

## The Many Challenges Facing Venezuela Bribery Suit: Part 2

By **Richard Cooper and Boaz Morag** (April 16, 2018, 4:08 PM EDT)

This is the second part of a two-part article providing an update on the lawsuit filed by the PDVSA US Litigation Trust in federal court in Miami on behalf of Venezuela's state-owned oil company, Petróleos de Venezuela SA, or PDVSA.[1] The lawsuit alleges that the defendants, a group of 44 oil trading companies, banks and individuals, participated in a 14-year scheme to rig bids, underpay on purchases and overcharge on sales, allegedly resulting in billions of dollars of losses to PDVSA.

Last month, we published an article flagging a number of interesting legal and factual questions raised by the suit, such as how the trust was created, whether it has standing to assert PDVSA's claims, whether some or all of the claims would be barred by applicable statutes of limitation and adequately assert an injury in the United States, and whether the trust would be able to obtain the cooperation from PDVSA necessary to respond to discovery requests, among others. The case also presents questions as to whether it will have implications for financial creditors of PDVSA, and even creditors of the republic of Venezuela, who may be able to lay claim to the economic value of the trust's lawsuit or to any recovery, on the theory that the trust is pursuing the claims for PDVSA's sole benefit.

In part one of this article, we discussed the current status of the suit, the new information that has come to light through the documents that have been filed thus far, and the issues related to the trust's standing to sue on behalf of PDVSA. In part two below, we will highlight some of the other interesting legal arguments about the claims being asserted and provide additional information that may shed light on some of the questions we previously raised.

### RICO Injury

As noted in our prior article, a federal civil claim under the Racketeer Influenced and Corrupt Organizations Act requires that the plaintiff allege and prove a domestic injury to business or property and does not permit recovery for foreign injuries.[2] In the trust's amended complaint filed on March 9, 2018, the trust alleged that PDVSA suffered a domestic injury because it incurred losses to its U.S. bank accounts. It also argues that PDVSA's ability to buy and sell certain products in the U.S. decreased as a result of the defendants' alleged scheme, and that this loss of U.S. business constitutes a domestic injury. In arguing that a preliminary injunction is unwarranted because the RICO claim is unlikely to



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succeed on the merits, the defendants assert that this allegation does not suffice to show a domestic injury. Even if PDVSA's bank accounts received less money because of a scheme to depress prices for PDVSA's oil sales, the defendants argue that PDVSA has no property located in the U.S. that was stolen or harmed. Rather, they contend, the trust "alleges a theft of information *from Venezuela* and the bribery of officials *in Venezuela* in a scheme orchestrated by 'two *Venezuelan* nationals.'" [3]

Even if but for a RICO violation, PDVSA would have received more money into its U.S. bank account and even if that qualifies in principle as a domestic injury, it is not clear, as a factual matter, what portion of the billions of dollars in damages the trust is claiming would have been deposited in PDVSA's U.S. bank account. It is one thing for the proceeds of dollar-denominated transactions such as those alleged in the complaint to be wired through correspondent bank accounts in the United States en route to their final destination in a PDVSA account, but it is another matter entirely to say that, in the ordinary course, PDVSA maintains bank accounts in the U.S. that are the final destination of such wire transfers. If the trust is essentially arguing that the destination of the proceeds of much of PDVSA's sales or purchases of hydrocarbon products is to U.S. bank accounts in PDVSA's name, that would be welcome news to numerous creditors who have been searching and will continue to search in earnest for attachable PDVSA assets in the United States.

### **Cooperation From PDVSA**

In our prior article, we noted that the trust may be unable to comply with discovery requests because it lacked access to PDVSA's books, records and witnesses. Although the "PDVSA U.S. Litigation Trust Agreement" expressly states that PDVSA transferred "all of their (sic) respective rights, title and interests in and [] any privilege or immunity attaching to any documents or communications (whether written or oral) associated with the [claims]," (Trust Agreement § 2.2(b)), the agreement contains no provision by which PDVSA agrees to provide information or cooperate with the litigation trustees in their pursuit of the assigned claims against the defendants. Such cooperation/access to information and witnesses clauses are common in agreements transferring claims to litigation trusts, because by definition the trust would otherwise have none of the documents, information or employees necessary to pursue the assigned claims. It is conceivable that such issues are addressed in the engagement letter between PDVSA and the trust's lawyers, or that counsel for PDVSA and the trust received an extensive download of information and documents before the suit was filed. But if not, the cooperation and information access issue may become significant, particularly if PDVSA takes a position contrary to the trust on the standing question.

### **Attachment Risk**

The trust agreement confirms that PDVSA is the sole beneficiary of the trust and that, after deducting legal fees and other expenses, PDVSA has the right to receive all remaining recoveries even if in total that is no more than 34 percent of the aggregate proceeds. PDVSA also appears to have exercised and continues to exercise significant control over the litigation process by retaining the law firms that are prosecuting the claims assigned to the trust, by purporting to appoint one of the three trustees, and by having control over the trustees' compensation. This evidence of control may increase the chance of a court finding that the trust's separate legal status cannot shield its assets from PDVSA's creditors.

It is also worth noting that the trust agreement's execution may have implications for the various republic creditors asserting that PDVSA is the alter ego of the republic. It is notable that the trust agreement was entered into on PDVSA's behalf by the minister of the people's petroleum power and with the consent of the attorney general of Venezuela. Further, the attorney general's approval is

required in order for the trust to distribute any proceeds of the litigation to PDVSA. Indeed, no PDVSA employee is entitled to receive any notices of information communicated in accordance with the trust agreement. The fact that government officials and no PDVSA officer executed the trust agreement and have the ability to dictate if and when PDVSA receives the benefits of PDVSA's litigation claims suggests significant control of PDVSA's assets and decision-making by the republic. This type of government control over PDVSA's operations and assets — if the trust agreement's validity is sustained — may lend additional credence to the argument that PDVSA is the alter ego of the republic, an issue that is currently pending before the Delaware district court in proceedings by Crystallex International Corp. to seek to enforce against assets of PDVSA a \$1.4 billion judgment against the republic.[4]

## Conclusion

The U.S. PDVSA Litigation Trust suit entails a number of significant procedural and substantive hurdles. First, the court will have to wade through the competing arguments on the standing question to determine whether the trust may pursue claims on behalf of PDVSA. After that, the trust will face continued opposition to its motion for preliminary injunction, and defendants have announced that they intend to file motions to dismiss the various causes of action. Resolution of the standing issue may have implications not just for this case, but for whether PDVSA may be bound by the Venezuelan government to any future debt restructuring and the extent to which National Assembly approval is required for such a restructuring. More immediately, however, the court will rule on the likely motions to dismiss. That ruling, assuming that the case is not dismissed, could indirectly incentivize financial creditors of PDVSA and the republic to seek to obtain value for themselves from the trust's claims. Finally, the fact that PDVSA may only have a maximum interest of 34 percent of the proceeds recovered by the trust under the trust agreement could diminish financial creditors' interest in attempting to seek to enforce their claims against the trust and raise further questions about the circumstances of its creation.

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[1] Richard Cooper and Boaz Morag, New Bribery Suit's Implications For Venezuela Restructuring, Law360 (March 19, 2018).

[2] See RJR Nabisco Inc. et al v. European Community et al, 136 S. Ct. 2090, 2111 (2016).

[3] Defendants' Joint Response in Opposition to Plaintiff's Motion for a Preliminary Injunction, PDVSA US Litigation Trust v. Lukoil Pan Americas LLC, et al., Case No. 1:18-cv-20818-DPG (Mar. 26, 2018) (Docket Entry 161 at 24) (emphasis in original).

[4] As discussed in our prior article, "Venezuela's Imminent Restructuring and the Role Alter Ego Claims May Play in this Chavismo Saga," Crystallex International Corp. is currently litigating whether PDVSA is the alter ego and liable for the debts of the republic as part of its ongoing enforcement efforts.