

## Practice Update

# Struggle for Control of Venezuelan Assets

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While the ongoing struggle for control over the Venezuelan state between embattled President Nicolas Maduro and National Assembly leader and interim President Juan Guaidó has captured the world's attention in recent weeks, a more discreet—but arguably equally important—battle has been playing out in U.S. federal courts that will help determine control over key Venezuelan state assets, such as the U.S. subsidiaries and corporate holdings of state oil behemoth *Petróleos de Venezuela, SA* (PDVSA).

The Trump Administration's January 2019 decision to recognize Mr. Guaidó as Venezuela's lawful president was followed in February by U.S. Treasury Department Office of Foreign Assets Control (OFAC) measures to block PDVSA-related accounts under the Maduro government's control and redirect those funds to the opposition. On February 13, 2019, the Guaidó-led National Assembly designated a new board of directors for PDVSA-owned U.S. subsidiary CITGO, followed by the designation on February 26, 2019 of attorney general José Ignacio Hernández, with a mandate to protect, control, and recover assets belonging to the republic outside Venezuela.

With billions at stake, one threshold in the opposition's efforts to legitimize its mandate has been to determine whether U.S. courts will recognize legal counsel retained by Mr. Guaidó to represent the republic's interests in ongoing disputes and litigation

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in the United States. Two cases currently working their way through U.S. federal courts may be good harbingers of who will control Venezuela's state-owned assets (and liabilities) moving forward.

The first, *Rusoro Mining Limited, Gold Fields Limited v. Bolivarian Republic of Venezuela* is being heard by the U.S. Court of Appeals for the District of Columbia and involves a \$1.2 billion arbitration award issued in 2016. The case stems from Venezuela's failure to compensate Canadian gold-mining firm Rusoro for seizing its assets without compensation in a 2011 drive to nationalize extractive industries. In a May 1, 2019 ruling on a motion filed by attorneys representing the Maduro government that alleged that legal counsel to Mr. Guaidó have no standing to litigate the case, the court denied the Maduro motion, and argued that the executive branch's "action in recognizing a foreign government...is conclusive on all domestic courts, which are bound to accept that determination." The judges' ruling further stated that, "it has long been established that only governments recognized by the United States...are entitled to access to our courts...").

In a separate similar case, third circuit U.S. court of appeals judge Thomas Ambro ruled on March 20 that Mr. Guaidó's representatives have standing to present arguments in a legal dispute with Canadian mining firm Crystallex International Corp stemming from the 2011 nationalization of Las Cristinas, a Crystallex-controlled mining project. In his ruling, judge Ambro wrote, "We grant the Republic of Venezuela's motion to intervene," in its request for a 120-day stay to allow the national assembly's counsel "sufficient time to evaluate its position in this and other cases."

From a legal standpoint, there are several precedents on the issue of disputed representation of a foreign state by two conflicting authorities. Most notably, in *Guaranty Trust Co. v. United States*, the U.S. Supreme Court said that "[w]hat government is to be regarded here as representative of a foreign

sovereign state is a political, rather than a judicial question, and is to be determined by the political department of the government. The action of that department in recognizing a foreign government and in receiving its diplomatic representatives is conclusive on all domestic courts, which are bound to accept that determination..." 304 U.S. 126 (1938). Furthermore, "the rights of a sovereign state are vested in the state rather than in any particular government which may purport to represent it, and... suit in its behalf may be maintained in our courts only by that government which has been recognized by the political department of our government as the authorized government of the foreign state."

These recent court rulings will help to determine which side in Venezuela's ongoing political dispute has standing to represent Venezuela's legal interests in a wide range of cases. Akerman is closely monitoring the situation and has assembled a multidisciplinary team to address clients' Venezuela-related questions and concerns. The team draws on the strength of Akerman's Latin America practice, as well as other practice areas, such as oil & gas, energy, banking and finance, international trade and customs, government affairs, and tax and arbitration.

This article is part of a continuing Akerman Perspectives' series that focuses on the latest Venezuela-related developments and provides timely updates on relevant topics with leading subject matter experts.

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