⁰ PDVH also recently represented in a corporate disclosure statement before the Third Circuit that PDVSA is its only parent corporation.¹²¹

ARGUMENT

I. Legal Standards Governing Crystallex’s Motion

A. Operative Delaware Provisions As Incorporated By Rule 69

Pursuant to Rule 69 of the Federal Rules of Civil Procedure, a money judgment entered by a federal court “is enforced by a writ of execution, unless the court directs otherwise,” and the “procedure on execution—and in proceedings supplementary to and in aid of judgment or execution—must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies.” Fed. R. Civ. P. 69(a). Delaware law provides that judgment creditors may execute on their judgments by garnishment, which is “the attachment of a defendant’s property in the hands of a third party.” *UMS Partners, Ltd. v. Jackson*, Nos. 94J-

¹¹⁷ Ex. 42; Hernandez Decl. ¶ 16.

¹¹⁸ Ex. 16; Hernandez Decl. ¶ 17.

¹¹⁹ See Ex. 91.

¹²⁰ See Ex. 81 at 80.

¹²¹ See Ex. 92.

12-159H-17-076, 95E-01-043, 1995 WL 413395, at *5 (Del. Super. Ct. June 15, 1995). “The plaintiff in any judgment in a court of record . . . may cause an attachment, as well as any other execution, to be issued thereon, containing an order for the summoning of garnishees, to be proceeded upon and returned as in cases of foreign attachment.”¹²² 10 *Del. C.* § 5031; *see also Wilmington Tr. Co. v. Barron*, 470 A.2d 257, 263 (Del. 1983) (“The authority for [attachment on property not in a debtor’s possession] is founded upon 10 *Del. C.* § 5031.”). Delaware law also specifically provides that a creditor may attach a debtor’s shares in a Delaware corporation in order to satisfy the debt owed. *See* 8 *Del. C.* § 324.

B. FSIA Section 1610(c)

Section 1610(c) of the FSIA permits court-ordered attachment of sovereign property in aid of execution of a judgment against the sovereign where (1) “a reasonable period of time has elapsed following the entry of judgment,” (2) “the judgment is based on an order confirming an arbitral award rendered against the foreign state,” (3) the sovereign property to be attached is located in the United States, and (4) the property is being “used for a commercial activity in the United States.” 28 U.S.C. § 1610(a), (c). Crystallex’s proposed writ, which seeks to attach shares and any other incidental commercial assets that belong to Venezuela by virtue of PDVSA’s ownership of PDVH, meets all of these requirements.

¹²² Assets of a judgment debtor that are in the possession of a third party and subject to garnishment in Delaware include debts that the third party owes to the judgment debtor. *See LNC Invs., Inc. v. Democratic Republic of Congo*, 69 F. Supp. 2d 607, 611–12 (D. Del. 1999) (noting that “debts owed the judgment debtors by the garnishee” are assets that can be attached pursuant to Section 5031); *UMS Partners, Ltd.*, 1995 WL 413395, at *5 (“Under Delaware law, a debt owed by a third party is subject to conventional garnishment.” (internal citations omitted)).

This Court has the authority to approve the issuance of a Delaware writ of attachment *fi. fa.* pursuant to Section 1610(c). *See Conn. Bank of Commerce v. Republic of Congo*, 440 F. Supp. 2d 346, 349 n.3 (D. Del. 2006) (“The order directing the Prothonotary to issue the writ of garnishment was issued in accordance with 28 U.S.C. § 1610(c.)”); *see also* Ex. 93. The D.C. Court already has found under Section 1610(c) that a reasonable period of time has passed since Judgment was entered, and Venezuela is bound by that finding. Ex. 8. Further, the D.C. Court also denied Venezuela’s motion to stay enforcement of the Judgment. Ex. 9. Venezuela has no basis to resist enforcement of the Judgment. Accordingly, the question before this Court is whether the assets on which Crystallex seeks to execute—which nominally belong to Venezuela’s alter ego, PDVSA—are Venezuelan property being used for a commercial purpose in the United States.

II. Crystallex Satisfies The Requirements Set Forth In FSIA Section 1610

A. Crystallex’s Judgment Is Based On An Order Confirming An Arbitral Award And The Confirming Court Already Has Found That A Reasonable Period Of Time Has Elapsed Since Entry Of Judgment

As set forth above, Crystallex’s judgment against Venezuela is based on an order confirming Crystallex’s arbitral award against Venezuela. D.I. 1; Exs. 1, 3, 4. The Judgment, which was entered by the D.C. Court, is registered in Delaware. D.I. 1. The D.C. Court already has determined that a reasonable period of time has elapsed since entry of judgment such that Crystallex may seek to execute on Venezuela’s assets pursuant to Section 1610(c). Ex. 8. And Venezuela’s motion to stay execution has been denied. Ex. 9.

B. Venezuela—Through Its Alter Ego PDVSA—Owns Property In the United States

As PDVH itself told this Court, “in order to enjoin, attach, or execute upon PDVSA’s property, Crystallex will first need to obtain a court order pursuant to 28 U.S.C. § 1610(c)

finding that PDVSA is an alter ego of Venezuela.” *See* Ex. 94.¹²³ This motion seeks precisely that determination in accordance with Federal Rule of Civil Procedure 69 and Delaware procedure. While no Delaware court has directly considered the question, the Delaware Court of Chancery has observed in another context that, “[i]ncident to its power to enforce [a] judgment through the seizure and sale of property located in Delaware, the Court . . . may determine the nature of [a defendant’s] interest in . . . stock” and “in its discretion may ‘decide to disregard the existence of a subsidiary corporation and look directly to the specific assets of a subsidiary for the satisfaction of [a] claim against the parent.’” *Kingsland Holding, Inc. v. Bracco*, CIV. A. No.

¹²³ Multiple federal courts have recognized that post-judgment attachments may be sought against judgment debtors’ alter egos. *See, e.g., Alejandre v. Telefonica Larga Distancia de Puerto Rico, Inc.*, 183 F.3d 1277, 1284 (11th Cir. 1999) (considering the merits—in the context of an appeal of the district court’s denial of a motion to dissolve a writ of garnishment—of judgment creditor’s argument that the presumption of separate juridical status for instrumentalities of foreign sovereigns could be “overcome in order to make [alleged alter ego’s] assets the property of a ‘foreign state’ . . . , thus rendering the exception to immunity in section 1610(a)[] applicable to [the company] and making [it] substantively liable for the Government’s debt”); *Flatow v. Islamic Republic of Iran*, 308 F.3d 1065, 1069–74 (9th Cir. 2002) (reviewing whether judgment creditor, in seeking a writ of execution against property belonging to wholly-owned subsidiary, and alleged alter ego, of judgment debtor Islamic Republic of Iran, had met its evidentiary burden); *Bayer & Willis Inc. v. Republic of Gambia*, 283 F. Supp. 2d 1, 3–7 (D.D.C. 2003) (considering, on the merits, whether Gambian telecommunications company (“Gamtel”) was alter ego of judgment debtor Republic of Gambia in context of motion to dismiss post-judgment writ of garnishment against assets belonging to Gamtel); *Flatow v. Islamic Republic of Iran*, 67 F. Supp. 2d 535, 538–44 (D. Md. 1999) (considering, on the merits, whether a foundation was an alter ego of judgment debtor Islamic Republic of Iran in the context of a motion to quash a writ of execution directed to the foundation’s assets), *aff’d*, 225 F.3d 653 (4th Cir. 2000); *see also Local Union No. 626 United Bhd. Of Carpenters & Joiners of Am. Pension Fund v. Delmarva Concrete Corp.*, No. Civ.A 02-648, 2004 WL 350452, at *2–3 (E.D. Pa. Feb. 24, 2004) (contemplating that post-judgment attachment of property belonging to judgment debtor’s alter ego would be permissible if alter ego was provided notice of enforcement proceeding); *ABC Sewer Cleaning Co. v. Foxco, Inc.*, No. Civ. A. No. 90-1934, 1990 WL 139391, at *1 (E.D. Pa. Sept. 21, 1990) (same); *Strick Corp. v. Thai Teak Prod. Co.*, 483 F. Supp. 1210, 1217 (E.D. Pa. 1980) (same). In unpublished opinions, federal courts have granted Section 1610(c) motions where judgment creditors sought authorization to attach assets belonging to the alter egos of their sovereign judgment debtors. *See* Exs. 95–96.

14817, 1996 WL 104257, at *7 (Del. Ch. Mar. 5, 1996). Accordingly, Crystallex respectfully requests that this Court consider the uncontroverted evidence and conclude that PDVSA is Venezuela's alter ego.¹²⁴

1. PDVSA Is Venezuela's Alter Ego

Courts will apply the alter-ego doctrine and disregard the presumed separate juridical status of instrumentalities of foreign sovereigns when: (1) the foreign state exercises complete control over the instrumentality; or (2) the foreign state uses its control over the instrumentality to commit a "fraud or injustice." See *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 629–32 (1983) (declining "to adhere blindly to the corporate form where doing so would cause such an injustice"); see also *U.S. Fid. and Guar. Co. v. Braspetro Oil Servs. Co.*, No. 97 CIV. 6124(JGK), 1999 WL 307666, at *11 (S.D.N.Y. May 17, 1999) (finding that plaintiffs had adequately alleged that oil company was alter ego of foreign state (wholly owned by Brazil) where plaintiffs alleged that foreign state controlled company's day-to-day operations), *aff'd*, 199 F.3d 94 (2d Cir. 1999).

a. Venezuela Exercises Complete Control Over PDVSA

To determine whether a sovereign "controls" an instrumentality, courts disregard the existence of "corporate formalities," and focus instead on "the reality of the corporate relationship" between the state and the instrumentality. *Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 447 F.3d 411, 419 (5th Cir. 2006). In particular, courts consider a non-exhaustive

¹²⁴ Crystallex believes the evidence adduced on this motion makes plain the alter-ego relationship between PDVSA and Venezuela. If, however, the Court concludes that additional evidence is necessary, Crystallex respectfully requests that it be allowed to pursue discovery regarding that relationship. See *Bayer & Willis Inc.*, 283 F. Supp. at 7 (ordering discovery regarding relationship between sovereign and alleged alter ego).

list of factors, which include whether: (1) the state caused the incorporation of the instrumentality; (2) the state and the instrumentality share common directors and officers, or common business departments; (3) the state exercises day-to-day control over the instrumentality; (4) the state exercises economic control over the instrumentality (*e.g.*, the instrumentality’s profits go to the state); (5) the state uses the instrumentality’s property as its own; (6) the state is the real beneficiary of the instrumentality’s conduct; and (7) whether state statutes and courts view the instrumentality as an arm of the state.¹²⁵

State-owned oil companies—the principal purposes of which are to exploit state resources and finance state actions with the proceeds of their operations—are regularly found to be alter egos of foreign states. *See, e.g., Bidas*, 447 F.3d at 419–420 (denying motion to dismiss because the state-owned oil company “was not financially independent from the Government” given that, among other things, the company’s oil revenues were diverted to a fund owned by the Government, the Government paid the company’s arbitration costs from that Government fund,

¹²⁵ *See, e.g., Bidas*, 447 F.3d at 418–20 (setting out factors that courts frequently consider when conducting an alter ego analysis and finding that a state-owned oil and gas company was the alter ego of the Government of Turkmenistan because (1) the Government caused the company’s incorporation, (2) there was overlap between the Government’s high-ranking officials and the company’s officials, (3) the company was grossly undercapitalized, (4) the company was operated as a closely held subsidiary of the Government, and (5) the company’s revenues were diverted to a state oil and gas fund); *see also TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 301–02 (D.C. Cir. 2005) (holding that the State Property Fund of Ukraine should not be treated as independent from Ukraine because Ukraine “had plenary control over” the Fund, including because the Fund’s chairman is “appointed and discharged by the President of Ukraine . . . and the members of its board must be approved by the Presidium of the Supreme Rada”); *Kensington Int’l Ltd. v. Republic of Congo*, No. 97 CIV. 6124 (JGK), 2007 WL 1032269, at *10 (S.D.N.Y. Mar. 30, 2007) (finding national oil company was alter ego of Republic of Congo based on, among other things, overlap between national and corporate officials and intermingling of corporate and government assets); *Dale v. Colagiovanni*, 443 F.3d 425, 429 (5th Cir. 2006) (“The inquiry . . . is whether the state exercises day-to-day control over the agency”).

and the Government “used the lack of financial separateness to commit a fraud or another wrong on plaintiffs” by manipulating the company to prevent a creditor from seizing its assets); *U.S. Fid. and Guar. Co. v. Braspetro Oil Servs. Co.*, 199 F.3d 94 (2d Cir. 1999) (finding that there was a “sufficient showing” that the state-owned oil company was an alter ego of a non-sovereign corporate defendant because the oil company controlled the day-to-day operations of the non-sovereign company); *see also Kensington*, 2007 WL 1032269, at *9 (discussing an English court decision finding that a state-owned oil company was the State’s alter ego where it “is financed by the State, its function is to act on behalf of the State with its officers being governmental appointees . . . [.] it acts as the trading arm of the State and is controlled by it, whilst putting into effect Government policy in relation to oil and oil products”).

Similarly, in this case, there can be no doubt that PDVSA, Venezuela’s state-owned oil company, is Venezuela’s alter ego:

- **Venezuela caused PDVSA’s incorporation to implement its policies.** PDVSA’s creation was mandated by Presidential decree and its existence and ongoing relationship with the Government is enshrined in the Venezuelan Constitution. (*See supra* at II.A).
- **There is substantial overlap between Venezuela’s government personnel and PDVSA’s officers and directors.** (*See supra* at II.B).
- **Venezuela exercises day-to-day control over PDVSA.** The Venezuelan Government hires and fires PDVSA personnel at all levels. By official decree, PDVSA acts under the direct supervision of the Sector Vice-Presidency of Economy, and the National Executive “regulates and supervises” PDVSA’s operations. (*See supra* at II.C).
- **Venezuela exercises economic control over PDVSA.** Venezuela designates the price at which PDVSA must sell its products (often at a discount or for no consideration) and to whom it must sell its oil (often to political or economic allies). PDVSA takes out debt on behalf of the Government, and has been forced to contribute billions of dollars per year to various Government programs having nothing to do with the oil industry. Further, the Government manipulates the rate at which PDVSA exchanges dollars for bolivars in order to increase the Government’s spending power at PDVSA’s expense. In addition to draining money out of PDVSA, the Government uses PDVSA’s oil to pay State debts, for which PDVSA receives no consideration in return. For example, PDVSA is the sole vehicle for the repayment of more than \$50 billion that China has advanced to Venezuela. Venezuela

requires PDVSA, directly and indirectly, to fund and run social programs on its behalf for no remuneration or consideration. (*See supra* at II.D).

- **Venezuela uses PDVSA’s property as its own.** In addition to using PDVSA’s money, Venezuela uses PDVSA’s planes for various governmental and political purposes and, as recently as April 2017, has used PDVSA’s trucks to block anti-government protestors from gathering in large numbers. (*See supra* at II.E).
- **Venezuela is the real beneficiary of PDVSA’s conduct.** Where it does not take PDVSA’s assets directly, the Government uses PDVSA to achieve its social and political objectives indirectly, both domestically (*e.g.*, through FONDEN) and abroad (through Petrocaribe). Venezuela uses PDVSA as a tool to expropriate foreign investments. In fact, after expropriating Crystallex’s interest in Las Cristinas, Venezuela gave those assets to PDVSA for no consideration. PDVSA later sold 40% of its interest in Las Cristinas for approximately \$2.4 billion. (*See supra* at II.F).
- **Venezuelan statutes and courts view PDVSA as an arm of Venezuela.** Venezuela’s Supreme Court recognized the “importance of PDVSA from the economic, social and constitutional viewpoint,” stating that “there is no doubt” that PDVSA “falls within the framework of the general structure of [the] National Public Administration,” enjoying all of the “privileges” of the Venezuelan State. (*See supra* at II.G).

In short, as PDVSA itself has admitted repeatedly in recent weeks in its Twitter feed, “PDVSA is Venezuela.”¹²⁶

b. Venezuela Used Its Control Over PDVSA To Commit A Fraud

Courts also find that the alter-ego doctrine applies where adhering to the corporate form of the instrumentality “would work fraud or injustice.” *Bancec*, 462 U.S. at 612, 633 (finding that it would be an “injustice” to let Cuba “escape liability for acts in violation of international law simply by retransferring assets to separate juridical entities”); *Bridas*, 447 F.3d at 416–17 (holding that the “fraud or injustice” test was satisfied where Turkmenistan manipulated its wholly-owned oil company in order to prevent plaintiff from recovering damages from oil company’s violation of a joint venture agreement); *Kensington*, 2007 WL 1032269, at *8–9

¹²⁶ *See Ex. 3.*

(denying motion to dismiss because there was support for plaintiff's allegations that giving effect to the independent status of Congo's state-owned oil company "would work an injustice" where Congo used the state-owned oil company to "confound[] its creditors"). This test is "broad" in scope, *Bridas*, 447 F.3d at 417, and is designed "to avoid the injustice that would result from permitting a foreign state to reap the benefits of our courts while avoiding the obligations of international law." *Kensington*, 2007 WL 1032269, at *14.

Here, treating PDVSA as a separate juridical entity would permit Venezuela to perpetrate a fraud or injustice. Venezuela's unlawful expropriation of Crystallex's interest in Las Cristinas, which is the subject of the Judgment and the underlying arbitration, resulted in a multibillion dollar benefit to state-owned and controlled PDVSA, which received Crystallex's interests from Venezuela for no consideration and then sold 40% of those interests for approximately \$2.4 billion. Crystallex, on the other hand, received nothing in return. It received no compensation for Venezuela's expropriation, was forced to spend years arbitrating this theft, and is now left seeking to collect on a U.S. judgment that Venezuela refuses to pay. Venezuela reaps enormous benefits from owning and operating an oil refining company under the protection of Delaware law, using PDVSA—a self-proclaimed "tool" of the State—in an attempt to protect Venezuela's Delaware assets from execution. It would be unjust to allow Venezuela to hide behind PDVSA to avoid compensating Crystallex for the assets taken from it.

For these reasons, Crystallex respectfully requests that the Court deem PDVSA to be Venezuela's alter ego to avoid the obvious injustice that would result if Venezuela were permitted to violate international law by taking Crystallex's assets, transfer those assets a state-owned and controlled company, PDVSA, for no consideration, and then use U.S. law to avoid paying its lawful obligations in the face of PDVSA's receipt of billions for those stolen assets.

2. PDVSA Owns PDVH Stock, Which Is Located In Delaware As A Matter Of Law

PDVSA's shares of PDVH are located in Delaware as a matter of law. Under Delaware law, "[f]or . . . purposes of . . . attachment [and] garnishment . . . the situs of the ownership of the capital stock of all corporations existing under the laws of this State . . . shall be regarded as in this State." 8 *Del. C.* § 169; *see also Alberta Sec. Comm'n v. Ryckman*, No. N13J-02847, 2015 WL 2265473, at *10 (Del. Super. Ct. May 5, 2015), *aff'd*, 127 A.3d 399 (Del. 2015) ("For attachment and garnishment purposes, the situs of ownership in a Delaware corporation is Delaware."). Likewise, any other assets or rights belonging to PDVSA by virtue of its ownership of PDVH also are sited, and subject to execution, in Delaware. *See D'Angelo v. Petroleos Mexicanos*, 378 F. Supp. 1034, 1038 (D. Del. 1974) ("[O]n several occasions Delaware courts have said that debts, when owed by Delaware corporations, have a situs here."); *UMS Partners, Ltd. v. Jackson*, No. 97 CIV. 6124(JGK), 1995 WL 413395, at *5 (Del. Super. Ct. June 15, 1995) ("The indebtedness of a Delaware corporation has its situs in Delaware. Under Delaware law, a debt owed by a third party is subject to conventional garnishment.") (internal citations omitted); *see also Kingsland Holding, Inc.*, 1996 WL 104257, at *6 ("Judgment creditors generally are free to attempt to execute their judgments in any forum where the creditor can find a debtor's assets.").

C. PDVSA's Shares Of PDVH Are Being Used For A Commercial Purpose In The United States

The Supreme Court has held that assets are commercial when they "may be held by private parties; they are negotiable and may be traded on the international market . . . ; and they promise a future stream of cash income." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 615–17 (1992) (holding that sovereign's issuance of bonds was commercial activity within the meaning of the FSIA). PDVSA's shares of PDVH—a Delaware corporation that, in turn, owns

another Delaware corporation, CITGO Holding—meet this standard, as do any other assets or rights belonging to PDVSA by virtue of its ownership of PDVH. *See In re 650 Fifth Ave.*, No. 08 Civ. 10934(KBF), 2014 WL 1516328, at *17 (S.D.N.Y. Apr. 18, 2014) (finding that sovereigns’ partnership shares in property company “were . . . used for commercial activity, because they were the mechanism through which the partners owned the [property] and determined the distribution of revenue that it produced”), *vacated on other grounds and remanded sub nom. Kirschenbaum v. 650 Fifth Ave. & Related Properties*, 830 F.3d 107 (2d Cir. 2016); *Anderman v. Fed. Republic of Austria*, 256 F. Supp. 2d 1098, 1108 (C.D. Cal. 2003) (finding that sovereign’s acquisition of “stocks and bonds of American companies” and its transfer of its “ownership of those stocks and bonds (to itself) or exchang[e] [of] the stocks and bonds for other property” constituted commercial activity within the meaning of the FSIA); *see also* H.R. REP. NO. 94-1487, at 16, 1976 U.S.C.C.A.N. 6604, at 6615 (1976) (contemplating that “courts would have a great deal of latitude in determining what is a ‘commercial activity’ for purposes of [the FSIA]” and that “activities such as a foreign government’s . . . investment in a security of an American corporation, would be among those included within the definition”).¹²⁷

* * *

Because the property that is targeted by Crystallex’s proposed writ—PDVSA’s shares of

¹²⁷ FSIA Section 1603(d) defines “commercial activity” for purposes of the statute. *See* 28 U.S.C. § 1603(d). “[I]n defining ‘commercial activity,’ [the FSIA] does not provide any different definition for § 1605 [jurisdictional immunity] versus § 1610 [attachment immunity].” *Aurelius Capital Partners, LP v. Republic of Argentina*, No. 08 Civ. 10934(KBF), 2009 WL 755231, at *13 (S.D.N.Y. Mar. 12, 2009), *rev’d and vacated on other grounds*, 584 F.3d 120 (2d Cir. 2009). Therefore, when construing the meaning of “commercial activity,” courts look to decisions concerning immunity under both sections. *See, e.g., De Letelier v. Republic of Chile*, 748 F.2d 790, 797–98 (2d Cir. 1984) (relying on Section 1605 decision to resolve Section 1610 commercial-activity issue).

PDVH and any incidental assets or rights belonging to PDVSA—are Venezuelan assets being used for a commercial purpose in the United States, they are attachable pursuant to Section 1610 of the FSIA. Crystallex therefore respectfully requests that this Court authorize the Clerk of the Court to issue Crystallex’s proposed writ pursuant to the Delaware Code.¹²⁸ *See* 10 *Del. C.* § 5031; 8 *Del. C.* § 324.

CONCLUSION

For the reasons set forth above, Crystallex respectfully requests that this Court enter an order pursuant to FSIA Section 1610(c) authorizing the Clerk of the Court to issue the proposed writ of attachment *fi. fa.* to PDVH, authorizing the U.S. Marshals Service to serve the writ, and granting such other and further relief as the Court deems just and proper.

OF COUNSEL:

Robert L. Weigel
Jason W. Myatt
Rahim Mooloo
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, New York 10166
(212) 351-4000

Dated: August 14, 2017

/s/ Travis S. Hunter

Raymond J. DiCamillo (#3188)
Jeffrey L. Moyer (#3309)
Travis S. Hunter (#5350)
RICHARDS, LAYTON & FINGER, P.A.
One Rodney Square
920 North King Street
Wilmington, Delaware 19801
(302) 651-7700
dicamillo@rlf.com
moyer@rlf.com
hunter@rlf.com
Attorneys for Plaintiff

¹²⁸ In Delaware state court, a creditor may attach the debtor’s shares of a Delaware corporation—or other property belonging to a debtor in the possession of a garnishee—by filing a praecipe specifying the relief requested and “prepar[ing] a form [of the requested writ] for signature by the Prothonotary under the seal of the Court.” *See* Del. Superior Court Civil Rule 4(a); *LNC Invs., Inc.*, 69 F. Supp. 2d at 612. The Prothonotary then “issue[s] the process specified in the praecipe and . . . deliver[s] it to the sheriff of the county or counties specified in the praecipe or to a person especially appointed by the Court to serve it” on the garnishee. Rule 4(a); *see also Wilmington Trust Co.*, 470 A.2d at 263 (“Significantly, the writ of attachment *fi. fa.* is not served upon the defendant, but upon the garnishee.”). In federal court, the signature and seal of the Clerk of the Court substitutes for the signature and seal of the prothonotary. *See LNC Invs., Inc.*, 69 F. Supp. 2d at 611, 615.