ALERT MEMORANDUM

Start Your Engines: Are We Going to See More Creditor Recovery Efforts in Venezuela?[1]

May 29, 2018

Even before last week's "fake" election in Venezuela, these past few weeks have seen a step-up in creditor efforts to pursue court judgments and judicial execution on the assets of Petroleos de Venezuela, S.A. ("PDVSA"). Within days of obtaining an almost $2 billion arbitral award against PDVSA and two subsidiaries, ConocoPhillips Co. initiated enforcement proceedings against various PDVSA operating assets in the Netherlands Antilles, and according to published reports, initially obtained (and then had partially lifted) various court-ordered attachments in the Dutch Antilles. In the United States, Crystallex should receive a decision by June 30, 2018 whether PDVSA is the alter ego of the Republic, possibly permitting it to enforce its $1.4 billion judgment against PDVSA's assets in the United States, in particular its shares in PDV Holding Inc., through which PDVSA holds Citgo Petroleum Corporation. Further, at least one commercial creditor of PDVSA has reportedly been the first to sue in New York seeking a judgment on a defaulted promissory note, perhaps foreshadowing similar actions by holders of defaulted PDVSA and Republic bonds.

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Outside of the courtrooms, the May 22 "election" confirmed that regime change in Venezuela is unlikely anytime soon, with the re-election of Nicolás Maduro as President for another six-year term. That perpetuation of the status quo in Caracas has already triggered additional sanctions from Washington D.C., and there is some talk of additional actions that the Trump administration might pursue that go beyond the recent attempts to cut PDVSA and the Venezuelan government off from critical suppliers and sources of funding.

This article first summarizes the magnitude of the claims against PDVSA and the Republic – both those that have been reduced to arbitral awards or judgments and are in various stages of enforcement proceedings, as well as the much larger pool of additional claims that are not (yet) in litigation but could become the subject of judicial proceedings. Next, the article provides an update on the pending enforcement proceedings in the United States and elsewhere and the possible ramifications of those proceedings directly for the creditors involved and indirectly for those other PDVSA and Republic creditors watching from the sidelines. The third section provides a report on the status of PDVSA Trust litigation in Florida,[2] by which a Trust purportedly formed on PDVSA's behalf is suing various oil traders and individuals to recover billions of dollars in damages they allegedly caused PDVSA through a decade-long bid rigging and bribery scheme.

Finally, the article discusses the implications of the litigation and political news of the last few weeks for Republic and PDVSA bondholders who have been – until now – monitoring developments, but have not initiated any legal actions. Until recently, Republic and PDVSA bondholders had little incentive (and some real disincentives) to litigate, but that may be changing for two reasons. First, the suspension on payments by both the Republic and PDVSA on the bonds that started in November 2017 has continued, and there is little doubt today that aside from possible payments on PDVSA's secured 2020 bonds, the Government and PDVSA are unlikely to make any payments on its bond indebtedness. Second, expropriation creditors may be on the verge of recovering at least partially on multi-billion dollar awards and judgments, raising the concern of what will be left for the much larger pool of bondholders and other financial creditors.

Yet, each financial creditor group faces challenges in pursuing litigation apart from the costs. For all Republic and PDVSA creditors who sue on bonds or notes, a U.S. court judgment would effectively cap the accrual of post-judgment interest at a rate substantially lower than the bond or note default rate at which the claims of a holder who does not litigate will accrue until payment. In addition, PDVSA bondholders must act through a Trustee who will require an indemnity and possibly an upfront escrow before pursuing claims, and bondholders will have less say in how the litigation is pursued. Republic bondholders, on the other hand, are free to act individually, but as of now, there are no significant Republic assets that are amenable to execution in the United States or elsewhere.

PDVSA promissory noteholders may be best positioned to act quickly since they do not need to go through a trustee. There may be assets available in the U.S. capable of execution once such noteholders get a judgment, and they can use the litigation and enforcement efforts to seek to locate other PDVSA assets that may have value and/or obtain a settlement from PDVSA by seeking to disrupt PDVSA's business. But for now at least, the determination of whether to pursue litigation may come down to a different question: Is sitting on the sidelines as other creditors

[2] *See generally*, Richard J. Cooper and Boaz S. Morag, *PDVSA US Litigation Trust: What Creditors Should Know About the Trust, Its Claims and Its Implications for Venezuela's Restructuring* (Mar. 15, 2018), available at https://client.clearygottlieb.com/52/691/uploads/pdvsa-us-litigation-trust---what-creditors-should-know-about-thetrust--its-claims-and-its-implications-for-venezuela-s-restructuring.pdf; Richard J. Cooper and Boaz S. Morag, *Update on PDVSA US Litigation Trust v. Lukoil Pan Americas, et al.* (Apr. 10, 2018), available at https://client.clearygottlieb.com/52/691/uploads/2018-04-10-update-on-pdvsa-us-litigation-trust-v.-lukoil-pan-americas.pdf.

pursue remedies going to disadvantage you on a relative basis as others get closer to possibly realizing on assets they may find? If the answer to that question is that it will, then we would expect other creditors to enter the proverbial ring and take a swing (possibly seeking past due interest and not the full accelerated principal amount to address the negative post-judgment interest rate issue).

I. The Claims the Republic and PDVSA Are Facing

The following table identifies the creditors who have already obtained arbitral awards and/or court judgments and who are currently pursuing enforcement efforts against one or both of PDVSA and the Republic:

Claimant	Award/ Judgment Debtor	Award/ Judgment Amount
ConocoPhillips	PDVSA (and two subsidiaries)	$2.0 billion
Crystallex	Republic	$1.4 billion
Rusoro Mining Limited	Republic	$1.4 billion
Oi European Group	Republic	$0.5 billion
		$5.3 billion

In addition, two Koch Industries entities, Koch Minerals Sarl and Koch Nitrogen International Sarl have proceedings pending to confirm and ICSID award in their favor against the Republic in the total amount of approximately $370 million.[3]

The proceedings that have reached the award issuance/enforcement stage are just the tip of the iceberg. The Republic and PDVSA have at least $191 billion in liabilities, consisting of approximately (a) $76 billion of non-financial liabilities, including $16 billion resulting from nationalizations and $57 billion owed to suppliers and contractors, and (b) $115 billion in financial debt – excluding interest accrued on missed payments – and forward oil sales, which include around $36 billion in bonds issued by the Republic and approximately $28 billion issued by PDVSA.[4] Most of these creditors have yet to take legal action.

While Venezuela and PDVSA were paying bondholders, there was little incentive and practical difficulties for financial investors to sue. But, since November 2017, the country has systematically defaulted on most of its unsecured bonds, and few investors think that is likely to change.[5] According to recent reports, in October of 2017 the Republic paid only $83 million of its $465 million obligations; in November it paid $25 million of its $183 million obligations; and in December it paid $23 million of its $242 million obligations.[6] Venezuela has not only dropped its "bondholder-first" policy; it is beginning to pick and choose which creditors to pay. PDVSA is behaving similarly. PDVSA has strategically defaulted on certain bonds while prioritizing payments to the holders of its 2020 bonds, which are secured by 51% shares of Citgo Holdings Inc. Accordingly, as discussed below, bondholders may now determine that the costs in time and legal fees of pursuing litigation are worth incurring in order to be able to share in litigation enforcement recoveries that expropriation creditors may be on the verge of receiving.

Another group of creditors that could start to embrace litigation is trade creditors who hold promissory notes issued by PDVSA in lieu of payment. Reports estimate that these notes represent over $2 billion of PDVSA's debt: $1.15 billion

[3] Am. Compl., Koch Minerals SARL et al v. Bolivarian Republic Of Venezuela, No. 17-02559 (D. D.C. May 24, 2018), ECF No. 7.

[4] *See generally*, Mark A. Walker and Alice Chong, *Restructuring certain Debt of the Republic of Venezuela and PDVSA on the same Terms* (Mar. 12, 2018), available at http://www.millsteinandco.com/images/pdfs/RESTRUCTURING%20CERTAIN%20DEBT%20OF%20THE%20REPUBLIC%20OF%20VENEZUELA%20AND%20PDVSA%20ON%20THE%20SAME%20TERMS.pdf.

[5] Robin Wigglesworth, *Venezuela: what happens now after official default*, Financial Times (Nov. 14, 2017), available at https://www.ft.com/content/5f07e298-c326-11e7-a1d2-6786f39ef675.

[6] Jonathan Wheatley, *Venezuela stopped bond payments in September*, Financial Times (Apr. 9, 2018), available at https://www.ft.com/content/c291cb76-3c20-11e8-b9f9-de94fa33a81e.

originally issued to ten suppliers and $800 million to $1.5 billion issued to SNC-Lavalin and Schlumberger.[7] Suppliers who in the past may have been interested in maintaining a long-term relationship with PDVSA may now be more keen on suing or finding investors with a different risk appetite to whom to sell their notes at a discount. These notes may be particularly appealing to certain litigious funds, as the notes do not include indenture-type restrictions on taking action and therefore allow individual holders to more easily sue PDVSA to obtain a judgment for the full face amount of the note rather than the steeply discounted purchase price they paid.

On May 9, 2018, White Beech SNC, LLC, a Delaware affiliate of a Canadian engineering and construction company, was the first noteholder to seek a court judgment in the United States as a result of a January 2018 missed payment by PDVSA. After acquiring the note, it sued PDVSA, as borrower, and PDVSA Petróleo, S.A. ("PDVSA Petróleo"), as guarantor, on a PDVSA Petróleo Senior Guaranteed Note originally issued to SNC-Lavalin International Co., Inc. on October 4, 2016 in the amount of approximately $25 million plus interest.[8]

Although claims not yet reduced to an arbitral award or court judgment constitute the vast majority of potential litigation claims against the Republic and Venezuela, $5 billion of judgments in the enforcement stage out of a total of approximately $193 billion are circling Venezuela's most important properties and the largest source of its foreign exchange, yet which are also the assets that would be critical to any overall debt restructuring. The potential success of ConocoPhillips, Crystallex and other creditors may begin a race to the bottom for strategic assets outside of Venezuela. If this risk materializes, a cascade of litigation and enforcement actions against the Republic and PDVSA is likely to follow. The next section provides our outlook of how the few currently active cases may tip the balance for Venezuela.

II. Status of Individual Proceedings

1. Key Highlights from Recent Collection Efforts against Venezuela and PDVSA

a. ConocoPhillips

In the late 1990s, subsidiaries of ConocoPhillips Co. entered into two ventures with PDVSA, to produce, transport and sell extra-heavy crude oil in Venezuela. Between 2001 and 2007, the Venezuelan government effectively nationalized the oil industry and expropriated Conoco's interests in the two projects. Following that expropriation, Conoco commenced two arbitrations: one against the government of Venezuela before an ICSID tribunal for claims under the Venezuela-Netherlands bilateral investment treaty, and the other against PDVSA and its subsidiaries before an International Chamber of Commerce ("ICC") tribunal, for claims arising out of the contracts for the two ventures.

On April 24, 2018, the ICC tribunal issued an award for ConocoPhillips in the amount of nearly $2 billion, plus post-award interest (the "ICC Award").[9] Whereas PDVSA is liable under the ICC Award for the full $2 billion, under their respective oil project venture agreements, PDVSA Petróleo is jointly liable with PDVSA for approximately $489 million and Corpoguanipa, S.A. is jointly liable for just under $1.5 billion of the total $2 billion.

The ICC tribunal found that certain actions taken by Venezuela constituted "Discriminatory Actions" under the terms of ConocoPhillips's agreements with PDVSA, for which PDVSA undertook to compensate ConocoPhillips. Though the tribunal found that PDVSA was required to indemnify Conoco for certain of the government's actions, the tribunal rejected ConocoPhillips's claim that PDVSA was itself liable

[7] Jonathan Wheatley, *Venezuela National Oil Company Sued in New York*, Financial Times (May 9, 2018), available at https://www.ft.com/content/bb555002-53be-11e8-b3ee-41e0209208ec

[8] White Beech SNC. LLC v. Petroleos De Venezuela, S.A, No. 18-04148 (S.D.N.Y. 2018).

[9] Ex. A (Final Award), Phillips Petroleum Co. Venezuela, Ltd. v. Petróleos de Venezuela, No. 18-03716 (S.D.N.Y. Apr. 24, 2018), ECF No. 8-1, available at http://res.cloudinary.com/lbresearch/image/upload/v1525081480/conoco_award2_303118_1044.pdf.

for breaching the contracts by helping to implement the government's policies.

Upon receiving the ICC award, ConocoPhillips immediately commenced two enforcement proceedings. The first was filed in the U.S. District Court for the Southern District of New York and sought to obtain a U.S. court judgment confirming the arbitral award. This proceeding requires ConocoPhillips to serve PDVSA, and allows PDVSA at least 60 days to respond, which has not yet started to run. To date, ConocoPhillips has not sought any pre-judgment attachments on PDVSA's U.S. assets such as its shares in PDV Holding.

ConocoPhillips also initiated attachment proceedings in the Netherlands Antilles, where PDVSA Petróleo has facilities for processing and storing oil for export. According to press reports, ConocoPhillips received court orders on an *ex parte* and pre-judgment basis attaching PDVSA Petróleo's interests in those facilities in an amount up to $636 million.[10] This figure reflects the $489 million liability of PDVSA Petróleo under the ICC Award plus 30% to cover accruing interest and costs as is the practice of the Netherlands Antilles courts.

The attachments ordered to date are "conservatory" in that they preclude PDVSA Petróleo from dealing in or dissipating its assets in the Antilles. Once ConocoPhillips obtains an Antilles court judgment under the New York Convention recognizing the ICC Award, the attachment orders will become "executory" and ConocoPhillips will then be able to realize on the value of the attached assets.

PDVSA's oil exports are reportedly on the order of about $1.8 billion a month,[11] about 24% of which passes through facilities in the Antilles.[12] These attachment orders have had the effect of freezing PDVSA's access to its oil reserves and blending facilities there; PDVSA has reportedly recalled its oil vessels from Dutch Caribbean waters and suspended any further shipments there to avoid asset seizures. It has been reported that the ultimate destination for Venezuelan heavy crude blended in the Antilles are PDVSA customers in China and India. Long-term and significant disruption of oil flows to Chinese customers would put the Republic at risk of defaulting on its repayment obligations under approximately $19 billion of Chinese loans to Venezuela.[13]

It is fairly clear that PDVSA was caught flat-footed by ConocoPhillips and is now scrambling to deal with the blocking of inventory in the Antilles by redirecting vessels and considering alternative payment terms to keep oil assets coming to those facilities out of the name of PDVSA Petróleo. How effective PDVSA will be in devising a work-around that keeps its products flowing to its Chinese and Indian customers and keeps Citgo supplied is yet to be determined.

The interruption in PDVSA operations in the Antilles has also been a source of concern to Antilles government officials as the facilities used by PDVSA entities also supply the oil products used on Curaçao, Bonaire and the other Antilles islands whose residents faced a shortage of oil and gasoline as a result of the effects of the attachment orders. Consequently, on May 21, 2018, the courts in the Antilles modified the previously issued attachment orders to permit oil facilities on Curaçao and Bonaire to continue operating, by directing PDVSA Petróleo to continue to deliver oil to the Antilles for the benefit of the local oil companies with the proceeds of those deliveries being placed in escrow under a sharing arrangement between ConocoPhillips and PDVSA. The funds would be

[10] *See* Associated Press, *Curacao Court Oks Conoco Seizing Venezuelan Oil Assets*, The Seattle Times (May 13, 2018), available at https://www.seattletimes.com/business/curacao-court-oks-conoco-seizing-venezuelan-oil-assets/.

[11] Wheatley, *supra* note 7.

[12] *See* Marianna Parraga, *Update 3-PDVSA halts Caribbean storage, shipping; diverts oil cargo: sources data*, Reuters (May 8, 2018), available at https://af.reuters.com/article/energyOilNews/idAFL1N1SF1F6.

[13] *See* Corina Pons *Exclusive: Venezuela faces heavy bill as grace period lapses on China loans – sources*, Reuters (Apr. 27, 2018), available at https://www.reuters.com/article/us-venezuela-china/exclusive-venezuela-faces-heavy-bill-as-grace-period-lapses-on-china-loans-sources-idUSKBN1HY2K0.

released once the ICC Award is recognized in the Antilles, which could take two months or so depending on the extent to which PDVSA and PDVSA Petróleo resist recognition.[14] This shared escrow account also provides in theory a process by which PDVSA Petróleo could pay off its debt to ConocoPhillips over time.

On May 24, 2018, it was reported that an Aruba court lifted a previously entered attachment order upon the determination that the oil in question belonged to Citgo Petroleum and not to PDVSA or PDVSA Petróleo.[15] As a result of the partial lifting of the conservatory attachments originally entered, it is unclear how much of ConocoPhillips's $489 million award against PDVSA Petróleo will be satisfied out of assets in the Antilles and how long that process will take even if ConocoPhillips were to obtain a prompt recognition of the ICC Award and an Antilles court judgment.

In addition, within a matter of months, it is expected that ConocoPhillips will receive its award in its ICSID case against Venezuela. In that proceeding, the Republic has already been found liable, but the award quantifying ConocoPhillips's damages has yet to be issued. This could create another multi-billion dollar headache for the Republic and, by extension, for PDVSA.

b. Crystallex

Even before it obtained is $1.4 billion arbitral award against Venezuela, Crystallex commenced proceedings in Delaware in an effort to aid in enforcement of its forthcoming award. The company brought an action in the District Court of the District of Delaware against PDVSA under the Delaware Uniform Fraudulent Transfer Act ("DUFTA")[16] challenging a series of dividend payments from CITGO to its parent company and wholly owned PDVSA subsidiary, PDV Holding Inc., and ultimately to PDVSA, in addition to the pledge of 50.1% of CITGO shares as security for PDVSA's 2020 bond issuance and the pledge of the remainder of CITGO shares as security for a financing agreement with Rosneft. The net effect of these transactions was to transfer roughly $3 billion from the U.S. back to Venezuela, and to potentially prevent judgment creditors from obtaining a priority lean on PDVSA's shares in CITGO. After obtaining its arbitral award, Crystallex obtained a court judgment confirming the award, then brought another proceeding in Delaware seeking to enforce the judgment against the Republic by executing upon the assets of PDVSA on the grounds that PDVSA is the alter ego of the Republic.[17]

On November 24, 2017, Crystallex announced a $441 million settlement with the government of Venezuela, which was approved by the Ontario bankruptcy court overseeing Crystallex's bankruptcy proceeding. That settlement apparently required Venezuela to make an initial payment to Crystallex, which was not timely made.[18] Notwithstanding the settlement, Crystallex has maintained its enforcement actions against Venezuela and has not publicly asked the Delaware court to refrain from issuing any decisions.

[14] Argus Media, *PdV to restore oil exports, pay ConocoPhillips debt*, (May 22, 2018), available at https://www2.argusmedia.com/en/news/1684952-pdv-to-restore-oil-exports-pay-conocophillips-debt.

[15] Reuters, *Aruba Court Lifts Conoco Seizures on PDVSA's Oil Cargoes*, Reorg Research (May 23, 2018), available at https://af.reuters.com/article/commoditiesNews/idAFL2N1SU2FF.

[16] Del. Code Ann. tit. 6, §§ 1301-1312 (West 2017).

[17] For more detailed background on the various Crystallex proceedings and Crystallex's efforts to recover from PDVSA on an alter ego theory of liability, see Richard J. Cooper and Boaz S. Morag, *Venezuela's Imminent Restructuring and the Role Alter Ego Claims May Play in this Chavismo Saga*, SSRN (Nov. 9, 2017) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3068455.

[18] In April 2018, Crystallex appears to have recovered some portion of a $43 million account balance funded by the Venezuelan Ministry of Defense years earlier to pay for repairs performed by Huntington Ingalls Inc. or its predecessors in Mississippi to two Venezuelan naval frigates. According to court records, the $43 million account balance was released to Crystallex to be shared between it and Huntington Ingalls, but the split between them was not publicly disclosed. Unopposed Mot. to Vacate Order, Northrop Grumman Ship Sys.'s, Inc. v. The Ministry of Def. of the Republic of Venezuela, No. 02-00785 (S.D. Miss. Apr. 4, 2018), ECF No. 369, 369-1.

On January 3, 2018, the United States Court of Appeals for the Third Circuit ruled that as to the allegedly fraudulent dividend payments made to PDVSA, PDV Holding was a non-debtor transferor, and as such cannot be liable for a fraudulent transfer under DUFTA.[19] This decision impedes Crystallex's ability to recover its $1.4 billion judgment against the Republic from PDVSA or its U.S. affiliates, but it does leave Crystallex able to pursue a DUFTA claim against PDVSA *if* Crystallex can first demonstrate that PDVSA is Venezuela's "alter ego." Crystallex is also seeking the alter ego determination so that it can enforce its judgment against PDVSA's assets in the United States, namely its shares in PDV Holdings, and thereby acquire control of Citgo subject to the pledges and other transactions it is challenging under DUFTA.

The Delaware court has held hearings on Crystallex's alter ego argument and has stated that it will resolve any pending motions with regard to the alter ego question by June 30, 2018.[20] Given the significant ramifications to Venezuela and PDVSA from an alter ego finding by the Delaware court, one must consider the possibility that Venezuela will do something before the court rules to consummate its existing settlement (or enter into a new settlement) with Crystallex rather than risk an adverse ruling. On the other hand, if Venezuela were confident that the Delaware court would rule in its favor and reject an alter ego finding, that could provide one explanation why Venezuela is letting the case reach a decision rather than performing the settlement it already agreed to and thereby mooting the litigation.

ConocoPhillips also has DUFTA and alter ego claims on file in Delaware which were commenced in anticipation of its as yet-to-be-issued award in its bilateral investment treaty arbitration against Venezuela. To date, those proceedings have been stayed pending the resolution of the Crystallex proceedings.

c. Rusoro Mining Limited

On August 22, 2016, Rusoro Mining Limited, a Canadian gold miner, won a nearly $1 billion ICSID award against the government of Venezuela for the expropriation of Rusoro's gold-mining assets, which totals almost $1.4 billion with interest and costs.[21] In October 2016, Rusoro filed a petition to confirm the arbitration award in the U.S. District Court for the District of Columbia, which was granted on March 1, 2018.

On May 7, 2018, Rusoro filed a lawsuit against Venezuela and PDVSA in the U.S. District Court for the Southern District of Texas, seeking, much like Crystallex in Delaware, to enforce the judgment against the Republic by attaching PDVSA's assets (including its shares in PDV Holdings) on alter ego grounds and arguing that PDVSA and its subsidiaries unlawfully transferred assets to repatriate their wealth and therefore shield those assets from creditors like Rusoro.[22] Because PDVSA has at least sixty days to respond to this complaint and the Delaware court is expected to rule by June 30, 2018, the outcome of Rusoro's suit could be influenced, if not practically foreclosed, were the Delaware court to rule in Crystallex's favor on the alter ego claim or if ConocoPhillips promptly obtains confirmation of its ICC Award against PDVSA from the federal court in New York and then seeks to enforce it against PDVSA's shares in PDV Holdings, before Rusoro can litigate its alter ego claim to judgment in Texas.[23]

[19] For more detailed analysis of the Third Circuit decision, see Richard J. Cooper and Boaz S. Morag, *Third Circuit Dismissed Crystallex's Fraudulent Transfer Claim But Potential Liability Remains for PDVSA* (Jan. 5, 2018), available at https://www.clearygottlieb.com/~/media/files/third-circuit-dismisses-crystallexs-fraudulent-transfer-claim--cooper--morag-crystallex-dufta-3d-cir-article-1-5-2018.pdf.

[20] Notice, Crystallex Int'l Corp. v. Venezuela, No. 17-00151 (D. Del. May 1, 2018), ECF No. 61.

[21] Pet. to Confirm Arbitration Award, Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela, No. 16-02020 (D. D.C. Oct. 10, 2016), ECF No. 1.

[22] Compl., Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela, No. 18-01458 (S.D. Tex. May 7, 2018), ECF No. 1.

[23] Whether ConocoPhillips can seek a pre-judgment attachment of PDVSA assets in the United States before obtaining confirmation of its ICC Award and a U.S court judgment would depend on whether either or both sets of the

d. Oi European Group

On March 10, 2015, an ICSID Tribunal issued a $462 million award in favor of Oi European Group B.V. ("OIEG") for claims arising out of the expropriation of OIEG's property in Venezuela. After Venezuela failed to pay the award, OIEG commenced proceedings in the U.S. District Courts in Washington D.C. and New York seeking recognition and enforcement of the award. OIEG dismissed the New York action and is proceeding exclusively in Washington D.C.

In the Washington D.C. action, Venezuela moved to dismiss OEIG's enforcement action and alternatively argued for a stay of the case pending the resolution of its ICSID annulment proceeding. The court granted the stay and ordered the parties to report developments in the annulment proceedings.[24] As a practical matter, the stay freezes OIEG enforcement efforts in the United States pending resolution of the annulment proceeding.

2. PDVSA Trust Litigation

In our prior articles on the PDVSA U.S. Litigation Trust suit, we noted that the Trust's standing to assert PDVSA's claims was a contested and threshold issue the Florida court would need to resolve before reaching the merits of the Trust's claims to recover damages on PDVSA's behalf. The court has scheduled the hearing on the defendants' challenge to the Trust's standing to start on June 28, 2018 and continue on June 29 if necessary. This will be a critical initial hurdle for the Trust to overcome, and it is unclear when the magistrate judge, who initially heard the standing issue, will render her report and recommendation on the standing issue, which is then subject to review by the district court judge.

The Florida court has also scheduled a deadline for the defendants to make their respective motions to dismiss on grounds other than standing. The defendants have informally raised a number of grounds under which they intend to challenge the sufficiency of the antitrust and RICO claims asserted by the Trust, which are the claims that provide for the recovery of treble damages. Finally, it does not appear that the mere filing of this suit has resulted in announced settlements with any of the named defendants (and certainly not any of the deep-pocketed defendants), suggesting that the Trust will have to overcome many obstacles and spend significant amounts of time before it sees any payday from this litigation. On the other hand, if the Trust can establish its standing and then survive the motions to dismiss with its claims largely intact, there is a chance that the prospect of extensive and invasive merits discovery could result in some settlements in due course. Conversely, this could be a drawn-out battle where the Trust does not see any meaningful recovery for years, if at all.

III. Implications for Republic and PDVSA Bondholders and Other PDVSA Financial Creditors

The next several weeks may shed a great deal of light on the question of how vulnerable the Republic and PDVSA are to creditor collection efforts. During this period, we may learn what recovery ConocoPhillips may actually realize from its attachment efforts in the Antilles in light of the recent lifting of its attachment orders and what other strategies it may employ (after all, Conoco has been planning its enforcement strategy for years and is privy to difficult-to-find industry and market information about PDVSA given its involvement in the sector and global reach); whether Crystallex will be able to establish, at least for purposes of its judgment against Venezuela, that PDVSA is the Republic's alter ego; whether the Republic or PDVSA will seek and actually consummate settlements with either of these creditors before any decisions are rendered at all given the potential threats posed by their actions; and whether these litigation efforts prompt further litigation by individual creditors, groups of creditors or bond trustees. Further, we should learn whether some of the

oil project agreements contain waivers of sovereign immunity that are broad enough under the U.S. Foreign Sovereign Immunities Act to include pre-judgment attachments. *See* 28 U.S.C. § 1609(d) (requiring explicit waiver of immunity from attachment prior to judgment).

[24] Oi European Grp. B.V. v. Bolivarian Republic of Venezuela, No. 16-01533 (D. D.C. 2016).

initial procedural hurdles in the PDVSA Litigation Trust action will be overcome, such that the purported billions of dollars of value PDVSA was deprived of as a result of the activities of the defendants could potentially be made available to PDVSA (and potentially its creditors who may seek to intervene in such litigation).

The near future may also present decision points for the numerous holders of billions of dollars in defaulted Republic and PDVSA bonds who to date have held off initiating legal proceedings.

PDVSA bond creditors will watch with interest to see whether PDVSA and PDVSA Petróleo will appear in White Beech's promissory note action in New York and if so, what defenses they raise.[25] PDVSA's bondholders, unlike those of the Republic, are required to act through a Trustee and do not have the right to commence individual suits. But if a Trustee were to sue on a PDVSA bond issuance, the case could be a test for PDVSA's willingness to let bondholders obtain U.S. court judgments without opposition to the extent those judgments are limited to a money judgment for unpaid principal and interest.[26] Besides the burdens of inducing the Trustee to act and the cost of indemnifying it, for some bondholders, U.S. law may create an economic incentive to refrain as long as possible from obtaining a money judgment, because under federal law, post-judgment interest would accrue at a considerably lower statutory rate than the default/contractual rate at which the bonds are currently accruing interest.[27] While there may be ways to neutralize or minimize this economic disincentive, such tactics will be complicated by the fact that, at least in the case of lawsuits brought against PDVSA, the actions will be brought by various Trustees (depending on the bond issue), and holders may have less practical ability to cause the Trustee to adopt specific strategies to mitigate these issues.

Another potential option open to PDVSA bondholders who have convinced a Trustee to pursue legal action is to attempt to replicate ConocoPhillips's Antilles strategy. To the extent that the partial lifting of the attachments by the Antilles courts still leaves PDVSA's subsidiary vulnerable to attachment, there may be merit to seeking to replicate the strategy. Any such gambit would also have to take into consideration whether PDVSA has developed or will be able to develop a work-around to minimize the effect of ConocoPhillips's already-issued attachment orders. Assuming there is value in following the lead of ConocoPhillips, PDVSA bondholders would be in a legal position to do so; PDVSA Petróleo is the guarantor of all PDVSA bonds and thus every PDVSA bondholder also has a claim against PDVSA Petróleo who is known to have assets in the Netherlands Antilles. We understand that Antilles courts may issue multiple conservatory attachments over the same assets, such that ConocoPhillips has not established a priority that would block other creditors. Rather, if multiple attachments are issued, even if

[25] One interesting aspect of the White Beech complaint is that it essentially treats both PDVSA and PDVSA Petróleo as private parties rather than as agencies or instrumentalities of Venezuela under the Foreign Sovereign Immunities Act ("FSIA"). Compl. at ¶ 5, White Beech SNC. LLC v. Petroleos De Venezuela, S.A, No. 18-04148 (S.D.N.Y. May 9, 2018), ECF No. 1. PDVSA is unquestionably subject to the FSIA as it is wholly owned directly by the Republic. Whether PDVSA Petróleo is an "organ" of Venezuela, and thus also subject to the FSIA, is an interesting question which has not been addressed in the Second Circuit. PDVSA Petróleo was found to be an "organ" of Venezuela in *RSM Prod. Corp. v. Petroleos de Venezuela, S.A.*, 338 F. Supp. 2d 1208, 1214-15 (D. Colo. 2004), but the analysis of the issue in that case was fairly superficial. Were PDVSA Petróleo *not* covered by the FSIA, then that would in theory expand a U.S. court's enforcement powers by permitting it to order PDVSA Petróleo to transfer property into the United States to satisfy a judgment that it could not order a foreign sovereign subject to the FSIA to do.

[26] In the relatively early days of the Argentina litigation, the New York federal court adopted in consultation with Argentina's counsel and with its consent a streamlined summary judgment procedure that facilitated Argentine bondholders promptly obtaining a federal court money judgment for principal and interest.

[27] Although the Trustee could sue PDVSA and PDVSA Petróleo in New York state court whose judgments accrue interest at the rate of 9%, PDVSA would almost certainly remove such a lawsuit pre-judgment to federal court even if it were to no longer participate once the case was pending in federal court.

ConocoPhillips's attachment would become executory ahead of those of other creditors by its obtaining an Antilles court judgment, the later-in-time creditors holding conservatory attachment orders would still be entitled to share in the proceeds from the disposition of the assets and that sharing would be on a *pari passu* basis. Of course, going down the road of attaching PDVSA Petróleo assets as a first step would require the Trustee, if successful, to initiate within a matter of weeks litigation in New York, or some other forum in which PDVSA and PDVSA Petróleo are subject to jurisdiction, to litigate their bond claims and obtain a judgment; otherwise the conservatory attachments in the Antilles would be lifted.

PDVSA bondholders should also closely monitor developments in the PDVSA U.S. Litigation Trust suit. At some point in the future, if the Trust succeeds in obtaining judgments or settlements against the defendants, the Trust may recover funds. At that point, it may be possible for PDVSA bond creditors to intervene and prevent the Trustees from disbursing PDVSA's share of the proceeds they have collected and to seek a pre-judgment attachment of PDVSA's interest in that recovery. Such pre-judgment relief is available given the breadth of PDVSA's waiver of immunity in its bond indentures.

Republic bondholders are free to sue individually without the need for any Trustee action on their behalf, but they face the same cost and financial issues as PDVSA bondholders of whether to incur the expense of litigation (and time commitments that flow from such efforts) and the reduction in the accruing interest rate once a judgment is entered. Any Republic bondholder that obtains a judgment will not be susceptible to being crammed down through the use of the collective action provisions in the Republic's bond documentation. On the other hand, the enforcement options open to holders of judgments against the Republic are more limited than to holders of judgments against PDVSA. The Republic is not known to have non-immune assets in its name in the Antilles or elsewhere that are readily attachable.[28] In the United States, pursuit of the primary assets here – PDVSA's shares in PDV Holding – first requires an alter ego finding, which, if made in either the Crystallex or Rusoro proceedings, may result in the PDV Holding shares being attached by one of those creditors, with no substantial value left for Republic bondholders. This assumes that the alter ego determination in favor of Crystallex and/or Rusoro is based on the "exclusive dominion and control" prong of the alter ego test (and not the "fraud and injustice" prong") since that prong of the alter ego analysis is more easily relied upon by a Republic bondholder than the fraud and injustice prong, which is more suited to an expropriation victim than the purchaser of a bond instrument. As noted in our prior article, Crystallex alleges facts relating to the transfer of expropriated property rights to PDVSA by the Republic (also alleged by Rusoro), which, if accepted by the U.S. courts, would qualify as a "fraud or injustice" that would strengthen the arguments in favor of an alter ego finding.[29] Republic bondholders, however, would have to show and rely on the Republic's control of PDVSA's day-to-day operations alone and are not likely to be able to rely on the argument that failing to pierce the veil would results in a "fraud or injustice."[30]

For Republic and PDVSA bondholders, a wait-and-see strategy may make more sense for the time being, at least until some of the events that are expected to occur over the next few weeks have played out.

It would seem that the creditors in the best position to litigate are holders of the promissory notes issued by PDVSA and guaranteed by PDVSA Petróleo. Such noteholders can sue individually without any Trustee, and can aggressively pursue collection of the face amount of notes which they likely purchased at steep discounts. Historically, the creditors who have

[28] Even with the Republic's complete waiver of immunity in its bond offering documents, the only Venezuelan assets in the United States that may be enforced against are those "used for a commercial activity in the United States." 28 U.S.C. § 1610(a)(1).
[29] *See* Cooper, *supra* note 17.
[30] *See id.*

pursued the most aggressive litigation and enforcement strategies in the sovereign context are those who acquired interests at steep discounts and can afford the costs of such litigation and the reduction in post-judgment interest that such litigation may entail (or those that have used provisions such as the *pari passu* clause in the bond documents to prevent the sovereign from servicing its restructured debt, a strategy that may be more difficult today following more recent decisions in this area and assuming Venezuela avoids certain missteps that the U.S. courts have focused on in this context). Most holders of the PDVSA promissory notes fall into this category, and, consequently, we would not be surprised to see more of these suits.

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