

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

CRYSTALLEX INTERNATIONAL CORP.,	:
	:
<i>Appellee,</i>	:
	:
v.	:
	:
BOLIVARIAN REPUBLIC OF	:
VENEZUELA,	:
<i>Defendant-Intervenor.</i>	:
	:
PETRÓLEOS DE VENEZUELA, S.A.	:
	:
<i>Intervenor-Appellant</i>	:

Nos. 18-2797, 18-2889, 18-3124
(consolidated)

CERTIFICATION OF ACCURACY

On behalf of all parties in the consolidated matters, Nos. 18-2797, 18-2889, and 18-3124, undersigned liaison counsel hereby certifies that the attached is a true and accurate transcript of the oral argument held before this Court on April 15, 2019. Three copies of the transcript have also been sent to the Court via overnight delivery service.

Dated: New York, New York
April 30, 2019

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Transcript of **Oral Argument**

Monday, April 15, 2019

Crystallex International Corp. v. Bolivarian Republic of Venezuela

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1 BEFORE :

2 HON. THOMAS L. AMBRO, Circuit Judge

3 HON. JOSEPH A. GREENAWAY, JR., Circuit Judge

4 HON. ANTHONY J. SCIRICA, Circuit Judge

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1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	JOSEPH D. PIZZURRO, ESQ.	
4	On behalf of the Appellant	11
5	MIGUEL A. ESTRADA, ESQ.	
6	On behalf of the Plaintiff-Appellee	46
7	REBUTTAL ARGUMENT OF	
8	JOSEPH D. PIZZURRO, ESQ.	
9	On behalf of the Intervenor-Appellant	67
10		
11	JOSEPH D. PIZZURRO, ESQ.	
12	On behalf of the Appellant	73
13	AMANDA F. DAVIDOFF, ESQ.	
14	On behalf of the Amicus Appellants	104
15	MIGUEL A. ESTRADA, ESQ.	
16	On behalf of the Plaintiff-Appellee	126
17	REBUTTAL ARGUMENT OF	
18	JOSEPH D. PIZZURRO, ESQ.	
19	On behalf of the Intervenor-Appellant	145
20	AMANDA F. DAVIDOFF, ESQ.	
21	On behalf of the Amicus Appellants	148
22		

1	C O N T E N T S (Continued)	
2	ORAL ARGUMENT OF (Continued)	PAGE
3	KENT A. YALOWITZ, ESQ.	
4	On behalf of the Intervenor	152
5	MIGUEL A. ESTRADA, ESQ.	
6	On behalf of the Plaintiff-Appellee	185
7	REBUTTAL ARGUMENT OF	
8	KENT A. YALOWITZ, ESQ.	
9	On behalf of the Intervenor	195
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		

1 P R O C E E D I N G S

2 JUDGE AMBRO: Good afternoon. We have one
3 and only one matter today because it is going to go on
4 for a while: numbers 18-2797, 2889, and 3124,
5 Crystallex International Corporation v. Bolivarian
6 Republic of Venezuela, et al. Mr. Pizzurro?

7 MR. PIZZURRO: Yes.

8 JUDGE AMBRO: Ms. Davidoff?

9 MS. DAVIDOFF: Yes, Your Honor.

10 JUDGE AMBRO: And Mr. Yalowitz?

11 MR. YALOWITZ: Yes, Your Honor.

12 JUDGE AMBRO: If I am mispronouncing
13 anybody's name, please correct me. And Mr. Estrada?

14 MR. ESTRADA: Thank you, Your Honor.

15 JUDGE AMBRO: Mr. Pizzurro, whenever you are
16 ready.

17 MR. PIZZURRO: Thank you.

18 Good afternoon, Your Honors. If it please
19 the Court, my name is Joseph Pizzurro, Curtis, Mallet-
20 Prevost, Colt and Mosle, representing the Appellant,
21 Petroleos de Venezuela, S.A., PDVSA. And I am here to
22 address the Court in the first instance on question A

1 as included in the Court's order of --

2 JUDGE AMBRO: Is that the way the District
3 Court's jurisdiction over PDVSA and its authority under
4 rule 69 to attach the PDVH shares are established by
5 showing that PDVSA is Venezuela's alter ego? Is that
6 correct?

7 MR. PIZZURRO: That is correct, Your Honor.
8 Thank you.

9 JUDGE AMBRO: Okay.

10 MR. PIZZURRO: And, Your Honor, I am
11 reserving three minutes of rebuttal time.

12 JUDGE AMBRO: Actually, you are probably not
13 going to have to worry about that.

14 (Laughter.)

15 MR. PIZZURRO: Thank you, Your Honor.

16 JUDGE AMBRO: We are going to go way over
17 three minutes on rebuttal and go over your time now.

18 (Laughter.)

19 MR. PIZZURRO: Thank you, Your Honor.

20 Well, let me begin in what is --

21 JUDGE AMBRO: If anybody needs a bathroom
22 break, let us know.

1 (Laughter.)

2 MR. PIZZURRO: Let me start with what might
3 be a somewhat unconventional way for an appellant and
4 focus on something that the District Court clearly got
5 correct. And I focus the Court's attention at joint
6 appendix page 49 in which the District Court found that
7 Crystallex had utterly failed to show -- and I quote --
8 "that Venezuela used PDVSA as an instrument to defraud
9 Crystallex. Everything that Crystallex alleges that
10 Venezuela did to harm Crystallex could have been done
11 and, indeed, was alleged to have been done by Venezuela
12 itself, regardless of whether PDVSA even existed."

13 And the Court goes on, "Crystallex does not
14 even allege that PDVSA participated in or facilitated
15 the expropriation, nor does Crystallex allege in
16 anything other than an insufficient conclusory manner
17 that PDVSA was created for or was being maintained by
18 Venezuela for the purpose of defrauding Crystallex."

19 JUDGE AMBRO: Are you saying the District
20 Court needed an independent basis for jurisdiction over
21 PDVSA? Is that correct?

22 MR. PIZZURRO: Yes, Your Honor, we do.

1 JUDGE AMBRO: Didn't it have that under
2 section 1330(a) of Title 28?

3 MR. PIZZURRO: It only has jurisdiction under
4 1330(a)?

5 JUDGE AMBRO: Yes, provided PDVSA is an alter
6 ego --

7 MR. PIZZURRO: There is an applicable basis,
8 exception to immunity, under section 1605, 28 U.S.C.
9 section 1605. So we --

10 JUDGE AMBRO: And this would be 1605, what,
11 (a)(6), the arbitration --

12 MR. PIZZURRO: (a)(6) is what the court
13 focused on.

14 JUDGE AMBRO: Okay.

15 MR. PIZZURRO: Now, to jump right to that
16 point, Your Honor -- and I can come back and address
17 the issue of whether under Peacock because this was a
18 veil-piercing action, it was a liability-shifting
19 proceeding, in which the court needed an independent
20 basis of subject-matter jurisdiction because it lacked
21 ancillary jurisdiction. But we go right to Your
22 Honor's question and address it as follows. PDVSA, as

1 an instrumentality, agency or instrumentality of a
2 foreign state, and under the Bancec decision is
3 entitled to a presumption of its own separateness. And
4 it is entitled to raise its own sovereign immunity and
5 is entitled to a separate determination of that
6 immunity.

7 A court cannot bootstrap an alter ego
8 allegation into jurisdiction. The only way that the
9 court can find subject-matter jurisdiction is if the
10 alter ego allegations are sufficient in themselves to
11 allege conduct which would otherwise render the agency
12 or instrumentality -- rather, would render one of the
13 exceptions to immunity applicable. Now, here in this
14 case, the only -- obviously, the only exception that
15 has any relevance is section 1605(a)(6), which is the
16 arbitration exception.

17 JUDGE AMBRO: Right.

18 MR. PIZZURRO: And so Crystallex would have
19 to have at least alleged, and then if put to its proof
20 proven, that sufficient allegations that PDVSA itself
21 had some responsibility on the arbitral award, either
22 because it participated in the underlying actions

1 giving rising to Crystallex's claim or that it was an
2 active participant in the arbitration itself, or that
3 its form, its existence was being used by Venezuela to
4 frustrate Crystallex's ability to enforce its award by
5 being used as some sort of shell, as is the case in the
6 BRIDAS decision, for example.

7 JUDGE AMBRO: Let's go back on the framework
8 for here. See if I have got this right. 1330(a) gives
9 a broad grant of jurisdiction to District Courts except
10 where there is immunity for the state or its
11 instrumentality. Is that right?

12 MR. PIZZURRO: I think it's phrased a little
13 bit in the other direction. The court has subject-
14 matter jurisdiction where an exception to immunity
15 applies, in a nonjury civil action. Yes, Your Honor.

16 JUDGE AMBRO: But it's a grant of
17 jurisdiction?

18 MR. PIZZURRO: It is a grant of subject-
19 matter jurisdiction.

20 JUDGE AMBRO: And then if you do FSIA 1604,
21 you have certain immunity grants. Is that correct?

22 MR. PIZZURRO: 1604 grants general subject-

1 matter immunity unless --

2 JUDGE AMBRO: Subject to certain exceptions.

3 MR. PIZZURRO: Subject to the exceptions

4 JUDGE AMBRO: And then we go to 1605(a)(6)?

5 MR. PIZZURRO: Correct, Your Honor.

6 JUDGE AMBRO: And you are saying the problem
7 with all of that is what?

8 MR. PIZZURRO: Well, there is no problem with
9 that. The problem is that in conducting that analysis,
10 the Court cannot use simply allegations of alter ego in
11 order to find that the jurisdictional grant applies.

12 JUDGE GREENAWAY: Well, if you didn't rely on
13 just the allegations of alter egos. It made findings.
14 You might disagree with the findings, but the findings
15 are there.

16 MR. PIZZURRO: The findings -- yes, Your
17 Honor, quite correct, but the findings of the District
18 Court had nothing to do with the underlying arbitral
19 award. The case is -- let me try to use as an analogy
20 the Peacock decision itself because I think the cases
21 line up.

22 JUDGE GREENAWAY: Can you start with

1 something a little more basic?

2 MR. PIZZURRO: Certainly.

3 JUDGE GREENAWAY: Is this a factual or
4 facial? And does it matter? The District Court talked
5 about both. I know it is rather basic, but I didn't
6 see anything in the papers on what challenge it is that
7 you are focused on.

8 MR. PIZZURRO: Here, Your Honor, it is a
9 facial challenge. And the court, the District Court,
10 as I read, it based its finding that Crystallex had not
11 -- or rather, that PDVSA had nothing to do with the
12 underlying claim of Crystallex or the arbitration on
13 the allegations of Crystallex itself. So the court
14 accepted as true Crystallex's allegations with respect
15 to that issue.

16 The court -- where the court made its mistake
17 -- and this is also the second question the court
18 posed, but they are related -- is in finding that the
19 alter ego -- the allegations of domination and control
20 can be applied in the absence of any connection between
21 that alleged conduct. That is the wrongful conduct
22 that is alleged, and the injury suffered by Crystallex;

1 in other words, that the domination and control was
2 exercised in a way which abused the corporate form to
3 result proximately in the injury to Crystallex. That
4 is the part that the court missed.

5 And in the jurisdictional analysis, why that
6 is so crucial is because PDVSA is entitled, first of
7 all, to the presumption of separateness. You can't
8 start from the fact that it is an alter ego. You have
9 to start from the fact that it is separate. And you
10 have to start from the fact, as the court pointed out
11 --

12 JUDGE GREENAWAY: I don't think the District
13 Court got that wrong. I think the presumption is
14 there. The question is, what happened afterwards?

15 MR. PIZZURRO: Yes, Your Honor, but what you
16 can't do - but you have to make the determination of
17 jurisdiction as well before you get to alter ego. You
18 can't use alter ego. You can't say, "Okay. There is
19 complete" -- this is what the court did, "There is
20 complete domination and control. I, therefore, find
21 that that is -- it is sufficient to find an alter ego
22 because Venezuela was subject to jurisdiction under

1 section 1605(a)(6). Then, clearly, PDVSA has to
2 because I have just found that it is its alter ego.”

3 JUDGE GREENAWAY: Well, then, tell me, what
4 is the precedent you have for the view that one cannot
5 impute a foreign state’s conduct onto its
6 instrumentality for jurisdictional purposes?

7 MR. PIZZURRO: That is not our argument. I
8 want to be very clear about that, Your Honor. We are
9 not saying that the conduct can never be imputed when
10 you are doing the analysis. What we are saying is that
11 the conduct which is alleged to be imputed has to
12 relate to the exception to immunity. So if, for
13 example, Crystallex had alleged that PDVSA was used by
14 Venezuela in connection with the expropriation, the
15 alleged expropriation, of Crystallex’s contract rights
16 or the termination of its contract rights, that PDVSA
17 had otherwise been liable on the arbitration agreement
18 that gave rise to the arbitration or that PDVSA had
19 actively participated in the arbitration, any one of a
20 number of theories where, generally, outside the
21 sovereign context, nonparties to arbitration agreements
22 can be pulled in and made liable on the agreement to

1 arbitrate and/or on the arbitral award. That is not
2 reserved to the sovereign context.

3 JUDGE SCIRICA: Are you saying this is the
4 first time, first case, where this kind of jurisdiction
5 has been exercised? I mean, I --

6 MR. PIZZURRO: Your Honor, it is the first
7 time that we can identify in which a court has said
8 that the foreign state can be the alter ego of its
9 shareholder, is the alter ego of the shareholder,
10 without connecting the injury that the plaintiff
11 suffers to the alleged abuse of the corporate form,
12 that if the analysis were that clean in every context
13 -- but there is none where the court has held what
14 Judge Stark held. This is the first one we are aware
15 of.

16 JUDGE SCIRICA: And so all the cases that we
17 have been reading provide that this is the step you
18 have to take? I mean, I just don't see it in the cases
19 that form the basis of the action here.

20 MR. PIZZURRO: Let me explore just two of
21 them, Your Honor. Let's look at the EML decision, EML
22 II in the Second Circuit, which involved allegations of

1 alter ego by Argentine bondholders against the Central
2 Bank of Argentina. And the Second Circuit starts its
3 analysis by saying, "The Central Bank is presumed to be
4 separate and the Central Bank has the ability and the
5 right to assert its own sovereign immunity. We are
6 going to then engage in an alter ego analysis." They
7 start their analysis at the control point. And the
8 court finds that there are insufficient allegations of
9 control.

10 The court goes on in footnote 86 and says,
11 "Had we found that the control was sufficient, we would
12 then have to go on and see whether or not the waiver of
13 immunity," which was the exception that was being
14 relied on, it was a waiver in the underlying debt
15 instrument, "whether that waiver of immunity was
16 intended to be imputed to the Central Bank and whether,
17 in fact, it covered these kinds of proceedings." In
18 other words, the bare finding of alter ego itself was
19 insufficient. Then there is a second step. And that
20 alter ego has to be finding, has to be somehow related
21 to an exception to immunity.

22 In Butler in the Eleventh Circuit, the court

1 looked at the alter ego allegations that were made.
2 There was a default judgment that was rendered against
3 a state entity. I know that it has been contested by
4 Crystallex as to whether it was a state entity.
5 Certainly the court and the parties were proceeding on
6 the basis that it was. And they did not -- eventually
7 there was a default judgment that was entered against
8 the original entity. And the plaintiff then sought to
9 enforce that judgment in a subsequent proceeding,
10 alleging that certain additional defendants were the
11 alter egos of the defaulted defendant. And the court
12 --

13 JUDGE SCIRICA: It was an arbitral award in
14 that case?

15 MR. PIZZURRO: That was not. It was a
16 commercial. It was a contract or a tort claim, I
17 believe. It was the crash of an airline, a military
18 plane, I believe, in Florida.

19 JUDGE GREENAWAY: How do you resolve Butler
20 with, on the other side, United States Fidelity and
21 Guaranty, on the other side of the argument, right, the
22 Second Circuit case? How do you reconcile the two?

1 MR. PIZZURRO: I'm sorry? Which two cases,
2 Your Honor?

3 JUDGE GREENAWAY: You are talking about
4 Butler.

5 MR. PIZZURRO: Yes, sir.

6 JUDGE GREENAWAY: I want you to compare and
7 contrast it to United States Fidelity and Guaranty, not
8 the Guaranty case that we are going to talk about on
9 another issue. That is a Second Circuit case. It is
10 1999, stands for the proposition that where for
11 purposes of asserting jurisdiction over a non-sovereign
12 foreign corporate defendant, a nonparty sovereign
13 instrumentality's immunity was imputed onto the
14 defendant and, with it, the FSIA exception qualifying
15 commercial acts of the instrumentality. I just want
16 you to grapple with those two. You are saying we
17 should follow Butler. So --

18 MR. PIZZURRO: Well, and --

19 JUDGE GREENAWAY: That is the other side.

20 MR. PIZZURRO: And EML. And EML is a
21 subsequent decision in the Second Circuit. So the law
22 which is prevailing in the Second Circuit is the EML

1 analysis, which I just explained to the Court. Yes.

2 And that is about -- more than 10 years subsequent,

3 Your Honor. That is -- the case which I believe Your

4 Honor is referring to is --

5 JUDGE GREENAWAY: I know the years.

6 MR. PIZZURRO: It is a District Court --

7 JUDGE GREENAWAY: I just want you to grapple

8 with the issues.

9 MR. PIZZURRO: Your Honor, it is a District
10 Court decision, which is in the Second Circuit. It is
11 District Court Judge --

12 JUDGE GREENAWAY: Well, Kensington I thought
13 was the District Court --

14 MR. PIZZURRO: Kensington is a District Court
15 and a Second Circuit case. And they are both around
16 1999.

17 JUDGE GREENAWAY: And the case that I cited
18 to you is a Second Circuit case. I just want you to
19 grapple with it. I don't understand --

20 JUDGE AMBRO: Think of it as talking about
21 concepts.

22 JUDGE GREENAWAY: They are opposing concepts.

1 I just want you to talk to us about it. That is all.

2 MR. PIZZURRO: Your Honor, the reason why
3 that you can't simply -- if there is a naked finding of
4 alter ego -- and it is part of the problem with the
5 underlying alter ego analysis. You cannot be an alter
6 ego based on findings that are unrelated to the injury
7 and use of the corporate form that injures the
8 plaintiff. So the case law is, and the treatises, and
9 the law upon which the Supreme Court relied in Bancec
10 all say that there needs to be some causal link between
11 the alter ego allegations, the domination and control
12 that is alleged, and the harm suffered by the
13 plaintiff.

14 JUDGE GREENAWAY: The District Court seems to
15 be relying on Bancec to come up with -- you know, let's
16 put ancillary aside for a moment and says, applying
17 Bancec, there is an independent basis for jurisdiction.
18 Is the analysis on Bancec all -- I think it is Bancec.
19 If it is not, you will tell me the correct
20 pronouncement. Is that all wrong? Is the reliance on
21 Bancec misplaced or the application of Bancec
22 misplaced?

1 MR. PIZZURRO: No. Let me -- Bancec or
2 Bancec has been used by the circuits in subsequent
3 jurisprudence, not the Supreme Court itself but the
4 circuits, to apply the same analysis to determine
5 whether or not subject-matter jurisdiction exists under
6 the FSIA, whether you can impute activities of the
7 sovereign to the instrumentality or vice versa in order
8 to find that an exception to immunity applies.

9 What we are saying is that the analysis can't
10 be that the allegations of alter ego, the domination
11 and control allegations, like in this case, you can't
12 make that finding either for jurisdictional purposes or
13 for substantive liability purposes unless you can find
14 that the conduct to be imputed to the agency or
15 instrumentality would be sufficient in and of itself
16 for an exception to immunity to apply. So in this
17 case, again --

18 JUDGE GREENAWAY: So that is why you need a
19 facial and not a factual?

20 MR. PIZZURRO: Well, this case, it is facial
21 because there never was an allegation that PDVSA was
22 responsible for, participated in, or in any way

1 connected to the underlying claim of Crystallex. That
2 is why Crystallex did not bring PDVSA in as a defendant
3 in its action to confirm the arbitral award. It would
4 be a very simple analysis -- well, a simpler analysis I
5 think, if, for example, instead of styling its action
6 as a rule 69 enforcement procedure, Crystallex had
7 simply said, "In the District Court in the District of
8 Columbia, we seek to enforce the arbitral award against
9 Venezuela and PDVSA, against PDVSA" --

10 JUDGE GREENAWAY: That would be --

11 MR. PIZZURRO: -- "as the alter ego."

12 JUDGE GREENAWAY: Right. But that -- well,
13 if they did alter ego maybe, but right up until that
14 point, it would be violative of Peacock. So that is
15 why they wouldn't do that, right?

16 MR. PIZZURRO: No, Your Honor. That is the
17 point. That is the point. In the original action, if
18 they had said that PDVSA is also not immune because of
19 the application of (a)(6), then that would have been
20 adjudicated by the court. And what would the -- the
21 court would necessarily have to have looked at whether
22 the allegations against PDVSA, the alter ego

1 allegations, were sufficient to make PDVSA liable on
2 the arbitral award. It is exactly like the Peacock
3 case. In Peacock, Your Honor, there was a --

4 JUDGE AMBRO: But you need an independent
5 basis under Peacock, right, for jurisdiction?

6 MR. PIZZURRO: That is because it is a
7 subsequent enforcement proceeding. I'm positing a
8 situation in which in the first instance, it is not an
9 enforcement proceeding. They had simply said, as many
10 plaintiffs do, "There are two parties that are liable
11 on this award, one of which is liable as an alter ego."

12 JUDGE GREENAWAY: But Peacock helps you on
13 ancillary jurisdiction. Peacock doesn't necessarily
14 help you on independent.

15 MR. PIZZURRO: No.

16 JUDGE AMBRO: Why don't -- go ahead. Why
17 don't you finish his question? Then I will follow up
18 with what we were just talking about.

19 MR. PIZZURRO: Okay. Well, Peacock stands
20 for the proposition that where you have a second
21 proceeding, whether it is a separate lawsuit or it is
22 an enforcement proceeding, it doesn't make any

1 difference. And I can get into that. It is completely
2 irrelevant. You need, where you are trying to transfer
3 liability to a party other than the party that was
4 originally liable on the judgment, right -- you need an
5 independent basis for subject-matter jurisdiction.

6 Peacock goes on and says, "Let's analyze this
7 as if it had been brought in the original action." The
8 veil-piercing allegations there were wholly unrelated
9 to the ERISA violation. The court makes it clear the
10 allegations of wrongdoing had nothing to do with the
11 original cause of action. Therefore, had Peacock
12 brought the action against Thomas in the original
13 action, it would have been dismissed. In Peacock, of
14 course, the action was dismissed in a subsequent
15 ancillary proceeding because the allegations of alter
16 ego didn't relate to the fiduciary violations that were
17 the basis for the ERISA case. The ERISA jurisdiction
18 didn't create -- you couldn't look back to the ERISA
19 jurisdiction.

20 Similarly here, you can't look back to the
21 FSIA jurisdiction that was originally applied and
22 correctly to Venezuela.

1 JUDGE AMBRO: So in --

2 MR. PIZZURRO: In -- sorry.

3 JUDGE AMBRO: Even if Peacock requires an
4 independent basis for jurisdiction in a post-judgment
5 proceeding like this one, why isn't this case like the
6 Fourth Circuit case from 2002 in First Flight, where it
7 says that Peacock does not prohibit a Federal court
8 from taking jurisdiction over a post-judgment alter ego
9 claim where an independent basis for jurisdiction
10 exists? Isn't that a correct analysis?

11 MR. PIZZURRO: Well, what we are arguing here
12 is that an independent basis for subject-matter
13 jurisdiction does not exist here, Your Honor.

14 JUDGE AMBRO: But it would seem to be it
15 would be 1330(a), which gives District Courts
16 jurisdiction over any nonjury civil action against a
17 foreign state or instrumentality with respect to which
18 the foreign state or instrumentality is not entitled to
19 immunity.

20 MR. PIZZURRO: But here PDVSA is entitled to
21 immunity, Your Honor, because there aren't sufficient
22 allegations regarding PDVSA's own conduct, which if

1 true would make PDVSA -- would establish the
2 applicability of section 1605(a)(6) with respect to
3 PDVSA. In other words, PDVSA -- it is not an action to
4 enforce an arbitral agreement against PDVSA. It is not
5 an action where you can enforce an arbitration award
6 against PDVSA. If you could, then yes, then --

7 JUDGE AMBRO: But it seems that what you are
8 trying to do is shift the immunity exception from the
9 foreign sovereign to an instrumentality. Is that
10 correct?

11 MR. PIZZURRO: We are saying, Your Honor,
12 that the instrumentality is entitled to that
13 determination on its own in the first instance. It is
14 entitled to that presumption because it is a foreign
15 state, as defined in the act.

16 JUDGE AMBRO: And why doesn't our 1993
17 decision in FDIC v. Rubin, in effect, tell us what we
18 do post -- you know, in this case?

19 MR. PIZZURRO: I don't think the Rubin case
20 deals with the issue of ancillary jurisdiction, Your
21 Honor. What it deals with is, can you use the concept
22 of veil-piercing or alter ego ...

1 JUDGE AMBRO: But it does say that in
2 determining jurisdiction, you do look to -- we
3 acknowledge there or, actually, basically what we did
4 is we joined other circuits in saying that when you
5 take a look at issuing a writ of attachment, that you
6 do look to Rubin for, among other things, or Bancec
7 for, among other things, to jurisdiction.

8 MR. PIZZURRO: Yes, Your Honor. And I am not
9 saying that that is incorrect. You can. You can. But
10 what the Court cannot do is take a finding -- can't
11 make a finding of alter ego and, therefore -- and a
12 finding sufficient to overcome the presumption of
13 jurisdiction unless that alter ego finding is related
14 to conduct of the instrumentality that itself is
15 sufficient to make one of the exceptions to immunity
16 apply.

17 So when we look, the problem with this case
18 is there is a complete disconnect between the
19 allegations of domination and control and the injury
20 that is alleged by Crystallex. Crystallex is not
21 alleging any injury, as Judge Stark said, any injury at
22 all, to it either by actions of PDVSA directly or by

1 abuse of the corporate form of PDVSA by Venezuela.

2 JUDGE AMBRO: I thought you were asking us,
3 in effect, to overturn our decision in FDIC v. Rubin.

4 MR. PIZZURRO: No, Your Honor.

5 JUDGE AMBRO: Page 21, note 5.

6 MR. PIZZURRO: Is that in PDVSA's brief, Your
7 Honor?

8 JUDGE AMBRO: Venezuela's brief.

9 MR. PIZZURRO: No. I am here on behalf of
10 PDVSA, Your Honor. That is not an argument that we
11 have made.

12 JUDGE AMBRO: Okay.

13 JUDGE GREENAWAY: Let me ask you a question.
14 Do I understand your view to be that -- here is the
15 question I want to know. What would prevent foreign
16 governments from avoiding international law; that is,
17 judgments arising from international treaties by simply
18 creating juridical entities and transferring their
19 assets to them whenever the need arises? That is one
20 of the things I am concerned about. Can you respond to
21 that?

22 MR. PIZZURRO: Well, Your Honor, they cannot

1 do that under the existing appropriately applied
2 principles of Bancec and the Foreign Sovereign
3 Immunities Act. That is not what is being alleged
4 here.

5 JUDGE GREENAWAY: Okay. Wonderful. So,
6 then, so imagine that it was clear that one such
7 juridical entity was merely a sham corporation such
8 that the first Bancec exception applies for liability
9 purposes. Couldn't the entity simply argue that its
10 own conduct has to be the basis for jurisdiction and,
11 as such, insulate the government from judgments by our
12 courts? I mean, you see where I am going with this.

13 MR. PIZZURRO: Well, I think, Your Honor,
14 that if there was an attempt to avoid either liability
15 or the ability of a defendant, a plaintiff to collect,
16 an abuse of the corporate form in that respect, Bancec
17 leaves open the possibility for the Court to make a
18 finding that could be both jurisdictional as well as
19 liability shifting that there is an alter ego
20 relationship because there, what Your Honor is positing
21 is conduct which is not only abuse of the corporate
22 form but an abuse of the corporate form that results in

1 an injury to the Plaintiff.

2 What you can't do is to take allegations,
3 such as in this case, that are wholly unrelated to the
4 underlying conduct, wholly unrelated to any abuse of
5 the corporate form that resulted in the injury to the
6 Plaintiff and say that there is an alter ego
7 relationship because then, Your Honor, the effect of
8 that is everything that Venezuela is responsible for,
9 PDVSA is responsible for. Everything that PDVSA is
10 responsible for, Venezuela is responsible for. And
11 there is no longer, not just with respect to this
12 particular conduct, not just with respect to the
13 conduct that gives Crystallex standing if it has it,
14 but with respect to anyone.

15 And, Your Honor, they are lining up at the
16 courthouse door in Delaware right now. Other
17 plaintiffs are lining up. And they are relying on
18 Judge Stark's decision in order to find PDVSA and its
19 assets responsible with respect to arbitral awards,
20 where its conduct is completely unrelated to the
21 underlying claim. And in that respect, Your Honor, why
22 wouldn't a state shipping company -- if you could make

1 a finding that the state-owned shipping company is
2 dominated and controlled by Venezuela, then why
3 wouldn't it also be liable to Crystallex? Why wouldn't
4 its assets be available? Why wouldn't the airline's
5 assets be available?

6 JUDGE GREENAWAY: We may be getting ahead of
7 ourselves, but I presume your major point is all of the
8 findings that the District Court made in whatever it
9 was, I think 30 to 32 of the opinion, all of those,
10 have to be undone because you keep talking about
11 allegations, but, obviously, the court looked at --
12 made particular findings because the court looked at it
13 both as a facial and factual. So I presume what you
14 want us to do is put everything to the side that the
15 court looked at in making its findings because it is
16 only a facial challenge.

17 MR. PIZZURRO: No, Your Honor. That is not
18 --

19 JUDGE GREENAWAY: Okay.

20 MR. PIZZURRO: It is not quite there. What
21 we are asking --

22 JUDGE GREENAWAY: Okay.

1 MR. PIZZURRO: What we are saying to the
2 Court and what we argued in the District Court was all
3 of that is irrelevant. It doesn't matter. It doesn't
4 matter at all because none of that conduct is related
5 to Crystallex's claim. As we put in the brief, a
6 fundamental requirement under Article III for standing
7 is that there be an injury alleged by the Plaintiff as
8 a result of the conduct complained of. You can't come
9 into court and say, "Life is unfair. And, therefore, I
10 should get assets."

11 JUDGE GREENAWAY: Well, yes. But I don't
12 understand how we could undo the opinion if we didn't
13 do that because all of these findings are made. The
14 alter ego and the independent basis seem to be sort of
15 inextricably intertwined as far as the finding of
16 jurisdiction, on the one hand, and alter ego.

17 I hear you. I hear what you are saying on
18 irrelevancy. I am just not where you are at the
19 moment.

20 MR. PIZZURRO: Well, let's look at -- if I
21 could, let's look at Peacock itself and what happened
22 in Peacock. There was a finding that there was an

1 ERISA violation by the corporation. Subsequently an
2 action is brought against, I believe it was, an
3 officer. Perhaps he was also a shareholder. The guy
4 himself, Thomas, brings a subsequent action.

5 JUDGE GREENAWAY: I hate to interrupt you,
6 and I do beg your pardon, but Peacock doesn't solve the
7 entire problem, does it?

8 MR. PIZZURRO: I think it does, Your Honor.
9 When you look at the court's analysis of the --

10 JUDGE AMBRO: Well, Peacock says you might
11 need in the ERISA context independent avenue for
12 jurisdiction. We keep telling you we think there might
13 be one in 1330(a), and you are saying --

14 MR. PIZZURRO: And our argument is, Your
15 Honor, that under -- 1330(a) only directs you to 1605.
16 So you have to look to 1605 because --

17 JUDGE AMBRO: The only case I see you relying
18 on is Butler. Right?

19 MR. PIZZURRO: Well, Butler is a case in
20 which --

21 JUDGE AMBRO: Butler suggests that -- well,
22 it implies that Bancec should not be used to determine

1 jurisdiction over a foreign instrumentality. Is that
2 correct?

3 MR. PIZZURRO: No, Your Honor. And I want to
4 be very clear. I want to be very clear.

5 JUDGE AMBRO: What are you --

6 MR. PIZZURRO: PDVSA --

7 JUDGE AMBRO: What are you using Butler for,
8 then?

9 MR. PIZZURRO: We are using Butler for the
10 proposition that where the alter ego allegations don't
11 relate to conduct that would give you independent
12 jurisdiction over the agency or instrumentality, they
13 are irrelevant because there is no exception to
14 immunity for being an alter ego. The fact that you are
15 an alter ego doesn't provide the application of an
16 exception to immunity. As an agency or
17 instrumentality, PDVSA is entitled to not only a
18 presumption of separateness under Bancec, but it is
19 entitled to a presumption of sovereign immunity itself,
20 not derivative of Venezuela. It is entitled to --

21 JUDGE AMBRO: And so how does Butler help
22 your argument here?

1 MR. PIZZURRO: Because in Butler, what the
2 court said was -- in ultimately dismissing the case and
3 denying the request for jurisdictional discovery, said
4 that all of those facts as to which you seek discovery
5 are irrelevant to the underlying claim. They don't
6 provide you with jurisdiction under either the waiver
7 provision or under commercial activity provision. You
8 are just trying to show that one is the alter ego of
9 the other. Being the alter ego without that next step
10 is not sufficient to confer that subject matter --

11 JUDGE AMBRO: Did Butler even cite Bancec?

12 MR. PIZZURRO: I don't believe that -- I
13 don't believe it does, Your Honor, but I think the
14 jurisdictional analysis is different. This is where --

15 JUDGE AMBRO: But also --

16 JUDGE GREENAWAY: I guess the key -- I'm --

17 JUDGE AMBRO: Go ahead, Joe. You got it.

18 JUDGE GREENAWAY: I thought the key was that
19 if PDVSA is Venezuela's alter ego, then Venezuela's
20 conduct can be imputed onto PDVSA for determining both
21 jurisdiction and substantive liability. Hence, that is
22 the argument to get to independent jurisdiction. Is

1 that wrong?

2 MR. PIZZURRO: Your Honor, this is where the
3 two questions the court posed, they meld into one
4 question. Can on the facts as found by the District
5 Court and on the allegations of Crystallex, PDVSA be
6 the alter ego of Venezuela in this case? The answer to
7 that is no.

8 JUDGE GREENAWAY: I get that. But if the
9 answer is yes, then that could be the independent basis
10 for jurisdiction.

11 MR. PIZZURRO: It could be, Your Honor, but
12 the only way that answer can be yes is if the
13 allegations with respect to the conduct of PDVSA or the
14 use of PDVSA by Venezuela related to the underlying
15 injury suffered by Crystallex.

16 JUDGE GREENAWAY: Right. But that --

17 MR. PIZZURRO: And it doesn't --

18 JUDGE GREENAWAY: -- goes back to the
19 question Judge Ambro asked you about Butler and whether
20 Butler is the only precedent that you are relying on.

21 MR. PIZZURRO: EML is also an analysis that
22 makes this point, but in EML, the Second Circuit never

1 gets to that second question. It says I would have to,
2 we would have to, in footnote 86 -- if we were to find
3 that these allegations of control were sufficient, we
4 would have to take the next step. And that next step
5 would be, do they relate to the exception to immunity?
6 Do they relate to the waiver because waiver was the
7 exception to immunity upon which the Plaintiff relied?

8 JUDGE AMBRO: I am beginning to piece part of
9 what you are saying in connection with a later argument
10 relating to alter ego. You are saying that there is a
11 requirement that there be a nexus between the actions
12 of PDVSA and the injury here. Is that correct?

13 MR. PIZZURRO: That is correct, Your Honor.

14 JUDGE AMBRO: And that depends on which law
15 you are applying to this. Isn't that correct? If it
16 is like, for example, Delaware law, you might be right.
17 If it is Bancec, you were wrong or Rubin, either way.

18 MR. PIZZURRO: No, Your Honor, I don't
19 believe so. That --

20 JUDGE AMBRO: Well, wait until we get there,
21 but that is -- we are not there yet --

22 MR. PIZZURRO: Correct.

1 JUDGE AMBRO: -- because that is some other
2 part of today's argument. But it appears, back to
3 Butler, that Butler, which was '09, was, in effect,
4 disregarded by later panels of the Eleventh Circuit. I
5 am thinking specifically of Architectural Ingenieria,
6 which is 788 F. 3rd 1329 from 2015. So I am not even
7 sure what you are citing Butler for in the Eleventh
8 Circuit is even good law in the Eleventh Circuit.

9 MR. PIZZURRO: Your Honor, let me please be
10 very clear. I don't want to mix an argument that
11 Bancec cannot be used for jurisdictional purposes with
12 the analysis of whether in this case Bancec, applying
13 its principles, does result or does not result in
14 jurisdiction, an independent basis for jurisdiction.
15 We are arguing the latter. We are not arguing the
16 former.

17 So our argument is this. Take as a given for
18 the purposes of this argument that a court can use the
19 principles embedded in Bancec in order to attribute
20 jurisdiction to an agency or instrumentality. Still,
21 in doing that finding, the court cannot extricate the
22 normal requirement of finding alter ego or veil-

1 piercing. They are the same for these purposes. And
2 the requirement that the conduct being attributed to
3 the entity is sufficient to make in this case the
4 entity liable on the arbitral award.

5 If Crystallex had or even could allege that
6 there was something that PDVSA had done or something
7 Venezuela caused PDVSA to do or abused PDVSA as a
8 separate corporation that resulted in injury to it,
9 then a court, the District Court, would have had
10 jurisdiction under 1605(a)(6) because the arbitration
11 exception would apply to PDVSA, both as a function of
12 the alter ego analysis as well as because that analysis
13 is directly related to the injury suffered by the
14 Plaintiff. It doesn't have to be part of the
15 arbitration. It could be there is a whole body of law
16 that exists where alter egos can be liable on arbitral
17 awards when they're not parties to the agreement or
18 even involved in the arbitration, but none of those
19 factors are present here.

20 As a result, the Court lacks subject-matter
21 jurisdiction, not because the Bancerc principles aren't
22 applicable. They are being applied, but they are

1 simply being applied correctly. And you have to find
2 that there is that causal link between the allegations
3 and the injury suffered.

4 JUDGE AMBRO: Now, let me ask you just in
5 terms of organization or how you want to proceed.
6 Whether PDVSA is Venezuela's alter ego under Bancec and
7 whether the shares are immune from attachment, do you
8 want to hold that for the next portion of the argument
9 and let Mr. Estrada reply to this portion now or do you
10 want to deal with that and let him reply to both?

11 MR. PIZZURRO: Well, Your Honor, it is the
12 Court's pleasure. Whatever the Court will --

13 JUDGE AMBRO: Why don't we let Mr. Estrada,
14 then, reply to this portion of the argument? Then we
15 will get you back up.

16 MR. PIZZURRO: Thank you, Your Honor.

17 MR. ESTRADA: Thank you, Judge Ambro, and may
18 it please the Court, let me start by making it clear --

19 JUDGE AMBRO: Excuse me for a moment. Just
20 for the record, you probably ought to note your name.

21 MR. ESTRADA: Yes. I am Miguel Estrada,
22 Gibson, Dunn and Crutcher, for the Appellee,

1 Crystallex.

2 Let me start by making clear that this is an
3 action against Venezuela. And the District Court in
4 the District of Columbia had clearly subject-matter
5 jurisdiction under 1330. The immunity of Venezuela as
6 a defendant was defeated under the arbitration
7 exception.

8 Once a judgment was issued by that court, we
9 registered the judgment in the District of Delaware
10 under section 1963, and it became, as it were, a
11 judgment of the District of Delaware.

12 We then commenced enforcement proceedings in
13 the District of Delaware. And it is our contention
14 that under rule 69, we were entitled to enforce our
15 judgment against property of the debtor, Venezuela.
16 The central issue once we got in the District of
17 Delaware was whether the property we asserted was
18 property of Venezuela was indeed property of Venezuela.
19 And that issue turned on whether the asset was one that
20 was that of the debtor or one of its separate entity:
21 PDVSA.

22 PDVSA was not sued. We never made any claim

1 that it was a defendant in the action. There was no
2 possible outcome of the action in which PDVSA was going
3 to be added to the judgment. If in the interim, PDVSA
4 were sold, say, to Exxon, we could not follow them and
5 execute any of its assets. We were making a claim with
6 respect to a specific asset that turned on our
7 assertion that it was proven as found by the District
8 Court that PDVSA was the alter ego of Venezuela.

9 JUDGE AMBRO: Now, it looks like the First,
10 the Second, and I think the Tenth Circuits have
11 construed Peacock to require a separate basis for
12 subject-matter jurisdiction --

13 MR. ESTRADA: Well, let me address --

14 JUDGE AMBRO: -- in the post-judgment
15 execution proceedings.

16 MR. ESTRADA: Well, let me address Peacock
17 first.

18 JUDGE AMBRO: Go ahead.

19 MR. ESTRADA: Peacock was a case in which the
20 earlier judgment was an ERISA judgment. And there was
21 an attempt later to commence a new lawsuit to impose
22 personal liability on a separate person. If you look

1 at footnote 6 of the opinion, in other words, there was
2 a mention by the SG as amicus that there might have
3 been ways in which the plaintiff in the case could have
4 sought to recover from the defendant under other means
5 of collection other than the imposition of personal
6 liability. It is like a fraudulent conveyance or
7 something like that. The court refused to get into
8 that by saying that the plaintiff was insistent that
9 this was a new action to impose personal liability on
10 the defendant and that they were going to take the
11 plaintiff at his word. That is point 1.

12 Point 2, also that Peacock and this Court's
13 own decision in IFC and Gambone made very clear that
14 Peacock has no application to rule 69 enforcement
15 actions, so that when you are actually enforcing a
16 judgment under the ancillary jurisdiction that flows
17 from the original judgment, the only question is, are
18 you still trying to go after property of the debtor?
19 And whether it is or it isn't property of the debtor,
20 it may be the merits of the action. But if you are
21 filing a rule 69 motion, that is federal jurisdiction
22 under rule 69 in any event. If I file a rule 69 motion

1 in the District of Delaware and say, "I assert that
2 this is the property of Venezuela," PDVSA or Russia can
3 come in and claim, "No, that is not the property of the
4 debtor," and they may be entitled to immunity if they
5 were a defendant in a separate lawsuit. And, you know,
6 as a matter of due process, they have rights to be
7 heard and come in if they want. Here, PDVSA intervened
8 of its own accord. But no one would claim that in
9 order for them to claim that we are wrong, that this is
10 not the property of the debtor, we have to sue them.

11 And what happened in the District of Delaware
12 was we made our assertion that identified property in
13 the rule 69 proceeding pursuant to the ancillary
14 jurisdiction that flowed from the original judgment was
15 property of the debtor. The theory that underlay our
16 assertion was alter ego, to be sure, but it was not a
17 theory that we were using in an effort --

18 JUDGE AMBRO: But, in effect, it is like
19 reverse alter ego, right? It is like reverse alter
20 ego?

21 MR. ESTRADA: Yes. We are saying that this
22 is property of the debtor because this company, in

1 effect, has no separate substantive existence. Now,
2 the theory on the merits is that these two entities are
3 one and the same. And, therefore, they -- you know,
4 the property on the day that we filed our motion was
5 property of the debtor. But it was not a lawsuit, as I
6 said at the beginning, against PDVSA.

7 If we are right, then the jurisdiction that
8 supports this under Peacock is one that Peacock and
9 this Court, recognizing IFC, is the ancillary
10 jurisdiction for enforcement. That is point 1.

11 Point 2 is that, even if you thought there
12 were any doubt on that, you know, the fundamental point
13 in Peacock is that somebody was trying to evade state
14 court jurisdiction. In Peacock, if you didn't get into
15 Federal court, you had to go do this in state court.
16 And, as you mentioned, the Fourth Circuit in that case
17 --

18 JUDGE AMBRO: First Flight.

19 MR. ESTRADA: -- that you cited and many
20 other courts have recognized that Peacock really has no
21 application if there is an independent subject-matter
22 jurisdiction basis. Now, the FSIA is party-based

1 jurisdiction, that even under the view that PDVSA is a
2 party here, the FSIA provides party-based jurisdiction.
3 And even if you thought that the proper party here was
4 PDVSA, there is no way that this lawsuit could be heard
5 anyplace other than the Federal District Court in the
6 District of Delaware because under the FSIA, as an
7 instrumentality of the Government of Venezuela, PDVSA
8 would have to be sued in Federal court, not in state
9 court. And under Delaware law, the situs of the shares
10 is in Delaware. And so this is, in fact, the only
11 court on the planet on which this lawsuit could have
12 been heard.

13 The only question and all that turns on
14 PDVSA's Peacock argument is they would like us to have
15 -- instead of have filed a motion for enforcement under
16 our original judgment, they would have liked to have us
17 take the more cumbersome process of filing a separate
18 lawsuit under 1608 and take well over a year to have
19 separate Hague Convention service so that they could,
20 perhaps with the aid of Venezuela, engage in additional
21 efforts to dissipate assets and evade their creditors.

22 JUDGE AMBRO: So, circling back to where we

1 started, then, do you agree with the other three
2 circuits that Peacock does require a separate basis for
3 subject-matter jurisdiction in a post-judgment
4 execution proceeding?

5 MR. ESTRADA: Not in cases in which there is
6 a rule 69 motion? If you agree with --

7 JUDGE AMBRO: But here it is being based --
8 the execution proceeding is based on a theory of alter
9 ego, right?

10 MR. ESTRADA: Yes, but I don't agree with the
11 proposition that just because the theory is alter ego,
12 you need a separate basis for subject-matter
13 jurisdiction. And on this point, I do think that the
14 District Court in this case was correct in noting that
15 although you could have an alter ego theory to support
16 a separate action for the imposition of personal
17 liability, you could have an alter ego theory that is
18 merely piercing for collection purposes with respect to
19 a specific piece of property.

20 And for that, I would refer you to Judge
21 Easterbrook's opinion in Vitek Enterprises, the Seventh
22 Circuit case, where the same argument there, as you may

1 recall, was somebody that in the context of an earlier
2 criminal case had been ordered to pay restitution to
3 victims. The restitution was never paid to the
4 victims. And then it was found by the District Court
5 that all of the money had been handed over to alter
6 egos.

7 The alter egos were then ordered to pay it,
8 and they made a Peacock argument. And Judge
9 Easterbrook said, "It is not the case that you need a
10 separate basis for a jurisdiction just because you use
11 your alter ego."

12 JUDGE AMBRO: Maybe I am wrong, but I don't
13 read the Seventh Circuit case as being in conflict with
14 the First Circuit in MD Construction or the Second
15 Circuit in Epperson or the Tenth Circuit in Ellis. Do
16 you?

17 MR. ESTRADA: Well, I don't think that any of
18 these cases are in conflict with each other. I
19 actually just think that they haven't addressed the
20 particular claim of alter ego that is at issue here,
21 one that is simply piercing for collection with respect
22 to specific property, as opposed to the more-often

1 claim that people make where the alter ego is invoked
2 to try to impose actual personal liability on the
3 defendant. This is why I said that I would agree more
4 generally that an independent basis for jurisdiction
5 would be needed if we had sued them to add them to the
6 judgment, which is not what we did.

7 But assuming that one's -- I mean, I don't
8 think a lot turns on it in this case because, as I
9 pointed out, on the assumption that an independent
10 basis for Federal jurisdiction is needed, given that
11 the FSIA provides party-based jurisdiction and that
12 they are an instrumentality of the Government of
13 Venezuela, this is a dispute that had to be in Federal
14 court anyway. And so that the dispute, whether or not
15 they are an alter ego of the Government of Venezuela,
16 would have had to be resolved in this District Court
17 and that the only thing that rides on the peak of
18 objection is whether we were correct in bringing this
19 by motion and having them willingly intervened or
20 whether they really were looking to have us sue them
21 separately and force us to go to yet another service so
22 that they could sort of use the interim time to evade,

1 you know, their creditors further.

2 But, as I said, it is not really a
3 jurisdictional objection in the true Peacock sense
4 because, although I do think that this is a good rule
5 1609 motion because we are not using alter ego to add
6 them to the judgment, which is the true Peacock problem
7 for alter ego, there is no jurisdictional problem in
8 terms of subject-matter jurisdiction. And I think at
9 the end of the day, that is what matters.

10 This is a case that could only be in this
11 District Court because it is party-based jurisdiction
12 and the shares are in Delaware. And to the extent that
13 there were any other issue as to whether they were in
14 court, they came in on a voluntary intervention anyway.

15 But from our point of view, as I said from
16 the beginning, this is a judgment that is against
17 Venezuela. The jurisdiction that supports this action
18 is 1330 in our action against Venezuela. And this is
19 an enforcement action seeking to ferret out the assets
20 of the judgment debtor Venezuela. This is why we filed
21 this under section 1610 and rule 69.

22 Yes, Your Honor?

1 JUDGE SCIRICA: Is there a nexus requirement
2 here?

3 MR. ESTRADA: No. Let me turn to that
4 because I am a little bit surprised about the strength
5 of the -- how should I phrase this? -- how strongly
6 this contention is being urged, both the notion that
7 the domination and control must have been used to harm
8 the Plaintiff in the specific action itself, which is
9 something that is asserted to be required both by
10 Article III and by Bancec. I think as to Article III,
11 obviously Article III is a controversy that we had with
12 the original debtor. And I think it is very well-
13 established going back to the 1700s that the judgment
14 of the Federal courts continue live until they are
15 fully enforced and until we are paid, there is an
16 Article III controversy. This is not our Article III
17 issue at all.

18 With respect to Bancec, I am even somewhat
19 more astonished because if you recall Bancec, the
20 District Court made a finding of alter ego. The Second
21 Circuit reversed. And why did the Second Circuit
22 reverse the alter ego finding? Well, it is on page 619

1 of the Supreme Court's opinion. The basis for the
2 reversal by the Second Circuit had been that the Bancec
3 had not participated in the underlying conduct. And
4 the Second Circuit had read one of its earlier cases --
5 and this is again at page 619 of the Supreme Court's
6 opinion -- had read one of its earlier cases, saying
7 that it was necessary that the instrumentality play a
8 key role, concluding that it could not uphold the alter
9 ego finding -- this is at the end of the first full
10 paragraph -- because it was totally unrelated to the
11 operations, conduct, or authority of the
12 instrumentality.

13 Now, you would think if anything was clearer
14 from Bancec, it was that the Second Circuit got
15 reversed and that its ruling overturning the alter ego
16 finding by the District Court had been based on
17 precisely the ground that is being urged here as an
18 essential component of Bancec. It is almost
19 incomprehensible to me that you could derive from
20 Bancec the proposition that it is essential for the
21 instrumentality to have participated in the wrong given
22 that that was the basis for the Second Circuit's ruling

1 in Bancec and the Second Circuit was actually
2 overturned.

3 But it seems to me also that with respect to
4 the Bancec factors more generally, it is also the case
5 that the Supreme Court has also made more clear in
6 Bancec itself by citing to the Deena Artware case that
7 it was not the type of factor that would require the
8 participation of the purported alter ego, right,
9 because under the factor of the Deena Artware case,
10 there had been an unfair labor practice and failure to
11 pay back pay. And it was very clear from the facts of
12 the unfair labor practice and what happened later with
13 the efforts to avoid paying the back pay that the
14 purported alter egos and the man who was running the
15 operation, Weiner, that all of that had happened after
16 the unfair labor practice. So none of these people
17 except possibly for Weiner, who had control of the
18 operations, had anything to do with the underlying
19 conduct.

20 It is also clear from the facts of the Deena
21 Artware case that the Sixth Circuit had basically
22 turned the board down on both of the grounds urged as a

1 basis for imposing liability on the other enterprises.
2 The Sixth Circuit had turned down fraud and control.
3 And the Supreme Court basically let the fraud finding
4 stand and overturned the Sixth Circuit only on the
5 control prong, even though the related entities again
6 had had nothing to do with the underlying unfair labor
7 practice. So it seems --

8 JUDGE GREENAWAY: Let me ask you this
9 question. Your adversary talked about the irrelevancy
10 of the District Court's findings with regard to
11 extensive control and the other findings about the
12 relationship between Venezuela and PDVSA. I presume
13 you don't agree that it is an irrelevancy, but how
14 should we look at that? And comment, if you will, on
15 the facial/factual distinction of --

16 MR. ESTRADA: Well, I think what has happened
17 is that the world has changed a little bit since the
18 District Court rendered its ruling and where we are
19 here. When the District Court rendered its ruling,
20 counsel for PDVSA was urging both arguments I think, as
21 the District Court correctly noted, that on the face of
22 the motion that we had filed, we had not made out a

1 claim for alter ego and that the factual support that
2 we had proffered also was insufficient. And I think
3 Judge Stark in a very methodical, rigorous way actually
4 dealt with them separately. I would have thought they
5 would have been sufficient for him to say, "As a matter
6 of fact, I disagree with you," but I think he gave them
7 the benefit of crossing every t and dotting every i by
8 dealing with both arguments separately.

9 I think at the time that we were in District
10 Court, when counsel for PDVSA and Venezuela -- how
11 should I put this delicately? -- were still following
12 the directions from the then-incumbent Government of
13 Venezuela, there were a lot of merits arguments as to
14 how these factors actually didn't amount to anything
15 and that they were basically commonplace and they were
16 -- you know, didn't show much of anything.

17 Now, that has become a little bit more
18 awkward because now we are in the service of a new
19 Government of Venezuela, which is saying that the old,
20 incumbent government was indeed a rogue government,
21 which is essentially what the District Court found. So
22 the situation is a little bit more awkward I would

1 think for my opponents. But the fact is it has always
2 been the case. And that government continues to be
3 manning the levers of power.

4 The facts obviously are key here because they
5 do control whether this is the property of the debtor
6 as a practical and factual matter. So, obviously, we
7 don't agree with counsel for PDVSA that the facts are
8 neither here nor there. I mean, it seems to us that
9 the controlling question here is we had a judgment from
10 a sovereign debtor that for years has declined or
11 refused to pay and has gone to great lengths, as this
12 Court pointed out in its earlier opinion in the DUFTA
13 case, to evade its creditors. And we have been very --
14 we have tried to go to great lengths to try to get our
15 own bondholders and our own people paid. You know, my
16 client is in bankruptcy in Canada. And there are
17 people who are waiting on this litigation so that they,
18 too, can be paid.

19 At the end of the day, we filed this motion.
20 And the question under the motion was, was this
21 property of the debtor on the day that we filed it? We
22 made a factual showing that I think was compelling to

1 the District Court, that it was indeed property of the
2 debtor. Now that the circumstances have changed in
3 terms of which government counsel for PDVSA is
4 answering to, I think it has become a little bit more
5 awkward to defend the actions of the old regime. And I
6 think that that is probably what explains what is it
7 that we are no longer quite as heartily sort of saying
8 that it was all okay. That would be what I would
9 assume, but you can ask them.

10 If I could go back, if I could back to one of
11 the points that counsel made with respect to the EM
12 case, you know, the Second Circuit case, which is
13 heavily relied on. It is, again, just like the
14 reliance on Bancec, which stands for the flatly
15 contrary proposition. I am also a little bit mystified
16 by the Central Bank of Argentina case. This one is a
17 little bit less mystifying because I think what Judge
18 Cabranes did in the case was simply to say that on the
19 allegations of the case, an alter ego case had not been
20 made out. Footnote 86, which is --

21 JUDGE AMBRO: The case with Argentina? Do
22 you mean what, the Aurelius case?

1 MR. ESTRADA: No, no. This is the second
2 case. This is the declaratory judgment action --

3 JUDGE AMBRO: I gotcha.

4 MR. ESTRADA: -- where what the professed
5 basis for the action was we don't know what we are
6 going to do with this lawsuit, but it would be nice to
7 have a declaratory judgment action saying that the
8 Central Bank of Argentina is the alter ego of the
9 government. And, as the Second Circuit pointed out,
10 there were some justiciability questions that the court
11 put to the side. And ultimately the Second Circuit
12 said that most of the facts being cited by the
13 bondholders in that case were sort of commonplace
14 because, of course, you would expect the Central Bank
15 of Argentina to have a role in monetary policy, for
16 example. But at the end of the day, the much-vaunted
17 footnote 86 that according to counsel saved all of
18 these issues didn't save anything. All it says is,
19 "The Central Bank makes these other arguments. We
20 don't need to get to them." It was not a determination
21 by the court that it thought these issues were lurking
22 out there or that it thought these issues needed

1 saving. It said, "Parties made these other arguments.
2 But since we find that there is no alter ego, we don't
3 raise them. We don't reach them."

4 By contrast, I think that Judge Greenaway did
5 point out to the Braspetro case, where there was
6 actually -- I have it right here -- the U.S. -- the
7 Fidelity and Guaranty case versus Braspetro, which did
8 go to the Second Circuit. And there was an allegation
9 there that the oil company was acting through its alter
10 ego. And that is a Second Circuit opinion in which the
11 jurisdictional finding was upheld based on the
12 commercial activity exception and based on the
13 activities of the alter ego. And what the Second
14 Circuit said at page 98 was that it was satisfied that
15 the claim against Petrobras had been that the -- excuse
16 me -- that the immunity of Petrobras, which is the oil
17 company in Brazil, had been defeated based on the
18 actions by Petrobras itself or through its alter ego,
19 Brasoil. That is at page 98.

20 And so, contrary to the assertion that EM
21 answers all of the questions here by simply saying that
22 it was not getting to arguments made by counsel, the

1 Second Circuit in the Braspetro case actually dealt
2 with the question and said that you could establish the
3 jurisdiction by having the alter ego showing, which is
4 I think what we did here.

5 If I could get to that, it does seem to me
6 that if we do show, as in the Kensington case and in
7 other cases, that we have shown that PDVSA and
8 Venezuela are one and the same, then necessarily we
9 have shown that there is no separate immunity that
10 attaches to PDVSA because it has no separate immunity
11 to assert.

12 If we defeated the immunity of Venezuela
13 under the FSIA under the (a)(6), the arbitration
14 exception, and we have separately shown by proof, not
15 by circular reasoning but by proof, that was
16 satisfactory to the District Court that there is no
17 separateness here under proper application of Bancec,
18 it seems to me that it follows logically that PDVSA has
19 no separate immunity to assert and that we can,
20 therefore, then execute on the property because it is
21 indeed property of the debtor Venezuela.

22 JUDGE AMBRO: Thank you. We will get you

1 back on the next part.

2 Mr. Pizzurro, do you want to do any kind of
3 rebuttal just for about three minutes or so to that --

4 MR. PIZZURRO: Thank you, Your Honor.

5 JUDGE AMBRO: -- before we go on to the next
6 issue?

7 MR. PIZZURRO: A couple of points that
8 counsel made that I would like to address in rebuttal.
9 First of all, counsel is representing that this is a
10 case where the proceedings in the Delaware District
11 Court were solely related to property that was in
12 Delaware and that it was not a general alter ego
13 allegation. That is not correct. There is nothing
14 about the PDVSA shares that has anything to do with the
15 underlying claim, either in the arbitration or even in
16 the alter ego analysis. They are not mentioned. It is
17 irrelevant. Counsel says --

18 JUDGE GREENAWAY: What is your answer to my
19 colleague's question about a nexus requirement that Mr.
20 Estrada spoke to?

21 MR. PIZZURRO: In the exception to immunity
22 (a) (5), there is no nexus requirement. There is an

1 issue lurking there that isn't in this case. But the
2 exception applies where it is an action to either
3 enforce an agreement or to enforce an arbitral award,
4 rendered pursuant to a treaty or convention to which
5 the United States is a party. And the New York
6 Convention is such a convention. And it requires no
7 additional nexus to the United States or to any
8 particular venue.

9 With respect to that issue because it seems
10 to be important to the argument -- I am not exactly
11 sure why because I guess it is this fiction that
12 somehow the property here is pivotal to the analysis --
13 two assertions were made: one, that under the FSIA,
14 they had to sue in Federal court. They can't sue in
15 state court. That is not correct. It is absolutely --

16 JUDGE GREENAWAY: Well, I don't think -- I am
17 going to interrupt you because I want to push back a
18 little bit. I thought the argument wasn't that the
19 property was key. I thought Mr. Estrada said at one
20 point if the property was sold, we would have to find
21 something else. So, I mean, there is nothing you -- if
22 this property, the PDVH --

1 MR. PIZZURRO: Right.

2 JUDGE GREENAWAY: If the PDVH shares were
3 sold before this was all resolved, they would be out of
4 luck. They would have to either find another avenue to
5 go. There is nothing -- I think, if I understand the
6 argument correctly, there is nothing particularly
7 unique about these shares other than they have access
8 to them.

9 MR. PIZZURRO: Your Honor, the notion that
10 PDVSA could be sold out from under them or that the
11 shares could be sold out from under them and they would
12 have no recourse and that this is not getting a
13 judgment against PDVSA, first of all, there is no alter
14 ego theory that supports that. You can't be an alter
15 ego for this little purpose over here and not for this.
16 The only reason there is any relationship at all
17 between the veil-piercing and the property is not
18 because of the particularity of the property but
19 because veil-piercing shifts liability unless all of
20 the property of the alter ego becomes available to
21 satisfy the obligations of the judgment debtor. So
22 focusing on the property serves the purpose to try to

1 argue that somehow rule 69 makes this a different
2 animal than a --

3 JUDGE GREENAWAY: I don't think their
4 argument is that any property that PDVSA has anywhere
5 would fall within the ambit of their judgment.

6 MR. PIZZURRO: They may not be arguing that,
7 Your Honor, but if it doesn't, then it can't be an
8 alter ego because that is what alter ego does. That is
9 definitional.

10 JUDGE GREENAWAY: I thought that the findings
11 that the District Court made were about these
12 particular shares. I mean, for instance, on the
13 commercial activity findings, I mean, it is how these
14 particular shares are used.

15 MR. PIZZURRO: Your Honor, that issue relates
16 to the immunity of the assets themselves. It has
17 nothing to do with the immunity of PDVSA. It has
18 nothing to do with the alter ego finding. It is a
19 completely different issue.

20 JUDGE GREENAWAY: The only thing I am talking
21 about is the fact that you said that this was somehow
22 unique to PDVSA and not the shares.

1 MR. PIZZURRO: What I am saying is this, Your
2 Honor --

3 JUDGE GREENAWAY: The thing is we are at
4 cross-purposes on that issue.

5 MR. PIZZURRO: The allegations of alter ego
6 and proceeding in Delaware with respect to these shares
7 are completely unrelated concepts. You are an alter
8 ego or you are not. If you are, you are liable as your
9 either principal or the shareholder. That is what
10 alter ego does. There is no finding of alter ego with
11 respect to particularized property unless, of course,
12 as in the Kingsland case, that is the only property
13 that is held.

14 JUDGE GREENAWAY: Yes.

15 MR. PIZZURRO: But the notion that they had
16 to come to Delaware and they had to be in Delaware
17 Federal court is just wrong. State courts have
18 concomitant jurisdiction on the Foreign Sovereign
19 Immunities Act. And they could have come to Delaware
20 originally because if there was something about this
21 property, 28 U.S.C. section 1391(f)(1), which is a
22 venue provision of the Sovereign Immunities Act,

1 permits them to commence the action where property that
2 is subject to the action is located. So if these
3 shares were something that were intricate to liability
4 of PDVSA on the award and, thus, relevant to any
5 jurisdictional determination under (a)(6), they could
6 have come to Delaware in the first instance. They
7 didn't. And that is because all of this is completely
8 irrelevant. And that is a consistent position,
9 contrary to what was implied by counsel.

10 In the District Court -- and I remember, and
11 I think Judge Stark was getting annoyed with me because
12 Judge Stark kept repeating, "What about this factor?";
13 "What about this controlled factor?"; "What about
14 that?" And he probably went through seven or eight.

15 And I said, "Irrelevant," "Irrelevant,"
16 "Irrelevant." I said, "It all is irrelevant." And it
17 is irrelevant because it does not relate to the
18 injuries suffered by Crystallex. There is no
19 allegation that there was an abuse of the corporate
20 form that injured Crystallex. There is no allegation
21 --

22 JUDGE AMBRO: In effect, what you are doing

1 is segueing to the next set of issues.

2 MR. PIZZURRO: And I am --

3 JUDGE AMBRO: So why don't we begin with
4 that? Just for everybody's sake, whether PDVSA is
5 Venezuela's alter ego under Bancec if, indeed, we apply
6 that and whether the PDVH shares or PDVSA shares --
7 PDVH -- excuse me -- shares are immune from attachment.

8 I think this is you and Ms. Davidoff.

9 MR. PIZZURRO: That is correct, Your Honor.
10 Let me start with the Bancec analysis. As
11 Your Honor pointed out, these things are interrelated.

12 JUDGE AMBRO: This is an outset, then. Is
13 there any reason we are not bound by the five factors
14 recognized by the Supreme Court in Rubin?

15 MR. PIZZURRO: Those are five factors where
16 the courts have identified in determining whether or
17 not there has been the domination and control. Courts
18 looked -- what the Supreme Court, however, was quoting
19 was the Walter Fuller case. Those were the factors
20 that were set out in Walter Fuller, ultimately were
21 factors that were codified by the Supreme Court in
22 1610(g), which relates to whether or not -- where the

1 liability or the jurisdiction over the foreign state is
2 predicated on an act of terrorism involving U.S.
3 victims, then there is to be accorded separateness
4 among the entities.

5 JUDGE AMBRO: But isn't the implication of
6 the case that if you are outside the terrorism context,
7 you would take a look at these five factors for
8 determining whether there is alter ego analysis?

9 MR. PIZZURRO: That is part of -- exactly,
10 Your Honor. And that is part of what you look at, but
11 as Walter Fuller said and as it articulated the
12 factors. And then it remanded the case to the District
13 Court because the District Court hadn't made any
14 determination as to whether or not the abuse of the
15 corporate form had led to an injury to the plaintiff.

16 JUDGE AMBRO: Go ahead. Go ahead, Joe.

17 JUDGE SCIRICA: No. You go ahead. You go
18 ahead.

19 JUDGE AMBRO: Is there any -- go ahead. I'm
20 sorry. I apologize.

21 JUDGE SCIRICA: No, no. Just to follow up on
22 that, in Rubin, is it an exact formulation of the

1 factors or the -- as you noted, the court was deciding
2 another issue under --

3 MR. PIZZURRO: It was a totally different
4 issue, Your Honor.

5 JUDGE SCIRICA: Okay.

6 MR. PIZZURRO: It had to do with a proper
7 interpretation of whether section 1610(g) and whether
8 section 1610(g) did away with the other immunity
9 attributes that sovereign property would otherwise
10 have.

11 JUDGE SCIRICA: So Bancec is what we would
12 look at when we are --

13 MR. PIZZURRO: Bancec is the case that the
14 Court needs to examine and follow. And when you look
15 at Bancec, Bancec does articulate two prongs. Right?
16 First of all, let me be clear about a couple of things
17 about Bancec: first of all, the two prongs. And we
18 are not backing away from it. There are two prongs.
19 But the court itself said, "There is not to be a
20 mechanical application." And, in fact, this is dicta
21 because the ultimate determination, as counsel pointed
22 out, didn't really have anything to do, certainly not

1 with prong 1. It had to do with basic fraud or
2 injustice, not allowing a state to assert liability and
3 then avoid liability on a counterclaim by dissolving or
4 transferring claims between its own entities.

5 JUDGE GREENAWAY: On that very point of
6 fraud, you suggest in your papers that Publicker and
7 its progeny require that when there is a finding of an
8 alter ego relationship, it entails some element of
9 fraud. And those cases involve the application of our
10 common law jurisprudence regarding private parties.

11 So my specific question is, the second Bancec
12 exception obviously speaks to fraud. Are you
13 specifically asking us to expand our jurisprudence so
14 that that fraud is part of the first exception as well?

15 MR. PIZZURRO: No, Your Honor. Here is what
16 we are --

17 JUDGE AMBRO: In other words, they are
18 disjunctive, right?

19 MR. PIZZURRO: They are disjunctive, Your
20 Honor, but the first test is not a control test. The
21 first test is not one where if you find control, that
22 is the end of the analysis. What the court was doing

1 was articulating what all of the circuits that then
2 look at this subsequently have characterized as
3 essentially a veil-piercing or traditional alter ego
4 analysis.

5 And that analysis requires, as Fletcher says
6 -- Fletcher was specifically cited, Fletcher Cyclopeda
7 on Corporations was specifically cited, by the Supreme
8 Court in a footnote to the first prong, articulation of
9 the first prong. And Fletcher says domination and
10 control is not enough. You need to have an abuse of
11 the form that results in an injury to the plaintiff.
12 It is fairly basic. It is almost first year law
13 learning, Your Honor, is that you need to have a
14 connection between the conduct and claimant --

15 JUDGE GREENAWAY: This is a lot of paper for
16 first year law stuff.

17 (Laughter.)

18 MR. PIZZURRO: Agreed, Your Honor. Agreed.

19 JUDGE AMBRO: Just a touch.

20 MR. PIZZURRO: But you can't allege conduct
21 and recover if there isn't any connection between the
22 conduct you complain of and the injury that you

1 suffered. Judge Stark said everything that Crystallex
2 complains of would have occurred if PDVSA never
3 existed. In other words, PDVSA has got nothing to do
4 with what they are complaining about here.

5 Now, where Judge Stark made his we believe
6 fundamental error is he says Bancec articulated a test,
7 which is based -- in the first prong, which is based
8 solely on control. And so he looked only to control.

9 JUDGE AMBRO: Let's go back to this point you
10 are making about a nexus between the abuse of the
11 corporate form and the injury. Where does Rubin say
12 that? Where does it make that requirement? I don't
13 see it. I mean, you look under alter ego tests under
14 New York or Delaware law, yes, it is there, but I don't
15 see it under Rubin's sort of interpretation of Bancec.

16 MR. PIZZURRO: Your Honor, I am not -- and,
17 again, if we had -- if the jurisprudence, both in this
18 circuit and all of the circuits, were a -- there was
19 perfect clarity on this, then we wouldn't be spending
20 all the time discussing --

21 JUDGE AMBRO: This is an important point of
22 this discussion if we get to it in terms of our

1 decision.

2 MR. PIZZURRO: Yes, Your Honor.

3 JUDGE AMBRO: Is control alone an adequate
4 basis to pierce the corporate veil?

5 MR. PIZZURRO: I don't believe there is
6 anything in Rubin which would suggest that control
7 alone, without the nexus to the injury to the plaintiff
8 --

9 JUDGE AMBRO: And I am saying to you, prove
10 the opposite per Rubin. Where does Rubin say that
11 control alone is not an adequate basis, that you have
12 to, in effect, go beyond these five factors that we
13 note?

14 MR. PIZZURRO: Rubin, the Supreme Court
15 decision Rubin?

16 JUDGE AMBRO: Yes, sir.

17 MR. PIZZURRO: That was not an issue that was
18 before the Supreme Court in Rubin, Your Honor. The
19 issue before the Supreme Court in Rubin was to
20 determine as a matter of statutory construction of the
21 Foreign Sovereign Immunities Act whether the section
22 1610(g) did away with the other requirements for

1 abrogating immunity of the assets of a foreign state
2 instrumentality; in other words, the use element. Does
3 it no longer have to be used in connection with a
4 commercial activity?

5 And the argument that was made was that
6 1610(g) has an overarching application that simply
7 reads out the remainder of section 1610(a) or 1610(b).
8 And the Supreme Court said no, but the Supreme Court
9 wasn't examining this issue. It was looking to those
10 factors that were articulated in the statute. But that
11 wasn't part of what the Supreme Court itself was
12 looking at in that case. It is not even close to the
13 issue that was before the justices.

14 JUDGE GREENAWAY: I think --

15 JUDGE AMBRO: Well -- go ahead, Joe.

16 JUDGE GREENAWAY: So are you saying that
17 there is no Federal common law that presents the
18 argument that you are saying that there has to be a
19 nexus between conduct and harm?

20 MR. PIZZURRO: BRIDAS says that, Your Honor.
21 I think the Craig -- one second -- the Craig decision
22 from this Court says that -- I don't have the citation,

1 but it is in our brief. The reason is --

2 JUDGE GREENAWAY: It supports that notion --

3 MR. PIZZURRO: Yes, Your Honor.

4 JUDGE GREENAWAY: -- in a non-private party
5 setting?

6 MR. PIZZURRO: Is there anything in a non --
7 I'm sorry.

8 JUDGE GREENAWAY: I didn't ask the question
9 properly. What is the context in which that case holds
10 that the two are required?

11 MR. PIZZURRO: BRIDAS just simply says it and
12 in articulating the test says you need to have that
13 control. That abuse of the form has to result in the
14 injury. I believe Craig says the same thing.

15 The issue, though, Your Honor -- and I want
16 to -- our research hasn't revealed, we haven't seen a
17 case in which a court has said anything other than
18 that, perhaps because it is so self-evident that you
19 can't complain of conduct that doesn't injure you. The
20 common law, the state law and Federal common law cases,
21 whether it is in the private context --

22 JUDGE GREENAWAY: I assume Mr. Estrada would

1 say that, "Well, we are in a different context here.
2 We are in a rule 69 context." Would that not make a
3 difference?

4 MR. PIZZURRO: I don't -- no, Your Honor. I
5 don't think -- rule 69 is -- whether they called it
6 rule 69 or they want to call it something else, we
7 don't believe has any relevance to anything here. It
8 has no relevance on the jurisdictional question as to
9 whether there is ancillary jurisdiction or they need an
10 independent basis for jurisdiction. It certainly has
11 nothing to do with the examination of whether they have
12 adequately shown that the veil should have been pierced
13 here or there is alter ego. That is irrelevant to rule
14 69.

15 What is relevant is to look at the
16 jurisprudence that the Supreme Court was aware of and
17 looked to, including the Deena Artware case, where
18 there was a classic use of various subsidiaries as
19 shell game to shuffle assets in and out of those
20 subsidiaries to avoid liability on a judgment to the
21 plaintiff, clearly an abuse of the corporate form that
22 was injuring the plaintiff.

1 So we are not saying that these are two -- or
2 not disjunctive tests. What we are saying is that
3 first test -- let's focus on the first test -- still
4 requires that you have a causal relationship between
5 the conduct complained of and the injury to the
6 plaintiff.

7 JUDGE AMBRO: When you look at the Bancec
8 factors in Rubin, the level of economic control by the
9 government, whether the entity's profits go to the
10 government, the degree to which the government
11 officials manage the entity or otherwise have a hand in
12 its daily affairs, whether the government is the real
13 beneficiary of the entity's conduct and whether
14 adherence to separate identities would entitle the
15 foreign state to benefits in the U.S. courts while
16 avoiding its obligations. Where does that -- you are
17 adding something to it from where? Where do you get
18 the requirement that there be a nexus between the act
19 and the harm?

20 MR. PIZZURRO: First of all, Your Honor, from
21 all of the jurisprudence that predates Bancec,
22 including the authorities that Bancec itself in

1 footnote 9, where it talks about the test and it cites
2 -- right after it cites the Deena case, it cites
3 Fletcher's. It cites other hornbooks and treatises.
4 All of those factors -- all of those authorities,
5 rather -- require this nexus. If you didn't require
6 the nexus, then there would be -- and counsel doesn't
7 like the argument, I understand that --

8 JUDGE AMBRO: But his argument is, "I now
9 have a judgment. It has been registered. We are
10 attempting to attach. And the alter or reverse alter
11 ego analysis comes into play here because we believe
12 that Venezuela through its control of PDVSA is -- and
13 PDVSA is an alter ego with the government. And,
14 therefore, we can go after assets of PDVSA." Really,
15 isn't that --

16 MR. PIZZURRO: That is their theory, Your
17 Honor, simply not the law. We couldn't find a single
18 case that would support that.

19 JUDGE GREENAWAY: What --

20 MR. PIZZURRO: Where the court -- where there
21 is -- and there is a finding in this case. It is not
22 in question --

1 JUDGE AMBRO: Where in Rubin does it say
2 that, "By the way, we ought to go take a look at pre-
3 Bancec law" and you look at note 9? Bancec may have
4 related to things that predated it.

5 JUDGE GREENAWAY: That is not what note 9
6 says, by the way, but that is okay.

7 JUDGE AMBRO: Yes. And I agree with that.
8 So just tell me, where is the Supreme Court telling us
9 that we have to look at something beyond these five so-
10 called Bancec factors?

11 MR. PIZZURRO: Your Honor --

12 JUDGE AMBRO: Rubin was a 2018 case, right?

13 MR. PIZZURRO: I understand that, Your Honor,
14 but that wasn't the question that the court was
15 confronting. There is nothing in the Rubin decision
16 which remotely suggests that it was holding that you
17 don't need to have a causal relationship between the
18 existence of these domination factors and the injury
19 alleged by the Plaintiff, that you can simply have
20 alter ego in a vacuum. So now all of the obligations
21 of Venezuela, of the republic, are obligations of
22 PDVSA. And all of that, all of what that means with

1 respect to other creditors who have relied on the
2 balance sheet of PDVSA, if you will, which you are
3 going to hear from the bondholders --

4 JUDGE AMBRO: Alter ego is a form of saying,
5 "We are going to ignore corporate boundaries for
6 certain purposes."

7 MR. PIZZURRO: For certain purposes.
8 Correct, Your Honor.

9 JUDGE AMBRO: And you are saying -- and,
10 obviously, control may be one of them, but if you are
11 saying if you are going to have a claim against
12 Venezuela and you are going to claim alter ego in order
13 to go against the assets of its wholly controlled
14 subsidiary, that wholly controlled subsidiary must also
15 have been part of the problem that caused the harm to
16 Crystallex.

17 MR. PIZZURRO: Not that they had to be -- and
18 I want to be very clear about this because I think our
19 position has been a little bit maybe perhaps misstated
20 by counsel. Not necessarily in the underlying
21 transaction, not necessarily in the arbitration or the
22 events giving rise to the arbitration. That is part of

1 it, but if you didn't have that -- and some of the
2 cases don't have that -- you have an abuse of the form
3 in a way to try to shelter assets, to shuffle
4 liabilities and assets between or among various
5 entities to shield liability of the Plaintiff.

6 Judge Stark addressed that as well. And he
7 said, "That is not this case. There is no allegation
8 that any of that happened."

9 What we are saying is you cannot simply be
10 the alter ego for purposes of liability attribution
11 where there isn't some connection. The corporate form
12 hasn't been abused in a way that results in an injury
13 to this Plaintiff. That is clearly --

14 JUDGE AMBRO: I think he is saying, "This is
15 not liability. This is attachment."

16 MR. PIZZURRO: Well, and that gets back to
17 the point where I was starting on the rebuttal. There
18 is no such thing. There is no such thing as an alter
19 ego -- although Judge Stark said, "Yes, there can be
20 two contexts for this" -- there is no such thing. You
21 are either an alter ego or you are not an alter ego.
22 When we direct the Court's attention --

1 JUDGE GREENAWAY: Let me ask you this. Let
2 me ask you this question. Focus exactly on this point.
3 Here are some of the findings that the District Court
4 made. Specifically, the District Court found that
5 Venezuela regularly uses the assets -- this is PDVSA it
6 is referring to -- as its own, regularly ignores the
7 separate status, has deprived PDVSA of its independence
8 from close political control, requires you to obtain
9 approvals for ordinary business decisions, causes you
10 to achieve domestic social and political goals and to
11 advance foreign policy goals.

12 Now, the argument that you pose is, that is
13 not enough to meet the control exception. So the
14 hypothetical that I would like to pose is, okay, all of
15 that is not enough. What would be?

16 MR. PIZZURRO: Your Honor, I am not here
17 today arguing --

18 JUDGE GREENAWAY: -- or is this not relevant
19 either?

20 MR. PIZZURRO: It is not relevant. I am not
21 arguing --

22 JUDGE AMBRO: Okay. But let's go to the next

1 case. Let's say we go to your -- this is a discussion.
2 You are not binding yourself.

3 MR. PIZZURRO: What would be relevant is, as
4 I said earlier on, if the control, as alleged and
5 found, had been used or abused in order to make PDVSA
6 an agent for the expropriation, to cause PDVSA to be
7 somehow involved in the underlying activities that give
8 rise to the claim, to cause PDVSA to be responsible for
9 the agreement to arbitrate, to have PDVSA entered into
10 contracts in some way that with Crystallex that were --
11 something of that nature. It has got to be focused.

12 JUDGE AMBRO: I thought I just essentially
13 asked that question. You said I was wrong in terms of
14 alter ego versus -- I said Mr. Estrada is arguing alter
15 ego versus for attachment purposes after liability has
16 already been established against Venezuela. And are
17 you arguing that you also have to have a nexus between
18 PDVSA and the involvement with the injury that was
19 caused to Crystallex? And you said, "Well, that is not
20 quite right."

21 MR. PIZZURRO: Perhaps I misunderstood Your
22 Honor's question?

1 JUDGE AMBRO: All right.

2 MR. PIZZURRO: All right? Our position is
3 that there needs to have a -- if I am not clear,
4 please, Your Honor, I would appreciate the opportunity
5 to clarify.

6 JUDGE AMBRO: No. Go ahead. That is fine.
7 Let's --

8 MR. PIZZURRO: The --

9 JUDGE AMBRO: Go ahead. You finish up, and I
10 will go to --

11 MR. PIZZURRO: The allegations of control
12 have to be in relation to and allege and show a
13 proximate injury to Crystallex. If using PDVSA's
14 property to bus demonstrators to -- you know,
15 government demonstrators someplace in Caracas, if
16 PDVSA's property is being used to fly people to the
17 United Nations, if PDVSA's property is being used to
18 fund social programs, all of those things, that has got
19 nothing to do with these folks. That is not injuring
20 them. They are not claiming that PDVSA has been
21 effectively looted of all of its assets so that there
22 isn't anything that it can get anymore because

1 Venezuela has acted this way to frustrate their ability
2 to get a judgment. That is not what they are saying at
3 all. They are saying, when you look at all of these
4 things, it doesn't matter whether we suffered as a
5 result of that. All we have to do is to show these
6 control factors.

7 And our argument is that that is not
8 sufficient unless you can show that you, Crystallex,
9 were injured, either because PDVSA should be
10 responsible on the arbitration award as a participant
11 in the events or because PDVSA's corporate form has
12 been abused in a way that has made it effectively
13 impossible for you or has defrauded you or has injured
14 you in some other way that you can't collect on your
15 rightfully obtained judgment because of the way
16 Crystallex has -- its affairs have been conducted by
17 Venezuela. Judge Stark said there is none of that in
18 this case.

19 JUDGE AMBRO: All right.

20 JUDGE SCIRICA: Yes. I just have a hard time
21 finding a nexus requirement in Bancec, but you will
22 have more time to talk.

1 JUDGE AMBRO: Let me ask you on this line.
2 You mentioned that the District Court used the wrong
3 evidentiary standard, that it used preponderance of the
4 evidence, as opposed to clear and convincing. What is
5 the reasoning behind that?

6 MR. PIZZURRO: Well, the argument is based,
7 Your Honor, on the fact that there is a presumption
8 that has to be overcome. We are not starting in stasis
9 where you normally would.

10 The presumption is a strong one in Bancec.
11 And to overcome that presumption, then you need to have
12 clear and convincing evidence. It is not simply enough
13 that you have tipped the scales out of equipoise.

14 JUDGE AMBRO: Yes. I can't find anything in
15 Supreme Court cases that is of help. I do see in the
16 Third Circuit case called Lutyk, L-U-T-Y-K, where in an
17 ERISA context, we said that it has to be clear and
18 convincing. I don't know if that applies to this or
19 not.

20 MR. PIZZURRO: Your Honor, I believe -- and I
21 don't have them -- I apologize -- at my fingertips, but
22 there are a number of cases, including I think a

1 relatively recent Third Circuit case.

2 JUDGE GREENAWAY: They are in your brief?

3 MR. PIZZURRO: It is in the briefs, Your
4 Honor. I --

5 JUDGE GREENAWAY: On the clear and convincing
6 issue?

7 MR. PIZZURRO: I believe that there is, Your
8 Honor, where we were talking about overcoming the
9 presumption, at least where there is an element of
10 fraud involved, and that there is some recent decisions
11 from the court that deals with that issue. But, again
12 --

13 JUDGE AMBRO: There are a number of cases.
14 On the other side, there is many cases that are
15 interpreting and applying Bancec, and I can't find --
16 none seems to require clear and convincing. So I am
17 not sure what to do. On the one hand, you can
18 distinguish Lutyk as being in another context, ERISA,
19 but that is -- well, any time you are looking at alter
20 ego piercing, then you really -- and there is a
21 presumption that goes one way, that you should have
22 separateness, that it had better be darned clear. So

1 there is a plausible argument your way. I am just not
2 finding a whole lot of support in case law for it.
3 Maybe that is not relevant.

4 MR. PIZZURRO: Well, Your Honor, exactly. We
5 don't believe the Court can get by the judge's, the
6 District Court judge's, finding that there is a
7 complete lack of a link between the conduct complained
8 of and the injury.

9 I would direct the Court's attention -- I
10 think the exact same -- exact same -- language which is
11 very much analogous to that was used by the Supreme
12 Court in Peacock, where the Supreme Court was looking
13 at the alter ego allegations that formed the basis for
14 the claim against Peacock. And the court said that
15 those allegations had nothing to do with an ERISA
16 violation, which was the jurisdictional predicate,
17 obviously, in the first case, and there isn't an ERISA
18 violation for being an alter ego. So that unless the
19 plaintiff could link the allegations that the defendant
20 and the original judgment debtors were alter egos in
21 relation to the ERISA case, there was no jurisdiction.

22 That is the same thing here, both with

1 respect to FSIA. The analogy is simply if you
2 substitute FSIA for ERISA, I think this case becomes
3 very clear in the jurisdictional context. And we think
4 it is also the same in the liability context.

5 And, if I may, one last point, Your Honor.
6 If this common law principle -- and we do believe that
7 it is an accepted and established common law principle
8 in the private context. If that doesn't apply under
9 Bancec, then what the Supreme Court did was not to
10 articulate a rule based on principles of comity of
11 international relations in respect for the way that
12 other countries organize their own economies, but they
13 were creating a new rule which is far more lenient than
14 we apply in a domestic context. We don't believe the
15 Supreme Court could have possibly intended to do that
16 given the fundamental policy underpinnings of the
17 Bancec decision.

18 JUDGE GREENAWAY: I just have one quick --

19 JUDGE AMBRO: Go ahead, Joe.

20 JUDGE GREENAWAY: I apologize. You do have
21 some cases on clear and convincing, but what you don't
22 have is an answer to this question, which is, tell me

1 why fundamentally there would be a difference in both
2 analysis and result if you applied clear and
3 convincing.

4 MR. PIZZURRO: I am not making that argument
5 today, Your Honor. I am not. What I am saying is --

6 JUDGE AMBRO: Okay. Another way to put it
7 is, what difference does it make?

8 MR. PIZZURRO: It doesn't make any difference
9 at all because those factors aren't something that the
10 Court can hang its hat on given the language that I
11 began the argument reading from Judge Stark.

12 JUDGE AMBRO: All right. Well, on the Bancec
13 factors, does Crystallex have to satisfy all of them or
14 is it a balancing test?

15 MR. PIZZURRO: I think it is a balancing
16 test, Your Honor. The Supreme Court was very clear
17 that it was not applying a mechanical test. The reason
18 why -- if I could go to Rubin for one second, I think
19 that what Congress did, Congress statutorily for
20 purposes of 1610(g) lists those factors. Now that is a
21 very different -- now you do have a mechanical analysis
22 because you are analyzing a statute.

1 So if the court were, for example, which it
2 wasn't in that case, but if it were faced with the
3 issue of whether those factors had been satisfied such
4 that the airline's assets were available for the oil
5 companies' liabilities -- and that is essentially how
6 that would come up -- then there would have to be a
7 determination of, "Well, what do we do? If there are
8 eight factors, is five out of eight enough? You need
9 six?" And that is a different question.

10 But in Bancec, the court was very clear that
11 it was not applying a mechanical test. And I think
12 that is very key in this analysis because if they are
13 not applying a mechanical test, if they are drawing on
14 general equitable principles, as they say they were,
15 international as well as domestic, common law in the
16 state and Federal system, then you have to look at all
17 of that and you have to see whether the application of
18 this equitable doctrine is appropriate where the
19 Plaintiff has not alleged that the conduct has injured
20 him. It is simply alleging that you should collapse
21 these entities just because you can, not --

22 JUDGE AMBRO: Once we start going through the

1 Bancec factors, the five of them, are you or Ms.
2 Davidoff going to handle that part of it?

3 MR. PIZZURRO: I'm sorry? The Bancec
4 factors?

5 JUDGE AMBRO: Yes, one by one.

6 MR. PIZZURRO: Your Honor --

7 JUDGE AMBRO: Who is going to be doing the
8 arguing on that point?

9 MR. PIZZURRO: If the Court wants to hear on
10 them one by one, it would be me, Your Honor.

11 JUDGE AMBRO: Okay. Let's go. Factor one is
12 the level of economic control by the government. PDVSA
13 disclosed in 2016 that "Given that we are controlled by
14 the Venezuelan government, we cannot assure you that
15 the Venezuelan government will not in the future impose
16 further material commitments upon us or intervene in
17 our commercial affairs in a manner that will adversely
18 affect our operations, cash flow, and financial
19 results," "Given that we are controlled by the
20 Venezuelan government."

21 MR. PIZZURRO: Correct, Your Honor.

22 JUDGE AMBRO: Isn't that game, set, and match

1 as to factor 1?

2 MR. PIZZURRO: I think it could be
3 characterized as a prudent disclosure in the
4 circumstances, but I am not sure that it -- and, again,
5 even if I were to accept, for the sake of argument --
6 and I do -- that that is the case, it is not relevant
7 here, Your Honor.

8 JUDGE AMBRO: Well --

9 JUDGE GREENAWAY: That concession is not
10 relevant at all?

11 MR. PIZZURRO: That the -- as I said, Your
12 Honor, unless there can be -- somehow that can be
13 linked --

14 JUDGE GREENAWAY: I'm sorry.

15 MR. PIZZURRO: -- to the injury --

16 JUDGE AMBRO: Go ahead. Go ahead.

17 MR. PIZZURRO: -- that they are alleging --

18 JUDGE AMBRO: No problem.

19 MR. PIZZURRO: -- if they could show, for
20 example -- let's say an investor had come in and was
21 alleging that somehow this control had been exercised
22 in a way that caused the insolvency of PDVSA or its

1 inability to make a payment, right, and it then tried
2 to allege that now Venezuela is reverse piercing here,
3 right, or classical piercing -- we are reverse piercing
4 in this case -- classical upward piercing, right,
5 because there would have been at least an articulated
6 connection between the control complained about and the
7 injury to that putative bondholder, okay. Now, whether
8 it is sufficient, there are fact-findings, et cetera,
9 et cetera, but that is the context in which that
10 analysis would be done.

11 JUDGE GREENAWAY: Can you give me an example
12 of a harm that you are hypothesizing?

13 MR. PIZZURRO: Well, do you mean in this
14 context, Your Honor?

15 JUDGE GREENAWAY: No. Just make up an
16 example.

17 MR. PIZZURRO: Here is an example, that in
18 this case, that PDVSA was the entity with whom
19 Crystallex had a contract or who had the obligation to
20 provide the --

21 JUDGE GREENAWAY: So that is a different
22 lawsuit, right? And that is not analogous, right?

1 That is --

2 MR. PIZZURRO: That is the only analogy
3 because there Venezuela has -- in my analogy, Venezuela
4 uses PDVSA as an instrumentality to injure, take rights
5 from or otherwise injure, Crystallex. It acted as --
6 and ultimately, the government issues a decree saying,
7 "Okay. We are taking away your contract." But the
8 degree of control is alleged in connection with actions
9 that give rise to the injury or, as I said earlier,
10 Your Honor, it is a hard --

11 JUDGE GREENAWAY: In your hypothetical, they
12 are a party to the contract. I don't know. They are a
13 party to the contract.

14 MR. PIZZURRO: Or they are not a party to the
15 contract. They simply go in, and they are used as an
16 instrumentality to alternatively exploit the oil, in
17 this case the gold-mining concession, something that is
18 basically connected. Or -- and this is why it becomes
19 difficult, but let's assume PDVSA is not the entity
20 which is a multibillion-dollar international oil
21 company but it is more along the lines of an SNPC in
22 the Congo case or Turkmenneft in the BRIDAS case, where

1 it is substituted in as a contract party but then is
2 essentially by administrative or legislative fiat
3 stripped of the ability to satisfy its obligations.
4 And there you have an alter ego analysis as between the
5 acts of the government and Turkmenneft and you have an
6 alter ego finding.

7 But there clearly, right, it was an
8 arbitration award. There is a causal link. There is a
9 proximate causation between the abuse of the form,
10 which can take many, many cases, many, many examples.
11 It doesn't have to be classically controlled. There is
12 lots of other ways in which you can abuse the corporate
13 form.

14 JUDGE AMBRO: Let's go to the second factor,
15 whether the entity's profits go to the government. It
16 looks like all of the entity's profits go to the
17 government and then the entity pays taxes on that.
18 There is like a double dip.

19 MR. PIZZURRO: Why does that harm Crystallex,
20 Your Honor? That is my --

21 JUDGE AMBRO: No. I mean, the point is that
22 shows control by Venezuela of PDVSA, right?

1 MR. PIZZURRO: Honestly, Your Honor, I am not
2 meaning to be impertinent, but, again, we say that is
3 not relevant. It has nothing to do with whether
4 Crystallex can assert an alter ego claim against --

5 JUDGE AMBRO: I understand you have got other
6 arguments. Maybe we can cut through this. If it is
7 just control by X over Y, what arguments do you have if
8 we just base it on the five Bancec factors that there
9 is not control by X over Y? Maybe we can just cut
10 through it this way because we can go --

11 MR. PIZZURRO: Because, Your Honor --

12 JUDGE AMBRO: Every one of these factors
13 seems to be pretty stacked. And we --

14 MR. PIZZURRO: Because, Your Honor, the
15 conduct complained of is the control. That is the
16 basis for the alter ego assertion. Remember, it is not
17 the underlying arbitration award. They have all --
18 Judge Stark said it is not that, right? So you have to
19 find that the conduct complained of -- this is exactly
20 the words of the Supreme Court in Peacock. The conduct
21 complained of is not the basis for the relief that is
22 sought; rather, for the injury that is alleged.

1 JUDGE AMBRO: That is your theme? Then that
2 is --

3 MR. PIZZURRO: Yes, Your Honor, that there is
4 no --

5 JUDGE AMBRO: And that has been it
6 throughout?

7 MR. PIZZURRO: There is no proximate cause.

8 JUDGE AMBRO: Okay. Then maybe what we can
9 do is we can dispense with the further discussion of
10 the Bancec factors and then just go to Ms. Davidoff.
11 And then we will hear from Mr. Estrada on this point.

12 MR. PIZZURRO: Thank you, Your Honor.

13 MS. DAVIDOFF: Good afternoon, Your Honors.
14 And may it please the Court, I am Amanda Davidoff,
15 arguing on behalf of the amici bondholders. Thank you
16 for hearing us today.

17 JUDGE AMBRO: I kept putting the emphasis on
18 the wrong syllable.

19 (Laughter.)

20 MS. DAVIDOFF: Nobody gets it right.
21 Sometimes people call me David.

22 Crystallex's position is that because

1 Nicholas Maduro looted PDVSA, Crystallex and other
2 creditors collectively seeking billions from Venezuela
3 should be able to as well. That cannot be right if the
4 interests of third party creditors of PDVSA are to be
5 taken into account, as they must be under Bancec and
6 its progeny.

7 JUDGE AMBRO: How do your interests fit into
8 our analysis here under Bancec?

9 MS. DAVIDOFF: Sure.

10 JUDGE AMBRO: Let's start with the facts.
11 This is an attempt to get the -- attach PDVSA's
12 interest in PDVH, right?

13 MS. DAVIDOFF: Yes, Your Honor.

14 JUDGE AMBRO: And, then, you are representing
15 a group of bondholders that has been, what, pledged
16 50.1 percent of --

17 MS. DAVIDOFF: Citgo Holdings, Your Honor.

18 JUDGE AMBRO: -- of the interest in Citgo
19 Holdings?

20 MS. DAVIDOFF: Correct.

21 JUDGE AMBRO: Okay. So it would be PDVH's
22 interest in Citgo Holdings?

1 MS. DAVIDOFF: Correct, Your Honor. We are
2 bondholders who are creditors of PDVSA. PDVSA owns
3 PDVH.

4 JUDGE AMBRO: And then PDVSA has put out
5 bonds on its own, has it not?

6 MS. DAVIDOFF: Yes, Your Honor, about 25
7 billion, we believe.

8 JUDGE AMBRO: And do you own any of those
9 bonds?

10 MS. DAVIDOFF: My clients are here solely as
11 20/20 bondholders and based on their interest in that.
12 But, Your Honor, the principle that I want to put in
13 front of the Court really applies to considering the
14 interests of any creditors of a subsidiary that is
15 going to be subject to downward piercing. And that
16 difference between upward piercing and downward
17 piercing I think has been a little lost in the
18 discussion today, but it is really an important one.

19 The typical situation is upward piercing,
20 where the shareholder, the parent, is held liable for
21 the debts of the subsidiary. And in that kind of case,
22 it may be less important to consider fairness to the

1 shareholders of the subsidiary because they are going
2 to be benefitted if there is upward piercing. And it
3 also might be less important to consider fairness to
4 the shareholders of the parent --

5 JUDGE AMBRO: But where in Bancec or Rubin
6 does it say that we should consider the interests of
7 third party creditors to a foreign instrumentality?

8 MS. DAVIDOFF: Well, Bancec does say it
9 explicitly, Your Honor. And it is actually the
10 foundation for this approach, although there are other
11 cases as well. I think De Letelier and Alejandro are
12 the two best examples.

13 But in Bancec, although the court did in the
14 end pierce the veil, it did that after analyzing the
15 potential harm to third party creditors of the credit
16 facility there and found that there would be no harm.

17 JUDGE AMBRO: Michael, why don't we just turn
18 the whole thing off? There is no time limits.

19 (Laughter.)

20 JUDGE AMBRO: You could be here until 9
21 o'clock. Just teasing. Just teasing.

22 JUDGE GREENAWAY: I won't.

1 (Laughter.)

2 MS. DAVIDOFF: At least there is no court
3 reporter.

4 JUDGE AMBRO: Yes. I do want to get away so
5 I can watch a little bit more --

6 JUDGE GREENAWAY: Could you tell us where you
7 --

8 JUDGE AMBRO: -- of the Masters Cup after the
9 Masters postgame.

10 JUDGE GREENAWAY: Could you tell us where you
11 were referring in Bancec? You were about to say
12 something. I just wanted to make sure I was there.

13 MS. DAVIDOFF: Yes, sure. The page in Bancec
14 -- and I apologize for not having that right at my
15 fingertips -- is -- I apologize, Your Honor. I don't
16 have the page at my --

17 JUDGE GREENAWAY: I'm sorry. Go ahead.

18 MS. DAVIDOFF: But the analysis in Bancec was
19 that the court could go ahead and pierce the veil
20 between Cuba and the credit facility of Cuba. And the
21 court specifically remarked that this was possible
22 because the assets of the credit facility had already

1 been distributed to Cuba. And so if there were a
2 piercing in that case -- and there was -- that wouldn't
3 harm the third party creditors of Bancec because
4 fundamentally anything that was going to be taken away
5 from Bancec in the case of piercing would be taken away
6 from Cuba.

7 JUDGE AMBRO: So let's pick up on that. What
8 is the likelihood of harm to your interest?

9 MS. DAVIDOFF: So to our interest, Your Honor
10 -- and, again, I am not sure that the exact nature of
11 our interest is the critical picture here because I
12 would like to get into it is not just Bancec. There
13 are other cases where courts talk generally about the
14 interests of third party creditors.

15 JUDGE AMBRO: But if this sale goes through,
16 as a practical matter, what is the likelihood of harm
17 --

18 MS. DAVIDOFF: So --

19 JUDGE AMBRO: -- to the interest of your
20 client bondholders?

21 MS. DAVIDOFF: Right. Aside from the harm to
22 any creditor of PDVSA, who then has to share assets

1 with every creditor of Venezuela, hundreds of -- at
2 least billions of dollars of potential creditors, the
3 harm to my particular clients is threefold. First, if
4 their security interest turns out to be insufficient to
5 secure their, PDVSA's, debt to my clients, they would
6 become general unsecured creditors of PDVSA.

7 JUDGE AMBRO: But the debt to your client is
8 how much, 1.6?

9 MS. DAVIDOFF: 1.6 is the current outstanding
10 value. That is correct.

11 JUDGE AMBRO: And if you have 50.1 percent of
12 the interest in PDVH in Citgo Holdings, roughly what
13 would be your guess that Citgo Holdings or Citgo
14 itself, the subsidiary of Citgo Holdings, is worth?

15 MS. DAVIDOFF: I don't believe that is in the
16 record, Your Honor. And I don't have a guess on that,
17 but I think it is a fair point.

18 JUDGE AMBRO: Based on what little I have
19 been able to piece together, it is significant, much,
20 much, much more than 1.6 billion.

21 MS. DAVIDOFF: That is right, Your Honor.
22 And that is not the only basis for my client's

1 interest. The second basis is that if there were a
2 judicial sale of the PDVH Holding shares, that could
3 result in a change of control as --

4 JUDGE AMBRO: The change of control would be
5 what, 50.1 percent if they actually got control of it?
6 It doesn't sound like they would get control of
7 anywhere near 50.1 percent.

8 MS. DAVIDOFF: So that is not the kind of
9 change of control. Under bonds that have been issued
10 by Citgo Holdings and Citgo Petroleum, it is defined as
11 a change of control if more than 50 percent of the PDVH
12 shares are sold. So that is not at all farfetched to
13 think that that could happen.

14 JUDGE AMBRO: But it sounds like here, that
15 significantly less than 50 percent of the shares of
16 PDVH would need to be sold in order to satisfy the
17 judgment pursuant to this attachment.

18 MS. DAVIDOFF: Well, that may be, Your Honor,
19 but, as my --

20 JUDGE AMBRO: So if it is, are you really
21 harmed vis-a-vis change of control?

22 MS. DAVIDOFF: Absolutely, Your Honor,

1 because this isn't going to be the last decision on
2 this topic. The creditors are, as was said, lining up
3 at the courthouse to come after PDVSA. And if
4 Crystallex can do it, so can everyone else.

5 JUDGE GREENAWAY: Well, you are an unsecured
6 -- your clients, not you, are unsecured creditors,
7 right?

8 MS. DAVIDOFF: No. We are secured, Your
9 Honor.

10 JUDGE AMBRO: No, no. They are secured.

11 MS. DAVIDOFF: We are secured by a 50.1
12 percent interest in PDVH's shares of --

13 JUDGE GREENAWAY: Sorry.

14 JUDGE AMBRO: No matter what happens, they
15 are buying subject to whatever you have, even if they
16 were coming against your particular --

17 MS. DAVIDOFF: Well, that is interesting.

18 JUDGE GREENAWAY: Well, it means you are at
19 the front of the line, instead of at the back of the
20 line. But what you are asking I think is in whatever
21 decision you make, think of equity and fairness, which
22 I am interpreting as, "Keep us at the front of the

1 line."

2 MS. DAVIDOFF: Yes, Your Honor. But, I mean,
3 it is not just "Keep us at the front of the line." It
4 is "Keep us in the line we bargained to be in." We
5 bargained to be a creditor of PDVSA. We don't have a
6 guarantee from Venezuela, but we also didn't bargain to
7 be competing with Venezuela's much larger number of
8 creditors for PDVSA's assets.

9 JUDGE GREENAWAY: Well, let's just say that
10 -- let me just pose a hypothetical to you. Let's
11 assume that your co-counsel is correct representing
12 PDVSA and that there needed to be a harm requirement.
13 And let's just assume for a moment that the harm
14 requirement was satisfied. Does that mean that you
15 would have nothing to say at this hearing or -- right?
16 Because PDVSA would have no basis, if I understand the
17 argument, if harm were appropriately alleged, then
18 there would be a basis for Crystallex to go ahead with
19 the attachment it seeks. So what would your position
20 be in that circumstance?

21 MS. DAVIDOFF: Sure, Your Honor. The answer
22 is if harm were alleged, I can imagine a hypothetical

1 situation like the one in Kensington versus Congo,
2 where the subsidiary has been used essentially to hide
3 assets and frustrate collection efforts. If the
4 situation is that one -- and that is the most readily
5 imaginable situation, where courts would downward
6 pierce in the sovereign context -- there would be less
7 unfairness to third party creditors of the subsidiary
8 because their interests wouldn't necessarily be
9 legitimate. I mean, in the Kensington versus Congo
10 situation, essentially what the Second Circuit said
11 about that case in the second EM decision was that that
12 was a case where Congo set up sham entities to hide its
13 assets and frustrate creditors. Well, in that case,
14 the third party creditors of the subsidiary may not
15 have a legitimate interest. And it may not be as
16 important for a court to consider those interests in
17 deciding whether to pierce the veil.

18 JUDGE GREENAWAY: Fair enough. But here if
19 all of the Bancec, now Rubin factors are met and
20 assuming just for the purpose of discussion that there
21 is no harm requirement, how is that different than the
22 hypothetical you just posed or the allusion, I should

1 say, to the Kensington decision?

2 MS. DAVIDOFF: Do you mean if there is no
3 harm requirement if you disagree with the argument that
4 there is a harm requirement?

5 JUDGE GREENAWAY: Yes. But I just flipped it
6 and, instead of agreeing, I disagreed.

7 MS. DAVIDOFF: Okay.

8 JUDGE GREENAWAY: And because your co-
9 counsel, if I understood him, said, "Don't look at the
10 Rubin factors because the harm requirement isn't met."
11 So all I did was flip it and say, "Okay."

12 MS. DAVIDOFF: "What if" --

13 JUDGE GREENAWAY: "Let's say there is no harm
14 requirement." Well, then you would look at the Rubin
15 factors. And the Rubin factors, hypothetically for
16 this purpose, are met. Are you in the same position?

17 MS. DAVIDOFF: I think, Your Honor, we would
18 be in a situation like the De Letelier case, for
19 example. I mean, that was a straight application of
20 Bancec by the Second Circuit. And what the court held
21 was that it wasn't enough, that there was --
22 essentially, what you have been calling the Rubin

1 factors had been satisfied, that there was basically
2 complete control by Chile over the LAN Chile airline.
3 And the court said, yes, we find that level of control.
4 That is there, no question. But -- and I am quoting --
5 "an injustice might be inflicted on third parties were
6 LAN's separate status so easily ignored" just based on
7 that kind of control. And the court said -- and it
8 specifically mentioned LAN's nonparty private bank
9 creditors as "unsuspecting third parties in need of
10 consideration."

11 So what the court in De Letelier did was say,
12 this kind of control is here, this same kind of five-
13 factor Bancec control, but we are going to look
14 further. We are going to look at what the impact is on
15 other people. And that is a thread that we see
16 throughout the downward piercing cases.

17 JUDGE AMBRO: But if you thought there was
18 going to be a significant problem here, when did you
19 first intervene in these proceedings?

20 MS. DAVIDOFF: Well, here in this proceeding,
21 we are here as an amicus, Your Honor. And so I think
22 we certainly --

1 JUDGE AMBRO: You didn't try to intervene in
2 the District Court, did you?

3 MS. DAVIDOFF: We did intervene in the
4 District Court toward the end of the District Court
5 proceedings, but putting that -- let's say we had never
6 intervened in the District Court. We would still be
7 entitled to identify a District Court decision that
8 goes the wrong way and come in as an amicus in the
9 Third Circuit and try to correct the error.

10 De Letelier is not the only case that voices
11 this kind of concern for third party creditors in the
12 downward piercing situation. And just think about it.
13 I mean, in the downward piercing situation, you are
14 making the subsidiaries' assets available to the
15 creditors of essentially what has been identified as
16 the dominating or --

17 JUDGE AMBRO: Yes, only if there is a finding
18 of alter ego or piercing the corporate veil.

19 MS. DAVIDOFF: And the question is, under
20 what circumstances should that finding be made in a
21 downward piercing situation, as opposed to an upward
22 piercing situation? This court's decision in In Re:

1 Blatstein called downward piercing "an unusual remedy"
2 available only in "exceptional circumstances."

3 JUDGE AMBRO: Any kind of piercing is an
4 unusual remedy only in exceptional circumstances.

5 MS. DAVIDOFF: Blatstein specifically makes
6 the distinction between upward and downward piercing
7 and says, downward piercing is an "unusual remedy"
8 available only in "exceptional circumstances."

9 JUDGE AMBRO: And I would argue so is upward.
10 The presumption is separateness.

11 MS. DAVIDOFF: That is --

12 JUDGE AMBRO: If you are going to ignore
13 separateness, there have to be some significant things
14 done that overcome the presumption of separateness.

15 MS. DAVIDOFF: That is absolutely right, Your
16 Honor, but where the creditors -- the interests of the
17 creditors of the subsidiary have already been infringed
18 on by the parent through the domination that is part of
19 the analysis for determining piercing, how can it be
20 that the right result is to further infringe on those
21 rights and take more assets away from the creditors of
22 the subsidiary in order to benefit the creditors of the

1 parent? That kind of concern for third party creditors
2 is in Bancec, is in De Letelier, and is in the Tenth
3 Circuit decision in Alejandro versus Telefonica. And
4 there --

5 JUDGE AMBRO: But the concern for creditors
6 has to be if there is something before us that gives us
7 an indication beyond remoteness that there actually
8 will be harm to those third parties as a result of what
9 is being attempted here. And you are saying it could
10 possibly be a change-of-control harm, it could be
11 something else. But that seems to be speculative,
12 especially when we are looking -- or at least what I
13 from way out of the left field seem to think that the
14 numbers here are not going to result in the 50.1
15 percent of the shares being sold here.

16 MS. DAVIDOFF: Two responses, Your Honor.
17 First of all, again, we are here as an amicus. And I
18 think the Court can consider the interests of all of
19 PDVSA's bondholders, not just the interests of the
20 secured bondholders. We have a very large interest and
21 a very great interest here. But what the Court should
22 be thinking about or what we are putting before the

1 Court is the argument that all of its third party
2 creditors, all \$25 billion worth, should be considered
3 in this analysis.

4 And, second of all, I didn't quite get to the
5 third way in which my clients could be harmed here,
6 which is that if the veil can be pierced between
7 Venezuela and PDVSA based solely on a showing of
8 control, can't the veil or could the veil potentially
9 -- I am not conceding anything, but could the veil
10 potentially be pierced between PDVSA and PDVH? Could
11 the veil on that basis be pierced between PDVH and
12 Citgo Holdings? And if the shares of Citgo Holdings
13 could be directly obtained by creditors of Venezuela,
14 well, then we do have a direct challenge to my clients'
15 security interest. So the reasoning behind the
16 District Court's decision is a danger --

17 JUDGE AMBRO: Keeping in mind that you are
18 always first, right?

19 MS. DAVIDOFF: Pardon?

20 JUDGE AMBRO: You are always first in the
21 queue in terms of --

22 MS. DAVIDOFF: Well, that wouldn't

1 necessarily be the case if this logic were taken to its
2 potential --

3 JUDGE AMBRO: But how do they come ahead of
4 you in terms of payment?

5 MS. DAVIDOFF: Pardon, Your Honor?

6 JUDGE AMBRO: How do they come ahead of you
7 in terms of --

8 MS. DAVIDOFF: If the veil were pierced so
9 far down the chain that creditors of Venezuela were
10 able to directly obtain the assets of Citgo Holdings by
11 arguing that those were themselves property of
12 Venezuela, then there would be no security interest
13 anymore. We would be direct competitors for those
14 assets with creditors of Venezuela, arguably. Again, I
15 am not conceding that, but --

16 JUDGE AMBRO: Yes, that is right, but --

17 MS. DAVIDOFF: -- that is a risk.

18 JUDGE AMBRO: The obstacle on the road is you
19 have a first lien on 50.1 percent of the shares in PDVH
20 and Citgo Holdings, right?

21 MS. DAVIDOFF: We absolutely do, Your Honor.

22 And I am not saying we --

1 JUDGE AMBRO: I don't think anybody has
2 challenged that.

3 MS. DAVIDOFF: We would fight this tooth and
4 nail were it to happen, but my point is that if the
5 veil can be collapsed at one level of the chain, there
6 is a risk it could be collapsed further down. And
7 creditors of Venezuela could come directly after Citgo.

8 JUDGE SCIRICA: Should we ignore the
9 disclaimers in the bond offerings or are they of any
10 relevance here?

11 MS. DAVIDOFF: The disclaimers in the bond
12 offerings about control?

13 JUDGE SCIRICA: Yes.

14 MS. DAVIDOFF: They don't have any relevance
15 to my client's arguments here, Your Honor. We are not
16 here to say that control isn't one of the factors that
17 courts consider in determining whether to pierce the
18 corporate veil. And we are not here to make an
19 argument one way or another about whether control was
20 established. We are here to say that that is not what
21 all courts look at.

22 Since Bancec, the only downward piercing

1 cases where the creditors of a sovereign parent have
2 been allowed to access the assets of the subsidiary
3 sovereign instrumentality are Bancec itself, of course,
4 but there the court found there would be no injury to
5 innocent third party creditors; Kensington versus
6 Congo, where it was basically fair to any creditors of
7 the SNPC to access the assets of the subsidiary because
8 it was a shell company that had been specifically set
9 up to frustrate Congo's creditors. And there really
10 just isn't a basis to pierce the veil in a way that
11 infringes on the rights of the third party creditors of
12 the subsidiary.

13 I mean, it sounds a little bit basic, but is
14 it fair? Is it fair that when a sovereign loots its
15 instrumentality, that then justifies further looting
16 the instrumentality?

17 JUDGE AMBRO: The argument I think that the
18 other side would make, assuming we consider there is a
19 risk of harm to you and other bondholders, how should
20 that be weighed against Crystallex's interest in
21 getting satisfaction of its judgment with respect to an
22 appropriation of its assets?

1 MS. DAVIDOFF: Well, it is just a simple
2 weighing, Your Honor.

3 JUDGE AMBRO: I just --

4 MS. DAVIDOFF: I think it would have to be
5 done in the first instance by the District Court. But
6 here the District Court, of course, found there was no
7 effort, there was not even an allegation that there had
8 been an effort, to frustrate collection efforts using
9 PDVSA.

10 I think an important weight on the side of
11 the scale of the creditors of sovereign
12 instrumentalities is the implications of too easily
13 piercing the corporate veil. And Bancec says this
14 again. It would have a chilling effect on credit
15 markets that sovereigns use their instrumentalities to
16 access if the mere fact of control by a sovereign of
17 the instrumentality were enough to pierce the veil.

18 And that is not just a problem for third
19 party creditors. That is a problem for international
20 policy.

21 JUDGE AMBRO: Well, didn't the market take
22 all of that into account when in 2016, PDVSA says that,

1 "We are controlled by the Venezuelan government" and
2 you have at that point 14 years of information relating
3 to control by the government? So it sounds like the
4 market has taken that into account.

5 MS. DAVIDOFF: I am not sure that is right,
6 Your Honor, because, again, legitimate subsidiaries of
7 sovereigns where the only relationship between them is
8 that the sovereign controls the subsidiary simply
9 haven't had their veil pierced in this way. I mean,
10 the only example is Bancec.

11 JUDGE AMBRO: Let's go back to, in effect, a
12 question that has been asked previously. When would
13 this veil, when could it be pierced under your
14 analysis?

15 MS. DAVIDOFF: Well, under my analysis, Your
16 Honor, I think the sort of logical and most common case
17 would be one where the parent, the sovereign, has used
18 the subsidiary to hide the assets, to hide its own
19 assets, and frustrate collection efforts of its
20 creditors. So Crystallex is a creditor of Venezuela.
21 If Venezuela had silver reserves that Crystallex could
22 somehow attach in some jurisdiction and Venezuela put

1 those into the ownership of PDVSA, that would be an
2 example of using PDVSA to hide assets and frustrate
3 collection efforts. But the District Court found, at
4 page 49, nothing like that here.

5 JUDGE AMBRO: This is probably a good segue
6 to get Mr. Estrada up. And then we will get you back
7 on rebuttal.

8 MS. DAVIDOFF: Thank you, Your Honor.

9 MR. ESTRADA: Thank you, Your Honor.

10 I don't even recall how we started this
11 segment of the argument anymore. I do. Mr. Pizzurro I
12 think began by accepting today that the first prong of
13 Bancec is indeed an alter ego test. So I think we made
14 some progress there with respect to the briefing, where
15 I think that was actually to disputed.

16 But then he went back. And while also
17 accepting that the test is disjunctive, he went back to
18 the claim that it is essential under Bancec that the
19 alter ego be involved in the particular injustice done
20 to the Plaintiff. I think I showed earlier that that
21 seemed to be contrary to Bancec itself and that that
22 had been the basis on which the Second Circuit had been

1 a return in Bancec.

2 JUDGE AMBRO: What would be your response to

3 Ms. --

4 MR. ESTRADA: Davidoff?

5 JUDGE AMBRO: -- Davidoff's point at the end

6 that piercing the corporate veil should come into play

7 when you have Venezuela hiding assets in a subsidiary

8 or an instrumentality that it completely controls?

9 MR. ESTRADA: Well, I think that is certainly

10 an example of when it might come into play, but I think

11 I would answer that with a more general point that

12 Bancec set up a presumption that we overcame at the

13 District Court. And we accepted our burden to overcome

14 it by pointing out that when government set up a

15 separate instrumentality, if so -- and this is what

16 Justice O'Connor said, that there would be insulated

17 from political control and that parties in the outside

18 world will deal with them on an arm's-length basis

19 separately from the government.

20 When the basis for the presumption is

21 disregarded decade after decade by the relevant

22 government and the government basically gets itself

1 into running the day-to-day affairs of the
2 instrumentality such that the prong, the first prong,
3 of Bancec is met, there is no mechanical test, as Mr.
4 Pizzurro said. And the outside world should no more be
5 required to respect the corporate form when the
6 sovereign itself does not.

7 One of the ironic aspects of this case to
8 stay on the argument that we heard last is that
9 creditors and bondholders who have security
10 instruments, like Ms. Davidoff's clients do, at least
11 had the luxury of getting in bed with Nicholas Maduro
12 and cutting a bargain with him. My client didn't have
13 that luxury. My client was involuntary expropriated
14 and has had to litigate for over 10 years to try to get
15 its interest repaid.

16 As the record makes clear because Judge Stark
17 relied on disclosures made to bondholders generally,
18 the true nature of the government's relationship with
19 PDVSA not only was apparent to the entire world but was
20 affirmatively disclosed to bondholders. So in a world
21 in which these things are bargained for and you could
22 have bargained for this, that, or the other security

1 interest, I would think that the parties that actually
2 had the opportunity to have a contractual basis on
3 which to have their own remedies are less well-
4 situated, the parties that have had to toil to get
5 remedies in our own courts, not courts of a third world
6 country ruled by a child dictator but our own courts
7 and are trying to actually enforce their rights, while
8 debtors continue to make every effort not to pay the
9 judgment of our own courts.

10 And so, I mean, I do think that it is sort of
11 quaint to sort of hear that because Nicholas Maduro
12 looted this agency, we should loot it, too. I have not
13 thought that the prompt and just payment of the
14 judgments of our own courts was looting. I actually
15 thought that that was actually sort of expected in the
16 ordinary course and that if we had shown the
17 requirements that the legal doctrines actually set
18 forth in cases by the U.S. Supreme Court, that was just
19 the ordinary working of the courts.

20 Here Bancerc does set a presumption that is
21 based on the expectation that governments will set
22 these instrumentalities free from political control.

1 And so that third parties will deal with them at arm's
2 length.

3 Now, the question is, when that does not
4 happen and when there is affirmative evidence of
5 pervasive day-to-day political control and day-to-day
6 management and use of the instrumentality as a
7 piggybank every day and when all of that is proven to
8 the satisfaction of a district judge, is it fair to
9 call that easily piercing the corporate veil? I would
10 submit to you that, actually, it is not fair because it
11 is not true that if you affirm here, it will follow
12 that every instrumentality in the country will lose the
13 presumption of Bancec.

14 It would be it seems to me illusory to sort
15 of claim that just because a rogue government that has
16 been condemned practically by the entirety of the
17 Western world has been shown not to have observed
18 practically any corporate formality and have used this
19 instrumentality as a piggybank and has been shown, in
20 fact, to have been the alter ego of this
21 instrumentality, it has to follow that other
22 instrumentalities will also be held alter egos.

1 JUDGE GREENAWAY: Well, what consideration,
2 if any, from your perspective should we have for people
3 or entities in the place of the bondholders? So here
4 if I understand the position that the bondholders have
5 a 50.1 percent interest, suppose for a moment that the
6 bondholders had a 98 percent interest, which would be a
7 considerable amount of money. Does that change the
8 position of the thoughts of equity that Ms. Davidoff
9 has brought forth?

10 MR. ESTRADA: Judge Greenaway, I think it
11 changes nothing that is relevant to this appeal for
12 this reason. A creditor in my client's position where
13 that is true I don't think will bother to go after
14 property that is essentially under water. And so,
15 therefore, the hypothetical would actually not arise.
16 It seems to me that if the attachment is affirmed here,
17 as it should be, everybody will have every incentive to
18 have the execution sale be conducted in a manner that
19 obtains the highest value.

20 And although I gave up my junior variety
21 investment banker sort of desires when I left my
22 practice in New York 20-something years ago, it seems

1 to me very hard to believe that anybody would bid on
2 these shares if there is a significant interest that
3 Citgo will be foreclosed on and be taken away from the
4 assets that are basically the only thing that makes
5 these shares valuable. Right?

6 And so, I mean, it seems to me that anybody
7 who is actually secured by shares that PDVH has in
8 Citgo, which I think is the interest of the
9 bondholders, is not going to be affirmatively harmed by
10 an execution sale of the sales of PDVH. I think in the
11 grand scheme of things, we would come sort of after
12 them because we don't have a security interest in the
13 shares of Citgo.

14 It is true, again, as counsel said, the
15 hypothetical is alter egos sort of exist as a doctrine.
16 People could claim that it would pierce, pierce, and
17 pierce, but, of course, each of these successive
18 piercings has to be demonstrated as a matter of proof,
19 right? And I will point out to you that when my client
20 was last in front of this Court, we lost on the theory
21 that the Court could assume that PDVSA was an alter
22 ego, but it would not assume that Citgo was. So this

1 is less easy than it looks. And so yes, the doctrines
2 exist, but the near assertion that somebody may claim
3 it doesn't mean that somebody will prove it.

4 And, again, it is one thing to say that
5 somebody will prove that Venezuela has for decades a
6 rogue government that does not observe any rule of law,
7 which makes it somewhat ironic to sort of claim that
8 corporate formalities are the one rule that they
9 actually do observe but quite another to then come to
10 this country and say that each successive subsidiary
11 who is also presumptively separate is also an alter
12 ego. I think, hypothetically, could somebody claim
13 that? Yes. Practically, I don't think it is likely.

14 Going back to the argument that we started
15 with is this notion that the alter ego must have been
16 involved in the underlying misconduct. As I pointed
17 out earlier by referring to the Second Circuit, I don't
18 think that that is actually a tenable reading of Bancec
19 itself. I will go back and also point out that there
20 was no tenable reading on the facts, that Bancec could
21 have been involved in the expropriation of the Citibank
22 assets, right, because, even though Bancec, just as we

1 heard, itself a case of reverse piercing, Bancec's
2 property was taken to satisfy a debt of the Republic of
3 Cuba. So it is itself a case of reverse piercing. The
4 Supreme Court did not so much as suggest that any
5 special showing was necessary in that context. And so
6 we start with a proposition that it is itself a case of
7 reverse piercing, that on the facts, it was --

8 JUDGE GREENAWAY: I thought that his point
9 was that if you were applying Bancec to this case,
10 Citibank would have to show --

11 MR. ESTRADA: Yes, that Bancec was somehow
12 involved in the expropriation. I don't think that -- I
13 don't see how that could be possible because Bancec was
14 not even in existence at the time. Well, it was in
15 existence at the time of the expropriation. It had
16 ceased to exist later. But, in all events, it wasn't
17 possible on the facts of the case I don't think. And,
18 nonetheless, Bancec had its separate property, if you
19 will, taken to satisfy a judgment that only Cuba should
20 have been answerable for because only Cuba had
21 expropriated the assets of Citibank, not Bancec
22 property, obviously.

1 I will point out, again, a different footnote
2 in Bancec, footnote 8, where in the process of noting
3 that the legislative history of the FSIA contemplated
4 that the FSIA itself would not change underlying rules
5 of liability, the Supreme Court quoted from the
6 legislative history, and said that the courts will have
7 to determine, among other things, whether property held
8 by one agency should be deemed the property of another
9 and whether property held by an agency is property of a
10 foreign state so that it was sort of assumed in the
11 context of the Bancec decision itself, that the sorts of
12 decisions that Judge Stark made here, that property
13 that is ostensibly held by agency is really the
14 property of the sovereign, will be the types of things
15 that will be brought in front of the courts. And there
16 is nothing especially unusual about that. Not only
17 Bancec said that, but it was quoting the very
18 legislative history of the FSIA.

19 Going back to Rubin, I think counsel said
20 that the Bancec factors were uttered in the context of
21 a case that involved terrorism. I think it was an
22 introductory passage in which the court was summarizing

1 Bancec. I think the court was not intimating that
2 these factors are only relevant in terrorism cases. In
3 fact, the court summarized the Bancec factors and then
4 went on to point out that in applying these factors,
5 the lower courts have, quote, "coalesced" around these
6 factors.

7 It is obvious and I think it has been pointed
8 out that none of those factors have anything to do with
9 the point that is being urged today to be dispositive
10 here, the participation by the purported alter ego in
11 the underlying conduct that gives rise to the claim.
12 And you would think if that were a key aspect of
13 Bancec, it would have made it somehow into the opinion.

14 The other aspect that the court mentioned in
15 Rubin is this notion that this is, of course, not a
16 mechanical test. I actually think that that helps us,
17 not them, because what Justice Sotomayor went on to say
18 is that the Supreme Court in Bancec and I assume in
19 Rubin as well expected the lower courts to continue to
20 apply these factors in a common law way on a case-by-
21 case basis. And, therefore, when you hear a parade of
22 horribles, that if you rule for us in this case, the

1 sky will fall, you can very well take stock of the fact
2 that Venezuela and PDVSA are very unusual countries and
3 instrumentalities. And thank heaven that most
4 countries are not ruled like that and most
5 instrumentalities are not ruled like that.

6 We made a very affirmative proof here with
7 respect to how this particular instrumentality had been
8 run over several decades. And I think it was
9 satisfactory for the District Court for good reason. I
10 mean, we proved our case I think fair and square.

11 There was an issue that was raised by Judge
12 Ambro that I think I have to avert to. It is a
13 question of the burden of proof. We have pointed out
14 that the inevitable rule in Federal court for causes of
15 action is that of a preponderance of the evidence, as
16 we have cited in a number of cases from the U.S.
17 Supreme Court. We accept that there are Third Circuit
18 cases, Kaplan and Lutyk, that have applied a clear and
19 convincing standard with respect to claims of alter
20 ego. Kaplan was a state law case that ultimately went
21 after the Supreme Court as First Options. And Lutyk
22 was, as Judge Ambro pointed out, an ERISA case, that

1 that applied the clear and convincing standard, though
2 somewhat unnecessarily because it doesn't appear to
3 have been the standard that the District Court had
4 applied and in a case in which the litigant in that
5 case had not actually challenged much of anything. So
6 it was not clear to me that it was even necessary to
7 the judgment in that case.

8 There was another case that I think has not
9 been mentioned that I should mention in an abundance of
10 candor. There is footnote 26 in a case called Trinity,
11 in which the court was urged on the question of burden
12 of proof and the court cited Lutyk for the proposition
13 that in a CERCLA case, which is an environmental
14 statute under Federal law, it would apply clear and
15 convincing standard to an alter ego determination but
16 ended up concluded that there would be no alter ego in
17 that case under any standard of proof. So although the
18 court cited Lutyk for the proposition, we think it is
19 dictum in that case.

20 We think that the correct answer under
21 Federal law is that the answer is the preponderance of
22 the evidence. And the reason for that is that the

1 appeal for any argument based on clear and convincing
2 evidence harkens to the common law rule that fraud had
3 to be proven by clear and convincing evidence. To us,
4 the most dispositive answer to that is that when fraud
5 has gone to the Supreme Court in the McClain and
6 Huddleston case and the Steadman case, the Supreme
7 Court has held that fraud itself need only be proved by
8 a preponderance of the evidence.

9 JUDGE AMBRO: The problem you have in Lutyk
10 is that we reaffirmed that "Evidence justifying
11 piercing the corporate veil must be clear and
12 convincing." And then that is quoting Kaplan as well,
13 as you know.

14 MR. ESTRADA: Yes.

15 JUDGE AMBRO: And the question is, how can
16 you park that in a corner? It seems like that any time
17 you are dealing with piercing the corporate veil, be it
18 ERISA, be it CERCLA, be it something else, it is going
19 to be because there is such a significant presumption
20 in connection with or in favor of separateness that you
21 really do need to show something more than 50.1 percent
22 in order to ignore that separateness.

1 MR. ESTRADA: No. But I think that that is
2 vacant to the presumption, Judge Ambro. And I think,
3 again, the traditional reason for invoking clear and
4 convincing evidence with respect to veil piercing has
5 been linked to the fraud component of it. And that is
6 what I think Lutyk also said. And I think part of the
7 difficulty with that is that when even fraud claims
8 have gotten to the Supreme Court, the Supreme Court has
9 held that fraud itself needn't be proved by clear and
10 convincing evidence but only by a preponderance.

11 My more basic answer on that point is that
12 the citation to Kaplan, which was indisputably a state
13 law-based case in the context of Lutyk, which I believe
14 Judge Smith also made the statement that Mr. Lutyk was
15 not contesting much of anything, was not really an
16 advised holding on a question of Federal law. It was
17 simply borrowing from an area that was not apposite.
18 Therefore, we have treated it in our papers as either
19 based on the fraud prong or as dicta, as we did Trinity
20 because I think it is difficult to reconcile with the
21 larger body of the Supreme Court doctrine.

22 Having said all of that, I will point out

1 that for as much as counsel likes to quote the aspect
2 of judge Stark's ruling, where it found that everything
3 that happened here could have happened without the
4 involvement of the alter ego, I will point out, again,
5 that that is a finding that Judge Stark made solely in
6 connection with finding that we had not met the fraud
7 prong that he applied separately. He did point out in
8 footnote 15 of his opinion that he considered that
9 there was an inequitable aspect to the control prong
10 and that he was satisfied that we had met it here.

11 Now, we also have pointed out that there is
12 inherent in the control prong -- and I use "control"
13 generally, not really to signify the mere control as
14 necessary but the type of pervasive day-to-day control
15 that the cases talk about -- that there is -- the
16 fundamental inequitable aspect of that is that for the
17 entire world to respect the corporate form when the
18 principal, in effect, does not and to allow --

19 JUDGE AMBRO: But that is why you have
20 piercing the corporate veil.

21 MR. ESTRADA: Correct. But it does seem to
22 me that that is the fundamental inequity. It is a

1 separate species of what Bancec itself was dealing with
2 where somebody wants to use the corporation as a
3 shield, but it doesn't actually respect it.

4 JUDGE AMBRO: Well, essentially that is the
5 Bancec fifth factor.

6 MR. ESTRADA: Pardon, Your Honor?

7 JUDGE AMBRO: Essentially that is the Bancec
8 fifth factor.

9 MR. ESTRADA: Right, though I think, again, I
10 don't entirely agree with counsel's efforts to
11 characterize Bancec solely as a fraud and injustice
12 case because I think in Bancec, although there was a
13 comment that is not entirely clear, there was a lot of
14 shenanigans, if you will, with the forming and the
15 dissolving all of these different companies.

16 And at the end of the day, Justice O'Connor
17 went principally on the proposition, which I think now
18 falls under the fifth Rubin factor, which is that it
19 was inequitable to allow Bancec and, in fact, Cuba, to
20 have access to our courts while not submitting itself
21 to --

22 JUDGE AMBRO: You want the benefits, but you

1 don't want the detriments.

2 MR. ESTRADA: Correct. And here, somewhat
3 ironically, we have the Government of Venezuela having
4 moved in the District Court in the related litigation
5 in D.C. here, not merely to oppose our efforts to
6 confirm the arbitration but affirmatively to vacate the
7 arbitration. So they moved in Federal District Court
8 for affirmatively.

9 JUDGE AMBRO: But you have heard the theme of
10 Mr. Pizzurro that it is essentially did PDVSA
11 contribute to the liability that resulted in the
12 judgment against Venezuela? And his point is it
13 didn't. And, therefore --

14 MR. ESTRADA: Yes. And my point is that his
15 reading of the case law as requiring that, commencing
16 with Bancec, is entirely mistaken, and I think that it
17 is demonstrably mistaken but that to the extent that it
18 is relevant, PDVSA is not quite a stranger to any of
19 this because, as even the District Court pointed out,
20 they did end up with our mine after the government took
21 it. The District Court was of the view that that was
22 not essential to the expropriation. But they did end

1 up with it. And I think they later sold it to the
2 Central Bank for 9 billion or so. And, in addition,
3 even though they are ostensibly not the Government of
4 Venezuela, somehow they paid the fees of the government
5 in the arbitration.

6 So it is not like they are a complete
7 stranger. And they are not a normal instrumentality.
8 And any notion that they are just like Norway is a
9 little bit ludicrous.

10 JUDGE AMBRO: Before you sit down, any
11 further questions on -- then the question I pose to
12 both sets of counsel, on this particular issue, we had
13 a sub-issue called whether the PDVH shares are not
14 immune from attachment. Does anybody wish to have that
15 argued orally or discussed orally or do we want to go
16 on to the issues that pertain to Mr. Yalowitz and
17 Venezuela?

18 MR. ESTRADA: I am happy to respond to any
19 questions the Court has. I have not heard any argument
20 on --

21 JUDGE AMBRO: Any that you want to deal with
22 this particular issue, Mr. Pizzurro?

1 MR. PIZZURRO: Your Honor, I am happy to
2 answer any questions the Court has.

3 JUDGE AMBRO: I don't know if I have any
4 particular questions on that.

5 JUDGE GREENAWAY: I don't.

6 JUDGE SCIRICA: I am good.

7 JUDGE AMBRO: I am fine.

8 MR. PIZZURRO: Can I get two minutes of
9 rebuttal to Mr. Estrada?

10 JUDGE AMBRO: You sure can. And then the
11 question is while you are doing that, does anybody at
12 the counsel table wish to take a break after that
13 before we go to the matters relating to Mr. Yalowitz?
14 And you let me know. Think about it. Anyone? It only
15 takes one person to say, "Yes."

16 JUDGE GREENAWAY: Yes.

17 (Laughter.)

18 JUDGE AMBRO: Okay. Come on for your two
19 minutes. He gets about two, doesn't he?

20 (Laughter.)

21 MR. PIZZURRO: In answer to a question that
22 was put to counsel for the bondholders, I direct the

1 Court's attention to Bancec, to the pages 462 U.S. at
2 626 to 628, where the Court very specifically addresses
3 the issues relating to facilitating credit transactions
4 with third parties and goes on to quote the legislative
5 history of the Foreign Sovereign Immunities Act and how
6 important it is that courts in the United States treat
7 foreign corporate instrumentalities the same as, at
8 least the same as, we treat them in the United States
9 lest we expose U.S. corporations to liability in other
10 courts. And I invite the Court to take a look at that
11 language.

12 And that brings me back to the basic point
13 that I want to spend my 2 minutes on, now 1 minute and
14 30 seconds. The court in Bancec was not, we posit,
15 establishing any rule that was any less stringent in
16 piercing the corporate veil than that that applies in
17 the jurisprudence in the United States, the state
18 courts, and the Federal courts. And we invite the
19 Court to find a single decision, a single one, in which
20 a court has said, "It doesn't matter whether or not
21 there is any fraud or injustice with respect to" -- let
22 me not use that term -- "any injury to the plaintiff as

1 a result of the abuse of the corporate form. That is
2 irrelevant. All we look at is control." I don't think
3 the Court is going to be able to find one because that
4 is not the law. So the only way that the Court can
5 affirm Judge Stark is if the Court finds that Bancec,
6 in fact, articulated such a test. And that test is
7 significantly more lenient than the test we apply in a
8 domestic context.

9 And that is precisely what the Supreme Court
10 was saying should not happen in an international
11 context, where all of these other competing interests,
12 comity, international relations, and respect for the
13 way countries structure their own economies, and the
14 potential risk to U.S. entities in an international
15 economy, face if that is going to become the --

16 JUDGE AMBRO: I think we can deal with some
17 of those issues in the next segment, then. One thing I
18 will note now, rather than at the end, I would ask that
19 once oral argument is over, if the two sides would get
20 together with the Clerk's Office and have a transcript
21 ordered of this oral argument and just spread it evenly
22 between that side and that side?

1 MR. PIZZURRO: Yes, Your Honor.

2 JUDGE AMBRO: So whoever does on your side
3 pays, but it would just be half.

4 MR. PIZZURRO: Thank you.

5 JUDGE AMBRO: All right? And we will take
6 about a -- how long do you guys want?

7 MR. ESTRADA: Five minutes should do it, Your
8 Honor.

9 JUDGE AMBRO: We will give you 10 minutes.

10 MS. DAVIDOFF: Your Honor, would it be
11 possible for me to have two minutes of rebuttal as
12 well?

13 JUDGE AMBRO: You sure can. Come on up.

14 MS. DAVIDOFF: Thank you, Your Honor.

15 Very briefly, first of all, the citation in
16 Bancec -- and it really is critical -- is pages 625 to
17 627. The court there says that, "Freely ignoring the
18 separate status of government instrumentalities would
19 result in substantial uncertainty over whether an
20 instrumentality's assets" --

21 JUDGE AMBRO: Which page are you on: 625,
22 '26, or '27?

1 MS. DAVIDOFF: Sorry. Six twenty-six.

2 JUDGE AMBRO: Six twenty-six? Okay.

3 MS. DAVIDOFF: -- "substantial uncertainty
4 over whether an instrumentality's assets would be
5 diverted to satisfy a claim against the sovereign and
6 might thereby cause third parties to hesitate before
7 extending credit to a government instrumentality
8 without the government's guarantee. As a result, the
9 efforts of sovereign nations to structure their
10 governmental activities in a manner deemed necessary to
11 promote economic development and efficient
12 administration would surely be frustrated." And that
13 discussion actually does go on from pages 625 to 627.
14 It is a very important part of the court's decision.

15 And I would commend also to the Court's
16 attention page 795, note 1 in De Letelier and page
17 1286, note 22 in Alejandro versus Telefonica. De
18 Letelier and Alejandro were both cases where the court
19 found the level of extensive control that Judge Stark
20 found here but, nevertheless, held that that wasn't
21 enough to pierce the corporate veil downward and
22 expressly mentioned the interests of third party

1 creditors in the subsidiary.

2 The only other point I wanted to make, Your
3 Honors, is that I do fear that the Court may be over-
4 reading Rubin in this case. That was not a piercing
5 case at all. It was about whether creditors of Iran
6 could enforce a terrorism-based judgment against Iran
7 on noncommercial directly held property of Iran that
8 happened to be present in the U.S. So, again, there
9 was no veil-piercing issue in that case at all. It was
10 just a collection of Iran's artifacts that was present
11 at the University of Chicago.

12 JUDGE GREENAWAY: The recitation of those
13 factors from Bancec should not be considered? What
14 specific point are you making?

15 MS. DAVIDOFF: Well, what I am saying is
16 there was no interpretation of Bancec in that case.
17 All the court did was explain the Bancec factors, then
18 identify the features of the terrorism exception in the
19 FSIA that tracked those factors. And the only
20 conclusion the court reached was, at a very minimum,
21 that statute abrogates the Bancec factors as they apply
22 to accessing assets of the sovereign instrumentality by

1 a plaintiff who holds a terrorism-based judgment.

2 There was no need to interpret Bancec, and
3 there was no interpretation of Bancec. It just laid
4 out the history of those factors in Bancec and said,
5 "Here is what the statute said. Those are abrogated
6 under the FSIA exception."

7 JUDGE AMBRO: I will make you a bet that if I
8 ignored those factors and we come out with a decision
9 that ignores them, we could be leading with our chin to
10 another court.

11 MS. DAVIDOFF: Well, nobody I don't think
12 would suggest ignoring them, Your Honor. It is just
13 not the whole picture. All that does is tell you
14 whether the factors that the court identified in Bancec
15 as indicative of the kind of control that could be a
16 first step in assessing whether to pierce the veil are
17 present, but it doesn't get you all the way there. It
18 didn't get you all the way there in Bancec. It didn't
19 get you all the way there in De Letelier. And it
20 didn't get you all the way there in Alejandro, all
21 Circuit Court decisions other than Bancec.

22 Thank you, Your Honor.

1 JUDGE AMBRO: Thank you. And we will take a
2 10-minute recess.

3 BAILIFF: All rise. The Court is now in
4 recess.

5 (Recess taken.)

6 BAILIFF: All rise. The Court is now in
7 session. Please be seated.

8 JUDGE AMBRO: Mr. Yalowitz, welcome.

9 MR. YALOWITZ: Thank you, Your Honor. I see
10 I have two minutes on the clock.

11 (Laughter.)

12 MR. YALOWITZ: I will try to be --

13 JUDGE AMBRO: Just -- Michael, you need to
14 forget the time. Don't worry about the two minutes.
15 You are on our time.

16 JUDGE GREENAWAY: This use of the red light
17 is not precedential.

18 (Laughter.)

19 MR. YALOWITZ: May it please the Court, Kent
20 Yalowitz on behalf of the Republic of Venezuela.

21 I would like to begin, if I may, with the
22 issue of the District Court's subject-matter

1 jurisdiction and the effect of section 1963 of the
2 judicial code on that jurisdiction.

3 JUDGE GREENAWAY: So does 1963 -- did you
4 have a prepared thing?

5 MR. YALOWITZ: No, no. Let's --

6 JUDGE GREENAWAY: I want to hear your --

7 MR. YALOWITZ: I love questions. I really
8 do.

9 JUDGE GREENAWAY: So in your view, does 1963
10 conflict with the FSIA generally or just in this
11 particular case? And if so, how?

12 MR. YALOWITZ: So yes. Nineteen sixty-three
13 is inconsistent with the FSIA. So to understand that,
14 I would like to begin with what 1963 is and what the
15 world looked like before there was a 1963, which even I
16 don't remember.

17 So before 1963 existed, if you had a judgment
18 issued by a Federal District Court and you wanted to
19 execute on that judgment in another district, you had
20 to bring an action on a judgment. And then you would
21 get a fresh judgment in the new district; in a sense,
22 in essence, a judgment on the judgment. And that

1 plenary action is still available. It still exists.
2 It is not used very much because section 1963 is so
3 much easier, but I would refer the Court to the Home
4 Port Rentals case from the Fifth Circuit; Stanford
5 versus Utley, which was by then Judge Blackmun when he
6 was a circuit judge on the Eighth Circuit; and Stiller
7 versus Hardman from the Second Circuit. All of those
8 cases involved situations in which somebody had used
9 section 1963 and registered a judgment in a second
10 Federal District Court. And the issue arose, well,
11 what does that mean? Is that enough for what happens
12 with the statute of limitations --

13 JUDGE AMBRO: I thought -- let me see if --
14 just back up here for a second. Sixteen-o-eight
15 applies expressly to give service of the complaint and
16 the summons.

17 MR. YALOWITZ: Correct.

18 JUDGE AMBRO: So what is your basis for
19 claiming that that also applies to a registration of
20 judgment under 1963?

21 MR. YALOWITZ: So my reading of the Foreign
22 Sovereign Immunities Act is that it does not allow for

1 a registration of judgment under 1963 in the same way
2 that it does not allow for the analogous proceeding
3 under 22 U.S.C. 1650a for basically registration of an
4 arbitral award, which otherwise would be available, as
5 the Second Circuit held in Mobil Cerro Negro.

6 JUDGE AMBRO: But there was a recent, just a
7 couple of weeks ago, Supreme Court case called Republic
8 of Sudan versus Harrison. And it was a 1963 case. The
9 Supreme Court didn't give any suggestion that the FSIA
10 preempts the procedure there.

11 MR. YALOWITZ: So maybe I need to start with
12 the FSIA.

13 JUDGE AMBRO: Okay.

14 MR. YALOWITZ: All right. So the FSIA says
15 -- and bear with me because it is a very technical
16 statute, but the FSIA begins -- the heart of the FSIA
17 is 1604, which says foreign sovereigns are immune.

18 JUDGE GREENAWAY: Right.

19 MR. YALOWITZ: And then it says, "unless an
20 exception applies in 1605 or 1607."

21 JUDGE GREENAWAY: Right.

22 MR. YALOWITZ: And 1605, the very first,

1 (a) (1), is "implicit or expressed waiver." Implicitly
2 the courts have said and Congress said in the House
3 report, it is very rare, but one of the ways you do an
4 implicit waiver if you are a foreign sovereign is you
5 appear without raising your immunity. The minute you
6 appear, if you don't raise your immunity, you will have
7 permanently waived it.

8 So when Sudan showed up in the Second Circuit
9 in that case that the Supreme Court just decided, they
10 raised the issue of personal jurisdiction. They didn't
11 raise the issue of subject-matter jurisdiction. And so
12 as the case came to the court, the issue was purely one
13 of personal jurisdiction and service. The Supreme
14 Court said, "You have to effect service." Nineteen
15 sixty-three doesn't trump the Foreign Sovereign
16 Immunities Act.

17 Now, there was not a question of subject-
18 matter jurisdiction in that case because, first of all,
19 it hadn't been raised; and, second of all, had the
20 court thought of it sua sponte, the court would have
21 said, "Well, it's been waived here because they
22 appeared in the Second Circuit and they didn't raise it

1 then. And, therefore, they would have waived immunity
2 under" --

3 JUDGE AMBRO: Any idea why the Harrison case
4 didn't mention --

5 MR. YALOWITZ: I think they didn't think of
6 it. I mean, I honestly think they didn't think of it.
7 I think that counsel didn't think of it. And then the
8 issue they went on, the issue was waived because if you
9 don't raise sovereign immunity at the first
10 opportunity, you waive it. So had they thought of it,
11 it would have been addressed.

12 JUDGE AMBRO: Okay.

13 MR. YALOWITZ: Now, we come back to 1963.
14 Nineteen sixty-three does more work than simply
15 extending the reach of the District Court that issued
16 the judgment. In other words, like if you get a
17 judgment, if you are representing the United States and
18 you have a judgment, the court of original jurisdiction
19 gives the judgment creditor, the AUSA nationwide
20 service of process for executions and attachment. So
21 if the United States is a judgment creditor with a
22 judgment in the District of Columbia, they can attach a

1 bank account in California or Hawaii or Guam or
2 wherever the debtor has assets subject to some -- you
3 know, there is some exception for individuals who can
4 ask that the proceedings be transferred to their home
5 court. But there is nothing like that in the Foreign
6 Sovereign Immunities Act.

7 So 1963, just if I could come back to 1963,
8 what it says is it is, in effect, giving a new
9 judgment. It is, in effect, commencing a new
10 proceeding. And it does that -- imagine a case in
11 which a -- we will take the Stanford against Utley
12 case. It was an auto accident case in Mississippi.
13 The defendant was in Missouri. The plaintiff was in
14 Mississippi. And the plaintiff got a judgment for
15 \$100,000. And he went to register that judgment in
16 Missouri.

17 Now imagine that during the course of the
18 case, the plaintiff moved into the same state as the
19 defendant. In that situation, once you got the -- of
20 course, the court would still have subject-matter
21 jurisdiction under diversity because you would measure
22 diversity at the time the complaint is filed. But once

1 the defendant and the plaintiff were in the same state,
2 there would be no jurisdiction, no subject-matter
3 jurisdiction, to bring an action on the judgment. That
4 would not be available in the Federal court. That was
5 the holding in the case of Ohio Hoist. Instead, there
6 is arising under jurisdiction because of section 1963.

7 Section 1963 says, "Despite the lack of
8 diversity or despite the lack of another Federal
9 question, we are going to give the District Courts
10 subject-matter jurisdiction to entertain this highly
11 expedited proceeding." In essence, you take the
12 judgment from one court. You send a letter to the
13 clerk of a new court. And you file it in the new
14 court. And that becomes a new judgment with a new
15 statute of limitations. It is just as if you had gone
16 through a plenary action.

17 Now, the only purpose for ever doing that is
18 to acquire in-rem jurisdiction over an asset of the
19 judgment debtor. That is what Mr. Estrada said. He
20 said he had to come to Delaware because that is where
21 you could get in-rem jurisdiction over the shares of
22 PDVH.

1 And section 1963, therefore, is designed for
2 giving in-rem jurisdiction. And the one thing we know
3 about the Foreign Sovereign Immunities Act is that they
4 did away with in-rem jurisdiction. The House report
5 says it crystal clear, page 26, section 1609 has the
6 effect of precluding attachments as a means for
7 commencing a lawsuit.

8 And the Congress expressly limited subject-
9 matter jurisdiction in section 1330(a) to in-personam
10 actions. 1330(a) says, "The District Court shall have
11 original jurisdiction with regard to amount in
12 controversy of any nonjury civil action against a
13 foreign state, as defined in section 1603, as to any
14 claim for relief in personam."

15 JUDGE AMBRO: So, just to back up for a bit,
16 I thought your main argument -- it may be -- that
17 Crystallex was required to serve Venezuela with a copy
18 of the registration of judgment in the District Court
19 in D.C. or its motion for writ of attachment in
20 Delaware. Is that correct?

21 MR. YALOWITZ: I'm sorry? Say it again.

22 JUDGE AMBRO: That Crystallex was required to

1 serve Venezuela with a copy of the registration of
2 judgment in the District Court in D.C. or in connection
3 with this motion for writ of attachment in the District
4 of Delaware.

5 MR. YALOWITZ: I guess I would -- I mean,
6 that is --

7 JUDGE AMBRO: How would you have --

8 MR. YALOWITZ: -- one way of saying it. I
9 might say it a little differently, which is that
10 because section 1963 is unavailable against foreign
11 sovereigns, Crystallex had to commence a plenary action
12 against Venezuela in Delaware, in which it sought
13 recognition of the judgment and in which it sought
14 attachment. And there would not have been subject-
15 matter jurisdiction for such an action.

16 JUDGE AMBRO: But when I bring up Harrison,
17 you are saying, "Well, maybe the Supreme Court didn't
18 think about it" because Harrison arose from a post-
19 judgment enforcement proceeding under 1963. And, yet,
20 there was no suggestion that the service requirements
21 examined in Harrison applied to those proceedings.

22 MR. YALOWITZ: That is true. The Supreme

1 Court didn't think about this issue. I may be
2 misremembering the case, but I thought the issue in
3 Harrison was service of process of the original plenary
4 complaint in the original court. I may be
5 misremembering that. I did not think the issue in
6 Harrison was, should they have served the 1963 --

7 JUDGE AMBRO: The way that Judge Fletcher
8 wrote about it in the Ninth Circuit case of Peterson
9 versus the Islamic Republic of Iran, a case from 2010,
10 is "If Congress had intended for foreign states to
11 receive notice of every post-judgment motion, it would
12 have said so."

13 MR. YALOWITZ: Right. I know that that is
14 what Judge Fletcher said. We disagree with that.

15 JUDGE AMBRO: And what support do you have on
16 the other side? Any cases?

17 MR. YALOWITZ: The path-marking case for us
18 is Mobil Cerro Negro.

19 JUDGE AMBRO: Okay.

20 MR. YALOWITZ: And, if I could, what Mobil
21 Cerro Negro does -- I think it is helpful to just sort
22 of recap. Mobil Cerro Negro was a case in which the

1 plaintiff invoked 22 United States Code 1650a. 1650a
2 gives the court the exact kind of -- gives the
3 plaintiff the exact kind of procedure that 1963 -- if
4 you take an arbitration award, you bring it to the
5 court ex parte. You give it to the court. The court
6 enters it as a judgment, period full stop. There is no
7 service. There is no debate.

8 And then what happened in Mobil Cerro Negro
9 was the defendant, which was the Republic of Venezuela,
10 sought to vacate the judgment and the District Court
11 judge, Engelmayer, declined to vacate the judgment.
12 And he said that "The cases in our district go back to
13 the 1980s and say, 'You can use this ex parte type
14 procedure. And you don't have to serve. And you don't
15 have to have any basis of subject-matter
16 jurisdiction.'"

17 Although Judge Engelmayer found that the FSIA
18 itself provided jurisdiction in that case, when it went
19 to the circuit, Mobil Cerro Negro, the judgment, the
20 arbitral award holder argued that 1650a provided an
21 independent basis of subject-matter jurisdiction and
22 preterminated the personal service requirements of the

1 FSIA.

2 After argument, a week after argument, the --
3 you know, I am not -- you have this power as well. A
4 week after oral argument, the panel invited the State
5 Department to file a brief on its interpretation of the
6 Foreign Sovereign Immunities Act and how it related to
7 1650a.

8 And the State Department and the United
9 States filed a brief, in which they said three things
10 with regard to subject-matter jurisdiction. They said,
11 first of all, the Foreign Sovereign Immunities Act is
12 the exclusive basis for subject-matter jurisdiction
13 over foreign sovereigns. And they cited not only the
14 Amerada Hess case. They cited Saudi Arabia against
15 Nelson. They cited the Permanent Mission of India
16 case. They cited Verlinden. And they cited the OBB
17 case. That is the first thing the State Department
18 said: exclusive basis for subject-matter jurisdiction.

19 The second thing they said was that the FSIA
20 supplants earlier enacted grants of subject-matter
21 jurisdiction. In this regard, they were following
22 Amerada Hess, which involved the alien tort statute.

1 And the third thing they said was that the
2 ICSID Convention did not contradict FSIA immunity.
3 That is not an issue here.

4 The Second Circuit in its opinion agreed with
5 the United States. First, they said that Amerada Hess
6 holds that the FSIA is the sole basis for obtaining
7 subject-matter jurisdiction over a foreign state. That
8 is the first thing they said. They cited the same
9 cases the State Department cited. The second thing
10 they said was that 1650a predated the FSIA. And it
11 stands as a grant of subject-matter jurisdiction
12 generally. It just doesn't apply to foreign
13 sovereigns. And then they also agreed about the --

14 JUDGE AMBRO: But in this case, what is your
15 argument? I mean, Venezuela participated in the
16 arbitration in Washington, did it not?

17 MR. YALOWITZ: Correct. Correct. Correct.
18 And the District Court in Washington had subject-matter
19 jurisdiction under 1605(a)(6). 1605(a)(6) grants
20 subject-matter jurisdiction in two and only two
21 circumstances. The first -- I am just going to use my
22 --

1 JUDGE GREENAWAY: Let me ask you a question,
2 then. Why doesn't this simply qualify as ancillary
3 jurisdiction? The FSIA was complied with in securing
4 the judgment. There is no Peacock problem vis-a-vis
5 Venezuela. And in Mobil Negro, Mobil Cerro Negro --

6 MR. YALOWITZ: Cerro Negro, yes.

7 JUDGE GREENAWAY: -- the judgment debtor
8 sought to entirely bypass the strictures of the FSIA.
9 So how does all of that work? Why is it -- how is it
10 that Mobil Cerro Negro --

11 MR. YALOWITZ: So we have to go back to, what
12 is section 1963? Section 1963 is not an extender of
13 the original jurisdiction of the District Court in
14 Washington. It is not a nationwide service of process
15 statute. It is, instead, a means of commencing a new
16 action, getting a new judgment, and invoking the
17 subject-matter jurisdiction of the new District Court.
18 I really commend the case as the Ohio Hoist case. Then
19 Judge Blackmun's decision in the Utley case. And
20 Moore's has a very good discussion of section 1963.

21 I have to admit that I have seen a lot of
22 things in law. I really had not looked at, what is

1 1963 and how does it work? But when I took a look at
2 it, I understood, okay. It is not like just nationwide
3 service of process. It is you can go to a new district
4 and start a new in-rem action. And that is fine if you
5 have a money judgment rising out of an auto accident,
6 where you might not be able to do that otherwise. But
7 it is not fine when the defendant is foreign sovereign
8 because Congress said it is not fine. So that is why
9 Mobil Cerro Negro helps us, because it is the reasoning
10 of Mobil Cerro Negro. It is that the FSIA is the
11 exclusive basis. And it is that if you didn't have
12 section 1963, you wouldn't have jurisdiction at all.

13 Imagine if Crystallex had not used section
14 1963 and, instead, they had started a plenary action
15 seeking recognition of the judgment and attachment of
16 the shares. Then everybody would say, "Well, no. You
17 look through section 1605(a). And there is nothing in
18 there for that."

19 If they wanted to attach a ship, if they
20 wanted to do a libel on a ship, they could do that
21 because 1605(c), (d), and (e) allow them to do that.

22 JUDGE SCIRICA: But is this really like an ex

1 parte summary proceeding?

2 MR. YALOWITZ: It is exactly what it is.

3 That is exactly what it is, of course. You show up,
4 and you say, "Here is my judgment. Give me a new one."
5 And they file it. And it is a new judgment. There is
6 a new statute of limitations. It is subject to all of
7 the restrictions and benefits and burdens of the local
8 court. It becomes a local judgment.

9 JUDGE GREENAWAY: How does your position
10 square with the FSIA's express language that where a
11 foreign state is not entitled to jurisdictional
12 immunity, it shall be liable in the same manner and to
13 the same extent as a private individual under like
14 circumstances? That is 1606.

15 MR. YALOWITZ: So 1606, 1606 is a rule of
16 decision that only applies if you have an exception for
17 immunity under 1605 or 1607, that if I could -- it is
18 on -- I sometimes get a little lost in the statutory
19 appendix, but 1606 says --

20 JUDGE GREENAWAY: Just give me one second.

21 (Pause.)

22 JUDGE GREENAWAY: Go ahead. 1606 says?

1 MR. YALOWITZ: "As to any claim for relief
2 with respect to which a foreign state is not entitled
3 to immunity under 1605 or section 1607." So it is not
4 an independent exception. It pends off of 1605. 1606
5 can't give you subject-matter jurisdiction.

6 And if we go back to 1605, 1605(a)(6) has 2
7 very specific arbitration exceptions. The first is to
8 enforce an agreement made by the foreign state with or
9 for the benefit of a private party to submit to
10 arbitration. Well, that is not the Delaware proceeding
11 because the arbitration already happened.

12 And the second is to confirm an award made
13 pursuant to such an agreement to arbitrate, to confirm
14 an award. And that is not the Delaware case because
15 the award was already confirmed in Washington.

16 Now, I agree that the --

17 JUDGE GREENAWAY: I read that in your papers,
18 and I was confused about that. So your point is
19 because it is -- I mean, this action is about the
20 confirmation, right? I mean, it is confirmed now they
21 are trying to do their thing to enforce, attach, et
22 cetera. As far as you are concerned, the applicability

1 ends because the confirmation has happened and it is
2 not sort of holistic, it applies generally when a
3 confirmation is involved?

4 MR. YALOWITZ: Right. So under the doctrine
5 of merger and bar, once you have gotten your cause of
6 action reduced to judgment, you now have a judgment.
7 And you enforce the judgment. This is a judgment
8 enforcement action. This is not an action to confirm
9 an award.

10 And I agree that the District Court -- I
11 mean, we heard a lot about the Peacock issue. And I
12 think that everybody agrees that the District Court in
13 Washington has ancillary jurisdiction of some kind.
14 So, for example, suppose that, instead of shares, we
15 were dealing with a building, you know, the Dupont
16 Hotel in Wilmington. So Venezuela owned the Dupont
17 Hotel. Now, Judge Contreras in Washington could say,
18 "I order you, Venezuela, to turn over the deed to that
19 hotel. Turn it over. I have in-personam jurisdiction
20 over you. And you have to turn it over."

21 And if Venezuela refused, Crystallex could go
22 to the District of Delaware. Indeed, it could go to

1 the Superior Court or Chancery Court and bring an
2 action to appoint a receiver or an action in ejectment
3 or something like that. And there would be
4 jurisdiction under section 1605(a) whatever it is. I
5 have to look. But there is one for an action
6 concerning an interest in immovable property.

7 So Congress made this very finely reticulated
8 statute in which they said, "If you want to go against
9 immovable property, you can do that. If you want to go
10 against a ship used for a commercial purpose, you can
11 do that." But they didn't have anything in the Foreign
12 Sovereign Immunities Act about chattel or stock or
13 intangible property.

14 And Congress was very intentional in 1976 in
15 saying, "We are not going as far on -- we are doing two
16 things that are very important. Number one, our in-rem
17 -- we are going to stop this business of allowing
18 people to start in-rem actions and obtain jurisdiction
19 over in-rem proceedings. And that was because it
20 created a lot of conflict with foreign sovereigns.

21 And they also said, "We are not going to
22 grant immunity from -- we are not going to grant as

1 broad of exceptions for attachment as we are for
2 adjudication. There are going to be circumstances
3 where a plaintiff against a foreign sovereign can
4 obtain a remedy, but they are not going to be able to
5 execute on that right."

6 And so 1963, in essence, is a gap filler that
7 Congress created for normal cases in the Federal
8 courts. Nineteen sixty-three, even before it existed,
9 before 1963 existed, people who wanted to enforce
10 Federal court judgments often had to go to state court.
11 And Congress decided that it didn't want to do that.
12 It wanted to give people the opportunity to go to
13 Federal court without an independent basis of subject-
14 matter jurisdiction other than the arising under
15 jurisdiction that is created by section 1963. When
16 Congress passed the Foreign Sovereign Immunities Act,
17 it didn't include section 1963. And it didn't include
18 nationwide service of process.

19 If I could just add one other thing about --
20 if I could go back, Judge Ambro, to your question about
21 the Supreme Court cases? Mr. Estrada mentioned that
22 there were four Supreme Court cases that have come up

1 under section 1963. We didn't have a reply brief, but
2 I did carefully read his brief. And I noticed that in
3 the brief. And three of those cases -- we have looked
4 carefully. Three of those cases are like the Republic
5 of Sudan, where the sovereign just never raised it.
6 And so by not raising it, they have waived it.

7 And the fourth was the Bank Markazi case,
8 where there was a special statute, 22 U.S.C. 8772. In
9 that case, the statute granted jurisdiction,
10 notwithstanding any other law, including any provision
11 of law relating to sovereign immunity. So whatever
12 effect the FSIA might have had in the Bank Markazi case
13 was wiped away by Congress.

14 So, just to recap here, Congress did not
15 provide for in-rem jurisdiction over individually owned
16 shares. And so the plaintiff here is trying to do
17 something indirectly that Congress did not allow it to
18 do directly. The reasons why Congress did not provide
19 for in-rem jurisdiction are obvious. Foreign policy
20 implications are significant of this case. Congress
21 can go back and change that, but the courts aren't here
22 to fill gaps in the Foreign Sovereign Immunities Act

1 because the gaps may be intentional.

2 And unless the Court has questions that I
3 might --

4 JUDGE AMBRO: I think that is actually a good
5 transition to your second point, whether there have
6 been changed circumstances pertaining to the Government
7 of Venezuela that would call for a remand to the
8 District Court.

9 MR. YALOWITZ: Indeed, I planned it that way.

10 JUDGE AMBRO: Well-done.

11 (Laughter.)

12 JUDGE AMBRO: I think in south Philly, you
13 done good.

14 MR. YALOWITZ: The changed circumstance here
15 is that the President of the United States --

16 JUDGE GREENAWAY: Can you help us with one
17 point of information?

18 MR. YALOWITZ: Yes.

19 JUDGE GREENAWAY: The elections happened. Is
20 it Guaidó?

21 MR. YALOWITZ: Guaidó.

22 JUDGE GREENAWAY: Guaidó. Right. The

1 election has happened. And he has not assumed the
2 position, so to speak. Is that right?

3 MR. YALOWITZ: No. So, as I understand it --
4 and this is just background information. As Mr.
5 Pizzurro would say, this is legally irrelevant. But I
6 will tell you what I think I understand the situation
7 to be. There was an election.

8 JUDGE GREENAWAY: I would have laughed much
9 more heartily before 1 o'clock.

10 (Laughter.)

11 MR. YALOWITZ: There was an election in May.
12 And there have been reports that the election was not
13 an honest election and was a fraudulent election. So
14 the National Assembly, which is a democratically
15 elected legislature, decided to exercise constitutional
16 rights that it has under the Venezuela constitution at
17 the end of Maduro's previous term, which was January
18 10th, I think, or January 23rd -- I think the end of
19 the term was January 23rd. So Maduro served out his
20 prior term. And then upon Maduro's assumption of a new
21 term commencing January 23rd, the National Assembly
22 said, "No. You are illegitimate. There was a

1 fraudulent election. We are not going to recognize you
2 as president. And Mr. Guaidó is going to assume the
3 presidency, as we would call it like acting president,
4 like as if -- I mean, we don't do it quite that way
5 under the 25th amendment, but --

6 JUDGE GREENAWAY: I think the 25th is when
7 you want to get them out.

8 MR. YALOWITZ: What? Yes. The is when you
9 want to --

10 JUDGE GREENAWAY: I think the 25th is when
11 you want to get them out.

12 MR. YALOWITZ: Right. But so the moment of
13 transition for Mr. Guaidó was January 23rd. I don't
14 know if -- does that answer the Court's question?

15 JUDGE GREENAWAY: Yes. Basically, I wanted
16 to know -- I knew there wasn't a smooth transition of
17 power. I just wanted to know whether he is actually in
18 because I think it goes to your changed-circumstances
19 argument.

20 MR. YALOWITZ: Right. So the reality in
21 Venezuela is that there are three branches of
22 government, as there are here, that there are competing

1 factions. And our president has recognized the
2 Legislative Branch as the legitimate representative of
3 the republic and Mr. Guaidó as the legitimate
4 president.

5 Mr. Maduro has not left. I think this is Mr.
6 Estrada's point. He remains in place. But he is not
7 recognized as the republic in the courts of the United
8 States.

9 And so that is not a -- I want to be very
10 clear here that that is not a political -- we are not
11 tugging on emotion. The president's recognition is not
12 precatory. In the eyes of the law and the courts of
13 the United States, the republic is represented by Mr.
14 Guaidó. And Mr. Maduro has no conduct which can be
15 attributed to the republic. None of the Maduro conduct
16 can be attributed to the republic in the eyes of the
17 law in the courts of the United States.

18 JUDGE AMBRO: Let me just ask a dumb
19 question. Isn't our job to review the decision of the
20 District Court based on the record that was before it?
21 I mean, that is what our Fassett, F-A-S-S-E-T-T,
22 decision from '86 says.

1 MR. YALOWITZ: Sure. I think that the
2 District Court in this case -- I mean, of course, that
3 is always true, but the court also always has the power
4 and responsibility to know about changed circumstances,
5 new legislation, new relevant facts. It is the duty of
6 counsel always to bring those facts to the courts'
7 attention because --

8 JUDGE GREENAWAY: The difficulty with your
9 argument is when I look at all of the findings of fact,
10 a lot of them appear to be to a novice just reading it
11 structural things that if the new president hasn't
12 really sort of taken over the firmament of government,
13 it is hard for us to sit back in Philadelphia and say,
14 "Yeah. Everything that you say is a changed
15 circumstance is a changed circumstance." This is
16 obviously not the way for us to take -- I mean, we
17 couldn't take judicial notice of it.

18 MR. YALOWITZ: No. I think the only thing
19 you can take judicial notice of is the fact that the
20 president recognized a new administration.

21 JUDGE GREENAWAY: Right. So if that is the
22 case, then how do we do anything different than -- how

1 can we do anything different than --

2 MR. YALOWITZ: Sure.

3 JUDGE GREENAWAY: -- what Judge Ambro
4 suggested?

5 MR. YALOWITZ: So I think that piercing the
6 corporate veil is an equitable remedy. And the courts
7 of equity always have the power to revisit their
8 decision based on changed circumstances. In fact,
9 Judge Stark anticipated that there might be changed
10 circumstances and said in his opinion at page 88 of the
11 joint appendix that he would take account of new
12 circumstances should they arise, should the Republic of
13 Venezuela appear.

14 JUDGE AMBRO: That begs the question, are you
15 in the right court? So if we are supposed to look at
16 the record that was before the District Court when it
17 made its decision, we decide of the issues before us.
18 We issue our mandate. And then wouldn't you seek
19 relief in the District Court if we affirm its orders?

20 MR. YALOWITZ: I think the Court could do
21 more than that. Had we had more time, say 120 days, we
22 might have gone to the --

1 JUDGE AMBRO: Are you still pursuing the 120
2 days?

3 MR. YALOWITZ: What?

4 JUDGE AMBRO: Are you still pursuing the 120
5 days?

6 MR. YALOWITZ: I think we will stand on our
7 papers on that, Your Honor.

8 JUDGE AMBRO: Okay. The question, I guess,
9 even assuming that we considered the U.S. Government's
10 I think it was January 23rd recognition of the --

11 MR. YALOWITZ: Yes.

12 JUDGE AMBRO: -- of Mr. Guaidó as the
13 rightful leader of Venezuela, does that change the
14 Bancec analysis?

15 MR. YALOWITZ: I think, as I understand the
16 Crystallex position, I think it would change the Bancec
17 analysis radically. As I understand the Crystallex
18 position, you could think of alter ego law as sort of
19 -- there are two kinds of philosophies of alter ego, if
20 you will. One is, you know, you -- but what I think
21 Ms. Davidoff and Mr. Pizzurro said quite well, that as
22 a court of equity, you have to look at some kind of

1 injury to the plaintiff through the use of control.
2 There is another sort of philosophy that is going on in
3 some of these cases, which is like it is all just one
4 big ball of wax. And you just collapse everything
5 because like in substantive consolidation, you just
6 collapse everything because everything is hopelessly
7 entangled. Now, I know that is not the law in this
8 circuit, but there are circuits in which in bankruptcy,
9 they substantively consolidate because it is all just
10 one big ball of wax.

11 And that is an example where -- I think if
12 the Court decides that Bancec requires it to go with
13 the sort of one big ball of wax theory, which I don't
14 agree with for reasons that have already been talked
15 about, then I think that the changed circumstances
16 matter a lot because if you think about it --

17 JUDGE GREENAWAY: What form are they
18 presented to us? We have a brief. Yes? And so how
19 are we to take notice of facts through your brief?
20 That is one question. And how are we to take them in
21 contradistinction to factual findings made?

22 So, for instance, when the District Court

1 found that Venezuela regularly uses PDVSA's assets as
2 its own and regularly ignores separate status and all
3 of those that could be listed from the District Court's
4 findings, how are we to essentially set that aside
5 based on a brief and remand it, which is I presume what
6 you would like us to do, for an opening of the record
7 by the District Court, as ordered by us, to come to a
8 different decision on its alter ego based on the fact
9 that a president who while recognized by the President
10 and our Executive Branch, we have no idea whether any
11 of the representations that may be made in that forum
12 could be so? How would we do that?

13 MR. YALOWITZ: So, I mean, I don't think that
14 it would be disputed that President Guaidó does not
15 have access to PDVSA, that the National Assembly under
16 the leadership of President Guaidó -- you know, you
17 could go down those Bancec factors. And I think that
18 all parties would concede that the National Assembly
19 under the leadership of President Guaidó does not
20 exercise day-to-day control over PDVSA, does not use it
21 as a piggybank, does not --

22 JUDGE GREENAWAY: You know, if Mr. Estrada

1 gets up and says, "You are absolutely right," great,
2 but that -- yes. I am not sure I would just take that
3 at face value.

4 MR. YALOWITZ: Well, I think that would be
5 something that -- I mean, as an officer of the Court, I
6 am --

7 JUDGE GREENAWAY: I mean, it is logical. I
8 get it logically.

9 MR. YALOWITZ: Right. And --

10 JUDGE GREENAWAY: But I don't know how we can
11 do that as a Court --

12 MR. YALOWITZ: I don't think you can find
13 facts.

14 JUDGE GREENAWAY: -- Court of Appeals.

15 MR. YALOWITZ: I don't think you can find
16 facts, but I think you can say that all -- I mean, I
17 think, as a matter of law, things that were
18 attributable to the republic when they were going on in
19 2018 and no longer attributable to the republic.

20 JUDGE GREENAWAY: Well, that would only work
21 if I was convinced based on your representations that
22 some of the findings that were made would only have

1 applied to the Maduro regime, if you will, and that, I
2 mean, some of them -- I think there was a finding about
3 articles of incorporation. I am sure that some of
4 these activities didn't start with President Maduro,
5 which to me would seem to make it a little more
6 difficult to take your -- not your representation as an
7 officer of the Court. Don't --

8 MR. YALOWITZ: No, no. I understand.

9 JUDGE GREENAWAY: You understand.

10 MR. YALOWITZ: We are having a conversation
11 about, how do we -- we are having a very legitimate
12 conversation about, how do you as a Court of Appeals
13 deal with a party who shows up and says, "Wait a
14 minute. There is a radically new environment." And it
15 is not without basis. Right? I mean --

16 JUDGE GREENAWAY: In a civil context, apart
17 from foreign governments, there might be some laughter
18 in the courtroom, someone coming in with no affidavit
19 saying, "Everything has changed now."

20 MR. YALOWITZ: Right. Well, but the Court
21 can take judicial notice that there has been
22 significant change based --

1 JUDGE SCIRICA: We can take judicial notice
2 that it could change tomorrow or we could have the
3 exact same situation we have now a year from now in
4 Venezuela, where there is a stalemate as to who is
5 really in control.

6 MR. YALOWITZ: I think that -- I mean, I am
7 not going to sit here and say I can predict the future
8 of what is going to happen in Venezuela.
9 Prognostication is very difficult, especially when the
10 future is involved.

11 JUDGE AMBRO: Did you reserve time for
12 rebuttal?

13 MR. YALOWITZ: I reserved three minutes.

14 JUDGE AMBRO: Okay. Maybe we will hear from
15 Mr. Estrada, and then we will get you back here.

16 MR. YALOWITZ: Okay. Thank you.

17 MR. ESTRADA: Thank you, Your Honor.

18 Let me start with the 1963 issue, which I
19 think I will have the Groundhog Day issue. Basically,
20 the underlying theory is that we have to sue, usually
21 in the District of Columbia because that is where you
22 usually can get venue. Conveniently, it is also where

1 there is practically nothing you can execute on because
2 it is pretty much all embassies and that, therefore,
3 even though the statute says that you can then execute
4 on property in the United States -- this is the FSIA.
5 You know, the theory of Venezuela is that we cannot
6 involve an otherwise available Federal statute, section
7 1963, but we have to file a fresh 1608 lawsuit in every
8 district in which they might have property again and
9 again and again and again. So it is the Groundhog Day
10 issue.

11 It is not that we can enforce a Federal
12 judgment. It is that we have to chase their property,
13 whether they move it or not, in every district in the
14 country. It is sort of almost unbelievable to think
15 that Congress could have contemplated a system like
16 that. And I don't think Congress did.

17 Section 1963 is available for the
18 registration of FSIA judgments. We have pointed out to
19 the proposition that multiple Courts of Appeals and the
20 Supreme Court have exercised jurisdiction over these
21 judgments over decades without anybody so much as
22 saying a peep over the possibility that there may be

1 something amiss.

2 Now, Mr. Yalowitz says, "Oh, waiver, waiver,"
3 but the fact is that there is a duty to inquire over
4 the court's own jurisdiction. And you would think that
5 in a country with 350 million people, most of whom are
6 lawyers, you would have come up with somebody who is
7 clever enough to point out that this was so obviously
8 inconsistent with the FSIA.

9 There is this notion that this is also
10 evident from the cases that they cite is also not so.
11 There is the Amerada Hess case, which dealt with the
12 Alien Tort Statute. The Alien Tort Statute is
13 notorious, right, because until the Second Circuit dug
14 it up from the grave in the Filartiga case in 1976, no
15 one thought that it applied to anything. And so when
16 the Amerada Hess case went to the Supreme Court, Chief
17 Justice Rehnquist was right to say that the notion that
18 you could invoke the ATS statute to get out of the
19 FSIA, Chief Justice says, had a really markedly
20 hypothetical cast to it because Congress clearly would
21 never have thought that the ATS statute could have
22 invoked to sue foreign sovereigns, where a) it had

1 never for almost 200 years been invoked to sue anybody
2 and b) had never been certainly invoked to sue a
3 foreign sovereign.

4 Now, Chief Justice Rehnquist also said, for
5 good measure, it is not as if you could think of the
6 ATS statute as something that could easily complement
7 the Foreign Sovereign Immunities Act, which is a point
8 that is pertinent to section 1963.

9 Now, their second authority is the Second
10 Circuit case in Mobil Cerro, where the defendant, oddly
11 enough, was Venezuela. In that case, the relevant
12 Federal statute was section 1650. Now, the issue there
13 was, can you go to Federal court under this statute and
14 have an ex parte hearing, where you basically register
15 and get enforcement on an ICSID arbitral award?

16 What the Federal statute said in that case,
17 1650, was you treat the arbitral award like a state
18 court judgment. And what the Second Circuit pointed
19 out is on a state court judgment, you have to file a
20 lawsuit on a lawsuit. That was Judge Carney on the
21 Second Circuit. Tellingly, she went on to say, "This
22 is not like section 1963. It is significant that

1 Congress chose not to incorporate the well-established,
2 streamlined, and unitary Federal registration
3 procedures of 28 U.S.C. 1963 into section 1650." So
4 the default that the Second Circuit found was that this
5 Federal statute didn't have what our statute has,
6 something that is clearly invokable and complementary
7 to the FSIA. Her point was you can't sort of just file
8 something ex parte. You have to start a new lawsuit by
9 filing something on the FSIA.

10 We clearly did that. And we served them
11 under section 1608 in the District of Columbia. We can
12 then rely on section 1963 without having to sue them in
13 every court in the country.

14 Now, Mr. Yalowitz also said that this is in
15 rem, in rem, in rem and that I had somehow admitted
16 this was in rem. I said no such thing. I am sort of
17 Latin. I think I would recall if I used Latin words.
18 What we said was we have to go to where property is
19 that we seek to attach under the rules of execution,
20 attachments that are available in the jurisdiction.
21 And we went to Delaware because that is where the
22 shares were that we were looking to attach. That

1 doesn't make the action in rem. That is the property
2 that we want to seize to satisfy the judgment that has
3 been outstanding for far too long, nothing in rem about
4 that. We are just seeking to find property that we can
5 use to satisfy the judgment. And so that is why we
6 properly we thought filed this under the ancillary
7 jurisdiction under rule 69.

8 Now, to go back to this whole question about
9 whether there is a basis for jurisdiction here, again,
10 this issue had been in front of the courts under
11 multiple registered judgments. The other telling
12 aspect of it is there is this Federal statute, right,
13 Bank Markazi. You know, the court had it. The Supreme
14 Court had this Federal statute in the Bank Markazi
15 case. The case went to the Supreme Court in a very
16 weighty separation of powers question of whether
17 Congress could pass a statute basically trying to
18 realize a Federal judgment. And it was trying to
19 direct property that was in the Southern District of
20 New York to be used to pay registered judgments in that
21 district. You would have thought that if the court and
22 the Congress didn't think that judgments could be

1 registered under section 1963 in the different
2 district, this whole statute would be pointless.

3 I have looked at the statute just quickly. I
4 can see nothing in the statute that actually conferred
5 new jurisdiction. We think that it was a necessary
6 assumption by Congress in passing that whole statute
7 that the judgments that had been registered were
8 properly registered.

9 One of the canons of construction the courts
10 apply is that when Congress legislates on the basis of
11 established practice, things that have been done, it
12 validates itself in other practice. And, again, that
13 is a point on that.

14 To go back -- to not take too much time
15 because I think it has been a very long day, I think
16 that is all I have mostly on this 1963 issue. If I
17 could say something about the purported change of
18 circumstances?

19 I don't have anything, as far as it goes,
20 with the very limited proposition that the recognition
21 power is vested in the Executive Branch of our country,
22 but that doesn't mean that you have to do anything more

1 than recognize that the titular head of the Government
2 of Venezuela in cases where that question is relevant
3 is Mr. Guaidó. The question in this case is not who is
4 the titular head of the Government of Venezuela. The
5 question here is, when we filed our attachment motion,
6 was this property of Venezuela? And when we filed our
7 attachment motion, this was property of Venezuela for
8 all of the reasons that the court found. So the court
9 rightly answered the right question at the relevant
10 time. It is unclear to me how is it that you import
11 into the recognition power, which really just speaks
12 to, who do we think heads the government of this
13 country, a whole suite of other things that are not
14 implicit or explicit into the recognition power,
15 including the hopes and expectations as to what this
16 leader may or may not do. We recognize all sorts of
17 people that behave well or badly.

18 JUDGE GREENAWAY: Well, could you just speak
19 to the one specific thing that your adversary said
20 everyone in the room could agree to, and that is that
21 the changed circumstances means that the manner in
22 which Venezuela and PDVSA interact is fundamentally

1 different --

2 MR. ESTRADA: I actually haven't --

3 JUDGE GREENAWAY: -- given the new president?

4 MR. ESTRADA: I actually don't know that I
5 would agree with that because the honest answer is I
6 have no earthly idea. I think the one thing I know is
7 that when we filed this motion, Mr. Maduro was in
8 control. To the extent I can tell from reading the
9 papers, I think that there is rival factions in
10 Venezuela as to who has what power. There is an
11 assembly. And there is some other form of the
12 legislature that is on the side of Mr. Maduro, that the
13 army is on the side of Mr. Maduro. Still, according to
14 press reports again, hearsay and press reports, Russia
15 and maybe China are sending people in to help Mr.
16 Maduro. And I don't know what degree of control he
17 continues to exert over this.

18 And, again, the mere fact that Mr. Guaidó is
19 the titular head doesn't actually require me to assume
20 that he is the actual head of the country on the facts
21 on the ground. And I think the fallacy of the
22 recognition argument here is that, yes, for purposes of

1 who we think is the head of the country, sure, the
2 Court can accept that Mr. Guaidó is the president of
3 the country. Whether that changes the question that
4 the Court should be examining, which is who is running
5 this company and who is the de facto government, in
6 fact, on the ground to the extent that that is relevant
7 to who is running PDVSA, I am not sure that the mere
8 act of recognition reaches that far to know that it is
9 relevant.

10 But at the end of the day, I think the
11 fundamental answer to any of this is twofold: number
12 one, that the judgment has to be looked at on the basis
13 of the record that was compiled when the District Court
14 heard it. And on that basis, it is correct because our
15 contention was we filed this motion. And today, this
16 is property of Venezuela. This is why we are entitled
17 to attach it. And second is we could be in the
18 District Court with no assurance of ever knowing
19 whether the record will actually be any more certain
20 than it is today or when the District Court heard this.

21 The one thing that I do understand is that my
22 client has been seeking justice from the courts of this

1 country for many years now. And I do understand as
2 well that the new government as well as the old
3 government have a unity of interest in avoiding paying
4 their creditors and that, therefore, there will be a
5 long delay and as long as they can basically string it
6 out, in coming up with new arguments as to why these
7 payments shouldn't be made.

8 Now, in our courts, these payments of lawful
9 judgment by our own courts are not usually optional.
10 And it is somewhat of a travesty that we have to chase
11 people and seek their assets and have to attach them.
12 But I think there is an additional imposition to then
13 sort of hear people who, instead of explaining why if
14 they have available assets, they don't pay our
15 judgments, have additional excuses as to why they must
16 be heard about the possibility that someday they will
17 show a change in circumstances.

18 I think ultimately the only question that is
19 relevant is when this motion was filed, did the
20 applicant make a demonstration that this was property
21 of the debtor? We did that in spades, we think. And
22 on that basis, we ask that the judgment be affirmed.

1 JUDGE AMBRO: Thank you.

2 Mr. Yalowitz?

3 MR. YALOWITZ: Thanks, Your Honor.

4 First of all, on the 1963 question, I do want
5 to commend the Court also very strongly to the
6 reasoning in the Amerada Hess case because the Amerada
7 Hess case did not, as counsel contends, say, "Well,
8 this was only about the ATS." There is a significant
9 passage in Amerada Hess that says, "We don't think that
10 Congress had to go back and repeal every single grant
11 of subject-matter jurisdiction pro tanto, whether it is
12 antitrust or" -- I mean, there was a long laundry list.
13 They said, "Everything that is -- every grant of
14 subject-matter jurisdiction is gone except for section
15 1330."

16 And I believe -- and I know the Court will go
17 back and look at the transcript, but I believe that
18 counsel has conceded that nothing in the FSIA grants
19 subject-matter jurisdiction under 1963, that he is
20 arguing that it is somehow sort of an independent basis
21 or something.

22 Now, finally with regard to 1963, I do urge

1 the Court to look at page 18 of the House report on the
2 issue of waiver because I do think that clears up -- I
3 mean, I agree this is an issue that comes out of Mobil
4 Cerro Negro, which was a decision that came out of the
5 Second Circuit less than two years ago. And it came
6 out of the Second Circuit on the basis of the advice of
7 the Department of State, which filed a statement of
8 interest on the invitation of the court in that case.
9 So cases that came before and statements that came
10 before may not take account of the interests of the
11 United States in seeing the Foreign Sovereign
12 Immunities Act applied, which brings me to the second
13 point, which is that on the changed circumstances, I
14 think that the Court has enough because, remember, it
15 is not just who sends the ambassador -- for example,
16 when Noriega was thrown out of Panama, there was a
17 fight over who controlled the Panamanian assets. When
18 China and Taiwan were fighting over the Bank of China,
19 every time the courts said, "We follow the president's
20 recognition decision." It is not just about who sends
21 the ambassador.

22 JUDGE GREENAWAY: Why isn't this --

1 JUDGE AMBRO: You are so -- go ahead, Joe.

2 JUDGE GREENAWAY: I am trying to think of all
3 of the different permutations of what we can do. And I
4 think that all of them lead to a remand to enforce, a
5 remand to vacate, whatever. One way or another,
6 something is going to go back. And my colleagues may
7 disagree, but I think all of the permutations I am
8 thinking about, something is going to go back. Why
9 isn't the way to deal with this changed-circumstances
10 issue you making a rule 60 when you go back?

11 JUDGE AMBRO: Hear hear.

12 MR. YALOWITZ: Well, let me just say I assume
13 from the question that we are assuming, arguendo, that
14 the Court is not going to reverse for lack of subject-
15 matter jurisdiction.

16 JUDGE GREENAWAY: Well, that is -- well --

17 MR. YALOWITZ: I mean, I know the Court is
18 going to take a hard look at the 1963 issue.

19 JUDGE AMBRO: I mean, the point here being
20 that --

21 JUDGE GREENAWAY: Well, then your argument
22 would be we don't have to think about changed

1 circumstances, I suppose, right?

2 MR. YALOWITZ: Exactly, exactly. But I want
3 to answer to --

4 JUDGE AMBRO: Essentially, if we look at the
5 record before the District Court, we don't know to what
6 extent any change in government is going to affect any
7 of the Bancec analysis. And if we affirm and, no
8 matter what, if the matter goes back, you file a rule
9 60 motion to see if there is something by way of
10 changed circumstances that somehow changes the analysis
11 with respect to the attempt to attach.

12 MR. YALOWITZ: I think that if the Court were
13 to remand, I think it needs to be very clear that Mr.
14 Estrada is incorrect that the time to measure when
15 there is one big ball of wax is on the day he files his
16 action to attach. The time --

17 JUDGE AMBRO: What you are saying, it is
18 based on the Fassett case from 30-some years ago.

19 MR. YALOWITZ: That is --

20 JUDGE AMBRO: You look to the record before
21 the District Court.

22 MR. YALOWITZ: I understand that, but what I

1 am saying is that the District Court's decision is not
2 based on the facts as they exist at the time of the
3 complaint.

4 JUDGE AMBRO: Then that goes to Judge
5 Greenaway's question, then, right?

6 MR. YALOWITZ: Right, right, exactly. I
7 think there are three reasons why it is very important
8 that this Court if it is going to remand make very
9 clear to the District Court that it has the power to
10 consider new circumstances. The first reason is that
11 this is an equitable proceeding. And as a court of
12 equity, he has the power to consider new circumstances.

13 The second is that as a matter of FSIA law,
14 when you look at, for example, how is the property
15 used, is it used for a commercial purpose, you look at
16 the time the writ is issued. And in this case, Judge
17 Stark did issue the writ after he was divested of
18 jurisdiction. And this Court stayed proceedings on a
19 writ of mandamus because the District Court was
20 proceeding before allowing this Court to evaluate the
21 immunity.

22 JUDGE SCIRICA: He made a statement that he

1 was going to try to work out some of the logistics
2 before he entered a final order. So it wasn't quite as
3 clean as that.

4 MR. YALOWITZ: I think that it is clear that
5 the District Court has -- I think this Court has -- if
6 the Court is going to remand, I think it would behoove
7 the Court for those two reasons and for an important
8 third reason, which is where I would like to end, to
9 just make crystal clear that Judge Stark has the power
10 to consider changed circumstances.

11 And the third reason is that the United
12 States Executive Branch has made it very clear that it
13 is the foreign policy of the United States to protect
14 the assets of PDVSA. And this case does implicate the
15 foreign relations of the United States. And, again,
16 this Court to the extent that it wishes to hear from
17 the Department of State about either the application of
18 the statute or the foreign policy implications, this
19 Court has the power to invite the State Department to
20 file a statement of interest.

21 JUDGE AMBRO: All right.

22 MR. YALOWITZ: Thank you very much.

1 JUDGE AMBRO: Thank you very much. Thank you
2 to all counsel for very well-presented arguments. And
3 we will take the matter under advisement. Thank you
4 also for very well-done briefs.

5 (Whereupon, the case in the above-entitled
6 matter was submitted.)

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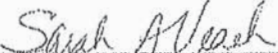
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April 30, 2019

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