



## **Ep. 15: Venezuela – The Roots and Future of U.S. Sanctions**

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**Jose Garriga:**

Hello and welcome to *OnAir with Akin Gump*. I'm your host, Jose Garriga.

Sanctions are a powerful foreign policy tool. They can be employed by a country to retaliate against actions by, or policies of, another country or in response to the internal situation in another country. Examples include the Continental System used by Napoleon against the United Kingdom, the oil embargo of the '70s imposed by Arab members of OPEC against the United States and others, and international sanctions on Russia following its military intervention in Ukraine.

Most recently, U.S. sanctions against Venezuela made headlines, as the Trump administration announced sanctions against that country's state-owned oil company.

We have with us today to discuss these sanctions and their impact on business Akin Gump public law and policy senior advisor and former U.S. Rep. Ileana Ros-Lehtinen and international trade partner Nnedi Ifudu.

Ileana, who joined the firm in January, served for almost three decades as a member of Congress, holding, among other positions, the chair of the House Foreign Affairs Committee and of its Subcommittee on the Middle East and North Africa.

Nnedi counsels U.S. and non-U.S. clients on economic sanctions, export control laws and antiboycott laws and regulations, among a variety of other laws that affect cross-border transactions and international trade.

They will discuss the current state of play regarding the Venezuela sanctions, what to expect by way of additional measures the Trump administration might take, and what kind of impact the sanctions are having on business.

Welcome to the podcast.

Ileana, Nnedi, thank you both for appearing on the show today. This is a big topic in trade. Let's start by giving listeners some context, then, for the recent developments in Venezuela. Ileana, if you could, please describe the political events that brought about the current situation.

**Ileana Ros-Lehtinen:** Well, that's a great question to start off the podcast, Jose. You are right that people started paying attention to sanctions and what the U.S. position is on Venezuela

after the oil sanctions on the state-owned PDVSA [*Petróleos de Venezuela, S.A.*], which is the name of the state conglomerate. But actually, when you look back at the history of Venezuela, in March of 2013, that's when Hugo Chavez, who was the president of Venezuela, dies after ruling Venezuela for 14 years, he handpicks his guy to take his spot, Nicolás Maduro, a retired truck driver, bus driver. And Maduro then wins the presidency by the slimmest of margins for a six-year term in an election that was fraught with many problems. Most international observers did not declare that that was a legitimate election. Then everything started to hit the fan against Maduro because of the way that he was leading Venezuela.

There was a coalition government that won in the National Assembly. The National Assembly is their way of saying "Congress." So, the opposition to Maduro gets elected to take over the National Assembly. Then what happens is Maduro says, "You, National Assembly, you don't count at all. I will make sure that my appointed Supreme Court takes over for the National Assembly." Then Maduro appoints or has the sham election for what he calls the People's Congress, a constituency congressional assembly. He puts all of his followers to take the place of the National Assembly. That then brings into play a lot of public upheaval. People are not happy with what is going on with the government.

The U.S. does not recognize the results of the most recent election, which was in May 2018. What happens is that this escalated fast. Three million Venezuelans leave Venezuela because there's no food and medicine and clean water. Even supporters of the Maduro regime say, "There's got to be a better way." Then what happens is that the leader of the National Assembly, this gentleman named, very young man, Juan Guaidó. He says he is the president of Venezuela because he's the leader of the Assembly. The U.S. spontaneously on that same day recognizes Guaidó as the legitimate interim president of Venezuela. Once the U.S. did that, then over 50 countries have followed suit in just a very short period of time. In the next two months, more than 50 countries have said, yes, Guaidó is the president, not Maduro.

The protests have continued in Venezuela. There's not enough food; there's not enough medicine, not enough water. People are literally dying. Electricity is at a premium. They've had rolling blackouts for a good chunk of this time. What happens is that the Trump administration says, we are going to donate humanitarian aid. Many countries also join us in this, and we send food and medicine and water. Maduro says that that is an infringement upon his regime. He does not accept the food and medicine and all the supplies. He says, "No, we'll take care of our own." In fact, he says, "I'm going to send food and medicine to Cuba, we have so much of it."

So, with that, Jose and Nnedi, then sanctions start to clamp down on the Maduro regime. Now we've got, we're so lucky at Akin Gump that we have the Sanctions Queen 2019, who is Nnedi. She will probably go into, I hope she does, what the sanctions are. But now we have a two-track policy with Venezuela. We send them supplies and medicine. We hope that one day they will get to the people. At the same time we clamped down, we've sanctioned over 150 or more government officials, organizations. We've revoked the visas of top Maduro officers. Just lately, we've even sanctioned their gold mining company as well as the oil conglomerate. And we have allocated a lot of money to help with displaced Venezuelans.

So, we're doing over 500 metric tons of food and humanitarian supplies. We're trying to help the people of Venezuela. But, at the same time, we have a tough sanctions policy against the Maduro regime.

**Jose Garriga:**

Thank you, Ileana. We started talking about some of the U.S. sanctions on Venezuela, so let's go into that a bit. The measures announced by the Trump administration have

received a lot of notice as you say. But U.S. sanctions on the country actually go back to the Obama administration. Nnedi, what were the original grounds for sanctioning Venezuela? And where are we today on the sanctions front?

**Nnedi Ifudu:**

Yes, that's correct, Jose. In fact, the sanctions program dates back to December of 2014, when Congress passed the Venezuela Defense of Human Rights and Civil Society Act, responding, at the time, to what it perceived as antidemocratic practices by the Maduro regime, which was clamping down on antigovernment protestors. As Ileana said at the beginning, following what was viewed as a sham election in 2013, in 2014, we witnessed a lot of protests in Venezuela. The Maduro regime was viewed as taking actions against those protestors. So, the Defense of Human Rights and Civil Society Act was Congress's response to that. That law actually authorized the president to impose sanctions on Venezuela.

So, in March of 2015, Obama issued Executive Order 13692, which authorizes the imposition of blocking sanctions on persons who are found to be responsible for, or involved in, undermining democratic processes or institutions in Venezuela, who are found to be violating human rights against persons involved in antigovernment protests, impinging on the exercise of freedom of expression of peaceful assembly, or otherwise involved in public corruption by senior officials with the government of Venezuela.

So, it is under this executive order, which was issued by Obama, that the Trump administration actually relies on for imposing blocking sanctions against President Maduro and certain members of his regime in July 2017. Today, through the issuance of an additional five executive orders by the current administration, we have expanded U.S. sanctions in Venezuela. These six executive orders along with about 18 general licenses—general licenses are general authorization issued by the Office of Foreign Assets Control, OFAC, which is an agency within the Department of Treasury, as well as a score of frequently asked questions—these together make up the current U.S. sanctions program vis-à-vis Venezuela. It is, without doubt, considered the most complicated sanctions program maintained and administered by OFAC.

Through these executive orders, we have imposed sanctions on individuals and entities that are deemed to be part of, or providing crucial support for, the Maduro regime. We've sanctioned entities operating in the gold, energy and, most recently, last Friday, the finance sectors of the Venezuela economy. On Friday, we imposed sanctions on the Venezuelan National Development Bank. Most notably, in January, we imposed sanctions on PDVSA, which Ileana mentioned already. This administration has also imposed certain financial sanctions on the government of Venezuela. I should note that “the government of Venezuela” is a very broad term. It includes not only agencies within the government, but any entities that are owned or controlled by the government or entities or persons acting on behalf of the regime.

So, we have scores of individuals and entities that are designated on the list of specially designated nationals and blocked persons, also known as the SDN list. This is a list administered and enforced by OFAC. U.S. persons are prohibited from dealing with any person or entity on the SDN list, the list that includes Maduro as well as PDVSA and a number of other blocked persons and entities.

As I said, U.S. persons are prohibited from engaging in most dealings with these entities and persons in the absence of a general or specific license. U.S. persons are also required to block or freeze any property of such persons that are currently in their possession or that subsequently come into their possession. As I noted earlier, there are a number of general licenses that currently allow U.S. persons to engage in certain otherwise prohibited activities vis-à-vis entities on the SDN list or owned or controlled by

PDVSA. For example, there are general licenses that allow limited activities with respect to PDVH and Citgo Holding, which are U.S. entities owned by PDVSA.

It's important to note that the sanctions apply to U.S. persons, and by that I mean that U.S. persons are required to comply with our sanctions regime vis-à-vis Venezuela. A "U.S. person" is a U.S. citizen; permanent resident, also known as "green card holders"; any entity organized under the laws of the United States, including foreign branches; as well as any person while physically in the United States. So, non-U.S. persons—anyone who doesn't fit this definition is a non-U.S. person, and they generally are not required to comply with the Venezuela sanctions restriction. However, any transactions between non-U.S. persons that have a U.S. nexus, meaning it involves the use of U.S. dollars, it involves U.S. persons in some capacity or the other, including U.S. financial institutions—all such transactions to the extent that they involve a U.S. nexus must also comply with our U.S. sanctions restrictions. Additionally, there is secondary sanctions risk for non-U.S. persons. And by "secondary sanctions," I mean sanctions that can be imposed on any person, principally non-U.S. persons, that engage in certain activities that are deemed to be inconsistent with U.S. national security or foreign policy concerns. For these activities, there is no need, rather, a U.S. nexus is not required.

So, certain activities under the Venezuela sanctions or certain activities, rather, with Venezuela could expose non-U.S. persons to sanctions, including, most notably, materially assisting, sponsoring or providing financial material or technological support for persons on the SDN list, including, famously, PDVSA. So that's the landscape, Jose.

**Jose Garriga:** Thank you, Nnedi.

**Ileana Ros-Lehtinen:** Jose, let me tell you.

**Jose Garriga:** Please.

**Ileana Ros-Lehtinen:** This is why we called Nnedi "Sanctions Queen 2019." I've got to get her a sash and a tiara. [*laughter*] No one knows sanctions like Nnedi and is able to explain such an arcane topic in a very commonsense way. So, for that, kudos.

**Nnedi Ifudu:** You're kind, Ily.

**Jose Garriga:** Agreed. Well, Ileana, talking about something with which I know you're very familiar, and that's sanctions in the form of an embargo involving another Latin American country, which is Cuba. To what extent are the two sets of sanctions comparable, Cuba and Venezuela? What lessons, if any, might be applied from the Cuban embargo to the Venezuelan situation?

**Ileana Ros-Lehtinen:** That is an excellent question, and I'm so glad that you asked it, Jose, because I often get that question, and people are under the impression that the word "sanction" means embargo. They're totally different legal concepts and in common-day usage as well. Totally different. We have, as Miss Sanctions Queen 2019 explained, a comprehensive sanctions program against Cuba, against North Korea. We do have it against other countries, and it prohibits nearly all unlicensed activities and transactions involving these countries or their governments.

So, that is quite different than what we're doing with Venezuela, where we have specially designated individuals. We have people who are blocked. We have individuals who are related to these entities. Some individuals can be licensed and continue operating with countries, and some cannot. But it really is specific to the company. It's very important for those companies to check with OFAC or the Treasury Department, Commerce Department. There's so many other regulations that take place they can come under. But it is not an embargo. We do not have an embargo on Venezuela. That's on Cuba. They have, perhaps, many similarities, but as of now, there is no embargo on

Venezuela. I don't suspect that there will be, but that will be something, a determination that the President can make. He has within his power the ability to do so.

When we passed Cuba legislation, we codified the embargo. That means that, in the law known as the LIBERTAD Act, the Helms-Burton bill, we put the embargo into law, which means that only Congress can lift the embargo on Cuba. Only Congress; the president cannot. However, only that was codified. That means that the president, Trump here, were he to put an embargo on Venezuela, that is within his power. It's not within their power to lift the embargo on Cuba because that is now law.

So, there's nothing that would prevent President Trump from putting an embargo on Venezuela. I don't believe that—who can guess what tomorrow brings?—but now I would say that it's not likely because he is doing what he needs to do, in his thinking, by going at these entities one by one and these individuals, one by one. For example, he was upset that humanitarian aid was not getting through to the Venezuelan people. So, anyone who was related to not having that aid get to the people of Venezuela, whether it's the governor of a province, a military leader, those individuals were sanctioned. So, he is able to get tough on the Venezuelan regime through designating certain entities and individuals. As of now, I would say that there is not going to be an embargo, but who knows? No one can predict the future. As Yogi Berra said, "It's so hard to predict, especially when it's about the future."

**Jose Garriga:** So, this would seem to be a much more targeted, much more surgical approach than what an embargo would imply, then?

**Ileana Ros-Lehtinen:** Very well stated, correct. It is surgical; it is specially designated. As of now, there's no indication that will change. But who knows?

**Jose Garriga:** Thank you, Ileana. A reminder, listeners, that we're here today with Akin Gump senior advisor Ileana Ros-Lehtinen and partner Nnedi Ifudu discussing U.S. sanctions on Venezuela.

So, let's talk a little bit about Venezuela in the international context. You mentioned that 50 countries supported the United States in recognizing Guaidó. On the flip side of that, Venezuela has challenged the U.S. sanctions that we've been discussing at the World Trade Organization. So, Nnedi, to what extent is international treaty law—and perhaps sentiment—with or against the U.S. effort beyond what we've discussed?

**Nnedi Ifudu:** So, before I answer that specific question, I think it might be helpful just to provide some context for our listeners. Venezuela in December of 2018 requested bilateral consultation with the U.S. in a filing to the WTO. Venezuela had taken the position that U.S. sanctions that had been imposed from 2015 to the present should be considered to be coercive trade restrictive measures. Venezuela claims that these actions collectively violate the United States' obligations under various articles of the General Agreement on Tariffs and Trade, also known as GATT and the General Agreement on Trade in Services, also known as GATS. Both of these are multilateral treaties to which the United States and Venezuela are parties. Following submission of this request for consultation in February of this year, the U.S. informed Venezuela that it refused to enter into consultations with Venezuela. Venezuela then supplemented its request for consultation on March 14, just a few weeks ago, because the U.S. denied the request for consultation. Venezuela requested the establishment of a panel be placed on the March 26th agenda for the WTO's Dispute Settlement Body meeting.

So, the request was placed that there be establishment of a panel at a meeting that was supposed to be held yesterday at the WTO. It is our expectation that had the meeting—and I have an interesting development on this—but it was our expectation that had the meeting progressed yesterday, that the U.S. would have blocked the request for the

convening of a panel. So, WTO rules will permit the U.S. to block Venezuela's first request for a panel, but a panel will be automatically established if Venezuela makes a second request. If there is ever a panel convened, it is our expectation that the U.S. would take the position that its sanctions against Venezuela are protected under article 21 of GATT and article 14 of GATS, which are essentially similar.

What these articles say is that member states are permitted to take any action they consider necessary for the protection of essential security interests or action, which is taken in time of war or other emergency in international relations. So, for example, in the ongoing WTO litigation related to U.S. steel and aluminum tariffs, the Trump administration has said that article 21 forbids the WTO from even examining the dispute at hand once a WTO member invokes article 21, the National Security Exemption. The U.S. has stated that it is its clear and unequivocal position for the past 70 years that issues of national security are not matters appropriate for adjudication in the WTO dispute settlement system.

So, this is what we expected the U.S. position to be if there is ever adjudication of the Venezuela claim. However, just yesterday, the United States took the very unusual step of blocking the entire meeting on the grounds that Venezuela's agenda item regarding its request for a panel establishment was not proper because it was put forth by a representative of the Maduro regime and not the legitimate government of Venezuela. So, Jose, it's unclear at this time if or when the meeting will take place, or what effect this will have on the U.S. ability to postpone the establishment of the panel.

Regarding the legitimacy or strength of the likely U.S. position, I would say that countries are split. Some countries believe that the WTO should hear such disputes and can review some of the elements of this national security exemption. However, the WTO cannot question whether a national security or emergency actually exists. Whereas other countries believe that the WTO should have jurisdiction to determine whether the exemption applies and whether there is, in fact, a question of national security or an emergency at hand.

At this time, neither WTO members nor WTO panel have formerly interpreted this national security exemption. So, it sort of remains to be seen. I will tell you that we are tracking a similar case involving the Russia-Ukraine sanctions. The panel has not yet adjudicated this dispute, but we expect that there will be a panel deliberation soon that will hopefully provide some insight into the panel's thinking regarding the national security exemption.

**Jose Garriga:** Thank you, Nnedi. Yeah, that's a very interesting development. We'll see how that plays out. Now, a question for both of you I'm sure listeners are very curious about. I think both of you had begun to address this in your answers earlier, but what additional sanctions on Venezuela can we expect from the White House?

**Ileana Ros-Lehtinen:** We can expect a lot more, and I'm sure that Nnedi would agree.

**Nnedi Ifudu:** I do.

**Ileana Ros-Lehtinen:** There's strong bipartisan support. Don't think that it's just the White House against Congress. No, it's Congress as part of this too; strong bipartisan support, Democrats and Senate. Just this week, a Democrat-sponsored bill passed in the House. So, there's strong bipartisan, bicameral support from the executive branch, from the legislative branch. The Trump administration, we should think it's going to continue to ratchet up sanctions, targeting the government, targeting the Maduro regime. Also, increased use of secondary sanctions based on what we've heard from National Security Advisor John Bolton, U.S. Special Envoy Elliott Abrams; Secretary Pompeo has also been tweeting. President Trump himself has tweeted that anything that could be

sanctioned that is keeping the Maduro regime financially afloat. Who knows what will happen?; I'm not going to predict it. But the words are pretty harsh, and I would think that we should think that more will be done rather than less.

There won't be a move to lessen the sanctions. I think that the expectation should be that more will be sanctioned. The political situation in Venezuela, as we know, is very fluid; it's quite dynamic. We don't know if more people will go out to the streets. We don't know if Maduro's government will shoot at them. But OFAC is going to be very busy. Executive orders coming out of the White House; many more to come. But if the regime falls, if there's a movement toward democracy, the sanctions can be lifted in a New York minute, very quickly. So, each sanctions program is unique, as Nnedi has said. Venezuela is one of the most complicated ones, but we can expect more rather than less coming out of the White House and coming out of Congress and the executive branch in general about targeting folks who are there doing business with Maduro.

**Nnedi Ifudu:**

Yeah, I agree with all of that. The only thing I would add to Ily's description is that we could also see sanctions imposed on Venezuelan entities under the Russia sanctions regime. So, we have the Venezuela program, but we separately have the Russia program, and it is possible that we could see sanctions on Venezuela entities who are engaged in targeted activities vis-à-vis Russia. So, just this week, Senate Foreign Relations Committee ranking member Sen. Menendez urged Secretary Pompeo to determine if Venezuela, among others—it was Venezuela, Cuba, and Nicaragua—should face mandatory sanctions for conducting significant transactions with the Russian defense and intelligence sectors. Specifically, he referred to Russia's delivery of attack helicopters to Venezuela. Congress has called for an overall assessment of whether any sanctionable transactions have taken place.

So, there is a sense that Congress is paying attention, close attention, to the ongoing Russian-Venezuela security/military cooperation. There may be efforts in Congress to develop a strategy to counter any perceived threats from such cooperation, which may include additional sanctions of Venezuelan entities or individuals.

**Ileana Ros-Lehtinen:**

I agree, and Nnedi, I would say that, as the tightening of sanctions continues to challenge the Maduro regime, he's turning to other countries for help. So, the Trump administration may expand this strategy to other countries in Latin America, including Nicaragua, that are helping Maduro stay afloat. So, we will have to wait and see. But it's certainly an ever-changing political landscape. But the humanitarian crisis continues unabated, and the American people have been so generous in helping the people of Venezuela. We just wish that the aid would get to those people who need it the most.

**Jose Garriga:**

Well, something that you both stressed in your responses here has been the fluidity and the volatile nature of this. I think that's something that I think our listeners would want to know is: Ultimately, given how complex it is, given the fact that it is bringing in other countries and other sanctions regimes, what impact are these sanctions, the Venezuela sanctions, having on business? What are the key points? What are the takeaways that businesspeople should have in mind regarding the other current sanction situation in Venezuela?

**Ileana Ros-Lehtinen:**

Well, I think that we should expect more action to be taken. We should say if there's political movement toward democracy, they will be lifted. It's a very fluid situation. But it's important to carefully analyze sanctions and political risk implications for ongoing or prospective investment in business opportunities in Venezuela. Don't assume that what you're doing today that has been okay, will be authorized in the future. So, this is the time to be very careful and understand what is at stake.

**Nnedi Ifudu:**

Right, and I would just remind our listeners that the sanctions program regarding Venezuela is currently targeted. It's targeted at the government of Venezuela; it's

targeted at entities and individuals that have been added to the SDN list. There are, importantly, financial sanctions affecting the government of Venezuela, which has created issues for security traders, notably. The sanctions on PDVSA have created issues, not only for securities traders but also energy companies. But because the sanctions are targeted, knowing who you're doing business with is paramount. As I said at the beginning, there are financial sanctions in place against the government of Venezuela that restrict dealings in equity securities, bonds, dividends of the government of Venezuela. But "who is the government of Venezuela?" is very broad. So, it's not only the government entities, but it's also any entity that is owned or controlled by the government. It's entities or persons representing the government. With respect to PDVSA, the way that the SDN restrictions work is that they apply not only to the listed entity, but any entity that the listed SDN owns by 50 percent or more interest. Which is why U.S. companies such as Citgo Holding, PDVH are all swept up in the sanctions.

So, even if your counterpart is not designated on the SDN list, understanding who owns your counterpart and their percentage of ownership will be key to your analysis. So, U.S. sanctions operate on a strict liability basis, which means that even if you did not know that your transaction was in violation of U.S. sanctions, that does not prevent enforcement action. Perhaps it could allow for some mitigation, but it will not prevent charges being brought against you because, again, our sanctions operate on a strict liability basis. Practically speaking, what we're seeing is that there's no more Venezuela oil coming into the United States since sanctions were imposed. That's because even though there are limited general licenses that allow companies like Citgo to continue importing oil from PDVSA for a limited period of time, we are not able to make any payments to PDVSA. All payments to PDVSA have to be blocked, and because we are unable to pay PDVSA, Venezuela is not allowing any oil to come into the United States.

We've also seen, due to the sanctions that have been imposed, that Venezuelan sovereign debt has been squeezed out of the U.S. market. That's because U.S. persons are authorized to divest government of Venezuela securities to non-U.S. persons, but even in the non-U.S. markets, we've seen a slowdown in trading on these bonds in foreign markets because of the additional diligence that non-U.S. persons have to engage in to ensure that their trades comply with U.S. sanctions. So, while non-U.S. companies are generally not required to comply with our sanctions against Venezuela, even non-U.S. persons are feeling the pinch of our sanctions program with respect to Venezuela.

So, I think the most immediately impacted are the energy companies and security traders, but you also have U.S. companies who have operations on the ground in Venezuela, in the agricultural space, in the pharmaceutical space, who are having difficulty getting in raw materials, who are having difficulty dealing with U.S. banks, who are either being overcompliant or simply de-risking and not wanting to have anything to do with Venezuela. So, the impact has been far-reaching, but to the extent that there's a listener or a listener's client who is interested in Venezuela, my message is, for now, the sanctions are targeted. So, there's still room to play in the Venezuela market as long as you understand the sanctions and political implications.

**Jose Garriga:**

That's a great point, thank you. Listeners, you've been listening to Akin Gump senior advisor Ileana Ros-Lehtinen and partner Nnedi Ifudu. Thank you both for a fascinating overview of this very critical and very volatile trade and foreign affairs situation.

And thank you, listeners, for your time and attention. Please make sure to subscribe to *OnAir with Akin Gump* at your favorite podcast provider to ensure you do not miss an episode. We're on, among others, iTunes, YouTube and Spotify.



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Until next time.

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