

Venezuela Update: Exchange Controls and Possible International Remedies to Recover Stranded Funds, and OFAC Sanctions

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Exchange control regulations on Foreign Investments in Venezuela

Topics

- I. Current exchange rate applicable to international investments and effective exchange control regulations on foreign investments.**
- II. Former exchange rates applicable to international investments under repealed exchange control regulations.**
- III. Foreign Exchange Regime. Regulation N° 056.**
- IV. Law-Decree on Foreign Investments.**

I. Current exchange rate applicable to international investments.

Exchange Agreement N°35, published in the Official Gazette Number 40,865 dated March 9, 2016 (effective on March 10, 2016).

The Exchange Agreement N°35 establishes two exchange rates: the DIPRO rate (Bs. 10.00 per USD) for specific cases and the complementary floating exchange rate (DICOM) for those transactions to which the DIPRO rate does not apply. The DICOM rate on June 21, 2016: Bs. 604.88 per USD.

Article 13. *All those transactions of foreign currency that are not expressly provided in this Exchange Agreement, shall be processed through the alternative foreign currency markets regulated in the exchange regulations, at the complementary floating exchange rate of the market.*

There is no specific mention in Exchange Agreement N°35 on the rate applicable to International Investments, so this article 13 applies to International Investments.

I. Current exchange rate applicable to international investments.

Pursuant to the Exchange Agreement N°35, the DICOM rate will be established, according to the SIMADI System created in the Exchange Agreement N° 33, published in the Official Gazette Special Number 6,171 dated February 10, 2015 (effective on February 12, 2015), until the new exchange control regulations replacing the SIMADI System are issued.

I. Current exchange rate applicable to international investments.

Exchange Agreement N°35, published in the Official Gazette Number 40,865 dated March 09, 2016 (effective on March 10, 2016).

Transitory Provisions

Article 15. *The acquisition of foreign currency of which liquidation had been requested to the Central Bank of Venezuela on the immediately preceding day to the date of effectiveness of this Exchange Agreement, which should have been made based on the Complementary System for the Administration of Foreign Currency (SICAD), will be applied the exchange rate resulting from the last allocation of foreign exchange, conducted through the referred System, published in the website of the Central Bank of Venezuela. (...)*

The last SICAD rate as of March 10, 2016: Bs. 13.50 per USD.

II. Former exchange rates applicable to international investments.

1) Exchange Agreement N°25, published in the Official Gazette Special Number 6,122 dated January 23, 2014 (repealed by the Exchange Agreement No. 35):

Article 1. *From the date of effectiveness of this Exchange Agreement, the liquidation of foreign currency for the concepts described below, regulated by the relevant norms of the foreign currency administration regime, will be made at the exchange rate resulting from the last allocation of foreign exchange made through the Complementary System for the Administration of Foreign Currency (SICAD), which will be published in the website of such Institute [Central Bank of Venezuela]:*

f) International Investments and royalty payments, use and exploitation of patents, trademarks, licenses and franchises, as well as technology import and technical assistance agreements.

II. Former exchange rates applicable to international investments.

2) Exchange Agreement N°28, published in the Official Gazette Number 40,387 dated April 4, 2014 (repealed by the Exchange Agreement No. 35):

Article 15.- *The sale of foreign currency to the Central Bank of Venezuela resulting from international investments will be liquidated at the reference exchange rate of the Alternative System for the Exchange of Foreign Currency (SICAD II), provided in Article 14 of the Exchange Agreement No. 27 dated March 10, 2014, on the date of the respective transaction, minus zero point twenty five percent (0.25%).*

The last SICAD II rate as of December 31, 2015: Bs. 50.10 per USD.

III. Foreign exchange control regime.

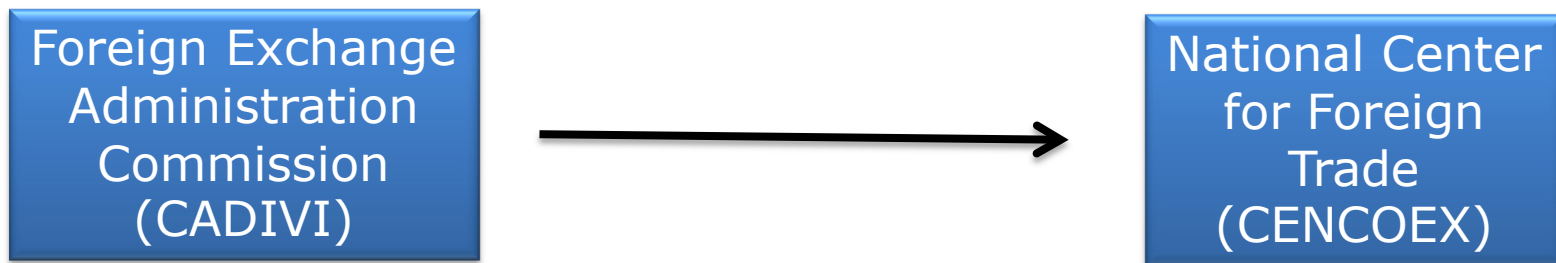
Regulation N° 056, published in the Official Gazette Number 38,006 dated August 23, 2004 [Commission For The Administration Of Foreign Currency (CADIVI)]:

Article 2. *Foreign currency authorized by the Foreign Exchange Administration Commission (CADIVI) under the provisions of this Ruling may only be applied for the following purposes:*

- a) Repatriation of initial capitals of international investment.*
- b) Necessary amounts for the maintenance, expansion, development, and completion of international investment.*
- c) Remittance of profits, income, interest and dividends from international investment.*
- d) International investors compensations for expropriation in cases of public and social interest, in accordance with the law governing the matter.*
- e) Proceeds from the sale or liquidation of an international investment.*
- f) Payments resulting from the settlement of disputes.*
- g) Payments for royalties, use and exploitation of trademarks, patents, licenses and franchises, as well as payments for import of technology and technical assistance agreements provided that they are related to a company that receives international investments and are not regulated in other rulings issued by this Commission.*
- h) Capital reductions in all its forms.*

III. Foreign exchange control regime.

In accordance with the Decree No. 903 issued by the Presidency of the Republic, published in the Official Gazette Number 40,393 dated April 14, 2014, the Foreign Exchange Administration Commission (CADIVI) has been replaced by the National Center for Foreign Trade (CENCOEX).



IV. Law-Decree on Foreign Investments.

Decree N° 1,438, published in the Official Gazette Special Number 6,152 dated November 18, 2014.

Minimum amount of foreign investment

Article 24. *To obtain the registration of a foreign investment, contributions must be made at the official exchange rate in force for a minimum amount of one million dollars of the United States of America (USD 1,000,000.00) or its equivalent in foreign currency. The National Center for Foreign Trade may set a minimum amount for the constitution of foreign investment which may not be less than ten percent (10%) of the amount described in this article, considering the sectorial interest to promote small and medium industry, and other forms of organizational of economic productive character.*

IV. Law-Decree on Foreign Investments.

Decree N° 1,438, published in the Official Gazette Special Number 6,152 dated November 18, 2014.

Remittance of profits or dividends

Article 33. *Foreign investors are entitled to remit abroad annually and from the close of the first fiscal year, up to eighty percent (80%) of profits or dividends derived from their registered and updated foreign investment in freely convertible foreign currency, subject to compliance with the object of the investment; in case of partial remittance, the difference may be accumulated to the profits obtained only in the following year for their remittance abroad; according to the provisions of this Decree with Rank, Value, and Force of Law and its Regulations.*

IV. Law-Decree on Foreign Investments.

Decree N° 1,438, published in the Official Gazette Special Number 6,152 dated November 18, 2014.

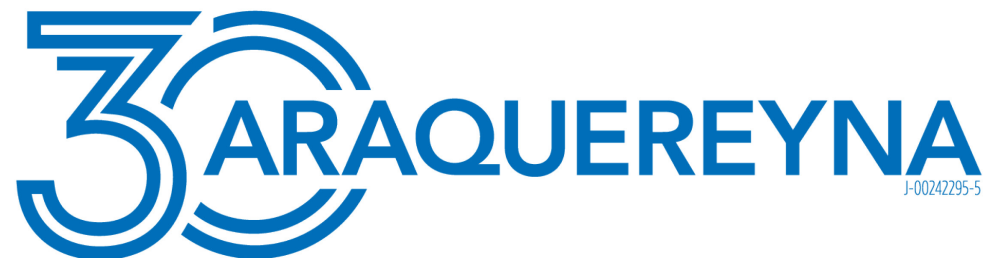
Reinvestment of profits or dividends

Article 34. *Foreign investors shall be entitled to reinvest all or part of the profits earned in local currency, in order to be considered as foreign investment.*

Any reinvestment must be notified to the National Center for Foreign Trade which may make observations within sixty days after the filing date. Foreign investors are required to register this form of investment with the National Center for Foreign Trade.

IV. Law-Decree on Foreign Investments.

In accordance with the Law-Decree on Foreign Investments, issued by the Presidency of the Republic, published in the Official Gazette Special Number 6,152 dated November 18, 2014, the activity of the Superintendence of Foreign Investments (SIEX) are assumed by the National Center for Foreign Trade (CENCOEX).

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Venezuela: Unfolding Economic, Humanitarian, and Political Crisis

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A challenge for the region

- Humanitarian crisis and governance crisis
- OAS confrontation on June 23?: Venezuela and the Inter-American Democracy Charter
- Regional split in views about next steps
- Official U.S. view: “All is fixable – if Venezuela is willing and able to make changes”

Several tracks for seeking resolution

- OAS and Secretary-General Almagro
- Former leaders' track (Zapatero, et al.)
- U.S.-Venezuela dialogue: Secretary Kerry proposed last week – Assistant Secretary Tom Shannon; Maduro agreed to send envoy
- HFAC: hearing June 22 at 1:00 pm – State, Treasury, Commerce to testify

U.S. calling for 4 elements

- 1) Immediate release of all political prisoners by Venezuelan government
- 2) Support dialogue efforts to seek a resolution (but not as delaying tactic)
- 3) Support effort to move ahead with recall as under Art. 72 of constitution
- 4) Executive branch to recognize legitimate constitutional role of National Assembly

Economic outlook bleak

- U.S. officials characterize Venezuela as having “anti-market” orientation
- Currency controls affect all sectors – food, medicine, oil services, airlines - \$billions in arrears
- Inflation: 720% - highest in the world
- GDP contracted 10% in 2015 (IMF); another 14% contraction possible in 2016

Economic outlook (cont'd)

- 97% of all foreign exchange from petroleum
- Steady decrease: oil production down 5% from April; down 11% from 2015 levels; oil revenue fell \$32 billion in 2015
- Changes sought (IMF and U.S.): collapse exchange rate tiers; reduce petroleum and food subsidies; stabilize money supply; curb inflation

Legal protections for foreign investors provided in Bilateral Investment Treaties (BITs) signed by Venezuela

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How Bilateral Investment Treaties (BITs) can protect companies' rights

- Legal protections provided in BITs
- Rights to enforce under BITs signed by Venezuela
- Potential recovery mechanisms for foreign investors under BITs signed by Venezuela
- Implications of pursuing BIT arbitration against Venezuela

What is a BIT?

- What types of investments are covered under BITs?
- What types of rights and protections do BITs provide for foreign companies and their investments?

BITs and other IIAs signed by Venezuela

VENEZUELA'S BILATERAL INVESTMENT TREATIES (BITs) IN FORCE

Argentina	Cuba	Iran	Russia
Barbados (4)	Czech Republic	Italy	Spain (5)
Belarus	Denmark	Lithuania	Sweden
Belgium-Luxembourg Economic Union (3)	Ecuador	Netherlands* (13)	Switzerland (3)
Canada (6)	France (1)	Paraguay	United Kingdom (3)
Chile (1)	Germany	Peru	Uruguay
Costa Rica	Indonesia	Portugal (2)	Vietnam

* Venezuela denounced the BIT in April 2008. However, a “survival clause” in the BIT secures investors’ protections until 2023, with respect to investments made before April 2008.

Free Transfers obligation

A government must allow foreign investments to transfer funds into and out of the country, including contributions to capital, profits, dividends, and capital gains.



CANADA-VENEZUELA Foreign Investment Promotion and Protection Agreement (FIPA) – Art. VIII: Each Contracting Party shall guarantee to an investor of the other Contracting Party the *unrestricted transfer of investment and returns* . . . Transfers shall be effected *without delay* in the convertible currency in which the capital was originally invested or in any other convertible currency agreed by the investor and the Contracting Party concerned. Unless otherwise agreed by the investor, transfer shall be made at the *rate of exchange applicable on the date of transfer*.

Fair and Equitable Treatment obligation

A government must treat foreign companies fairly and with due process.



nationals or companies of each Contracting Party shall at all times be accorded *fair and equitable treatment* in accordance with international law and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by *arbitrary or discriminatory measures* the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to the treatment of investments of nationals or companies of the

NT and MFN obligations

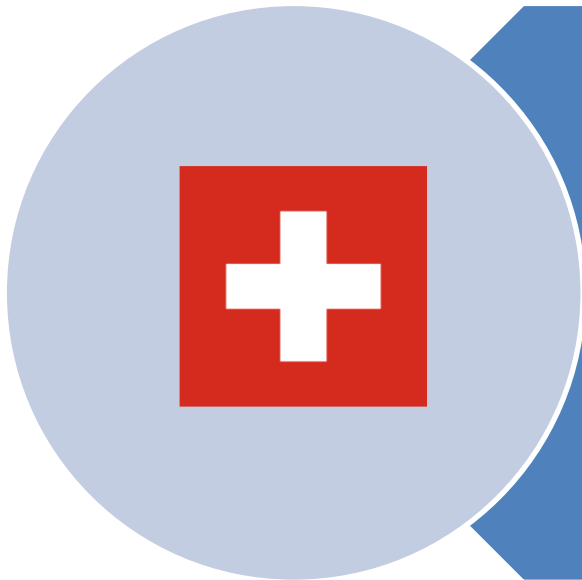
A government may not treat foreign companies or their investments any worse than it treats its own companies and investments or than it treats those of another country.



- (1) Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State.
- (2) Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own nationals or companies or

Expropriation obligation

A government may not expropriate or nationalize foreign investments without paying full and just compensation.



SWITZERLAND-VENEZUELA BIT – Art. 6: Neither of the Contracting Parties shall take, either *directly or indirectly*, measures of expropriation, nationalization or any other measures having the same nature or the same effect against investments of investors of the other Contracting Party, unless the measures are taking in the public interest, on a non-discriminatory basis, and under due process of law, and provided that provisions be made for effective and adequate compensation...

Why pursue BIT Arbitration?

- For use as leverage
- Direct
- Neutral
- Flexible
- Enforceable

To-do list before pursuing BIT Arbitration

- Protect your rights
- Evaluate political and regulatory risks of activating BIT arbitration
- Review BIT time limitations
- Undertake a government relations strategy to pursue settlement

U.S. OFAC's Venezuela Sanctions Program

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U.S. Venezuela Sanctions Program – Legal Framework

- **2011 – Iran Sanctions Act (ISA):** Prohibited PDVSA (though not its U.S. subsidiaries) from undertaking certain activities before U.S. government agencies (restrictions removed in January 2016)
- **2014 – Venezuela Defense of Human Rights and Civil Society Act:** Provided the president with authority to establish a list-based targeted blocking sanctions program
- **2015 – Executive Order (EO) 13692 and Sanctions Regulations:** Created a new sanctions program that blocked the property of certain persons and added them to the U.S. List of Specially Designated Nationals (SDNs) if the U.S. determines the persons are responsible for:
 - Undermining democratic processes or institutions
 - Significant acts of violence or violations of human rights
 - Limitations on freedom of expression or peaceful assembly
 - Public corruption

Specially Designated Nationals (SDNs)

- **Antonio José Benavides Torres:** Commander of the Guayana Integral Strategic Defense Region of the National Armed Forces, and Director of state-owned company CAMIMPEG
- **Gustavo Enrique González López:** Minister of Interior, Justice and Peace
- **Justo José Noguera Pietri:** President of state-owned company SIDOR
- **Katherine Nayarith Haringhton Padron:** National Level Prosecutor of the Public Ministry
- **Manuel Eduardo Pérez Urdaneta:** Deputy Minister of Prevention and Citizen Security
- **Manuel Gregorio Bernal Martínez:** Chief of the 31st Armored Brigade of Caracas
- **Miguel Alcides Vivas Landino:** President of state-owned company VENETUR

Questions?

iGracias!

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