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PDVSA's Win-Win Option: A Bankruptcy Framework Using Chapter 15 and Section 363 to Maximize PDVSA's Debt Restructuring Options

Ryan C. Nichols†

I. Introduction

The Bolivarian Republic of Venezuela is experiencing one of the world's worst economic crises in recent history and by far the worst in its history.[1] Promulgated by failed policies of its two most recent presidents, current President Nicolás Maduro and the late Hugo Chávez, Venezuela's future economic stability looks bleak. Currently, Venezuela's debt exceeds its Gross Domestic Product (GDP) by over 100%, hyperinflation is over 400%, unemployment is around 20%, and Venezuela is struggling to be current on its bond payments.[2] This economic crisis has led to a shortage of basic

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1 *Venezuela's Worst Economic Crisis: What Went Wrong?*, AL JAZEERA (May 3, 2018), http://www.aljazeera.com/indepth/features/2017/05/venezuela-worst-economic-crisis-wrong-170501063130120.html [https://perma.cc/2QXF-BK9R].

2 *Id.*

necessities for its people, such as food and medicine, because the country has prioritized paying its debts in lieu of these supplies.[3] Thus, the debt of Venezuela and its wholly owned oil company, Petróleos de Venezuela, S.A. (PDVSA), require a restructuring in order to prevent widespread default. This Note focuses on restructuring PDVSA's debt, which will, given the dire economic situation, be no easy task.[4]

PDVSA generates about 95% of Venezuela's revenue,[5] which further complicates the restructuring scenario because it is so vital to the economy—as PDVSA goes, so does Venezuela. Notably, PDVSA possesses assets located outside of Venezuela, such as shares of its subsidiary, PDV Holding, and its most valuable asset CITGO Petroleum—both of which are Delaware corporations that could be subject to seizure from creditors.[6] Along with the uncertainty of how to protect its assets in PDV Holding and CITGO,[7] PDVSA's creditors vary dramatically. PDVSA owes billions of dollars of claims to secured and unsecured creditors, bond holders, promissory note holders, and, possibly, judicial

3 Patrick Gillespie et al., *Venezuela: How a Rich Country Collapsed*, CNN MONEY (July 30, 2017), http://money.cnn.com/2017/07/26/news/economy/venezuela-economic-crisis/index.html [https://perma.cc/K98Q-9VL2] [hereinafter Gillespie et al.].

4 This Note builds upon the ideas and analysis from another paper I coauthored, *PDVSA's Hail Mary: A Chapter 15 Bankruptcy Solution*, (with Rich Gittings, Samantha Hovaniec, Matt Taylor, and Heather Werner), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3161604.

5 Dion Rabouin, *Venezuela Default More Likely on Sovereign Bonds Than PDVSA's: Bondholders*, REUTERS (Dec. 15, 2017), https://www.reuters.com/article/us-venezuela-debt/venezuela-default-more-likely-on-sovereign-bonds-than-pdvsas-bondholders-idUSKBN1E92UX [https://perma.cc/RT2V-2YY8].

6 Tom Hals, *Venezuelan Creditors Eyeing Citgo Assets Face Uphill Battle,* REUTERS (Dec. 14, 2017), https://www.reuters.com/article/us-venezuela-citgo-bondholders-analysis/venezuelan-creditors-eyeing-citgo-assets-face-uphill-battle-idUSKBN1E838E [https://perma.cc/9XHB-8MK3].

7 Venezuela can seek a discharge or protection for its assets in PDV Holdings and CITGO by having both entities file a Chapter 11 bankruptcy in the United States or move the account receivables or shares to a bank in Venezuela to escape seizure from creditors. *See* Mark Walker & Richard Cooper, *Venezuela's Restructuring: A Realistic Framework* 11–12, MILLSTEIN & CO. (Sept. 19, 2017) *available at* http://dx.doi.org/10.2139/ssrn.3039678 [https://perma.cc/7DSG-HUBQ] [hereinafter Walker & Cooper],. However, it would be more beneficial if PDV Holding and CITGO attempted to receive protection from PDVSA's Chapter 15 proceeding. This would mean their assets would be protected and their debts discharged or significantly reduced.

claimants.[8] The reluctance of creditors to provide funding and credit to PDVSA due to the dire situation, along with PDVSA's dependence on oil and third parties, makes for an uphill battle for PDVSA to repay its debt.[9]

Adding to the complexity, various nations, including the United States, have imposed sanctions against the Venezuelan government for its corruption and failure to create sustainable economic conditions.[10] These sanctions prohibit PDVSA from issuing any new debt,[11] presenting an almost impossible barrier to overcome for any restructuring.[12] The restructuring plan detailed below assumes that these sanctions will be lifted and leaves PDVSA with one question going forward: what is the best way to restructure its debt?

This Note posits a solution in the form of a Chapter 15 foreign bankruptcy proceeding of the United States Bankruptcy Code[13] to answer PDVSA's debt restructuring question.[14] If successful, this plan protects PDVSA's assets and seriously reduces or completely eliminates the debt of PDVSA and its Venezuelan entities from

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8 *Id.* at 3.

9 *Id.* at 13–14.

10 *See, e.g.*, Resolution on EU Political Relations with Latin America, EUR. PARL. DOC. P8_TA (2017)0345 (2017), [hereinafter EU Resolution of September 13] *available at* http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2017-0345+0+DOC+PDF+V0//EN [https://perma.cc/76ND-BS6F] (EU sanctions); *see also* Exec. Order No. 13,808, 82 Fed. Reg. 41,155 (Aug. 24, 2017); Exec. Order No. 13,692, 80 Fed. Reg. 12,747 (Mar. 8, 2015).

11 *See, e.g.*, EU Resolution of September 13, *supra* note 10.

12 One way, if not the only, to restructure under the sanctions requires an entity to petition to the Office of Foreign Assets Control to obtain a license to engage in the prohibited activity. *OFAC License Application Page*, TREASURY.GOV, https://www.treasury.gov/resource-center/sanctions/Pages/licensing.aspx [https://perma.cc/U8Z2-TWG9] (last visited Mar. 20, 2018).

13 Ch. 15 of the U.S. Bankruptcy Code enables a U.S. bankruptcy court to recognize a foreign bankruptcy proceeding, as long as all of the requirements are met, and then provides assistance with the proceeding. Part of Ch. 15's goals are to protect financially troubled business that involve cross-border insolvencies. The U.S. court assists with the foreign proceeding in order to provide protections of trade, investment, employment, as well as protect the interests of creditors and debtors. *See* 11 U.S.C.§ 1501(a) (2018) (stating the purpose of § 1501). This Note focuses on restructuring PDVSA bonds, and not Venezuela's bonds, because of the vital importance of PDVSA to Venezuela. A restructuring of these bonds will in turn benefit Venezuela.

14 The idea of putting PDVSA through a Chapter 15 bankruptcy proceeding came from the work of Mark A. Walker & Richard J. Cooper, in their publication *Venezuela's Restructuring: A Realistic Framework*, *supra* note 7. This Note aims to build upon their ideas and to resolve problems that they did not address.

promissory note holders, bond debt, and any judicial claims. Additionally, this proceeding may also protect the assets and discharge the debt for PDVSA's non-Venezuelan entities, such as PDV Holding and CITGO.[15] Importantly, even if this plan is unsuccessful, pursuing a Chapter 15 bankruptcy provides PDVSA benefits and leverage while the bankruptcy court makes its decision. Thus, this plan provides a win-win option for PDVSA.

PDVSA's debts definitely require a restructuring, but given PDVSA's importance to the Venezuelan economy, a restructuring where Venezuela relinquishes its control of PDVSA is not an option because it presents a paramount risk that could prove detrimental to the Venezuelan economy. Yet, maintaining ownership in a Chapter 15 bankruptcy restructuring could violate the absolute priority rule of U.S. bankruptcy law that prevents debtors from maintaining ownership unless all unsecured creditors are paid in full.[16] Fortunately, Venezuela maintains control without violating the absolute priority rule under this Chapter 15 solution by utilizing a Chapter 11 § 363 sale that discharges any adverse interests on PDVSA's assets,[17] similar to the sale utilized in the General Motors bankruptcy in the United States.[18] A new government owned entity, New PDVSA, would then emerge from the sale with PDVSA's assets without any encumbrances. Before consummating the sale, PDVSA must file under a public-sector insolvency law—which will first need to be passed by Venezuela—and PDVSA must petition for a Chapter 15 proceeding, meet the eligibility requirements of § 109(a) of the Bankruptcy Code, and satisfy the recognition requirements of § 1515 and § 1517 of the Bankruptcy Code in order to receive relief under Chapter 15.[19] If PDVSA fails to meet any of

15 It is possible that PDVSA's non-Venezuelan entities, such as PDV Holding and CITGO, may receive protection and a discharge from PDVSA's Chapter 15 proceeding if they argue PDVSA's proceeding significantly relates to their business. *See, e.g.*, Order Recognizing Foreign Proceeding and Granting Additional Relief at 3, *In re* Hibu, Inc., No 8-14-70323 (Bankr. E.D.N.Y. Feb. 27, 2014) (recognizing "foreign nonmain proceedings" as distinct from the court's adjudication).

16 *See* 11 U.S.C. §§ 1129(b)(2)(B), 1115(a) (2018) (describing provisions for unsecured creditor claims, and defining an individual's estate's property).

17 *See* 11 U.S.C. § 363(f) (2018).

18 *See In re* GMC, 407 B.R. 463 (Bankr. S.D.N.Y. 2009) (explaining the sale used in General Motors' bankruptcy proceeding).

19 *See generally* 11 U.S.C. § 109(a) (2018) (listing debtor eligibility requirements); *see also* 11 U.S.C. §§ 1515, 1517 (2018) (listing foreign representative recognition requirements and describing recognition procedure).

these requirements, relief will not be granted.[20] These requirements may prove insurmountable for PDVSA, but PDVSA can present strong arguments for each requirement. Yet, even if PDVSA fails to meet these requirements, this solution gives leverage to PDVSA and Venezuela in its out of court restructuring negotiations against potential holdout creditors. Thus, PDVSA should consider filing for bankruptcy under Chapter 15 because it provides PDVSA protection and leverage that no other restructuring plan can offer—protection of its assets and an increased likelihood of negotiating a beneficial out of court restructuring while simultaneously presenting its own restructuring possibility that leaves it free and clear of adverse interests.

Analysis proceeds in three parts. Part II briefly describes the current economic crisis in Venezuela and details the policy actions of President Maduro and the late President Chávez that laid the groundwork for the crisis. Part III analyzes the Chapter 15 framework. Additionally, this section details the benefits and leverage PDVSA acquires with each requirement it meets. Part IV concludes by summarizing the arguments and listing potential concerns.

II. Background of the Crisis

Venezuela leads the world in crude oil reserves.[21] With this asset and its state-owned oil company, PDVSA, Venezuela experienced tremendous growth and became the richest economy in South America.[22] However, being dependent on a single commodity makes an economy more susceptible to economic volatility.[23] It also presents a vital asset that potential creditors in a restructuring would attempt to seize.[24] Notwithstanding the

20 *See* 11 U.S.C. § 1517(a)(3) (2018).

21 Gillespie et al., *supra* note 3.

22 Max Fisher & Amanda Taub, *How Venezuela Went From the Richest Economy in South America to the Brink of Financial Ruin*, INDEPENDENT (May 21, 2017), http://www.independent.co.uk/news/long_reads/how-venezuela-went-from-the-richest-economy-in-south-america-to-the-brink-of-financial-ruin-a7740616.html [https://perma.cc/VY73-8LDA] [hereinafter Fisher & Taub].

23 *See* Gillespie et al., *supra* note 3 (illustrating the volatility caused by Venezuela's reliance on petroleum).

24 Mark Weidemaier & Matt Gauthier, *Venezuela as a Case Study in Limited (Sovereign) Liability*, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2882835 [https://perma.cc/D9C5-

potential for growth, Venezuela spiraled into its worst economic crisis.[25]

From an economics standpoint, the numbers are eye-opening. As Mark Walker from the financial firm Millstein & Co., and Richard Cooper from the law firm Cleary Gottlieb point out in their restructuring proposal, Venezuela's economic situation is one of drastic proportions.[26] They list the following as some of the key issues: hyperinflation, debts exceeding $196 billion, reduction in reserves, and a collapse of its banking system, reduction in GDP by more than 30% in the last few years, a national income reduction of 51% in the last several years, and debts exceeding GDP by 150%.[27] As will be explained below, the failed policies of its two most recent presidents, Hugo Chávez and Nicolás Maduro, laid the groundwork for this crisis. Given these financial difficulties and the unlikelihood of PDVSA repaying these debts, PDVSA must restructure its debts to avoid widespread default.

Hugo Chávez was elected President in 1998,[28] and he remained in this position for fourteen years[29] by winning four consecutive elections.[30] His populist ideals centered on overtaking the corrupt elite and establishing unity between the different social classes.[31] Upon his first election, he quickly galvanized support for his social policies that simultaneously saw a reduction in the check on his authority.[32] Initially, the people viewed this as beneficial; however, corruption, protests, and struggles against those that opposed him

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25 *See, e.g.*, Gillespie et al., *supra* note 3 (illustrating the extent of Venezuela's economic crisis); *see also* Fisher & Taub, *supra* note 22 (describing Venezuela's economic crisis).

26 *See* Walker and Cooper, *supra* note 7, at 1.

27 *Id.* at 24.

28 Edgardo Lander, *Venezuelan Social Conflict in Global Context*, *in* VENEZUELA: HUGO CHÁVEZ AND THE DECLINE OF AN "EXCEPTIONAL DEMOCRACY" 16, 17 (Steve Ellner & Miguel T. Salas eds., 2007) [hereinafter Lander].

29 ELENA BLOCK, COMMUNICATION AND LEADERSHIP: MIMETISATION, HUGO CHÁVEZ AND THE CONSTRUCTION OF POWER AND IDENTITY 228 (Kenneth Rogerson & Laura Roselle eds., 2016) [https://perma.cc/UD4Y-96UU] [hereinafter BLOCK].

30 *Id.* at 229.

31 *See* Lander, *supra* note 28, at 26.

32 *See*, *e.g.*, Fisher & Taub, *supra* note 22 ("[Chávez] passed a new constitution and purged government jobs . . . [and he] abolish[ed] the legislature's upper house[.]").

resulted, and this created social division.[33] Moreover, as Chávez grew in power, so too did his control over PDVSA,[34] a key contributor to Venezuela's revenue. Chávez seized the opportunity to utilize PDVSA's funds for social welfare programs, such as lowering food prices,[35] instead of improving the revenue capabilities of Venezuela and PDVSA. This decimated PDVSA and its ability to make money, despite an increase in oil prices.[36] The price increase prompted Chávez to borrow tremendous amounts of money from various creditors,[37] which put Venezuela and PDVSA in an even weaker position to make money when oil prices dropped in 2014.[38] Chávez died in 2013, leaving his successor, Nicolás Maduro, to clean up the mess.[39] Unfortunately, President Maduro has exacerbated the situation.

Facing opposition ever since his election, President Maduro has jailed thousands and asserted control over every aspect of the government in order to maintain power.[40] Because of the continued improper management of PDVSA, Maduro's focus on staying in control, and the country's inability to pay its debts from excess borrowing, more money needed to be printed to make payments, causing tremendous inflation in the process.[41] In an effort to avoid

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33 *See, e.g.*, *id.* ("When courts challenged Chávez, he gutted them, suspending unfriendly judges and packing the supreme court with loyalists."); *see also* BLOCK, *supra* note 29, at 229–30 (Chávez was "an elected autocrat that 'bullied' those who 'challenged or angered him'; a man leading a 'socialist revolution', whose ideologies were 'never as extremist as he or his detractors made out' . . . . Chávez did not achieve an effective reform of the state, but rather ran a centralized and militaristic regime that concentrated 'all power in the president's hand.'").

34 *See, e.g.*, Fisher & Taub, *supra* note 22 ("[Chávez] fired 18,000 PDVSA workers . . . and replaced them with some 100,000 supporters.").

35 *Id.*

36 Rick Gladstone, *How Venezuela Fell Into Crisis, and What Could Happen Next*, N. Y. TIMES (May 27, 2016), https://www.nytimes.com/2016/05/28/world/americas/venezuela-crisis-what-next.html [https://perma.cc/8ECJ-TM66].

37 *Id.*

38 Fisher & Taub, *supra* note 22.

39 *Id.*

40 *Venezuela's Leader Nicolás Maduro Divides Opinion,* BBC NEWS (Jan. 21, 2015), http://www.bbc.com/news/world-latin-america-20664349 [https://perma.cc/JEN5-GHQ3].

41 *See* Gladstone, *supra* note 36.

default and due to the inability to fund the social welfare programs,[42] Maduro froze prices, causing a shortage of food, medicine, and inputs.[43] As the government prioritized paying its debts over these necessities,[44] the shortage further increased prices of goods and shut down some businesses.[45]

The compounding mismanagement from both presidents, coupled with the lack of necessities available for its people, has not gone unnoticed by other countries. For example, the United States sanctioned several Venezuelan government officials because of the corruption, lack of economic sustainability, and political oppression under the current regime.[46] The sanctions are a way to force Maduro and other government officials out of office and to protect American bondholders by preventing its citizens from buying Venezuelan and PDVSA bonds.[47] Specifically, the sanctions prohibit any U.S. person from engaging in transactions related to any new debt of PDVSA and Venezuela.[48] This prevents Venezuela and PDVSA from acquiring funds from more creditors. Additionally, the United States blocked property and interests into Venezuela to prevent cash flows from entering into the corrupt government.[49] Thus, the government in Venezuela is being squeezed out to make sure they "promote and defend democratic governance."[50] Arguably, Venezuela and PDVSA can only pay its debt and restructure if a new government is put in place. Even if the current regime continues and the United States lifts the sanctions, a Chapter 15 bankruptcy proceeding provides a possible restructuring solution.

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42 *Id.*

43 *Id.*

44 Fisher & Taub, *supra* note 22.

45 Katia Porzecanski, *Why Venezuela Doesn't Get it Over With and Default*, BLOOMBERG (Aug. 9, 2017), https://www.bloomberg.com/news/articles/2017-08-09/why-venezuela-struggles-so-hard-to-avoid-default-quicktake-q-a [https://perma.cc/R2JZ-YW5B].

46 Patricia Mazzei, *U.S. Sanctions Four More Venezuela Officials*, N. Y. TIMES (Jan. 5, 2018), https://www.nytimes.com/2018/01/05/world/americas/venezuela-us-sanctions-maduro.html [https://perma.cc/5VF9-UBE4].

47 *See id.*

48 Exec. Order No. 13,808, 82 Fed. Reg. 41,155 (Aug. 24, 2017).

49 *See* Exec. Order No. 13,692, 80 Fed. Reg. 12,747 (Mar. 11, 2015).

50 *Venezuela-Related Sanctions*, U.S. DEPT. OF STATE, https://www.state.gov/e/eb/tfs/spi/venezuela/ [https://perma.cc/83JQ-EBAV] (last visited Feb. 10, 2018).

III. Restructuring PDVSA with a Chapter 15 Proceeding

As noted earlier, a default is approaching for Venezuela—the country simply does not have enough money to pay its debts.[51] The last reported number Venezuela had in its reserves accounted for less than $10 billion, and that was in July 2017.[52] Barring a massive investment from Russia or China, the default will happen sooner rather than later.[53] With this in mind, PDVSA's debts require a restructuring to prevent a widespread default in Venezuela. Significantly, because of PDVSA's vital importance, a Chapter 15 bankruptcy restructuring should only be done where Venezuela maintains control of PDVSA without violating the absolute priority rule of the U.S. Bankruptcy Code.[54] The absolute priority rule, one of the key features of the American bankruptcy system, states that equity holders in a bankrupt business cannot receive or retain anything under the confirmed plan on account of their equity in the debtor unless all of the unsecured creditors are paid in full.[55] Venezuela does not violate the absolute priority rule by utilizing a Chapter 11 § 363 sale, similar to the General Motors bankruptcy proceeding in the United States.[56] Under a confirmation plan that utilizes a § 363 auction sale, the Venezuelan government would create a new corporate entity, New PDVSA, for the purpose of buying PDVSA's assets, then use the bankruptcy procedure to "auction" PDVSA, with the new corporate entity acting as a stalking horse bidder.[57] Because § 363 explicitly allows the assets of a

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51 Walker & Cooper, *supra* note 7, at 2–4.

52 Patrick Gillespie, *Venezuela has Less Than $10 Billion—Lowest Reserves in Over 20 Years*, CNN MONEY (July 17, 2017), http://money.cnn.com/2017/07/17/news/economy/venezuela-reserves-20-year-low/index.html [https://perma.cc/K2AB-8697].

53 Walker & Cooper, *supra* note 7, at 10.

54 *See* 11 U.S.C. §§ 1129(b)(2)(B), 1115(a) (2018) (describing provisions for unsecured creditor claims and defining an individual estate's property); *see also* 11 U.S.C. § 363(f) (2018) (avoiding violation of the absolute priority rule by utilizing a Chapter 11 § 363 sale that discharges any adverse interests on PDVSA's assets).

55 Bank of Am. Nat. Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434, 444–45 (1999). If the Venezuelan bankruptcy plan violated such a key tenet of American bankruptcy law, it is unlikely that the plan would be confirmed by the U.S. bankruptcy courts.

56 *See In re* GMC, 407 B.R. at 463–520.

57 A stalking horse bid is an initial bid on the bankrupt company's assets used by the debtor to prevent against low bidding. David Schilli, *Asset Sales Under the Bankruptcy Code*, ROBINSON BRADSHAW PUB. (Apr. 2009),

debtor to be sold free and clear of any debts that may have encumbered the assets, the Venezuelan government maintains continued control of PDVSA free and clear of any adverse interests.[58] Under this proposed plan, the government of Venezuela receives nothing on account of their interest in PDVSA, but would instead receive any assets it receives (to the degree to which it receives any assets while acting through New PDVSA) instead on account of the new value it has contributed to the estate through the § 363 sale.[59] Thus, this would not violate the absolute priority rule.

In order for this to occur, Venezuela must pass a public-sector insolvency law, and PDVSA must file under that law.[60] Notably, the Venezuelan law does not need to be identical to the United States' bankruptcy law, but it should provide some similarities and adequate protections. Case law and other countries that have experienced similar situations to Venezuela provide some guidance for Venezuela to improve its own chances of gaining recognition. After the law passes and PDVSA files for bankruptcy, PDVSA must satisfy the person and property eligibility requirements of § 109(a).[61] By arguing that PDVSA is not an instrumentality of Venezuela, or, in the alternative, by arguing that Chapter 15's broader scope warrants eligibility as a person, and by opening a bank account in New York to establish property in the United States, PDVSA meets the eligibility requirements.[62] PDVSA satisfies the

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https://www.robinsonbradshaw.com/newsroom-publications-Asset-Sales-under-the-Bankruptcy-Code-04-23-2009.html [https://perma.cc/F36Q-59LG]. Chapter 15 permits foreign bankruptcy proceedings to seek assistance from the United States in their proceeding. *See* 11 U.S.C. § 1501(a)-(b) (2018); *see also* 11 U.S.C. § 1502(4) (2018) ("a 'foreign main proceeding' means a foreign proceeding pending in the country where the debtor has the center of its main interests."); 11 U.S.C. § 1520(a)(2) (2018) (permitting use of § 363 upon recognition of a foreign main proceeding).

58 11 U.S.C. § 363(f) (2018).

59 *See id.* § 363.

60 *See generally* 11 U.S.C. § 109(a) (2018) (listing who qualifies as a debtor); *see also* 11 U.S.C. §§ 1515, 1517 (2018) (explaining the application and order for recognition of a foreign proceeding).

61 Only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title. 11 U.S.C. § 109(a) (2018).

62 *See id.*

recognition requirements of § 1515[63] and § 1517[64] by petitioning to a U.S. Bankruptcy Court as a foreign main proceeding. However, a U.S. Bankruptcy Court must not invoke § 1506[65] by finding the

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63 (a) A foreign representative applies to the court for recognition of a foreign proceeding in which the foreign representative has been appointed by filing a petition for recognition.

(b) A petition for recognition shall be accompanied by—

(1) a certified copy of the decision commencing such foreign proceeding and appointing the foreign representative;

(2) a certificate from the foreign court affirming the existence of such foreign proceeding and of the appointment of the foreign representative; or

(3) in the absence of evidence referred to in paragraphs (1) and (2), any other evidence acceptable to the court of the existence of such foreign proceeding and of the appointment of the foreign representative.

(c) A petition for recognition shall also be accompanied by a statement identifying all foreign proceedings with respect to the debtor that are known to the foreign representative.

(d) The documents referred to in paragraphs (1) and (2) of subsection (b) shall be translated into English. The court may require a translation into English of additional documents.

11 U.S.C. § 1515 (2018).

64 (a) [s]ubject to section 1506, after notice and a hearing, an order recognizing a foreign proceeding if—

(1) such proceeding for which recognition is sought is a foreign main proceeding or foreign nonmain proceeding within the meaning of section 1502;

(2) the foreign representative applying for recognition is a person or body; and

(3) the petition meets the requirements of section 1515.

(b) Such proceeding shall be recognized—

(1) as a foreign main proceeding if it is pending in the country where the debtor has the center of its main interests; or

(2) as a foreign nonmain proceeding if the debtor has an establishment within the meaning of section 1502 in the foreign country where the proceeding is pending.

(c) A petition for recognition of a foreign proceeding shall be decided upon at the earliest possible time. Entry of an order recognizing a foreign proceeding constitutes recognition under this chapter.

(d) The provisions of this subchapter do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist, but in considering such action the court shall give due weight to possible prejudice to parties that have relied upon the order granting recognition. A case under this chapter may be closed in the manner prescribed under section 350.

11 U.S.C. § 1517 (2018).

65 Nothing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States. 11 U.S.C. § 1506 (2018).

proceeding to be manifestly contrary to the public policy of the United States or for it to be fraudulent. Finally, the § 363[66] plan must be confirmed. Overall, meeting all of the requirements presents a tall but surmountable task for PDVSA. Regardless, even if PDVSA fails to commence their proceeding, whether because it is ineligible or it is unrecognized, it still gains valuable benefits and leverage over potential holdout creditors by going through the bankruptcy process.

A. Making a Public-Sector Bankruptcy Law

The first step requires Venezuela to enact a public-sector bankruptcy law. As noted above, Venezuela lacks a public-sector bankruptcy law.[67] Enacting one is a fundamental necessity because a foreign proceeding must be ongoing to gain relief under Chapter 15.[68] Venezuela must create this law with the mindset of gaining recognition by a U.S. court. Because comity and cooperation guide U.S. Bankruptcy Courts,[69] and to improve its own chances of recognition, the law should promote fairness and provide adequate protections for debtors and creditors. Thus, some key aspects that this law could contain are the benefit of an automatic stay for debtors to obtain relief from any attempts at creditor collection,[70] procedural and substantive due process for creditors enforcing their claims, an ability to discharge debt, protection of creditors, prevention of fraudulent transfers, and the ability for the debtor to

66 11 U.S.C. § 363(f) (2018) ("The trustee may sell property under subsection (b) . . . free and clear of any interest in such property of an entity other than the estate, only if—(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest; (2) such entity consents; (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property; (4) such interest is in bona fide dispute; or (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.").

67 *See generally* 11 U.S.C. § 109(a) (2018) (listing who qualifies as a debtor); *see also* 11 U.S.C. §§ 1515, 1517 (2018) (explaining the application and order for recognition of a foreign proceeding).

68 11 U.S.C. § 1501(b)(1) (2018).

69 Peter M. Gilhuly et al., *Bankruptcy Without Borders: A Comprehensive Guide to the First Decade of Chapter 15*, 24 AM. BANKR. INST. L. REV. 47, 54 (2016) [hereinafter Gilhuly et al.]; *see also* 11 U.S.C. § 1507(b) (2018) ("[T]he court shall consider whether such additional assistance, consistent with the principles of comity, will reasonably assure [protections.]").

70 *See* 11 U.S.C. § 362(a) (2018).

continue and reorganize its operations.[71]

Notably, Venezuela's bankruptcy law does not need to be identical to the law of the United States.[72] Despite stark differences in the law, several proceedings have gained recognition by the U.S. bankruptcy courts. For example, in *In re ABC Learning Ctrs. Ltd.*,[73] a Third Circuit Bankruptcy Court overseeing an Australian proceeding permitted "secured creditors to realize the full value of their debts, and tender the excess to the company" despite U.S. law requiring secured creditors to seek distribution from the bankruptcy estate.[74] Similarly, a bankruptcy court in the Southern District of New York recognized foreign law in an Indian bankruptcy proceeding despite it lacking a "formal statutory mechanism for creditor participation."[75]

Although enacting a public-sector insolvency law presents some difficulty, reviewing more recent and similar situations in Greece and Puerto Rico can provide further guidance for Venezuela. In 2014, Puerto Rico enacted a bankruptcy law to pursue a debt restructuring regime that enabled the government to provide services to its citizens.[76] The law comprised several different chapters similar to U.S. law, but also contained other provisions for corporations to restructure.[77] Even though the law failed to gain recognition by the U.S. Supreme Court because of preemption by

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71 *See* 11 U.S.C. § 1507(b)(1)–(5) (2018) (stating that courts will consider the "(1) just treatment of all holders of claims against or interests in the debtor's property; (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding; (3) prevention of preferential or fraudulent dispositions of property of the debtor; (4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and (5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.").

72 *See, e.g.*, *In re* Rede Energia S.A., 515 B.R. 69, 104 (Bankr. S.D.N.Y. 2014) ("This Court will not decline to extend comity and grant additional relief simply because Brazilian bankruptcy law is not identical to U.S. bankruptcy law.").

73 *In re* ABC Learning Ctrs. Ltd., 728 F.3d 301 (3rd Cir. 2013).

74 *Id.* at 310–11.

75 *In re* Ashapura Minechem Ltd., 480 B.R. 129, 141 (S.D.N.Y. 2012).

76 *See* Puerto Rico Corporation Debt Enforcement and Recovery Act, 2014 P.R. Laws 371. English translation *available at* http://www.lexjuris.com/lexlex/Leyes2014/lexl2014071d.htm [https://perma.cc/8XBH-L9TD]; *see also* Walker & Cooper, *supra* note 7, at 17 (stating that the law contained a "two-tiered consensual and in-court restructuring approach.").

77 *See* Walker & Cooper, *supra* note 7, at 15.

the bankruptcy code, this law provides some guidance for Venezuela, and importantly, preemption does not apply in Venezuela's situation.[78] Greece, on the other hand, successfully restructured its debt in 2012 with changes to its legal regime.[79] The change in law permitted a higher cash payout, changes to legal terms that increased the likelihood of the survival of the bonds, and a compulsory offer of the exchange that required approval by creditors for two-thirds of the remaining principal.[80]

Additionally, because this law would represent Venezuela's first public-sector insolvency law, there are presently no existing legal barriers that would prohibit the insolvency law from including provisions sufficient to receive recognition from a U.S. bankruptcy court. This enables Venezuela to model its law after previously recognized laws in other countries. Courts have recognized other foreign bankruptcy laws that include difference of payouts and participation mechanisms,[81] and therefore Venezuela's law should receive the same treatment if it bears some similarity to them. Moreover, Venezuela can mirror the United States' law as much as possible, but as noted earlier, differences are permissible. However, foreign bankruptcy laws that violate U.S. law, restrict a court's ability to administer the proceeding, or violate debtor protections have been found to be impermissible by United States courts.[82] Therefore, Venezuela must steer away from permitting these actions. Overall, enacting a public-sector insolvency law presents a low barrier for Venezuela to overcome, because Venezuela's law should be recognized by a U.S. court if Venezuela follows the examples of other countries or mirrors U.S. bankruptcy law.

B. Eligibility Requirements for PDVSA

The second step for Venezuela is making sure PDVSA meets the eligibility requirements for a Chapter 15 proceeding under §

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78 *See id.*

79 *See* Jeromin Zettelmeyer et al., *The Greek Debt Restructuring: An Autopsy*, ECON. POL'Y 513 (2013).

80 *Id.* at 515.

81 *See In re* Ashapura Minechem Ltd., 480 B.R. 129, 141 (S.D.N.Y. 2012).

82 *See In re* Toft, 453 B.R. 186, 188–96 (S.D.N.Y. 2011) (proceeding violated U.S. privacy law); *In re* Gold & Honey, Ltd., 410 B.R. 357, 363–72 (Bankr. E.D.N.Y. 2009) (considering violations of debtor protections of the automatic stay); Gilhuly et al., *supra* note 69, at 70–71 (considering whether a foreign proceeding frustrates the Courts' ability to administer the proceeding).

109(a). Section 103(a) explicitly states that the requirements of § 109(a) applies to Chapter 15,[83] which are that only "a person that resides or has a domicile, a place of business, or property in the United States . . . may be a debtor under this title."[84] The Bankruptcy Code defines debtor in Chapter 1 as a "person or municipality" who has filed for relief,[85] and the Code's definition of person specifically includes corporations but excludes "governmental units"[86] such as Venezuela. Governmental unit includes an instrumentality of a foreign state or government.[87] Arguably, PDVSA falls into this category, but importantly, instrumentality is not defined in the Bankruptcy Code. Courts have found state-owned entities to be instrumentalities only where "the relationship [between the government and entity is] an active one, [and the entity] is actually carrying out some government function."[88] In order to prevent classification as Venezuela's instrumentality, PDVSA must argue that it is not carrying out a government function because its actions are business motivated, not government motivated.[89] Fortunately, courts have not squarely addressed this issue;[90] therefore, a court could rule PDVSA is not Venezuela's instrumentality. PDVSA would then be eligible by classifying as a corporation within the "person" requirement of § 109(a).[91]

However, if PDVSA cannot successfully argue that they are not Venezuela's instrumentality, PDVSA should argue that Chapter 15's broader scope warrants eligibility. Section 1502 defines debtor as "an entity that is the subject of a foreign proceeding" with no explicit prohibition on governmental units.[92] "Entity", as defined in

83 *See* 11 U.S.C. § 103(a) (2018) (stating that Chapter 1 applies in a Chapter 15 proceeding).

84 11 U.S.C. § 109(a) (2018).

85 11 U.S.C. § 101(13) (2018).

86 11 U.S.C. § 101(41) (2018).

87 *See* 11 U.S.C. § 101(27) (2018).

88 *See In re* Irish Bank Resolution Corp. (In Special Liquidation), No. 13-12159, 2014 Bankr. LEXIS 1990, at *37–38; *In re* Nortel Networks, Inc. 669 F.3d 128, 138 (3rd Cir. 2011); *In re* Lombard Pub. Facilities Corp. 579 B.R. 493, 15–16 (Bankr. N.D. Ill. 2017).

89 *See In re Irish Bank Resolution Corp.*, 2014 Bankr. LEXIS 1990, at *38.

90 Walker & Cooper, *supra* note 7, at 18–19.

91 11 U.S.C. § 109(a) (2018).

92 11 U.S.C. §1502(1) (2018).

§ 101, includes a "governmental unit" and therefore its instrumentality.[93] Section 1501(c) explicitly prohibits some entities from filing under Chapter 15, but does not explicitly prohibit governmental entities and their instrumentalities.[94] Notably, some courts have recognized the broader scope of Chapter 15 despite explicit prohibitions.[95] For example, the Eastern District of California Bankruptcy Court in *In re Tri-Continental Exch. Ltd.* found that, even though the foreign insurance company debtor was explicitly prohibited to file under the Bankruptcy Code by 11 U.S.C. § 109(b)(3), this did not prohibit Chapter 15 relief.[96]

Coupled with the broader debtor definition of Chapter 15, some of the stated objectives of Chapter 15 are to "provide effective mechanisms" to increase cooperation between the United States and the foreign country, provide "greater legal certainty for trade and investment," and to rescue financially troubled businesses to "protect investment and preserve employment."[97] Courts are instructed to consider the "international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions."[98] Thus, a court could be persuaded that, since PDVSA is a financially troubled and economically significant business in need of rescue, the objectives of Chapter 15 warrant finding PDVSA eligible.

While it is uncertain whether PDVSA would be classified as a "person" or be eligible as an "entity," PDVSA would still need to prove it has "property in the United States" to satisfy § 109(a).[99] As noted in the Introduction, the only property PDVSA currently owns in the United States are shares of its subsidiary, PDV Holding.[100] As will be discussed below, this is likely not sufficient for obtaining eligibility, but courts have upheld another option that PDVSA can easily meet.

PDVSA should follow the actions of the entities of *In re Suntech*

93 11 U.S.C. § 101(15) (2018).

94 11 U.S.C. § 1501(c) (2018).

95 *In re* Tri-Continental Exch. Ltd., 349 B.R. 627, 632 (Bankr. E.D. Cal. 2006).

96 *See id.*

97 11 U.S.C. § 1501(a) (2018).

98 11 U.S.C. § 1508 (2018).

99 11 U.S.C. § 109(a) (2018).

100 *See* Hals, *supra* note 6.

Power Holdings Co.[101] and *In re International Bank of Azerbaijan*[102] and open a bank account in New York to establish "property in the United States."[103] In *Suntech*, the court found that a debtor in a foreign proceeding establishing a bank account, held by an agent for the debtor, in New York prior to the commencement of a Chapter 15 was sufficient to render the debtor eligible for a Chapter 15 case.[104] It also noted that even though the debtor had no presence in the United States, the debtor "owes a substantial amount of United States debt and requires recognition as a condition to the enforcement of the scheme of arrangement in the United States."[105] Without recognition, the debtor "will be hindered from ever establishing a United States presence or conducting future business in the United States for fear that creditors will seize its United States assets."[106] The Court reasoned that "[s]hutting the door on the Debtor, where it has no other access, w[ould] hinder the restructuring of this multi-national business as contemplated by chapter 15."[107] Despite Suntech's subsidiary being located in California, the court found New York to be the proper venue because "the assets of a subsidiary are not the assets of the parent."[108] Thus, the bank account "represented the Debtor's principal United States asset at the time [of filing] the Chapter 15 petition."[109]

Similarly, the Bankruptcy Court in *International Bank of Azerbaijan* granted recognition even though the bank accounts in the United States represented the only U.S. property of the bank.[110] The International Bank of Azerbaijan claimed that due to their U.S. dollar denominated transactions, their economy would be adversely

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101 *In re* Suntech Power Holdings Co., 520 B.R. 399 (Bankr. S.D.N.Y. 2014).

102 *See* Walker & Cooper, *supra* note 7, at 20, n. 36.

103 11 U.S.C. § 109(a) (2018).

104 *See In re* Suntech, 520 B.R. at 399, 411–13; *see also In re* Octaviar Admin. Pty Ltd., 511 B.R. 361, 372 (Bankr. S.D.N.Y 2014) (noting that a non-interest-bearing trust account in New York constitutes property in the United States and transfers of property "do not, in and of themselves, constitute grounds for a finding of bad faith.").

105 *In re* Suntech, 520 B.R. at 413.

106 *Id.*

107 *Id.*

108 *Id.* at 414.

109 *Id.*

110 *See* Walker & Cooper, *supra* note 7, at 20, n. 36.

affected if creditors could seize these assets.[111]

Here, New York law already governs PDVSA's bonds,[112] therefore, PDVSA should open the bank account in New York. Notably, the amount of money in the account is irrelevant—PDVSA only needs to open an account with the bare minimum deposit requirement to meet the statutory requirement.[113] Similar to *Suntech*, PDVSA maintains no presence in the United States, but owes substantial debt in the United States, and the prevention of the § 363 sale would prohibit the restructuring of this multi-national business as contemplated by Chapter 15.[114] Likewise, the location of PDVSA's subsidiaries in Delaware are irrelevant, and thus New York is the proper venue.[115] Moreover, similar to the *International Bank of Azerbaijan*, the U.S. dollar dominates the PDVSA bonds; therefore, creditors' ability to seize these assets would adversely affect the Venezuelan economy, particularly because of PDVSA's vital importance.[116] Importantly, courts hold that § 109(a) provides no standard or inquiry into the circumstances of acquiring the property—debtors need only have property to meet the plain meaning of the statute.[117] Thus, PDVSA should be treated the same and be granted eligibility under Chapter 15.[118]

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111 *See id.*

112 *See, e.g.*, PDVSA 12.75% SENIOR NOTES DUE 2022, 6 (2011), *available at* https://www.bourse.lu/security/USP7807HAM71/172640 [https://perma.cc/U48W-P5GS] [hereinafter PDVSA].

113 *See In re* Global Ocean Carriers Ltd., 251 B.R. 31, 39 (Bankr. D. Del. 2000) ("[W]e conclude that the bank accounts constitute property in the United States for purposes of eligibility under section 109 of the Bankruptcy Code, regardless of how much money was actually in them on the petition date.").

114 *See In re* Suntech, 520 B.R. at 399, 413.

115 *See id.* at 414.

116 *See, e.g.*, PDVSA, *supra* note 112.

117 *See In re* Suntech, 520 B.R. at 413; *see also In re* Octaviar, 511 B.R. at 373 ("The imposition of a requirement that property in the United States be 'substantial,' for example, would subvert the intent of Congress and the plain meaning of the statute.").

118 Because the Venezuelan bankruptcy proceeding would be comprised by PDVSA and its Venezuelan subsidiaries, all of these entities would be debtors in the Chapter 15 proceeding. *See Organization Chart*, PDVSA, http://www.pdvsa.com/index.php?option=com_content&view=article&id=6544&Itemid=889&lang=en [https://perma.cc/PCW2-Z8WU].

C. *Obtaining Recognition of the Venezuelan Bankruptcy Proceeding*

The third step for PDVSA is to obtain recognition. Recognition is defined as "the entry of an order granting recognition of a foreign main proceeding or a foreign nonmain proceeding."[119] In order for this to occur, the foreign representative[120] must file a petition for recognition,[121] which commences the case.[122] This petition must meet the requirements of §§ 1515 and 1517, and the foreign representative bears the burden of proving the proceeding as a foreign main or nonmain proceeding.[123] A foreign main proceeding is a "foreign proceeding pending in the country where the debtor has the center of its main interests,"[124] while a foreign nonmain proceeding is "a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment."[125] Since PDVSA operates and has its main interests in Venezuela, it meets the definition of a foreign main proceeding. In order to prove the existence of a foreign main proceeding, the foreign representative must prove all of the following seven criteria:

(1) The existence of a proceeding; (2) that is either judicial or administrative; (3) that is collective in nature; (4) that is in a foreign country; (5) that is authorized or conducted under a law related to insolvency or the adjustment of debts; (6) in which the debtor's assets and affairs are subject to the control or supervision of a foreign court; and (7) which proceeding is for the purpose of

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119 11 U.S.C. § 1502(7) (2018).

120 11 U.S.C. § 101(24) (2018). A foreign representative is defined as "a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding." *Id.*

121 11 U.S.C. § 1515(a) (2018); 11 U.S.C. § 1515(b) (2018) ("A petition for recognition shall be accompanied by—(1) a certificated copy of the decision commencing such foreign proceeding and appointing the foreign representative; (2) a certificate from the foreign court affirming the existence of such foreign proceeding and of the appointment of the foreign representative; or (3) in the absence of evidence referred to in paragraphs (1) and (2), any other evidence acceptable to the court of the existence of such foreign proceeding and of the appointment of the foreign representative.").

122 11 U.S.C. § 1504 (2018).

123 *See* 11 U.S.C. §§ 1515, 1517 (2018).

124 11 U.S.C. § 1502(4) (2018).

125 11 U.S.C. § 1502(2); *see also* 11 U.S.C. § 1502(5) (2018) (defining establishment as "any place of operations where the debtor carries out a nontransitory economic activity.").

reorganization or liquidation.[126]

The first step is whether a proceeding exists. A proceeding for PDVSA's purposes would mean a "statutory framework that constrains a company's actions and that regulates the final distribution of a company's assets."[127] This is satisfied with Venezuela's public-sector insolvency law. The second step requires the proceeding to be judicial or administrative, which PDVSA solves by filing their case under the bankruptcy law.[128] No issue arises for the third step or fourth step because a bankruptcy proceeding would be taking place in Venezuela to collect. Likewise, since the public-sector bankruptcy law grants control or supervision of PDVSA's assets by the Venezuelan court, and reorganization is the purpose, PDVSA satisfies the remaining criteria.

Once a court recognizes the foreign main proceeding in Venezuela, PDVSA gains access to mandatory relief that is automatically given under § 1520.[129] Notably, § 1520 provides relief for the debtor's assets "within the territorial jurisdiction of the United States" which includes tangible and intangible property.[130]

The relief granted by § 1520 includes an automatic stay granted by § 362, which protects the debtor's assets from creditor actions,[131] control of the debtor's affairs by the foreign representative during the administration of the case, and the use of § 363 to dispose of the debtor's property free and clear of any adverse interests,[132] which will be discussed below. The stay would give PDVSA time to carry out the bankruptcy, as well as relief from the requirement to continue paying creditors while the case is ongoing.

Further, § 1521 allows the court to grant additional permissive

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126 *See In re* Ashapura Minechem Ltd., 480 B.R. at 136; *see also* 11 U.S.C. § 101(23) (2018) (defining "foreign proceeding.").

127 Gilhuly et al., *supra* note 69, at 90.

128 *See id.*

129 11 U.S.C. § 1520(a) (2018).

130 *Id.* ("'[W]ithin the territorial jurisdiction of the United States', when used with reference to property of a debtor, refers to tangible property located within the territory of the United States and intangible property deemed under applicable non-bankruptcy law to be located within that territory, including any property subject to attachment or garnishment that may properly be seized or garnished by an action in a Federal or State court in the United States.").

131 *See* 11 U.S.C. § 362(a) (2018).

132 11 U.S.C. § 1520(a) (2018).

relief "where necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors."[133] This includes staying protections of PDVSA's assets that have not been stayed by the automatic stay under § 1520, suspension of transfer rights, and extending relief granted under § 1519.[134] Additionally, § 1521 allows the court to grant any relief the Code allows for a bankruptcy trustee.[135] Importantly, this could mean that the assets of PDVSA's non-Venezuelan entities, such as PDV Holding and CITGO, who are not "debtors" in the Chapter 15 proceeding could receive protection.

D. Potential Stumbling Blocks to Recognition

PDVSA faces two stumbling blocks that may preclude a U.S. Bankruptcy Court from recognizing its foreign main proceeding. The first stumbling block occurs if a court invokes § 1506 and refuses to take action "if the action would be manifestly contrary to the public policy of the United States."[136] It is possible that courts could find recognizing a Venezuelan bankruptcy proceeding to be contrary to public policy due to the United States' tense relationship with Venezuela and the corrupt history of the Maduro regime. However, the public policy provision is seldom used, largely because the term "manifestly" constrains the ability of a judge to invoke the provision.[137] For example, in *In re OAS S.A.*,[138] a Brazilian bankruptcy law had substantial issues, including that it did not provide "procedural and substantive fairness" to certain senior noteholders, eliminated creditors' "ability to avoid [certain] inter-debtor transfers," and failed to provide a remedy for fraudulent transfers.[139] Still, the U.S. Bankruptcy Court in the Southern District of New York did not invoke the public policy exception to prevent recognition of the Brazilian bankruptcy law,[140] because the Brazilian bankruptcy law met the United States' "fundamental standards of fairness and accord[ed] with the course of civilized

133 11 U.S.C. § 1521(a) (2018).

134 *See id.*

135 *See id.*

136 11 U.S.C. § 1506 (2018).

137 *See In re* ABC Learning Ctrs. Ltd., 728 F.3d 301, 309 (3rd Cir. 2013).

138 *In re* OAS S.A., 533 B.R. 83 (Bankr. S.D.N.Y. 2015).

139 *Id.* at 104.

140 *See id.* at 106.

jurisprudence."[141] Similarly, the U.S. Bankruptcy Court for the District of Delaware elected not to invoke the public policy provision in *In re Irish Bank Resolution Corp.*,[142] despite the foreign law creating an unfair proceeding. In that case, the "Irish proceeding discriminate[d] against or disadvantage[d] U.S. Citizens, deprive[d] U.S. creditors of due process, [was] procedurally unfair . . . and [did] not grant the same fundamental rights that creditors would receive in [a] U.S. Bankruptcy Courts."[143] However, the U.S. Bankruptcy Court refused to find the Irish bankruptcy law to be manifestly contrary to U.S. public policy, because it found that the Irish bankruptcy law did not involve "constitutional or statutory rights available in the United States."[144] The Court reasoned that the foreign law "'established a different way to achieve similar goals' of United States statutes . . . [and the foreign law] support[ed] the strong public policy of the United States in favor of a universalism approach to complex multinational bankruptcy proceedings."[145]

In contrast, courts invoke the exception when the proceeding "'would impinge severely a U.S. constitutional or statutory right' and . . . an action should not be taken in a chapter 15 proceeding where taking such action would frustrate a U.S. court's ability to administer the chapter 15 proceeding."[146] For example, the Bankruptcy Court for the Southern District of New York found in *In re Toft* that the foreign representative's reason for filing a Chapter 15 case impinged severely on a U.S. constitutional right.[147] The representative attempted to gain access to the debtor's email accounts, which were stored on the servers of internet service providers located in the United States.[148] This invoked the prohibition of being manifestly contrary to public policy because "the relief sought by the Foreign Representative [was] banned under U.S. law, and it would result in criminal liability . . . [by] directly

141 *Id.* at 103.

142 *In re* Irish Bank Resolution Corp., No. 13-12159, 2014 WL 9953792, at *88-102 (Bankr. D. Del. 2014).

143 *Id.* at 58.

144 *Id.* at 70.

145 *Id.*

146 Gilhuly et al., *supra* note 69, at 70–71.

147 *In re* Toft, 453 B.R. 186 (S.D.N.Y. 2011).

148 *Id.* at 188–96.

compromise[ing] privacy rights . . . . [This] 'would impinge severely a U.S. constitutional or statutory right.'"[149] Similarly, the Bankruptcy Court in the Eastern District of New York invoked the public policy exception in *In re Gold & Honey, Ltd.* The proceeding "reward[ed] and legitimize[d the creditors'] violation of both the automatic stay and . . . [the bankruptcy court's orders] regarding the stay[,]" which are two of the most fundamental policies of the automatic stay.[150] Therefore, it appears that "manifestly contrary to public policy" is a high standard, and even if a public-sector insolvency law enacted in Venezuela contains potentially problematic elements, the U.S. bankruptcy courts still may be unlikely to find it to violate § 1506. Moreover, if the United States lifts its sanctions against Venezuela, this means a friendlier relationship with the country and the government is in place, and because of this, a court could be persuaded that this presents sufficient evidence not to invoke the public policy exception.

The second stumbling block Venezuela faces is a finding by a U.S. court that the law fraudulently permits PDVSA to refuse payment to creditors. A court could find the law to be fraudulent because the only reason that Venezuela would make a bankruptcy law is to get PDVSA out of paying its creditors and enacting one was not considered at the time of the issuance of the bonds. However, the U.S. Bankruptcy Court in the Southern District of New York refused to deny recognition in *In re International Bank of Azerbaijan* despite fraudulent objections against Azerbaijan's amendment to its bankruptcy law immediately before filing for Chapter 15.[151] This amendment prevented substantive and procedural due process and allowed preference of creditors, and yet the court recognized the proceeding because it did not violate fundamental principles of the United States.[152] Moreover, the contract language of the PDVSA bonds clarifies that a Venezuelan bankruptcy was considered at the time of issuance. Specifically, under the "Risk Factors" subheading in the contract, if PDVSA is "subjected to Venezuelan bankruptcy or insolvency law, the ability of the Noteholders to recover their investment in the Notes will be substantially impaired and will be subordinated to several classes of

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149 *Id.* at 198.

150 *In re* Gold & Honey, Ltd., 410 B.R. 357, 371 (Bankr. E.D.N.Y. 2009).

151 *See* Walker & Cooper, *supra* note 7, at 20, n. 36.

152 *Id.*

creditors."[153] Additionally, Venezuela passing a bankruptcy law signals to the courts that they are providing the opportunity for PDVSA and other public-sector companies to restructure their debts fairly and effectively to prevent a default.[154] Thus, it is possible that a court will grant recognition by refusing to find the law to be fraudulent.

E. Confirmation Plan with a Section 363 Sale

Because of PDVSA's importance to the Venezuelan economy, confirming a plan where Venezuela relinquishes control and ownership of PDVSA is not an option. This conflicts with the absolute priority rule, one of the key features of the American bankruptcy system, which states that equity holders in the bankrupt business cannot receive or retain anything under the confirmed plan unless all of the unsecured creditors are paid in full.[155] If the Venezuelan bankruptcy plan violated such a key tenet of American bankruptcy law, it is unlikely that the plan would be confirmed by the U.S. bankruptcy courts.

One possible workaround for this problem would be to confirm a plan around a § 363 sale of substantially all of PDVSA's assets[156] to a new entity, New PDVSA, that is wholly owned by the government of Venezuela.[157] Under this plan, the government would create a new corporate entity for the purpose of buying PDVSA's assets, then use the bankruptcy procedure to "auction" PDVSA, with the new corporate entity as a stalking horse bidder.[158] A stalking horse bid is an initial bid on the bankrupt company's assets used by the debtor to prevent against low bidding.[159] In this case, the amount bid and the terms attached by New PDVSA would be used to dissuade other potential buyers from bidding on

153 *See* PDVSA, *supra* note 112.

154 Walker & Cooper, *supra* note 7, at 15.

155 Bank of Am. Nat. Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434, 434–35 (1999).

156 11 U.S.C. § 363(b)(1) (2018) ("The trustee, after notice and a hearing, may use, sell, or lease . . . property of the estate.").

157 *See* 11 U.S.C. § 1520(a)(2) (2018) (permitting the use of § 363 in a foreign main proceeding).

158 *See* Schilli, *supra* note 57.

159 *See id.*

PDVSA.[160] The most important of the terms to dissuade other bidders is the Republic's retention of the actual rights to the hydrocarbon reserves. Because PDVSA does not own the rights to these reserves, the rights are not in the bankruptcy estate, and would not be sold, so no entity other than a government-controlled entity would be guaranteed access to the oil reserves.[161] Thus, no company would risk purchasing an oil company without access to the oil reserves. Moreover, the new entity would make a bid with such generous terms that no other entity would be likely to match or surpass it, and even if an entity did, acquiring assets without access to the oil reserves makes little economic sense.

This plan would allow Venezuela to retain ownership of PDVSA through its new entity free and clear of any adverse interests,[162] which would clear adverse interests worth billions of dollars from secured and unsecured creditors, bond holders, promissory note holders, and judicial claims.[163] Following its acquisition, New PDVSA would operate with none of PDVSA's currently held debt, which should allow the new entity to be profitable again.[164] The money given by New PDVSA for these assets would then be used by PDVSA to pay its creditors based on the priority of their claims. This purchase price could be funded by new debt issued by either the new entity or the government.

Such a plan would not violate the absolute priority rule, so long as New PDVSA's bid was for the full value of the assets it purchases. The absolute priority rule prevents an equity owner of the debtor from receiving or retaining assets of the debtor only on account of its equity interest.[165] However, there is an exception to

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160 *See id.*

161 *See* 11 U.S.C. § 541(b)(4) (2018).

162 11 U.S.C. § 363(f) (2018) ("The trustee may sell property under subsection (b) . . . free and clear of any interest in such property of an entity other than the estate, only if—(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest; (2) such entity consents; (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property; (4) such interest is in bona fide dispute; or (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest."). Here, PDVSA meets the requirements by either consenting or providing evidence of a dispute over their property.

163 Walker & Cooper, *supra* note 7, at 3.

164 *See* 11 U.S.C. § 363(l) (2018).

165 *See* Bank of Am. Nat. Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434,

this rule, the new value corollary, that allows the equity holders of a debtor to receive assets under a plan if they provide new value to the bankruptcy estate that is money or money's worth and is equal to the full value of the assets received.[166] Under this proposed plan, the government of Venezuela is not receiving anything on account of their interest in PDVSA. It would instead receive any assets PDVSA receives (to the degree to which it receives any assets while acting through New PDVSA) account of the new value it has contributed to the estate through the § 363 sale. Because the bid amount must be large enough to dissuade other creditors from bidding, it should be enough to cover the full value of the assets. Therefore, this plan does not violate the absolute priority rule.

While it may seem improbable that this type of § 363 sale would be confirmed by U.S. bankruptcy courts, a similar deal was confirmed in *In re General Motors*.[167] In *General Motors*, a § 363 sale was permitted where a new entity, New GM, purchased the assets of GM, and the U.S. Treasury Department purchased a sixty percent interest in New GM.[168] The court found this permissible because GM did not receive a better offer than the one from the U.S. government, independent advisors found the offer to be fair, and there was no other feasible way for GM to restructure its business and remain viable.[169] Although it may seem that a Venezuelan bankruptcy plan that results in investors holding bonds for a New PDVSA that remains under the control of the Venezuelan government would be contrary to U.S. public policy, *General Motors* suggests that a bankruptcy court may accept this type of plan. As long as the plan is fair to creditors and there are not more beneficial alternatives, General Motors provides at least a colorable argument that a § 363 plan may be confirmed.

F. Benefits of Filing for a Chapter 15 Bankruptcy

While the likelihood of PDVSA passing every stage of a Chapter 15 may be relatively low, it would be unwise for PDVSA not to file for bankruptcy because of the possible leverage and other benefits it will receive if it is filed. As noted above, the relief

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444–45 (1999).

166 *Id.* at 456–58.

167 *In re* General Motors, 407 B.R. 463 (Bankr. S.D.N.Y. 2009).

168 *Id.* at 473.

169 *Id.* at 486–506.

provided by the court at each step protects PDVSA's assets for at least a temporary period of time.[170] If confirmed, which would be the best-case scenario, the PDVSA plan eliminates or significantly reduces billions of dollars of debt from bondholders, promissory note holders, and any judicial claims against PDVSA and its Venezuelan entities. Additionally, PDVSA's non-Venezuelan entities, such as PDV Holding and CITGO, may also receive protection and a discharge of its debt from PDVSA's Chapter 15 proceeding if they successfully argue that the automatic stay should extend to protect their assets.[171]

Even if the plan fails to get confirmed, at the very least, a few extra months free and clear of creditor collection actions gives PDVSA an ability to seek out-of-court restructuring options while the Bankruptcy Court makes its decision. Moreover, if potential holdout creditors face the threat of a bankruptcy plan being confirmed, PDVSA yields greater leverage in its out-of-court restructuring negotiations. This leverage provides a potential method of binding holdout creditors through bankruptcy law, which it does not have under the terms of its current bonds. Given the value of some of the claims, risking a cramdown from bankruptcy should incentivize some creditors to be more willing to negotiate in an out-of-court proceeding, rather than elect to holdout and risk recouping less under the bankruptcy.

A Chapter 15 bankruptcy provides PDVSA protection and leverage that no other restructuring plan can offer—protection of its assets and an increased likelihood of confirming an out of court restructuring while simultaneously presenting its own restructuring possibility that would leave it free and clear of any adverse interests. Moreover, the likelihood of an out-of-court restructuring increases with each requirement that PDVSA meets. Thus, whether the Chapter 15 process results in a confirmed bankruptcy plan with a § 363 sale, brings creditors to the negotiating table, or merely provides a temporary stay, Chapter 15 is a win-win option for PDVSA.

IV. Conclusion

Venezuela's current economic crisis presents an extremely

170 *Id.* at 463.

171 *See In re* Hibu, Inc., No 8-14-70323 (Bankr. E.D.N.Y. Feb. 27, 2014).

complex and difficult restructuring for PDVSA. This Note aimed at pursuing one option—a Chapter 15 proceeding. However, this type of restructuring raises serious concerns that would need to be addressed if used. First, it is highly unlikely that the current regime desires being subject to United States' jurisdiction and discovery for a bankruptcy proceeding. Thus, this type of proceeding may only be possible with a regime change. Second, with the reserves running lower every day, PDVSA would want to restructure sooner rather than later. A bankruptcy proceeding, particularly one as complex as this, could take longer than a year. This may not be time that Venezuela or PDVSA can spare. Yet, this proposal is appealing for that same reason—PDVSA can maximize its out-of-court restructuring options *while* the bankruptcy proceeding is taking place. Third, PDVSA may lack the funding required to consummate a § 363 sale. Unlike in *General Motors* where the company received funding from the U.S. government to keep control, PDVSA is not in the same position to receive funding from its government because of the economic crisis. This could be problematic for the government of Venezuela because they need to keep control of PDVSA. Thus, funding for the PDVSA sale will most likely have to come from somewhere else. This funding should at least be for the short term to consummate the sale in hope that, after the sale, PDVSA will get back on its feet and improve its economic position. Fourth, it is unclear if PDVSA would be eligible for relief under Chapter 15 because PDVSA is likely an instrumentality of the government of Venezuela, thereby a governmental unit as defined in § 109(a) of the Bankruptcy Code, and thus explicitly ineligible for relief. This hinges upon a court finding that PDVSA is actually carrying out some governmental function. However, as noted earlier, PDVSA may still gain relief if PDVSA fails to meet this requirement by arguing Chapter15's broader scope warrants eligibility. Fifth, creditors, such as Crystallex, have filed suit against Venezuela seeking to pierce the veil under the alter ego doctrine[172] to acquire CITGO assets worth over a billion dollars, if not protected by sovereign immunity.[173] If successful, other

172 First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 627–33 (1983) (holding that an alter ego relationship exists where (1) the "corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created," or (2) recognizing the corporate entity as legally separate "would work fraud or injustice.").

173 *See* Crystallex Int'l Corp. v. Bolivarian Republic of Venez., C.A. No. 17-mc-151-

creditors will surely follow suit. Sixth, PDV Holding and CITGO represent vital assets of PDVSA outside of Venezuela that need protection, because they most likely would not be allowed to file for bankruptcy in Venezuela, even if the Venezuelan bankruptcy law permits it.

Thus, in order to protect these assets, PDVSA must pursue other options to protect these assets. This may include filing these companies under Chapter 11, moving the account receivables assets into a bank in Venezuela to prevent seizure from creditors, or arguing that the relief and protection from the Chapter 15 proceeding should extend to these entities. Notwithstanding these concerns, filing bankruptcy under Chapter 15 offers PDVSA a possible debt restructuring option that can eliminate all of PDVSA's debt if confirmed. Even if unsuccessful, it provides benefits and leverage to pursue other out of court options while the bankruptcy court makes its decision.

LPS, 2018 WL 3617957, at *1 (D. Del. July 30, 2018).