No. 19-__

In the Supreme Court of the United States

BOLIVARIAN REPUBLIC OF VENEZUELA AND PETRÓLEOS DE VENEZUELA, S.A,

Petitioners,

v.

CRYSTALLEX INTERNATIONAL CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. 1330, 1602 *et seq*., provides that foreign sovereigns and their instrumentalities are immune from suit, and that foreign sovereign property is immune from attachment, unless one of the FSIA's enumerated exceptions to immunity applies. This case concerns respondent Crystallex's efforts to enforce a judgment obtained against the Bolivarian Republic of Venezuela by attaching the property of Venezuela's national oil company, Petróleos de Venezuela, S.A. (PDVSA). In the decision below, the Third Circuit affirmed the district court's exercise of ancillary enforcement jurisdiction with respect to PDVSA, despite the absence of any basis under the FSIA for doing so. The court of appeals further held that PDVSA was an alter ego of Venezuela, even though there was no connection between Venezuela's control over PDVSA and respondent Crystallex's injuries—as would be required to treat a private corporation as another entity's alter ego. The questions presented are:

1. Whether a judgment-enforcement action against a foreign sovereign and its instrumentality must be predicated on applicable exceptions to the immunity provided by the FSIA.

2. Whether a plaintiff can overcome the presumption of juridical separateness between a foreign sovereign and its instrumentality in the absence of any connection between the foreign sovereign's control over its instrumentality and the plaintiff's injuries.

PARTIES TO THE PROCEEDING

Petitioner Bolivarian Republic of Venezuela was a defendant in the district court and an appellant in the court of appeals, although it did not initially appear in the action. On January 10, 2019, while this case was pending before the court of appeals, National Assembly President Juan Guaidó began acting as interim President of Venezuela pursuant to Article 233 of the Venezuelan Constitution. On January 23, 2019, the United States officially recognized Mr. Guaidó as interim President of the Republic. On March 1, 2019, the Republic, under the Guaidó administration, moved to intervene in the court of appeals. The court of appeals granted the Republic's motion to intervene on March 20, 2019.

Petitioner Petróleos de Venezuela, S.A. was an intervenor in the district court and an intervenor-appellant in the court of appeals.

Respondent Crystallex International Corporation was a plaintiff in the district court and an appellee in the court of appeals.

RELATED PROCEEDINGS

The proceedings directly related to this petition are:

Crystallex International Corporation v. *Bolivarian Republic of Venezuela*, No. 18-3124 (3d Cir. July 29, 2019), *rehearing en banc denied* (3d Cir. Nov. 21, 2019)

Crystallex International Corporation v. *Bolivarian Republic of Venezuela*, No. 17-mc-151-LPS (D. Del. Aug. 10, 2018)

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Bolivarian Republic of Venezuela and Petróleos de Venezuela, S.A. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in the consolidated appeals Nos. 18-2797 and 18-3124.

OPINIONS BELOW

The opinion of the court of appeals is reported at 932 F.3d 126 and reprinted in the Appendix (App.), *infra*, at 1a-44a. The opinion of the district court, App., *infra*, at 45a-136a, is reported at 333 F. Supp. 3d 380.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 2019. Petitions for rehearing en banc were denied on November 21, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Foreign Sovereign Immunities Act and Federal Rule of Civil Procedure 69 are reproduced at App., *infra*, 141a-149a.

INTRODUCTION

The Bolivarian Republic of Venezuela (Venezuela or the Republic) is experiencing an unprecedented fiscal and humanitarian crisis as a result of the corrupt and repressive regime of its former presidents Nicolás Maduro and Hugo Chávez. Last year, the United States joined other nations in recognizing Juan Guaidó as the interim President of the Republic. The United States also announced the urgent

foreign-policy objective of supporting the Guaidó administration's efforts to restore democracy to the Republic and stabilize its economy.

The Third Circuit's decision in this case threatens those U.S. policy objectives and, in the process, creates two circuit splits on issues that threaten to upset U.S. foreign-relations interests more broadly. First, the Third Circuit held that the district court could rely on ancillary enforcement jurisdiction to hold Venezuela's national oil company, Petróleos de Venezuela, S.A. (PDVSA), liable for a judgment against Venezuela on the theory that PDVSA was Venezuela's alter ego. That holding is irreconcilable with this Court's decision in *Peacock* v. *Thomas*, 516 U.S. 349 (1996). It also conflicts with decisions of the First, Second, Fourth, and Tenth Circuits, which have all held that a federal court cannot invoke its ancillary enforcement jurisdiction to hold a third party liable for a judgment on an alter-ego theory.

Second, the Third Circuit treated PDVSA as an alter ego of Venezuela, even though the district court found that any control that Venezuela asserted over PDVSA had no connection to the injuries in this suit. As the court of appeals acknowledged, that holding created a direct conflict with the Fifth Circuit, which requires a nexus between a foreign sovereign's control of an instrumentality and a plaintiff's injury before that instrumentality can be held liable for the acts of the sovereign. Disregarding such a nexus requirement makes instrumentalities of foreign sovereigns subject to suit where similarly situated private parties would not be—even though the Foreign Sovereign Immunities Act (FSIA) requires that foreign sovereigns and their instrumentalities be subject to suit only "to the same extent" as a private party would be. 28 U.S.C. 1606.

The Third Circuit's approach has serious foreign-policy implications. It damages the FSIA's goal of international comity by threatening broad liability in U.S. courts against foreign-sovereign instrumentalities. And in creating substantial uncertainty about the exposure of foreign instrumentalities in the United States, the decision could also subject U.S. instrumentalities and corporations abroad to reciprocal adverse treatment.

Those results are particularly pernicious here. The Guaidó administration is working to establish an orderly debt restructuring process. By allowing a single creditor to use the federal courts to gain preferential treatment, the Third Circuit's decision subverts that process as well as the Executive Branch's own efforts to support the Guaidó administration and to preserve Venezuelan assets in the United States for the Venezuelan people.

STATEMENT

1. The FSIA provides that foreign states and their instrumentalities are presumptively immune from suit in U.S. courts, and sets forth limited exceptions to that immunity. 28 U.S.C. 1604-1605; see 28 U.S.C. 1603(a)-(b). Those exceptions constitute the exclusive circumstances in which federal courts may exercise jurisdiction over suits against foreign states or their instrumentalities. See 28 U.S.C. 1330(a); *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983). A plaintiff bears the burden of demonstrating that an exception applies. See *ibid.*[1]

[1] The FSIA also sets forth independent rules regarding immunity of the property of a foreign state or its instrumentalities, which is "immune from attachment[,] arrest[,] and execution"

To advance the goals of comity and reciprocity underlying its enactment, the FSIA provides that a nonimmune foreign state or instrumentality generally may be held liable only "to the same extent as a private individual under like circumstances." 28 U.S.C. 1606. Thus, as this Court recognized in *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba* (*Bancec*), 462 U.S. 611 (1983), "duly created instrumentalities of a foreign state," like separate corporate entities, "are to be accorded a presumption of independent status." *Id.* at 627. As a result, ordinarily a person who obtains a judgment against a foreign state cannot satisfy that judgment by attaching or executing against the property of that state's agencies or instrumentalities, which are separate juridical entities. See *ibid.*; see also *id.* at 625-626 (contrary approach "would result in substantial uncertainty over whether an instrumentality's assets would be diverted to satisfy a claim against the sovereign").

That presumption of separateness may be overcome only in limited circumstances. Applying generally accepted corporate-law principles, *Bancec* concluded that a foreign-state instrumentality may be held responsible for the acts of the state if the instrumentality is "so extensively controlled by [the state] that a relationship of principal and agent is created" or if recognizing the instrumentality's separate juridical status would "'work fraud or injustice.'" 462 U.S. at 629 (citation omitted); see *Rubin* v. *Islamic Republic of Iran*, 138 S. Ct. 816, 822-823 (2018).

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unless an express FSIA exception applies. 28 U.S.C. 1609; see 28 U.S.C. 1610-1611.

2. In April 2016, respondent Crystallex International Corporation (Crystallex), a defunct Canadian mining company, filed an action against the Republic in the U.S. District Court for the District of Columbia. In that action, Crystallex sought to confirm an arbitration award entered against the Republic based on the 2011 expropriation of property carried out by the government of then-president Chávez. App., *infra*, 4a. Having exercised jurisdiction under an FSIA provision specific to confirmation of certain arbitration awards, see 28 U.S.C. 1605(a)(6), the D.C. district court confirmed the award in favor of Crystallex and issued a $1.4 billion judgment, App., *infra*, 2a, 4a.

In October 2016, Crystallex registered the D.C. judgment in Delaware federal court under 28 U.S.C. 1963. Crystallex named only the Republic as the defendant. But Crystallex nevertheless asked the Delaware court to attach and then sell U.S.-based assets of PDVSA, Venezuela's national oil company. PDVSA, which subsequently intervened in the action, is an "agency or instrumentality" of Venezuela within the meaning of the FSIA. App., *infra*, 57a. One of the world's largest oil companies, PDVSA owns all of the shares of PDV Holding (PDVH), a Delaware corporation, which is the holding company for CITGO Holding, Inc., which in turn owns CITGO Petroleum Corp., a leading U.S. refining company. App., *infra*, 2a.

In August 2018, the district court ruled that the PDVH shares owned by PDVSA could be attached to satisfy the judgment against the Republic. App., *infra*, 46a, 136a. The court acknowledged that the Republic and PDVSA are legally separate and that PDVSA had no connection to the underlying dispute. App., *infra*, 86a (no basis to believe that the Republic

"used PDVSA as an instrument to defraud Crystallex"). But the court concluded that the Republic exercised sufficient control over PDVSA to render them alter egos, and that no independent basis of FSIA jurisdiction with respect to PDVSA was necessary to permit the court to make the alter-ego determination and order the attachment of PDVSA's assets. App., *infra*, 55a-110a. The U.S. Marshals Service served the writ of attachment on PDVH, but proceedings in the district court were then stayed. Dkt. No. 154, at 1-2.

3. On July 29, 2019, the Third Circuit affirmed. First, the court ruled that Crystallex need not identify an independent basis of jurisdiction with respect to PDVSA under the FSIA because the Delaware suit fell within the district court's ancillary enforcement jurisdiction, App., *infra*, 15a-18a—that is, a federal court's inherent power to enforce its judgments, *Peacock*, 516 U.S. at 356. The Third Circuit acknowledged that this Court's decision in *Peacock* held that courts may not exercise such ancillary jurisdiction over "subsequent lawsuit[s] to impose an obligation to pay an existing federal judgment on a person not already liable for that judgment," *id.* at 356-357, but deemed that holding inapplicable in "a case involving foreign sovereigns or the [FSIA]," App., *infra*, 16a.

Second, the court of appeals found that the Republic exercised sufficient control over PDVSA to render PDVSA the Republic's alter ego. App., *infra*, 24a. In so ruling, the court adopted a categorical rule that this Court's decision in *Bancec* "does not require a connection between a sovereign's extensive control of its instrumentality and the plaintiff's injury" in order to disregard an instrumentality's separate status. App., *infra*, 24a. The court acknowledged that its

interpretation of *Bancec* created a direct conflict with the Fifth Circuit. App., *infra*, 24a n.9.

The court of appeals therefore affirmed the district court's issuance of a writ of attachment against PDVSA's shares of PDVH and remanded for further proceedings.[2]

4. On remand, the district court stayed proceedings in its court until the conclusion of proceedings in this Court. Dkt. No. 154, at 3; Dkt. No. 166, at 2-3. In so doing, the district court recognized that before any further steps are taken toward any sale of PDVSA's shares of PDVH, Venezuela and PDVSA should have the opportunity to seek this Court's review of the substantial jurisdictional and liability questions presented in this case. Dkt. No. 154, at 4. The district court further explained that this case implicates "[i]ssues of international affairs and United States foreign policy, which are within the purview of the Executive Branch." *Id.* at 6.

As the district court acknowledged in issuing that stay, this case has played out against the backdrop of extraordinary turmoil in Venezuela. See *id.* at 4-10. As a result of the corruption and maladministration of former president Maduro and his predecessor Chávez, Venezuela is in the midst of an unprecedented fiscal and humanitarian crisis—"the worst on the planet other than in Syria." *Id.* at 7; see, *e.g.*, Colleen Walsh, *Understanding Venezuela's collapse*, The Harvard Gazette (Feb. 12, 2019), https://news.harvard.edu/gazette/story/2019/02/harvard-expert-tries-to-make-sense-of-venezuelas-collapse/.

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[2] On November 29, 2019, the court of appeals denied petitions for rehearing en banc.

Venezuela's gross domestic product has fallen by more than 50 percent, and 90 percent of families are unable to obtain enough food. See, *e.g.*, Walsh, *supra*; State Dep't, *U.S. Government Support for the Democratic Aspirations of the Venezuelan People*, https://www.state.gov/u-s-government-support-for-the-democratic-aspirations-of-the-venezuelan-people/#crisis.

On January 10, 2019, in the midst of that crisis (and during the pendency of this case before the Third Circuit), opposition leader Juan Guaidó became the interim president of the Republic. The United States, along with a broad cross-section of the international community, recognized the Guaidó government as the sole legitimate government of Venezuela. App., *infra*, 8a n.2; see U.S. Presidential Statement (Jan. 23, 2019), https://www.whitehouse.gov/briefings-statements/statement-president-donald-j-trump-recognizing-venezuelan-national-assembly-president-juan-guaido-interim-president-venezuela/. President Guaidó took immediate steps to ensure the autonomy of PDVSA and its U.S. subsidiaries. See *Jiménez* v. *Palacios*, No. 2019-0490-KSJM, at 12-13 (Del. Ch. Aug. 2, 2019). He is also undertaking efforts to stabilize the oil industry (which is critical to the Venezuelan economy) and to establish an orderly claims restructuring process that will address the Republic's external debt. Declaration of Amb. Carlos Vecchio (3d Cir. Aug. 29, 2019) ¶¶ 13-15 (Vecchio Decl.). And shortly after he assumed the presidency, President Guaidó directed the Republic to appear in this litigation for the first time by intervening before the Third Circuit. See App., *infra*, 7a.

The United States has expressed its commitment to "use the full suite of its diplomatic and economic tools to support Interim President Juan Guaidó * * *

and the Venezuelan people's efforts to restore their democracy." U.S. Dep't of the Treasury, *Treasury Sanctions Venezuela's State-Owned Oil Company Petroleos de Venezuela, S.A.* (Jan. 28, 2019), https://home.treasury.gov/news/press-releases/sm594 (Treasury Press Release).[3] To carry out that commitment, the U.S. government has implemented asset-blocking measures designed to protect Venezuelan assets—including PDVSA's assets—from exploitation by the Maduro regime and to "preserve these assets for the people of Venezuela." *Ibid.*; see U.S. Dep't of the Treasury, Office of Foreign Assets Control, FAQ 596, https://www.treasury.gov/resource-center/faqs/sanctions/pages/faq_other.aspx#venezuela (Treasury FAQ); see also E.O. 13835 (May 21, 2018); E.O. 13850 (Nov. 1, 2018).

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals in this case has created a direct conflict in the circuits on two issues of vital importance to the sound administration of the FSIA and to U.S. foreign-relations interests—both systemically and with respect to the immediate crisis in Venezuela.

First, the Third Circuit's ruling that the district court could exercise ancillary enforcement jurisdiction with respect to PDVSA despite the lack of any

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[3] That effort enjoys bipartisan support. See, *e.g.*, Kevin Derby, *Florida Delegation Helps Launch, Lead Venezuela Democracy Caucus to Take on Maduro Regime*, Florida Daily (Nov. 14, 2019); Venezuela Emergency Relief, Democracy Assistance, and Development Act of 2019, Pub. L. No. 116-94, div. J, title I, 133 Stat. 2534 (2019); State of the Union Address (Feb. 4, 2020) (president describing President Guaidó as "the true and legitimate president of Venezuela").

statutory authorization under the FSIA conflicts with the decisions of numerous courts of appeals, as well as with this Court's decision in *Peacock*. In creating a circuit conflict on that issue, the Third Circuit disregarded well-established law that an independent basis for jurisdiction must exist before a federal court can impose liability on a third party as an alter ego. As a result, in the Third Circuit foreign sovereigns and their instrumentalities are now denied even the basic protections the law affords to private parties, a result that is irreconcilable with the FSIA.

Second, the Third Circuit created a direct conflict with the Fifth Circuit by ruling that alter-ego liability may be established under *Bancec* without any showing that a foreign sovereign's control over a separate instrumentality caused the plaintiff's injury. That ruling violates settled common-law principles on which this Court relied in *Bancec*, and venerable principles of respect for corporate separateness that limit the scope of alter-ego liability. It is particularly troubling because it affords foreign-sovereign instrumentalities *less* protection than private companies enjoy under the common law, contrary to the FSIA. See 28 U.S.C. 1606.

Those rulings by the Third Circuit would independently warrant review even apart from their grave effects on the newly recognized government of Venezuela and its efforts to restore stability to the nation's economy and foreign relations. The Third Circuit has endorsed the imposition of alter-ego liability in situations that go well beyond not merely what the FSIA authorizes but even what the decisions of this Court and well-established law would permit in cases involving only private parties. The decision thus raises international comity and reciprocity concerns of the highest order.

That the Third Circuit's decision will severely disrupt the Guaidó government's efforts to address Venezuela's massive economic and humanitarian crisis—as well as the efforts of the United States to support the new government's actions—only strengthens the case for immediate review. If the decision below remains in place, entities with claims against Venezuela will rush to the courthouse to jockey for priority in payment of those claims, subverting the Guaidó government's efforts to create an orderly and comprehensive restructuring process, and transferring from the Executive to the courts the power to manage the foreign-policy consequences of that process. Review by this Court is thus manifestly warranted.

I. This Court should review the Third Circuit's expansion of enforcement jurisdiction against foreign sovereigns and their instrumentalities.

The Third Circuit held that the district court properly exercised ancillary enforcement jurisdiction over Crystallex's action seeking to hold PDVSA liable for Crystallex's judgment against the Republic on the ground that PDVSA is the Republic's alter ego. As a result, the Third Circuit held, the district court could exercise jurisdiction over a claim seeking to impose alter-ego liability on PDVSA—a foreign-sovereign instrumentality—despite the lack of any independent ground for such jurisdiction under the FSIA. Nothing in the FSIA—"the sole basis for obtaining jurisdiction over a foreign state in our courts," *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989)—authorizes such bootstrapping. To the contrary, the court of appeals' decision squarely conflicts with *Peacock*, which holds that federal courts *lack* ancillary enforcement jurisdiction over claims seeking to hold an alleged alter ego liable on a judgment,

as well as with decisions of the courts of appeals that have followed *Peacock*. The Third Circuit's decision erroneously expands federal jurisdiction over foreign sovereigns not only beyond the limited circumstances set forth in the FSIA, but also beyond the circumstances in which federal courts would have enforcement jurisdiction over private parties.

A. The court of appeals' decision conflicts with this Court's precedent and the decisions of other courts of appeals.

The Third Circuit's decision conflicts with this Court's decision in *Peacock*, as well as with decisions of the First, Second, Fourth, and Tenth Circuits.

1. In *Peacock*, this Court held that a federal court's ancillary jurisdiction to enforce its judgments does not extend to a "new action[] in which a federal judgment creditor seeks to impose liability for a money judgment on a person not otherwise liable for the judgment." 516 U.S. at 351. There, the plaintiff had obtained a money judgment against his employer for ERISA violations. When the plaintiff was unable to enforce the judgment against the employer, he sued Peacock (an officer of the employer), asserting, as relevant here, a veil-piercing claim. *Id.* at 351-352.

This Court held that the plaintiff's suit did not fall within federal courts' ancillary jurisdiction. *Id.* at 356. The Court explained that ancillary enforcement jurisdiction is strictly "reserved" for attempts to execute an existing judgment—that is, proceedings to enforce a judgment against the judgment debtor itself, and certain actions to recover the judgment debtor's assets in the hands of a third party. See *id.* at 356-357. The latter suits include actions to garnish the judgment debtor's assets held by a third party such as a bank, as well as actions to void a

fraudulent transfer of the judgment debtor's assets to a third party. See *id.* at 357 n.6. In such proceedings, the judgment creditor need only establish that the assets in question belong to the judgment debtor, such that the third party must hand them over to satisfy the judgment against the judgment debtor. The third party is not liable on the judgment, and therefore need not pay the full judgment amount; rather, it is obligated only to hand over the judgment debtor's assets in its possession. *Id*. at 356-357.

The *Peacock* veil-piercing claim was different in kind from such ancillary actions, however, because it sought "to impose an obligation to pay an existing federal judgment on a person not already liable for that judgment." *Id.* at 357. "Piercing the corporate veil," the Court explained, "is a means of *imposing liability* on an underlying cause of action" against a third party who would not otherwise be liable. *Id*. at 354 (emphasis added; citation omitted). Moreover, the veil-piercing theory was a "new" theory of liability that was not asserted in the original suit and that turned on "different facts than the [original] suit." *Id*. at 358. For those reasons, the Court held that the veil-piercing action did not fall within the district court's ancillary jurisdiction and required an independent basis of federal jurisdiction. Because no such independent basis existed, the suit was not properly in federal court.

2. In the decision below, the Third Circuit held—contrary to *Peacock*—that the district court's ancillary jurisdiction "extend[ed]" to Crystallex's suit seeking to establish that PDVSA is the Republic's alter ego and is therefore liable to satisfy Crystallex's judgment against the Republic. App., *infra*, 14a. The court acknowledged that jurisdiction over Crystallex's judgment-enforcement action must be based, if at all,

on "federal courts['] * * * ancillary jurisdiction to enforce their judgments." App., *infra*, 11a. The court also recognized that Crystallex seeks to establish that PDVSA "is Venezuela's alter ego under *Bancec*"—that is, to pierce the veil between Venezuela and PDVSA. App., *infra*, 14a. And the court did not dispute that Crystallex seeks to pierce the veil in order to "shift liability for payment of an existing judgment" against the Republic "to a third party that is not otherwise liable," *i.e.*, PDVSA. App., *infra*, 16a. This suit is thus precisely the sort of veil-piercing action that *Peacock* holds is not within a federal court's ancillary enforcement jurisdiction.

Yet the Third Circuit held that *Peacock* does not apply in an FSIA suit involving a foreign sovereign, and that the district court therefore could exercise ancillary enforcement jurisdiction over Crystallex's alter-ego claim. The Third Circuit thought it determinative that *Peacock* did not involve an alter-ego claim asserted under *Bancec* against a foreign-sovereign instrumentality. The *Bancec* doctrine, the court of appeals stated, "exists specifically to enable federal courts * * * to disregard the corporate separateness of foreign sovereigns to avoid * * * unfair results." App., *infra*, 16a. That is a non sequitur. The question is not whether Crystallex may assert a *Bancec* claim against PDVSA, but whether it may invoke the district court's ancillary enforcement jurisdiction to do so when no independent basis for jurisdiction with respect to PDVSA exists.

Far from serving as a ground for distinguishing *Peacock*, a *Bancec* alter-ego claim is precisely the type of suit that *Peacock* held falls outside of ancillary jurisdiction. See 516 U.S. at 357. Because *Bancec* applied common-law principles of corporate veil piercing to foreign sovereigns, see 462 U.S. at 627-628, a

Bancec claim, like the veil-piercing action at issue in *Peacock*, is an "equitable" claim that allows a party to overcome the legal presumption of separateness between two entities, such that "one may be *held liable* for the actions of the other." *Bancec*, 462 U.S. at 629 (emphasis added); see *Rubin*, 138 S. Ct. at 823 (in FSIA judgment-enforcement context, successful *Bancec* claim establishes "the *liability* of agencies and instrumentalities of a foreign state" to "satisfy a judgment held against the foreign state") (emphasis added). The Third Circuit's holding that the district court had ancillary jurisdiction over Crystallex's *Bancec* claim therefore squarely conflicts with *Peacock*.

3. The court of appeals' decision also conflicts with decisions of the First, Second, Fourth, and Tenth Circuits. Those courts of appeals have held that *Peacock* means what it says—namely, that ancillary enforcement jurisdiction does not extend to any suit by a judgment creditor seeking to hold a third party liable to satisfy a judgment on alter-ego grounds.

In *Futura Development of Puerto Rico, Inc.* v. *Estado Libre Asociado de Puerto Rico*, 144 F.3d 7 (1998), the First Circuit held that *Peacock* requires an independent basis of jurisdiction *any time* a judgment creditor attempts to enforce a judgment against a third party on the ground that the third party's corporate separateness should be disregarded. The court explained that "[a]lter ego/veil-piercing claims involve a substantive theory for imposing liability upon entities that would, on first blush, not be thought liable for a tort or on a contract," and *Peacock* holds that such claims do not fall within ancillary enforcement jurisdiction. *Id.* at 12. The court reasoned that any claim seeking to overcome a third party's presumptively separate status—regardless of

how the claim is characterized—"involves an independent theory of liability under equity, complete with new evidence," and therefore *Peacock* requires an independent basis of jurisdiction. *Ibid.*; see *Groden* v. *N&D Transp. Co.*, 866 F.3d 22 (1st Cir. 2017).

The Second, Fourth, and Tenth Circuits have similarly held that ancillary enforcement jurisdiction does not extend to a plaintiff's attempt to enforce a judgment against a third party based on an alter-ego or veil-piercing theory. See *Epperson* v. *Entm't Express, Inc.*, 242 F.3d 100, 106 (2d Cir. 2001) ("claims of alter ego liability and veil-piercing" require an independent basis for jurisdiction because they "raise an independent controversy with a new party in an effort to shift liability"); *C.F. Tr., Inc.* v. *First Flight Ltd. P'ship*, 306 F.3d 126, 133 (4th Cir. 2002) (*Peacock* requires "*independent* basis of jurisdiction" to hear "a subsequent, post-judgment alter ego claim"); see also *Flame S.A.* v. *Freight Bulk Pte. Ltd.*, 807 F.3d 572, 581-582 (4th Cir. 2015); *Ellis* v. *All Steel Constr., Inc.*, 389 F.3d 1031, 1035 (10th Cir. 2004).

B. The court of appeals incorrectly concluded that Crystallex's suit against PDVSA fell within the district court's ancillary enforcement jurisdiction.

1. The Third Circuit's decision is incorrect. For the reasons discussed above, the decision permits the district court to do precisely what *Peacock* forbade: invoke ancillary enforcement jurisdiction to hold a third party liable for a prior judgment. See 516 U.S. at 357. As a result of that erroneous ruling, the Third Circuit did not require Crystallex to demonstrate that this suit is supported by an independent

basis of federal jurisdiction. Had it done so, this suit would have been dismissed.

A federal court has jurisdiction over a suit against a foreign sovereign or its instrumentality only if the plaintiff establishes one of the exceptions to immunity under Section 1605. 28 U.S.C. 1330(a). Here, the only arguably relevant exception to immunity is the arbitral exception, Section 1605(a)(6)—but this suit (unlike Crystallex's earlier suit in the D.C. district court) was not brought to "enforce an agreement" to arbitrate or to "confirm an [arbitral] award," as that provision requires. And in all events, Crystallex would have to demonstrate a basis for holding PDVSA, a non-party to the arbitration, liable on the award rendered against Venezuela. See *Bridas S.A.P.I.C.* v. *Gov't of Turkmenistan* (*Bridas II*), 447 F.3d 411, 415 & n.4, 416 (5th Cir. 2006). No such basis exists here because the district court found as fact that PDVSA was not involved in the transaction that gave rise to the arbitration, and that the Republic's alleged control over PDVSA had no relation to that transaction. See C.A. J.A. 49. Thus, the district court lacked jurisdiction to hold PDVSA liable for the judgment against the Republic.

2. The Third Circuit's decision thus does far more than simply disregard the well-established limits on ancillary enforcement jurisdiction, thereby treating foreign states less favorably than private parties—a result that itself raises significant comity and reciprocity concerns. The decision also permits judgment creditors to circumvent the FSIA by using a judgment against one foreign-sovereign entity as a means to attach the assets of another presumptively independent sovereign instrumentality despite the latter's immunity from suit under Section 1605 of the FSIA.

The attempts by Crystallex and the Third Circuit to justify that indefensible result lack merit.

In addition to its erroneous suggestion that a *Bancec* alter-ego claim is somehow exempt from *Peacock*'s rule, see pp. 14-15, *supra*, the court of appeals appeared to believe that ancillary enforcement jurisdiction is broader in the context of FSIA litigation than in other contexts. App., *infra*, 15a-16a. But the court gave no reason why that should be so. The FSIA, which is the "sole basis for obtaining jurisdiction" in any action against a foreign state and its instrumentalities, *Amerada Hess*, 488 U.S. at 443, does not expressly confer ancillary jurisdiction to bring a subsequent judgment-enforcement action on an alter-ego theory, or otherwise suggest that the district court's ancillary jurisdiction would be broader than in other contexts. Quite the contrary: because the FSIA confers immunity from suit on foreign sovereigns and their instrumentalities, 28 U.S.C. 1604, it is all the more important in the FSIA context to ensure independent jurisdiction over each foreign-sovereign entity. See *Jesner* v. *Arab Bank, PLC*, 138 S. Ct. 1386, 1407 (2018).[4]

To be sure, as the Third Circuit observed, this Court has acknowledged that judgment creditors may

[4] The Third Circuit also erred by concluding that the Delaware district court had jurisdiction over the Republic by operation of 28 U.S.C. 1963. The FSIA supersedes prior congressional grants of subject-matter jurisdiction, see *Amerada Hess*, 488 U.S. at 434, and Section 1963 is itself a grant of such jurisdiction, see *Stanford* v. *Utley*, 341 F.2d 265, 268 (8th Cir. 1965). The FSIA permits subject-matter jurisdiction over certain types of enforcement actions, *e.g.*, 28 U.S.C. 1605(a)(4), 1605(b), but does not provide a blanket grant of jurisdiction for judgment-enforcement proceedings initiated in new district courts.

invoke *Bancec*'s alter-ego theory to attach the assets of an alter-ego instrumentality to satisfy a judgment against a foreign state. App., *infra*, 16a-17a (citing *Rubin*, 138 S. Ct. 823). But this Court's general observation about *Bancec*'s availability in judgment-enforcement actions does not even purport to address, much less resolve, whether the judgment creditor needs an independent basis of jurisdiction to support its invocation of *Bancec*'s equitable veil-piercing rule.

The decision below also draws no support from Crystallex's characterization of its suit as a judgment enforcement action under Federal Rule of Civil Procedure 69. A litigant's self-serving characterization cannot determine federal court jurisdiction. See *Rivet* v. *Regions Bank of La.*, 522 U.S. 470, 475 (1998). And Rule 69 simply provides procedures for enforcing a judgment; it does not confer jurisdiction, ancillary or otherwise, to determine an entity's liability in the first instance. See Fed. R. Civ. P. 82. Even in Rule 69 proceedings, therefore, a district court must have either ancillary jurisdiction or an independent basis of jurisdiction. See *Hudson* v. *Coleman*, 347 F.3d 138, 144 n.4 (6th Cir. 2003) (Rule 69 "does not purport to confer ancillary subject matter jurisdiction for all garnishment proceedings" and it is, instead, "*Peacock* [that] explains the limits of federal ancillary jurisdiction"); *USI Props. Corp.* v. *M.D. Const. Co.*, 230 F.3d 489, 498 (1st Cir. 2000). Because a Rule 69 proceeding based on an alter-ego theory seeks to impose liability for the judgment on a third party, it does not fall within the district court's ancillary jurisdiction.

Similarly unavailing is Crystallex's attempt to characterize this suit as merely an attempt to recover the Republic's property in the hands of PDVSA, in the nature of a fraudulent-conveyance or garnish-

ment action that would fall within the court's ancillary jurisdiction. See *Peacock*, 516 U.S. at 356. When Crystallex filed this action, PDVSA was entitled to a presumption of juridical independence, pursuant to which the court was required to treat PDVSA's assets as its own. Crystallex could overcome the presumption of corporate separateness and establish that PDVSA's assets should be treated as though they were the Republic's only by first establishing an antecedent point: that the two entities are alter egos. It is that antecedent claim that *Peacock* and numerous other courts of appeals have held requires an independent basis of jurisdiction.

That is for a good reason: an alter-ego claim is fundamentally different from a fraudulent-conveyance or garnishment claim. A fraudulent-conveyance or garnishment claim focuses on specific property; the judgment creditor need only establish that the property was fraudulently conveyed or otherwise belongs to the judgment debtor. See, *e.g.*, *Gilchinsky* v. *Nat'l Westminster Bank N.J.*, 732 A.2d 482, 488 (N.J. 1999); *Irwin* v. *O'Bryan*, No. 18-5997, 2019 WL 6112693, at *3 (6th Cir. Nov. 18, 2019). Such actions accordingly result in an order directed to property, undoing the fraudulent transaction or otherwise directing that the specific property in question be used to satisfy the judgment. By contrast, an alter-ego action requires a searching examination of the overall relationship between the two *entities*, and the resulting ruling is that the two should be treated as one, such that the third party is fully liable for the entire judgment against the judgment debtor (even if, as here, the alter-ego claim is tactically aimed at a particular category of property). See *Peacock*, 516 U.S. at 351.

II. This Court also should review the Third Circuit's conclusion that control alone is sufficient to deem a foreign-sovereign instrumentality an alter ego of the foreign state.

Having improperly enlarged federal jurisdiction over foreign-sovereign instrumentalities, the Third Circuit then vastly expanded the circumstances under which an instrumentality may be deemed an alter ego of the foreign state. The court of appeals held that *Bancec* permits a plaintiff to overcome the presumption of juridical separateness between a foreign sovereign and its instrumentality based solely on a showing of "extensive control"—even if that relationship of control has no nexus to the plaintiff's injury. That decision creates an acknowledged conflict with the Fifth Circuit, and it is also wrong.

A. The court of appeals' decision conflicts with decisions of the Fifth Circuit.

The Third Circuit held that *Bancec*'s "extensive control" analysis "does not require a connection between a sovereign's extensive control of its instrumentality and the plaintiff's injury." App., *infra*, 24a-25a. The Third Circuit therefore focused exclusively on whether the Republic exercised extensive control over PDVSA, a question that the court answered in the affirmative. The court's rejection of any nexus requirement was outcome-determinative, as the district court found that the Republic's alleged control over PDVSA had no connection at all to Crystallex's injury. C.A. J.A. 49 (finding that Republic's alleged control over PDVSA did not contribute to Crystallex's injury and was not used to commit a fraud or wrong against Crystallex).

The Third Circuit expressly acknowledged (App., *infra*, 24a & n.9) that its exclusive focus on extensive control conflicts with the Fifth Circuit's decision in *Bridas II*, 447 F.3d 411. There, the Fifth Circuit addressed whether to disregard the juridical separateness between the Turkmenistan government and a state-owned oil-and-gas company. *Id.* at 416. The court explained that *Bancec*'s alter-ego doctrine drew on "bedrock principle[s] of corporate law"—that is, common-law principles—and "applied" those principles to foreign sovereign entities. *Ibid*. Under the common law, the Fifth Circuit explained, a court may pierce the veil between presumptively separate entities only if "(1) the owner exercised complete control over the corporation with respect to the transaction at issue *and* (2) *such control was used to commit a fraud or wrong that injured the party* seeking to pierce the veil." *Ibid.* (emphasis added) (quoting *Bridas S.A.P.I.C.* v. *Gov't of Turkmenistan*, 345 F.3d 347, 359 (5th Cir. 2003), and citing *Bancec*).[5] The Fifth Circuit accordingly considered whether the government of Turkmenistan's abuse of the corporate form was a cause of the plaintiff's injury. *Id.* at 420. The court disregarded the corporate separateness between the government and the instrumentality

[5] Although the Third Circuit suggested that the Fifth Circuit's decision in *First Investment Corp. of Marshall Islands* v. *Fujian Mawei Shipbuilding, Ltd*., 703 F.3d 742, 752-753 (2012), is inconsistent with the Fifth Circuit's decision in *Bridas II*, that is incorrect. In *First Investment Corporation*, the Fifth Circuit approvingly cited *Bridas II*'s requirement of a nexus between the sovereign's control and the plaintiff's injury. *Id.* at 754. But because the *First Investment Corporation* court held that the foreign sovereign did not exercise the necessary level of control over the instrumentality's operations, it had no occasion to address the existence of a nexus.

only after concluding that the "[g]overnment used the lack of financial separateness" to injure the plaintiff. *Ibid.*; see *Janvey* v. *Libyan Inv. Auth.*, 840 F.3d 248, 265 (5th Cir. 2016) (declining to pierce the corporate veil where there was no evidence of control "generally or with specific regard to" the transaction at issue).[6]

B. The Third Circuit's decision is incorrect.

1. In holding that extensive control is itself sufficient to overcome *Bancec*'s presumption of juridical independence, the Third Circuit disregarded the *Bancec* doctrine's origin in the common law governing private corporations. *Bancec* started with the established rule in American corporate law that both private and public corporations are entitled to a presumption of juridical independence. 462 U.S. at 624-625; see *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 474 (2003) ("A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities."). The Court afforded the same protection to foreign-state instrumentalities, recognizing a presumption that such instrumentalities are distinct

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[6] The Eleventh Circuit has also suggested that a nexus between extensive control and the plaintiff's injury is a relevant consideration, as it has stated that it would be "unfair" to disregard corporate separateness where a foreign-state-owned "airline was neither a party to the litigation nor was in any way connected with the underlying transaction giving rise to the suit." *Hercaire Int'l* v. *Argentina*, 821 F.2d 559, 563, 565 (11th Cir. 1987).

Consistent with the decision below, the Second Circuit has disregarded a foreign-state instrumentality's juridical independence on the basis of extensive control alone. See *Kirschenbaum* v. *Assa Corp.*, 934 F.3d 191, 197 (2d Cir. 2019). But there the instrumentality did not argue that *Bancec*'s "extensive control" prong includes a nexus requirement, so the court did not consider the question. *Id.* at 198.

entities from the foreign government itself. *Bancec*, 462 U.S. at 628.

To define the rare circumstances that would justify overcoming that presumption, the Court looked to the common law on attributing liability among "*private* corporations." *Ibid.* The Court explained that decisions of U.S. courts and corporate-law treatises identify limited situations in which equity calls for an entity to be held liable for the actions of another, related entity. *Id.* at 628-629 & n.19 (citing 1 W.M. Fletcher, Cyclopedia of the Law of Private Corporations § 41 (rev. perm. ed. 1974)). Synthesizing those authorities, the Court stated that corporate form may be disregarded "where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created." *Id.* at 629. The Court further stated that "our cases have long recognized 'the broader equitable principle that the doctrine of corporate entity * * * will not be regarded when to do so would work fraud or injustice.'" *Ibid.* (citation omitted). Because the Court concluded that Bancec's corporate status should be disregarded on the basis of "injustice," the Court had no occasion to elaborate further on "extensive control." *Id*. at 632-633.

Bancec's reliance on the common law to determine when a sovereign entity's juridical status should be disregarded nonetheless makes clear that the "extensive control" test draws its content from the common law. And the common-law rule is clear: extensive control alone does not justify piercing the corporate veil. A plaintiff must *also* demonstrate a nexus between the control and the plaintiff's injury. As the leading treatise cited in *Bancec* explains, courts normally do not disregard corporate separateness without a showing that "control and breach of duty prox-

imately caused the injury or unjust loss." 1 W.M. Fletcher, Cyclopedia of the Law of Private Corporations § 41 (rev. perm. ed. 1974); cf. *id.* § 43.60. Judicial decisions are to the same effect. See, *e.g.*, *Am. Fuel Corp.* v. *Utah Energy Dev. Co.*, 122 F.3d 130, 134 (2d Cir. 1997) ("[D]omination, standing alone, is not enough; some showing of a wrongful or unjust act toward the party seeking piercing is required.") (citation and alterations omitted); *Kirk* v. *Schaeffler Grp. USA, Inc.*, 887 F.3d 376, 388 (8th Cir. 2018); *Corrigan* v. *U.S. Steel Corp.*, 478 F.3d 718, 724 (6th Cir. 2007); *Morris* v. *N.Y. State Dep't of Taxation & Fin.*, 623 N.E.2d 1157, 1160-1161 (N.Y. 1993); 1 Treatise on the Law of Corporations § 7:8 (3d ed. 2019) ("[C]ontrol and breach of duty must proximately cause the injury or unjust loss complained of."); 18 C.J.S. *Corporations* § 14 (2019) (same).

2. The Third Circuit's rejection of that nexus requirement is irreconcilable with *Bancec*'s reliance on common-law principles. Rather than looking to the common law to determine the meaning of "extensive control," the court of appeals focused myopically on *Bancec*'s facts. It thought that extensive control alone sufficed to disregard juridical status because *Bancec* did not discuss a nexus between the Cuban government's control of Bancec and the plaintiff's injury. But *Bancec* did not analyze extensive control; instead, the Court relied on the "broader equitable principle" of "fraud or injustice" as the basis for ruling that Cuba could not avoid liability by invoking Bancec's separate status. 462 U.S. at 629, 632-633 (citations omitted) (explaining that it was unjust for Cuba to pursue a claim in U.S. court on behalf of Bancec and, at the same time, to use Bancec's separate status as a shield against liability on a counterclaim against Cuba). The Court did not silently elim-

inate the nexus requirement in a case where the extensive-control prong was not implicated.[7] To the contrary, as support for the extensive-control prong, the Court cited *NLRB* v. *Deena Artware, Inc.*, 361 U.S. 398 (1960), a case that involved quintessential abuse of extensive control to defraud the plaintiff—namely, siphoning assets to avoid a payment obligation. *Id.* at 401, 404.

The Third Circuit also worried that adopting the common-law nexus requirement would significantly narrow the scope of *Bancec*'s extensive-control test. App., *infra*, 24a. But that reasoning mistakes a *feature* of the doctrine for an error in its application. *Bancec* emphasizes that a foreign-sovereign instrumentality's juridical status should be disregarded only in rare circumstances, and that ordinarily the presumption of corporate separateness should control. By expanding alter-ego liability well beyond the circumstances allowed under the common law, the Third Circuit's permissive rule expands veil piercing far beyond what *Bancec* contemplated. See, *e.g.*, *Dole Food Co.*, 538 U.S. at 475 (discussing *Bancec* and stating that "doctrine of piercing the corporate veil * * * is the rare exception, applied in the case of fraud or certain other exceptional circumstances"); *De Letelier* v. *Republic of Chile*, 748 F.2d 790, 795 n.1 (2d Cir. 1984) (noting "injustice" inflicted if "separate status" is too "easily ignored").

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[7] This Court's decision in *Rubin* (see App., *infra*, 16a-17a) is even further afield. *Rubin* was not a veil-piercing case and, accordingly, did not evaluate alter-ego standards. Instead, *Rubin* addressed an FSIA provision that concerns terrorism judgments and is not at issue here. See 138 S. Ct. at 823, 827.

The Third Circuit's rejection of the common-law nexus requirement is particularly troubling because it affords foreign-sovereign instrumentalities *less* protection against veil piercing under *Bancec* than private companies enjoy under the common law. That is contrary to *Bancec*, which recognized that "the efforts of sovereign nations to structure their governmental activities" must be accorded at least as much respect as the corporate-governance decisions of private parties. 462 U.S. at 626. It is also contrary to the FSIA, which codifies that equal-treatment principle by providing that a non-immune "foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 1606.

III. The questions presented are exceptionally important.

This Court's review is urgently needed. The Third Circuit's decision raises grave comity, reciprocity, and other foreign-relations concerns because it broadens significantly the exposure of the assets of foreign-state instrumentalities to execution for acts committed by a separate entity: the foreign state itself. The decision dramatically constricts foreign sovereign immunity in a manner that undermines the FSIA and may expose the United States and its instrumentalities to a reciprocal expansion of liability abroad. Those concerns apply broadly to all foreign states and instrumentalities with U.S. assets, but they are particularly acute with respect to Venezuela, which is experiencing a major crisis that the Third Circuit's rulings will exacerbate—a result directly contrary to clearly expressed U.S. foreign-policy goals.

1. a. The FSIA is intended to promote "respect for the actions taken by foreign sovereigns and * * *

comity between nations." *Bancec*, 462 U.S. at 626. The statute is also intended to protect U.S. entities from reciprocal adverse treatment in foreign courts. See H.R. Rep. No. 94-1487, at 9 (1976) (House Report); see also *National City Bank of N.Y.* v. *Republic of China*, 348 U.S. 356, 362 (1955). The Third Circuit's decision threatens both of those objectives because it treats foreign entities less favorably than private corporate entities.

The Third Circuit's holding that a court can exercise purported "ancillary" jurisdiction with respect to a foreign-state instrumentality despite the absence of any applicable exception to FSIA immunity from suit is likely to be perceived as disregard for that instrumentality's sovereign status. The decision permits any judgment creditor of a foreign state to hale that state's instrumentalities into court based on a mere allegation that the instrumentalities should be treated as alter egos of the foreign state—and without any regard to the FSIA's immunity-from-suit provisions. That will precipitate the very international friction that the FSIA was designed to prevent. And that friction will be exacerbated by the fact that the plaintiff's purpose is to attach the instrumentality's assets. As this Court has explained, the "judicial seizure" of foreign-sovereign property "may be regarded as an affront to [the] dignity" of the sovereign "and may * * * affect our relations with it." *Republic of Philippines* v. *Pimentel*, 553 U.S. 851, 866 (2008) (citation omitted); see *Ex parte Rep. of Peru*, 318 U.S. 578, 588 (1943); *Conn. Bank of Commerce* v. *Republic of Congo*, 309 F.3d 240, 255-256 (5th Cir. 2002) (execution may be viewed as "greater affront" to "sovereignty than merely permitting jurisdiction over the merits of an action"); Ian Brownlie, *Principles of Public International Law* 346 (5th ed. 1998).

In addition, the Third Circuit's approach to the alter-ego analysis disrespects the foreign state's decisions about how to "structure" its own sovereign entities "to promote economic development and efficient administration." *Bancec*, 462 U.S. at 626. This Court has warned that a lax approach to the "separate status of government instrumentalities would result in substantial uncertainty over whether an instrumentality's assets would be diverted to satisfy a claim against the sovereign, and might thereby cause third parties to hesitate before extending credit to a government instrumentality without the government's guarantee." *Ibid*. Piercing the veil with respect to an instrumentality that had nothing to do with the plaintiff's injury causes just such harm. And that approach may also give rise to sovereign perceptions of "unfair[ness]," *Hercaire*, 821 F.2d at 565, thereby threatening significant friction between the United States and the foreign sovereign.

Moreover, because "some foreign states base their sovereign immunity decisions on reciprocity," *Persinger* v. *Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir. 1984), the Third Circuit's decision is likely to result in adverse treatment for the United States and its instrumentalities—or even private U.S. corporations and their subsidiaries—in suits brought in foreign countries. See *Boos* v. *Barry*, 485 U.S. 312, 323 (1988); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963). Indeed, in enacting the FSIA, Congress expressed specific concern that lack of sufficient "respect" for "separate juridical identities" could "encourage foreign jurisdictions to disregard the juridical divisions between different U.S. corporations or between a U.S. corporation and its independent subsidiary." *Bancec*, 462 U.S. at 627-628 (quoting House Report 29-30).

b. All of those concerns are heightened here. First, the confluence of the Third Circuit's rulings—each of which weakens sovereign-immunity protections in different ways—intensifies the comity and reciprocity concerns. In the Third Circuit, not only may a foreign-state instrumentality be subjected to a suit seeking to hold it liable for a judgment that was not entered against it, despite the absence of any applicable exception to its immunity, but that instrumentality may then be held substantively responsible for acts of the foreign state in circumstances that go beyond those approved in *Bancec*. The decision below thus represents a one-two punch that weakens the juridical separation between a foreign state and its instrumentality.

Second, because the Third Circuit has departed from decisions of this Court and of other circuits, foreign-sovereign entities may now receive different treatment in different U.S. jurisdictions. But clarity and uniformity are exceptionally important when jurisdictional rules and international relations are at stake: foreign states and their instrumentalities need certainty about the underlying rules when deciding how to order their corporate affairs in the United States. See, *e.g.*, *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1321-1322 (2017); see also *Verlinden B.V.*, 461 U.S. at 489; see generally *Direct Mktg. Ass'n* v. *Brohl*, 135 S. Ct. 1124, 1133 (2015). Many foreign-state instrumentalities established as separate entities hold assets in the United States. That serves U.S. interests, as foreign-state investment in the United States contributes to the U.S. economy and furthers the United States' position as a leader in global markets. But the Third Circuit's decision creates considerable uncertainty about the exposure

of those assets to attachment and execution for acts committed by the foreign state, thereby threatening to discourage foreign-state instrumentalities' maintenance of U.S. assets. That is particularly so given that many foreign-state instrumentalities are incorporated in Delaware—*i.e.*, within the Third Circuit.

2. Those concerns are relevant to all foreign states and their instrumentalities. Still, petitioners' particular situation provides not only a vivid illustration of the problems inherent in the Third Circuit's approach but also an independent reason why this Court's review is important. The Third Circuit acknowledged—but chose to disregard—the fact that "U.S. foreign policy interests may be affected by attachment and execution of PDVSA's assets." App., *infra*, 43a.

This litigation has proceeded against the backdrop of, and has significant implications for, the United States' efforts to support the U.S.-recognized government of interim President Guaidó. Venezuela is in the midst of an unparalleled fiscal and humanitarian crisis that has been made much worse by the collapse of the Venezuelan oil industry.[8] In an effort to aid the Guaidó government's attempts to address that crisis and foster the stability of the government itself, the Executive Branch has taken steps to sanction the corrupt Maduro regime and preserve Venezuelan assets in the United States for the use of the Guaidó government and the Venezuelan people. Specifically, the United States has added PDVSA to

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[8] See pp. 7-9, *supra*; Walsh, *supra* (describing "the biggest economic collapse in human history outside of war or state collapse").

the list of Specially Designated Nationals, freezing its assets in the United States unless the Executive gives specific permission for them to be transferred. See, *e.g.*, Treasury Press Release. The U.S. Treasury Department explained that, "[a]s the illegitimate former Maduro regime continues to usurp power and plunder assets that rightfully belong to the Venezuelan people, the United States has implemented Venezuela-related sanctions to preserve such assets for the Venezuelan people." Treasury Dep't, *Guidance Related to the Provision of Humanitarian Assistance and Support to the Venezuelan People* 1 (Aug. 6, 2019), https://www.treasury.gov/resource-center/sanctions/Programs/Documents/20190805_vz_humanitarian_guidance.pdf.[9]

That asset-control regime obligates Crystallex to seek a license from the Executive Branch before taking any concrete steps towards selling PDVSA's shares. Treasury FAQ, FAQ 809; see E.O. 13850 § 1(b); E.O. 13835 § 1(b); E.O. 13692 § 1(b). But that does not alter the need for immediate review. For one thing, the FSIA confers immunity from suit, which will be lost if petitioners are subject to further district court proceedings. Moreover, had the courts below properly applied the FSIA's jurisdictional immunity provisions and *Bancec*, the Executive Branch would not be forced to decide whether to grant a license—with all the foreign-relations consequences that decision entails—because this suit would not have proceeded in the first place. That sort of judicial intrusion into the Executive Branch's conduct of for-

[9] See also E.O. 13835 § 1(a); E.O. 13692 (Mar. 8, 2015) (declaring the situation in Venezuela "an unusual and extraordinary threat to the national security and foreign policy of the United States"); E.O. 13850; Treasury FAQ.

eign relations is exactly what the careful limits set forth in the FSIA, and discussed in *Bancec*, are intended to avoid. See generally *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108, 114-117 (2013) (warning of "the danger of unwarranted judicial interference in the conduct of foreign policy").

In addition, the Third Circuit's decision threatens to obstruct Venezuela's sovereign management of its monetary policy and U.S. efforts to support that policy. The Guaidó government has announced a plan to establish an orderly and consensual debt restructuring process, consistent with international norms and in coordination with the international financial community, to address the crisis that the Republic faces. See Vecchio Decl. ¶¶ 13-15. But under the Third Circuit's approach, a few creditors will be able to use U.S. courts to obtain preferential attachment of PDVSA's assets. That will disrupt any attempt to persuade creditors to participate in a voluntary restructuring, undermining the U.S. interest in fostering consensual restructuring of sovereign debts. See generally Brief of the United States, *Aurelius Capital Master, Ltd., et al.* v. *Republic of Argentina*, 2016 WL 1267524, at *4 (2d Cir Mar. 23, 2016); see also *De Letelier*, 748 F.2d at 795 n.1 ("abuse of corporate form must be clearly demonstrated to justify holding the 'subsidiary' liable for the debts of its sovereign 'parent,'" lest the court harm the subsidiary's "non-party creditors"). If such preferential treatment is to be granted to a few creditors, it should not be through a judge-made expansion of jurisdiction and corporate liability. See *Jesner*, 138 S. Ct. at 1403 ("The political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns.").

3. As this Court has explained, when it comes to delicate foreign-relations matters, courts must be especially "wary of impinging on the discretion of the Legislative and Executive Branches." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 727 (2004). This Court has frequently stepped in to review FSIA and other cases implicating that concern, and such review is likewise warranted here. At a minimum, the Court should invite the Solicitor General to express the views of the United States, as it has done in similar cases implicating foreign sovereign immunity and the foreign-relations interests of the United States. See, *e.g.*, *Rubin*, 138 S. Ct. 816; *Helmerich & Payne*, 137 S. Ct. 1312.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 19, 2020

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 18-2797 & 18-3124

CRYSTALLEX INTERNATIONAL CORPORATION

v.

BOLIVARIAN REPUBLIC OF VENEZUELA;
PETROLEOS DE VENEZUELA, S.A.

No. 18-2889

In re: PETROLEOS DE VENEZUELA, S.A.,

[Filed: July 29, 2019]

Before: AMBRO, GREENAWAY, JR., and SCIRICA, Circuit Judges

OPINION OF THE COURT

AMBRO, Circuit Judge

Crystallex International Corp., a Canadian gold mining company, invested hundreds of millions of dollars to develop gold deposits in the Bolivarian Republic of Venezuela. In 2011, Venezuela expropriated those deposits and transferred them to its state-owned oil company, Petróleos de Venezuela, S.A. ("PDVSA"). To seek redress, Crystallex invoked a bilateral investment treaty between Canada and Venezuela to file for arbitration before the International Centre for Settlement of Investment Disputes. The arbitration took place in Washington, D.C., and Crystallex won; the arbitration panel awarded it $1.2 billion plus interest for Venezuela's expropriation of its investment. The United States

District Court for the District of Columbia confirmed that award and issued a $1.4 billion federal judgment. Now Crystallex is trying to collect.

Unable to identify Venezuelan-held commercial assets in the United States that it can lawfully seize, Crystallex went after U.S.-based assets of PDVSA. Specifically, it sought to attach PDVSA's shares in Petróleos de Venezuela Holding, Inc. ("PDVH"), its wholly owned U.S. subsidiary. PDVH is the holding company for CITGO Holding, Inc., which in turn owns CITGO Petroleum Corp. ("CITGO"), a Delaware Corporation headquartered in Texas (though best known for the CITGO sign outside Fenway Park in Boston).

This attachment suit is governed by the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602–1611 (the "Sovereign Immunities Act"). Under federal common law first recognized by the Supreme Court in *First National City Bank v. Banco Para El Comercio Exterior de Cuba* ("*Bancec*"), 462 U.S. 611, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983), a judgment creditor of a foreign sovereign may look to the sovereign's instrumentality for satisfaction when it is "so extensively controlled by its owner that a relationship of principal and agent is created." *Id.* at 629, 103 S.Ct. 2591.

Interpreting *Bancec*, the District Court, per Chief Judge Stark, concluded that Venezuela's control over PDVSA was sufficient to allow Crystallex to attach PDVSA's shares of PDVH in satisfaction of its judgment against the country. PDVSA and Venezuela, along with PDVSA's third-party bondholders as *amici* (the "Bondholders"), challenge this ruling.

Venezuela and the Bondholders do not substantially contest the District Court's finding that it extensively controlled PDVSA. Rather, they raise various jurisdictional and equitable objections to the attachment. Likewise, PDVSA primarily contends that its tangential role in the dispute precludes execution against its assets under *Bancec* irrespective of the control Venezuela exerts over it.

We affirm the District Court's order granting the writ of attachment and remand for further proceedings consistent with this opinion.[1]

I. Background

A. Factual background

In 2002, Crystallex contracted with Corporación Venezolana de Guayanaan, an organ of the Venezuelan government, for the right to develop and extract exclusively for 20 years the gold deposits at Las Cristinas, Venezuela. *See Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela* ("*D.C. Crystallex I*"), 244 F. Supp. 3d 100, 105–06 (D.D.C. 2017). The deposits are among the world's largest. Per the contract, Crystallex spent hundreds of millions of dollars developing the Las Cristinas site. *Id.* at 106. It also performed various other obligations under the contract. *Id.*

In 2011, Venezuela nationalized its gold mines and seized the Las Cristinas works without providing compensation. As Crystallex asserts and PDVSA does not dispute, Venezuela then gave the mining rights at Las Cristinas to PDVSA for no consideration, and

[1] We also deny PDVSA's petition for a writ of mandamus and dismiss as moot its second appeal.

PDVSA subsequently "sold to the Venezuelan Central Bank 40% of its shares in the affiliate that was created to exercise those mining rights." J.A. 1194.

Later that year, Crystallex filed for arbitration under a bilateral investment treaty between Canada and Venezuela before the International Centre for Settlement of Investment Disputes. As noted earlier, the arbitration took place in Washington, D.C., and Crystallex won an arbitration award of $1.2 billion plus interest.

Crystallex had its award. Now it had to collect.

B. Crystallex's collection efforts

1. Confirmation proceedings in the District of Columbia

Crystallex filed an action to confirm its award in the U.S. District Court for the District of Columbia. It properly served Venezuela, who appeared to defend it. The Court confirmed the award and entered a federal judgment in favor of Crystallex. *D.C. Crystallex I*, 244 F. Supp. 3d at 122–23. After Venezuela failed to satisfy the judgment within 30 days, the Court ruled that Crystallex could execute on it. *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, No. CV 16-0661 (RC), 2017 WL 6349729, at *1 (D.D.C. June 9, 2017). However, the Court expressly declined to address whether Crystallex could attach assets held by PDVSA and its subsidiaries. *Id.* at *2. Venezuela appealed the ruling, and the D.C. Circuit affirmed it. *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, 760 Fed.Appx. 1, 2–3 (D.C. Cir. 2019).

2. Delaware Uniform Fraudulent Transfer Act proceedings

While arbitration was pending and then after the award was announced, Crystallex brought suits against CITGO, CITGO Holding, PDVH, and PDVSA in the Delaware District Court. *See Crystallex Int'l Corp. v. PDV Holding, Inc.* (1:15-CV-1082); *Crystallex Int'l Corp. v. PDV Holding, Inc.* (1:16-CV-1007). It claimed that Venezuela refused to pay its arbitration award and "thwart[ed] enforcement" by transferring its assets among several entities—PDVSA, PDVH, and CITGO— allegedly in violation of the Delaware Uniform Fraudulent Transfer Act, 6 Del. C. §§ 1301–11. *Crystallex Int'l Corp. v. Petróleos de Venezuela, S.A.*, 879 F.3d 79, 82 (3d Cir. 2018). The Court denied PDVH's motion to dismiss, but we reversed and held that a transfer from a non-debtor could not be a "fraudulent transfer" under the Act. *Id.* at 81 ("While we do not condone the debtor's and the transferor's actions, we must conclude that Crystallex has failed to state a claim under [the Act]."). That panel noted explicitly but reserved judgment on the question now before us—whether PDVSA could be liable for the arbitration award as an "alter ego" of Venezuela. *Id.* at 84 n.7.

3. Proceedings in this appeal

While the award-confirmation appeal was pending in the D.C. Circuit, Crystallex followed up its judgment by filing an attachment action against Venezuela in the Delaware District Court. Under Federal Rule of Civil Procedure 69(a), Crystallex attempted to attach PDVH shares owned by PDVSA. That rule provides: "A money judgment is enforced by a writ of execution, unless the court directs

otherwise. 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," here Delaware, "but a federal statute governs to the extent it applies." Delaware law permits a judgment creditor to obtain a writ of attachment (known by its Latin name, *fieri facias*, or simply *fi. fa.*) over various forms of property belonging to the debtor, including its shares in a Delaware corporation. *See* 10 Del. C. § 5031; 8 Del. C. § 324(a).

Though not named in the attachment proceeding, PDVSA intervened in the District Court. It moved to dismiss the proceeding on the ground of sovereign immunity under the Sovereign Immunities Act.

After several rounds of briefing and hearings, the District Court concluded that PDVSA was Venezuela's "alter ego" under *Bancec*. *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela* ("*Del. Crystallex*"), 333 F. Supp. 3d 380, 414 (D. Del. 2018). The Court held (1) it had jurisdiction to order attachment against PDVSA's U.S.-based commercial assets, and (2) Crystallex could attach PDVSA's shares of PDVH to satisfy the judgment against Venezuela. A follow-up order, dated August 23, 2018, directed the Clerk to issue the writ and have it served in furtherance of an execution through a public sale of PDVH stock. PDVSA appealed both of these orders (docketed in our Court as Nos. 18-2797 & 18-3124), and also filed a petition for a writ of mandamus (No. 18-2889) to prevent completion of the sale during this appeal. We consolidated all three appeals for oral argument and resolution.

While they were pending before us, Venezuela

moved to intervene and to stay these appeals for 120 days so that it could further evaluate its legal position. By order dated March 20, 2019, we granted Venezuela's motion to intervene and participate in oral argument. We also permitted it to file supplemental briefing. We did not rule on its motion to stay but stated we would consider that motion at oral argument. At that argument, Venezuela chose to forgo further pursuit of a stay. Oral Arg. Tr. at 180:1–7 (Apr. 15, 2019).

C. Relationship between Venezuela and PDVSA

The District Court's primary ruling was that PDVSA is Venezuela's "alter ego" under *Bancec*. Numerous facts are relevant to that determination, as discussed in more detail below. In general, it is undisputed the relationship between PDVSA and Venezuela has tightened significantly since 2002, when then-President Hugo Chávez fired roughly 40% of the PDVSA workforce for protesting increased Venezuelan control over the company. Since then PDVSA's presidents have generally been senior members of the Venezuelan president's cabinet, including members of the Venezuelan military. Venezuela has also passed various laws that require PDVSA to fund both government initiatives and discretionary government funds. Venezuela controls PDVSA's domestic oil production, sales, and pricing. It also requires that PDVSA supply Venezuela and its strategic allies with oil at below-market rates.

D. The Bondholders' interests

Also relevant to this appeal are the various bonds that PDVSA has issued over the past decade or so. Several holders of PDVSA bonds due to mature in

2020 moved to intervene as *amici* in this appeal. They include BlackRock Financial Management, Inc. and Contrarian Capital Management, LLC. Their bonds have an outstanding face value of approximately $1.684 billion and are secured by a 50.1% collateral interest in PDVH's shares of Citgo Holding, Inc. as security for the bonds. According to the Bondholders, PDVSA has also issued roughly $25 billion in bonds to U.S. and non-U.S. capital markets investors.

E. U.S. policy towards Venezuela and PDVSA

President Nicolas Maduro became the President of Venezuela in 2013. This year Juan Guaidó, Venezuelan's opposition leader and president of the National Assembly, has made efforts to oust Maduro and take control of the Venezuelan government. The United States Government recognized Guaidó as the rightful leader of Venezuela on January 23, 2019.[2]

Five days later, as part of a broader effort to convince the Maduro regime to cede power, the Office of Foreign Assets Control of the U.S. Department of the Treasury ("OFAC") imposed new sanctions against PDVSA by adding it to the List of Specially Designated Nationals and Blocked Persons. As discussed further below, the U.S. Government has

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[2] As a practical matter, there is reason to believe that Guaidó's regime does not have meaningful control over Venezuela or its principal instrumentalities such as PDVSA. Nonetheless, under *Guaranty Trust Co. v. United States*, 304 U.S. 126, 138, 58 S.Ct. 785, 82 L.Ed. 1224 (1938), we recognize Guaidó's regime as authorized to speak and act on behalf of Venezuela in these appeals.

also promulgated several executive orders limiting transfer of Venezuelan or PDVSA-controlled assets in the United States.

II. Jurisdiction and standard of review

The parties dispute whether the District Court had jurisdiction to attach PDVSA's property to satisfy the judgment against Venezuela. The Court held that it had both ancillary jurisdiction to enforce the judgment and an independent basis for jurisdiction per 28 U.S.C. § 1330 and 28 U.S.C. § 1605(a)(6) because PDVSA was Venezuela's alter ego. Section 1330 grants federal-court jurisdiction over "any nonjury civil action" against a foreign sovereign, so long as the sovereign is properly served under 28 U.S.C. § 1608 and is not entitled to sovereign immunity. *See* 28 U.S.C. § 1330(a)–(b). Under 28 U.S.C. § 1604, foreign sovereigns and their instrumentalities are entitled to sovereign immunity in U.S. courts except as provided in 28 U.S.C. §§ 1605–1607. Section 1605(a)(6), the immunity exception applied by the District Court in this case, provides an exception to immunity for actions seeking to compel arbitration pursuant to an agreement or to enforce arbitration awards that meet certain criteria.

We have jurisdiction to review the District Court's denial of PDVSA's motion to dismiss as an immune sovereign and the grant of Crystallex's motion for a writ of attachment under Federal Rule of Civil Procedure 69. We have jurisdiction to review the former under the collateral order doctrine. *See Fed. Ins. Co. v. Richard I. Rubin & Co.*, 12 F.3d 1270,

1279–82 (3d Cir. 1993).[3] Our jurisdiction exists for the latter because it amounted to a final judgment under 28 U.S.C. § 1291 by leaving the District Court "nothing left to do but execute[.]" *Bryan v. Erie Cnty. Office of Children and Youth*, 752 F.3d 316, 321 (3d Cir. 2014).

We review questions of law *de novo* and findings of fact for clear error, and we review *de novo* the ultimate determination whether to treat PDVSA as Venezuela's alter ego. *See Clientron Corp. v. Devon IT, Inc.*, 894 F.3d 568, 575 (3d Cir. 2018).

III. Analysis

The parties raise a host of issues. We group them into three core inquiries: (A) whether the *Bancec* "alter ego" doctrine determines the District Court's jurisdiction to attach PDVSA's assets (it does), (B) the scope of the *Bancec* inquiry and whether its factors are satisfied here (they are), and (C) whether PDVSA's shares of PDVH are immune from attachment under the Sovereign Immunities Act (they are not).

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[3] The collateral order doctrine allows us to exercise jurisdiction over interlocutory appeals, such as this one, when the order "conclusively determines the disputed question, resolves an important issue completely separate from the merits of the action, and is effectively unreviewable on appeal from a final judgment." *Fed. Ins. Co.*, 12 F.3d at 1279–80 (brackets and internal quotation marks omitted); *see also Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545–47, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949) (articulating the doctrine).

A. *Bancec* controls the jurisdictional inquiry here.

1. The District Court had jurisdiction over Venezuela.

As noted, Crystallex confirmed its arbitration award against Venezuela in the U.S. District Court for the District of Columbia, which yielded a federal judgment. It then registered that judgment for enforcement in the Delaware District Court under 28 U.S.C. § 1963. That section provides that a judgment so registered "shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner." *Id.* After registering the judgment, Crystallex moved to enforce it by attaching assets under Federal Rule of Civil Procedure 69(a).

As a threshold question, we consider whether the District Court in Delaware had jurisdiction over Venezuela, the only party named as a defendant here. It is undisputed that the D.C. District Court had jurisdiction over Venezuela under the Sovereign Immunity Act's arbitration exception, 28 U.S.C. § 1605(a)(6). It is well established that federal courts have ancillary jurisdiction to enforce their judgments. *See IFC Interconsult, AG v. Safeguard Int'l Partners, LLC*, 438 F.3d 298, 311 (3d Cir. 2006). That jurisdiction applies to "a broad range of supplementary proceedings involving third parties to assist in the protection and enforcement of federal judgments—including attachment ... [and] garnishment." *Peacock v. Thomas*, 516 U.S. 349, 356, 359 & n.7, 116 S.Ct. 862, 133 L.Ed.2d 817 (1996). Furthermore, ancillary enforcement jurisdiction—or its functional equivalent—has been routinely applied

to post-judgment enforcement proceedings against a foreign sovereign. *See First City, Texas Houston, N.A. v. Rafidain Bank*, 281 F.3d 48, 53–54 (2d Cir. 2002); *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1123 (9th Cir. 2010); *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 150 (D.C. Cir. 1994). In other words, when a party establishes that an exception to sovereign immunity applies in a merits action that results in a federal judgment—here, the exception for confirming arbitration awards, 28 U.S.C. § 1605(a)(6)—that party does not need to establish yet another exception when it registers the judgment in another district court under 28 U.S.C. § 1963 and seeks enforcement in that court. Rather, the exception in the merits action "sustain[s] the court's jurisdiction through proceedings to aid collection of a money judgment rendered in the case ...." *First City*, 281 F.3d at 53–54.

According to Venezuela, we should forbid Crystallex from using the § 1963 procedure in this case, as that procedure for registering a judgment cannot be applied to a foreign sovereign at all because it is "preempted by [the Sovereign Immunities Act]." (Venezuela Br. at 9–16.)[4] Venezuela presents this position as a two-pronged jurisdictional argument. First, it contends that § 1963 does not confer personal jurisdiction over it because the only method for establishing jurisdiction is by making proper service under the Sovereign Immunities Act's service provisions, 28 U.S.C. § 1608. (Venezuela Br. at 9–12.) We disagree: § 1608 applies only to the "summons

[4] We note that, as a doctrinal matter, "preemption" generally refers to the effect of a federal statute on state law rather than on other federal statutes.

and complaint," *id.*, whereas "[s]ervice of post-judgment motions is not required." *Peterson*, 627 F.3d at 1130.

Second, Venezuela asserts that § 1963 does not create subject matter jurisdiction over foreign sovereigns and cannot be used to "piggyback" on the subject-matter jurisdiction of the court that rendered the judgment being enforced. (Venezuela Br. at 12–16.) Regardless whether § 1963 separately confers subject-matter jurisdiction over foreign sovereigns, a district court has jurisdiction to enforce a federal judgment against a foreign sovereign when it is registered under § 1963. This is so, as noted, because the jurisdictional basis from the action resulting in the judgment carries over to the post-judgment enforcement proceeding in a manner akin to the ordinary operation of a district court's enforcement jurisdiction over post-judgment proceedings. *See First City*, 281 F.3d at 53–54; *Peterson*, 627 F.3d at 1123; *Transaero*, 30 F.3d at 150.

A recent decision by the Supreme Court reinforces our rejection of Venezuela's novel § 1963 argument. *See Republic of Sudan v. Harrison*, —— U.S. ——, 139 S. Ct. 1048, 1054, 203 L.Ed.2d 433 (2019). It involved a § 1963 proceeding against the instrumentalities of a foreign sovereign—the same procedural posture we have here. The Court resolved that case on a ground not relevant here, but, notably, it expressed no concern about the use of a § 1963 proceeding against a foreign sovereign. If Venezuela's view of § 1963 were correct, *Harrison* would

presumably have said so.[5]

In short, before the Delaware District Court and us is a continuation of the action in the D.C. District Court. As the latter had jurisdiction over Venezuela—by virtue of the Sovereign Immunities Act's arbitration exception, 28 U.S.C. § 1605(a)(6)—both Courts that follow, the Delaware District Court and our Court, also have jurisdiction.

2. The District Court properly used *Bancec* to extend its jurisdiction to assets held nominally by PDVSA.

Taking a different tack, PDVSA concedes the District Court had jurisdiction over Venezuela but believes that *Bancec* cannot be used to extend that jurisdiction to reach the assets of PDVSA, a non-party to the merits action. We part company again.

To reach this conclusion, we first consider our decision in *Federal Insurance*, 12 F.3d at 1287. There we joined other circuits in holding that, although the *Bancec* doctrine came in a case involving the shifting of substantive liability, it also applied to extend a district court's jurisdiction over a foreign sovereign to reach an extensively controlled instrumentality. *See id.* (collecting cases). On a straightforward application of *Federal Insurance*, the District Court's jurisdiction over Venezuela would extend to PDVSA so long as it is Venezuela's alter ego under *Bancec*. *See De Letelier v. Republic of Chile*, 748 F.2d 790, 795 (2d Cir. 1984) (applying *Bancec* in post-judgment

[5] Indeed, Justice Thomas would have affirmed the Second Circuit's exercise of jurisdiction—implicitly concluding there was no § 1963 jurisdictional problem. *Id.* at 1066 (Thomas, J., dissenting).

enforcement proceeding); *Alejandre v. Telefonica Larga Distancia de Puerto Rico, Inc.,* 183 F.3d 1277, 1288 (11th Cir. 1999) (same).

That potential application of *Federal Insurance* deserves a closer look. The decision was in the context of a merits action—it did not address the post-judgment enforcement setting we have here. 12 F.3d at 1287. According to PDVSA, that distinction makes all the difference. It claims that a district court cannot exercise post-judgment enforcement jurisdiction over a party other than the judgment debtor based on a theory of "alter ego" or "veil piercing"[6] unless it has an "independent basis" for jurisdiction over the third party. (PDVSA Br. at 24–27.) For that proposition, PDVSA cites *Peacock*, 516 U.S. at 357, 116 S.Ct. 862, in which a plaintiff who had obtained a federal judgment against his employer under the Employee Retirement Income Security Act of 1974 ("ERISA") filed a new action in a federal court against a shareholder of the employer seeking to hold him liable by "piercing the corporate veil." *Id.* at 353, 116 S.Ct. 862. The Court ruled that action was not within the district court's ancillary enforcement jurisdiction because it does not extend to "a subsequent lawsuit to impose an obligation to pay an existing federal judgment on a person not already liable for that judgment." *Id.* at 357, 116 S.Ct. 862.

According to PDVSA, *Peacock* precludes the District Court from exercising ancillary enforcement

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[6] These terms in legal context mean that if an entity's separate form (typically as a subsidiary corporation) is so disregarded by the one who controls it (the "parent"), the "corporate veil" can be "pierced," that is, separateness is ignored.

jurisdiction over this action because it seeks to "shift liability for payment of an existing judgment to a third party that is not otherwise liable on the judgment." (PDVSA Br. at 24 (citing *Peacock*).) That reading of *Peacock* misfires. It was not a case involving foreign sovereigns or the Sovereign Immunities Act. The Act is a specialized jurisdictional statute designed to address a specific problem—the extent to which foreign sovereigns and their instrumentalities are immune from suit and attachment in our courts. And the *Bancec* doctrine—the applicability of which is the core question here—is a federal common-law outgrowth of that specialized statute. It (the doctrine) exists specifically to enable federal courts, in certain circumstances, to disregard the corporate separateness of foreign sovereigns to avoid the unfair results from a rote application of the immunity provisions provided by the Sovereign Immunities Act. Nothing in *Peacock* leads us to believe the Supreme Court expected or intended its decision in that case to restrain the application of *Bancec* in post-judgment proceedings.

Moreover, in *Rubin v. Islamic Republic of Iran*, — U.S. ——, 138 S. Ct. 816, 823, —— L.Ed.2d —— (2018), the Supreme Court all but confirmed that *Bancec* can indeed be used to reach the assets of a foreign sovereign's extensively controlled instrumentality through post-judgment attachment proceedings. The Court examined 28 U.S.C. § 1610(g), a provision of the Sovereign Immunities Act related to attachments of assets held by agencies and instrumentalities of states that have sponsored terrorism. *Id.* It observed that § 1610(g)(1), which was added to the Sovereign Immunities Act by congressional amendment in 2008, "incorporate[s] almost verbatim the five *Bancec*

factors [they are noted below], leaving no dispute that, at a minimum, § 1610(g) serves to abrogate *Bancec* with respect to the liability of agencies and instrumentalities of a foreign state where a [terrorism-related-judgment] holder seeks to satisfy a judgment held against the foreign state." *Id*. We take from this the implication that in *ordinary* FSIA attachment proceedings—*i.e.*, those that do not involve judgments based on state-sponsored terrorism—the judgment holder may reach the assets of the foreign judgment debtor by satisfying the *Bancec* factors. *See id.* Indeed, the Court expressly stated that, where 28 U.S.C. § 1610(g) does not apply, a plaintiff with a judgment against the sovereign would need to satisfy the *Bancec* factors if it sought, for example, "to collect against assets located in the United States of a *state-owned telecommunications company*." *Id.* at 23–24 (citing *Alejandre*, 183 F.3d 1277) (emphasis added).

These analyses confirm the relevance of *Bancec* here: so long as PDVSA is Venezuela's alter ego under *Bancec*, the District Court had the power to issue a writ of attachment on that entity's non-immune assets to satisfy the judgment against the country. *See Hercaire Int'l, Inc. v. Argentina*, 821 F.2d 559, 563–65 (11th Cir. 1987) (looking to the Sovereign Immunities Act and *Bancec* to determine "whether the assets of a foreign state's wholly-owned national airline are subject to execution to satisfy a judgment obtained against the foreign state, where the airline was neither a party to the litigation nor was in any way connected with the underlying transaction giving rise to the suit"); *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 532–38 (5th Cir. 1992) (doing the same to determine whether the district court had

jurisdiction to conduct a garnishment proceeding against a foreign instrumentality, where the purported basis for jurisdiction was solely the actions of the instrumentality's agents).

B. Whether Venezuela is PDVSA's alter ego under *Bancec*

"Due respect for the actions taken by foreign sovereigns and for principles of comity between nations" caused the Supreme Court to conclude in *Bancec* that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." 462 U.S. at 626–27, 103 S.Ct. 2591. Recognizing the respect due to foreign sovereigns, the Court adopted a "presumption of independent status" for instrumentalities. *Id.* at 627, 103 S.Ct. 2591. PDVSA, as an instrumentality of Venezuela separately formed in 1976, is accorded that presumption. It is not to be taken lightly, as the District Court noted. *Del. Crystallex*, 333 F. Supp. 3d at 396 (D. Del. 2018) (citing *Arch Trading Corp. v. Republic of Ecuador*, 839 F.3d 193, 201 (2d Cir. 2016)); *see also De Letelier*, 748 F.2d at 795 ("[B]oth *Bancec* and the [Sovereign Immunities Act's] legislative history caution against too easily overcoming the presumption of separateness.").

1. Extensive control standard under *Bancec*

In *Bancec* the Supreme Court allowed a U.S. bank to recover assets from a Cuban instrumentality to satisfy a debt owed by the Republic of Cuba. *Bancec*, 462 U.S. at 613, 103 S.Ct. 2591. It held that while there exists a strong presumption that government instrumentalities have a separate legal identity

(along with limited liability) from their "parent" governments, this presumption can be overcome in certain situations—for example, "where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created, we have held that one may be held liable for the actions of the other." *Bancec*, 462 U.S. at 629, 103 S.Ct. 2591 (citing *NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 402–404, 80 S.Ct. 441, 4 L.Ed.2d 400 (1960)). "In addition," it recognized "the broader equitable principle that the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when to do so would work fraud or injustice." *Id.* (quoting *Taylor v. Standard Gas Co.,* 306 U.S. 307, 322, 306 U.S. 618, 322, 59 S.Ct. 543, 83 L.Ed. 669 (1939)). Thus we recognize *Bancec* establishes a disjunctive test for when the separate identities of sovereign and instrumentality should be disregarded: when there is "extensive[ ] control," and when not disregarding separate identities would work a "fraud or injustice." *Rubin*, 138 S. Ct. at 823.

Bancec did not develop a "mechanical formula" for determining when these exceptions should apply, however, which left "lower courts with the task of assessing the availability of exceptions on a case-by-case basis." *Rubin*, 138 S. Ct. at 823. In ensuing decades district and circuit courts applied the *Bancec* extensive-control test in various contexts. Several multi-factor tests emerged in that period—the Second Circuit, for example, had a non-exhaustive five-factor test, *see EM Ltd. v. Banco Cent. De La Republica Argentina*, 800 F.3d 78, 91 (2d Cir. 2015), which the District Court applied here.[7] By and large the multi-

[7] These factors include:

factor tests for extensive control percolating through the federal courts covered similar ground, *see, e.g.*, *Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines*, 965 F.2d 1375, 1380 n.7, 1381 (5th Cir. 1992) (identifying five extensive-control factors), though at least one court has piled on the factors, *see Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 447 F.3d 411, 418 (5th Cir. 2006) (recognizing 21 factors relevant to extensive control);

In *Rubin*, the Supreme Court recently provided a further gloss on the *Bancec* factors, which we believe clarifies the analysis of the extensive-control prong here. The plaintiffs there held a § 1605A-judgment against the Islamic Republic of Iran and attempted to attach and execute against certain Iranian artifacts on loan to the University of Chicago. *Rubin*, 138 S. Ct. at 820. In the course of addressing whether that attachment was proper (it was not), the Court identified five "*Bancec* factors" to aid circuit courts in their analysis:

> (1) the level of economic control by the government;
>
> (2) whether the entity's profits go to the government;

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whether the sovereign nation: (1) uses the instrumentality's property as its own; (2) ignores the instrumentality's separate status or ordinary corporate formalities; (3) deprives the instrumentality of the independence from close political control that is generally enjoyed by government agencies; (4) requires the instrumentality to obtain approvals for ordinary business decisions from a political actor; and (5) issues policies or directives that cause the instrumentality to act directly on behalf of the sovereign state.

EM Ltd., 800 F.3d at 91; *Del. Crystallex*, 333 F. Supp. 3d at 401.

> (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.

Id. at 823 (quoting *Walter Fuller Aircraft Sales, Inc.*, 965 F.2d at 1380 n.7). We use these factors identified in *Rubin* to structure our analysis here. At the same time, we recognize that they, like the other extensive control tests our sister circuits have adopted,[8] are meant to aid case-by-case analysis rather than establish a "mechanical formula" for identifying extensive control. *Bancec*, 462 U.S. at 633, 103 S.Ct. 2591.

2. *Bancec*'s scope

PDVSA and the Bondholders raise together six challenges to the District Court's inquiry under *Bancec*: that (i) a sovereign's extensive control, alone, cannot allow courts to ignore the separateness of a corporation from the country it is in, (ii) Crystallex

[8] We follow Crystallex's suggestion to apply the *Rubin* factors, and neither Venezuela nor PDVSA indicates a preference between them and those the District Court applied. Either inquiry compels the same result. *See generally Del. Crystallex*, 333 F. Supp. 3d at 406–14. But an unresolved point of ambiguity remains: whether the *Rubin* factors apply only to the extensive-control inquiry (as in *Walter Fuller*) or to both disjunctive tests. The parties do not address this issue, and so we leave it for a future panel.

must show PDVSA acted as Venezuela's agent against Crystallex, (iii) we must consider the third-party interests of PDVSA's bondholders, (iv) extensive control must be shown by clear and convincing evidence, (v) the *Bancec* inquiry must be examined in light of current circumstances, particularly the limited control of the Guaidó regime over PDVSA; and (vi) *Bancec* requires that courts also balance equities when they consider whether to discard an instrumentality's presumption of separateness. We address each argument in turn.

i. Bancec's extensive control prong does not require a nexus between the plaintiff's injury and the instrumentality.

PDVSA contends that there must be some connection between the sovereign's abuse of its instrumentality's corporate form and the plaintiff's injury. Indeed PDVSA declined our numerous invitations at oral argument to argue that any of the extensive control factors cut against Crystallex's position. It reiterated its position that each is irrelevant here because Crystallex also needed to show that PDVSA did something to cause the plaintiff's injury. Oral Arg. Tr. at 97:22–104:12 (Apr. 15, 2019). We differ.

First, though *Bancec* involved the "fraud or injustice" prong rather than the "extensive control" prong, no nexus existed between the dominated instrumentality and the plaintiff's injury. Cuba had established in 1960 Banco Para El Comercio Exterior de Cuba (Bancec), "[a]n official autonomous credit institution for foreign trade ... with full juridical capacity ... of its own ...." *Bancec*, 462 U.S. at 613, 103

S.Ct. 2591. Bancec was a creditor of Citibank and sued the bank to collect on a letter of credit. Days later, the Cuban government seized all of Citibank's Cuba-based assets. *Id.* It also dissolved Bancec after that proceeding began, and the remainder of its case was handled by the Cuban Ministry of Foreign Trade. *Id.* at 615, 103 S.Ct. 2591. Despite no link between Bancec and Cuba's seizure of Citibank's assets, the Supreme Court held Citibank could offset its debt to Bancec with the value of the expropriated assets. "Giving effect to Bancec's separate juridical status in these circumstances" would cause an injustice. *Id.* at 632, 103 S.Ct. 2591. In recounting the case's history, the Court also expressly noted that the Second Circuit, from where the case came, had applied a nexus requirement and then did not adopt one itself. *See id.* at 619, 103 S.Ct. 2591 (quoting the Second Circuit as saying the presumption of separate identities may be overcome only "when the subject matter of the counterclaim assertible against the state is state conduct in which the instrumentality had a key role").

Like *Bancec*, not a single factor recognized in *Rubin* suggests any link between the dominated instrumentality and the injury to the plaintiff. The *Rubin* Court's brief discussion of the hypothetical plaintiff seeking to collect against "the assets located in the United States of a state-owned telecommunications company," and citation to *Alejandre* (which in turn involved no connection between the telecommunications agency and the plaintiff's injury), likewise suggest no tying requirement. *Rubin*, 138 S. Ct. at 824. Similarly, the vast majority of circuits have required no link between the abuse of the corporate form and the

plaintiff's injury under the first *Bancec* path for veil-piercing. *See, e.g.*, *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 478 (2d Cir. 2007); *Flatow v. Islamic Republic of Iran*, 308 F.3d 1065, 1071–73 (9th Cir. 2002); *Transamerica Leasing, Inc. v. La Republica de Venezuela*, 200 F.3d 843, 848 (D.C. Cir. 2000); *Hercaire Int'l, Inc. v. Argentina*, 821 F.2d 559, 565 (11th Cir. 1987).[9]

Second, as Crystallex observes, requiring an independent nexus requirement would likely read the *Bancec* extensive-control test out of the doctrine. When pressed at oral argument to identify the circumstances where *Bancec* could be applied, PDVSA offered two: under *Bancec*'s "fraud or injustice" prong (*i.e.*, where a sovereign uses its instrumentality's separate status to perpetuate a fraud or injustice) or where the instrumentality was itself "responsible on the arbitration award as a participant in the events." Oral Arg. Tr. at 91: 7–18. But if the instrumentality were directly liable for the award, there would be no need to invoke *Bancec* at all. PDVSA thus tries to read the extensive control prong out of *Bancec*. We cannot.

The District Court concluded correctly that *Bancec* does not require a connection between a sovereign's extensive control of its instrumentality and the plaintiff's injury. Control alone, if sufficiently

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[9] One panel of the Fifth Circuit has suggested that *Bancec*'s alter ego standards are the same as common state-law requirements, many of which include a nexus requirement. *See Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 447 F.3d 411, 416 (5th Cir. 2006). *But see First Inv. Corp. of Marshall Islands v. Fujian Mawei Shipbuilding, Ltd.*, 703 F.3d 742, 752–53 (5th Cir. 2012), *as revised* (Jan. 17, 2013).

extensive, is an adequate basis to disregard an instrumentality's separate status.[10]

ii. Bancec does not require a principal-agent relationship.

PDVSA also argues that the requirement in *Bancec* of extensive control such "that a relationship of principal and agent is created" requires the instrumentality to act as the sovereign's agent with respect to the events in dispute. *Bancec*, 462 U.S. at 629, 103 S.Ct. 2591. Before *Rubin*, courts struggled with how to give meaning to *Bancec*'s apparent

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[10] At oral argument, PDVSA stressed that *Bancec* clearly assumed for "extensive control" a connection between the abused form and the plaintiff's injury when it cited to the 1974 edition of *W.M. Fletcher, Cyclopedia of the Law of Private Corporations*. Oral Arg. Tr. at 77: 9–11 ("Fletcher says domination and control [are] not enough. You need to have an abuse of the form that results in an injury to the plaintiff."). But the excerpt *Bancec* quotes squarely contradicts such a narrow view: "[A] corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons." *Bancec*, 462 U.S. 611, 630 n.19, 103 S.Ct. 2591, 77 L.Ed.2d 46 (quoting 1 *W.M. Fletcher, Cyclopedia of the Law of Private Corporations* § 41 (rev. perm. ed. 1974)). Further, *Bancec* does not even cite to *Fletcher* to support the proposition that extensive control can be sufficient to disregard corporate formalities. For this, it cited to *N.L.R.B. v. Deena Artware, Inc.*, 361 U.S. 398, 402, 80 S.Ct. 441, 4 L.Ed.2d 400 (1960), where the Court held that the National Labor Relations Board was entitled to seek discovery on an alternative theory of liability—"that these separate corporations are not what they appear to be, that in truth they are but divisions or departments of a 'single enterprise.' " *Id.* at 402, 80 S.Ct. 441.

reference to a principal–agent relationship. *See, e.g.*, *Doe v. Holy See*, 557 F.3d 1066, 1080 (9th Cir. 2009). The most persuasive interpretation of the various approaches is by the D.C. Circuit, which recognized that "[c]ontrol by the sovereign is relevant in two distinct contexts[.]" *Transamerica Leasing*, 200 F.3d at 848. "First, ... when it significantly exceeds the normal supervisory control exercised by any corporate parent over its subsidiary and, indeed, amounts to complete domination of the subsidiary." *Id.* "Second, ... when the sovereign exercises its control in such a way as to make the instrumentality its agent; in that case control renders the sovereign amenable to suit under ordinary agency principles." *Id.* at 849. These examples of control are disjunctive. Only one method of domination needs to be shown, and Crystallex opts to pursue the former. Thus further discussion of a principal-agent relationship is not necessary.

iii. Bancec does not require consideration of the third-party bondholders.

Amici bondholders of PDVSA contend *Bancec*'s extensive-control analysis requires consideration of the interests of other creditors of the judgment debtor's alleged alter ego, both as a matter of doctrine and of equity. That argument, plausible on its face, does not prevail here. As a doctrinal matter, the overarching framework of the extensive-control test tells us that third-party creditors' interest is a reason for—not a separate criterion of—the analysis. *Bancec* explained that those creditors' interests are part of the reason the presumption of separate juridical status is so difficult to overcome: "Freely ignoring the

separate status of government instrumentalities would result in a substantial uncertainty over whether an instrumentality's assets would be diverted to satisfy a claim against the sovereign, and might thereby cause third parties to hesitate before extending credit to a government instrumentality without the government's guarantee." 462 U.S. at 626, 103 S.Ct. 2591. For that reason (among others), *Bancec* counsels courts not to ignore separate status. *See also De Letelier v. Republic of Chile*, 748 F.2d 790, 795 n.1 (2d Cir. 1984) (noting that abuse of the corporate form of the type identified in *Bancec* "must be clearly demonstrated to justify holding the 'subsidiary' liable for the debts of its sovereign 'parent,' particularly where, as here, LAN apparently has non-party private bank creditors"). To add to this analysis an additional unspecific consideration of third-party interests would double-count the creditors' concern in an arena of many competing concerns.

The difficulty of overcoming the *Bancec* presumption is also practical comfort: where there is extensive control, we can expect reasonable third parties to recognize the risks of extending credit. Here, for example, Venezuela's relationship to PDVSA was clearly disclosed to any prospective holder of the latter's bonds in the offering circular for that issuance: "We are controlled by the Venezuelan government"; obligations imposed by the government "may affect our ... commercial affairs"; and "we cannot assure you that the Venezuelan government will not, in the future, impose further material commitments upon us or intervene in our commercial affairs." JA-608. Perhaps recognizing that risk, the Bondholders protected their extension of credit to

PDVSA by obtaining as collateral a 50.1% security interest in PDVH's shares of Citgo Holding, Inc., which, of course, will not be impaired by the District Court's writ of attachment.

iv. Timeframe: What is the appropriate point of reference for the extensive-control analysis?

Venezuela argues that the relevant time for a *Bancec* analysis of the relationship between a sovereign and its instrumentality is the moment the writ is issued. But it points to no authority for that proposition, and it does not explain why our review of the District Court's *Bancec* analysis would be any different than in the normal course, where we render our decision based on the record before the district court and "do[ ] not purport to deal with possible later events." *Standard Oil Co. v. United States*, 429 U.S. 17, 18, 97 S.Ct. 31, 50 L.Ed.2d 21 (1976) (*per curiam*); *Rubin*, 12 F.3d at 1284; *Fassett v. Delta Kappa Epsilon (New York)*, 807 F.2d 1150, 1165 (3d Cir. 1986). We follow the standard practice. On remand, Venezuela may direct to the District Court credible arguments to expand the record with later events.

v. The burden of proof is preponderance of the evidence.

PDVSA contends that the District Court erred by reviewing the parties' evidence under a "preponderance of the evidence" rather than a "clear and convincing" burden of proof. We disagree, but also note that our decision as to the burden of proof has no effect on the outcome of our *Bancec* analysis; indeed, the implications of this question matter little to this appeal. PDVSA conceded as much at oral argument that our decision as to burden of proof has

no effect on the outcome of our *Bancec* analysis. Oral Arg. Tr. at 95–96: 20–14 (Apr. 15, 2019).

PDVSA points to our ruling in *Trustees of Nat. Elevator Indus. Pension, Health Benefit & Educ. Funds v. Lutyk*, 332 F.3d 188, 194 (3d Cir. 2003), an ERISA veil-piercing case, where at summary judgment we re-affirmed that "evidence justifying piercing the corporate veil must be 'clear and convincing.' " *Id.* (quoting *Kaplan v. First Options of Chicago, Inc.*, 19 F.3d 1503, 1522 (3d Cir. 1994), *aff'd*, 514 U.S. 938, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995)). Should this federal common law be applied here? We think not.

The Sovereign Immunities Act is the exclusive basis for finding jurisdiction in suits involving foreign sovereigns and instrumentalities, and *Bancec* is binding federal common law for disputes under the Act. Neither indicates that plaintiffs must show clear and convincing evidence, while many courts have applied a preponderance-of-the evidence standard to inquiries under it. *See, e.g.*, *Owens v. Republic of Sudan*, 864 F.3d 751, 784 (D.C. Cir. 2017); *Sachs v. Republic of Austria*, 737 F.3d 584, 589 (9th Cir. 2013), *rev'd on other grounds sub nom. OBB Personenverkehr AG v. Sachs*, —— U.S. ——, 136 S. Ct. 390, 193 L.Ed.2d 269 (2015); *S & Davis Int'l, Inc. v. The Republic of Yemen*, 218 F.3d 1292, 1300 (11th Cir. 2000); *Kirschenbaum v. 650 Fifth Ave.*, 257 F. Supp. 3d 463, 472 (S.D.N.Y. 2017) (requiring preponderance of the evidence for *Bancec* inquiries); *First Inv. Corp. of the Marshall Islands v. Fujian Mawei Shipbuilding, Ltd. of People's Republic of China*, 858 F. Supp. 2d 658, 668 n.54 (E.D. La. 2012) (also conducting a *Bancec* extensive control inquiry), *aff'd* 703 F.3d 742 (5th Cir. 2012); *In re 650 Fifth Ave.*

& Related Properties, 881 F. Supp. 2d 533, 544 (S.D.N.Y. 2012) (same); *Kensington Int'l Ltd. v. Republic of Congo*, No. 03 CIV. 4578 LAP, 2007 WL 1032269, at *5 (S.D.N.Y. Mar. 30, 2007) (same). Further, no case cited by the parties suggests that the *Bancec* extensive-control inquiry requires clear and convincing evidence.

Lutyk drew from our Court's existing precedent holding that, where a plaintiff relies on a fraud theory for alter ego, it must be shown by clear and convincing evidence. *See Kaplan*, 19 F.3d at 1522. But here Crystallex does not attempt, nor need, to satisfy an element of fraud.[11] Further distinguishing *Lutyk* or *Kaplan*, it here seeks to survive a factual challenge under Rule 12(b)(1), which generally requires the plaintiff to establish jurisdiction by a preponderance of the evidence. *See, e.g.*, *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000).

We also see scant policy reason to depart from existing caselaw and require plaintiffs to make a clear and convincing showing. The difficulties of marshaling evidence sufficient to show a *Bancec* relationship present "a substantial obstacle to [Sovereign Immunities Act] plaintiffs' attempts to satisfy judgment." *Estate of Heiser v. Islamic Republic of Iran*, 885 F. Supp. 2d 429, 435 (D.D.C. 2012), *aff'd* 735 F.3d 934 (D.C. Cir. 2013). In addition to the initial information imbalance between the

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[11] Even if it did, as the Supreme Court has observed, the traditional state-law presumption in favor of clear and convincing evidence for fraud claims has not always extended to Congress, which frequently has required preponderance of the evidence for federal fraud claims. *See Grogan v. Garner*, 498 U.S. 279, 288–89, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991).

judgment creditor and the foreign sovereign, the creditor must gather evidence related to events, witnesses, and relationships between a foreign sovereign and its own instrumentality, the bulk of which is often within the territorial control of the sovereign itself, making discovery a particularly onerous task. Given the difficulties inherent in this evidence gathering,[12] the preponderance standard is "the measure of respect due foreign sovereigns." *Bank of New York v. Yugoimport*, 745 F.3d 599, 614 (2d Cir. 2014). A more onerous requirement would tip the balance too far in favor of the foreign sovereign at the expense of *Bancec*'s other core concern—ensuring that foreign states not dodge their obligations under international law. Thus we conclude that preponderance of the evidence is the appropriate burden of proof under *Bancec*.

vi. Is there an equitable component to the "extensive control" prong of Bancec?

PDVSA proposes that an "equitable basis" is required "to rebut the presumption of separateness" under *Bancec*'s extensive-control prong. The District Court observed that even though *Bancec*'s two prongs are disjunctive, the extensive-control inquiry "inherently assumes that some element of unfairness would result if the Court fails to treat one entity as the alter ego of the other." *Del. Crystallex*, 333 F. Supp. 3d at 397 n.15. We need not determine whether this is an independent or necessary factor in an extensive-control inquiry. The test discussed in *Rubin*

[12] The parties here rely chiefly on expert affidavits, publicly available corporate documents, and news articles.

appears to treat it as such, and, as discussed below, it is easily satisfied here.

C. Extensive control determination under *Bancec*

Having clarified the contours of the *Bancec* extensive-control inquiry, our applying that analysis here is straightforward. Though the factors the District Court applied differ slightly from those in *Rubin*, they are similar enough that its factual findings, which we review for clear error, direct the same result under either approach to the *Bancec* inquiry. While PDVSA effectively conceded that Crystallex satisfied each factor under *Rubin* at oral argument, we summarize the evidence for the sake of clarity, as the facts are paramount in determining when control is so extensive that entity separateness fades away as a legal distinction.

1. Factor 1: the level of economic control by the government

Venezuela wields extensive economic control over PDVSA. Venezuela's bondholder disclosures in 2011 and 2016 stated: "[G]iven that we are controlled by the Venezuelan government, we cannot assure you that [it] will not, in the future, 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." JA-645; 1921. They leave no doubt Venezuela has the power to intervene and mandate PDVSA's economic policies. In 2011 PDVSA disclosed that "the Venezuelan government required us to acquire several electricity generation and distribution companies, as well as certain food companies ... [,] and required ... us to acquire the assets of [another

Venezuelan company] at a price to be determined in the future." JA-608–09. The District Court found that Venezuela requires PDVSA to fund

> Venezuelan programs that have nothing to do with its business, causing PDVSA to take on additional debt. Such programs include PDVSA Agricola S.A., which subsidizes Venezuela's agriculture, industrial infrastructure, and produce sectors, and PDVSA Desarrollos Urbanos S.A., which subsidizes Venezuela's housing projects. ... PDVSA's total contributions to the Venezuelan budget between 2010 and 2016 were in excess of $119 billion.

Del. Crystallex, 333 F. Supp. 3d at 409. In 2014 and 2015, PDVSA was required to contribute U.S. $974 million and U.S. $3.3 billion, respectively, to social programs and projects. *Id.*

As its 2011 offering circular to prospective bondholders explains, PDVSA's legal obligations stem in part from the Venezuelan constitution, which endows the State with significant control over PDVSA and the oil industry in the country. Article 12 provides hydrocarbon deposits within the territory of the state are the property of the Republic, JA-1722, and Article 302 reiterates "the State reserves to itself, through the pertinent organic law, and for reasons of national convenience, petroleum activity," *id.* at 1558. Article 303 addresses the state's control over PDVSA specifically: "For reasons of economic and political sovereignty and national strategy, the State shall retain all shares in Petroleos de Venezeula, S.A." *E.g.*, JA-350; 386. In addition, as PDVSA disclosed to

bondholders, under Article 5 of the Organic Hydrocarbons Law, its revenues "are required to be used to finance health and education, to create funds for macroeconomic stabilization and to make productive investments, all in favor of the Venezuelan people. Those social commitments may affect our ability to place additional funds in reserve for future uses and, indirectly, our commercial affairs." *Id.* at 608.

The District Court also found that Venezuela exercises its economic control over PDVSA by dictating to whom PDVSA must sell oil to and at what price. The 2011 circular explains that "[t]he Venezuelan government, rather than the international market, determines the price of products ... sold by us through our affiliates in the domestic market." *Id.* at 643. Thus Venezuela "dictates the severely discounted price at which PDVSA must sell its product to Venezuelan citizens" and "forces PDVSA to 'sell' oil to third parties for no, or *de minimis*, consideration." *Del. Crystallex*, 333 F. Supp. 3d at 408 (internal quotation marks and citations omitted). Per Venezuela's "Petrocaribe" agreements with its allies, PDVSA must provide oil to member states at a steep discount on price, along with a two-year grace period for payments, on a payment schedule up to 25 years in length with interest rates as low as 1% (with the option, on Venezuela's part, to accept deferred payments directly in the form of goods and services). JA-928. Under the agreement, Venezuela "may acquire at preferential prices ... sugar, bananas, or other goods or services to be determined, which are adversely affected by trade policies of rich countries." *Id.* In other words, as the District Court found, PDVSA

provides oil while Venezuela maintains the right to accept payment. PDVSA's financial reports show that, from 2010 to 2016, it contributed approximately USD $ 77 billion under the Petrocaribe agreements. *Id.* at 1178.

The District Court wasn't finished: "Venezuela manipulates PDVSA's conversion of U.S. Dollars to Venezuelan Bolivars to leverage PDVSA's revenues. ... PDVSA is required to convert foreign currency into Venezuelan Bolivars at an artificially low U.S. Dollar to Bolivar exchange rate (which is approximately 1/500th of the market rate)." *Del. Crystallex*, 333 F. Supp. 3d at 410 (internal quotation marks omitted).

Finally, Venezuela controls PDVSA's debt structure. Dr. Roberto Rigobon's supplemental declaration states that in November 2017 President Maduro decreed that Venezuela would restructure the external debt of both Venezuela and PDVSA. JA-2013. He also provided evidence that Venezuela made a $1.2 billion payment on a 2017 PDVSA bond. *Id.* at 2014.

2. Factor 2: whether the entity's profits go to the government

As PDVSA's lone shareholder, all profit ultimately runs to the Venezuelan government. In addition, PDVSA pays Venezuela taxes and royalties on the oil it produces. The Rigobon Declaration contends that PDVSA pays "extraordinary taxes," *i.e.*, taxes at an artificial rate designed to collect more of PDVSA's revenues. *Id.* at 1172.

3. Factor 3: the degree to which government officials manage the entity or otherwise have a hand in its daily affairs

The Venezuelan government exercises direct and extensive control over PDVSA. President Maduro appoints PDVSA's president, directors, vice-presidents, and members of its shareholder council. *Del. Crystallex*, 333 F. Supp. 3d at 407–08. Crystallex introduced a declaration from Jose Ignacio Hernandez, a Venezuelan legal academic, which notes that it has been "commonplace" since 2002 for PDVSA's president also to serve as Venezuela's oil minister. JA-1195. "This arrangement allowed the Government to control the daily operations of PDVSA." *Id.* PDVSA and Venezuela's Ministry of Petroleum and Mining share physical office space for its headquarters. *Id.* at 1196 & n.51. In a 2014 speech discussing the state of Venezuelan control over PDVSA since this reorganization, then-PDVSA President Rafael Ramirez Carreño, and the country's Vice Minister for Petroleum, stated that "we are one of the few oil producing countries in the world that has a strict and tight control over the sovereign management of its natural resources." *Id.* at 594.

The military increasingly exercises control over PDVSA. In November 2017, President Maduro appointed Major General Manuel Quevedo as Petroleum Minister and PDVSA president. *Id.* at 2018. Earlier that year, he also created a new post—Executive Vice-President of PDVSA—and appointed Vice-Admiral Maribel del Carmen Parra de Mestre to the position. *Id.* at 1198.

Venezuela has also wielded substantial influence

over PDVSA's employees through a series of politically motivated firings. The highest profile of these occurred in 2002, when President Chávez fired roughly 40% of the PDVSA workforce in response to a strike protesting his regime. *Id.* at 1054. Employees continue to face pressure from the state today. The District Court found that, "[a]s recently as July 2017, Venezuela continued to threaten to terminate PDVSA employees who were opposed to the governing regime." *Del. Crystallex*, 333 F. Supp. 3d at 407. Employees face pressure to attend Socialist Party rallies and have been threatened with termination unless they voted in elections. *Id.* at 408.

4. Factor 4: whether the government is the real beneficiary of the entity's conduct

The District Court found that PDVSA's cheap oil to Venezuela's strategic allies also creates a mechanism whereby Venezuela extracts value from PDVSA's oil without paying the company. "Venezuela also uses PDVSA to achieve its foreign policy goals by committing PDVSA to sell oil to certain Caribbean and Latin American nations at substantial discounts, without PDVSA's consent. ... Even when those oil debts are repaid, the money is given to Venezuela, not PDVSA...." *Id.* at 410.

PDVSA's actions with respect to this litigation also show how Venezuela is the real beneficiary of PDVSA's conduct. For example, "it is undisputed that PDVSA paid the administrative fees Venezuela incurred in connection with the arbitration with Crystallex, which amounted to around $249,000." *Id.* And, when Venezuela expropriated the La Cristinas mines, it gave to PDVSA for no consideration a

number of mining rights, including rights in Las Cristinas that it had expropriated from Crystallex. JA-1194. This seamless transfer of value between PDVSA and Venezuela also suggests an alter ego relationship.

5. Factor 5: whether adherence to separate identities would entitle the foreign state to benefits in United States courts while avoiding its obligations

Venezuela owes Crystallex from a judgment that has been affirmed in our courts. Any outcome where Crystallex is not paid means that Venezuela has avoided its obligations. It is likewise clear from the record that PDVSA, and by extension Venezuela, derives significant benefits from the U.S. judicial system. Its 2020 bonds are backed by the common stock and underlying assets of U.S.-based corporations, and hence disputes stemming from default will be subject to U.S. laws and presumably be resolved through the U.S. legal system.[13] *See, e.g.*,

[13] Crystallex has not identified any Venezuelan commercial assets in Delaware or the District of Columbia and may be unable to find satisfaction if attachment of PDVSA property is impermissible. *See Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, No. CV 16-0661 (RC), 2017 WL 6349729, at *2 (D.D.C. June 9, 2017) ("Petitioner has been unable to identify any commercial assets belonging to [Respondent] in the District of Columbia but believes that Respondent possesses assets elsewhere in the United States, including in Delaware. ... The assets Petitioner identifies are connected to Respondent through a variety of corporate structures ...[,] in particular [Respondent's] indirect subsidiaries, PDVH, CITGO Holding, and CITGO Petroleum ....") (citations and internal quotations omitted).

Bayrock Exhibit 6 at 131–32, *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, F. Supp. 3d 380 (D. Del. 2018), ECF No. 99-1. Indeed, it is probable the U.S. legal system is the backstop that gives substantial assurance to investors who buy PDVSA's debt.

Nor does ignoring separate identities run against the equities here. PDVSA profited directly from Crystallex's injury: Venezuela transferred the rights to the expropriated mines to PDVSA for no consideration. Hence this factor too is satisfied.

D. PDVSA's Shares of PDVH are attachable under the Sovereign Immunities Act.

Crystallex must also show that the particular property at issue in the attachment action—the PDVH stock—is not immune from attachment under the Sovereign Immunities Act. It provides that "the property in the United States of a foreign state shall be immune from attachment arrest and execution" unless one of the Act's statutory exceptions is met. 28 U.S.C. § 1609. The exception Crystallex invokes states that the "property in the United States of a foreign state ..., *used for a commercial activity* in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States" based on an order confirming an arbitral award rendered against the foreign state. 28 U.S.C. § 1610(a)(6) (emphasis added).[14]

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[14] Section 1610(b) governs execution of a foreign instrumentality's property, but only section 1610(a) is relevant because the jurisdictional immunity is overcome for Venezuela,

The Act defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d). The Supreme Court in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 613, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992), stated that the phrase "commercial activity" captures the "distinction between state sovereign acts, on the one hand, and state commercial and private acts, on the other." *Id.* "[W]hen a foreign government acts, not as a regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the [Sovereign Immunities Act]." *Id.* at 614, 112 S.Ct. 2160. Commercial actions include those that "(whatever the motive behind them) are the *type* of actions by which a private party engages in 'trade and traffic or commerce.' " *Id.* (quoting Black's Law Dictionary) (emphasis in original).[15]

PDVSA contends that the commercial activity exception requires current commercial use (*i.e.*, at the moment the writ is executed), which PDVSA contends is impeded by the current U.S. sanctions regime. There is some support for PDVSA's interpretation. *See Aurelius Capital Partners v.*

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not PDVSA, who only enters the picture as Venezuela's alter ego.

[15] *Weltover* involved the commercial-activity exception to jurisdictional immunity, 28 U.S.C. § 1605(a), but its interpretation of "commercial" would apply equally here.

Republic of Argentina, 584 F.3d 120, 130 (2d Cir. 2009) ("[T]he property that is subject to attachment and execution must ... have been 'used for a commercial activity' *at the time* the writ of attachment or execution is issued.") (emphasis in original). But narrowing the temporal inquiry to the day the writ is executed unnecessarily leaves room for manipulation, as any jurisdictional determination under the Sovereign Immunities Act is immediately appealable for interlocutory review, and courts (like the District Court here) may elect not to issue the writ alongside analysis of the jurisdictional and execution immunity. A strict day-of-writ inquiry could allow parties to avoid execution by freezing assets or otherwise ceasing commercial use when the appeal decision is handed down. Instead, a totality-of-the-circumstances inquiry seems more appropriate, as the Fifth Circuit aptly described: "This analysis should include an examination of the uses of the property in the past as well as all facts related to its present use, with an eye toward determining whether the commercial use of the property, if any, is so exceptional that it is 'an out of character' use for that particular property." *Af-Cap Inc. v. Republic of Congo*, 383 F.3d 361, 369 (5th Cir. 2004). And "it would be appropriate for a court to consider whether the use of the property in question was being manipulated by a sovereign nation to avoid being subject to garnishment under [the Sovereign Immunities Act]." *Id.* at 369 n.8.

But whether we apply the date the writ was issued—August 23, 2018—or the date of the August 9 opinion, PDVH shares are not immune from attachment. PDVSA argues that the shares cannot be used in commerce because they are subject of

sanctions contained in two Executive Orders. *See* Exec. Order. No. 13835, 83 Fed. Reg. 24,001 (May 21, 2018) ("E.O. 13835"); Exec. Order No. 13808, 82 Fed. Reg. 41, 155 (Aug. 24, 2017) ("E.O. 13808").

This argument fails because the sanctions regime prohibits only some commercial uses of the shares; other commercial uses continue to be exercised by Venezuela. Section 1(a)(iv) of E.O. 13808 bars PDVH from paying dividends or other distribution of profits to the Government of Venezuela,[16] and section 1(b) prohibits the "purchase, directly or indirectly, by a United States person or within the United States, of securities from the Government of Venezuela." In addition, Section 1(a)(iii) of E.O. 13835 precludes United States persons or those within the United States from engaging in any transactions, provisions of financing, and other dealings related to "the sale, transfer, assignment, or pledging as collateral by the Government of Venezuela of any equity interest in any entity in which [it] has a 50 percent or greater ownership interest."

However, the shares can still be used by PDVSA to run its business as an owner, to appoint directors, approve contracts, and to pledge PDVH's debts for its own short-term debt. Venezuela illustrates its continued use of this power, noting that President Guaidó in February 2019 appointed an *ad hoc* administrative board to represent PDVSA in its

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[16] The Executive Orders of our Government define "the Government of Venezuela" as specifically including PDVSA. E.O. 13808, 82 Fed. Reg. 41156 ("[T]he term ... means the Government of Venezuela, any political subdivision, agency or instrumentality thereof, including ... [PDVSA] ..."); E.O. 13835, 83 Fed. Reg. 24001–02 (same).

capacity as sole shareholder of PDVH for appointing a new board of directors of that entity. These actions are available to the sole shareholder of a company, and so the shares continue to be used in commerce.

This is not to say that the sanctions of PDVSA assets play no role in whether Crystallex ultimately recovers. According to a Treasury Department Frequently Asked Question, any attachment and execution against PDVSA's shares of PDVH would likely need to be authorized by the Treasury Department. *See Del. Crystallex*, 333 F. Supp. 3d at 420–21. In a case like this, "[Treasury's Office of Foreign Asset Control, called by its acronym OFAC] would consider license applications seeking to attach and execute against such equity interests on a case-by-case basis." *Id.* at 421. Whether that FAQ is legally binding, Crystallex has committed that it "will seek clarification of the current license ... and/or the issuance of an additional license to cover the eventual execution sale of the shares of PDVH once the [attachment w]rit has issued." *Id.* at 421 n.40 (internal quotation marks omitted) (ellipsis in original).

Though the U.S. State Department has not sought to provide a statement of interest, it is nonetheless conceivable that short- or long-term U.S. foreign policy interests may be affected by attachment and execution of PDVSA's assets. The Treasury sanctions provide an explicit mechanism to account for these. Whether the Treasury Department permits execution in this case, it is clear that the sanctions do not make the PDVH shares immune from attachment under the Sovereign Immunities Act.

IV. Conclusion

Under the Foreign Sovereign Immunities Act, there is a strong presumption that a foreign sovereign and its instrumentalities are separate legal entities. But the Supreme Court made clear in *Bancec* and *Rubin* that in extraordinary circumstances—including where a foreign sovereign exerts dominion over the instrumentality so extensive as to be beyond normal supervisory control—equity requires that we ignore the formal separateness of the two entities. This clears that bar easily. Indeed, if the relationship between Venezuela and PDVSA cannot satisfy the Supreme Court's extensive-control requirement, we know nothing that can.

The District Court acted within its jurisdiction when it issued a writ of attachment on PDVSA's shares of PDVH to satisfy Crystallex's judgment against Venezuela, and the PDVH shares are not immune from attachment. Thus we affirm.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 17-mc-151-LPS

CRYSTALLEX INTERNATIONAL CORPORATION,
Plaintiff,

v.

BOLIVARIAN REPUBLIC OF VENEZUELA,
Defendant.

[Filed August 9, 2018]

LEONARD P. STARK, UNITED STATES DISTRICT JUDGE

OPINION

Plaintiff/Judgment Creditor Crystallex International Corporation ("Crystallex") holds a $1.2 billion judgment against the Bolivarian Republic of Venezuela ("Venezuela" or "the Republic"). (D.I. 1) Crystallex has registered the judgment in Delaware. (*Id.*) Venezuela has not appeared in the litigation. However, Petróleos de Venezuela, S.A. ("PDVSA"), an oil company, has intervened. (D.I. 14) This is because Crystallex seeks to collect on its judgment against Venezuela by executing on property nominally owned by PDVSA, specifically shares of common stock PDVSA owns in PDV Holding Inc. ("PDVH"), a Delaware corporation. Crystallex's theory is that PDVSA is the alter ego of Venezuela, making PDVSA's property subject to execution for payment of Venezuela's debt.

Crystallex and PDVSA have each filed a motion.

Crystallex moves for a writ of attachment *fieri facias* ("*fi. fa.*") pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1601(c). (D.I. 2) In turn, PDVSA has filed a motion to dismiss for lack of subject matter jurisdiction. (D.I. 25) Together, the parties'[1] motions present numerous complex questions, some of which have been addressed by no previous court, and others on which different courts have reached competing conclusions. The Court's careful consideration of the issues before it has included reviewing numerous briefs (D.I. 3-1, 26, 33), letter briefs (D.I. 51-54, 70-71), submissions of supplemental authority (D.I. 41, 46, 59-60, 63-65), six substantive declarations (D.I. 7-8, 28-29, 35-36), and hundreds of exhibits (*see, e.g.*, D.I. 4-6, 11, 27, 34, 37, 47). The Court also heard oral argument on two separate occasions. (*See* Transcript of Dec. 21, 2017 Hr'g (D.I. 49) ("Tr."); Transcript of Aug. 3, 2018 Hr'g (D.I. 74) ("Aug. Tr."))

Having undertaken the required analysis, the Court will grant Crystallex's motion and deny PDVSA's motion.

BACKGROUND

In 2002, the Government of Venezuela awarded Crystallex, a Canadian corporation, a Mine Operating Contract ("Contract") by which Crystallex was granted the opportunity to develop the Las Cristinas gold mines. (D.I. 3-1 at 1; D.I. 26 at 4-5) Completion of the mining project was dependent on Crystallex obtaining certain permits from Venezuela.

[1] The Court will refer to Crystallex and PDVSA as "the parties," as they are the only entities who have appeared and have provided briefing and evidence to the Court.

(D.I. 26 at 5) Crystallex never obtained such permits. (*Id.*) Instead, in 2011, Venezuela seized the Las Cristinas mines. (D.I. 3-1 at 5)

"In accordance with a bilateral investment treaty (BIT) between Canada and Venezuela, Crystallex pursued its grievances against Venezuela before an international arbitration tribunal ...." *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, 244 F. Supp. 3d 100, 105 (D.D.C. 2017) ("*Crystallex*"). Specifically, in 2011, Crystallex initiated arbitration proceedings against Venezuela before the International Centre for Settlement of Investment Disputes ("ICSID") in Washington, D.C. (D.I. 3-1 at 1, 5) On April 4, 2016, an arbitration panel found that Venezuela's actions constituted an indirect expropriation of Crystallex's rights under the Contract. (D.I. 26 at 5) The ICSID awarded Crystallex $1.2 billion plus interest. (*Id.*; D.I. 3-1 at 5)

Crystallex then filed suit in the United States District Court for the District of Columbia (the "D.C. Court") seeking to confirm the arbitral award. *See Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, C.A. No. 16-0661 (RC) D.I. 1 (D.D.C. Apr. 7, 2016). On March 25, 2017, Judge Rudolph Contreras issued an opinion and order confirming the award. (*See* D.I. 1; D.I. 26 at 6; D.I. 4-1 Exs. 6, 7) On April 7, 2017, the D.C. Court entered judgment against Venezuela. (D.I. 1; D.I. 26 at 6) Just over two months later, on June 9, 2017, Judge Contreras found that a "reasonable period" had elapsed since entry of judgment but Venezuela had not paid its debt. *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, C.A. No. 16-0661 (RC) D.I. 36 (D.D.C. June 9, 2017) (*see* D.I. 4-1 Ex. 8) ("*Crystallex II*"). Hence, pursuant to Section 1610(c) of the FSIA, the

D.C. Court ruled that Crystallex could commence proceedings in aid of execution of the judgment. *Id.*[2]

Accordingly, on June 19, 2017, Crystallex registered the D.C. Court's judgment in this Court. (D.I. 1; *see also* 28 U.S.C. § 1963 (providing district court in which judgment is registered with same power to enforce it that is possessed by district court which issued judgment))[3] Crystallex filed its pending motion for a writ of attachment on August 14, 2017, seeking to attach shares of PDVH, which are owned by PDVSA, which Crystallex alleges is an alter ego of Venezuela. (D.I. 3-1 at 1; *see also* Tr. at 36 (PDVSA stating "the PDV Holding shares they want to attach belong to PDVSA")) Thereafter, PDVSA moved to intervene for the purpose of opposing the attachment motion (D.I. 14), a request the Court granted on August 28, 2017 (D.I. 17), without objection from

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[2] When advised that Crystallex viewed PDVSA's holdings in Delaware as attachable to satisfy Crystallex's judgment against Venezuela, and that Venezuela challenged whether PDVSA's assets would be subject to the judgment against Venezuela, Judge Contreras "decline[d] the invitation to adjudicate whether or not those assets will ultimately be attachable by Petitioner [Crystallex] because such a determination is unnecessary at this stage." (*Crystallex II* at 4) As the instant motions make plain, such a determination is necessary now.

Venezuela's appeal of the D.C. Court's orders is pending before the Court of Appeals for the D.C. Circuit. *See* C.A. No. 16-0661 (RC) D.I. 34.

[3] Crystallex has also filed the judgment in other courts, including the United States District Court for the Southern District of New York. (*See* D.I. 3-1 at 2; *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, C.A. No. 17-mc-205-VEC) According to the parties, there has been no litigation in S.D.N.Y. that is of any relevance to any of the issues before this Court. (*See* Tr. at 66; Aug. Tr. at 13)

Crystallex (D.I. 16). Subsequently, on November 3, 2017, PDVSA filed its pending cross-motion to dismiss for lack of subject matter jurisdiction. (D.I. 25)

The parties initially completed briefing on the motions on November 22, 2017 (D.I. 3-1, 26, 33) and were scheduled for oral argument on December 5, 2017 (D.I. 23). When they appeared on December 5, Crystallex requested a continuance in light of a recent settlement reached between it and Venezuela. (*See* D.I. 40; *see also* Transcript of Dec. 5, 2017 Chambers Conference) The Court continued the argument until December 21, at which point the parties again appeared, indicated that Venezuela had not met a condition precedent to the settlement, and proceeded to present argument. (*See* D.I. 43; Aug. Tr. at 12-13)

Over the ensuing months, the parties have advised the Court of subsequent authorities and developments (*see, e.g.*, D.I. 59-60, 63-65) and responded to the Court's orders for supplemental briefing (*see* D.I. 51-54, 70-71). On July 30, 2018, the Court provided the parties with a list of additional questions on which it sought their input. (*See* D.I. 68) Then, on August 3, the Court heard additional oral argument. (*See* Aug. Tr.)

APPLICABLE LAW

A. Writ Of Attachment

Pursuant to Federal Rule of Civil Procedure 69(a)(1), "[a] money judgment is enforced by a writ of execution, unless the court directs otherwise. 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." Under Rule 69, "a district court has the authority to enforce a judgment by attaching property in accordance with the law of the state in which the district court sits." *Peterson v. Islamic Republic of Iran*, 876 F.3d 63, 89 (2d Cir. 2017) (internal quotation marks omitted).

Delaware law permits a judgment creditor to obtain a writ of attachment *fi. fa.*, as set out in 10 Del. C. § 5031:

> The plaintiff in any judgment in a court of record, or any person for such plaintiff lawfully authorized, 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.[4] The attachment, condemnation, or judgment thereon, shall be pleadable in bar by the garnishee in any action against the garnishee at the suit of the defendant in the attachment.

As expressly provided by statute, the types of property a judgment creditor may attach include a debtor's shares in a Delaware corporation:

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[4] "By its reference to cases of foreign judgment, § 5031 incorporates Chapter 35 of Title 10 of the Delaware Code. Under those provisions, '[g]oods, chattels, rights credits, moneys, effects, lands and tenements' may be attached." *LNC Invests., Inc. v. Democratic Republic of Congo*, 69 F.Supp.2d 607, 611 (D. Del. 1999) (citing 10 Del. C. § 3508).

> The shares of any person in any corporation with all the rights thereto belonging ... may be attached under this section for debt, or other demands, if such person appears on the books of the corporation to hold or own such shares, option, right or interest.

8 Del. C. § 324(a).[5] Delaware law further provides that judgment creditors may execute on their judgments by "the attachment of a defendant's property in the hands of a third party." *UMS Partners, Ltd. v. Jackson*, 1995 WL 413395, at *5 (Del. Super. Ct. June 15, 1995).

B. Subject Matter Jurisdiction

Federal Rule of Civil Procedure 12(b)(1) "authorizes dismissal of a complaint for lack of jurisdiction over the subject matter, or if the plaintiff lacks standing to bring his claim." *Samsung Elecs. Co., Ltd. v. ON Semiconductor Corp.*, 541 F.Supp.2d 645, 648 (D. Del. 2008). "At issue in a Rule 12(b)(1) motion is the court's very power to hear the case." *Petruska v. Gannon Univ.*, 462 F.3d 294, 302 (3d Cir. 2006) (internal quotation marks omitted).

Usually, a motion to dismiss for lack of subject matter jurisdiction presents either a facial or factual challenge. *See CNA v. United States*, 535 F.3d 132, 139 (3d Cir. 2008). A facial attack "concerns an alleged pleading deficiency," while a factual attack concerns the "failure of a plaintiff's claim to comport factually with the jurisdictional prerequisites." *Id.*

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[5] The statute sets out specific procedural requirements for, among other things, a "public sale to the highest bidder." 8 Del. C. § 324(a).

(internal quotation marks and brackets omitted).

Where the motion presents a facial challenge to the Court's jurisdiction, or one based purely on the sufficiency of the plaintiff's allegations, the Court must accept well-pled factual allegations as true and generally may consider only the complaint and any documents referenced in or attached to it. *See Lincoln Benefit Life Co. v. AEI Life, LLC*, 800 F.3d 99, 105 (3d Cir. 2015); *see also Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977) ("[T]he court must consider the allegations of the complaint as true."). "Affidavits and briefs in opposition do not fall in this category." *Lincoln Benefit*, 800 F.3d at 110.

"The factual attack, however, differs greatly ...." *Mortensen*, 549 F.2d at 891.

> Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction ... there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist.

Id.

Occasionally, the Court must consider both facial and factual challenges to its subject matter jurisdiction. *See Carrier Corp. v. Outokumpu Oyj*, 673

F.3d 430, 440 (6th Cir. 2012) ("Outokumpu has presented arguments for both a facial and factual challenge to subject-matter jurisdiction, and we address each in turn."); *Hopewell Valley Reg'l. Bd. of Ednc. v. J.R.*, 2018 WL 2411616 (D.N.J. May 29, 2018) (addressing motion to dismiss presenting both types of challenges); *In re PennySaver USA Publ'g, LLC*, 587 B.R. 43, 48 (Bankr. D. Del. 2018) ("Defendant has made both factual and facial challenges in its Rule 12(b)(1) Motion.... [T]he Court will review the factual and then facial challenges, in that order."). When a motion presents both types of attacks, the plaintiff must overcome both in order for its claims to proceed.

Here, PDVSA presents both a facial and factual attack to subject matter jurisdiction. (*See, e.g.*, D.I. 26 at 20 (discussing facial attack); *id.* at 22-27 (discussing factual attack); *see also infra* n.16)

DISCUSSION

A. Foreign Sovereign Immunity

1. The Parties' Disputes Are Governed By The FSIA

The Foreign Sovereign Immunities Act ("FSIA" or "Act"), 28 U.S.C. § 1602 *et seq.*, "establishes a comprehensive framework for determining whether a court in this country, state or federal, may exercise jurisdiction over a foreign state." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 610, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992). The FSIA is the "sole basis for obtaining jurisdiction over a foreign state in our courts." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989). "[F]oreign sovereign

immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." *Verlinden B.V. v. Centr. Bank of Nigeria*, 461 U.S. 480, 486, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983).

"Under the Act, a 'foreign state shall be immune from the jurisdiction of the courts of the United States and of the States' unless one of several statutorily defined exceptions applies." *Weltover*, 504 U.S. at 610-11, 112 S.Ct. 2160 (quoting 28 U.S.C. § 1604). Hence, "a district court has subject matter jurisdiction over a suit against a foreign state if – and only if – the plaintiff's claim falls within a statutorily enumerated exception." *Odhiambo v. Republic of Kenya*, 764 F.3d 31, 34 (D.C. Cir. 2014). Accordingly, the FSIA

> must be applied by the District Courts in every action against a foreign sovereign since subject matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity, 28 U.S.C. § 1330(a).[6] At the threshold of every action in a District Court against a foreign state, therefore, the court must satisfy itself that one of the exceptions applies – and in doing so

[6] Section 1330(a) provides: "district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any international agreement."

> it must apply the detailed federal law standards set forth in the Act.

Verlinden, 461 U.S. at 493-94, 103 S.Ct. 1962 (internal footnote omitted). "[T]he FSIA exceptions are exhaustive; if no exception applies, the district court has no jurisdiction." *Odhiambo*, 764 F.3d at 34; *see also Verlinden*, 461 U.S. at 497, 103 S.Ct. 1962 ("[I]f a court determines that none of the exceptions to sovereign immunity applies, the plaintiff will be barred from raising his claim in any court in the United States ....").

Therefore, the disputes among Crystallex, Venezuela, and PDVSA are governed by the FSIA. Unless Crystallex can meet its burden to establish the applicability of exceptions to sovereign immunity, the Court is required to dismiss this case.[7]

2. Crystallex Must Establish An Exception to Jurisdictional Immunity, Although It Need Not Show An Independent Basis For Subject Matter Jurisdiction With Respect to PDVSA

Venezuela, as a foreign sovereign state, is presumptively immune from suit in all courts in the United States. *See* 28 U.S.C. § 1604 ("Subject to existing international agreements to which the United States is a party at the time of enactment of

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[7] The FSIA also imposes procedural requirements that must be met before a party may execute on property held by a foreign sovereign state or its agency or instrumentality, including (i) that a "reasonable period of time has elapsed following the entry of judgment" and (ii) "the giving of ... notice." 28 U.S.C. § 1610(c). It is undisputed that these procedural conditions have been satisfied here.

this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter."). Crystallex contends, and PDVSA does not dispute, that Venezuela is subject to the Court's jurisdiction under § 1605(a)(6), the arbitration exception. Section 1605(a)(6) states, in relevant part:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case
>
> ...
>
> (6) in which the action is brought, ... to confirm an award made pursuant to ... an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States ....

The Act defines a "foreign state" to include "a political subdivision of a foreign state or an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). In turn, an "agency or instrumentality of a foreign state" is defined as any entity:

> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is 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, and

> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603(b). It is undisputed that PDVSA is an "agency or instrumentality" of Venezuela within the meaning of the FSIA. (*See* D.I. 26 at 12 ("PDVSA indisputably is an 'agency or instrumentality of a foreign state' as defined in the FSIA ...."); Tr. at 36 ("Where the plaintiffs and PDVSA agree is that PDVSA is an agency or instrumentality of Venezuela ....")))

Where the parties' views first diverge is on the question of whether the Court must have an independent basis for subject matter jurisdiction with respect to PDVSA. PDVSA contends that because Crystallex's motion seeks to impose liability on PDVSA for Venezuela's debt, Crystallex is in effect suing PDVSA, and the Court cannot adjudicate such a suit without having a basis to exercise subject matter jurisdiction over PDVSA. (*See, e.g.*, D.I. 26 at 10-11; *see also* Tr. at 36-37) To PDVSA, the effect of Crystallex prevailing on its motion would be the same as if PDVSA were added to the judgment Crystallex holds against Venezuela, rendering PDVSA – a third party, which had no involvement in the events that harmed Crystallex and no involvement in the arbitration giving rise to the judgment against Venezuela – potentially liable for all of Venezuela's debts. Crystallex counters that once it establishes the Court has subject matter jurisdiction with respect to its dispute with Venezuela, and further establishes that PDVSA is the alter ego of Venezuela, it will have met its burden to show that the Court has subject

matter jurisdiction with respect to PDVSA as well. To Crystallex, the crucial facts are that Crystallex has not sued PDVSA and does not seek to add PDVSA as a liable party on its judgment against Venezuela. (*See, e.g.*, D.I. 70 at 8) ("Crystallex does not seek to hold PDVSA liable for its judgment but rather seeks 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.") Alternatively, if an independent basis for subject matter jurisdiction is necessary with respect to PDVSA, Crystallex argues that it, too, is present. (*See id.* at 4-5) ("[T]his Court has an independent basis for jurisdiction against PDVSA under 28 U.S.C. § 1330 and Section 1605(a)(6) of the FSIA.") On these points, the Court agrees with Crystallex.

PDVSA's position is based on the Supreme Court's decision in *Peacock v. Thomas*, 516 U.S. 349, 357, 116 S.Ct. 862, 133 L.Ed.2d 817 (1996), which stated, "We have never authorized the exercise of ancillary jurisdiction in a subsequent lawsuit to impose an obligation to pay an existing federal judgment on a person not already liable for that judgment." *See also Butler v. Sukhoi Co.*, 579 F.3d 1307, 1313 (11th Cir. 2009) ("Because the Butlers sought to invoke the jurisdiction of the United States courts to enter a new judgment in a separate cause of action against appellants, they bore the burden of presenting a *prima facie* case that jurisdiction [against the third party] existed.") (footnote omitted).

However, as Crystallex emphasizes, the Third Circuit has had occasion to consider the applicability of *Peacock* in the context of garnishment actions.

(*See, e.g.*, Tr. at 10) (arguing "*Peacock* has no application to proper Rule 69 motions") In *IFC Interconsult, AG v. Safeguard International Partners, LLC*, 438 F.3d 298, 310 (3d Cir. 2006), the Third Circuit held that Rule 69 authorizes a garnishment action against an indemnitor of a judgment debtor even when there is no independent basis for federal subject matter jurisdiction – such as diversity – for a new action by the judgment creditor directly against that indemnitor.[8] As the *IFC* Court stated: "*Peacock* itself made clear that it does not apply to Rule 69 actions." *Id.* at 311. *IFC* adds: "Although garnishment actions are new actions in the sense that there is a new party and a new theory for that party's liability, they are not new actions in the sense of a new direct claim." *Id.* at 314.

Crystallex brings its motion for a writ of attachment *fi. fa.* pursuant to, *inter alia*, Rule 69, contending that it, as the garnishor, "is seeking to collect its judgment against Venezuela (the judgment debtor) by stepping into Venezuela's shoes and demanding Venezuela's alter ego's shares from PDVH (the garnishee)." (D.I. 70 at 7; *see also* D.I. 3 at 1; Tr. at 82-83 ("Rule 69 actions are to be treated as part of the original suit. Therefore, if the original suit was a suit against Venezuela, and there was jurisdiction under [Section] 1330, there is jurisdiction to adjudicate rights in the property.")) According to Crystallex, "[t]he fact that this garnishment proceeding involves an alter ego theory does not

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[8] In reaching this conclusion, the Third Circuit reaffirmed its prior *en banc* holding in *Skevofilax v. Quigley*, 810 F.2d 378, 385 (3d Cir. 1987), finding that *Skevofilax* was not abrogated by *Peacock*. *See IFC*, 438 F.3d at 310.

change the nature of the proceeding." (D.I. 70 at 7; Tr. at 11 ("[T]he fact that you could have a broader alter-ego theory does not mean that all alter-ego theories fall under *Peacock*.")

Again, the Court agrees. Unlike the situation presented in *Peacock*, 516 U.S. at 350, 116 S.Ct. 862, this case is not "a subsequent lawsuit" to "impose an obligation to pay" an "existing federal judgment on a person not already liable for that judgment." To the contrary, it is part of the "same lawsuit" – that is, the action giving rise to the judgment against Venezuela, which has been registered in this District – and does not seek to impose any obligation on PDVSA to pay Venezuela's existing judgment, but, instead, seeks to attach property nominally belonging to PDVSA as truly belonging to Venezuela. (*See* D.I. 70 at 7-8) Rather than attempting to hold PDVSA primarily liable or shifting the judgment to PDVSA, Crystallex seeks to enforce its judgement against debtor Venezuela, "whose immunity has already been defeated on the FSIA and the arbitra[tion] exception," by attaching PDVSA property because it is "***property of the debtor***" under an alter ego theory. (Aug. Tr. at 31) (emphasis added)[9]

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[9] As Crystallex acknowledges, because its theory is not based on establishing primary liability or adding PDVSA to the judgment, if the Republic were to sell PDVSA before the Court rendered its judgment, Crystallex would have no redress against PDVSA. (*See* Aug. Tr. at 33 ("If you were to rule for us and PDVSA were sold, PDVSA would not be liable in personam if sold to [e.g.] Exxon."); *id.* at 35-36 ("It's very different to get a Writ of Fi Fa against a particular asset than it is to get a judgment. If we were to get a judgment against PDVSA, ... [w]e could then go and attach any asset of PDVSA. We could take that judgment and go to other courts.... What we're asking here ... is [for] an order [that] applies only to [a] particular asset.")

Such a theory, seeking only to collect a judgment but not to establish liability, does not require an independent basis for jurisdiction. *See EM Ltd. v. Banco Cent. de la Republica Argentina*, 800 F.3d 78, 91 n.56 (2d Cir. 2015) ("*EM Ltd. II*") ("Our precedent supports the view ... that once an instrumentality of a sovereign state has been deemed to be the alter ego of that state ... the instrumentality and the state are to be treated as one and the same for all purposes."); *Transfield ER Cape Ltd. v. Lndus. Carriers, Inc.*, 571 F.3d 221, 224 (2d Cir. 2009) (stating alter egos "are treated as one entity for jurisdictional purposes") (internal quotation marks omitted); *Patin v. Thoroughbred Power Boats, Inc.*, 294 F.3d 640, 654 (5th Cir. 2002) (alter egos "are considered to be one and the same under the law"); *Epperson v. Entm't Express, Inc.*, 242 F.3d 100, 106 (2d Cir. 2001) ("Where the post-judgment proceeding is an effort to collect a federal court judgment, the courts have permitted judgment creditors to pursue, under the ancillary enforcement jurisdiction of the court, the assets of the judgment debtor even though the assets are found in the hands of a third party."); *U.S.I Props. Corp. v. M.D. Constr. Co.*, 230 F.3d 489, 496 (1st Cir. 2000) ("Where the postjudgment claim is simply a mode of execution designed to reach property of the judgment debtor in the hands of a third party, federal courts have often exercised enforcement jurisdiction.... Where the state procedural enforcement mechanisms incorporated by Rule 69(a) allow the court to reach assets of the judgment debtor in the hands of third parties in a continuation of the same action, such as garnishment or attachment, federal enforcement jurisdiction is clear."); *Thomas, Head & Greisen Emps. Tr. v.*

Buster, 95 F.3d 1449, 1454 & n.7 (9th Cir. 1996) (stating that where judgment creditor "is not attempting to establish the [third party's] liability for the original judgment,... *Peacock* [is] inapposite.... *Peacock* suggested that whether a judgment creditor's post-judgment action is within a federal district court's ancillary enforcement jurisdiction hinges on whether it seeks not merely 'to ***collect*** a judgment' but also '***to establish liability***' on the part of the third party.").

The Court acknowledges that the proper resolution of this issue is not free from doubt. This case is certainly not an "ordinary" Rule 69 garnishment action. Moreover, PDVSA directs the Court's attention to *Gambone v. Lite Rock Drywall*, 288 Fed. App'x 9, 12 (3d Cir. 2008), in which the Third Circuit described *Peacock* as holding "that ancillary jurisdiction was not intended for use as a tool for establishing personal liability on the part of a new defendant, for instance by designating that third party ***as an alter ego of the indebted party or by piercing the corporate veil***" (emphasis added). *Gambone*, then, suggests that seeking to attach a third-party's property on the basis that the third-party is the alter ego of a judgment-debtor is an effort to impose primary liability on the third-party, an outcome requiring an independent jurisdictional basis with respect to the third party. However, the *Gambone* Court elaborated that "[n]othing in *Peacock* ... precludes ancillary jurisdiction over suits involving assets already subject to the judgment; it only bars the exercise of ancillary jurisdiction over attempts ***to impose personal liability for an existing judgment on a new party.***" *Id.* (emphasis added).

Just as the creditor in *Gambone* was not seeking to impose personal liability on the third party transferees, and thus, the Third Circuit concluded that the district court there had ancillary jurisdiction (*see id.* at 13), here, too, Crystallex does not attempt to impose personal liability on PDVSA, but instead seeks to attach assets that it alleges belong to Venezuela – assets which belong only nominally to Venezuela's alter ego, PDVSA. Where, as here, a plaintiff "does not seek to impose personal liability on" a third party, but rather "the relief [it] seek[s] is solely to corral [the debtor's] assets in an effort to preserve [its] access to them," *id.*, an independent basis for subject matter jurisdiction is not required. Moreover, while the *Gambone* Court explained that "*Peacock* holds that ancillary jurisdiction does not extend to suits demanding that a third party use its legitimately held assets to satisfy a previously rendered judgment," *id.*, the Court finds it is appropriate – if it finds PDVSA is Venezuela's alter ego – to view the instant case as ***not*** involving a demand that PDVSA use ***its*** "legitimately held assets" to satisfy Venezuela's judgment. Rather, the issue here is whether PDVSA's assets are, in effect, ***Venezuela's*** assets; for if they are, then this case is not correctly characterized as one in which Crystallex is attaching a third-party's property.

PDVSA also directs the Court to *IFC*, 438 F.3d at 312, in which the Third Circuit described veil-piercing as a mechanism for imposing "primary liability" on a third party. *Id.* The *IFC* Court explained, "[v]eil-piercing does not make a party secondarily liable. Rather, it collapses corporate distinctions to make for joint primary liability. This contrasts with garnishment, in which there is a new

party and a new theory of liability, but not a new direct claim." *Id.* Like *Gambone*, then, *IFC* seems to suggest that the Third Circuit would hold that alter ego liability is a form of "primary liability," which, pursuant to *Peacock*, requires an independent basis to exercise subject matter jurisdiction as to the third party. *See Epperson*, 242 F.3d at 106 ("Since *Peacock*, most courts have continued to draw a distinction between post-judgment proceedings to collect an existing judgment and proceedings, such as claims of alter ego liability and veil-piercing, that raise an independent controversy with a new party in an effort to shift liability.").

But the Court finds persuasive Crystallex's notion of "two different contexts" of alter ego liability. (D.I. 70 at 7-8 & n.8) (citing, for example, *First Horizon Bank v. Moriarty-Gentile*, 2015 WL 8490982, at *4 n.4 (E.D.N.Y. Dec. 10, 2015) (finding independent jurisdiction, but also noting "alternate basis for jurisdiction" based on finding that third party was alter ego of debtor); *Aioi Seiki, Inc. v. JIT Automation, Inc.*, 11 F.Supp.2d 950, 952-54 (E.D. Mich. 1998) ("An action to pierce the corporate veil is not a new cause of action, but merely a determination of whether multiple entities exist as separate entities or as mere alter egos of each other.... Accordingly, [such actions are] brought supplementary to and in an effort to enforce a previous judgment of this court and should therefore be brought pursuant to Fed. R. Civ. P. 69(a).") An alter ego (or veil piercing) theory may be raised either as a basis for primary liability, in which "the judgment creditor seeks to establish that the alleged alter ego is liable for the original judgment, and thus obtain a new judgment against the alter ego," or alternatively as a basis for

secondary liability, in which the judgment creditor "seeks a more limited finding, namely that the specific property at issue ... though nominally held in the name of [a third party, is], at this time, really the property of the [judgment debtor]." (D.I. 70 at 7-8) For the reasons already discussed in relation to *Gambone*, the Court views the present case as involving garnishment, seeking only to establish secondary liability (by attaching certain specified property), rather than an action seeking to impose primary liability on PDVSA.

Therefore, the Court concludes that if Crystallex meets its burden to show that the Court has subject matter jurisdiction with respect to Venezuela under Section 1605(a)(6), and if Crystallex further demonstrates that PDVSA is the alter ego of Venezuela, then Crystallex will also necessarily have established that the Court may exercise subject matter jurisdiction with respect to PDVSA as well. Crystallex does not need to additionally prove that some other independent basis of subject matter jurisdiction exists with respect to PDVSA. *See Kensington Int'l Ltd. v. Republic of Congo*, 2007 WL 1032269, at *13 (S.D.N.Y. Mar. 30, 2007) ("[I]f the facts alleged in the Complaint claiming that SNPC is an alter ego of Congo are accepted as true, then SNPC is Congo, and the only immunity at issue is Congo's immunity.").[10]

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[10] Even if an independent basis for jurisdiction were required, it is present, based on § 1330 and FSIA § 1605(a)(6). (*See* D.I. 70 at 4-5) (Crystallex: "[T]his Court has an independent basis for jurisdiction against PDVSA under 28 U.S.C. § 1330 and Section 1605(a)(6) of the FSIA.") The Court further concludes that whether an independent basis for jurisdiction is required is a question that does not necessarily need to be answered in this

3. Crystallex Must Establish An Exception to Attachment and Execution Immunity

In addition to showing that Venezuela and PDVSA are not immune from exercise of this Court's subject matter jurisdiction, Crystallex must also establish an exception to attachment and execution immunity. *See Rubin v. Islamic Republic of Iran*, 637 F.3d 783, 793 (7th Cir. 2011) ("The Act contains two primary forms of immunity[:] ... Section 1604 provides jurisdictional immunity from suit ... [while] Section 1609 ... codifies the related common-law principle that a foreign state's property in the United States is immune from attachment and execution ...."). In order for the Court to issue the requested writ of attachment, the Court must be satisfied that the specific property on which Crystallex seeks to execute – PDVSA's shares of stock in Delaware corporation PDVH – are not immune from attachment and execution under the FSIA. *See generally Rubin v. Islamic Republic of Iran*, —— U.S. ——, 138 S. Ct. 816, 823-25, —— L.Ed.2d —— (2018) (discussing "attachment and execution immunity" in relation to FSIA terrorism exception, 28 U.S.C. § 1605A).

"[T]he FSIA's provisions governing jurisdictional immunity, on the one hand, and execution immunity, on the other, operate independently." *Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 288 (2d Cir. 2011).[11] "[T]his means that 'a waiver

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case. Subject matter jurisdiction here is so intertwined with the merits of the alter ego issue that the Court must address Crystallex's alter ego contentions, one way or the other.

[11] Because the FSIA does not specify the "circumstances and manner of attachment and execution proceedings," courts apply

of immunity from suit does not imply a waiver of immunity from attachment of property, and a waiver of immunity from attachment of property does not imply a waiver of immunity from suit.'" *Id.* (quoting *Restatement (Third) of Foreign Relations Law of the United States* § 456(1)(b)(1987)).[12]

Notably, "the exceptions to attachment immunity are narrower than the exceptions to jurisdictional immunity. Although there is some overlap between the exceptions to jurisdictional immunity and those for immunity from execution and attachment, there is no escaping the fact that the latter are more narrowly drawn." *Rubin*, 637 F.3d at 796 (internal quotation marks omitted). That is, all else being equal, it is easier to establish subject matter jurisdiction over a foreign sovereign entity than it is to attach and execute on the property in the United States of such an entity.

In the instant case, it is also important to

Rule 69(a) in attachment actions involving foreign states. *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 474 n.10 (2d Cir. 2007) ("*EM Ltd. I*").

[12] Several circuits have expressly held that "[f]ederal sovereign immunity from execution does not defeat a court's jurisdiction." *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1125 (9th Cir. 2010); *see also Weinstein v. Islamic Republic of Iran*, 831 F.3d 470, 479, 484 (D.C. Cir. 2016) (subject matter jurisdiction can exist even where plaintiff did not establish exception to attachment immunity under FSIA); *Rubin*, 637 F.3d at 799-800 (finding FSIA § 1609 attachment and execution immunity is "not jurisdictional"). Regardless of whether this would be a correct statement of the law in the Third Circuit, the Court has decided that it must address both jurisdictional immunity and attachment/execution immunity and, accordingly, does so in this Opinion.

understand that the scope of the exceptions to attachment and execution immunity vary depending on whether the property targeted by the plaintiff is property of the foreign sovereign itself or, instead, is property of an agency or instrumentality of the foreign sovereign. Consequently, "property owned by a foreign state's instrumentalities is generally more amenable to attachment than property owned by the foreign state itself." *Id.* at 794. As applied here, however, because of the Court's alter ego finding, Crystallex's burden is the greater of the two: as the Court is treating PDVSA as Venezuela, and therefore treating the property of PDVSA as the property of Venezuela, Crystallex must satisfy the narrower exception to execution immunity applicable to property of foreign states.

4. PDVSA Is Presumptively Separate from Venezuela

It is undisputed that PDVSA is an agency or instrumentality of Venezuela, having been separately formed by Venezuela in the 1970s. (*See, e.g.*, Tr. at 13, 36) "[D]uly created instrumentalities of a foreign state are to be accorded a presumption of independent status." *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 627, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983) ("*Bancec*"). This is a strong presumption. *See Arch Trading Corp. v. Republic of Ecuador*, 839 F.3d 193, 201 (2d Cir. 2016). "Both *Bancec* and the FSIA legislative history caution against too easily overcoming the presumption of separateness." *De Letelier v. Republic of Chile*, 748 F.2d 790, 795 (2d Cir. 1984); *see also EM Ltd. II*, 800 F.3d at 99 ("[*Bancec*] sets a high bar for when an instrumentality will be deemed an alter ego

of its sovereign state.").

Indeed, in *Bancec* – the leading case on how the presumption of separateness between a foreign state and its agency or instrumentality may be overcome – the Supreme Court explained that "the instrumentality's assets and liabilities must be treated as distinct from those of its sovereign in order to facilitate credit transactions with third parties." 462 U.S. at 626, 103 S.Ct. 2591. "Freely ignoring the separate status of government instrumentalities would result in substantial uncertainty over whether an instrumentality's assets would be diverted to satisfy a claim against the sovereign, and might thereby cause third parties to hesitate before extending credit to a government instrumentality without the government's guarantee." *Id.* "Due respect for the actions taken by foreign sovereigns and for principles of comity between nations leads us to conclude ... that government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *Id.* at 626-27, 103 S.Ct. 2591 (citation omitted).

Therefore, the Court must presume that PDVSA retains its status as separate and distinct from the nation of Venezuela. Unless Crystallex can overcome this strong presumption, the Court must dismiss this case.

5. Federal Common Law Provides The Applicable Disjunctive Test For Rebutting Presumption of Separateness

The FSIA does not address the circumstances under which an agency or instrumentality of a foreign state may be treated as the sovereign state

itself for purposes of either jurisdiction or attachment and execution. Thus, to determine whether Crystallex has rebutted the strong presumption of separateness between PDVSA and Venezuela, the Court applies standards developed pursuant to federal common law. *See Bancec*, 462 U.S. at 623, 103 S.Ct. 2591. "The controlling case for when an instrumentality of a foreign sovereign state becomes the 'alter ego' of that state" is, once again, *Bancec. EM Ltd. II*, 800 F.3d at 89; *see also Doe v. Holy See*, 557 F.3d 1066, 1080 (9th Cir. 2009) ("The *Bancec* standard is in fact most similar to the 'alter ego' or 'piercing the corporate veil' standards applied in many state courts to determine whether the actions of a corporation are attributable to its owners.").[13]

In *Bancec*, the Supreme Court explained that the "presumption may be overcome in certain circumstances:" (1) "where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created, we have held that one may be held liable for the actions of the other," ***and "[i]n addition,"*** (2) where adhering to "the broader equitable principle" of corporate separateness "would work fraud or injustice." *Id.* at 628-29, 103 S.Ct. 2591 (emphasis added; internal quotation marks omitted). The test, then, is disjunctive. A party such as Crystallex may rebut the presumption of

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[13] Importantly, it is federal law, not state law, that applies. PDVSA's reliance on *Canfield v. Statoil USA Onshore Props. Inc.*, 2017 WL 1078184, at *10-11 (M.D. Pa. Mar. 22, 2017), a case applying Delaware state law, is unpersuasive. *Canfield* involved an alter ego relationship between a Delaware corporation and its foreign-sovereign-owned parent corporation. Here, the pertinent relationship is that between Venezuela and PDVSA, neither of which is a Delaware corporation.

separateness by establishing either of the foregoing and need not establish both. *See Fed. Ins. Co. v. Richard I. Rubin & Co.*, 12 F.3d 1270, 1287 (3d Cir. 1993) ("We recognize that there are two major exceptions to the *Bancec* rule, namely, the independent corporate status of government-owned entities should be disregarded (1) 'where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created;' ***or*** (2) where to give effect to the separate instrumentalities 'would work fraud or injustice.'") (emphasis added); *see also Arch Trading*, 839 F.3d at 201 (stating alter ego may be shown by either extensive control "or ... fraud or injustice"); *EM Ltd. II*, 800 F.3d at 90-91 (same); *Holy See*, 557 F.3d at 1077-80 (same).[14]

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[14] PDVSA has been somewhat inconsistent on this point. After agreeing at the hearing that the applicable standard is disjunctive (*see, e.g.*, Tr. at 50-52), it asserted in a post-hearing letter that "control alone" is not enough, as "it is well established that an alter ego theory, under *Bancec* or otherwise, requires evidence of both extensive control ***and*** an abuse of the corporate form resulting in an injury to the plaintiff." (D.I. 51 at 3 n.2) (emphasis in original; citing D.I. 26 at 16-18) PDVSA likewise argued in its letter that "[a]n alter ego relationship exists '***only if*** (1) the owner exercised complete control over the corporation with respect to the transaction at issue ***and*** (2) such control was used to commit a fraud or wrong that injured the party seeking to pierce the veil.'" (D.I. 51 at 1-2 (quoting *BRIDAS S.A.P.I.C. v. Gov't of Turkmenistan*, 447 F.3d 411, 416 (5th Cir. 2006) (emphasis added)); *see also id.* at 3 ("[A]n abuse of PDVSA's corporate form ... is ***required*** to establish an alter ego relationship under *Bancec*.") (emphasis added); D.I. 54 at 2 (PDVSA reiterating view that "abuse of PDVSA's corporate form resulting in harm to Crystallex [i]s ***required*** under *Bancec*") (emphasis added)) As Crystallex observes, *BRIDAS* did not hold that the applicable test is conjunctive; it only held that under the facts presented there, both portions of the test were satisfied. (*See* D.I. 53 at 1 n.1) The Court concludes – consistent

The Court will refer to the *Bancec* disjunctive test for whether the presumption of separateness has been rebutted as the "extensive control" and "fraud or injustice" tests (or prongs), respectively.[15]

In "examin[ing] ... the nature of government instrumentalities," the *Bancec* Court noted these entities "vary considerably, but many possess a number of common features." 462 U.S. at 623-24, 103 S.Ct. 2591.

> A typical government instrumentality, if one can be said to exist, is created by an enabling statute that prescribes the powers and duties of the instrumentality, and specifies that it is

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with the authorities cited in the text and Crystallex's consistent position – that the applicable test is disjunctive.

[15] While the applicable federal common law test is disjunctive, even its excessive control prong inherently assumes that some element of unfairness would result if the Court fails to treat one entity as the alter ego of the other. In this regard, the *Canfield* decision (noted at footnote 13, *supra*), is instructive (though not controlling). It observed, in discussing *Bancec's* excessive control test, "[t]here are several alter ego tests within this circuit ... but all seek the same purpose of holding a parent liable for the actions of a subsidiary or a corporation responsible for the actions of its shareholders.... In addition, there must be some overall element of injustice or unfairness present" (internal quotation marks and citations omitted). *Canfield*, 2017 WL 1078184, at *11. These generalized equitable considerations, while far from sufficient to overcome the strong immunities set out in the FSIA, have some relevance to any full and fair attempt to apply *Bancec* and distinguish the vast majority of "normal[ ]" cases – in which separate entities must be treated as separate – from those rare exceptional cases where the presumptions are overcome. *See* 462 U.S. at 627, 103 S. Ct. 2591.

> to be managed by a board selected by the government in a manner consistent with the enabling law. The instrumentality is typically established as a separate juridical entity, with the powers to hold and sell property and to sue and be sued. Except for appropriations to provide capital or to cover losses, the instrumentality is primarily responsible for its own finances. The instrumentality is run as a distinct economic enterprise; often it is not subject to the same budgetary and personnel requirements with which government agencies must comply.

Id. at 624, 103 S.Ct. 2591. A typical government instrumentality would, normally, retain its separate juridical status. *See id.* at 633, 103 S.Ct. 2591.

Still, "[d]etermination of who is and is not an agent of whom will be in great part factual, and the fact-finding should be explicit." *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 448 (D.C. Cir. 1990) (internal citation and quotation marks omitted). In *Bancec*, the Supreme Court emphasized that it was not "announc[ing] [a] 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, 103 S.Ct. 2591; *see also Hester Int'l Corp. v. Federal Republic of Nigeria*, 879 F.2d 170, 179 (5th Cir. 1989) (describing how "determination of whether a government instrumentality is a separate juridical entity involves the application of the law to fact-specific situations").

The burden of making the appropriate showing rests on the party seeking to rebut the presumption of separateness, which here is Crystallex. *See Hester*, 879 F.2d at 179; *see also Foremost-McKesson*, 905 F.2d at 447 ("It is further clear that the plaintiff bears the burden of asserting facts sufficient to withstand a motion to dismiss regarding the agency relationship.") (emphasis omitted). The Supreme Court has held that a plaintiff must "make out a legally valid claim" and ultimately prove the facts supporting the court's jurisdiction under the FSIA; it is insufficient simply to state a "non-frivolous" claim to that effect. *See Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, —— U.S. ——, 137 S. Ct. 1312, 1316, 1318-19, 197 L.Ed.2d 663 (2017) (considering jurisdictional standard under FSIA expropriation exception); *see also Owens v. Republic of Sudan*, 864 F.3d 751, 779 (D.C. Cir. 2017).

B. Crystallex Has Met Its Burden with Respect to Jurisdictional Immunity

It is undisputed that the Court has subject matter jurisdiction with respect to Crystallex's claim against Venezuela, given the FSIA's arbitration exception. Nonetheless, PDVSA has moved to dismiss Crystallex's efforts to collect on its judgment against Venezuela by attaching the property in the United States of PDVSA, on the theory that PDVSA is Venezuela's alter ego. In the Court's view, PDVSA's motion presents both a facial and factual attack on the Court's subject matter jurisdiction.[16]

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[16] Among the questions the Court recently directed the parties to address were: "Is PDVSA's motion to dismiss a facial or factual challenge, or both? Is the answer the same for jurisdictional

Below, after setting out the statutory basis for the Court's undisputed jurisdiction with respect to Venezuela, the Court addresses PDVSA's facial and factual challenges. As to the facial challenge to the sufficiency of Crystallex's allegations, the Court determines that Crystallex's burden is to rebut the presumption of separateness between Venezuela and PDVSA by showing probable cause. The Court then explains that, taking Crystallex's allegations as true, Crystallex has met this burden by adequately alleging that Venezuela exerts extensive control over PDVSA, including its day-to-day operations, rendering PDVSA the alter ego of Venezuela. However, Crystallex has not shown probable cause to find that recognizing the separateness of PDVSA and Venezuela would work a fraud or injustice.

Turning next to PDVSA's factual challenge, the Court concludes that Crystallex's burden is to prove its allegations by a preponderance of the evidence – not, as PDVSA contends, by clear and convincing evidence. The Court then summarizes the evidence presented by both sides and finds that Crystallex has proven, by a preponderance of the evidence, that Venezuela extensively controls PDVSA, and has, thus, proven that PDVSA is Venezuela's alter ego. With respect to the fraud or injustice prong, however, Crystallex has not met its burden.

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immunity and for execution immunity?" (D.I. 68 at 1) The parties' responses to these seemingly straightforward questions collectively amount to approximately three pages of single-spaced text. (*See* D.I. 70 at 1-2; D.I. 71 at 1-2) The Court's best assessment is that it is presented with both facial and factual challenges. To the extent this is unclear, in an abundance of caution the Court treats PDVSA's motion as if it presents both types of challenges.

1. The Court Has Undisputed Jurisdiction With Respect to Venezuela

PDVSA does not challenge the Court's subject matter jurisdiction with respect to Venezuela. It is undisputed that Crystallex has gone beyond probable cause and fully proven that Venezuela is not immune from suit due to registration of the confirmed arbitration award against Venezuela. (*See* D.I. 3-1 at 5-7)

As noted previously, § 1604 of the FSIA renders foreign states like Venezuela "immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607" of the Act. 28 U.S.C. § 1604. The exception Crystallex relies on to establish subject matter jurisdiction with respect to Venezuela is § 1605(a)(6), relating to arbitration:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case ...
>
> > (6) in which the action is brought ... to confirm an award made pursuant to ... an agreement to arbitrate, if
> >
> > > (A) the arbitration takes place or is intended to take place in the United States ....

It is undisputed that the Court has subject matter jurisdiction over Venezuela under § 1605(a)(6)(A) due to Crystallex's $1.2 billion arbitral award against Venezuela, which was confirmed by the United States District Court for the District of Columbia, and is now registered in the District of Delaware.

2. PDVSA's Facial Attack

There is no dispute that this litigation can go forward against Venezuela. But Venezuela has not appeared and Crystallex has not identified any specific property directly owned by Venezuela that can be found in the District of Delaware. Instead, as noted throughout this Opinion, Crystallex seeks to execute its judgment against Venezuela by attaching and executing on property owned by PDVSA and found in Delaware; specifically, the shares of Delaware corporation PDVH, which are indisputably directly owned by PDVSA. Hence, the Court now addresses PDVSA's facial attack on the Court's subject matter jurisdiction.

a. Crystallex's burden is probable cause

As previously noted, when considering PDVSA's facial attack on the sufficiency of Crystallex's allegation that PDVSA is Venezuela's alter ego, the Court takes as true all of Crystallex's well-pled factual allegations. *See, e.g., Rong v. Liaoning Province Government*, 452 F.3d 883, 888 (D.C. Cir. 2006) ("If the defendant challenges only the legal sufficiency of the plaintiff's jurisdictional allegations, then the district court should take the plaintiff's factual allegations as true and determine whether they bring the case within any of the exceptions to immunity invoked by the plaintiff. If a foreign state argues that even if taken as true, the plaintiff's allegations are insufficient to come within the commercial activity exception, this amounts to a challenge to the legal sufficiency of the allegations.") (internal quotation marks and citations omitted); *see also Holy See*, 557 F.3d at 1073 ("[A] motion to dismiss for lack of jurisdiction under the FSIA is no

different from any other motion to dismiss on the pleadings for lack of jurisdiction, and we apply the same standards in evaluating its merit.").[17]

The burden is on Crystallex to show that these allegations support a finding of at least probable cause that the *Bancec* presumption of separateness has been rebutted. *See Strick Corp. v. Thai Teak Prods. Co.*, 493 F.Supp. 1210, 1217 (E.D. Pa. 1980) ("The writ should issue only if on its face probable cause exists for accepting its conclusion."); *Local Union No. 626 United Bhd. of Carpenters & Joiners*

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[17] Because this miscellaneous action was initiated not by a complaint but instead by a motion, there is some uncertainty as to what materials the Court should look to for purposes of the facial challenge. The Court concludes it is appropriate to take as true all "well-pled" factual allegations contained in Crystallex's motion, briefs, letters, declarations, expert reports, exhibits, or during any hearing or teleconference with the Court. (*See* D.I. 70 at 3) There is no doubt PDVSA has had fair notice of each of these allegations and a full opportunity to rebut them. In any event, even were the Court to take a more restrictive approach – for instance, limiting its consideration to only those factual allegations contained in Crystallex's opening brief in support of its motion – the Court would still find that Crystallex had met its burden to show probable cause.

Relatedly, both sides fault the other for purportedly fatal procedural failings. PDVSA complains that "Crystallex should have commenced a plenary action against PDVSA by filing a complaint and serving PDVSA in accordance with the procedures set forth in the FSIA." (D.I. 71 at 2) Crystallex counters that PDVSA should have "move[d] to quash the writ after issuance, as is the ordinary course," rather than intervening and "preemptively" moving to dismiss. (D.I. 70 at 3 n.5) In the Court's view, both parties had options as to how to proceed, and there is nothing deficient in how they chose to do so. Certainly, neither party can credibly contend that it has been denied due process or had an inadequate opportunity to be heard.

of Am. Pension Fund v. Delmarva Concrete Corp., 2004 WL 350452, at *2-3 (E.D. Pa. Feb. 24, 2004) (requiring "factual basis for satisfying" alter ego standard); *see also* 10 Del. C. § 3507 ("A writ of foreign attachment may be issued against any corporation, aggregate or sole, not created by or existing under the laws of this State upon proof satisfactory to the court that the defendant is a corporation not created by, or existing under the laws of this State, and that the plaintiff has a good cause of action against the defendant in an amount exceeding $50."); Del. Super. Ct. Civ. R. 49(b)(1) ("The proof required for the issuance of a mesne writ of attachment under Chapter 35, Title 10, Delaware Code, will be satisfied by filing with the complaint an affidavit of plaintiff or some credible person setting forth the facts required by the applicable statute.").

Undertaking this analysis, the Court concludes that Crystallex has met its burden to overcome PDVSA's facial attack. Specifically, Crystallex has met this burden with respect to the extensive control prong of *Bancec*, but not with respect to the fraud or injustice prong.

b. Extensive control

Taking Crystallex's allegations as true, Crystallex has shown at least probable cause for a finding that PDVSA is not immune from suit. This is because Crystallex has stated sufficient allegations that, if proven, would rebut the presumption of separateness and establish that PDVSA is the alter ego of Venezuela.

In determining whether a corporate entity is "so extensively controlled" by a sovereign state, the Court considers "whether the sovereign state exercises

significant and repeated control over the instrumentality's day-to-day operations." *EM Ltd. II*, 800 F.3d at 91; *see also Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines*, 965 F.2d 1375, 1382 (5th Cir. 1992) ("[W]e look to the ownership and management structure of the instrumentality, paying particularly close attention to whether the government is involved in day-to-day operations, as well as the extent to which the agent holds itself out to be acting on behalf of the government."); *Holy See*, 557 F.3d at 1079-80 (requiring "day-to-day, routine involvement" to overcome *Bancec* presumption).

Considerations relevant to the fact-intensive inquiry of whether a sovereign state exercises control over an instrumentality's day-to-day operations include:

> whether the sovereign nation: (1) uses the instrumentality's property as its own; (2) ignores the instrumentality's separate status or ordinary corporate formalities; (3) deprives the instrumentality of the independence from close political control that is generally enjoyed by government agencies; (4) requires the instrumentality to obtain approvals for ordinary business decisions from a political actor; and (5) issues policies or directives that cause the instrumentality to act directly on behalf of the sovereign state. These factors are relevant to answering the touchstone inquiry for "extensive control": namely, whether the sovereign state exercises significant and repeated control over

> the instrumentality's day-to-day operations.

EM Ltd. II, 800 F.3d at 91.

Crystallex makes sufficient allegations which, taken as true, establish probable cause that the presumption of separateness is rebutted. As summarized in Crystallex's briefing on the motions, Crystallex has alleged each of the factors identified above, as well as other bases for finding Venezuela exercised significant and repeated control over PDVSA's day-to-day operations. Borrowing from Crystallex's briefing, the Court sets out below the well-pled allegations that, collectively, demonstrate probable cause that Venezuela extensively controls PDVSA, rebutting the *Bancec* presumption of separateness.[18]

Venezuela Using PDVSA's Property As Its Own

- Venezuela uses PDVSA's property, including aircraft and tanker trucks, for its own political purposes

Ignoring PDVSA's Separate Status

- PDVSA discloses Venezuela's control and willingness to direct the company to act against its interests as risk factors in its bond offering

[18] *See, e.g.*, D.I. 3-1 at 7-23; D.I. 33 at 10-12 (internal quotation marks, citations, and footnotes omitted). Crystallex's allegations as set out in its briefing are rearranged here in order to track more closely the recitation of factors as contained in *EM Ltd. II*. The pertinent factors are not exhaustive – the Court can (and does) consider other factors, and not every factor need be present – nor are they mutually exclusive, as many of them overlap. Reasonable minds will differ as to the category into which to place any specific allegation or evidence.

documents

- At least for marketing purposes, including on Twitter, PDVSA regularly boasts "PDVSA es Venezuela," which translates to "PDVSA is Venezuela"

Depriving PDVSA of Independence from Close Political Control

- Venezuela appoints PDVSA's Board of Directors, and several Government Ministers are also members of PDVSA's Board of Directors
- Venezuela's Oil Minister has almost always also been PDVSA's President and Director
- Venezuela's Oil Ministry and PDVSA share physical office space
- Venezuela – including its President – hires and fires, and exerts political pressure on, both high- and low-level PDVSA employees, including by requiring that PDVSA managers be trained according to the Government's social policies
- PDVSA's Articles of Incorporation confirm that it is required to adhere to the guidelines and policies established or agreed upon by the National Executive

Requiring PDVSA to Obtain Approvals for Ordinary Business Decisions

- Venezuela's National Executive regulates and supervises PDVSA's operations
- Venezuela instructs PDVSA to whom it must sell oil internationally and at what price
- Venezuela dictates the price at which oil is sold domestically (forcing PDVSA to subsidize gas

prices)

Issuing Policies Causing PDVSA to Act Directly on Behalf of Venezuela

- PDVSA was created by presidential decree not to generate profits but as a national company to implement national policy on hydrocarbons
- From 2010 through 2016, Venezuela required PDVSA to contribute to the State directly (through taxes, royalties, and dividends in the amount of approximately $119 billion) and indirectly (through off-budget social programs and other public expenditures that have nothing to do with the hydrocarbons industry in the amount of approximately $82 billion)
- Venezuela uses PDVSA to achieve its social and political goals, both domestically (e.g., through Fondo Nacional para el Desarrollo Nacional ("FONDEN"), a social development fund) and abroad (e.g., through Petrocaribe)
- Venezuela forces PDVSA to provide oil to China and Russia as repayment for loans those countries made to Venezuela
- Venezuela directs PDVSA to sell oil to other friendly nations on non-economic terms to advance Venezuela's foreign policy objectives

Additional Indications of Venezuela's Extensive Control Over PDVSA

- Venezuela manipulates PDVSA's conversion of U.S. Dollars to Venezuelan Bolivars to leverage PDVSA's revenues for the sole benefit of Venezuela and to the detriment of PDVSA
- Venezuela uses PDVSA to expropriate private

investment

- PDVSA paid Venezuela's fees to the ICSID tribunal in the underlying arbitration between Venezuela and Crystallex

PDVSA's facial challenge can be summarized as follows:

> [T]he facts asserted in [Crystallex's motion] and supporting memorandum of law demonstrate nothing more than ordinary shareholder control and government regulation that cannot, as a matter of law, satisfy the required showing that the shareholder exercise complete domination and control over the corporation's day-to-day operations.

(D.I. 71 at 4) The Court is not persuaded. Crystallex has shown probable cause to rebut the presumption of separateness between the Republic of Venezuela and PDVSA. PDVSA's arguments are weightier (though ultimately unsuccessful) in connection with its factual challenge, where the Court can (and does) consider PDVSA's evidence, and not just Crystallex's allegations.

c. Fraud or injustice

Crystallex contends that it has satisfied both prongs of the disjunctive *Bancec* test: extensive control as well as fraud or injustice. While, as already explained, the Court agrees with the former assertion, it rejects the latter. Even taking Crystallex's well-pled allegations as true, there is not probable cause that giving effect to the separateness of Venezuela and PDVSA would "work a fraud or injustice" as that term is used in *Bancec* (i.e., as a

stand-alone test that may be satisfied independent of whether there is extensive control).[19] Instead, as PDVSA contends, Crystallex has not "show[n] that the Republic abused PDVSA's corporate form to perpetrate a fraud or injustice resulting in harm to Crystallex." (D.I. 71 at 5)

Crystallex alleges that the expropriation of its interest in the Las Cristinas mines "resulted in a multibillion dollar benefit to state-owned and controlled PDVSA." (D.I. 3-1 at 32) Further, Crystallex contends that "Venezuela reaps enormous benefits from owning and operating an oil refining company under the protection of Delaware law ... in an attempt to protect Venezuela's Delaware assets from execution." (*Id.*) From these premises, Crystallex asks the Court to "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 [to] 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." (*Id.*; *see also* D.I. 33 at 17 ("Venezuela uses PDVSA to generate billions of dollars in revenue in the United States through its commercial refining and oil industry subsidiaries, while simultaneously using PDVSA to shield those same assets from creditors in the United States."))

Crystallex's allegations fail because they do not

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[19] It follows that neither has Crystallex met its higher burden of proving fraud or injustice by a preponderance of the evidence. Therefore, Crystallex's motion with respect to the fraud or injustice prong also fails to survive PDVSA's factual challenge.

sufficiently allege that Venezuela used PDVSA as an instrument to defraud Crystallex. Everything Crystallex alleges that Venezuela did to harm Crystallex could have been done – and, indeed, was alleged to have been done – by Venezuela itself, regardless of whether PDVSA even existed. It was Venezuela, not PDVSA, which expropriated Crystallex's interests in the mines. While Venezuela may have subsequently transferred those interests to PDVSA, it did not need to do so as part of its scheme to defraud Crystallex or to engineer an unjust outcome. Crystallex does not even allege that PDVSA participated in or facilitated the expropriation. Nor does Crystallex allege in anything other than an insufficient, conclusory manner that PDVSA was created and/or is being maintained by Venezuela for the purpose of defrauding Crystallex and other creditors.

As PDVSA persuasively explains:

> PDVSA had nothing to do with the underlying dispute between the parties to the arbitration. And PDVSA is not a newly created sham corporation designed to insulate the Republic from liability. PDVSA was established over 40 years ago and is one of the largest oil companies in the world.... [T]he mere fact that a government instrumentality benefits from the actions of the government does not demonstrate an abuse of the corporate form required to overcome the presumption of separateness under *Bancec*.

(D.I. 26 at 19-20)

Therefore, the Court concludes that Crystallex cannot meet its burden under *Bancec's* fraud or injustice prong.

2. PDVSA's Factual Attack

As previously noted, PDVSA's motion presents both a facial and factual attack on Crystallex's efforts to establish subject matter jurisdiction. In evaluating the factual challenge, the Court does not assume the truth of Crystallex's allegations. Instead, the Court must consider the evidence presented by Crystallex, as well as any competing evidence presented by PDVSA, and determine, under the appropriate burden of proof, whether Crystallex's evidence meets that burden.

For the reasons set out below, the Court concludes that (1) Crystallex's burden is to prove, by a preponderance of the evidence, that Venezuela extensively controls PDVSA, and (2) Crystallex has met this burden.

a. Crystallex's burden is preponderance of the evidence

While the parties agree that Crystallex bears some burden in order to obtain its requested writ, they disagree as to the nature of that burden. Crystallex argues for the "'usual ... rule generally applicable to civil actions in federal courts'": that the plaintiff must prove its case by a preponderance of the evidence. (D.I. 52 at 1) (quoting *Ramsey v. United Mine Workers of Am.*, 401 U.S. 302, 308, 91 S.Ct. 658, 28 L.Ed.2d 64 (1971)) PDVSA contends that Crystallex, as "a party seeking to rebut the strong presumption of separateness under *Bancec*, bears the heavy burden of proving an alter ego relationship by

clear and convincing evidence." (D.I. 51 at 1) The Court agrees with Crystallex.

As Crystallex correctly points out, *Bancec* held there is "no mechanical formula" for assessing whether the presumption of separateness has been rebutted. 462 U.S. at 633, 103 S.Ct. 2591. Nor does *Bancec* speak of a heightened burden. Neither does the FSIA address the standard of proof or suggest it is a heightened one. (*See* D.I. 52 at 1) In this situation, the Court discerns no basis to depart from the ordinarily prevailing standard in a civil case, which is the preponderance of the evidence standard. *See generally McNutt v. Gen. Motors Acceptance Corp. of Indiana*, 298 U.S. 178, 189, 56 S.Ct. 780, 80 L.Ed. 1135 (1936) ("[T]he court may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence.").

The sparse caselaw on the subject further supports this conclusion.[20] While many cases in this area fail to state the standard of proof being applied, Crystallex cites a handful of cases that expressly apply a preponderance of the evidence standard. *See, e.g., Kirschenbaum v. 650 Fifth Ave.*, 257 F. Supp. 3d 463, 472 (S.D.N.Y. 2017) (issuing findings of fact based on "assessment of the preponderance of the credible evidence," while also finding "massive amount of evidence" that left Court "firmly convinced

[20] As the District Court for the District of Columbia has recognized, "[w]hile the D.C. Circuit has explained that the court must look beyond the pleadings and even conduct limited jurisdictional discovery when a foreign-sovereign defendant challenges the factual basis for subject-matter jurisdiction under the FSIA, there is no authority to direct this court as to the appropriate burden of proof." *Kilburn v. Republic of Iran*, 277 F.Supp.2d 24, 33 n.5 (D.D.C. 2003).

... by far more than a preponderance of the evidence"); *Kensington*, 2007 WL 1032269, at *5 (applying preponderance of evidence standard). As Crystallex further notes, other courts have undertaken a "totality of the circumstances" analysis, *Bridas*, 447 F.3d at 417, or assessed whether claims were "well-supported" or supported by "sufficient [evidence of] control," *McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346, 351-52 (D.C. Cir. 1995) – approaches which do not suggest that these courts were applying any heightened evidentiary standard. In a case involving alter ego allegations outside the sovereign immunity context, the Third Circuit (applying state law) has applied a preponderance of the evidence standard. *See Plastipak Packaging, Inc. v. DePasquale*, 75 Fed. App'x 86, 90 (3d Cir. 2003).

PDVSA has not cited a single case that applied a clear and convincing evidence standard to an alter ego inquiry in the context of *Bancec* and the FSIA. PDVSA's cases applying state-law alter ego standards (like state-law cases cited by Crystallex) are unhelpful, as the Court is (by the parties' agreement) applying a federal law standard.[21] PDVSA broadly asserts that "the clear and convincing evidence

[21] As Crystallex acknowledges, "[t]he Third Circuit has also stated, without citation, that alter-ego claims that 'rely on a fraud theory' require proof by clear and convincing evidence." (D.I, 52 at 2 n.1) (quoting *Kaplan v. First Options of Chi, Inc.*, 19 F.3d 1503, 1522 (3d Cir. 1994)) Since the Court has already concluded that Crystallex failed to establish even probable cause to support application of the fraud or injustice prong of *Bancec*, and cannot prove fraud or injustice by a preponderance of the evidence, it follows that Crystallex also could not meet the clear and convincing evidence standard. Thus, there is no need for the Court to resolve which of the evidentiary standards applies to the fraud or injustice test.

standard applies any time a party seeks to overcome a legal presumption." (D.I. 51 at 2) But this is incorrect, as Crystallex demonstrates. (*See* D.I. 53 at 2) ("That ignores decades of decisions holding that a wide range of presumptions across different subject-matter areas could be rebutted by a preponderance of the evidence.") (citing cases)

The Court does not agree with PDVSA that "a preponderance of the evidence standard is inconsistent with" *Bancec*'s "strong presumption" of separateness. (D.I. 54 at 1-2) PDVSA does not cite authority to support the view that the strength of the presumption necessarily alters the standard of proof necessary to rebut it. The "strong" characterization of the presumption helps explain the justification for it and the importance of the Court enforcing it, unless and until it is overcome by the required amount of evidence. It does not, however, dictate a clear and convincing burden of proof.

Hence, the Court will now turn to evaluating whether Crystallex has met its burden of proof by a preponderance of the evidence.

b. Extensive control

Based on the evidence presented by both parties,[22] the Court finds that Crystallex has proven by a preponderance of the evidence that PDVSA is not immune from suit. The record contains sufficient

[22] Crystallex requests that the Court take judicial notice of many of the exhibits included in its appendix, particularly those which are acts and statements of various branches of the Venezuela Government as well as orders issued by or public filings made in U.S. Courts. (*See* D.I. 9) No opposition to this request has been filed. (*See generally* Tr. at 67-68) The Court will take judicial notice as requested.

evidence to enable the Court to find – including by resolving disputed issues of fact[23] – that PDVSA is the alter ego of Venezuela. In particular, Crystallex has met its burden to show that Venezuela extensively controls PDVSA.

As noted above, while there is no mechanical formula that applies to this inquiry, the Court finds it helpful to organize its discussion based initially on factors that are commonly looked to, in the same order that the Court identified these same factors in connection with PDVSA's facial challenge. The Court then considers some additional evidence further supporting its findings.

i. Venezuela's use of PDVSA's property as its own

Crystallex has proven by a preponderance of the evidence that Venezuela regularly uses PDVSA's assets as its own. (*See* D.I. 3-1 at 16-17, 31) (citing evidence)

Venezuela uses PDVSA aircraft for travel by Venezuelan officials and to escort other countries' politicians who are "friendly to Venezuela," even when they are not traveling to or from Venezuela. (*See* D.I. 3-1 at 16-17; *see also, e.g.*, D.I. 5-1 Ex. 54 at 1 (LaPatilla reporting, "They don't try to hide it any more. It is an official policy to use the large fleet of VIP ... airplanes of Pdvsa and the government itself not only for the private use of public officials ... but

[23] *See generally Bolivarian Republic of Venezuela*, 137 S. Ct. at 1324 ("If a decision about the matter requires resolution of factual disputes, the court will have to resolve those disputes, but it should do so as near to the outset of the case as is reasonably possible.").

also to make use of the Venezuelan people's money ...."); *id.* Ex. 55 (BBC reporting, "The President of Venezuela, Nicolas Maduro, stated ... that Colombian guerilla leader Rodrigo Londoño Echeverri, alias 'Timochenko', the senior commander of the [Revolutionary Armed Forces of Columbia]..., traveled in an official Venezuelan airplane [owned by PDVSA] to Havana."); *id.* Ex. 56 (Noticias24 reporting "Venezuelan Foreign Minister Nicolas Madura ... stated ... that the deposed president of Honduras Manuel Zelaya has left the United States bound for his country in an airplane bearing Venezuelan registration number ... and flown by 'a Venezuelan captain'"); *id.* Ex. 57 (Reportero24 reporting, "Pdvsa allocates 3 luxury airplanes for the use of the Cuban regime," airplanes which "were previously utilized to serve executives of the state-owned Petróleos de Venezuela (PDVSA) company" and which "only visit Venezuela when they require maintenance")) Venezuela also uses PDVSA trucks as physical barriers to prevent anti-government demonstrators from gathering. (*See id.* Ex. 58) (LaPAtilla reporting PDVSA trucks were blocking central highway and being guarded by Bolivarian National Police and Bolivarian National Guard)

ii. Ignoring PDVSA's separate status

Crystallex has proven by a preponderance of the evidence that Venezuela regularly ignores PDVSA's separate status. This is evidenced in numerous statements PDVSA has made in filings associated with efforts to raise money, including bond offering documents.

For example, in a November 11, 2011 offering document, PDVSA disclosed:

> [T]he Venezuelan government ***required*** us to acquire several electricity generation and distribution companies, as well as certain food companies .... The Venezuelan government has also nationalized and continues to nationalize other companies in Venezuela.. .. [T]he Venezuelan government announced the nationalization of Venoco ... and ***required*** ... us to acquire the assets of Venoco at a price to be determined in the future.

(D.I. 4-3 Ex. 40 at 16-17) (emphasis added) In September 2016, PDVSA advised its bondholders it could provide 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." (*Id.* Ex. 44 at 28) (emphasis added)

In the context of the full record developed here, the Court finds that these acknowledgments by PDVSA of actions Venezuela has "required" it to take, and material commitments Venezuela has "impose[d]" on it, are indicative of Venezuela, its sole shareholder, ignoring the separate legal status of PDVSA.

This finding is bolstered by PDVSA's repeated identification of itself, including on Twitter, as Venezuela. PDVSA has used the hashtag "#PDVSAesVenezuela," which literally means "PDVSA is Venezuela." (D.I. 4-1 Ex. 3) The Court disagrees with PDVSA that Crystallex's arguments

relating to the Twitter hashtag are "frivolous." (D.I. 26 at 37 n.13) PDVSA also disseminates Venezuelan propaganda through its social media presence by regularly tweeting messages in support of the Government and portraying a photograph of former President Hugo Chavez as its banner heading. (D.I. 5-1 Exs. 67-69)

In connection with other evidence in the record, these facts constitute additional evidence that Venezuela and PDVSA regularly ignore their separate legal status.

iii. Depriving PDVSA of independence from close political control

Crystallex has proven by a preponderance of the evidence that Venezuela has deprived PDVSA of independence from close political control.

This is illustrated by the fact that Venezuela's President, Nicolas Maduro, appoints PDVSA's directors, vice-presidents, and members of its shareholder council. (*See* D.I. 4-1 Ex. 13; *see also* D.I. 4-3 Ex. 40 at 16 (PDVSA Nov. 11, 2011 Notes Offering Circular) ("The President of Venezuela appoints our president and the members of our Board of Directors by executive decree.")) In January 2017, President Maduro also appointed Nelson Martinez, former President of Citgo (a corporate subsidiary several steps below the Government of Venezuela), as Minister of the People's Power for Oil and Mining ("Oil Minister") and President of PDVSA. (*See* D.I. 4-2 Exs. 23-24) In November, 2017, a newspaper headline announced, "President Maduro Appoints Asdrúbal Chávez As New President of Citgo." (D.I. 42-1 Ex. 110; *see also* Tr. at 30)

In 2002, then-President of Venezuela, Hugo Chavez, fired two PDVSA employees on national television, fired seven PDVSA executives, and forcibly retired 12 other PDVSA employees. (D.I. 8 at ¶ 21) In 2003, "the Government fired nearly 40% of the PDVSA's workforce at the time (approximately 18,000 PDVSA employees) because of their role in opposing the Government." (*Id.*; *see also* D.I. 7 at ¶ 11) As recently as July 2017, Venezuela continued to threaten to terminate PDVSA employees who were opposed to the governing regime. (*See* D.I. 4-2 Ex. 35 at 2 ("Political appointees are gaining clout at the expense of veteran oil executives, while employees are under mounting pressure to attend government rallies and vote for the ruling Socialists. The increasing focus on politics over performance is contributing to a rapid deterioration of Venezuela's oil industry ...."); *id.* at 3 ("Managers told workers they would be fired unless they voted in Maduro's controversial election ...."); *see also* D.I. 4-3 Ex. 66 (President Maduro reported as stating, "If there are 15,000 workers, all 15,000 workers must vote without any excuses"))

There is also a great deal of overlap between the leadership of Venezuela and that of PDVSA. In November 2017, President Maduro appointed a military general as Oil Minister and also as President of PDVSA. (*See* Tr. at 29-30) That individual's predecessors, Nelson Martinez, Eulogio del Pino, and Rafael Ramirez Carreño, similarly served simultaneously as both Venezuela's Oil Minister and PDVSA's President. (*See* D.I. 4-2 Exs. 23-24) In a speech to the International Assembly in 2014, former Oil Minister and PDVSA President, Rafael Ramirez, said; "today we can say with clarity that we have the

lull and sovereign management of our oil industry." (D.I. 4-3 Ex. 38 at 17; *see also* Tr. at 19) Given the evidence recited throughout this Opinion, the Court considers it reasonable to infer that when individuals who simultaneously hold office in the Government of Venezuela and in PDVSA confront situations in which the interests of their two "bosses" conflict, they make decisions based on what they view to be the best interests of Venezuela, even if that comes at the expense of PDVSA's interests.[24]

While hiring and firing board members may also be "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," *EM Ltd. II*, 800 F.3d at 92-93, given the totality of the circumstances here the Court finds these facts to be evidence that Venezuela "interfere[d] in and dictate[d] [PDVSA's] daily business decisions," *id.*

Additionally, PDVSA's Articles of Incorporation require that it adhere to policies established by the National Executive. (*See* D.I. 4-1 Ex. 13; *see also* D.I. 8 at ¶ 20) Venezuela's National Executive, through the Oil Ministry, also "regulates and supervises PDVSA's operations, exercises control of PDVSA's production and export of oil, and grants the rights

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[24] Among other evidence supporting this inference is, as will be described further below, how PDVSA in its own public filings warns investors that the Republic of Venezuela may force PDVSA to take actions that are not in PDVSA's own interests as a corporation, when, in the Republic's view, those actions will further policies and goals of the nation itself. (*See, e.g.*, D.I. 4-3 Ex. 40 at 16) ("As a result, we may engage in activities that give preference to the objectives of the Venezuelan government rather than our economic and business objectives.")

and mining areas as established under Venezuelan law." (D.I. 8 at ¶ 20) (internal quotation marks omitted)

iv. Requiring PDVSA to obtain approvals for ordinary business decisions

Crystallex has proven by a preponderance of the evidence that in addition to designating oil production levels by official decree, Venezuela also "dictates the severely discounted price at which PDVSA must sell its product to Venezuelan citizens" and "forces PDVSA to 'sell' oil to third parties for no, or *de minimis*, consideration." (D.I. 3-1 at 12) (citing evidence) In a 2011 debt offering, PDVSA explained: "[t]he Venezuelan government, rather than the international market, determines the price of products ... sold by us through our affiliates in the domestic market." (D.I. 4-3 Ex. 40 at 14) The Government sets the prices for oil sold within Venezuela and designates oil production levels. (*Id.* Ex. 39; D.I. 7 at ¶ 38)[25]

Venezuela's National Executive regulates and supervises PDVSA's operations. (*See* D.I. 7 at ¶ 7; D.I. 4-3 Ex. 40) The Government compels PDVSA to sell oil to China, Russia, and 17 Caribbean countries at a discount in order to support Venezuela's foreign policy. (*See* D.I. 5-1 Exs. 72-74, 77; *see also* D.I. 8 at ¶¶ 49-50; D.I. 7 at ¶¶ 9, 31-37) Energy Minister

[25] Crystallex points to PDVSA's audited financial statements, which reveal that PDVSA received a government subsidy "corresponding to the difference between the cost of production and the regulated sale price of motor and diesel fuels in the national market," which KPMG called "an unusual transaction" and "key audit issue." (D.I. 3-1 at 20; D.I. 7 at ¶ 40)

Rafael Ramirez has explained that PDVSA "is not a company designed to generate profits;" instead, it "is a national company." (D.I. 7 at ¶ 39)

PDVSA observes that other oil-producing nations similarly regulate oil policies, making PDVSA no different from any other national oil company. (D.I. 26 at 8, 31) Just because PDVSA shares this feature (and perhaps others) with "typical" national oil companies does not, however, deprive this feature of all evidentiary value in assessing whether Venezuela exercises extensive control over PDVSA. Nor, of course, is this the only evidence on which the Court is relying to find an alter ego relationship.

v. Issuing policies causing PDVSA to act directly on behalf of Venezuela

The record further establishes that Venezuela causes PDVSA to achieve domestic social and political goals and to advance Venezuela's foreign policy goals. (D.I. 3-1 at 17-21) (citing evidence)

PDVSA was created by Presidential Decree, in 1975, to implement government policy. (*See* D.I. 4 Exs. 11, 12; D.I. 8 at ¶ 9) The "History" section of PDVSA's website lists among the company's "Strategic guidelines" the following: "Support the geopolitical position of the country and key objectives of Venezuelan foreign policy, such as the promotion of comprehensive cooperation with strategic allies ...." (D.I. 4-2 Ex. 32 at 1)

In 2002, the National Executive reorganized PDVSA, expanding its corporate mission beyond the hydrocarbons industry to "take on a more political role." (D.I. 3-1 at 17) Under the new structure, PDVSA funds Venezuelan programs that have

nothing to do with its business, causing PDVSA to take on additional debt. Such programs include PDVSA Agrícola S.A., which subsidizes Venezuela's agriculture, industrial infrastructure, and produce sectors, and PDVSA Desarrollos Urbanos S.A., which subsidizes Venezuela's housing projects. (*Id.* at 18; D.I. 8 at ¶ 41) PDVSA's total contributions to the Venezuelan budget between 2010 and 2016 were in excess of $119 billion. (D.I. 7 at ¶ 20)[26] As PDVSA disclosed to investors in September 2016: "[T]he government ***requires*** us to make significant financial contributions to social programs, including transfers to FONDEN, as well as requiring us to fund specific projects. In 2014 and 2015, we made total contributions to FONDEN in the amounts of U.S. $974 million and U.S. $3,306 million, respectively." (D.I. 4-3 Ex. 44 (PDVSA Offer Sept. 16, 2016) at 29) (emphasis added); *see also* D.I. 4-2 Exs. 19, 30)

PDVSA asserts that "[t]hese taxes and currency regulations, which apply to companies other than PDVSA, are not a basis for disregarding PDVSA's legal separateness." (D.I. 26 at 33 n.9) It is true that Venezuela regulates and taxes the entire oil industry operating in the country, not just PDVSA. (*See* D.I. 28 at ¶ 5; *see also* D.I. 26 at 7-8) But that does not mean the taxation and regulation of PDVSA is inconsistent with a finding of PDVSA being Venezuela's alter ego.

Moreover, the tax and regulatory policies are only some of the Venezuelan policies that cause PDVSA to act directly on behalf of Venezuela, as already noted.

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[26] PDVSA points out that in this same period PDVSA had revenues of more than $724 billion and earned a total net profit of over $45 billion. (D.I. 27-1 Exs. 4-6)

Venezuela also uses PDVSA to achieve its foreign policy goals by committing PDVSA to sell oil to certain Caribbean and Latin American nations at substantial discounts, without PDVSA's consent. (D.I. 3-1 at 21) (citing evidence) Even when those oil debts are repaid, the money is given to Venezuela, not PDVSA. (*Id.*; D.I. 5-1 Ex. 77) Venezuela has entered into agreements with China whereby PDVSA acts "on behalf of the Bolivarian Republic of Venezuela" to repay China. (D.I. 4-3 Ex. 49 at 3; *see also id.* at 5 (additional references to PDVSA taking on duties "on behalf of the Bolivarian Republic of Venezuela" or "acting on behalf of the Bolivarian Republic of Venezuela")) China has thereby paid more than $50 billion to Venezuela (for oil) yet PDVSA itself has received nothing. (D.I. 7 at ¶ 37)

Consistent with the foregoing, PDVSA stated the following in a November 11, 2011 Notes Offering Circular:

> We are controlled by the Venezuelan government, which ultimately determines our capital investment and other spending programs.... The Bolivarian Republic of Venezuela, as our sole owner, has pursued, and may pursue in the future, certain of its macroeconomic and social objectives through us. As a result, we may engage in activities that give preference to the objectives of the Venezuelan government rather than our economic and business objectives. We may make investments, incur costs and engage in sales on terms that affect our results of operations and financial condition.

(D.I. 4-3 Ex. 40 at 16)

vi. Additional indications of Venezuela's extensive control over PDVSA

The record contains additional evidence of Venezuela's extensive control over PDVSA, evidence that does not neatly fit into one or more of the categories above.

For instance, it is undisputed that PDVSA paid the administrative fees Venezuela incurred in connection with the arbitration with Crystallex, which amounted to around $249,000. (*See* Tr. at 40-41; D.I. 6 (Fung Decl.) at ¶¶ 3-5, Exs. 1-2)[27]

Also, Venezuela manipulates PDVSA's conversion of U.S. Dollars to Venezuelan Bolivars to leverage PDVSA's revenues for the sole benefit of Venezuela and to the detriment of PDVSA. (*See* D.I. 7 at ¶ 26; *see also* D.I. 4-3 Exs. 47-48) PDVSA is required to convert foreign currency into Venezuelan Bolivars at an artificially low U.S. Dollar to Bolivar exchange rate "(which is approximately 1/500th of the market rate)." (D.I. 7 at ¶ 26; *see also* D.I. 8 at ¶ 46; D.I. 4-3 Ex, 48) The Republic can then exchange that currency at more favorable rates. (D.I. 7 at ¶ 26; *see also* D.I. 4-3 Ex. 48)

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[27] PDVSA insists there is "nothing untoward" about an entity paying a debt of its shareholder owner. (Tr. at 41; *see also EM Ltd. II*, 800 F.3d at 93 (stating that "repayment by [a government instrumentality] of [a foreign country's] other debts does not establish the existence of an alter ego relationship," at least where instrumentality was a national bank, as "central banks commonly perform payment functions for their governments")) That this observation is true does not mean this evidence lacks relevance or contradicts the Court's findings.

Additionally, in November 2017, PDVSA announced: "As of today, the command of the oil industry passes into the hands of the country's first worker, Nicolas Maduro." (D.I. 42-1 Ex. 112 at 1) PDVSA has also stated that one of its objectives is to "guarantee control by the State over [PDVSA]." (D.I. 5-1 Ex. 60)

Finally, Venezuela has designated PDVSA as an expropriating entity, thereby authorizing it to exercise a sovereign power. (*Id.* Exs. 86-88, 99)

All of the foregoing is further evidence supporting the Court's conclusion.

vii. PDVSA's contrary interpretation wrongly fails to account for the totality of the evidence

PDVSA recognizes the support in the record for the Court's findings identified above. Indeed, as Crystallex notes, the evidence here is "largely undisputed," as PDVSA has instead "focus[ed] its challenges on the inferences that may be drawn from the undisputed facts." (D.I. 52 at 2) PDVSA's arguments against concluding an alter ego relationship exists rest largely on disputing the relevance of Crystallex's evidence and insisting that none of the above-listed findings individually transforms PDVSA into Venezuela's alter ego.

The Court disagrees with PDVSA's protestations that all of Crystallex's evidence is irrelevant. (*See, e.g.*, Tr. at 47 ("extensive regulation by an oil producing state of its hydrocarbon industry" is irrelevant); *id.* at 54 (characterizing as irrelevant whether Venezuela itself benefitted from acts taken by PDVSA); *id.* at 55 (contending designation of

PDVSA as expropriating entity, use by Venezuela of PDVSA property without reimbursement, and sale of oil to other countries at reduced prices are "totally irrelevant")) Based on the caselaw discussed in this Opinion, the Court concludes that all of the considerations on which the Court has relied are relevant to the issue of whether Venezuela so extensively controls PDVSA, including its day-to-day conduct, that it should be treated as Venezuela's alter ego for purposes of application of the FSIA. As has been noted repeatedly in this Opinion, *Bancec* did not establish a mechanical formula for courts to apply. It is appropriate for the Court to consider the totality of circumstances that either side wishes to present.

Much of PDVSA's attack on Crystallex's showing consists of dissecting the totality of Crystallex's evidence and arguing that no single piece of evidence renders PDVSA the alter ego of Venezuela. (*See, e.g.*, D.I. 26 at 20 ("mere fact that a government instrumentality benefits from the actions of the government does not demonstrate an abuse of the corporate form"); *id.* at 33-34 ("mere fact that PDVSA may have been designated as an expropriating entity in certain other cases is not grounds for disregarding its separate legal personality"); *id.* at 35-36 (contending that Venezuela's use of PDVSA's planes "would not support" veil piercing); *id.* at 35 (contending sale of oil to other countries on deferred payment and other favorable terms "do[es] not support a finding of alter ego liability")) Of course, no single piece of evidence in the record is sufficient on its own to enable Crystallex to meet its burden, but of course that also is not what the law requires. Again, the Court must consider all of the evidence in the record. When it does so, the Court finds that it

sufficiently proves, by a preponderance of the evidence, that PDVSA is the alter ego of Venezuela.

PDVSA also characterizes itself as merely a "typical" national oil company, the type of creature that *Bancec* compels must retain its separate juridical status. (*See* Tr. at 53 ("[A]ll they have shown is that it is the same as other national oil corporations that are owned by petrol states."); *see also* D.I. 26 at 2 (arguing PDVSA is "nothing more than a 'typical government instrumentality'") (quoting *Bancec*)) While the Court agrees with PDVSA that it possesses many of the characteristics *Bancec*, 462 U.S. at 624, 103 S.Ct. 2591, ascribed to "typical" government instrumentalities – it was created by an enabling statute, is managed by a board selected by the government, has powers to hold and sell property and sue and be sued, and is primarily responsible for its own finances – PDVSA also has numerous other characteristics, which the Court has described above in detail. Considering the totality of the evidence, the Court finds that PDVSA is not merely a "typical government instrumentality" but is the alter ego of Venezuela.

viii. The parties' declarations confirm the Court's findings

The Court's findings described above are further supported by the declarations the parties submitted. Together, Crystallex and PDVSA have filed six substantive declarations: two each from Dr. Roberto Rigobon and Professor Jose Ignacio Hernandez, who endorse Crystallex's view that PDVSA is the alter ego of Venezuela; and one each from Professor Luis A. Garcia Montoya and Mr. Alejandro Schmilinsky, supporting PDVSA's view that the two entities are

properly viewed as separate. (*See* D.I. 7, 8, 28, 29, 35, 36)[28] While there are certainly disputes among the various declarations, to the limited extent those disputes are material, the Court resolves them in favor of Crystallex, for the reasons explained below.

Dr. Rigobon, a professor of management at the Massachusetts Institute of Technology and Research Associate of the National Bureau of Economic Research, opines on the economic realities of the relationship between PDVSA and Venezuela, specifically concluding that: (1) the Venezuelan Government exercises complete economic control over PDVSA's day-to-day operations; (2) Venezuela relies on PDVSA to sustain its economy; and (3) the Venezuelan Government uses PDVSA for political purposes. (*See* D.I. 7 at ¶¶ 7-9) Dr. Rigobon also explains that PDVSA was created by Presidential Decree and initially behaved "like an economically-driven company," including by setting its own budget, making its own decisions, and promoting, hiring, or firing its own staff. (*See id.* at ¶ 11) Then, however, in 2002 and 2003, the Government began getting involved in PDVSA's affairs, effectively converting the formerly commercial-minded PDVSA into the present State-controlled "New PDVSA." (*See id.* at ¶¶ 11-13)

This transformation was accomplished by the Government's appointment of then-President Chavez's "most trusted allies" to manage PDVSA, creating "substantial overlap between the [PDVSA] Board of Directors and senior members of the Government." (*Id.* at ¶¶ 13-14) In 2002, the

[28] Other declarations in the record (*see, e.g.*, D.I. 4-6, 27, 34, 42, 47) transmit documents and additional evidence to the Court.

Government began requiring PDVSA to contribute monetarily to Venezuela, directly through oil revenues (totaling $119 billion from 2010 to 2016) and "extraordinary taxes," and indirectly through social programs such as FONDEN (to which, PDVSA contributed more than $34 billion from 2010 to 2016) and other programs created to subsidize consumer housing and gasoline purchases through PDVSA. (*See id.* at ¶¶ 15, 21, 23-29; *see also* D.I. 36 at ¶ 2)

Regarding PDVSA's day-to-day operations, Dr. Rigobon opines that "Venezuela dictates the quantity of oil that PDVSA must produce (partly through OPEC [29] commitments), the parties to which PDVSA must sell its oil, and the price at which PDVSA must sell its oil." (D.I. 7 at ¶ 30) The Government does this, in part, through Petrocaribe, an agreement pursuant to which Venezuela committed PDVSA to supply oil to 17 Caribbean countries on favorable economic terms, and similar agreements Venezuela entered into with China and Russia, all to enable Venezuela to "reap[ ] enormous political benefits." (*Id.* at ¶¶ 31-37) Venezuela controls PDVSA's oil production levels and regulates the price at which all refined products are sold in Venezuela, often causing PDVSA to suffer a loss in profits. (*Id.* at ¶ 38)

Dr. Rigobon agrees with Professor Montoya that PDVSA is "financially autonomous" from Venezuela (see below), but persuasively opines how "[a]ll that means ... is that the budget of Venezuela and the budgets of State-owned companies are governed differently;" it does not mean that "PDVSA operates independently from Venezuela as a practical matter

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[29] Organization of Petroleum Exporting Countries. (*See* D.I. 26 at 8)

(it does not)." (D.I. 36 at ¶ 3) The Court agrees with Dr. Rigobon that even if "PDVSA is on paper an independent organization from the Venezuelan Government," PDVSA is not "a de-facto independent organization." (*Id.*)

Professor Hernandez, Crystallex's Venezuelan law expert, opines that "Venezuela and PDVSA are one and the same as a matter of Venezuelan law." (D.I. 8 at ¶ 7) He describes the Public Administration Organic Law, which "nominally" recognizes PDVSA's "own legal personality," but in fact allows PDVSA's "activities" to be "controlled by the National Executive Branch by 'control agencies or entities.'" (*Id.* at ¶¶ 13-14) Professor Hernandez further observes that the Venezuelan Supreme Court has recognized that PDVSA has all the "privileges" of the Republic, and "although PDVSA is a company constituted and organized as a corporation," as is enshrined in the country's Constitution, PDVSA nonetheless "falls within the framework of the general structure of the National Public Administration." (*Id.* at ¶ 16)

Professor Hernandez also explains how Venezuela has used PDVSA to assist in the Government's expropriation objectives. (*See id.* at ¶¶ 22-25) He opines as to the Government's formulation of PDVSA's pricing policies and management of PDVSA's employment policies (*see id.* at ¶¶ 19-21), the overlap of directors and officers between PDVSA and the Government (*see id.* at ¶¶ 28-33), the Government's increased control after the establishment of "New PDVSA" (*see id.* at ¶¶ 34-38), and the use of PDVSA to achieve Venezuela's social and political objectives (*see id.* at ¶¶ 39-50). Citing the opinions of various "learned commentators," all of

whom have concluded that "PDVSA and its affiliates are considered a state company of a unique nature" (*id.* at ¶ 26), Professor Hernandez persuasively concludes that whether PDVSA has its own legal personality "has no bearing" on the reality that Venezuela and PDVSA are not, in practice, separate entities (D.I. 35 at ¶ 2).

On behalf of PDVSA, Professor Montoya, PDVSA's expert in Venezuelan law, opines that "PDVSA enjoys a legal personality of its own as a corporation separate and distinct from the Republic." (D.I. 28 at ¶ 4) In his view, "neither the importance of PDVSA in the national economy nor the fact that it is highly regulated changes the fact that PDVSA has all the attributes in law of separate legal personality." (*Id.*) Additionally, Professor Montoya asserts that PDVSA is "financially autonomous from the Republic," "has its own budget, and ... is subject to a budgetary regime distinct from that of the Republic," and that various tweets and press reports cited by Crystallex carry no legal significance under Venezuelan law. (*See id.* at ¶¶ 28, 33)

Much of Professor Montoya's declaration emphasizes that, according to the PDVSA Bylaws, PDVSA operates as a *sociedad anónima* ("SA"), a corporate form having one or more shareholders, which makes it clear PDVSA is not a department of the Government. (*See id.* at ¶¶ 7-11, 18, 24-26) His opinion is echoed by Mr. Schmilinsky, PDVSA's litigation corporate manager, who explains PDVSA's corporate structure – naming the various directors, officers, and corporate managers – and points out that PDVSA is an SA, whose only shareholder has

ever been the Republic. (D.I. 29 at ¶¶ 4, 8-10)[30] Neither of Crystallex's experts disagrees with this conclusion: Dr. Rigobon and Professor Hernandez acknowledge that PDVSA is an SA with its own legal personality. (*See* D.I. 35 at ¶ 5; D.I. 36 at ¶ 3) But the important point - which is the opinion of Crystallex's experts, as well as the finding of the Court, after considering the totality of the evidence, including the views of PDVSA's experts – is that, in practice, PDVSA operates as the alter ego of Venezuela.

Professor Montoya further discusses the distinction made in the Public Administration Organic Law between Centralized Administration departments, which do not have their own legal personalities, and the Decentralized Administration, which consists of entities, like PDVSA, which do have their own legal personalities. (*See* D.I. 28 at ¶¶ 16-19) Professor Montoya cites a decision by the Supreme Tribunal of Justice (Constitutional Chamber), which recognized "the legal nature of PDVSA as [an SA] and confirmed that PDVSA is part of the Public Administration, but not part of the Centralized Administration." (*Id.* at ¶ 18) Again, Crystallex's declarants do not challenge the facts of this conclusion, just their significance, and again the Court agrees with Crystallex's view as to their minimal importance.

ix. Conclusion as to exclusive control test

Having made the factual findings noted

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[30] Mr. Schmilinsky further states that "PDVSA is a stranger to the dispute between Crystallex and the Republic." (D.I. 29 at ¶ 14)

throughout the discussion above by a preponderance of the evidence after considering all of the record evidence cumulatively, the Court finds that Crystallex has rebutted the presumption of separateness and has shown that PDVSA may be deemed the alter ego of Venezuela pursuant to the exclusive control prong of *Bancec* and its progeny. Therefore, Crystallex has proven the applicability of an exception to PDVSA's sovereign immunity. The Court rejects PDVSA's factual challenge to the Court's subject matter jurisdiction.

C. Crystallex Has Met Its Burden with Respect to Execution Immunity

Having found that Crystallex has met its burden to rebut the presumption of separateness between PDVSA and Venezuela and proven that PDVSA is the alter ego of Venezuela, and therefore no jurisdictional immunity prevents the Court from having authority to resolve the parties' disputes, the Court must next determine whether Crystallex has also overcome the immunities embodied in the FSIA relating to attachment and execution on property held by foreign sovereigns in the United States. On this issue, while again PDVSA's motion can be read as raising both facial and factual attacks, the analysis essentially overlaps and, hence, can be conducted once.

Three issues are presented: (i) which statutory provision applies, (ii) has the property Crystallex seeks to attach – the shares of Delaware corporation PDVH – been used for commercial activity, and (iii) even if the shares have been so used, are they currently being used for commercial activity, which requires consideration of certain Executive Orders issued by the U.S. Treasury Department's Office of

Foreign Asset Control ("OFAC"). The Court addresses each in turn.

1. The Court Applies § 1610(a), Not § 1610(b)

"[T]he FSIA codifies the common-law rule that property of a foreign state in the United States is ***presumed*** immune from attachment and execution. To overcome the presumption of immunity, the plaintiff must identify the particular foreign-state property he seeks to attach and then establish that it falls within a statutory exception." *Rubin*, 637 F.3d at 796. "The party in possession of the property may raise the immunity or the court may address it sua sponte." *Id.* at 801.

While "the execution immunity afforded sovereign property is broader than the jurisdictional immunity afforded the sovereign itself," *Walters*, 651 F.3d at 289, the statutory framework for attachment and execution immunity mirrors that for jurisdictional immunity. Attachment and execution immunity are governed by FSIA § 1609, subject to specific exceptions to that immunity recited in §§ 1610 and 1611.

Section 1609 provides:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

28 U.S.C. § 1609.

Section 1610 identifies exceptions to immunity based on whether the property subject to attachment is that of a foreign state, § 1610(a), or of an agency or instrumentality of a foreign state, § 1610(b). "[T]he property of an agency or instrumentality of a foreign state is afforded narrower protection from execution than the property of the foreign state itself." *Walters*, 651 F.3d at 289-90.

For property of a foreign state to be subject to attachment under § 1610(a), it must be "***used for*** a commercial activity in the United States" and, under the subsection implicated here, § 1610(a)(6), the attachment must be in aid of a judgment "based on an order confirming an arbitral award rendered against the foreign state" (emphasis added). Under the broader exceptions to immunity under § 1610(b), attachment is proper where the agency "***engaged in*** commercial activity in the United States," regardless of whether the particular property subject to attachment was used for commercial activity (emphasis added). Therefore, the Court must determine whether to apply § 1610(a) or § 1610(b).

Although there is no dispute that PDVSA is an agency of Venezuela (*see* D.I. 28 at 4-8, 12-14; D.I. 35 at 2, 4; D.I. 36 at 3) and, therefore, one might expect § 1610(b) to apply, because the Court concludes that PDVSA is to be treated as Venezuela's alter ego for purposes of jurisdictional immunity, PDVSA must also be treated as Venezuela's alter ego for purposes of execution immunity. Therefore, the property subject to attachment – PDVSA's shares in PDVH – may properly be considered property of Venezuela, implicating § 1610(a).

Moreover, Crystallex expressly moves only under

§ 1610(a) – and PDVSA appears to agree that only § 1610(a) applies. (*See* Tr. at 6 ("[W]e have filed a motion under the FSIA, Section 1610(a)."); *see also* D.I. 3-1 at 25 (citing § 1610(a), (c)); D.I. 33 at 7 n.6 (same); D.I. 52 at 3 (relying on § 1610(a)); D.I. 26 at 37 (PDVSA stating, "where, as here, a judgment creditor of a foreign state attempts to reach the assets of an agency or instrumentality on the theory that it is the alter ego of the state under *Bancec*, the judgment creditor must satisfy the more restrictive exceptions to execution immunity set forth in Section 1610(a)"); D.I. 51 at 4 (relying on § 1610(a))[31] Thus, the Court will apply § 1610(a).

2. Used For Commercial Activity

As identified above, Crystallex proceeds under § 1610(a)(6), which recites:

> (a) The property in the United States of a foreign state ... used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if ...
>
> > (6) the judgment is based on an order confirming an arbitral award rendered against the foreign state,

[31] In the event that § 1610(b) were held to apply, the Court would be required to deny the requested writ, as Crystallex cannot meet its burden to show applicability of any exception to immunity enumerated in § 1610(b), as it has failed to prove (or even allege) waiver of attachment immunity by PDVSA or jurisdiction under §§ 1605(a)(2), (3), (5), (7), 1605(b), or 1605A. Nor does Crystallex have a judgment against PDVSA.

> provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement.[32]

As it is undisputed that Crystallex's judgment is based on an order confirming an arbitral award rendered against Venezuela, PDVSA's shares in PDVH are subject to post-judgment attachment and execution if they are "used for commercial activity in the United States." 28 U.S.C. § 1610(a).[33]

"[P]roperty is 'used for a commercial activity in the United States' when the property in question is put into action, put into service, availed or employed ***for*** a commercial activity, not ***in connection*** with a commercial activity or ***in relation*** to a commercial activity." *Af-Cap Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1091 (9th Cir. 2007). The FSIA defines a "commercial activity" as "either a regular course of commercial conduct or a particular

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[32] Section 1610(c) details the procedural requirements for an attachment under § 1610(a) or (b), requiring the Court to first determine that "a reasonable period of time has elapsed following the entry of judgment" and that any required notice is given. It is undisputed that these procedural requirements have been met. (*See* D.I. 4 Ex. 8) (D.C. Court finding reasonable time elapsed)

[33] "[A] foreign sovereign's property is subject to execution under § 1610(a) only when the sovereign itself uses the property for a commercial activity." *Rubin v. Islamic Republic of Iran*, 830 F.3d 470, 479 (7th Cir. 2016); *see also Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 256 n.5 (5th Cir. 2002) ("[W]hat matters under the statute is how the foreign state uses the property, not how private parties may have used the property in the past."). As PDVSA is the alter ego of Venezuela, it follows that PDVSA's use of the PDVH assets for commercial activity can be said to be the sovereign's use.

commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C.A. § 1603(d). "[B]ecause the [Foreign Sovereign Immunity] Act provides that the commercial character of an act is to be determined by reference to its 'nature' rather than its 'purpose,' the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in 'trade and traffic or commerce.'" *Weltover, Inc.*, 504 U.S. at 614, 112 S.Ct. 2160 (internal citation omitted).[34] In general, if the sovereign state is using property in the same manner as a private citizen could, then it is being used for a commercial purpose. If, alternatively, the property is being used in a manner that only a sovereign state can use it, then it is not being used for a commercial purpose and cannot be attached. *See, e.g., id.* at 614-15, 112 S.Ct. 2160 ("[A] foreign government's issuance of regulations limiting foreign currency

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[34] While PDVSA takes issue with Crystallex's reliance on *Weltover* due to its discussion of "commercial activity" arising in the context of jurisdictional immunity, not execution activity (*see* D.I. 26 at 39 n.14), courts have noted that "in defining 'commercial activity,' [the FSIA] does not provide any different definition for § 1605 versus § 1610. Courts have therefore applied decisions concerning immunity under § 1605 to construe the scope of 'commercial activity' under § 1610." *Aurelius Capital Partners, LP v. Republic of Argentina*, 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).

exchange is a sovereign activity, because such authoritative control of commerce cannot be exercised by a private party; whereas a contract to buy army boots or even bullets is a 'commercial' activity, because private companies can similarly use sales contracts to acquire goods ...").

In determining whether property is used for a commercial purpose, the Court must "make factual findings concerning how the property was used" and "reach legal conclusions concerning whether that particular use was 'for commercial purposes.'" *Af-Cap Inc. v. Republic of Congo*, 383 F.3d 361, 368 (5th Cir.), *decision clarified on reh'g*, 389 F.3d 503 (5th Cir. 2004). This requires "a more holistic approach," requiring the Court to "examine the totality of the circumstances surrounding the property." *Id.* at 369.

Crystallex contends that PDVSA – and therefore, Venezuela – uses the PDVH shares for commercial activity by "exercising its rights as a shareholder" and using the shares to name directors of PDVH and to approve contracts. (D.I. 52 at 3) Crystallex further contends that PDVSA uses the PDVH shares to conduct commercial business through PDVH's wholly-owned subsidiary, CITGO, a Delaware corporation. (*Id.* at 4) PDVSA responds that "Crystallex cannot demonstrate that PDVSA uses the PDVH shares for a commercial activity in the United States" (D.I. 26 at 39) and has "presented no evidence concerning PDVSA's use of the PDVH shares" (D.I. 51 at 4).

The Court finds by a preponderance of the evidence that the PDVH shares are being "used for a commercial purpose" by PDVSA and, therefore, may be attached (and executed on) as property of

Venezuela's alter ego.[35] The PDVH shares are used for a commercial purpose because, through them, PDVSA manages its ownership of PDVH and, consequently, CITGO,[36] in the United States. *See In re 650 Fifth Ave.*, 2014 WL 1516328, at *17 (S.D.N.Y. Apr. 18, 2014), *vacated on other grounds and remanded sub nom. Kirschenbaum v. 650 Fifth Ave. & Related Props.*, 830 F.3d 107 (2d Cir. 2016) (stating shares in company "were also used for commercial activity, because they were the mechanism through which the partners owned the Building and determined the distribution of revenue that it produced").

Specifically, Venezuela – through PDVSA – uses the shares to appoint directors, approve contracts, and pledge assets as security for PDVSA's debt. (*See, e.g.*, D.I. 42 Ex. 110 (news article announcing Venezuelan President Nicolás Maduro appointed Asdrúbal Chávez as new president of Citgo); D.I. 52 Ex. B at 14 (PDVSA's "main operating segments" use shares to conduct "[r]efining, trade and supply activities in the United States of America

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[35] PDVSA insists that Crystallex has not met its burden to overcome the presumption of immunity from attachment by clear and convincing evidence. (D.I. 51 at 4) For reasons already explained in connection with exceptions to jurisdictional immunity, the Court agrees with Crystallex that its burden of proof is a preponderance of the evidence, and not clear and convincing evidence.

[36] As PDVSA acknowledges: "PDVSA owns 100% of the shares of PDVH, a Delaware corporation, which in turn owns 100% of the shares of CITGO Holding, Inc., which in turn owns 100% of the shares of CITGO Petroleum Corp. ("CITGO"), a multi-billion dollar Delaware corporation headquartered in Texas and founded in 1910." (D.I. 26 at 9)

compris[ing] the administration of refineries and gasoline and refined products marketing ... under the CITGO® brand"); D.I. 52 Ex. A at 20 (PDVH may pledge assets, including its CITGO shares, as security for PDVSA's debt)) As Crystallex states, "it is difficult to imagine property with more of a commercial use than shares of a Delaware for-profit corporation that itself owns, through an intermediate holding company, a multi-billion dollar Delaware petroleum corporation." (D.I. 33 at 18; *see also* H.R. Rep. No. 94-1487, at 16, 1976 U.S.C.C.A.N. 6604, at 6615 (1976) ("Activities such as a foreign government's ... investment in a security of an American corporation ... would be among those included within the definition of ['commercial activity']."). In sum, Venezuela is using the shares of PDVH "not as a regulator of a market, but in the manner of a private player within it," rendering its actions "'commercial' within the meaning of the FSIA." *Weltover*, 504 U.S. at 614, 112 S.Ct. 2160.

3. Can the PDVH Shares Be Used Now For Commercial Activity?

The property subject to attachment - here the PDVH shares – must also be "'used for a commercial activity' at the time the writ of attachment or execution is issued." *Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120, 130 (2d Cir. 2009). It is not sufficient that a foreign state's property in the United States "will be used" or "could potentially be used" for a commercial activity in the United States. *Id.*; *see also City of Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31, 36, 37 (3d Cir. 1985) ("The determinative issue is whether [the property] is currently being used in a

'regular course of commercial conduct' [and not whether] the property was acquired by [the foreign state] in a commercial transaction.").

PDVSA contends the PDVH shares are "effectively frozen" and cannot be used for a commercial activity (D.I. 51 at 4) because Executive Order 13808, entitled "Imposing Additional Sanctions With Respect to the Situation in Venezuela," 82 Fed. Reg. 41,155 (Aug. 29, 2017), precludes the issuance of dividends (D.I. 26 at 40; D.I. 54 at 3), while Executive Order 13835, "Prohibiting Certain Additional Transactions With Respect to Venezuela," 83 Fed. Reg. 24,001 (May 24, 2018), and related OFAC guidance, together prohibit attachment and execution of the PDVH shares (D.I. 63 at 2). (*See* Tr. at 34) (PDVSA arguing, "what the Executive Order says is you cannot purchase equity from Venezuela in the United States" and "[t]here can't be a buyer in the United States")

Crystallex responds that "selling these shares so that a judgment of a United States Court could be satisfied is not what these sanctions are trying to prevent." (Tr. at 76) According to Crystallex, "Executive Order [13808] does not change that PDVH is a commercial enterprise and that PDVSA's shares are used for commercial activity – the management of its commercial operations in the United States.... PDVSA retains the ability to use the shares to name directors and approve contracts submitted to shareholders for approval.... PDVSA can still pledge its PDVH shares to secure its own short term debt (a commercial use)." (D.I. 52 at 5) Moreover, Crystallex contends that the PDVH shares are equity securities, and OFAC has specifically allowed such dealings in equity, notwithstanding the Executive Order. (*Id.*) (quoting D.I. 34 Ex. 107)

The Court agrees with Crystallex. Once a foreign state has used property in commerce, that property continues to satisfy the commercial use requirement unless that property becomes "cordoned off for use of the [foreign state] in its sovereign capacity." *Af-Cap*, 383 F.3d at 370. Thus, it is presumed that the use of the property for commercial activity is continuing, in the absence of evidence to the contrary. PDVSA has presented no evidence to the contrary, other than pointing to the Executive Orders, which, for reasons now to be explained, do not preclude the possibility that the PDVH shares are continuing to be "used for a commercial activity."[37]

i. Executive Order 13808

Executive Order 13808 provides, in pertinent part:

> Section 1. (a) All transactions related to, provision of financing for, and other dealings in the following by a United States person or within the United States are prohibited:
>
> ...
>
> (iv) dividend payments or other distributions of profits to the Government of Venezuela from any entity owned or controlled, directly or indirectly, by the Government of Venezuela.

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[37] Notably, both Executive Orders expressly define PDVSA as the "Government of Venezuela." (D.I. 34-1 Ex. 106 at 1-2; D.I. 63 at 2; *see also* Tr. at 71-72 (PDVSA counsel admitting as much)) While this statement does not constitute a finding of fact to which the Court must defer, it appears that the Executive Branch's view is consistent with the Court's conclusions.

> (b) The purchase, directly or indirectly, by a United States person or within the United States, of securities from the Government of Venezuela, ... is prohibited.

82 Fed. Reg. 41,155 (Aug. 29, 2017); *see also* D.I. 26 at 40.

This Executive Order, directed to dividend payments and purchases of securities, has no impact on PDVSA's ability to carry on the commercial activities based on exercise of shareholder rights (e.g., replacing board members, pledging assets). Section 1(a)(iv) does not render the PDVH shares non-commercial property because it does not prohibit PDVSA from exercising all ownership rights. Section 1(b) also does not render the PDVH shares noncommercial property or otherwise pose a bar to the relief Crystallex seeks. Upon attachment, the PDVH shares would not be paid or distributed to Venezuela but, eventually, to Crystallex. In fact, as Crystallex states, "PDVSA can ***and does*** continue to engage in a wide array of commercial uses of the shares, such as: naming directors and officers, including, for example, the president of PDVH's indirect subsidiary, CITGO Petroleum, months after sanctions were imposed; running large-scale gas refining and marketing operations in the United States; and directing PDVH (and its subsidiaries) to enter into related-party transactions for PDVSA's benefit, including the sale of PDVSA's (low quality) oil to CITGO Petroleum." (D.I. 53 at 3) (citing evidence)

Moreover, the PDVH shares are equity securities and the OFAC has instructed that "[e]ngaging in

transactions related to, providing financing for, or otherwise dealing in any equity issued by, on behalf of, or for the Government of Venezuela is permissible, if the equity was issued prior to the effective date of [the Executive Order]." (D.I. 34-1 Ex. 107 at 2; *see also id.* ("The term ***equity*** includes stocks, share issuances, depositary receipts, or any other evidence of title or ownership.")) The shares of PDVH that Crystallex seeks to attach were issued before the Executive Order was adopted. The Court, thus, concludes that Executive Order 13808 does not pose a bar to the relief it has granted today.[38] The Court further notes that nothing about its ruling today is inconsistent with the letter or spirit of the Executive Order, which seems intended to deprive Venezuela of certain assets and opportunities, not to prevent legitimate judgment creditors in United States Courts to be made whole by Venezuela. (*See* Tr. at 25) (Crystallex stating, "the idea is that this was, put bluntly, to punish Venezuela, not to punish people who were owed money by Venezuela")

ii. Executive Order 13835

PDVSA contends that Executive Order 13835 and OFAC Frequently Asked Question ("FAQ") No. 596, issued July 19, 2018, "confirm PDVSA's argument that U.S. sanctions prohibit the attachment and execution of the shares of its wholly-owned Delaware subsidiary, PDVH." (D.I. 63 at 2; *see also* Aug. Tr. at 24 (PDVSA characterizing FAQ No. 596 as "most on point" of FAQs parties have discussed))

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[38] It may be that this Executive Order will have some applicability to any transaction Crystallex might seek to undertake with the PDVH shares once they are attached, but it does not, in the Court's view, prevent the attachment.

Executive Order 13835 states, in part:

> Section 1. (a) All transactions related to, provision of financing for, and other dealings in the following by a United States person or within the United States are prohibited:
>
> ....
>
> (iii) the sale, transfer, assignment, or pledging as collateral by the Government of Venezuela of any equity interest in any entity in which the Government of Venezuela has a 50 percent or greater ownership interest.

83 Fed. Reg. 24001 (May 21, 2018); *see also* D.I. 63 at 1-2.

FAQ 596 provides:

> **596. Does E.O. 13835 prohibit me from attaching and executing against assets of the Government of Venezuela, including vessels, properties, or financial assets, if I have a legal judgment against the Government of Venezuela?**
>
> No, provided that the attachment does not involve (i) debt owed to the Government of Venezuela (including accounts receivable) that was pledged as collateral after the effective date of E.O. 13835 (per subsection 1(a)(ii) of the E.O.), or (ii) an equity interest in any entity in which the Government of

> Venezuela has a 50 percent or greater ownership interest (per subsection 1(a)(iii) of the E.O.). OFAC authorization would likely be required for attachment of equity interest in any entity in which the Government of Venezuela has a 50 percent or greater ownership interest, OFAC would consider license applications seeking to attach and execute against such equity interests on a case-by-case basis.

OFAC FAQs: Other Sanctions Programs, *Venezuela Sanctions?*[39]

On the same day OFAC issued FAQ 596, it also issued FAQ 595, which states:

> **595. Why is OFAC issuing General License 5?**
>
> Subsection 1(a)(iii) of E.O. 13835 prohibits U.S. persons from being involved in the transfer by the Government of Venezuela (GOV) of any equity interest in any entity owned 50 percent or more by the GOV, as well as related transactions in the United States. Subsequent to the issuance of E.O. 13835, OFAC received inquiries about how and whether subsection 1(a)(iii) of E.O. 13835 could affect the ability to enforce bondholder rights to the CITGO shares serving as collateral for the PdVSA 2020 8.5 percent bond.

[39] *See* https://www.treasury.gov/resource-center/faqs/Sanctions/-Pages/faq_other.aspx#venezuela.

> Subsection 1(a)(iii) of E.O. 13835 hinders the Maduro regime's ability to dispose of interests in entities owned 50 percent or more by the GOV at terms unfavorable to the Venezuelan people. Authorizing bondholders to enforce rights related to the PdVSA 2020 8.5 percent bond prevents the Maduro regime from using the EO to default on its bond obligations without consequence. In order to provide that authorization, OFAC is issuing General License 5, which removes E.O. 13835 as an obstacle to holders of the PdVSA 2020 8.5 percent bond gaining access to their collateral, and keeps sanctions pressure where it belongs – on the Maduro regime.

Id.

According to Crystallex, FAQ 596 specifically allows attachment and execution of Venezuelan assets and while FAQ 595 "addresses a specific class of creditors, the same reasoning applies to other creditors such as Crystallex." (D.I. 64 at 2) Crystallex further contends that while, in response to FAQ 596, "OFAC did advise – in a non-binding FAQ response – that a license would likely be needed before attachment and execution could be completed, ... that has no impact on the question of whether this Court can or should authorize the relief sought by the Writ Motion in the first instance." (*Id.*)

The Court agrees with Crystallex. Notwithstanding PDVSA's assertion, it is not correct that "OFAC's published views ***confirm*** PDVSA's

argument that the U.S. sanctions ***prohibit*** the attachment and execution of the shares of its wholly-owned Delaware subsidiary, PDVH." (D.I. 63 at 2) (emphasis added) Instead, the OFAC guidance confirms that attaching the PDVH shares "would likely ... require[ ]" OFAC authorization, and that, if such authorization were sought, OFAC would evaluate it "on a case-by-case basis." OFAC FAQs: Other Sanctions Programs, *Venezuela Sanctions*. Accordingly, the Court concludes that Executive Order 13835 does not pose a bar to granting the relief it has granted today.[40]

D. Additional Issues Raised by PDVSA

Although most of PDVSA's arguments against granting Crystallex's requested writ have been addressed in the course of resolving the many issues discussed to this point in this Opinion, several additional contentions merit brief discussion. None, however, alters the outcome.

1. Prejudgment Attachment

PDVSA warns that granting the relief sought by Crystallex will amount to a prejudgment attachment, which is precluded by § 1610(d). (*See, e.g.*, D.I. 71 at 3 ("[T]his Court cannot attach or otherwise restrain PDVSA's shares of PDVH unless and until it enters

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[40] In its letter of July 24, 2018, Crystallex represented that OFAC had issued a license to a previously undisclosed third-party, [Redacted] As Venezuela has not yet made such payments, [Redacted] Crystallex "can and will seek clarification of the current license ... and/or the issuance of an additional license to cover the eventual execution sale of the shares of PDVH once the Writ has issued." (*Id.* at 3) The Court agrees with PDVSA that [Redacted] But these facts do not alter the Court's rulings.

judgment against PDVSA ...."); Tr. at 64) The Court rejects this view and instead agrees with Crystallex that it has a judgment: the confirmed and registered arbitration judgment against Venezuela. (*See, e.g.*, Tr. at 78; Aug. Tr. at 30 ("It's not that we cleverly labeled this as a Rule 69 motion. It is that we cleverly already won our case against the Government of Venezuela and we don't have to file it again and again in every court in the land.")) Crystallex is not seeking to add PDVSA to that judgment. Provided that, as the Court has found, any sovereign immunity that would otherwise protect PDVSA and its specified property has been overcome — by the judgment against Venezuela, the finding that PDVSA is Venezuela's alter ego, and the findings with respect to the "commercial" use of the PDVH shares – then the FSIA is no bar to the relief sought by Crystallex. in this context, it is simply incorrect to call what the Court is doing an improper prejudgment attachment on PDVSA's property.[41]

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[41] Some of the weight PDVSA's contention might otherwise carry is countered by the Court's finding, as a factual matter based on the present record, that PDVSA is accurately treated as Venezuela's alter ego. Were the Court merely to have resolved PDVSA's facial challenge, and assessed only the sufficiency of Crystallex's allegations as opposed to having also weighed the evidence, the argument that Crystallex is proceeding "prejudgment" would have had more appeal (though nonetheless still lack merit). (*See, e.g.*, D.I. 54 at 2) (PDVSA arguing: "an attachment of a putative alter ego's property ***in advance of an adjudication of whether the entity is an alter ego*** is effectively a prejudgment attachment and would only pass constitutional muster where the judgment creditor posts a bond") (emphasis added)

2. PDVSA's Non-Involvement with Expropriation of Crystallex's Property

Throughout this litigation, PDVSA has emphasized the lack of allegations and evidence that PDVSA had anything to do with "the facts and circumstances that gave rise to [Crystallex's] claim for expropriation. It is a stranger to the entire dispute." (Tr. at 39; *see also* D.I. 51 at 3 ("[I]t is undisputed that PDVSA was a complete stranger to that transaction.")) PDVSA is correct. The only connection Crystallex even alleges between PDVSA and the harm Crystallex Has suffered is that, ultimately, Crystallex's expropriated property was given to PDVSA, which then converted part of it into "billions of dollars." (Aug. Tr. at 40; *see also* Tr. at 73 ("[B]asically we had a contract to develop this mine. [Venezuela] took that contract away from us and they gave the mine without the license to PDVSA which went around and sold ... 40 percent of it for $2.4 billion."); *see also* D.I. 5-1 Exs. 78-82 (showing PDVSA ended up with rights to gold mines))[42]

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[42] It is also undisputed that PDVSA was not a party to the arbitration and its name is not mentioned in the arbitration award. (*See* D.I. 51 at 2-3) Although PDVSA has frequently emphasized this fact, too, it does not impact the pending motions, given the Court's conclusions of law and findings of fact as explained throughout this Opinion. Essentially, it is just another way of arguing that an independent basis of subject matter jurisdiction is required in order to impose primary liability on PDVSA for the arbitration judgment against Venezuela. (*See, e.g.*, Tr. at 48) (PDVSA suggesting Court needs to ask itself "was PDVSA, as the agency or instrumentality, involved in the underlying arbitration to the extent that I, this Court, can say that it should be liable on the award") These are contentions the Court has thoroughly considered and rejected – elsewhere in its analysis.

But these facts do not undermine the Court's conclusions. *Bancec* does not require that the alter ego, whose property is being attached and executed, have been involved in the underlying conduct that harmed the judgment creditor. (*See* Tr. at 85-86) (Crystallex noting, "there was not remotely any claim that *Bancec* had been involved at all in the expropriation of the Citibank assets") To the contrary, *Bancec* shows that alter ego status is not limited to "state conduct in which the instrumentality had a key role," as there the Cuban bank - which Citibank sought to hold liable for Cuba's seizure of Citibank's assets – played no role whatsoever in Cuba's seizure of those assets. *See Bancec*, 462 U.S. at 619, 103 S.Ct. 2591; *see also Kensington*, 2007 WL 1032269, at *14-16 (finding state oil company liable for nation's default even though company was not involved in underlying loan).[43]

Although, as already noted, there is "no mechanical formula" for assessing whether the extensive control prong of *Bancec* has been satisfied, the factors that have been developed by courts applying *Bancec* have *not* included a requirement that the purportedly "separate" entity has been involved in the conduct that harmed the creditor. To the contrary, as reiterated earlier this year by the Supreme Court:

> Over time, the Courts of Appeals

[43] Notably, when the case was before the Court of Appeals, the Second Circuit did hold that instrumentality involvement in the underlying conduct was required. *See Banco Para El Comercio Exterior de Cuba v. First Nat'l City Bank,* 658 F.2d 913, 919-20 (2d Cir. 1981). The Supreme Court's contrary holding shows that it disagreed. (*See* Aug. Tr. at 39-40)

> coalesced around the following five factors (referred to as the *Bancec* factors) to aid in this analysis;
>
> (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.

Rubin, 138 S.Ct. at 822-23 (internal quotation marks omitted).[44] None of these commonly-considered factors[45] suggests that rebutting the presumption of separateness requires that both entities have been involved in the underlying conduct.[46]

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[44] Notably, *Rubin* also reiterated the disjunctive nature of the *Bancec* analysis. *See* 138 S.Ct. at 822 (noting "liability would be warranted, for example," where extensive control "or" where fraud or injustice prong is satisfied).

[45] The commonly-considered factors as described in *Rubin* are consistent with those the Court has considered in its analysis of PDVSA's facial and factual challenges, although they are stated somewhat differently than the Second Circuit stated them in *EM Ltd. II*.

[46] The dicta *in BRIDAS*, 447 F.3d at 414-15, on which PDVSA relies (*see* D.I. 26 at 18-19, 24) cannot establish the contrary proposition.

3. Judicial Estoppel

PDVSA has directed the Court's attention to a separate action Crystallex commenced against PDVSA in the Hague. (*See* D.I. 26 at 21-22) Some of the claims being pressed by Crystallex in the Hague evidently were premised on PDVSA's separateness from the Republic. (*See id.*) PDVSA concludes that "Crystallex should be precluded from pursuing such fundamentally inconsistent positions in different fora." (*Id.* at 22; *see also* Tr. at 69-70)

The Court disagrees. As an initial matter, it is not clear what law governs the Hague proceedings, and the parties have not provided the Court with evidence of (for example) Dutch law on conspiracy. Therefore, the Court does not have a clear understanding of the basis on which the Hague Court dismissed certain of Crystallex's claims. Moreover, Crystallex explains that it was initially pressing multiple theories in the Hague: some of them premised on PDVSA and Venezuela being separate entities, some premised on a different view. (*See* Tr. at 26-28) The Court has no basis to conclude that maintaining alternative theories, particularly at the outset of a case, is improper in the Hague Court. More importantly, doing so is expressly permitted under the Federal Rules of Civil Procedure. *See* Rule 8. As those rules govern this Court's procedures, it is plain that Crystallex is not judicially estopped from advocating inconsistent theories in this very Court (something it is not even accused of doing). It follows that it is also not (at this point) judicially estopped from taking inconsistent positions in different courts. Finally, as Crystallex observes, estoppel of the type PDVSA urges on the Court does not apply at least until a party is successful in persuading a tribunal of one

position and then seeks to persuade another tribunal of a contradictory position. (*See* Tr. at 80) (citing *New Hampshire v. Maine*, 532 U.S. 742, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001)) Crystallex has not prevailed on its position in the Hague. (*See id.*)

4. Overbreadth of Crystallex's position

PDVSA also highlights what it portrays as the vast breadth of Crystallex's position: if Crystallex is correct that PDVSA is the alter ego of Venezuela, then both entities are potentially liable for all of each other's liabilities, even where (as PDVSA contends is true here) one entity had absolutely nothing to do with the facts giving rise to the liability imposed on the other. (*See generally* Tr. at 86-87) (Crystallex responding to PDVSA's charge) The Court does not agree that this is the necessary outcome of granting the requested writ. The writ is directed (as it must be) to specifically-identified property, here the shares of PDVH. Were Crystallex (or any other judgment creditor of Venezuela) to wish to attach other property belonging to PDVSA, it would have to prove, by a preponderance of the evidence, that the sovereign immunity otherwise applicable to that property has been overcome – just as Crystallex has done here. That will not always be possible; for instance, the property might not be currently "used for a commercial activity," as required by § 1610(a)(6). This is 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.

Additionally, the record which has persuaded this Court that PDVSA and Venezuela should be treated as alter egos of one another may not be the same record that is created in some other action. Indeed, even in this case, the record may be supplemented in the next stage of the proceedings (as is further described below), which could potentially lead to different findings. Other factfinders might deem the record before them to justify different findings. Further, the state law and procedures applicable in any other District may well vary from those being applied here, perhaps in material ways. (*See generally* Aug. Tr, at 36) And the collateral estoppel effect of any ruling from this Court will be a matter to be decided by whatever other court is confronted with these issues at a later time. (*See id.*)

Finally, even if PDVSA is right about the implications of the Court's holding today (and Crystallex insists it is not[47]), the Court cannot be deterred from reaching the right conclusion, based on the facts before it and the applicable law, just because it fears the impact of its rulings.

E. Next Steps

By its decision today, the Court is holding that it will, after conferring further with the parties about additional details, direct the Clerk of Court to issue to Crystallex a writ, which Crystallex will then have the opportunity to serve and attach to PDVSA's

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[47] *See, e.g.*, Tr. at 16 ("They're not being added to the ... judgment, they're just simply being told that the property they have needs to be turned over to satisfy the underlying judgment.").

property in Delaware, i.e., its shares in PDVH. Some aspects of the parties' dispute, however, remain unsettled. These include: (i) how quickly should the Court direct the writ to be issued, how quickly should Crystallex be directed to serve it, and how quickly must Crystallex execute on it; (ii) what is the appropriate commercially reasonable procedure by which to effectuate the sale of the PDVH shares, in order to maximize the likelihood of a fair and reasonable recovery, and how involved (if at all) does the Court need to be in that sale process;[48] (iii) does Crystallex, or alternatively a purchaser of the PDVH shares, wish to (or need to) seek a license from OFAC to permit the sale and, if so, when will it do so; and (iv) will Venezuela, PDVSA, and/or any other entity appear and seek to supplement the factual record already developed in this litigation and, if so, will such an entity attempt to (and, if so, be permitted to) argue that additional evidence materially alters the Court's findings, and thereby seek to quash the writ? *See generally Hibou, Inc. v. Ramsing*, 324 A.2d 777, 783 (Del. Super. Ct. 1974) ("[O]n a motion to quash the order the Court as required by 10 Del. C. § 3506 must look at the Prima facie case presented to ascertain whether the plaintiff has 'a good cause of action' against all the defendants whose property has been attached."); D.I. 3-1 at 2 (Crystallex noting, "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"); Tr. at 21, 23 (Crystallex recognizing PDVSA, as well as perhaps PDVH and Venezuela,

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[48] The parties appear to agree that Delaware law requires execution of shares of a Delaware corporation to be completed through a "public sale." (*See* D.I. 71 at 8 (citing 8 Del. C. § 324); *see also* Aug. Tr. at 9, 20-21)

may have right to "come back in and challenge the writ"); D.I. 70 at 2 n.4 (Crystallex noting, "PDVSA may, of course, seek to challenge the writ on non-jurisdictional grounds by a motion to quash brought after the writ has issued and before the Court allows the execution process to commence").

In a separate Order being issued today, the Court will direct the parties to provide their views as to the timing and nature of the next steps in this proceeding.

CONCLUSION

As PDVSA's counsel succinctly and correctly stated:

> PDVSA is a presumptively separate sovereign instrumentality that is entitled to come to this court, invoke its own sovereign immunity, and is presumptively immune from the court['s] subject matter jurisdiction, presumptively separate from Venezuela, and its property is presumptively immune from attachment and execution.

(Aug. Tr. at 17) However, for reasons the Court has endeavored to explain, at length, throughout this Opinion, Crystallex has met its burden to rebut each of these presumptions. Therefore, the Court will grant Crystallex's motion for an order authorizing the issuance of a writ of attachment *fieri facias* (D.I. 2) and deny PDVSA's cross-motion to dismiss (D.I. 25). An appropriate Order follows.

ORDER

At Wilmington this **9th** day of **August, 2018**:

For the reasons set forth in the Opinion issued on this date, **IT IS HEREBY ORDERED** that:

1. Crystallex's motion for an order authorizing the issuance of a writ of attachment *fieri facias*, pursuant to 28 U.S.C. § 1610(c) (D.I. 2), is **GRANTED.**

2. PDVSA's cross-motion to dismiss for lack of jurisdiction over the subject matter (D.I. 25) is **DENIED.**

3. Because the Opinion has been issued under seal, Crystallex and PDVSA shall meet and confer and, no later than **August 10, 2018 at 12:00 p.m.,** submit a proposed redacted version, as well as for their proposed redactions. Should Crystallex and PDVSA meet their burden and timely request redactions, the Court will consider their views before issuing a public version of its Opinion.

4. Crystallex and PDVSA shall meet and confer and, no later than **August 16, 2018**, submit a joint status report providing their position(s) as to how this case should now proceed.

5. The Clerk of Court is directed **not** to issue the writ of attachment until after the Court issues an additional Order following its review of the forthcoming status report.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 18-2797 & 18-3124

CRYSTALLEX INTERNATIONAL CORPORATION

v.

BOLIVARIAN REPUBLIC OF VENEZUELA; PETROLEOS DE VENEZUELA, S.A.

[Filed: November 21, 2019]

Before: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, GREENAWAY, Jr., SHWARTZ, KRAUSE, RESTREPO, BIBAS, MATEY, PHIPPS, and SCIRICA[*] Circuit Judges

SUR PETITION FOR REHEARING

The petitions for rehearing filed by Appellant and Intervenor-Appellant in the above-entitled cases having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing and a majority of the judges of the circuit in regular service not having voted for rehearing, the petitions for rehearing by the panel and the Court *en banc* are denied.

By the Court,

s/ Thomas L. Ambro
Circuit Judge

[*] Senior Judge Scirica is limited to panel rehearing only.

Dated: November 21, 2019

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 18-2797 & 18-3124

CRYSTALLEX INTERNATIONAL CORPORATION

v.

BOLIVARIAN REPUBLIC OF VENEZUELA;
PETROLEOS DE VENEZUELA, S.A.

No. 18-2889

In re: PETROLEOS DE VENEZUELA, S.A.,

[Filed: July 29, 2019]

Before: AMBRO, GREENAWAY, JR.,
and SCIRICA, Circuit Judges

JUDGMENT

These causes came on to be heard on the record before the United States District Court for the District of Delaware and were argued on April 15, 2019.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgments of the District Court entered August 9, 2018, and August 23, 2018, are hereby affirmed. Appellant's petition for a writ of mandamus is dismissed. Costs taxed against Appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: July 29, 2019

[SEAL]

Certified as a true copy and issued in lieu
of a formal mandate on 11/29/19

Teste: s/ Patricia S. Dodszuweit
Clerk, U.S. Court of Appeals for the Third Circuit

APPENDIX E

1. 28 U.S.C. § 1330 provides:

Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

2. 28 U.S.C. § 1604 provides:

Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

3. 28 U.S.C. § 1605 provides, in relevant part:

General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case--

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

* * * * *

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or

award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

* * * * *

4. 28 U.S.C. § 1606 provides:

Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

5. 28 U.S.C. § 1609 provides:

Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

6. 28 U.S.C. § 1610 provides, in relevant part:

Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if--

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged

for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property--

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7) (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a

judgment entered by a court of the United States or of a State after the effective date of this Act, if--

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), or (5) or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based, or

(3) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605A of this chapter or section 1605(a)(7) of this chapter (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in

any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if--

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

* * * * *

(g) Property in certain actions.

(1) In general.--Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of--

(A) the level of economic control over the property by the government of the foreign state;

(B) whether the profits of the property go to that government;

(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(D) whether that government is the sole

beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

(2) United States sovereign immunity inapplicable. Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.

(3) Third-party joint property holders. Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.

7. Federal Rule of Civil Procedure 69 provides:

Execution

(a) In General.

(1) ***Money Judgment; Applicable Procedure.*** A money judgment is enforced by a writ of execution, unless the court directs otherwise. 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.

(2) *Obtaining Discovery.* In aid of the judgment or execution, the judgment creditor or a successor in interest whose interest appears of record may obtain discovery from any person--including the judgment debtor--as provided in these rules or by the procedure of the state where the court is located.

(b) Against Certain Public Officers. When a judgment has been entered against a revenue officer in the circumstances stated in 28 U.S.C. § 2006, or against an officer of Congress in the circumstances stated in 2 U.S.C. § 118,[1] the judgment must be satisfied as those statutes provide.

[1] Now editorially reclassified 2 U.S.C. § 5503.