ALERT MEMORANDUM

Implications of U.S. Court of Appeals Decision Affirming that Petróleos de Venezuela, S.A. Is the Alter Ego of the Republic of Venezuela

September 9, 2019

On July 29, 2019, the United States Court of Appeals for the Third Circuit addressed when a judgment creditor of a foreign state may satisfy its judgment by attaching assets of that sovereign's instrumentality. In *Crystallex International Corporation v. Bolivarian Republic of Venezuela*,[1] the court found that the factual record supported the trial court's determination that Venezuela's wholly-owned oil company "is so extensively controlled by its owner [the Republic of Venezuela] that a relationship of principal and agent is created," sufficient to overcome the presumption of separateness otherwise afforded to state-owned instrumentalities.

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[1] 932 F.3d 126 (3d Cir. 2019).

Background

In 2011, the Republic of Venezuela ("Venezuela" or "the Republic") seized gold deposits held and developed by Crystallex International Corp. ("Crystallex"). Crystallex filed an ICSID arbitration, which resulted in a $1.2 billion award for Crystallex solely against the Republic. The U.S. District Court for the District of Columbia confirmed the award,[2] and the D.C. Circuit affirmed.[3] While the appeal of the confirmation was pending, Crystallex filed an action in Delaware District Court to attach property of Petróleos de Venezuela, S.A. ("PDVSA"), the state-owned oil company of Venezuela, in Delaware on the grounds that PDVSA was the alter ego of the Republic. That property comprised PDVSA's interest in the shares of its wholly-owned subsidiary PDV Holding, Inc. ("PDVH"), a Delaware corporation, through which PDVSA owns CITGO Petroleum Corp.[4] PDVSA, which was not named or served in the attachment action, intervened and moved to dismiss, asserting that (i) it enjoyed sovereign immunity under the Foreign Sovereign Immunities Act ("FSIA") with respect to Crystallex's enforcement action, (ii) it was not the alter ego of the Republic, and (iii) due to U.S. sanctions in effect, the shares Crystallex sought to attach were immune on the ground that they were not being "used for a commercial activity" in the United States,[5] as required under the FSIA.

Under U.S. law, even when an FSIA exception allows for recovery against a sovereign, the instrumentalities of that sovereign are afforded a "presumption of independent status" under *First National City Bank v. Banco Para El Comercio Exterior de Cuba* ("*Bancec*").[6] This presumption can be overcome in one of two ways: (i) where viewing the instrumentality as a separate entity "would work fraud or injustice," or (ii) "where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created."[7]

While most alter ego cases under *Bancec* have historically been brought under the "fraud or injustice" prong, the Supreme Court recently articulated five factors to consider in conducting the "extensive control" analysis under *Bancec*:[8] "(1) the level of economic control by the government; (2) whether the entity's profits go to the government; (3) the degree to which government officials manage the entity or otherwise have a hand in its daily affairs; (4) whether the government is the real beneficiary of the entity's conduct; and (5) whether adherence to separate identities would entitle the foreign state to benefits in United States courts while avoiding its obligations."[9]

In the *Crystallex* case, the District Court found that it had jurisdiction over Venezuela under the FSIA's arbitration exception,[10] and that, if PDVSA was Venezuela's alter ego, the exception to the Republic's sovereign immunity would be imputed to PDVSA. The court then found that the *Bancec* "extensive control" exception applied, such that PDVSA was Venezuela's alter ego. Finally, the court also found that Crystallex could attach the shares of PDVH owned by PDVSA to satisfy its judgment against the Republic because they remained "used for a commercial activity," even though their disposition

[2] *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, 244 F. Supp. 3d 100 (D.D.C. 2017).
[3] *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, 760 F. App'x 1 (D.C. Cir. 2019).
[4] *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, 333 F. Supp. 3d 380 (D. Del. 2018).
[5] The PDVH shares are in the United States even though PDVSA has no presence there, and are thus potentially subject to seizure as a consequence of a provision of Delaware law that allows a judgment creditor to attach a debtor's shares in any Delaware corporation, regardless of the location of the shareholder or whether the shares are in certificated or uncertificated form. 8 Del. C. § 324(a).
[6] 462 U.S. 611, 627 (1983).
[7] *Id.* at 629. *See also Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 822-23 (2018).
[8] The District Court had used a slightly different five-factor test in its "extensive control" analysis, and the Third Circuit noted that at least one court had articulated a test containing 21 factors. *See Crystallex*, 932 F.3d 126, 140-41; *Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 447 F.3d 411, 418 (5th Cir. 2006).
[9] *Rubin*, 138 S. Ct. at 823 (internal citations omitted).
[10] 28 U.S.C. § 1605(a)(6) (eliminating immunity from suit for action to recognize arbitral award subject to the New York or Panama Convention).

was blocked by U.S. Executive Branch sanctions on Venezuela.[11] PDVSA appealed to the Third Circuit, and the newly-recognized administration of Interim Venezuelan President Juan Guaidó intervened in the appeal.

The Third Circuit Decision

The Third Circuit affirmed the District Court's decision. The court found that the Delaware District Court had jurisdiction over Venezuela, since jurisdiction from the recognition proceeding in the D.C. District Court (which also stemmed from the FSIA's arbitration exception) "carrie[d] over" to the post-judgment enforcement proceeding in Delaware. Crystallex was therefore not required to establish an independent jurisdictional basis for the enforcement action under the FSIA.[12] As to PDVSA, the court held that a finding that PDVSA was Venezuela's alter ego was sufficient to extend jurisdiction to PDVSA for the purposes of the enforcement proceeding.[13]

The court then considered and rejected numerous challenges to the application of *Bancec*, including the argument that the "extensive control" analysis requires a nexus between the abuse of the corporate form and the injury, which the court rejected because, among other reasons, "requiring an independent nexus requirement would likely read the *Bancec* extensive-control test out of the doctrine."[14] The court also considered the argument made by PDVSA bondholders, as *amici*, that the *Bancec* "extensive control" analysis requires consideration of the interests of the alleged alter ego's other creditors (*i.e.*, holders of PDVSA's $25 billion in defaulted bonds and a comparable amount of liabilities to other creditors) and found that *Bancec* does not require specific consideration of these interests. Rather, it noted that the presumption of separateness already takes into consideration the interests of third-party creditors, but that bondholders are or should be aware of the risks of extending credit to entities that are extensively controlled by a sovereign.[15]

The court found that PDVSA met each of the five *Bancec* "extensive control" factors. For example, the court pointed to PDVSA's bond offering materials, which included "risk factors" regarding the Republic's general control over PDVSA, the fact that the Venezuelan constitution "endows the State with significant control over PDVSA and the oil industry," and the Republic's ability to select the parties to whom and the prices at which PDVSA sold oil.[16] The Third Circuit also referenced the District Court's findings that Venezuela controls the rate at which PDVSA converts U.S. Dollars to Venezuelan Bolivars and that President Maduro controlled PDVSA's debt restructuring in 2017.[17] Furthermore, since the Republic owns 100% of the shares of PDVSA, PDVSA's profit runs to Venezuela, and PDVSA also pays taxes at a heightened rate (presumably relative to other Venezuelan corporations) to ensure that the Republic collects a greater portion of its revenues.[18] The court also noted that President Maduro appoints PDVSA's officers and directors[19] and uses PDVSA to effect foreign policy goals, and that PDVSA and Venezuela's Ministry of Petroleum and Mining share

[11] *Crystallex*, 333 F. Supp. 3d at 399, 414, 417-21.
[12] *Crystallex*, 932 F.3d at 136-38.
[13] *Id.*
[14] *Id.* at 141-43.
[15] *Id.* at 143-44.
[16] *Id.* at 146-47.
[17] *Id.* at 147-48.
[18] *Id.* at 148. *See also* Decl. of Dr. Roberto Rigobon, *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, No. 17-mc-00151-UNA (D. Del. Aug. 14, 2017), ECF No. 7 (stating that "[t]he [Venezuelan] Government charges a tax rate of up to 95% on the difference between the actual oil price charged by PDVSA and Venezuela's budgeted oil price").
[19] A recent decision from the Delaware Court of Chancery considered a petition by former directors of PDVH, Citgo Holding, Inc. and Citgo Petroleum Corp. appointed by President Maduro, who sought a declaration that they comprised the rightful boards of those entities. The court found that the political question and act of state doctrines required the court to assume the validity of the Guaidó government's appointments to PDVSA's board. *See Jiménez v. Palacios*, No. 2019-0490-KSJM, 2019 WL 3526479 (Del. Ch. Aug. 12, 2019).

physical office space.[20] Lastly, the court found that respecting the corporate form would allow Venezuela to benefit from the U.S. legal system while avoiding its obligations, since PDVSA's bonds are held by U.S. bondholders, and disputes arising from default will likely be resolved in U.S. courts.[21] Based on these and other findings, the court noted that the relationship between PDVSA and Venezuela "clears th[e] bar easily."[22]

In reviewing the trial court's findings, the Third Circuit reinforced that alter ego determinations are made as of the time the court is asked to make such a finding and rejected the argument advanced by the Guaidó administration on appeal that changes in the Venezuelan government since the trial court made its findings in August 2018 should be taken into consideration in determining whether to affirm the decision.[23] Conversely, in deciding whether PDVSA was an alter ego of the Republic in 2018, the trial court considered events dating back to 2002 which it presumably, but not explicitly, found reflective of the status quo as of 2018.[24]

Finally, the court found that the specific asset at issue, the shares of PDVH owned by PDVSA, was not immune from attachment under the FSIA because the shares are "*used for a commercial activity* in the United States," namely the ownership of Citgo Petroleum, and that such ownership continued notwithstanding U.S. sanctions that precluded, for example, the payment of dividends to PDVSA from Citgo.[25]

After the *Crystallex* decision, in *Kirschenbaum v. Assa Corp.*, the United States Court of Appeals for the Second Circuit in New York affirmed a finding that an instrumentality incorporated in New York, but whose shares were 100% owned by and was deemed "interchangeable with" an entity controlled by Iran, to be Iran's alter ego under the *Bancec* "extensive control" analysis, where the district court likewise had made no finding on "fraud or injustice."[26] Although the Second Circuit and lower court decisions included little substantive analysis of the *Bancec* factors, prior decisions in the case focused on facts such as ownership of the entity's shares, appointment of directors, and whether the entity had "true separate decision-making authority or real existence except that which is allowed and directed by the Iranian government."[27] This decision further extended the application of the *Bancec* alter ego analysis to cases involving entities that are not covered by the FSIA and do not qualify for any immunity protections, since an "agency or instrumentality" under the FSIA must be formed under the laws of the foreign state, and cannot be incorporated in the U.S. or some third country.[28]

Takeaways

While the court in *Crystallex* emphasized that the presumption of separateness afforded to instrumentalities of foreign sovereigns "is not to be taken lightly," it did not identify what level of control would overcome the presumption of separateness.[29] To the contrary, the court acknowledged the extreme nature of the relationship between the Republic and

[20] *Crystallex*, 932 F.3d at 148-49. Regarding the third *Bancec* factor, the court reached as far back as 2002, "when President Chávez fired roughly 40% of the PDVSA workforce in response to a strike protesting his regime." *Id.* at 148.
[21] *Id.* at 149.
[22] *Id.* at 152.
[23] *Id.* at 144.
[24] *Id.* at 148.
[25] *Id.* at 149-51 (emphasis in original) (citing 28 U.S.C. § 1610(a)(6)).
[26] *See Kirschenbaum v. Assa Corp.*, No. 17-3682(L), 2019 WL 3756048 (2d Cir. Aug. 9, 2019); *In re 650 Fifth Avenue and Related Properties*, 830 F.3d 66, 79-81 (2d Cir. 2016).
[27] *See id.*; *In re 650 Fifth Avenue and Related Properties*, No. 08 Civ. 10934 (KBF), 2014 WL 1516328 at *12-13 (S.D.N.Y. Apr. 18, 2014).
[28] *See Assa Corp.*, 2019 WL 3756048 at *3-4 (noting that defendant is not an agency or instrumentality as defined in 28 U.S.C. § 1603(b)(3), since it is a New York corporation and its parent is a Jersey corporation).
[29] *Crystallex*, 932 F.3d at 140. In this regard, the court followed in the tradition of *Bancec* itself, where the Court declared that its "decision today announces no mechanical formula for determining the circumstances under which the normally separate juridical status of a government instrumentality is to be disregarded." *Bancec*, 462 U.S. at 633.

PDVSA, ultimately finding that "if the relationship between Venezuela and PDVSA cannot satisfy the Supreme Court's extensive-control requirement, we know nothing that can."[30] Unhelpfully, the Third Circuit provided no insight into the relative importance of the various *Bancec* factors, where to draw the line, or how to apply its analysis in future cases.

This bears particular significance given that *Crystallex* is one of the first cases dealing with the relationship between a foreign sovereign and its instrumentality where the district court specifically found that the "fraud or injustice" prong of *Bancec* was not met,[31] and thus was decided solely on the basis of the "extensive control" prong.[32] Contrast this, for example, with *Bancec* itself, where the Supreme Court found that to not permit Citibank to assert a counterclaim when sued by a Cuban bank, and where Citi's property in Cuba had been expropriated and transferred to the very bank suing it, "would cause [] an injustice."[33] The Third Circuit's decision reinforces that the *Bancec* test is disjunctive—if the "extensive control" test is met, a showing of "fraud or injustice" is not required (and vice versa). By contrast, Delaware law would not permit effective veil-piercing of this type absent some showing of fraud or injustice.[34]

In some ways, the close relationship between Venezuela and PDVSA that gave rise to the Third Circuit's decision is unique—for example, in addition to its ownership of 100% of the shares of PDVSA, the Court pointed to the effective commandeering of PDVSA's assets by the Republic in order to serve Venezuela's foreign and domestic policy agenda, the appointment of government and military personnel in key management roles at PDVSA, and the Republic's practice of collecting taxes from PDVSA at a heightened rate relative to other Venezuelan corporations in order for the Republic to receive a greater portion of its revenues. This decision may demonstrate that, in cases of sufficiently extraordinary actions on the part of the sovereign, conduct between a sovereign and its instrumentality that is otherwise a normal part of the relationship between an entity and its controlling shareholders, such as appointing directors and officers, may become further indicia of an alter ego relationship.[35]

However, even though the relationship between Venezuela and PDVSA may be (or may have been) *sui generis*, there are multiple reasons that this decision may have application significantly beyond this case.

First, Venezuela is unlikely to be the only foreign sovereign whose non-immune assets outside of its borders are insufficient to satisfy claims against it. In many cases, the state's agencies and instrumentalities operating internationally will have more substantial (nonimmune) foreign assets than will the state itself, such that judgment creditors may be incentivized to seek recovery from the sovereign's instrumentalities, even those that were strangers to the creditors' dispute with the sovereign.[36] After the *Crystallex* and *Assa Corp.* decisions, that "instrumentality" could either be

[30] *Crystallex*, 932 F.3d at 152.
[31] *Crystallex*, 333 F. Supp. 3d at 403-04.
[32] A number of cases have considered both prongs. *See, e.g.*, *Bridas*, 447 F.3d at 416-20 (treating the two prongs of *Bancec* as requirements in order to hold a sovereign liable for the actions of its instrumentality).
[33] *Bancec*, 462 U.S. at 622.
[34] *See Pauley Petroleum Inc. v. Continental Oil Co.*, 239 A.2d 629, 633 (Del. 1968) (finding that veil-piercing "may be done only in the interest of justice, when such matters as fraud, contravention of law or contract, public wrong, or where equitable consideration among members of the corporation require it, are involved").
[35] Contrast this with the decision in the case of Banco Central de la Republica Argentina ("BCRA"), where the United States Court of Appeals for the Second Circuit found BCRA not to be the alter ego of the Republic of Argentina. *See EM Ltd. v. Banco Central de la Republica Argentina*, 800 F.3d 78, 91-95 (2d Cir. 2015). The court there noted that "[t]he hiring and firing of board members or officers is an exercise of power incidental to ownership, and ownership of an instrumentality by the parent state is not synonymous with control over the instrumentality's day-to-day operations," and that the central bank's repayment of the sovereign's debts, as well as coordinating and implementing the sovereign's monetary policy, did not establish "extensive control" under *Bancec*. *Id.*
[36] Venezuela may also not be unique in that the economic distress the Republic is experiencing is also being experienced by its state-owned oil company, since PDVSA, too, went into default on its unsecured bond and promissory note obligations at the same time as did the Republic.

a foreign state-owned enterprise such as PDVSA with property in the U.S., or even a U.S. corporation, which through a chain of ownership may be ultimately, albeit indirectly, owned or controlled by the foreign state.[37]

Second, the Third Circuit's application of the *Bancec* factors illustrates the importance of maintaining corporate formalities, both in principle and in practice. There are likely other instances where, for example, government officials and the instrumentality share physical office space. Alter ego arguments arise only when the foreign state is unable to pay or perform its obligations or has "holdout creditors" who pursue litigation in order to recover the entire amount of their claim through enforcement actions rather than accept a consensual settlement or restructuring of their obligations. Accordingly, agency or instrumentality practices that in the ordinary course cause no harm and no foul can become subjected to judicial scrutiny when the sovereign is unable or unwilling to satisfy its creditors' claims. This risk could be mitigated, for example by instituting policies that require an instrumentality not owned 100% by the sovereign to consider the interests of all shareholders when their country experiences financial distress,[38] and/or to consider having one or more independent directors on the instrumentality's board.

Third, the decision highlights the role that corporate disclosures and other public statements may play in the alter ego analysis. As discussed above, the Third Circuit referenced PDVSA's bondholder disclosures, which contained various risk factors related to Venezuela's ability to "impose further material commitments upon us or intervene in our commercial affairs," as well as statements relating to PDVSA's duties under the Venezuelan constitution and other obligations imposed by Venezuela.[39] The decision also cited a 2014 speech given by PDVSA's then-president, in which he stated that Venezuela was "one of the few oil producing countries in the world that has a strict and tight control over the sovereign management of its

Accordingly, the question may arise whether an instrumentality's creditors may use the *Crystallex* decision to seek recovery from the foreign state's assets to satisfy the obligation of its instrumentality. In some sense, this form of veil-piercing is the more traditional one in the private corporate context, where a creditor seeks to hold the shareholders of an undercapitalized corporate debtor liable on an alter ego theory. In the sovereign context, however, as noted, it is unlikely that the state itself would have some greater pool of assets available in the U.S. than would its instrumentality. As to whether Venezuela's and PDVSA's debts are treated similarly in any restructuring, that is a question for negotiation rather than for courts to resolve in the first instance.

[37] At least two Venezuela creditors, OI European Group and Rusoro Mining Ltd., have filed complaints in federal court in Delaware and Texas seeking alter ego declarations at every level of the Citgo ownership structure for the purpose of seeking to satisfy their judgments against the Republic against the substantial assets of Citgo Petroleum. *See* Complaint, *OI European Group B.V. v. Bolivarian Republic of Venezuela*, No. 19-cv-00290-LPS (D. Del. Feb. 11, 2019); Complaint, *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, No. 18-1458 (S.D. Tex. May 7, 2018). As each of the entities from PDVH down to Citgo Petroleum are Delaware corporations, the prevailing view had been that to succeed in such a claim, the creditor would have to satisfy the alter ego test under Delaware law, not the *Bancec* international law standard, and successfully pierce the three corporate veils separating PDVSA from Citgo Petroleum. The Second Circuit's decision in *Assa Corp.*, however, holds without significant analysis that the *Bancec* analysis, rather than New York veil-piercing law, applies even where the entity whose presumption of separateness is sought to be disregarded is a New York corporation separated from the foreign state by a Jersey corporate parent, which, in turn, is owned by Iranian entities ultimately owned by Iran itself. *See Assa Corp.*, at **2, 4-5. *Assa Corp.* also suggests the analysis under *Bancec* need be done only once, looking at the relationship between Iran and Assa Corporation without explicit consideration of the entities in the ownership chain in between.

[38] Instrumentalities are defined under the FSIA as "an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." 28 U.S.C. § 1603(b)(2). Accordingly, 50.1% foreign state ownership would satisfy the FSIA requirement of "majority" ownership to qualify for "agency or instrumentality" status under the FSIA. In many alter ego cases, however (*Crystallex*, for example), the sovereign is either the sole shareholder or owns nearly all of the shares of the instrumentality.

[39] *Crystallex*, 932 F.3d at 144.

natural resources."[40] Instrumentalities and foreign sovereigns should bear this in mind when formulating disclosures and releasing statements, and should consider carefully how best to balance the need to provide investors with appropriate disclosure against the risk that such language could be used against it in a subsequent alter ego case.[41]

Fourth, a foreign instrumentality seeking to own a U.S. company may consider whether there are ways of structuring that transaction such that the instrumentality's ownership interest would not be deemed to be "in the United States" for purposes of the FSIA. As noted above, by statute, Delaware deems the shares (whether certificated or not) of every Delaware corporation to be located in Delaware and hence "in the United States" for FSIA purposes. However, under New York law, the property interest represented by certificated shares in a New York corporation would be deemed located where the certificate is found.[42]

Fifth, sovereigns should ensure that their domestic law treats state instrumentalities as separate entities. The first step of the *Bancec* analysis considers whether the domestic law of the sovereign treats the instrumentality as separate from the state. However, the presumption of separateness will not afford more protection than granted by the sovereign's local law. If the law of the sovereign, therefore, does not treat its instrumentalities as entities distinct from the state, the *Bancec* test will not provide much aid.

For these and other reasons, the *Crystallex* decision may have given more teeth to the "extensive control" analysis as a tool for judgment creditors to pursue the instrumentality's assets in a variety of scenarios in situations where a sovereign is unable or unwilling to satisfy a judgment.

Finally, the Third Circuit's finding that PDVSA's alter ego status was sufficient to confer jurisdiction for purposes of the enforcement action is concerning.[43] The question of "whether PDVSA could be liable for the arbitration award as an 'alter ego' of Venezuela"[44] was not actually before the court, since in the District Court proceeding Crystallex conceded that it did not seek a finding that PDVSA was liable for its judgment against Venezuela, but rather "a more limited finding, namely that the specific property at issue on this motion – the shares of PDVH – though nominally held in the name of PDVSA, are, at this time, really the property of Venezuela."[45]

However, the Third Circuit's opinion was not similarly cabined and does not even refer to the District Court's statement that if the value of the PDVH shares is insufficient to satisfy the judgment against the Republic, Crystallex has no deficiency claim against PDVSA.[46] Indeed, in several places in its decision, the Third Circuit suggested that it was deciding whether PDVSA was the alter ego of the Republic for all purposes.[47] While this omission may ultimately be cleaned up on a reconsideration petition, the Third

[40] *Id.* at 148.

[41] Note, however, that PDVSA's risk factors appeared to contain some qualifying language in an attempt to avoid providing specific assurances. *See id.* at 146. While risk factors, and possibly other types of corporate disclosures, should not necessarily constitute admissions of fact, but are rather meant as warnings, the Third Circuit treated them as the former.

[42] *Hotel 71 Mezz Lender LLC v. Falor*, 14 N.Y.3d 303, 314 (2010) (noting that if the "intangible interests [in LLCs] sought to be attached . . . were [] evidenced [by written instruments], their situs would be where the written instruments were physically present"). However, after the Second Circuit's decision in *Peterson v. Islamic Republic of Iran*, 876 F.3d 63 (2d Cir. 2017), FSIA immunity in the Second Circuit may be limited to assets located in the U.S., and those considering such issues may find it prudent to seek legal advice.

[43] *Crystallex*, 932 F.3d at 137-39.

[44] *Id.* at 134.

[45] *Crystallex*, 333 F. Supp. 3d at 390-91.

[46] *Id.* at 424 (noting "an important distinction between adding PDVSA to Crystallex's judgment against Venezuela – which would allow Crystallex to attach any of PDVSA's property to satisfy the judgment, without additional proceedings, if for example, the proceeds from the sale of the shares it is attaching are less than the full amount of its judgment – and only attaching specific property, which is the result being permitted here").

[47] *See Crystallex*, 932 F.3d at 134, 152 (characterizing the question before the Third Circuit as "whether PDVSA could be liable for the arbitration award as an 'alter ego' of Venezuela," and finding that "if the relationship between

Circuit's decision as written could extend beyond the requested finding that a specific PDVSA asset was the property of Venezuela, leaving open the possibility of a subsequent action, if needed, to add PDVSA as a debtor on Crystallex's judgment against the Republic.[48]

Moreover, the Third Circuit's decision makes clear that the FSIA's arbitration (or explicit waiver) exception applies to eliminate the foreign sovereign's immunity from suit or enforcement anywhere in the U.S. The open question after *Crystallex* is whether there must be an independent basis for jurisdiction over a state instrumentality in order to render it liable for a judgment against the sovereign, or whether the alter ego doctrine coupled with the foreign state's lack of immunity alone is sufficient—*i.e.*, must a creditor establish that the instrumentality itself is not immune from suit in the U.S. to hold it liable for the obligation of its parent state? This question is highly significant, since its resolution could either greatly facilitate or, alternatively, foreclose an avenue of recovery from state instrumentalities with property in the United States but who otherwise have no relationship to the dispute between the creditor and the foreign state.

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[48] The recent Second Circuit decision in *Assa Corp.* contains similarly concerning language—the court there found that the entities "are Iran's alter egos as a matter of law and are therefore foreign states under the FSIA," and that the alter ego "is subject to the district court's jurisdiction and its property is subject to attachment and execution." *Assa Corp.*, at *4-5.