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(NOT) RIGHT ON TIME: INTERPRETATION OF "PERTINENT TIME" FOR *BANCEC* ALTER EGO ANALYSIS AND ITS EFFECT ON ATTACHING FOREIGN SOVEREIGN ASSETS

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I. INTRODUCTION

Expropriations[1] of foreign investments by a host state[2] are often high-profile legal, economic, and diplomatic events.[3] The swift and effective resolution of such disputes can be essential in normalizing relations between the expropriating state and the home country of the investor as well as ensuring that the injured foreign investor does not suffer irreparable economic harm.[4] This process can fall apart if the courts misinterpret the rules. [5]

1. A governmental taking or modification of an individual's property rights, especially by eminent domain. *Expropriation*, *in* Black's Law Dictionary (11th ed. 2019). Examples of past and present alleged expropriations of foreign investments that made headlines throughout history include Mexico's nationalization of foreign oil investments in 1938, Venezuela's nationalization of ConocoPhillips's oil investments in 2007, and the Russian Federation's alleged expropriation of ExxonMobil's assets in Siberia in late 2022. *See Mexican Expropriation of Foreign Oil*, OFF. OF THE HISTORIAN, https://history.state.gov/milestones/1937-1945/mexican-oil [https://perma.cc/QM7H-HR7Q]; *Conoco-Phillips Says Wins Arbitration Ruling After Venezuela Assets Seized*, REUTERS (Sept. 24, 2013, 10:46 AM), https://www.reuters.com/article/conocophillips-venezuela-idUSL2N0H00UI20130904 [https://perma.cc/FZ98-AB2M]; Kevin Crowley, *Exxon Completes Russia Exit, Says Operation Was Expropriated*, BLOOMBERG (Oct. 17, 2022, 5:31 PM), https://www.bloomberg.com/news/articles/2022-10-17/exxon-completes-russia-exit-says-operation-was-expropriated [https://perma.cc/84MM-3SN3].

2. In international investment law, a "host state" is the country in which a foreign investor makes an investment. *Host State*, *in* BLACK'S LAW DICTIONARY (11th ed. 2019).

3. The Russian Federation's early 2000s nationalization of Yukos, a former Russian oil company which had many foreign investors (including Americans), resulted in lengthy international litigation, potentially caused increased wariness among foreigners looking to invest in Russian oil companies, and complicated diplomatic relations with other nations and international institutions. *See* Mark Milner, *Back Door Yukos Nationalisation Perfectly Normal, Says Putin*, THE GUARDIAN (Dec. 23, 2004), https://www.theguardian.com/business/2004/dec/24/russia.oilandpetrol [https://perma.cc/6QRP-65C8]; Tjaco Van Den Hout, *Yukos Expropriation: At What Cost to Russia?*, LATVIJAS ĀRPOLITIKAS INSTITŪTS (Sept. 1, 2014), https://www.lai.lv/viedokli/yukos-expropriation-at-what-cost-to-russia-396 [https://perma.cc/5Q7C-L64E]; *Council of Europe in Dispute with Russia over Yukos Case*, BBC NEWS (Jan. 20, 2017), https://www.bbc.com/news/world-europe-38691148 [https://perma.cc/GQ9T-SMA7]; Anders Åslund, *US-Russia Economic Relationship: Implications of the Yukos Affair*, PETERSON INST. FOR INT'L ECON. (Oct. 17, 2007), https://www.piie.com/commentary/testimonies/us-russia-economic-relationship-implications-yukos-affair [https://perma.cc/2YXE-T46A].

4. Tim R. Samples, *Investment Disputes and Federal Power in Foreign Relations*, 59 COLUM. J. TRANSNAT'L L. 247, 261 (2021) ("[A]t the international level, the ISDS [Investor State Dispute Settlement] system aims to mitigate the risk of conflicts stemming from disputes between foreign investors and sovereign states.").

5. OI Eur. Grp. B.V. v. Bolivarian Republic of Venez. (*OI Eur. Grp. VI*), Nos. 19-290, 19-342, 20-257, 21-46, 22-68, 22-69, 2022 U.S. Dist. LEXIS 80725, at *14 (D. Del. May 4, 2022) ("[T]he foreign policy considerations and large amounts of money at stake in these cases present exceptional circumstances that make interlocutory review of the pertinent time issue especially appropriate.").

The United States Congress provided a powerful tool enabling investors to confront the inherent legal privileges of foreign states in U.S. courts: the Foreign Sovereign Immunities Act of 1976 ("FSIA").[6] At its heart, the FSIA codifies the customary immunities from jurisdiction and attachment held by foreign sovereigns and their U.S.-based property and provides exceptions that strip said immunities under certain limited circumstances.[7] Nevertheless, investors must also overcome substantial legal and political burdens to utilize these tools[8] if the foreign-policy interests of the executive branch stand at odds with their own.[9] In 1983, the U.S. Supreme Court defined the factors permitting an American judgment creditor[10] to pierce the corporate veil[11] between a foreign sovereign—in that case, Cuba—and its instrumentality—the Banco para el Comercio Exterior de Cuba ("Bancec")—in order to attach the foreign sovereign assets held in the United States, which became known as *Bancec* alter ego analysis.[12]

However, as this Note discusses, in at least one recent case, a long-running complex cross-border dispute arising from the expropriation of the industrial assets of Owens-Illinois European Group B.V. ("OIEG"), the Dutch subsidiary of an American glass product manufacturing group, by the Venezuelan government in 2011,[13] courts failed to apply the correct timing standard developed by the courts for application of the

6. Codified at 28 U.S.C. §§ 1602-1723. The legislative intent underlying the FSIA was to "codify the so-called 'restrictive' principle of sovereign immunity," "insure that this restrictive principle of immunity is applied in litigation before U.S. courts," "provide a statutory procedure for making service upon, and obtaining in personam jurisdiction over, a foreign state," and "remedy the present predicament of a plaintiff who has obtained a judgment against a foreign state" by restricting a foreign sovereign's broad immunity from execution of said judgment. H.R. REP. NO. 94-1487, at 7-8 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6605-06.

7. 28 U.S.C. § 1602.

8. W. Mark C. Weidemaier, *Piercing the (Sovereign) Veil: The Role of Limited Liability in State Owned Enterprises*, 46 BYU L. REV. 795, 827 (2021).

9. *See, e.g.*, Samples, *supra* note 4, at 249-50 (noting that the judicial branch is traditionally deferential to the foreign policy aims of the executive to avoid multiple voices in foreign affairs, but so-called normalization in recent years has resulted in the judicial branch sometimes making decisions at odds with the outcome preferred by the executive).

10. A person having a legal right to enforce execution of a judgment for a specific sum of money. *Judgment Creditor*, *in* BLACK'S LAW DICTIONARY (11th ed. 2019).

11. Technically, this describes a variation of reverse veil-piercing, "[t]he judicial imposition of liability on a corporation for the wrongful acts of an officer, director, or shareholder who is using the corporation as a shield." *Reverse Piercing the Corporate Veil in* BLACK'S LAW DICTIONARY (11th ed. 2019). The difference in cases such as *Bancec* is that the "shareholder" in question is a foreign sovereign.

12. First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba (*Bancec*), 462 U.S. 611 (1983).

13. Thomas Black & Charlie Devereux, *Owens-Illinois Drops as Chavez Orders Expropriation*, BLOOMBERG (Oct. 26, 2011, 4:40 PM), https://www.bloomberg.com/news/articles/2010-10-26/owens-illinois-declines-after-venezuela-s-chavez-orders-unit-expropriation#xj4y7vzkg [https://perma.cc/8TNM-APSL].

Bancec alter ego analysis.[14] Instead of applying the ownership and control analysis to the asset at the time of the underlying injury to the creditor, the Delaware District Court instead determined that the pertinent time to conduct such a review was the moment of the plaintiff's application to attach the asset.[15] The Third Circuit denied the plaintiff's permission to appeal.[16] This decision may have profound implications for investors engaged in complex, long-running claims against foreign sovereigns. Indeed, were such an approach to continue unrectified, the carefully legislated balance of power between foreign investors and sovereign states could destabilize, unjustly disadvantaging future plaintiffs bringing similar actions in federal court. In particular, the questions answered—or, rather, left unanswered—in the OIEG dispute implicate crucial considerations for investors weighing whether to embark on the long, expensive, and uncertain road of seeking compensation for expropriation of their foreign investments.

This Note addresses these questions and considerations. First, Section II provides context for the Gordian knot of complex legal challenges OIEG has faced in United States courts since its 2015 arbitration victory and the established legal theories for cutting through them. Next, Section III discusses why the Delaware District Court's decision not to identify the pertinent time for conducting the alter ego analysis of the foreign sovereign asset as the time that the liability originally arose was incorrect, explores the consequences of this error, and proposes possible solutions.

II. BACKGROUND

This Section briefly reviews the history of the OIEG dispute and the international and U.S. federal laws enabling the holder of an international arbitration award to attach indirectly held foreign sovereign assets in the United States. First, Part A reviews how OIEG successfully confirmed its $372 million international arbitration award against Venezuela in the D.C. District Court in May 2019. Next, Part B summarizes the legal challenges confronting OIEG since November 2019 in attempting to collect on this award and attach a valuable U.S.-based Venezuelan state-owned asset.

14. *See infra* Part II.B.5.

15. OI Eur. Grp. B.V. v. Bolivarian Republic of Venez. (*OI Eur. Grp. V*), No. 19-290, 2022 U.S. Dist. LEXIS 36631 at *36 (D. Del. Mar. 2, 2022).

16. Order Denying Petitions for Leave to Appeal, No. 22-8025 (3d Cir. June 27, 2022).

A. Confirming an International Arbitration Award in the United States

More than eight years passed between the conclusion of the Venezuelan state's expropriation of OIEG's property in April 2011 and OIEG's successful confirmation of its international arbitration award in the United States in May 2019.[17] Subpart 1 provides context for the expropriation and OIEG's victorious international arbitration. Next, Subpart 2 briefly reviews the legal basis for the confirmation of OIEG's international arbitration award in the U.S. federal courts.

1. OIEG's Victory at International Arbitration

In March 2015, a tribunal at the International Centre for Settlement of Investment Disputes ("ICSID") in Washington, D.C. awarded OIEG, a Netherlands-based entity in the Ohio-headquartered Owens-Illinois Group, damages against the Bolivarian Republic of Venezuela ("Venezuela") totaling over $370 million plus costs, expenses, and interest.[18]

Generally, when host states expropriate the assets of foreign investors, investors have the option to proceed under the internationally recognized (albeit heavily criticized)[19] Investor-State Dispute Settlement ("ISDS") system. This is a legal corpus comprised of a myriad of investment treaties, investment arbitration jurisprudence and international institutional frameworks, including the ICSID.[20] International investment agreements between the investor's home nation and the host nation typically grant investors the right to sue a sovereign nation in a forum other than that nation's domestic courts.[21] Such agreements, founded in public international law, can exist in bilateral investment treaties ("BITs") between states, multilateral investment treaties ("MITs"), or investment protection agreements ("IPAs").[22] A claim arising out of a breach of a

17. *OI European Group B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/11/25*, ITALAW, https://www.italaw.com/cases/2979 [https://perma.cc/HC9J-CB4G] (last visited Apr. 12, 2023) (timeline and archive of available documents).

18. OI European Group B.V. v. Bolivarian Republic of Venez. (*OI Eur. Grp. I*), ICSID Case No. ARB/11/25, Award, ¶ 984 (Mar. 10, 2015), *translated in* https://www.italaw.com/sites/default/files/case-documents/italaw7100.pdf.

19. *See, e.g.*, Jessica Trevellick, *ISDS: The Worst, Except for All the Others*, THOMPSON REUTERS ARBITRATION BLOG (Oct. 24, 2019), http://arbitrationblog.practicallaw.com/isds-the-worst-except-for-all-the-others/ [https://perma.cc/P2NB-AF9F].

20. Samples, *supra* note 4, at 252 n.21.

21. *Id*. at 276–77 ("As an enforcement mechanism to the substantive obligations, investors typically receive procedural rights to sue sovereigns via arbitration in the ISDS system.").

22. *See* Jay E. Grenig, INTERNATIONAL COMMERCIAL ARBITRATION, app. M (Hilary Shroyer ed., 2022).

BIT (rather than a simple breach of contract) typically gives an arbitral tribunal—of which many different institutions exist[23]—jurisdiction over the case.[24]

OIEG brought its claim against Venezuela in September 2011 under the terms of the pertinent BIT: the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Venezuela of 1991.[25] On September 26, 2011, the Secretary General of the ICSID registered OIEG's Request for Arbitration in accordance with Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention"),[26] a multilateral treaty designed to provide a legal framework for resolving disputes between private investors and governments.[27] The ICSID has authority to convene arbitration tribunals to adjudicate disputes between international investors and host governments in contracting states and issue written awards.[28]

OIEG is part of the corporate group controlled by Ohio-headquartered Owens-Illinois Group, Inc. ("Owens-Illinois").[29] In its ICSID claim, Owens-Illinois described itself as one of the world's largest glass container manufacturers at the time of the expropriation in 2011.[30] In Venezuela, Owens-Illinois operated through two companies in which it was the majority shareholder: Owens-Illinois de Venezuela C.A. ("OIdV") and Fabrica de Vidrios los Andes C.A. ("Favianca").[31] OIdV and Favianca were owners of two industrial plants for the production,

23. Many international arbitral tribunals exist, including *inter alia* the International Centre for Settlement of Investment Disputes of the World Bank ("ICSID"), the London Court of International Arbitration ("LCIA"), and the International Chamber of Commerce ("ICC"). *Id.* at ch. 2.

24. Konstantin Christie, *Treaty Claims vs. Contractual Claims in ISDS*, JUS MUNDI (last updated June 2, 2022), https://jusmundi.com/en/document/publication/en-treaty-claims-vs-contractual-claims-in-isds [https://perma.cc/27LL-K6TU].

25. Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Venezuela, Neth.-Venez., Oct. 22, 1991, 1788 U.N.T.S. 31069, https://treaties.un.org/doc/Publication/UNTS/Volume%201788/volume-1788-I-31069-Eng lish.pdf; *OI Eur. Grp. I*, ICSID Case No. ARB/11/25, Award, ¶ 7 (Mar. 10, 2015), *translated in* https://www.italaw.com/sites/default/files/case-documents/italaw7100.pdf. Venezuela had filed a notice of termination of the BIT in 2008, but the tribunal held that it remained the relevant basis for the investor's legal action. *Id*.

26. *OI Eur. Grp. I*, ¶ 6.

27. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, pmbl, Mar. 18, 1965, 17 U.S.T. 1270 [hereinafter ICSID Convention].

28. *Id*. at art. 1. The written award "deal[s] with every question submitted to the [t]ribunal, and . . . state[s] the reasons upon which it is based." *Id.* at art. 48.

29. O-I Glass, Inc., Annual Report (Form 10-K), exhibit 21, p. 2 (Dec. 31, 2021), https://s201.q4cdn.com/163451133/files/doc_financials/2021/ar/2021-O-I-Annual-Report.pdf [https://perma.cc/HMV6-6FYU].

30. *OI Eur. Grp. I*, ¶ 86.

31. *Id.* ¶ 87.

processing, and distribution of glass containers in Venezuela.[32] The plants reportedly had the "latest generation technology" and "exclusive equipment" of Owens-Illinois.[33] However, on October 26, 2010, Venezuela issued Presidential Decree No. 7,751, formalizing the emergency forcible acquisition of the movable and real property and improvements belonging to the companies and creating a new company under the Venezuelan Ministry of Science, Technology and Intermediate Industries ("MINCIT"): Venezolana del Vidrio, C.A. ("Venvidrio").[34] Venvidrio, founded on April, 26, 2011, assumed direct management of Owens-Illinois' Venezuelan property four days later.[35]

After four years of considering the relevant Venezuelan, Dutch, and international laws at issue,[36] on March 10, 2015, the arbitration tribunal unanimously found that Venezuela had (1) illegally expropriated OIEG's investments in violation of Article 6 of the BIT, (2) failed to guarantee the fair and equitable treatment recognized in Article 3(1) of the BIT to OIEG's investment, and (3) failed to comply with the obligations under Article 3(4) of the BIT with regard to OIEG's investment.[37] The tribunal ordered Venezuela to pay OIEG $372,461,982 plus costs, expenses, and interest as compensation for the expropriation of its investment.[38]

However, the ICSID Convention places the responsibility on "[e]ach Contracting State [to] recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories."[39] OIEG would thus need to confirm its award in federal court in the United States to recover against Venezuela.[40]

2. Confirmation of OIEG's ICSID Award in the United States

An additional four years of considerable procedural delays later,[41] on

32. *Id.* ¶ 88

33. *Id.*

34. *Id.* ¶ 111.

35. *Id.* ¶ 90.

36. For an overview of the back-and-forth course of the arbitration proceedings, see the background provided in OI Eur. Grp. B.V. v. Bolivarian Republic of Venez. (*OI Eur. Grp. II*), No. 16-1533, 2019 U.S. Dist. LEXIS 85128, at *5-7 (D.D.C. May 21, 2019).

37. *OI Eur. Grp. I*, ¶ 984.

38. *Id.*

39. ICSID Convention, *supra* note 26, art. 54(1); *see also* 22 U.S.C. § 1650a.

40. Before even seeking to confirm the arbitration award in an ICSCID Convention member state, the investor might consider identifying the jurisdictions where any potentially attachable sovereign assets are located. This step generates an industry of its own, with specialized investigations firms assisting award recipients in determining the best jurisdictions to bring their arbitration award for confirmation. *See, e.g.*, *Sovereign Debt Advisory*, J.S. HELD https://gpwsda.com/about [https://perma.cc/8SJX-VN4U] (last visited Apr. 12, 2023).

41. As discussed below, some of these delays related to the intervention by the administration of

May 21, 2019, the U.S. District Court for the District of Columbia confirmed OIEG's arbitral award and entered judgment against Venezuela.[42] In the United States, the ICSID Convention governs the confirmation of ICSID awards,[43] stating:

> An award of an arbitral tribunal rendered pursuant to chapter IV of the convention shall create a right arising under a treaty of the United States. The pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States. The Federal Arbitration Act shall not apply to enforcement of awards rendered pursuant to the convention.[44]

Accordingly, Judge Berman Jackson held that the court would enter judgment for OIEG, "[b]ecause 22 U.S.C. § 1650a requires this Court to confirm an arbitral award obtained under ICSID, and the sole issue raised in defendant's opposition pertains to the applicable post-judgment interest rate."[45]

B. OIEG's Challenges in Attaching Venezuelan Sovereign Assets in the U.S.

Since November 2019, OIEG has faced numerous legal challenges in attempting to attach a valuable U.S.-based Venezuelan asset. First, Subpart 1 provides background on the asset that OIEG targeted for attachment. Next, Subpart 2 reviews different approaches to foreign sovereign immunity in the United States through the lens of the Foreign Sovereign Immunities Act. Then, Subpart 3 illustrates the *Bancec* case and its significance on alter ego analysis in attaching foreign sovereign assets in the United States. Subpart 4 identifies the unique circumstances

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the interim president of Venezuela, Juan Guaidó, in the litigation. *See infra* Part II.B.4.

42. *OI Eur. Grp. II*, No. 16-1533, 2019 U.S. Dist. LEXIS 85128 (D.D.C. May 21, 2019).

43. The ICSID Convention is implemented in the United States since 1966 under 22 U.S.C. § 1650a. In what may represent a circuit split, in 2017 the Second Circuit held that the Foreign Sovereign Immunities Act of 1976 [hereinafter FSIA] provided the sole basis for subject matter jurisdiction over actions to enforce ICSID awards against a foreign sovereign; accordingly, the Second Circuit held that the procedures for service of process contained in the FSIA govern such actions – not the rules in 1650a. *See* Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venez., 863 F.3d 96 (2d Cir. 2017). A separate important set of rules for recognizing international arbitration awards in the United States, neither of which apply to ICSID awards, includes the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 [hereinafter the "New York Convention"], a United Nations treaty ratified by the United States in 1970. The New York Convention requires courts of contracting states to give effect to private agreements to arbitrate and to recognize and enforce arbitration awards made in other contracting states. *See* Grenig, *supra* note 21, § 3:6. Additionally, in the United States, the confirmation of foreign arbitral awards is governed by chapter 2 of the Federal Arbitration Act; this incorporates the provisions of the New York Convention. *Id.* § 8:8.

44. 22 U.S.C. § 1650a(a) (citation omitted).

45. *OI Eur. Grp. II*, No. 16-1533, 2019 U.S. Dist. LEXIS 85128, at *2.

surrounding OIEG's attempts to attach Venezuelan sovereign assets. Finally, Subpart 5 reviews the judicial decisions on the pertinent time question and the arguments that OIEG brought in its petition to appeal to the Third Circuit.

1. Attaching Shares in Petróleos de Venezuela Holding, Inc.

On November 1, 2019, OIEG registered its judgment in the D.C. District Court.[46] Including inflation and interest, OIEG calculated the total amount of its award to exceed $400 million.[47] OIEG sought to collect on its judgment by attaching shares in PDV Holding, Inc. ("PDVH"), a Delaware-registered holding company wholly owned by Petróleos de Venezuela, S.A. ("PDVSA"), the Venezuelan state-owned oil company that OIEG asserted was an "alter ego" of the Venezuelan state.[48] PDVH is the owner of another Delaware-registered holding company, CITGO Holding, Inc., through which PDVH, and thus PDVSA and Venezuela, own the valuable CITGO group, a Houston-headquartered downstream oil business.[49]

On December 12, 2019, the Delaware District Court denied OIEG's application for an order granting a writ of attachment.[50] OIEG's application relied on the alter ego arguments present in the application for a writ of attachment granted to rival creditor, Canadian gold mining company Crystallex International Corp. ("Crystallex") on August 10, 2018.[51] However, the court stated that collateral estoppel, key to OIEG's argument, did not apply "under the present circumstances"[52] and that OIEG had failed to "prove, by a preponderance of the evidence, that PDVSA is the alter ego of Venezuela *on and as of the pertinent date* &

46. OI Eur. Grp. B.V. v. Bolivarian Republic of Venez. (*OI Eur. Grp. III*), 419 F. Supp. 3d 51 (D.D.C. 2019) (referencing U.S.C. § 1963, which permits judgment creditors to register a judgment "entered in any court of appeals, district court, bankruptcy court, or in the Court of International Trade" in any judicial district).

47. *Id.* at *52.

48. Crystallex Int'l Corp. v. PDV Holding Inc. (*PDV Holding*), No. 15-cv-1082-LPS, 2019 U.S. Dist. LEXIS 214167, at *19 (D. Del. Dec. 12, 2019).

49. *About Citgo*, CITGO, https://www.citgo.com/about [https://perma.cc/Q8NJ-2JUN] (last visited Apr. 12, 2023).

50. *PVD Holding*, No. 15-cv-1082-LPS, 2019 U.S. Dist. LEXIS 214167, at *24 (D. Del. Dec. 12, 2019).

51. Crystallex Int'l Corp. v. Bolivarian Republic of Venez. (*Crystallex I*), 333 F. Supp. 3d 380, 414 (D. Del. 2018), *aff'd*, 932 F.3d 126 (3d Cir. 2019), *cert. denied*, 140 S. Ct. 2762 (2020) (holding that equity demanded that the court pierce the veil between the Venezuelan state and its wholly owned instrumentality, PDVSA, in order for Crystallex, which held an international arbitration award against Venezuela, to attach PDVSA's shares in PDVH, a Delaware corporation).

52. *PDV Holding*, No. 15-cv-1082-LPS, 2019 U.S. Dist. LEXIS 214167, at *20 (D. Del. Dec. 12, 2019).

just as Crystallex did in connection with its writ of attachment."[53] In particular, the court accepted the Republic of Venezuela's argument that:

> The relevant portion of PDVSA, which is the property in the U.S., is under different control under a new legal regime . . . , recognized by the U.S. Thus, the Court agrees with the Republic that "[t]he alter-ego status today was not actually litigated and necessarily decided in [the Court's] decision in August of 2018.[54]

The court also noted that it was "not persuaded at this point that its finding of an alter ego relationship as of August 2018 is dispositive of whether such a relationship existed at any other time."[55] Despite the large sums at issue and the considerable length of the litigation to date, in subsequent opinions issued January 15, 2021[56] and March 2, 2022,[57] the Delaware District Court again rejected OIEG's motion for a writ of attachment against the PDVH shares. In the latter decision, the court noted that it "previously held that the relevant time at issue in connection with the alter ego determination is 'the period between the filing of the motion seeking a writ of attachment and the subsequent issuance and service of that writ.'"[58] This issue of the relevant, or pertinent, time for executing the alter ego analysis has proven the main sticking point in OIEG's attempts to attach the PDVH shares. Moreover, underlying this issue is the question of the legal basis for attaching the PDVH shares at all—both in overcoming the jurisdictional immunity of a foreign sovereign entity and attaching an asset only indirectly belonging to the foreign state—lying in the FSIA and the *Bancec* case.[59]

2. The Foreign Sovereign Immunities Act

The Supreme Court has ruled that if a judgment is rendered against a state or a state-owned entity, the party seeking to enforce the judgment must comply with procedures outlined in the FSIA.[60] Indeed, the FSIA provides the exclusive means for obtaining jurisdiction over foreign states

53. *Id.* at *23-24 (D. Del. Dec. 12, 2019) (emphasis added).

54. *Id.* at *20 (citations omitted).

55. *Id.* at *21.

56. OI Eur. Grp. B.V. v. Bolivarian Republic of Venez. (*OI Eur. Grp. IV*), No. 19-290, 2021 U.S. Dist. LEXIS 8610, at *1 (D. Del. Jan. 15, 2021).

57. *OI Eur. Grp. V*, 2022 U.S. Dist. LEXIS 36631 (D. Del. Mar. 2, 2022).

58. *Id.* at *36 (D. Del. Mar. 2, 2022) (citing Crystallex Int'l Corp. v. Bolivarian Republic of Venez. (*Crystallex III*), No. 17-mc-151, 2021 U.S. Dist. LEXIS 7793, at *36 (D. Del. Jan. 14, 2021)).

59. Rubin v. Islamic Republic of Iran, 138 S. Ct. 816, 823 (2018).

60. *See* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989); *see also* Republic of Austria v. Altmann, 541 U.S. 677, 699 (2004) (quoting *Amerada Hess*, 488 U.S. at 434); Saudi Arabia v. Nelson, 507 U.S. 349, 355 (1993).

and their instrumentalities in courts in the United States.[61] The statute provides that foreign states are immune from the jurisdiction of federal and state courts unless one or more statutory exceptions to immunity apply.[62] Most importantly, jurisdictional immunity may not extend to foreign states' commercial activities, nor is foreign states' commercial property immune from attachment in satisfaction of a sovereign debt.[63]

The concept of foreign sovereign immunity in international law is historically encapsulated by the maxim *par in parem non habet imperium*—the "notion that one sovereign could not properly be subject to coercion or 'dominion' by another."[64] Until the twentieth century, states broadly extended absolute immunity against adjudication or enforcement of judgments.[65] In the United States, this classic view of absolute sovereign immunity was first clearly expressed in the early case, *The Schooner Exchange v. McFaddon*.[66] The Supreme Court held that a vessel, formerly owned by U.S. citizens but forcibly seized and converted into a French warship should not be subject to the jurisdiction of U.S. courts.[67] Indeed, as Chief Justice Marshall wrote, "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself."[68] Although initially applicable only to foreign warships, subsequent cases extended immunity from jurisdiction and attachment to other property belonging to foreign sovereigns and developed the principle of judicial deference to the political branches on matters of foreign policy to avoid potential incoherence on the world stage.[69]

However, after World War II, the U.S. government's strict adherence to the absolute theory of sovereign immunity declined in favor of the alternative so-called "restrictive theory."[70] Under this approach, both

61. *Amerada Hess*, 488 U.S. at 443.

62. 28 U.S.C. § 1604.

63. *Id.* § 1602. See also Rubin v. Islamic Republic of Iran, 138 S. Ct. 816, 825 (2018).

64. George K. Foster, *When Commercial Meets Sovereign: A New Paradigm for Applying the Foreign Sovereign Immunities Act in Crossover Cases*, 52 HOUS. L. REV. 361, 370 (2014) (citing DROR HAREL, SOVEREIGN IMMUNITY AND HUMAN RIGHTS 9 (2010)).

65. *Id.*

66. Samples, *supra* note 4, at 256.

67. Schooner Exch. v. McFaddon, 11 U.S. 116 (1812).

68. *Id.* at 136.

69. *See, e.g.*, Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562 (1926) (upholding dismissal of the action on immunity grounds in relation to claims arising out of an Italian government-owned merchant vessel's delivery of damaged cargo in New York); *Ex parte* Peru, 318 U.S. 578 (1943) (holding that, under the doctrine of judicial deference in matters of foreign relations, vessels owned by foreign governments were immune from suit in courts in the United States—even though both the vessel and the claim were commercial in nature—because the executive branch had formally recognized the foreign sovereign's claim of immunity); Republic of Mex. v. Hoffman, 324 U.S. 30 (1944) (concluding that the judiciary should not broaden immunity beyond that granted by the executive branch).

70. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 1, pt. IV, ch. 5A, intro. (AM. L.

Congress and the executive branch agreed that immunity from jurisdiction and attachment, although still the default, should not be granted in cases where the plaintiff proves that the sovereign's activities involved private acts, especially in the commercial sphere.[71]

Assuming that a federal court correctly has jurisdiction over the foreign sovereign or instrumentality, the FSIA also governs the attachment of the foreign sovereign or instrumentality's property in the United States, providing that it "shall be immune from attachment[,] arrest[,] and execution[,]" subject to a few exceptions.[72] As a judgment creditor, the investor may seek to execute upon the confirmed award by attaching, garnishing, or seizing assets of the award debtor as necessary to discharge the debt owed.[73] Rule 69 of the Federal Rules of Civil Procedure governs the procedure for executing a judgment in federal court, providing that a judgment is enforced by a writ of execution in accordance with the procedure of the state where the court is located.[74] In Delaware, a writ of attachment is referred to as a writ of *fieri facias*.[75] Under Delaware law, a creditor attaches a local corporation's stock shares by serving the writ of attachment on the corporation.[76] The court may then order the sale of the shares so that the proceeds can be applied to the judgment.[77]

Further, property in the United States owned by a foreign state is subject to attachment, arrest, or execution if (1) it is "used for a commercial activity in the United States," or (2) another enumerated exception to immunity from attachment or execution is applicable (e.g., the state has waived its immunity from attachment via contract or the property was used for the commercial activity upon which the claim is based).[78] Mirroring the exception to jurisdictional immunity found at § 1605(a)(6) of the FSIA, § 1610(a)(6) permits attachment in aid of execution, *inter alia*, "where the judgment is based on an order

INST. 1987) (noting the rapid expansion of restrictive immunity after World War II).

71. The U.S. State Department set forth its position and reasoning in a May 1952 letter to the Department of Justice, known as the Tate Letter. *Id.* Congress later incorporated the restrictive theory of sovereign immunity into law in the Foreign Sovereign Immunities Act at 28 U.S.C. §§ 1330, 1391(f), 1441(d), 1602–1611. *Id.*

72. 28 U.S.C. § 1609.

73. FED. R. CIV. P. 69 ("A money judgment is enforced by a writ of execution")

74. *Id.* ("The procedure on execution-and in proceedings supplementary to and in aid of judgment or execution-must accord with the procedure of the state where the court is located").

75. A writ of execution that directs a marshal or sheriff to seize and sell a judgment debtor's property to satisfy a money judgment, *Fieri Facias*, *in* BLACK'S LAW DICTIONARY (11th ed. 2019); *see also Executions, Etc.*, *in* 30 AM. JUR. 2D *Enforcement of Judgement by Writ of Fieri Facias* § 14 (2022); *see also* DEL. CODE ANN. tit. 10, § 5041 (1998).

76. DEL. CODE ANN. tit. 8, § 324(a)-(b) (1998).

77. *Id.* § 324(c)-(d).

78. 28 U.S.C. § 1610.

confirming an arbitral award rendered against the foreign state."[79]

3. *Bancec* Alter Ego Analysis

A separate issue arises when the property identified in the United States through discovery or investigation belongs only indirectly to the sovereign, such as the PDVH shares OIEG identified in Delaware.[80] To attach the asset in what amounts to "reverse" veil piercing,[81] the Supreme Court held that an investor must establish that its direct owner is the "instrumentality or alter ego" of the sovereign judgment debtor and that the particular asset does not itself have sovereign immunity—piercing the "sovereign" veil, as one scholar recently put it.[82] In the seminal 1983 *Bancec* case establishing this standard,[83] a Cuban state-owned credit institution, Bancec, sued Citibank to collect on a letter of credit shortly before the Cuban government seized all of Citibank's Cuban-based assets and dissolved Bancec.[84] The Court held that Cuba was liable for damages and that Citibank could offset Bancec's own claim against it with the assets belonging to Bancec that Citibank held because Bancec was Cuba's "instrumentality"[85] in this action.[86]

First, the investor must overcome a presumption of separateness. In *Bancec*, the Supreme Court recognized a "presumption" that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated" as separate.[87] However, the Court also found that joint liability can exist where the "agency or instrumentality" is an "alter ego" of a foreign government, when a principal-agent relationship exists between the foreign government and the agency or instrumentality, and when viewing them as separate would give rise to fraud or injustice.[88] The FSIA largely

79. *Id.* § 1610(a)(6).

80. *OI Eur. Grp. V*, No. 19-290, 2022 U.S. Dist. LEXIS 36631, at *3 n.1 (D. Del. Mar. 2, 2022) ("PDVSA wholly owns PDVH, which wholly owns CITGO Holding, Inc., which in turn wholly owns CITGO Petroleum Corp. ('CITGO'). In practical effect, then, the dispute over the PDVH Shares may be viewed as a dispute over ownership interests in CITGO.")

81. Weidemaier, *supra* note 7, at 832. *See also Reverse Piercing the Corporate Veil*, *supra*, note 10.

82. *Weidemaier, supra* note 7, at 795.

83. *Bancec*, 462 U.S. 611 (1983).

84. *Id.* at 615.

85. *Id.* at n.2.

86. *Id.* at 630-32.

87. *Id.* at 626-27.

88. *Id.* at 629. Per *Bancec*, an investor may circumvent the requirement of proving alter ego status entirely if the court holds that failing to find joint liability would result in fraud or injustice. *See, e.g.*, Bridas S.A.P.I.C. v Gov't of Turkm., 447 F.3d 411 (5th Cir. 2006) (permitting enforcement of an arbitral award because the foreign state, as majority owner of the instrumentality, had deliberately extracted value

incorporates the *Bancec* analysis into the United States Code.[89] In 2018 the Supreme Court restated the § 1610(g) factors, holding them as dispositive in establishing that a foreign government and its agencies and instrumentalities are sufficiently connected so that the latter is an "alter ego" of the former, which permits joint enforcement of what would otherwise be distinct legal obligations.[90] The lower courts also considered factors such as the foreign state's ownership of the entity,[91] the level of control by the state,[92] the appointment of government officials as directors or officers of the instrumentality,[93] the nature of the foreign state's involvement in the instrumentality,[94] and details specified in contracts and foreign court decisions.[95]

Regarding the degree to which a nexus must exist between the claim and the commercial activity, the Supreme Court ruled in *Saudi Arabia v. Nelson*[96] that a plaintiff's claim against a state—in this case Saudi Arabia, accused of torturing an American contractor—must be "based upon a commercial activity" in order for the court to have jurisdiction.[97] The

from the instrumentality to frustrate recovery – a type of conduct that the court held was "a classic ground for piercing the corporate veil").

89. 28 U.S.C. § 1610(g)(1)(A)-(E).

90. Rubin v. Islamic Republic of Iran, 138 S. Ct. 816, 823 (2018) (factors included "(1) the level of economic control by the government; (2) whether the entity's profits go to the government; (3) the degree to which government officials manage the entity or otherwise have a hand in its daily affairs; (4) whether the government is the real beneficiary of the entity's conduct; and (5) whether adherence to separate identities would entitle the foreign state to benefits in United States courts while avoiding its obligations").

91. *See* Transamerica Leasing, Inc. v La Republica De Venez. & Fondo de Inversiones De Venez., 200 F.3d 843 (D.C. Cir. 2000) (determining that the fact that the entity is wholly owned by the foreign state is not in itself sufficient to overcome the presumption of separateness).

92. *See* Seijas v Republic of Arg. & Banco De La Nacion Arg., 2011 U.S. Dist. LEXIS 31946 (S.D.N.Y. 2011) (looking to whether the level of control exercised over the instrumentality is of the kind typically exerted by a majority shareholder of a private company); NML Capital, Ltd. v Republic of Arg., 2011 U.S. Dist. LEXIS 14795 (S.D.N.Y. 2011) (holding that the fact that an instrumentality is required to carry out certain government policies does not automatically render it an alter ego of the foreign state)).

93. *See* U.S. Fid. & Guar. Co. v Braspetro Oil Servs. Co., 1999 WL 307666, at *9 (S.D.N.Y. 1999) *aff'd,* 199 F.3d 94 (2d Cir. 1999) (finding extensive intermingling of officers and directors to be highly probative of alter ego status); *but see* Gen. Star Nat'l Ins. Co. v Asigurarilor de Stat, Carom, S.A., 713 F. Supp. 2d 267 (S.D.N.Y. 2010) (holding that even when directors or officers appointed by the foreign state are also government officials this is insufficient to prove that the foreign state has the requisite level of day-to-day control over the instrumentality).

94. *See, e.g., Transamerica Leasing, Inc.*, 200 F.3d at 843; *Gen. Star Nat'l Ins. Co.* 713 F. Supp. 2d at 267; *but see* Braspetro Oil Serv. v. Modec, 240 F. App'x 612 (5th Cir. 2007) (affirming that that one instrumentality of Brazil was an alter ego of another and placing heavy reliance on the fact that the "parent" instrumentality "controlled the day-to-day operations" of the subsidiary).

95. *See* Servaas Inc. v Republic of Iraq, 686 F. Supp. 2d 346 (S.D.N.Y. 2010) (finding that an entity was an alter ego of Iraq because the contract at issue had been approved by the government; certain agreements defined the instrumentality as within the State of Iraq; and the agreement was signed in the name of Iraq by individuals from the instrumentality).

96. 507 U.S. 349 (1993).

97. *Id.* at 363.

Third Circuit followed this precedent when, in 1993, it ruled in *Federal Insurance Co. v. Richard I. Rubin & Co.* that the plaintiff's legal claims must have "arisen materially from the commercial activity undertaken by the foreign state."[98] That said, no nexus need exist between the dominated instrumentality and the plaintiff's injury for *Bancec* to apply. In *Crystallex International Corp. v. Bolivarian Republic of Venezuela*,[99] the Third Circuit recognized that "not a single factor recognized in *Rubin* suggests any link between the dominated instrumentality and the injury to the plaintiff"[100] and pointed out that "the vast majority of circuits have required no link between the abuse of the corporate form and the plaintiff's injury under the first *Bancec* path for veil-piercing."[101]

However, the temporal question of *when* to conduct alter ego analysis is less clear and courts do not appear to have directly addressed the question. In *Cassirer v. Thyssen-Bornemisza Collection Found.*, the Supreme Court's most recent case involving *Bancec* alter ego analysis, the Court noted:

> [W]hen a foreign state is not immune from suit, it is subject to the same rules of liability as a private party. Which is just to say that the substantive law applying to the latter also applies to the former. As one court put the point, Section 1606 directs a "pass-through" to the substantive law that would govern a similar suit between private individuals. The provision thus ensures that a foreign state, if found ineligible for immunity, must answer for its conduct just as any other actor would.[102]

Thus, the rule is that the timeframe for executing a *Bancec* alter ego analysis is generally governed by the same rules developed for conducting alter ego analysis in the context of "ordinary" limited liability entities.[103] Indeed, a survey of Supreme Court, Third Circuit, Delaware District Court, and Delaware Court of Chancery cases—including *Bancec* itself, as well as *Pearson v. Component Tech. Corp.*,[104] *Energy Marine Servs., Inc. v. DB Mobility Logistics*,[105] and *Midland Interiors, Inc. v. Bur-*

98. Fed. Ins. Co. v. Richard I. Rubin & Co., 12 F.3d 1270, 1288 (3d Cir. 1993).

99. Crystallex Int'l Corp. v. Bolivarian Republic of Venez. (*Crystallex II*), 932 F.3d 126 (3d Cir. 2019), *cert. denied*, 140 S. Ct. 2762 (2020).

100. *Id.* at 142.

101. *Id.*; *see also* EM Ltd. v. Republic of Arg., 473 F.3d 463, 478 (2d Cir. 2007); Flatow v. Islamic Republic of Iran, 308 F.3d 1065, 1071-73 (9th Cir. 2002); *Transamerica Leasing*, 200 F.3d at 848; Hercaire Int'l, Inc. v. Argentina, 821 F.2d 559, 565 (11th Cir. 1987).

102. Cassirer v. Thyssen-Bornemisza Collection Found., 142 S. Ct. 1502, 1508 (2022) (citations omitted).

103. Weidemaier, *supra* note 7, at 816.

104. Pearson v. Component Tech. Corp., 247 F.3d 471 (3d Cir. 2001) (holding that liability was closely linked to the requirements for proving alter ego).

105. Energy Marine Servs., Inc. v. DB Mobility Logistics, No. 15-24-GMS, 2016 U.S. Dist. LEXIS 7406 (D. Del. Jan. 22, 2016) (finding that the relevant timeframe for alter ego analysis was the time that liability arose).

leigh[106]—indicates that the time of the liability-generating activity is typically considered the pertinent time for the alter ego analysis. As noted below, OIEG itself made such an argument based on a review of numerous judicial opinions dating back to 1936.[107]

4. An Unusual Procedural Posture

As Judge Amy Berman Jackson dryly understated in her May 2019 decision, the circumstances of OIEG's case presented an "unusual procedural posture."[108] In fact, these unusual circumstances coalesced in an unprecedented experiment of legal alchemy, devising a novel question of law as well as insuperable challenges for OIEG in applying the requirements of the FSIA and *Bancec*.[109]

First, in August 2018, the Delaware District Court issued rival creditor Crystallex a writ of attachment against PDVSA's equity stake in PDVH on the basis that, at the time of the issuance of the writ, PDVSA was an alter ego or instrumentality of the Venezuelan state based on the

106. Midland Interiors, Inc. v. Burleigh, No. 18544, 2006 Del. Ch. LEXIS 220, at *11 (Del. Ch. Dec. 19, 2006) (finding that in piercing the corporate veil the Delaware state courts look back to the time that liability arose).

107. *See, e.g.*, Groden v. N&D Transp. Co., 866 F.3d 22, 30 (1st Cir. 2017) (finding that a plaintiff could state a claim for alter ego under ERISA by "claiming that [one company] was [another's] alter ego when the withdrawal liability arose"–that is, "at the times pertinent."); *Energy Marine Servs., Inc.*, 2016 WL 284432, at *3 (whether parties were alter egos "[d]uring the relevant time frame," 2008-2016); Greene v. New Dana Perfume Corp., 287 B.R. 328, 343 (D. Del. 2002) (analyzing the parties' "separate corporate existence at the time in question"); Trs. of Nat'l Elevator Indus. Pension v. Lutyk, 140 F. Supp. 2d 447 (E.D. Pa. 2001), *aff'd*, 332 F.3d 188 (3d Cir. 2003) ("Here, the relevant time period is the time at which the corporation incurred liability . . . ."); J.M. Thompson Co. v. Doral Mfg. Co. Inc., 324 S.E.2d 909, 915 (1985) ("Furthermore, for the *alter ego* doctrine to be satisfied, it must be shown that control was exercised at the time the acts complained of transpired."); Moran v. Johns-Manville Sales Corp., 691 F.2d 811, 817 (6th Cir. 1982) ("It is agency at the time of the tortious act, not at the time of litigation, that determines the corporation's liability."); C M Corp. v. Oberer Dev. Co., 631 F.2d 536, 539 (7th Cir. 1980) ("An examination of the evidence introduced at trial reveals that there is no evidence that Gold Key Builders or its predecessors were shells or sham corporations during the period when appellants and their assignors were dealing with them."); Lowendahl v. Balt. & O.R. Co., 287 N.Y.S. 62, 76 (N.Y. App. Div. 1936) ("It must also be kept in mind that the unlawful control must be shown to have been exercised at the time the acts complained of took place.").

108. *OI Eur. Grp. II*, No. 16-1533, 2019 U.S. Dist. LEXIS 85128, at *10 (D.D.C. May 21, 2019).

109. *OI Eur. Grp. VI*, No. 19-290, 2022 U.S. Dist. LEXIS 80725, at *14 (D. Del. May 4, 2022) ("[F]oreign policy considerations and the large amounts of money at stake in these cases present exceptional circumstances . . . ."). Other issues, not discussed at length here, include the fact that PDVSA registered 50.1% of the PDVH shares as collateral in the issuance of bonds on which it subsequently defaulted, and the remaining 49.9% of the shares were pledged to Russian state oil company Rosneft as a guarantee for a major oil transaction to mitigate the effect of U.S. sanctions. *See* RICHARD J. COOPER ET AL., HITTING THE BRAKES: HOW A POTENTIAL PDV HOLDING BANKRUPTCY MIGHT AFFECT VENEZUELA AND PDVSA CREDITORS, https://www.clearygottlieb.com/-/media/files/hitting-the-brakes-how-a-potential-pdv-holding-bankruptcy-might-affect-venezuela-and-pdvsa-creditors.pdf [https://perma.cc/NQ5G-BCVV].

application of the *Bancec* factors.[110]

Second, in January 2019, the U.S. Treasury's Office of Foreign Asset Control ("OFAC") designated PDVSA as a sanctioned entity, blocking all transactions by U.S. entities with it or anything over which PDVSA held majority ownership or control, such as the PDVH shares.[111] Notably, the restrictions in the executive orders do not apply "if a statute, regulation, order, directive, or license states otherwise."[112] Thus, a creditor that proves the alter ego status of PDVSA could attach the PDVH shares if they obtained a license to do so from OFAC.[113] Such a license, however, remains elusive.[114] Indeed, the U.S. government continues to shield certain Venezuelan assets in the United States from creditors in pursuit of foreign policy interests arising out of the events described below.[115]

Third, following disputed national elections in Venezuela, the U.S. government formally recognized opposition figure Juan Guaidó, the President of Venezuela's democratically elected National Assembly, as the legitimate interim President of Venezuela in January 2019.[116] In February 2019, Guaidó appointed a new board of directors of PDVSA and its U.S. subsidiary, CITGO.[117] When Guaidó's administration subsequently intervened in the various legal actions ongoing in the U.S. federal courts, the courts deferred to the executive branch's judgment. Accordingly, when ruling on OIEG's motion for summary judgment, the D.C. District Court found that it was bound by D.C. Circuit precedent on political questions to recognize counsel for the Guaidó government as the proper representatives of Venezuela.[118]

Fourth, in a January 2021 motion in the ongoing *Crystallex* litigation,

110. *Crystallex I*, 333 F. Supp. 3d 380, 414 (D. Del. 2018), *aff'd*, 932 F.3d 126 (3d Cir. 2019), *cert. denied*, 140 S. Ct. 2762 (2020).

111. *See* Exec. Order No. 13,850, 3 C.F.R. § 881 (2019); Exec. Order. No. 13,884, 3 C.F.R. § 350 (2019).

112. Exec. Order No. 13,850, *supra* note 110, at § 1(b); Exec. Order. No. 13,884, *supra* note 110, at § 1(c); *see also OI Eur. Grp. V*, No. 19-290, 2022 U.S. Dist. LEXIS 36631, at *8-9 (D. Del. Mar. 2, 2022).

113. *OI Eur. Grp. V*, 2022 U.S. Dist. LEXIS 36631, at *12-22.

114. *See, e.g.*, *id.* at *7.

115. *595. What Does Venezuela-Related General License 5J Authorize?*, U.S. DEP'T OF THE TREASURY, OFF. OF FOREIGN ASSETS CONTROL (Jan. 17, 2023), https://ofac.treasury.gov/faqs/595.

116. Michael R. Pompeo, U.S. Secretary of State, *Recognition of Juan Guaido as Venezuela's Interim President*, U.S. DEP'T OF STATE (Jan. 23, 2019), https://2017-2021.state.gov/recognition-of-juan-guaido-as-venezuelas-interim-president/index.html [https://perma.cc/5S3Z-ULYA].

117. Fabiola Zerpa & Alex Vasquez, *Venezuela's Guaido Names PDVSA Board in Haste to Seize Assets*, BLOOMBERG (Feb. 12, 2019, 10:42 PM), https://www.bloomberg.com/news/articles/2019-02-13/venezuela-s-guaido-is-said-to-announce-pdvsa-board-this-week [https://perma.cc/D6WH-QFE9].

118. *OI Eur. Grp. II*, No. 16-1533, 2019 U.S. Dist. LEXIS 85128, at *4-8 (D.D.C. May 21, 2019) (referencing the court's prior holding that the determination of which government may represent of a foreign state is a political, and not a judicial, question).

Venezuela—represented by the alternative U.S.-recognized government of Juan Guaidó—argued that the change in government since the Delaware District Court granted Crystallex's request to attach the Venezuelan government's shares in PDVH in 2018[119] meant that PDVSA should no longer be properly considered an alter ego of the Venezuelan state.[120] Importantly, the Delaware District Court held that "Venezuela's motion . . . fails because it is predicated on the Court giving weight (indeed, controlling weight) to events that post-date the situation as it existed at the *pertinent time*."[121] The court wrote that it:

> agrees with Crystallex that the important dates are the dates on which it filed its motion for a writ of attachment, on which the writ of attachment was issued, and on which the writ was served. Before the Court granted Crystallex's motion for a writ, PDVSA was free to alienate its shares of PDVH. After that date, however, the shares were attached; that is, they were (and remain) restricted from alienation by operation of the Court's order. To conclude that the pertinent date of analysis is any date after service of the writ would undermine the entire logic of issuing the writ in the first place.[122]

In so doing, the court had effectively moved the "pertinent time" for *Bancec* alter ego analysis from the time of the injury to the time of the issuing of the writ of attachment.

5. The Pertinent Time for *Bancec* Alter Ego Analysis

OIEG thus faced a significant challenge in making its *Bancec* alter ego analysis.[123] OIEG initially based its argument that PDVSA, the owner of the PDVH shares at issue, was an alter ego or instrumentality of the Venezuelan state (against which OIEG held the arbitral award), on the same *Bancec* factors that its fellow creditor, Crystallex, had in a separate case.[124] However, in December 2019, the district court denied OIEG's November 2019 motion for attachment of the PDVH shares, ruling that:

> [C]ollateral estoppel does not apply, [and] any creditor seeking to place itself into a situation similar to Crystallex will have to prove that PDVSA is and/or was the Republic's alter ego on whatever pertinent and applicable date. In attempting to meet this burden, any creditor may be able to find

119. *Crystallex I*, 333 F. Supp. 3d 380, 414 (D. Del. 2018), *aff'd*, 932 F.3d 126 (3d Cir. 2019), *cert. denied*, 140 S. Ct. 2762 (2020).

120. *Crystallex III*, No. 17-mc-151, 2021 U.S. Dist. LEXIS 7793, at *17-18 (D. Del. Jan. 14, 2021).

121. *Id*. at *18 (emphasis added).

122. *Id.* at *19 (citations omitted).

123. *OI Eur. Grp. V*, No. 19-290, 2022 U.S. Dist. LEXIS 36631, at *35-36 (D. Del. Mar. 2, 2022).

124. *PDV Holding*, No. 15-cv-1082-LPS, 2019 U.S. Dist. LEXIS 214167, at *19 (D. Del. Dec. 12, 2019).

> support (perhaps strong support) in the record created in the Crystallex Asset Proceeding and the finding reached (and affirmed) there. . . . From all of the foregoing, it follows that a creditor like [OIEG] must prove, by a preponderance of the evidence, that PDVSA is the alter ego of Venezuela on and as of the pertinent date . . . .[125]

In January 2021, the district court denied a motion for reconsideration, determining among other things that OIEG had:

> failed to show that "the pertinent date as to which the [District] Court must decide whether PDVSA was or is the alter ego of Venezuela in connection with [OIEG's] action is the same August 2018 date the [District] Court analyzed in the *Crystallex Asset Proceeding*" . . . [and] must "prove that PDVSA is and/or was the Republic's alter ego on whatever pertinent and applicable date."[126]

In early 2021, OIEG again revised its motion for a writ of attachment.[127] Although the Delaware District Court once more declined to issue a writ of attachment against the PDVH shares in March 2022, the court definitively determined that the OFAC sanctions do not prevent it "from authorizing the *eventual* issuance of a writ of attachment contingent on grant of an OFAC license or material modification to the sanctions regime."[128] This affirmed other decisions by the same court.[129]

Further, in the March 2022 *OI European Group, B.V.* opinion, the Delaware District Court noted that it would not decide on the issue of attaching sanctioned property or the pertinent time issue in case the Third Circuit, which was hearing many appeals on similarly affected foreign sovereign issues, ruled differently.[130] Accordingly, in May 2022, the Delaware District Court certified two questions for interlocutory review by the Third Circuit, the latter of which asked:

> Whether the pertinent time for conducting an alter ego analysis with respect to the Bolivarian Republic of Venezuela and Petróleos de Venezuela, S.A. is: (i) the period between a judgment creditor filing a motion seeking a writ of attachment and the subsequent issuance and service of the writ, (ii) the time of the injury that gave rise to the judgment creditor's judgment, or (iii) some other time.[131]

In its petition for permission to appeal to the Third Circuit, OIEG asked

125. *Id*. at *23.

126. *OI Eur. Grp. IV*, No. 19-290, 2021 U.S. Dist. LEXIS 8610, at *3 (D. Del. Jan. 15, 2021) (citations omitted).

127. *OI Eur. Grp. V*, No. 19-290, 2022 U.S. Dist. LEXIS 36631, at *4-5.

128. *Id*. at *37.

129. *See* Crystallex Int'l Corp. v. Bolivarian Republic of Venez. (*Crystallex IV*), No. 17-151, 2022 U.S. Dist. LEXIS 36630 (D. Del. Mar. 2, 2022).

130. *OI Eur. Grp. V*, No. 19-290, 2022 U.S. Dist. LEXIS 36631, at *35.

131. *OI Eur. Grp. VI*, No. 19-290, 2022 U.S. Dist. LEXIS 80725, at *14-15 (D. Del. May 4, 2022).

the court to consider the pertinent time question as the primary issue.[132] OIEG made several arguments against the Delaware District Court's decision, including (1) the district court's decision created a "Zeno's paradox,"[133] making it impossible for an investor in OIEG's situation to ever successfully attach the assets of a host state;[134] (2) to accord with Supreme Court precedent, the court should disregard Venezuela's (recognized) change in government since the time of the injury to OIEG;[135] (3) equitable principles "required consistency between the attachment decisions granted to different parties that suffered near simultaneous injury, . . . as well as avoiding unnecessary waste of party and judicial resources;"[136] (4) the district court not only ignored Third Circuit precedent regarding the pertinent time that the court should consider,[137] but it created a novel standard that stood apart from the decision of any other court;[138] and (5) extensive existing case law supported the view that the "pertinent time" for an alter ego analysis, generally, relates back to the date of the injury.[139]

By contrast, Venezuela's counterargument to the Third Circuit largely rested on procedural grounds that the question was not subject to interlocutory review and, even if it were, such review now would be "an academic exercise contingent on rank speculation that an OFAC license may issue or the sanctions regime may change at some hypothetical future time."[140]

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132. Plaintiff OI European Group B.V.'s Petition for Permission to Appeal under 29 U.S.C. § 1292(b) at 1, OI Eur. Grp. B.V. v. Bolivarian Republic of Venez. (*OI Eur. Grp. VII*), No. 22-8025 (3d Cir. May 16, 2022) [hereinafter OIEG Petition].

133. Analogizing to ancient Greek philosopher Zeno of Elea's famous paradox of Achilles and the Tortoise:

> Achilles runs a race with a tortoise, who has a start of n metres. Suppose the tortoise runs one-tenth as fast as Achilles. Then by the time Achilles has reached the tortoise's starting-point, the tortoise is n/10 metres ahead. By the time Achilles has reached that point, the tortoise is n/100 metres ahead, and so on *ad infinitum*. So Achilles cannot catch the tortoise.

in Zeno's Paradoxes, OXFORDREFERENCE.COM, https://www.oxfordreference.com/display/10.1093/oi/authority.20110803133426900 (last visited May 4, 2023).

134. OIEG Petition, *supra* note 131 at 8.

135. *Id*. at 4 n.2 ("If the third circuit disagrees with this court and holds that the pertinent time for the alter ego analysis is the time of the injury that gave rise to the underlying judgment, the court no longer needed to decide whether it must limit its view of the evidence to that involving [newly-recognized] administration of interim president Guaidó."); *see also* Republic of Iraq v. ABB AG, 768 F.3d 145, 164 (2d Cir. 2014) ("[T]he obligations of a foreign state are unimpaired by a change in that state's government."). OIEG claimed that PDVSA "remains the state-owned, and utterly dominated oil company of Venezuela."

136. OIEG Petition, *supra* note 131, at 5.

137. *Id.* at 13 (citing *Crystallex II*, 932 F.3d 126, at 144 (3d Cir. 2019), *cert. denied*, 140 S. Ct. 2762 (2020)).

138. OIEG Petition, *supra* note 131 at 14-15.

139. *See supra* note 106.

140. Response of Petróleos de Venezuela, S.A. to Petitions for Permission to Appeal under 28

On July 26, 2022, the Third Circuit denied OIEG's petition for permission to appeal without explanation.[141] In September that same year, the Delaware District Court lifted the abeyance on OIEG's attachment order and resumed its consideration of the pending attachment motion.[142]

III. DISCUSSION

The Third Circuit should have taken up the challenge put forward by OIEG to provide a definitive answer to the question: what is the relevant timeframe for conducting *Bancec* alter ego analysis? In answering, it would have been proper for the court to determine that the correct time for determining alter ego of the foreign sovereign asset under *Bancec* is the time that liability originally arose. In doing so, the Third Circuit could have corrected the Delaware District Court's erroneous interpretation of the law in its March 2022 opinion in *OI European Group, B.V.*[143]

This Section explains how the pertinent time question should be answered and, for brevity, will not review other arguments made by OIEG in its petition to appeal.[144] Part A reviews the principal arguments in favor of finding that the pertinent time for alter ego analysis is the time that the liability arose, with a focus on prior Supreme Court decisions as well as public policy. Part B identifies the limited arguments supporting the Delaware District Court's interpretation of the pertinent time.

A. The Pertinent Time for Alter Ego Analysis is the Time Liability Arose

The Court should conduct *Bancec* alter ego analysis based on the circumstances at the time the liability arose. This recommendation is based on pertinent legal authority relating to "ordinary" (i.e., not *Bancec*) alter ego analysis as well as the Supreme Court's approach to *Bancec* alter ego analysis more generally. OIEG needed to argue that the Court's 2018 recognition of Crystallex's alter ego analysis of the state-owned company

U.S.C. § 1292(b) at 21, *OI Eur. Grp. VII*, No. 22-8025 (3d Cir. May 31, 2022).

141. Order Denying Petitions for Leave to Appeal, *OI Eur. Grp. VII*, No. 22-8025 (3d Cir. June 27, 2022).

142. Memorandum Order, No. 19-MC-290 (D. Del. Sept. 29, 2022).

143. *OI Eur. Grp. V*, No. 19-290, 2022 U.S. Dist. LEXIS 36631, at *36 (D. Del. Mar. 2, 2022) (citing *Crystallex III*, No. 17-mc-151, 2021 U.S. Dist. LEXIS 7793, at *6 (D. Del. Jan. 14, 2021)).

144. For instance, this Note will not review OIEG's arguments that equitable principles require consistency between the attachment decisions granted to different parties that suffered near simultaneous injury, as well as avoiding unnecessary waste of party and judicial resources, OIEG Petition, *supra* note 131 at 5, nor that "[u]nder the District Court's erroneous interpretation of the 'pertinent time' issue, a judgment creditor would be required to reestablish the alter ego status continuously between the time the motion for attachment was filed and when the final attachment order is issued." *Id.*

holding the asset had collateral estoppel effect on its own claim.[145] This argument, in turn, relies on a determination of the "pertinent time" for making such an alter ego claim under the *Bancec* factors codified at 28. U.S.C. § 1610(g).[146] On the one hand, if the pertinent time for alter ego analysis is the time that the liability arose (here, the date of the expropriation of OIEG's assets in 2010-11), then because that occurred before the U.S. government recognized Juan Guaidó as legitimate interim President of Venezuela, OIEG could either rely on the 2018 *Crystallex* decision or make a new argument using the expropriation date as the pertinent time for alter ego analysis. Alternatively, if the pertinent time for the alter ego analysis is upon or after a motion petitioning for a writ of attachment, then OIEG's argument is more likely to fail because the current political circumstances mean that the *Bancec* factors pursuant to alter ego analysis—such as dominance of the instrumentality by the foreign state—do not apply as a matter of law.

Subpart 1 demonstrates how a key provision of the Foreign Sovereign Immunities Act provides that the "ordinary" approach to alter ego analysis applies even in cases pertaining to foreign sovereign assets. Next, Subpart 2 identifies controlling precedent demonstrating that alter ego analysis is generally conducted in relation to the time that the liability arose. Finally, Subpart 3 identifies pertinent policy considerations for assuming this approach.

1. 28 U.S.C. § 1606 and "Ordinary" Alter Ego Analysis

28 U.S.C. § 1606 of the FSIA applies in cases where one of the FSIA's enumerated exceptions has abrogated the foreign sovereign's immunity from the jurisdiction of the U.S. federal courts.[147] Indeed, under 28 U.S.C. § 1606, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances."[148] Accordingly, alter ego analysis for foreign sovereigns should follow the same rules as private individuals.

For private individuals, there is substantial legal precedent in the Third Circuit and under Delaware law that alter ego analysis is conducted using the creation of the liability as the relevant timeframe. As noted above,[149] in *Cassirer v. Thyssen-Bornemisza Collection Found.*, the Supreme Court

145. *See Crystallex I*, 333 F. Supp. 3d 380, 414 (D. Del. 2018), *aff'd*, 932 F.3d 126 (3d Cir. 2019), *cert. denied*, 140 S. Ct. 2762 (2020).

146. OIEG Petition, *supra* note 131 at 1.

147. 28 U.S.C. § 1606 (applying "[a]s to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter").

148. *Id*.

149. See Part II.B.3, *supra*.

held that under 28 U.S.C. § 1606, "when a foreign state is not immune from suit, it is subject to the same rules of liability as a private party."[150] Although this case specifically related to a question of choice of law regarding the correct jurisdiction to hear a suit relating to a painting expropriated by the Nazi regime from its Jewish owners in the 1930s, one can reasonably extend the Supreme Court's argument to other substantive areas covered by the FSIA—such as *Bancec* alter ego analysis. As previously noted, 28 U.S.C. § 1606 does not specifically mention choice of law, it simply acknowledges that a foreign state's liability is identical to a private individual's liability under similar circumstances.[151]

One can draw a straight line from this principle to alter ego issues previously decided by the Third Circuit and the Delaware District Court. For example, in *Pearson v. Component Tech. Corp.*, the Third Circuit detailed that it used an alter ego test that included "fairly typical" factors to which a court would look.[152] The court further explained that "in order to succeed on an alter ego theory of liability, plaintiffs must essentially demonstrate that in all aspects of the business, the two corporations actually functioned as a single entity and should be treated as such."[153] This conjunction of the concepts of "liability" and the requirements for proving alter ego strongly imply that the Third Circuit looked to the time of the liability as an anchor point for conducting alter ego analysis.

Further, in *Energy Marine Servs., Inc. v. DB Mobility Logistics AG*, the Delaware District Court explicitly considered whether a Libyan subsidiary company was the alter ego of the defendant, its parent company, based on the defendant's dominant ownership of the subsidiary "[d]uring the relevant time frame."[154] The court clearly identified the "relevant time frame" in this case as the period during which an alleged abuse of a corporate form took place and from which the defendant allegedly became liable.[155]

This principle also seems to apply under Delaware state law. For example, in *Midland Interiors, Inc. v. Burleigh*, the Delaware Court of Chancery held that one element of the alter ego analysis "must be performed in conjunction with consideration of any fraudulent action

150. Cassirer v. Thyssen-Bornemisza Collection Found., 142 S. Ct. 1502, 1508 (2022) (holding that 28 U.S.C. § 1606 directs a "pass-through" to the substantive law that would govern a similar suit between private individuals, thus ensuring that a foreign state, if found ineligible for immunity, must answer for its conduct just as any other actor would). *See also Bancec*, 462 U.S. 611, 628 (1983) (analogizing to piercing the corporate veil in private litigation).

151. 28 U.S.C. § 1606.

152. Pearson v. Component Tech. Corp., 247 F.3d 471, 484-85 (3d Cir. 2001).

153. *Id*. at 485.

154. Energy Marine Servs., Inc. v. DB Mobility Logistics AG, No. 15-24, 2016 U.S. Dist. LEXIS 7406, at *8 (D. Del. Jan. 22, 2016).

155. *Id*. at *6-7.

committed under the guise of the corporate form."[156] This case, which involved piercing the corporate veil of a dissolved corporation, demonstrates that, under Delaware law, courts look back to the time that liability arose (here, the fraudulent activity committed by the corporation), not necessarily the situation as it currently stands.[157]

Here, in OIEG's case, the rules for determining the need for "ordinary" alter ego analysis should have guided the Delaware District Court's approach under 28 U.S.C. § 1606. Even though the alter ego analysis is based on the factors laid out in *Bancec* (and subsequent cases) and codified in 28 U.S.C. § 1610(g), the Supreme Court made clear that substantive interpretations of rules for the application of the FSIA should look to customary practice under 28 U.S.C. § 1606.[158] Although the Delaware District Court was correct in determining that the "pertinent time" for alter ego analysis was not necessarily after the issuance of a writ of attachment,[159] it was incorrect to hold that the grant of the writ of attachment to Crystallex in August 2018 did not have a collateral estoppel effect on OIEG's own claim the following year.[160]

Thus, the rules for conducting "ordinary" alter ego analysis should apply. Since under Third Circuit and Delaware District Court precedent the proper timeframe for conducting such analysis is the time that the liability arose, OIEG could properly avail itself of this same principle in its petition for a writ of attachment and, therefore, could rightly rely on the decision the court reached in the 2018 *Crystallex* opinion regarding PDVSA's alter ego status.

It was, therefore, of vital importance that the Third Circuit take up OIEG's appeal to apply the proper definition of the "pertinent" time for conducting *Bancec* alter ego analysis to this case. The fact that it did not means that the Delaware District Court's March 2022 *OI European Group B.V.* opinion seemingly created a novel standard not based on prior judicial precedent.[161]

156. Midland Interiors, Inc. v. Burleigh, No. 18544, 2006 Del. Ch. LEXIS 220, at *11 (Del. Ch. Dec. 19, 2006).

157. The court in this case further noted that under Delaware law, "[a] Delaware corporation is not dead for all purposes following forfeiture of its charter," and that title 8, section 278 of the Delaware Code continues the existence of a voided corporation for three years for purposes of lawsuits. *Id.* at *11-12 (quoting Frederic G. Krapf & Son, Inc. v. Gorson, 243 A.2d 713, 715 (Del. 1968)). However, the Court also pointed out that such provisions had "limited relevance" in that particular case. *Id.* at *12.

158. *See* Cassirer v. Thyssen-Bornemisza Collection Found., 142 S. Ct. 1502 (2022).

159. *Crystallex III*, No. 17-mc-151, 2021 U.S. Dist. LEXIS 7793, at *19 (D. Del. Jan. 14, 2021) (citations omitted).

160. *PDV Holding*, No. 15-cv-1082-LPS, 2019 U.S. Dist. LEXIS 214167, at *19 (D. Del. Dec. 12, 2019).

161. *OI Eur. Grp. V*, No. 19-290, 2022 U.S. Dist. LEXIS 36631, at *36 (D. Del. Mar. 2, 2022).

2. Controlling Precedent in Relation to the Timeframe for *Bancec* Alter Ego Analysis

The Supreme Court and the Third Circuit only infrequently reviewed the substantive application of *Bancec* alter ego analysis since it was decided in 1983. The timing of the alter ego analysis is not at question in most of these cases. However, the inference from *Bancec* itself and relevant authority in the Third Circuit is that the analysis is typically conducted based on the circumstances at the time that the liability arose.

First, in *Bancec*, the Supreme Court conducted alter ego analysis based on the circumstances at the time that liability arose.[162] The Court used the time that the liability arose as the time frame for conducting the alter ego analysis because the Cuban government had dissolved Bancec, noting that:

> Giving effect to Bancec's separate juridical status in these circumstances, *even though it has long been dissolved*, would permit the real beneficiary of such an action, the Government of the Republic of Cuba, to obtain relief in our courts that it could not obtain in its own right without waiving its sovereign immunity and answering for the seizure of Citibank's assets—a seizure previously held by the Court of Appeals to have violated international law.[163]

Similarly, a footnote in *Bancec* emphasizes the period of the injury as the proper timeframe, stating that the Court "rel[ies] only on the fact that Bancec was dissolved by the Cuban Government and its assets transferred to entities that may be held liable on Citibank's counterclaim"[164] in determining the scope of the injurious conduct required for the court to pierce the corporate veil.

Bancec is now an older case; legislation abrogated its holdings[165] and lower courts refined their interpretation of the *Bancec* alter ego factors.[166] However, the Third Circuit itself evidently adopted the *Bancec* principles. In a 2019 opinion issued on the *Crystallex* matter, in a section titled "Timeframe: What is the appropriate point of reference for the extensive-control analysis?," the Third Circuit affirmed the district court's rejection of Venezuela's argument that the relevant time for a *Bancec* analysis of the relationship between a sovereign and its instrumentality was "the moment the writ is issued."[167] In 2021, the Delaware District Court held in a subsequent decision that the "pertinent time" could not be after the

162. *Bancec*, 462 U.S. 611, 615 (1983).

163. *Id.* at 632 (emphasis added).

164. *Id.* at 632, n.22.

165. 28 U.S.C. § 1610(g)(1)(A)-(E).

166. *See, e.g.*, Rubin v. Islamic Republic of Iran, 138 S. Ct. 816, 823 (2018).

167. *Crystallex II*, 932 F.3d 126, 144 (3d Cir. 2019), *cert. denied*, 140 S. Ct. 2762 (2020).

issuance of the writ.[168] By process of elimination, therefore, the only relevant time frame left for *Bancec* alter ego analysis is the time that the liability arose.

Thus, it appears that, in its March 2022 opinion for *OI European Group B.V.*, the Delaware District Court not only misinterpreted its prior January 2021 decision in *Crystallex*, but it also ignored the precedent that the Supreme Court established in *Bancec* and, four decades later, upheld in *Cassirer*.[169]

3. The Importance of Timing – Policy Considerations

At first glance, this matter may seem of little import. Not only does the question arise out of an "unusual procedural posture,"[170] but the fact that so few courts have even spoken to the matter of the pertinent time frame for conducting *Bancec* alter ego analysis highlights the niche nature of this analytical instrument. Nevertheless, resolving this question for the Delaware District Court could result in far-reaching consequences. Delaware is one of the top five states for entity formations in the U.S.[171] As of 2015, 82 percent of non-Delaware businesses incorporated in the state reportedly were foreign; 6,883 of the 8,392 companies incorporated in Delaware were located outside the United States.[172] The fact that Delaware is such a nexus for the registration of foreign corporations in the United States magnifies the importance of any case in that jurisdiction relating to recovery against states that have expropriated the foreign investments of U.S. companies. The issues underlying OIEG's case could easily occur again.[173]

Indeed, OIEG is not the only investor in this very position. Several others, including well-known companies such as defense manufacturer

168. *Crystallex III*, No. 17-mc-151, 2021 U.S. Dist. LEXIS 7793, at *19 (D. Del. Jan. 14, 2021).

169. *OI Eur. Grp. V*, No. 19-290, 2022 U.S. Dist. LEXIS 36631, at *36 (D. Del. Mar. 2, 2022) (citing *Crystallex III*, 2021 U.S. Dist. LEXIS 7793, at *6).

170. *OI Eur. Grp. II*, No. 16-1533, 2019 U.S. Dist. LEXIS 85128, at *10 (D.D.C. May 21, 2019).

171. *Delaware Corporate Law: Facts and Myths*, STATE OF DEL., https://corplaw.delaware.gov/facts-and-myths [https://perma.cc/52UB-JNSB].

172. Jeff Mordock, *Majority of Delaware Corporations Are Based Overseas*, DEL. ONLINE (June 1, 2015, 10:27 AM), https://www.delawareonline.com/story/money/business/2015/06/01/majority-delaware-corporations-based-overseas/28299257 [https://perma.cc/4499-7XZ5]. More up to date information appears to be unavailable; indeed, one blog author, a University of Chicago Booth School of Business Executive Director, reported that he "asked the Delaware Secretary of State's office what proportion of companies registered in the state were foreign-owned. They told [him] that they do not know, and that there is no way of knowing." Hal Weitzman, What's the Matter With Delaware?, PRINCETON U. PRESS (May 24, 2022), https://press.princeton.edu/ideas/hal-weitzman-on-whats-the-matter-with-delaware [https://perma.cc/MB9S-4PHX].

173. The number of different plaintiffs whose cases are consolidated under *PDV Holding*, No. 15-cv-1082-LPS, 2019 U.S. Dist. LEXIS 214167 (D. Del. Dec. 12, 2019) illustrates that this is the case.

Northrop Grumman and energy company ConocoPhillips,[174] find their attempts to recover against Venezuela stymied by the same issue of timing. Further, the issue of attaching foreign sovereign assets as a method of recovery following expropriation remains a perennial issue. Russia threatened to expropriate the assets of foreign companies that left the country in protest at its 2022 invasion of Ukraine; a new round of proceedings looking to collect against Russian sovereign assets in the U.S. may soon arise.[175]

The nature of the cases in which *Bancec* alter ego analysis is carried out further underlines the importance of determining the full application of this instrument: cases involving the foreign sovereign immunity of assets belonging to foreign states. Not only are the amounts at stake potentially exorbitant,[176] but the nature of such cases—expropriation by a foreign state, exhaustion of legal actions in the foreign state's courts, followed by international arbitration—means there are few remedies available to the injured investors.

Additionally, it is important from an equity perspective to preserve the power of the FSIA. The FSIA does not create an absolute shield against litigation, which would give states carte blanche to act in bad faith against private parties without fear of repercussion (as has happened historically).[177] But neither does it completely abrogate sovereign immunity, which could reinforce the power imbalance between wealthy U.S. litigants and developing states. The commercial activity exceptions to foreign sovereign immunity are exceptionally powerful remedial tools, especially given the general difficulty of enforcing a judicial order against a sovereign state.[178] However, they are also limited, as demonstrated by the substantial number of cases in which the courts have *not* found an exception to sovereign immunity.[179] Therefore, despite the enormous power of the FSIA to strip the absolute protection of sovereign immunity from a foreign state and its instrumentalities in the United States, the multifarious possible failure points for a litigant attempting to bring such a claim provides an adequate counterbalance.[180]

174. *See, e.g.*, Phillips Petroleum Co. Venez. v. Petróleos De Venez., S.A., No. 19-342, 2021 U.S. Dist. LEXIS 8745 (D. Del. Jan. 15, 2021).

175. *See, e.g.*, Derek A. Soller, Robert L. Sills, Rafael T. Boza, & Kristina Fridman, *Expropriations Related to the Russia Sanctions May Trigger Liability Under Investment Treaties*, PILLSBURY LAW (Mar. 15, 2022), https://www.pillsburylaw.com/en/news-and-insights/russia-sanctions-expropriations.html [https://perma.cc/Y6LG-TF6N].

176. *OI Eur. Grp. II*, 2019 U.S. Dist. LEXIS 85128, at *22 (noting that in OIEG's case, the award amount totals over $370 million without including interest and costs accrued since 2015).

177. Samples, *supra* note 4, at 259.

178. *Id.* at 283.

179. *See, e.g.*, Saudi Arabia v. Nelson, 507 U.S. 349 (1993).

180. Samples, *supra* note 4, at 827.

The burden on the plaintiff may be too heavy. The many, long-running, and exceptionally expensive investor-state cases brought against Venezuela, which expropriated the proprietary assets of several western investors in the early 2010s, attest to the fact that the country has been able to draw out litigation through a focus on procedural quibbles. Such protracted litigation may only be maintained by those with the deepest pockets. Indeed, the shareholders of one of the most well-known plaintiffs in the corpus of Venezuelan expropriation litigation, Crystallex, borrowed $75 million in loans from specialized litigation funders, gambling that they could recover a chunk of their original arbitration award and the cost of the loans as soon as they could attach, seize, and sell a valuable corporate asset in the United States.[181]

Finally, the purpose of the alter ego doctrine is arguably to lay aside the fiction that the entities—here, the state and its instrumentality—are truly separate to impose the underlying liability against the entity that caused the harm.[182] It logically follows that the most equitable temporal framework for testing the alter ego of a foreign sovereign instrumentality should be at the time that the liability arose.[183]

How could this question of timing be definitively resolved? One solution, difficult as it may be to pass federal legislation, could be to codify this approach to timing, much as Congress did in codifying the *Bancec* factors into 28 U.S.C. § 1610(g) in 2008.[184]

B. Relevant Counterarguments

The many counterarguments to this approach cannot all be addressed in this Note. However, this Part shall review certain counterarguments relevant to the discussion laid out in Part A.

Professor Weidemaier identified the following principle in his article on alter ego analysis in the context of state-owned enterprises:

> There are several contexts in which U.S. law lets creditors reach property "used for a commercial activity in the United States" without demonstrating a link between the property and the claim. These include . . .

181. Andrew Scurria, *Scurria's Take: Crystallex Shareholders Renew Bankruptcy Lending Complaint*, WALL ST. J. (Feb. 2, 2018, 5:29 PM), https://www.wsj.com/articles/scurrias-take-crystallex-shareholders-renew-bankruptcy-lending-complaint-1517609483 [https://perma.cc/Z4LF-HCGS].

182. *Bancec*, 462 U.S. 611, 630 (1983) ("Although a corporation and its shareholders are deemed separate entities for most purposes, the corporate form may be disregarded in the interests of justice where it is used to defeat an overriding public policy. . . . We hold that similar equitable principles must be applied here.") (citation omitted).

183. Jay Adkisson, *Temporal Issues In Alter Ego Analysis*, FORBES (Apr. 9, 2021, 10:18 PM), https://www.forbes.com/sites/jayadkisson/2021/04/09/temporal-issues-in-alter-ego-analysis [https://perma.cc/CU56-AACT].

184. 28 U.S.C. § 1610 (2006), *amended by* 28 U.S.C. § 1610(g) (Supp. II 2006).

> expropriation in violation of international law, 28 U.S.C. § 1610(a)(3) . . . These exceptions relieve the creditor of the need to demonstrate a relationship between the attached property and the liability-generating activity. All the creditor must show is that the property is used for a commercial activity in the United States. . . . A creditor can avoid the need to show a link between the property and the liability-generating activity if . . . the creditor has contracted for arbitration and holds a judgment based on an arbitration award.[185]

In other words, although a nexus must exist between the liability-generating activity and commercial activity to bring a claim against the foreign state,[186] a similar nexus need not exist between the investor's claim against the state and the property attached.[187] As a corollary, if the courts eschew the requirement of such a nexus under certain circumstances, such as a contract, why should they similarly require the creditor to relate the time of the alter ego analysis back to the time of the liability-generating activity? Judicial precedent and the law dealing with foreign sovereign immunity demand that the courts should look to the time that the liability arose as the timeframe for conducting alter ego analysis, yet the rules for applying the exceptions to sovereign immunity are inconsistent and, seemingly, of malleable substance.

But what of judicial precedent that seems to point the other way? As a brief example, in the Third Circuit's 2019 *Crystallex* opinion, it held that "so long as PDVSA is Venezuela's alter ego under *Bancec*, the District Court had the power to issue a writ of attachment on that entity's non-immune assets to satisfy the judgment against the country."[188] This holding implies that the Third Circuit considered the time that Crystallex applied for a writ of attachment as the pertinent time. This interpretation is flawed. As argued in Part A, judicial precedent and federal legislation indicate that the court should have looked to the time of the liability-generating activity instead.[189]

Finally, one could argue that the changed circumstances—here, the change in the U.S. government's recognition of Juan Guaidó as legitimate Venezuelan leader in 2019—sufficiently divorce the current situation from the circumstances at the time of the injury. However, not only would this be unfair in the light of the Delaware District Court's granting of a writ of attachment to Crystallex mere months before OIEG's motion for

185. Weidemaier, *supra* note 7, at 827-28.

186. *See, e.g.*, Saudi Arabia v. Nelson, 507 U.S. 349 (1993).

187. Indeed, in certain other countries with similar restrictive approaches to sovereign immunity, such as the United Kingdom, the default position is there need be no "nexus between the asset and the claim [and thus] the creditor could reach property that the state owns and uses for a commercial purpose." Weidemaier, *supra* note 7, at 830.

188. *Crystallex II*, 932 F.3d 126, 139 (3d Cir. 2019), *cert. denied*, 140 S. Ct. 2762 (2020).

189. *See supra* Parts III.A.1 and III.A.2.

the same, but Supreme Court precedent on alter ego analysis after changes in government demonstrates this has little impact.[190] Indeed, the Delaware District Court itself even held, in relation to those very changed circumstances, that:

> [A]ny change in the status of the relationship between PDVSA and the Republic after the Court's August 2018 rulings does not constitute an exceptional circumstance justifying relief under Rule 60(b)(6). Because all the events on which Venezuela relies — including the Guaidó administration's changes with respect to the PDVSA board, the National Assembly's adoption of new laws, the U.S. government's January 2019 recognition of the Guaidó government, and amendment of U.S. sanctions on Venezuela — post-date August 2018, they do not provide a valid basis for relief.[191]

IV. CONCLUSION

Nearly three millennia ago, the Greek poet Hesiod wrote that "timing is best in all things."[192] This Note has shown why this is, unfortunately, all too true for investors whose assets have fallen victim to expropriation by foreign states.

The potential implications of the Delaware District Court's deleterious definition of the pertinent timing are vast. They encompass the typical process and accompanying requirements for an investor to successfully attach the U.S.-based assets of a foreign sovereign, which influence foreign policy if the U.S. government decides to take, or not take, actions that could affect court decisions. Reviewing this decision is key to releasing OIEG and other creditors in the same position from their current legal limbo. Its significance also lies in the sheer importance of precedence on this issue and in this particular jurisdiction—Delaware—for recovering against foreign sovereigns in the United States.[193]

This Note tells the story of such a case. A U.S. creditor (OIEG), having confirmed an ICSID arbitral award in the U.S. federal courts, was blocked from obtaining a writ of attachment by the Delaware District Court based on collateral estoppel arising from the grant of a writ of attachment to

190. *See, e.g.*, Republic of Iraq v. ABB AG, 768 F.3d 145, 164 (2d Cir. 2014) (holding that "the obligations of a foreign state are unimpaired by a change in that state's government").

191. *Crystallex III*, No. 17-mc-151, 2021 U.S. Dist. LEXIS 7793, at *20 (D. Del. Jan. 14, 2021).

192. HESIOD, WORKS AND DAYS 694 (Gregory Nagy trans., Harv. Ctr. for Hellenic Studs. 2020) (700 B.C.E.), https://chs.harvard.edu/primary-source/hesiod-works-and-days-sb [https://perma.cc/3B3Y-3VNQ].

193. *OI Eur. Grp. VI*, No. 19-290, 2022 U.S. Dist. LEXIS 80725, at *14 (D. Del. May 4, 2022) ("[T]he foreign policy considerations and large amounts of money at stake in these cases present exceptional circumstances that make interlocutory review of the pertinent time issue especially appropriate.").

another creditor (Crystallex).[194] Both creditors sought to attach shares in a Delaware company (PDVH) owned by an oil company (PDVSA) belonging to the foreign sovereign (Venezuela); both creditors therefore had to prove that the state-owned company was the alter ego of the foreign sovereign to attach the state-owned company's assets.[195] OIEG, held up by delays at arbitration, simply filed its claim a year later, despite beginning legal action earlier than Crystallex.[196]

OIEG argued that the court's previous adoption of Crystallex's *Bancec* alter ego analysis of PDVSA held collateral estoppel effect on its own claim.[197] However, OIEG's argument ultimately rests on a determination of the pertinent time for making such an alter ego claim (under the *Bancec* factors codified at 28. U.S.C. § 1610(g)).[198] As noted above, if the pertinent time for alter ego analysis is the time of the injury in 2010-11, then since that occurred prior to the change in circumstances, OIEG could either rely on the 2018 *Crystallex* decision—because the political developments in Venezuela and the United States that made reliance on the 2018 *Crystallex* decision invalid had not occurred—or make an independent argument using the time of injury as the pertinent time for alter ego analysis. Yet, if the pertinent time for the alter ego analysis is any other time, such as whenever OIEG submits a petition for a writ of attachment, then OIEG's argument must fail because changed political circumstances mean the courts cannot find the *Bancec* alter ego factors currently apply.[199]

Therein lies the rub. Although there is little definitive law on the matter of the pertinent time for conducting alter ego analysis,[200] federal law, judicial precedent, and public policy all support a determination of the relevant timeframe consistent with general practice: the time of the liability-generating activity. Therefore, since the pertinent time for alter ego analysis is properly the time of the injury—in OIEG's case, the time of the expropriation of OIEG's glass manufacturing assets in 2010-11—then OIEG should either rely on the 2018 *Crystallex* decision in determining that PDVSA is the alter ego of the Venezuelan state or, in the alternative, make a new argument using the time of the expropriation as the pertinent time for alter ego analysis. If this is not permitted, then OIEG's claim may remain in legal limbo until the United States

194. *OI Eur. Grp. V*, No. 19-290, 2022 U.S. Dist. LEXIS 36631 (D. Del. Mar. 2, 2022).

195. *PVD Holding*, 2019 U.S. Dist. LEXIS 214167, at *19 (D. Del. Dec. 12, 2019).

196. OIEG Petition, *supra* note 131 at 4 n.3.

197. *PVD Holding*, 2019 U.S. Dist. LEXIS 214167, at *19 (D. Del. Dec. 12, 2019).

198. *OI Eur. Grp. IV*, No. 19-290, 2021 U.S. Dist. LEXIS 8610, at *3 (D. Del. Jan. 15, 2021).

199. OIEG Petition, *supra* note 131 at 8.

200. *OI Eur. Grp. V*, No. 19-290, 2022 U.S. Dist. LEXIS 36631 at *13 (D. Del. Mar. 2, 2022) ("[g]iven *the lack of precedent* and the significant arguments on both sides") (emphasis added).

government changes its official stance towards the Venezuelan government.[201]

Nevertheless, the Third Circuit should have taken up this challenge. If the courts will not, then Congress should amend the Foreign Sovereign Immunities Act to finally answer this question. It is about time.

201. At the time of writing, the U.S. government has issued a limited license to the Chevron oil company to restart oil extraction activities in Venezuela on the provision, *inter alia*, that profits from the activities are used to pay off U.S.-based creditors; it is unclear if this may also include OIEG. *See* Karen DeYoung, *U.S. Grants Chevron License to Pump Oil in Venezuela*, WASH. POST (Nov. 26, 2022, 5:34 PM), https://www.washingtonpost.com/national-security/2022/11/26/us-grants-chevron-license-pump-oil-venezuela [https://perma.cc/PMR6-FYVW]. Further political developments appear under way in Venezuela which could lead to changes in the treatment of Venezuelan state assets in the United States; however, on January 17, 2023, the U.S. Treasury Department extended its protection of Citgo (the subsidiary of PDVSA held through PDVH) from bond holder creditors for another three months. *See 595. What Does Venezuela-Related General License 5J Authorize?*, *supra* note 104.