

FOREIGN RELATIONS LAW — PRESIDENTIAL POWER — THIRD
CIRCUIT RULES ACTS BY DERECOGNIZED GOVERNMENT
DISSOLVE SOVEREIGN INSTRUMENTALITY’S IMMUNITY. — *O.I.
European Group B.V. v. Bolivarian Republic of Venezuela*, 73 F.4th 157
(3d Cir. 2023).

Venezuela — home to the “largest proven oil reserves” on Earth¹ — vests its hydrocarbon deposits in the Republic as its “inalienable” assets and subjects them to governmental control.² Venezuela’s Constitution enshrines the government’s role in the petroleum sector by assigning it “all of the shares of Petróleos de Venezuela, S.A.,”³ the state-owned oil monopoly commonly known as PDVSA.⁴ PDVSA engages in oil exploration, production, refining, and transportation within Venezuela and across the globe, including in the United States through its wholly owned subsidiary and “crown jewel”: CITGO.⁵ Under Presidents Hugo Chávez and Nicolás Maduro, Venezuela has faced tremendous instability,⁶ including extraordinary threats to PDVSA’s autonomy.⁷ In 2019, after disputed elections, the National Assembly declared that opposition leader Juan Guaidó had become Venezuela’s Interim President.⁸ The same day, the U.S. executive branch “officially” recognized Guaidó⁹ and simultaneously proclaimed it “does not recognize the Maduro regime” as being part of “the government of Venezuela.”¹⁰ The National Assembly enacted a “Transition to Democracy” statute,¹¹ which among other

¹ *Jiménez v. Palacios*, 250 A.3d 814, 822 (Del. Ch. 2019), *aff’d*, 237 A.3d 68 (Del. 2020).

² CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA Dec. 20, 1999, art. 12.

³ *Id.* art. 302; *id.* art. 303.

⁴ *See, e.g., Crystallex Int’l Corp. v. Bolivarian Republic of Venezuela (Crystallex II)*, 932 F.3d 126, 147 (3d Cir. 2019).

⁵ *OI Eur. Grp. B.V. v. Bolivarian Republic of Venezuela*, 663 F. Supp. 3d 406, 413–14, 424 (D. Del.), *aff’d*, 73 F.4th 157 (3d Cir. 2023), *cert. denied*, 144 S. Ct. 549 (2024).

⁶ *Jiménez*, 250 A.3d at 821. In 2019, following a presidential election “many critics say was rigged,” Venezuela faced “the biggest economic collapse in human history outside of war or state collapse.” Colleen Walsh, *Understanding Venezuela’s Collapse*, HARV. GAZETTE (Feb. 12, 2019) (quoting Professor Ricardo Hausmann), <https://news.harvard.edu/gazette/story/2019/02/harvard-expert-tries-to-make-sense-of-venezuelas-collapse> [<https://perma.cc/PRR2-GPRX>].

⁷ In 2003, the Chávez government “fired nearly 40% of” PDVSA’s employees “because of their role in opposing the Government”; these threats continued under Maduro: PDVSA workers were told “they would be fired unless they voted in Maduro’s controversial election.” *Crystallex Int’l Corp. v. Bolivarian Republic of Venezuela (Crystallex I)*, 333 F. Supp. 3d 380, 407–08 (D. Del. 2018).

⁸ *See OI Eur. Grp.*, 663 F. Supp. 3d at 418 (“Maduro disqualified his opposition and claimed to win reelection.” (citing *Jiménez*, 250 A.3d at 821)).

⁹ Statement Announcing United States Recognition of National Assembly President Juan Gerardo Guaidó Márquez as Interim President of Venezuela, 2019 DAILY COMP. PRES. DOC. 1 (Jan. 23, 2019); Exec. Order No. 13,857, 3 C.F.R. 251 (2020) (describing “Maduro regime” as “illegitimate”).

¹⁰ Press Release, Michael R. Pompeo, Sec’y of State, Continuing U.S. Diplomatic Presence in Venezuela (Jan. 23, 2019), <https://2017-2021.state.gov/continuing-u-s-diplomatic-presence-in-venezuela> [<https://perma.cc/D2XB-69UY>].

¹¹ *Estatuto que rige la Transición a la democracia para restablecer la vigencia de la Constitución de la República Bolivariana de Venezuela*, GACETA LEGISLATIVA No. 1 Leg. 2016–2021 Extraordinario (Feb. 6, 2019) [hereinafter *Democracy Transition Statute*].

things, directed Guaidó to appoint an ad hoc PDVSA board,¹² something he promptly did.¹³ The Maduro-controlled Constitutional Court struck down the statute and Guaidó's PDVSA appointments as an "assault on the rule of law."¹⁴ However, U.S. state and federal courts, applying the President's "unambiguous" pronouncements, have held (1) Guaidó's government, including the ad hoc PDVSA board, to be Venezuela's "sole effective government" (and thus the Republic's only representative in U.S. courts) and (2) Maduro's regime to no longer be "legitimate parts of the Venezuelan government."¹⁵ Recently, in *OI European Group B.V. v. Bolivarian Republic of Venezuela*,¹⁶ the Third Circuit held that when Guaidó's recognized government and Maduro's affirmatively¹⁷ derecognized one exert dueling control over PDVSA, courts "must consider" the "actions of both the Guaidó and Maduro governments as the totality of the sovereign conduct of Venezuela,"¹⁸ on the theory that the Foreign Sovereign Immunities Act's¹⁹ (FSIA) use of "foreign state" (rather than "foreign government") required the court to examine — and, critically, accord legal weight to — the legal acts of "both" governments.²⁰ But because so holding gave legal effect to the acts of an "illegitimate"²¹ regime made after the executive branch "explicitly withdrew" its "recognition,"²² the court implicitly extended the Act of State doctrine beyond its separation of powers foundation and simultaneously risked undermining the President's "'exclusive' and 'conclusive'" power to recognize — for all three branches of our government — "the legitimacy of other states and governments."²³ Reading "foreign state" to mean

¹² *Id.* ch. VII, art. 34.

¹³ See *Acuerdo que Autoriza el Nombramiento para Ejercer los Cargos del Órgano de Intervención, Llamado "Junta Administradora Ad-Hoc", que Asuma las Funciones de la Asamblea de Accionista y Junta Directiva de Petróleos de Venezuela S.A.*, GACETA LEGISLATIVA No. 4 (Feb. 20, 2019) [hereinafter *Nat'l Assembly Ad Hoc Bd. Act*]; see also Venez. Presidential Decree No. 3 (Apr. 10, 2019).

¹⁴ El Tribunal Supremo de Justicia [Supreme Tribunal of Justice] Feb. 14, 2019, 17-0001 (Venez.); Jiménez v. Palacios, 250 A.3d 814, 821, 825 n.26 (explaining that the Supreme Tribunal of Justice is "packed . . . with judges reportedly loyal to Maduro"), *aff'd*, 237 A.3d 68 (Del. 2020).

¹⁵ See, e.g., Jiménez, 250 A.3d at 830–32; PDVSA US Litig. Tr. v. Lukoil Pan Ams. LLC, 65 F.4th 556, 562–63 (11th Cir. 2023) (citing *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918)) (holding "[t]he district court cannot question the validity of then-President Guaidó's appointment of an alternative board of directors"); cf. *Valores Municipales, S.L. v. Bolivarian Republic of Venezuela*, No. 19-cv-46, 2023 WL 3453633, at *7 (D.D.C. May 15, 2023) ("To be sure, the identity of a foreign sovereign's representative before a federal court is left to the Executive." (citing *Guar. Tr. Co. v. United States*, 304 U.S. 126, 137–38 (1938))), *aff'd*, 87 F.4th 510 (D.C. Cir. 2023).

¹⁶ 73 F.4th 157 (3d Cir. 2023), *cert. denied*, 144 S. Ct. 549 (2024).

¹⁷ See *The Maret*, 145 F.2d 431, 442 (3d Cir. 1944).

¹⁸ *OI Eur. Grp.*, 73 F.4th at 168, 170.

¹⁹ 28 U.S.C. §§ 1330, 1602–1611.

²⁰ See *OI Eur. Grp.*, 73 F.4th at 168–69 (quoting 28 U.S.C. § 1604).

²¹ Exec. Order No. 13,857, 3 C.F.R. 251, 251 (2020).

²² *OI Eur. Grp.*, 73 F.4th at 164.

²³ *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 10, 17 (2015) (emphasis added) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring)); see Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 829 n.83 (1997).

anything *other* than the presidentially recognized “government” creates a gap between both terms that the Supreme Court has repeatedly said it is not competent to fill,²⁴ due to our tradition that Presidents are “the sole organ of the nation in its external relations.”²⁵

On October 25, 2010, Hugo Chávez, then-President of Venezuela, appeared on evening TV, announcing: “The expropriation of that glass company, what’s it called? — Owens-Illinois! — is already all set. Let it be expropriated.”²⁶ The next morning, he decreed “the forcible acquisition” of Owens-Illinois’s Venezuelan property;²⁷ later that day, the military arrived at the company’s Los Guayos factory.²⁸ The plaintiffs, OIEG and five companies who suffered expropriations totaling \$2.7 billion,²⁹ won arbitration awards against Venezuela³⁰ for violating bilateral investment treaties,³¹ confirmed the awards in federal court (thus converting them into judgments),³² and registered them in Delaware.³³ The companies sought to attach PDVSA’s U.S. assets, namely CITGO,³⁴ on an established “reverse veil piercing” theory under which courts “disregard” a sovereign instrumentality’s “separate legal personhood”³⁵ if it “is so extensively controlled by” its parent country that it “may be held liable” for the Republic’s debts as the country’s corporate “alter ego.”³⁶ (In 2018, Crystallex, another of Chávez’s expropriation victims, successfully used this mechanism to attach PDVSA’s assets by showing that

²⁴ *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918) (“Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but is a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances.” (quoting *Jones v. United States*, 137 U.S. 202, 212 (1890))).

²⁵ *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) (quoting 10 ANNALS OF CONG. 613 (1800) (statement of Rep. John Marshall)).

²⁶ *OI Eur. Grp. B.V. v. República Bolivariana de Venezuela*, ICSID Case No. ARB/11/25, Award, ¶ 110 (Mar. 10, 2015) [hereinafter *ICSID Case*], <https://www.italaw.com/sites/default/files/case-documents/italaw7100.pdf> [<https://perma.cc/6WXZ-NPKK>].

²⁷ *Venez. Presidential Decree No. 7,751*, reprinted in GACETA OFICIAL No. 39,538, at 380.490–.491 (Oct. 26, 2010); see also *ICSID Case*, *supra* note 26, ¶ 111.

²⁸ *ICSID Case*, *supra* note 26, ¶ 541.

²⁹ Owens-Illinois European Group B.V., sometimes called “OIEG,” is the lead creditor in this case. For the remaining creditors, see *OI Eur. Grp.*, 73 F.4th at 162 n.2. See also *OI Eur. Grp. B.V. v. Bolivarian Republic of Venezuela*, 663 F. Supp. 3d 406, 414–17, 424 (D. Del. 2023).

³⁰ *OI Eur. Grp.*, 73 F.4th at 162–63. See generally *ICSID Case*, *supra* note 26.

³¹ *ICSID Case*, *supra* note 26, ¶ 984; see also Agreement on Encouragement and Reciprocal Protection of Investments, Neth.-Venez., Oct. 22, 1991, 1788 U.N.T.S. 45.

³² See, e.g., *Crystallex Int’l Corp. v. Bolivarian Republic of Venezuela*, 244 F. Supp. 3d 100, 122 (D.D.C. 2017); see also 22 U.S.C. § 1650a(a).

³³ See, e.g., *Crystallex I*, 333 F. Supp. 3d 380, 426 (D. Del. 2018).

³⁴ Clifford Krauss, “It’s the Only Way to Get Paid”: A Struggle for Citgo, Venezuela’s U.S. Oil Company, N.Y. TIMES, Oct. 17, 2019, at B1 (“Citgo is . . . Venezuela’s most valuable overseas asset.”).

³⁵ *First Nat’l City Bank v. Banco Para El Comercio Exterior de Cuba (Bancec)*, 462 U.S. 611, 625, 628, 633 (1983) (grounding veil-piercing mechanism for sovereign instrumentalities in “internationally recognized equitable principles”); see also W. Mark C. Weidemaier, *Piercing the (Sovereign) Veil: The Role of Limited Liability in State-Owned Enterprises*, 46 BYU L. REV. 795, 796, 802, 838 (2021).

³⁶ *OI Eur. Grp.*, 73 F.4th at 163, 165, 167–68 (quoting *Crystallex II*, 932 F.3d 126, 140 (3d Cir. 2019)).

Venezuela, under then-President Maduro, exerted “extensive control over PDVSA”,³⁷ the Third Circuit affirmed Crystallex’s attachment of PDVSA’s assets under *First National City Bank v. Banco Para El Comercio Exterior de Cuba*’s³⁸ (*Bancec*) “alter ego” test in *Crystallex II*.³⁹ Looking “to seize on Crystallex’s success,”⁴⁰ OIEG brought parallel attachment proceedings in 2019.⁴¹ But between *Crystallex II* and this case, the National Assembly replaced Maduro with Guaidó, and the United States recognized Guaidó’s government as Venezuela’s “only legitimate” government,⁴² so the district court required OIEG to independently re-prove PDVSA’s “alter ego” status because Venezuela and PDVSA were now “under different control under a new legal regime”: that of Juan Guaidó.⁴³ The *Bancec* alter-ego inquiry thus began anew. But this time the district court “held that the relevant analysis” under *Bancec* “must focus on” the Guaidó government because Guaidó’s is the only regime recognized by the President “as the legitimate government” and the power to recognize “a foreign government” is “reserved exclusively to the Executive Branch.”⁴⁴ The court surveyed the Guaidó government’s actions and concluded that it, like its predecessor, exercised “extensive direction and control over PDVSA.”⁴⁵ Venezuela appealed.

The Third Circuit affirmed.⁴⁶ Writing for the panel, Judge Matey⁴⁷ held that PDVSA “remains” Venezuela’s alter ego under *Bancec*’s rubric.⁴⁸ But instead of cabining its alter-ego inquiry to the Guaidó government’s actions, as the district court did, the Third Circuit credited “both the Guaidó and Maduro governments as the totality of the sovereign conduct of Venezuela,”⁴⁹ despite acknowledging that the President “explicitly withdrew recognition of the Maduro Government” four years

³⁷ *Crystallex I*, 333 F. Supp. 3d at 399.

³⁸ 462 U.S. 611 (1983).

³⁹ See *Crystallex II*, 932 F.3d at 136.

⁴⁰ *OI Eur. Grp.*, 73 F.4th at 164.

⁴¹ See, e.g., *OI Eur. Grp. B.V. v. Bolivarian Republic of Venezuela*, 419 F. Supp. 3d 51, 53 (D.D.C. 2019).

⁴² Exec. Order No. 13,857, 3 C.F.R. 251, 251 (2020); Pompeo, *supra* note 10.

⁴³ *OI Eur. Grp. B.V. v. Bolivarian Republic of Venezuela*, No. 19-mc-290, 2019 WL 6785504, at *7 (D. Del. Dec. 12, 2019).

⁴⁴ *OI Eur. Grp. B.V. v. Bolivarian Republic of Venezuela*, 663 F. Supp. 3d 406, 432, 442 (D. Del. 2023) (citing *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 18–19, 30 (2015)) (“Federal courts have no authority to question a decision by the Executive Branch on this issue” because it is the “Executive Branch’s ‘authority to speak as the sole organ’ of government on external affairs.” (quoting *United States v. Belmont*, 301 U.S. 324, 330 (1937))).

⁴⁵ See *id.* at 433.

⁴⁶ *OI Eur. Grp.*, 73 F.4th at 163.

⁴⁷ Judge Matey was joined by Judge Bibas and Judge Freeman.

⁴⁸ *OI Eur. Grp.*, 73 F.4th at 174. The court declined to review a question of state versus federal attachment law also raised by the parties. *Id.* at 174–76.

⁴⁹ *Id.* at 170. The district court primarily focused on the Guaidó government’s relationship with PDVSA, evaluating both governments’ actions only in the alternative, while the Third Circuit took the exact opposite approach: resting its analysis on *both* governments’ actions, holding only alternatively that the Guaidó government’s actions alone satisfied *Bancec*’s test. *Id.* at 174 n.21.

earlier.⁵⁰ The court grounded its decision in the FSIA's "[t]ext, tradition, and legislative aim," concluding that Congress's use of "foreign state" (instead of "foreign government") meant courts "must consider" derecognized governments' actions in their *Bancec* analyses.⁵¹

On the text, the court pointed to 28 U.S.C. § 1604's use of "foreign state," and then quoted *Samantar v. Yousuf*⁵² for the proposition that, "on its face," foreign state "indicates a body politic that governs a particular territory."⁵³ The court also considered various secondary sources,⁵⁴ along with the fact that in *Bancec* itself "the Supreme Court never mentioned the Castro Regime" (referring instead to "actions taken by the sovereign"), to buttress its reading of "foreign state" in the FSIA to mean the "nation — rather than the regime presently in power."⁵⁵

Turning to "tradition," the court quoted Blackstone's view that "sovereign power" remains constant despite changes in government.⁵⁶ The opinion then cited four Supreme Court cases to support the distinction between government representatives and their sovereign. *The Sapphire*,⁵⁷ the Third Circuit observed, embraced this view: "the national sovereignty or its rights" does not change when the "party in power" changes.⁵⁸ The court also pointed to *Guaranty Trust Co. v. United States*,⁵⁹ which held that a change in recognized government did not affect the sovereign's rights.⁶⁰ The opinion again cited *Samantar* for the suggestion that a state, under the FSIA, "is more than its government" because the FSIA sweeps in a "state's political subdivisions, agencies, and instrumentalities."⁶¹ Finally, the court quoted *United States v. Curtiss-Wright Export Corp.*⁶² to note: "[R]ulers come and go; governments end and forms of government change; but sovereignty survives."⁶³

On legislative aim, the court reasoned that "the FSIA was enacted against" a backdrop of case-by-case executive pronouncements, and

⁵⁰ *Id.* at 164.

⁵¹ *Id.* at 168.

⁵² 560 U.S. 305 (2010).

⁵³ *OI Eur. Grp.*, 73 F.4th at 168–69 (quoting *Samantar*, 560 U.S. at 314). *Samantar* addressed whether an individual foreign official was a "foreign state" under the FSIA. 560 U.S. at 308.

⁵⁴ *OI Eur. Grp.*, 73 F.4th at 169 (citing *Foreign State*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Foreign State*, BLACK'S LAW DICTIONARY (4th ed. 1968); JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 45–46 (2d ed. 2007); RESTATEMENT (THIRD) OF FOREIGN RELS. L. OF THE U.S. § 201 (AM. L. INST. 1987)).

⁵⁵ *Id.* at 169 (emphasis added) (quoting *Bancec*, 462 U.S. 611, 621 (1983)).

⁵⁶ *Id.* (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *49).

⁵⁷ 78 U.S. (11 Wall.) 164 (1870).

⁵⁸ *OI Eur. Grp.*, 73 F.4th at 169 (quoting *The Sapphire*, 78 U.S. (11 Wall.) at 168).

⁵⁹ 304 U.S. 126 (1938).

⁶⁰ *OI Eur. Grp.*, 73 F.4th at 169 (citing *Guar. Tr. Co.*, 304 U.S. at 137).

⁶¹ *See id.* at 170 (quoting *Samantar v. Yousuf*, 560 U.S. 305, 314 (2010)). Notably, this formulation *vertically* sweeps in political entities below the recognized foreign government, not, as here, *horizontally* across multiple competing national governments.

⁶² 299 U.S. 304 (1936).

⁶³ *OI Eur. Grp.*, 73 F.4th at 170 (quoting *Curtiss-Wright*, 299 U.S. at 316).

Congress sought to eliminate the State Department's role in immunity decisions, so the court should not reinstate the Executive's prerogative.⁶⁴

Applying *Bancec*'s factors, the Third Circuit held Venezuela's legitimate and "illegitimate" governments, together, exerted significant control over PDVSA's global operations, and among other things pointed to the fact that in March 2019 — months after he was officially derecognized by the United States⁶⁵ — "Maduro ordered the transfer of PDVSA's European Office from Lisbon to Moscow" and that "[s]enior members of the Maduro Regime used PDVSA's aircraft *for state purposes* . . . well after the 2019 election."⁶⁶ The court also gave weight to PDVSA's rescission of service station licenses pursuant to "Maduro's Executive Order 4.090," an act promulgated a year after derecognition.⁶⁷ The court concluded that "all the *Bancec* factors weigh towards finding an alter-ego relationship" between PDVSA and its parent sovereign.⁶⁸

According legal effect to any of these post-derecognition actions by Maduro, as acts of the "foreign state" of Venezuela, has implications for the Act of State doctrine — the "classic American statement" of which is that "courts of one country will not sit in judgment on the acts of the government of another."⁶⁹ Grounding the doctrine in "domestic separation of powers considerations,"⁷⁰ the Supreme Court clarified that the nonreviewability of sovereigns' legal acts covers those made "by a foreign sovereign government, extant and *recognized by this country*."⁷¹ The doctrine's inverse is also true: courts "may not examine the *effect* of decrees of the unrecognized foreign sovereign" when executive nonrecognition of a foreign sovereign and "its decrees" is announced.⁷²

In holding Maduro's post-derecognition actions as acts of state legally capable of binding actors like PDVSA — rather than holding them null, and thus incapable under *Bancec* of demonstrating any legal control by the state over PDVSA — the Third Circuit seems to have extended the reach of the Act of State doctrine to sweep in enactments promulgated by derecognized regimes, even when those acts directly conflict with the recognized government's acts.⁷³ Observing the court's treatment of the contrary legal actions taken by the Guaidó and Maduro governments reveals the crux of the issue: by crediting Maduro's post-

⁶⁴ *Id.* (quoting *Samantar*, 560 U.S. at 323 n.19).

⁶⁵ See Exec. Order No. 13,857, 3 C.F.R. 251, 251 (2020); Pompeo, *supra* note 10.

⁶⁶ *OI Eur. Grp.*, 73 F.4th at 172–73 (emphasis added).

⁶⁷ *Id.* at 172; see Venez. Presidential Decree No. 4.090, *reprinted in* GACETA OFICIAL No. 6.501 Extraordinario (Jan. 5, 2020).

⁶⁸ *OI Eur. Grp.*, 73 F.4th at 174.

⁶⁹ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416 (1964) (quoting *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897)).

⁷⁰ *Bradley & Goldsmith*, *supra* note 23, at 829 n.83 (citing *Sabbatino*, 376 U.S. at 421–24).

⁷¹ *Sabbatino*, 376 U.S. at 428 (emphasis added).

⁷² *The Maret*, 145 F.2d 431, 442 (3d Cir. 1944) (emphasis added).

⁷³ Compare, e.g., *Nat'l Assembly Ad Hoc Bd. Act*, *supra* note 13, with, e.g., Venez. Presidential Decree No. 4.090, *supra* note 67. See generally *Sabbatino*, 376 U.S. at 423–28.

derecognition orders as acts of the Venezuelan state evidencing its “extreme control of PDVSA”⁷⁴ *over* the directly contradictory laws passed by the Guaidó government to wrest control of PDVSA from Maduro,⁷⁵ the court held the recognized government responsible for legal actions originating from a regime the Executive had years earlier derecognized and deemed “illegitimate.”⁷⁶ The Third Circuit’s holding thus creates an unheralded entity in the FSIA framework: a derecognized former government capable of issuing legal directives that “must” be “consider[ed]” acts of the “foreign state” under the FSIA and *Bancec*.⁷⁷ And it justified such a creation not under the Act of State doctrine’s “‘constitutional’ underpinnings,” namely, respect for “basic relationships between branches of government,” but on the FSIA’s “[t]ext, tradition, and legislative aim,” divorced from separation of powers concerns or even discussion.⁷⁸ This reading is also in tension with the FSIA’s definition of “foreign state,” which includes “political subdivision[s]” and “agenc[ies] or instrumentalit[ies],” suggesting “foreign state” means a single political entity *vertically* integrating its subordinate parts, not one sweeping *horizontally* across competing national governments.⁷⁹

The FSIA’s reference to a “foreign state” likely assumes that executive recognition determines which government’s actions constitute those of the state.⁸⁰ The Executive agrees, stating that “[n]othing” in the FSIA “even hints at” congressional intent “to transfer recognition authority from the President to the courts,” and inferring so raises “serious constitutional questions.”⁸¹ This reading aligns with *Sabbatino*’s limitation to acts made “by a foreign sovereign government, extant and *recognized* by this country.”⁸² Even if the FSIA’s use of “foreign state” were susceptible to the inference that multiple dueling governments could together make up the “state,” there is no textual basis for limiting the President’s exclusive recognition power⁸³ to operate only at the “foreign state” level. But even granting such an inference, the FSIA’s terms ought to be read in light of the statute’s constitutional, not just plausibly textual, domain. When Congress legislates with respect to foreign sovereign recognition, it lacks its usual plenary policy discretion.⁸⁴ Instead, “Congress has the general power to legislate *in support of* the President’s foreign policy goals.

⁷⁴ *OI Eur. Grp.*, 73 F.4th at 172.

⁷⁵ *Nat’l Assembly Ad Hoc Bd. Act*, *supra* note 13; *Democracy Transition Statute*, *supra* note 11.

⁷⁶ Exec. Order No. 13,857, 3 C.F.R. 251, 251 (2020).

⁷⁷ *OI Eur. Grp.*, 73 F.4th at 168; *see* 28 U.S.C. §§ 1602–1611.

⁷⁸ *Compare Sabbatino*, 376 U.S. at 423, *with OI Eur. Grp.*, 73 F.4th at 168–74.

⁷⁹ 28 U.S.C. § 1603(a); *see supra* note 61 and accompanying text.

⁸⁰ *See Owens v. Republic of Sudan*, 531 F.3d 884, 892–93 (D.C. Cir. 2008).

⁸¹ Final Brief for the United States as Intervenor and Amicus Curiae Supporting the Defendant at 26, *O’Byran v. Holy See*, 556 F.3d 361 (6th Cir. 2009) (No. 07-5078), 2007 WL 4963197, at *26 (citing *Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991)).

⁸² *Sabbatino*, 376 U.S. at 428 (emphasis added).

⁸³ *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 10 (2015).

⁸⁴ *Id.* at 17 (holding “Congress may not qualify” the formal act of recognition by the Executive).

But . . . [s]ince it is derivative of the President's power, it must be exercised in coordination with, and *not in opposition to*, the President."⁸⁵

By crediting the Maduro regime's "official acts," issued after it ceased being "recognized by the United States,"⁸⁶ as acts of state demonstrating "extreme" state control under *Bancec*,⁸⁷ the Third Circuit has effectively ruled that unrecognized — even *derecognized* — governments can, to some extent, have their acts count under the Act of State doctrine. The court's reliance "on actions taken by the Maduro regime *after 2019*" as acts of the Venezuelan state is "a contested legal theory" because it "disregard[s] the executive branch's recognition of the sovereign leadership of a country," which implicates separation of powers concerns.⁸⁸ Moreover, adopting this theory likely forces "future State Departments . . . to clean up the mess" by, for example, withholding sanctions licenses to counteract these sort of "alter ego" findings by courts⁸⁹ — which reinvents the exact executive prerogative the Third Circuit claimed to disavow in its construction of the FSIA.⁹⁰

The Third Circuit's reading of "foreign state" in the FSIA to mean that courts "must consider," or even *may* consider, the legal acts of both recognized and derecognized regimes has implications for the President's recognition authority. It creates legal space between "foreign state" and "foreign government," implying the existence of "foreign governments" that could bind the foreign state's instrumentalities (for example through bond sales or, as here, waiving immunity) in U.S. courts *despite* the President recognizing a different government as solely legitimate.⁹¹ Until this ruling, the President's exclusive power to formally recognize foreign governments implied a monopoly on Act of State status for that government's legal enactments.⁹² Now, the situation is murkier for Presidents. The question of "[w]ho is the sovereign," at least under the FSIA, no longer seems to be just "a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges."⁹³

⁸⁵ *Id.* at 50 (Thomas, J., concurring in the judgment in part and dissenting in part) (alterations in original) (emphases added) (quoting Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 255–56 (2001)).

⁸⁶ RESTATEMENT (FOURTH) OF FOREIGN RELS. L. OF THE U.S. § 441 reporters' note 8 (AM. L. INST. 2018).

⁸⁷ *OI Eur. Grp.*, 73 F.4th at 172.

⁸⁸ Letter from Consejo de Administración y Protección de Activos, República Bolivariana de Venezuela, to the Hon. Antony Blinken, U.S. Sec'y of State, at 6 (June 28, 2023), <https://efile.fara.gov/docs/7049-Informational-Materials-20230726-4.pdf> [<https://perma.cc/NZ7W-8QVK>].

⁸⁹ *Id.*

⁹⁰ *OI Eur. Grp.*, 73 F.4th at 170.

⁹¹ *Cf.* Petition for a Writ of Certiorari at 20, *Bolivarian Republic of Venezuela v. OI Eur. Grp. B.V.*, 144 S. Ct. 549 (2024) (No. 23-140), 2023 WL 5321854, at *20.

⁹² *See* *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 10, 17 (2015); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423, 428 (1964).

⁹³ *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 766 (1972) (plurality opinion) (quoting *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918)).