

# OBSTÁCULOS LEGALES A LAS INVERSIONES INTERNACIONALES EN VENEZUELA Y POLÍTICA ANTICORRUPCIÓN\*

## *LEGAL OBSTACLES TO INTERNATIONAL INVESTMENTS IN VENEZUELA AND ANTI-CORRUPTION POLICY*

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RESUMEN: Este artículo comienza presentando datos estadísticos recientes sobre el estado de derecho, las inversiones y la corrupción en Venezuela. A continuación, el trabajo se centra en analizar la Ley venezolana contra la corrupción, de 2014, y desarrolla varios argumentos que pueden conducir a cuestionar los verdaderos objetivos de la norma desde la perspectiva de la inversión internacional. El artículo reflexiona sobre si el actual gobierno venezolano podría usar esta ley anticorrupción en contra de los inversores extranjeros. El cataclismo que actualmente está viviendo Venezuela no trae buenos augurios para las inversiones internacionales.

*ABSTRACT: This article begins by presenting some recent statistical data on rule of law, investment, and corruption in Venezuela. It focuses afterwards on analysing the 2014 Venezuelan Anti-Corruption Law, and it develops various arguments that may lead to question this Law's real objectives from an international investment's perspective. The paper reflects on whether the current Venezuelan government might use this 2014 Anti-corruption law against foreign investors. The cataclysm that the country is currently experiencing does not bode well for international investments.*

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**Palabras clave:** corrupción, Venezuela, **Keywords:** *Corruption, Venezuela, rule of law, estado de derecho, inversión extranjera, foreign investment, investor-State dispute settlement* resolución de controversias inversor-Estado. (*ISDS*).

SUMMARY: I. *Introduction*. II. *The (lack of) rule of law in Venezuela, corruption, and international investment*. III. *The Venezuelan 2014 Anti-Corruption law and its likely effects on international investment*. IV. *Final remarks: Quo vadis, Venezuela?*

## I. INTRODUCTION

The most recent developments in corruption in Latin America are spectacularly scandalous (*e. g.*, the Petrobras case has touched Brazilian politics at the highest level<sup>1</sup>, the ex-President of Guatemala remains in custody for months on corruption charges<sup>2</sup>). Parallel to these “star cases”, day-to-day reality in Latin America is also seen as corrupt by many international actors, such as international investors.

Institutional weakness, which generates an unreal separation of powers in many countries, is one of the numerous factors that accounts for the weakness in the rule of law and means that corruption is entrenched in many sectors of Latin America. This article focuses specifically on Venezuela and briefly runs through some relevant Venezuelan statistical data on rule of law, investment, and corruption (section I), before analysing the 2014 Anti-Corruption Law. Although the Law’s wording includes references to the fight not only against internal corruption but also against international aspects of corruption, this article develops various arguments that may lead to the “quarantining” of this Law’s real objectives from an international investor’s perspective (section II). More specifically, the paper reflects on whether the current Venezuelan government might use this 2014 Anti-corruption law against foreign investors. The cataclysm that the country is currently experiencing does not bode well for international investments (section III).

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<sup>1</sup> Arruda de Almeida, Monica and Zagaris, Bruce, “Political Capture in the Petrobras Corruption Scandal: The Sad Tale of an Oil Giant”, *Fletcher F. World Aff.*, v. 39, 2005, p. 87.

<sup>2</sup> “El expresidente de Guatemala, Otto Pérez, ligado a proceso por un nuevo caso de corrupción”, [http://internacional.elpais.com/internacional/2016/07/28/america/1469668078\\_832754.html](http://internacional.elpais.com/internacional/2016/07/28/america/1469668078_832754.html).

## II. THE (LACK OF) RULE OF LAW IN VENEZUELA, CORRUPTION, AND INTERNATIONAL INVESTMENT

“In Venezuela, there is no rule of law”. This harsh statement was uttered recently by Lilian Tintori, the wife of Leopoldo López, a Venezuelan opposition politician sentenced to almost 14 years imprisonment.<sup>3</sup> Without meaning to be alarmist, the latest statistics on the (lack of) rule of law and corruption in Venezuela tend to corroborate Ms. Tintori’s contention.<sup>4</sup>

To name but a few: Venezuela scored only 17 in the 2015 Corruption Perception Index (CPI), ranking 158<sup>th</sup> out of 168 countries—in comparison, Chile scored 70, and ranked 23<sup>st</sup> on the CPI—.<sup>5</sup> In the same vein, the World Bank’s Governance Research Indicator Country Snapshot (GRICS) shows a clear worsening of the Venezuelan situation.<sup>6</sup> The 2015 Country Report on Human Rights Practices on Venezuela issued by the U.S Department of State reveals “(high-level public) officials sometimes engaged in corrupt practices with impunity. The government frequently investigated and prosecuted its political opponents selectively on corruption charges to harass, intimidate, or imprison them”.<sup>7</sup> Likewise, a 2014 United States Agency of International Development (USAID) report stated that trust in the Venezuelan government had decreased significantly in recent years.<sup>8</sup>

<sup>3</sup> García Otero, Pedro, “10 Reasons Why Venezuela Is Not a Democracy”, <http://panampost.com/pedro-garcia/2015/07/08/10-reasons-why-venezuela-is-not-a-democracy>.

<sup>4</sup> Domínguez, Roberto, “The Limits and Contributions of the EU to Democracy in Latin America: The Cases of Mexico, Venezuela and Honduras”, in Boening, A. *et al.* (eds.), *Global Power Europe*, Springer, 2013, pp. 181-197; Ellner, Steve, “Does the process of change in Venezuela resemble a “Permanent Revolution?””, *Dialectical Anthropology*, 2011, pp. 249-253.

<sup>5</sup> 0 is perceived as highly corrupt, whereas 100 means that a country is perceived as very clean. Transparency International, <http://www.transparency.org/cpi2015#results-table>.

<sup>6</sup> As its website specifies, the Worldwide Governance Indicators (WGI) are a research dataset summarizing the views on the quality of governance provided by a large number of enterprise, citizen and expert survey respondents in industrial and developing countries. These data are gathered from a number of survey institutes, think tanks, non-governmental organizations, international organizations, and private sector firms. <http://info.worldbank.org/governance/wgi/index.aspx#reports>.

<sup>7</sup> “Country Reports on Human Rights Practices for 2015” <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper>.

<sup>8</sup> “Venezuelans rated schools 6.3 units lower in 2014, which may also be linked to the ongoing political and social instability in the country... evaluations of public health services have declined dramatically in Venezuela, adding more evidence that the environment

80% of Venezuelans feel that their national officials are corrupt<sup>9</sup> and the impunity level is higher than 95%.<sup>10</sup> According to a study by a non-profit organization, The Fund for Peace, Venezuela is currently characterised by: “existing income inequality among the population, massive and endemic corruption in the judicial system or profiteering by ruling elites, lack of political opposition, high media scrutiny and harassment, and human rights violations”.<sup>11</sup> In a much more political language, the 2015 country report regarding Venezuela, issued during the 4th round of review of the Follow-Up Mechanism (MESICIC) of the Organization of American States (OEA) Convention against Corruption, also notes that there is much room for improvement in this area.<sup>12</sup>

The above presented political, legal and social landscape undoubtedly influences the Venezuelan economy,<sup>13</sup> including the flow of international investments in Venezuela.<sup>14</sup> Attending to the multigovernment-sponsored Business Anti-Corruption Portal, the Venezuelan panorama is demolishing:

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in Venezuela is taking its toll on public evaluations of government performance”. “The Political Culture of Democracy in the Americas, 2014: Democratic Governance across 10 Years of the Americas Barometer”, [http://www.vanderbilt.edu/lapop/ab2014/AB2014\\_Comparative\\_Report\\_English\\_V3\\_revised\\_011315\\_W.pdf](http://www.vanderbilt.edu/lapop/ab2014/AB2014_Comparative_Report_English_V3_revised_011315_W.pdf).

<sup>9</sup> Albarrán, Tammy, and Ebanks, Tracy, “Latin America: a hotbed for FCPA enforcement”, [https://www.cov.com/~media/files/corporate/publications/2014/07/dj-latin\\_america\\_fcpa.pdf](https://www.cov.com/~/media/files/corporate/publications/2014/07/dj-latin_america_fcpa.pdf).

<sup>10</sup> Alison O’Connell, “Venezuela remains the most corrupt country in Latam”, <http://laccanet.com/news/article/930/lacca/venezuela-remains-corrupt-country-latam>.

<sup>11</sup> Rheman, Scherezade S. and Perry, Frederick V., “Corruption, Constitutions and Crude in Latin America”, *Law & Business Review of the Americas*, v. 20, 2014, pp. 163, 192; <http://fsi.fundforpeace.org/2016-venezuela>.

<sup>12</sup> “Venezuela”, [http://www.oas.org/juridico/PDFs/mesicic4\\_ven\\_sp\\_final.pdf](http://www.oas.org/juridico/PDFs/mesicic4_ven_sp_final.pdf).

<sup>13</sup> Recent scholarly papers state for example that the quality of business regulation is influenced by the corruption’s level. Breen, Michael and Gillanders, Robert, “Corruption, institutions and regulations”, *Economics of the Governance*, 2012, pp. 263-285.

<sup>14</sup> Aguilera, Ruth V., “A Comparative Analysis of Corporate Governance Systems in Latin America: Argentina, Brazil, Chile, Colombia and Venezuela”, in McGee, R. W. (ed.), *Corporate Governance in Developing Economies*, Springer, 2009, pp. 151-171; Gyimah-Brempong, Kwabena and Muñoz de Camacho, Samaria, “Corruption, Growth, and Income Distribution: Are there Regional Differences?”, *Economics of Governance* 2006, p. 268 (“corruption has a negative, large and statistically significant effect on the growth rate of per capita income”); Perla, Juan O., “A Game Theoretic Analysis of the Inter-American Convention against Corruption”, <https://www.oecd.org/cleangovbiz/Integrity-Forum-16-Juan-Perla.pdf> (“higher rates of corruption are linked to lower levels of development”).

Corruption represents a major obstacle for businesses operating or planning to invest in Venezuela. Most sectors of the Venezuelan economy suffer from endemic corruption, due to the highly politicized and ineffective judiciary that is inefficient in cracking down on corruption and impunity... Enforcement of anti-corruption legislation in the country is very weak, and government officials do engage in corrupt practices with impunity.<sup>15</sup>

Proof of this is the involution that Venezuela is experiencing in the Political Risk Index, where it has obtained the worst results of the whole Latin America.<sup>16</sup>

Likewise, recent academic work has established a connection between Venezuela's high corruption levels, and high reliance on extractive industries —oil and gas—, which accounted for 85.46% of total exports between 2002 and 2007.<sup>17</sup> As can be guessed from everything discussed so far, the richness of Venezuelan natural resources has not been sufficient to retain foreign direct investment (FDI) to the country. The resource curse is still active<sup>18</sup> and nowadays the FDI setting in Venezuela is alarming. For instance, FDI to Venezuela in 2014 declined by USD 6 billion (-88% compared to 2013).<sup>19</sup> A series of corrective measures proposed by regional organizations such as the Inter-American Development Bank,<sup>20</sup> as well as from the business and academic milieu<sup>21</sup> —more transparency, establishe-

<sup>15</sup> “Venezuela”, <http://www.business-anti-corruption.com/country-profiles/the-americas/venezuela.aspx>.

<sup>16</sup> The index is calculated by using all 17 risk components from the PRS Methodology including turmoil, financial transfer, direct investment, and export markets, <https://www.prsgroup.com/category/risk-index>.

<sup>17</sup> Rheman, Scherezade S. and Perry, Frederick V., *op. cit.*, note 11, pp. 163 and 192.

<sup>18</sup> Morrison, John, “An Overview of the Current Practice and Policy Relating to Business Activities and Human Rights: Some of the Implications from Corporate Rule Making”, in Pies, I., Koslowski, P. (eds.), *Corporate Citizenship and New Governance*, Springer, 2011, p. 9.

<sup>19</sup> “Venezuela-Foreign Investment”, <https://en.portal.santandertrade.com/establish-overseas/venezuela/investing>.

<sup>20</sup> “Transparent Governance in an Age of Abundance. Experiences from the Extractive Industry in Latin America and the Caribbean”, 2015, <https://publications.iadb.org/bitstream/handle/11319/6682/Transparent-Governance-in-an-Age-of-Abundance-Experiences-from-the-Extractive-Industries-in-Latin-America-and-the-Caribbean.pdf?sequence=3>.

<sup>21</sup> Latin America has a history of industrialization based on labor-intensive industries and the exploitation of natural resources. Scholars suggest “a modern business pro-

ment of independent regulatory agencies, more participation of private-owned firms in the economy, more foreign assistance, a much modern business profile, etc.—, do not seem practicable with the current Venezuelan government.<sup>22</sup>

### III. THE VENEZUELAN 2014 ANTI-CORRUPTION LAW AND ITS LIKELY EFFECTS ON INTERNATIONAL INVESTMENT

In this context of highly troubled waters, the Venezuelan government enacted in November 2014 the “Decreto con rango, valor y fuerza de Ley de reforma de la Ley contra la corrupción” —hereafter, the 2014 Anti-Corruption Law.<sup>23</sup> This law<sup>24</sup> partially amends the 2003 “Ley contra la corrup-

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file characterized by participatory practices and decentralized authority that allows the sharing of power”. Davila, Anabella, “Culture and Business Practices in Latin America”, in Schweickart, N. *et al.* (eds.), *Lateinamerika-Management*, Betriebswirtschaftlicher Verlag, 2004, pp. 575 and 576. Other voices consider that “Venezuela should ignore scruples over sovereignty and seek foreign assistance in the management of their oil wealth”. Nwabuzor, Augustine, “Corruption and Development: New Initiatives in Economic Openness and Strengthened Rule of Law”, *Journal of Business Ethics*, vol. 59, 2005, p.121. It is also stated that: “greater corruption if associated with lower firm labor productivity, but this association is reduced when an independent regulatory agency is present... The association between corruption and productivity also appears weaker for privately owned firms compared to publicly owned firms”. Wren-Lewis, Liam, “Do Infrastructure Reforms Reduce the Effect of Corruption? Theory and Evidence from Latin America and the Caribbean”, *The World Bank Economic Review*, vol. 29, p. 353.

<sup>22</sup> It is stated that: “The presence of resource rents creates incentives for government officials and investors to engage in corrupt cronyistic arrangements to share projects benefits between themselves. The presence of rents also reduces the need for a government to be accountable to its citizens, and to support the development of productive sectors in its economy. For all these reasons, in countries with poor quality institutions, additional investment in the resources sector often fails to benefit the host state. For this reason, policy responses to the resource curse focus on improving governance in the host states”. Bonnit-cha, Jonathan, “Foreign Investment, Development and Governance. What international investment law can learn from the empirical literature on investment”, *Journal of International Dispute Settlement*, 2016, 7, pp. 31-54.

<sup>23</sup> *Gaceta Oficial de la República Bolivariana de Venezuela*, núm. 6155, November 19th, 2014. [http://www.cgr.gob.ve/pdf/leyes/Decreto\\_Reforma\\_ley\\_Contra\\_Corrupcion.pdf](http://www.cgr.gob.ve/pdf/leyes/Decreto_Reforma_ley_Contra_Corrupcion.pdf).

<sup>24</sup> There are additional Venezuelan law ruling corruption (*e. g.*, the Law against Organized Crime, the Organic Law of the Republic’s Comptroller General and of the National

ción”— Anti-Corruption Law.<sup>25</sup> It is noteworthy that this 2014 Law is part of a broad package of legislative measures aimed at “enabling the Socialist productive offensive for 2015”,<sup>26</sup> which have been issued only a day before the expiration of the decree powers granted to President Maduro twelve months before by Venezuela’s national assembly.<sup>27</sup>

If the government’s official approach regarding the 2014 Anti-Corruption Law is heeded, the law is a genuine milestone in the fight against not only domestic but also international corruption.<sup>28</sup> Indeed, the new law includes a provision (Article 85) penalising the corruption of foreign officials,<sup>29</sup> which reproduces article VIII of the 1996 Inter-American Convention against Corruption (IACAC), and is also inspired by article 16 of the 2005 United Nations Convention against Corruption. Since Venezuela is a party to both international texts —ironically, IACAC was

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Fiscal Control System, the Public Function Statute and the Code of Ethics of the Public Servant) Likewise, there are a number of resolutions and other acts that have an impact on Venezuelan public officials (*e. g.*, Public Procurement Laws, the Organic Law for Citizens’ Power). Fernando Peláez-Pier and Gerardo Briceño, “Getting The Deal Through —Anti-Corruption Regulation 2014— Venezuela”, <http://www.worldservicesgroup.com/publications.asp?action=article&artid=6203>. Nevertheless, Venezuelan scholars highlight that the legal answer to corruption in Venezuela is far from being complete, as for instance civil law — *derecho civil*— is not providing satisfactory answers to this issue. Hernández Bretón, Eugenio and Madrid Martínez, Claudia, “Fighting Corruption from the Civil Side: Echoes from the Silence in Venezuelan Contract Law”, in Bonell, M. J. and Meyer, O. (eds.), *The Impact of Corruption on International Contracts*, Springer, 2015, pp. 439-446.

<sup>25</sup> *Gaceta Oficial de la República Bolivariana de Venezuela*, núm. 5637, April 7th, 2003. [http://www.diiuc.uc.edu.ve/pdf/Ley\\_Contra\\_La\\_Corruptcion\\_-\\_5.637\\_E.pdf](http://www.diiuc.uc.edu.ve/pdf/Ley_Contra_La_Corruptcion_-_5.637_E.pdf). Presenting the key aspects of this 2003 Act, “Anticorruption Regulation Survey”, <http://www.jonesday.com/files/Publication/8a15a2cf-9d6d-43cd-942e-015493d8db26/Presentation/PublicationAttachment/f5d92402-d49e-4afc-a74f-01a5b9fde574/Anti-Corruption%20Regulation%20Survey%202015%20%5BFINAL%5D.pdf>.

<sup>26</sup> “Venezuela-Enabling the Socialist Productive offensive”, in <http://www.courcyint.com/component/k2/item/62893-venezuela-enabling-the-socialist-productive-offensive.html>.

<sup>27</sup> Under the decree powers, President Maduro is allowed to bypass the Venezuelan National Assembly when legislating on issues linked to what it has been vaguely described as an “economic emergency”.

<sup>28</sup> “1.620 inspecciones ha realizado “Misión Eficiencia o Nada” para combatir la corrupción”, <http://consuladodevenezuela.es/contenido.php?idNot=1731>. President Maduro stated: “With this measures, I am sure that we will achieve a climate of trust and transparency against corruption under an ideological, cultural and deeply human criticism”, <http://www.rmv.gob.ve/eficiency-or-nothing-reformed-law-against-corruption>.

<sup>29</sup> Article 85 Anti-Corruption Law.

adopted in Caracas in 1996, two years before Chavez's rise to power—, it may be interpreted that the 2014 Anti-Corruption Law reflects governmental efforts to comply with its international commitments, and to level the playing field in an area with clear effects on the trade and economic sphere.

Without detracting from the possible importance of the referred article regarding corruption of foreign officials, the reality is that Venezuela is extremely rich in natural resources and over time has attracted many foreign companies. Proof of this interest, and also of the problems that investments of this type have experienced in recent decades, are the numerous awards generated under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID) in which the defendant was the Bolivarian Republic of Venezuela.<sup>30</sup> In fact, Venezuela has the dubious honour of being the second defendant State of the world—36 cases— (after Argentina -59 cases) with more claims at the ICSID level.<sup>31</sup> The implication of this is that the main problem facing the Venezuelan government in the area of international corruption—also called transnational corruption—is quite different to the one presented in the referred Article 85 of the Anti-corruption Law: the normal fact pattern is the corrupting of domestic public officials by individuals or legal entities representing foreign interests.<sup>32</sup>

If the focus is on the typology referred to above—corruption stemming from international investment aiming to locate itself in Venezuela or already located there—, a first reading leads one to believe that the

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<sup>30</sup> 39 ICSID cases are reported in the organization's website <https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pp./AdvancedSearch.aspx?rntly=ST153>.

<sup>31</sup> <http://investmentpolicyhub.unctad.org/ISDS/FilterByCountry>. Dupont, Cédric, Schultz, Indicating that “bad governance and economic nationalism are indeed conducive to arbitration claims in the oil and gas sector”, Thomas, Wahl, Melanie R. And Angin, Merih, “Types of Political Risk Leading to Investment Arbitration in the Oil and Gas Sector”, *Journal of World Energy Law and Business*, 2015, vol. 8, núm. 4, pp. 337-361.

<sup>32</sup> A working definition of “transnational corruption” is provided by Llamzon, indicating that the following elements should be present: “a foreign investor; committed to investing large sums of money or resources; entering into specific negotiations with the host State's government; through a local intermediary that has access to the relevant public officials; over an area of the economy in which the government has established monopoly (such as public Works or natural resource extraction)”. Llamzon, Aloysius P., *Corruption in International Investment Arbitration*, Oxford University Press, 2014, p. 32.



new Anti-Corruption Law is adequate in a formal sense. It could even be described as ambitious, since it states that some lawsuits do not lapse, for example, and also outlaws facilitation payments —also called expediting payments or “grease payments”—. As a point of comparison, the US Foreign Corrupt Practices Act (FCPA), which is often used as an example, includes an exception for facilitation payments.<sup>33</sup>

Nevertheless, the Venezuelan Anti-Corruption Law is a textbook example of a number of important issues that are presented below and are connected to the question of the rule of law. They all cast a critical eye on non-transparent governmental decision-making and reflect on what the current legal position of foreign investors in Venezuela really is:

a) A crucial issue that often arises when analysing a law is the setting of its personal and material scope, which leads to indirect reflections on the drafting legislator’s degree of skill, or lack of it. In this specific case, the question that arises is the extent to which the 2014 Venezuelan Anti-Corruption Law is applicable to foreign investors. As far as its personal scope is concerned, Article 2 states that the law applies to “individuals, public and private legal entities, public officials, communes; communal councils, socio-productive associations, grassroots organisations and any other form of popular organizations when managing public funds”.<sup>34</sup> Since the law does not explicitly exclude foreign individuals or foreign legal entities from this list, it is understood that they are also subject to it when managing public funds. This is an approach that is also reinforced by the explicit reference to foreign persons in Article 98.

Article 4 provides a very broad definition of public funds, which, for example, cover “assets belonging to companies of any nature in which persons referred to in the preceding paragraphs have a stake in the capital”<sup>35</sup>

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<sup>33</sup> “FCPA-A Resource Guide to the U.S. Foreign Corrupt Practices Act”, <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf>; Backer & McKenzie, “Global Overview of Anti-Bribery Laws 2015”, <http://globalcompliancenews.com/anti-corruption/anti-corruption-laws-around-the-world>. Comparing the approach regarding these payments both in the FCPA and the IACAC: Low, Lucinda A., Bjorklund, Andrea K. and Atkinson, Kathryn Cameron, “The Interamerican Convention against Corruption: A Comparison with the United States Foreign Corrupt Practices Act”, *Virginia Journal of International Law*, vol. 38, pp. 269-271.

<sup>34</sup> Article 2 (author’s translation).

<sup>35</sup> Article 4.1.10 of the Anti-Corruption Law.

and “the resources provided to individuals by public sector entities with the aim of complying with purposes of public interest”.<sup>36</sup> Considering that the Venezuelan state is very often legally present in companies held by foreign capital —mixed companies—, especially when it comes to the managing of national natural resources,<sup>37</sup> it is conceivable to imagine cases where foreign investors maybe considered to be managing Venezuelan public funds. It must also be borne in mind that the type of unlawful conduct the Venezuelan law condemns is very broad, encompassing extortion, improper passive corruption, proper passive corruption, inducement to corruption, and agreements with contractors. As well as this, in some provisions the perpetrator of the offence may be “whoever” and not only a Venezuelan “public official”, as defined in Article 3.<sup>38</sup> For all these reasons, it does not seem far-fetched to argue that the 2014 Venezuelan Anti-Corruption Law may also apply to foreign investors, especially if there is the necessary political will to interpret the law in such a way.<sup>39</sup>

b) A more thorough reading of the 2014 Anti-Corruption Law also leads to reflections on how the presumed neutrality of a Law’s wording can in fact be shaped by the political circumstances of the country in which it applies. In this sense, Article 98.1 of the law in question states that Venezuelan judges can confiscate property owned by national or foreign individuals and legal entities that have been found guilty of corruption.<sup>40</sup> Article 50 —the text of which is somewhat cryptic—, states that simply because of a final judgment the property constituting illicit enrichment will belong to the institution concerned if it has suffered financial loss, and that otherwise it will become part of the Venezuelan national treasury. These measures were included in the 2003 Law, drafted during

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<sup>36</sup> Article 4.2 of the Anti-Corruption Law.

<sup>37</sup> Sarmiento, María Gabriela, “The UNASUR Centre for the Settlement of Investment Disputes and Venezuela. Will both ever see the light at the end of the tunnel?”, *Journal of World Investment and Trade*, v. 17, 2016, pp. 658-680.

<sup>38</sup> Article 47 of the Anti-Corruption Law.

<sup>39</sup> Supporting this hypothesis, José Valentín González, “Venezuela. Anti-Corruption 2016”, <http://latinlawyer.com/reference/topics/74/jurisdictions/24/venezuela>.

<sup>40</sup> According to article 98.2, confiscation can also be imposed on individuals who are guilty of crime of illicit enrichment, categorized in article 47. This article covers both active and passive corruption, as they are termed, and article 47.1 is considered to refer to paying or offering bribes to foreign officials, whereas article 47.2 refers to the solicitation or acceptance of bribes by foreign public officials.

the early months of the first Hugo Chavez mandate, and initially appear to be consistent with the objective of fighting corruption.

However, because the situation has changed, the same text takes a different meaning today than it did thirteen years ago and it creates an uneasy feeling. To give a few examples, Hugo Chavez's television programme "Álo Presidente" became depressingly famous during his last term of office. With cries of "Expropriate it!" the president decided the fate of many businesses located in Venezuela on the programme, some of which had been set up with foreign capital.<sup>41</sup> This televised and staged manner of governing Venezuela triggered a wave of panic among foreign investors. The same happened in 2012 when Venezuela withdrew from ICSID,<sup>42</sup> an action that still generates a great deal of legal uncertainty and distress for foreign investors.<sup>43</sup> In this context, reading the current Article 98 leads one to consider whether Venezuelan judges might improperly expropriate foreign investors in the future, alleging that they have behaved corruptly and therefore violated Venezuelan Anti-Corruption legislation. In theory, it may be said that Venezuela is governed by the principle of separation of powers and that court rulings are not influenced by the Executive.<sup>44</sup> Nevertheless, recent reports from international organizations seem to conclude just the opposite.<sup>45</sup> In this sense, the American Director

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<sup>41</sup> "Why Venezuela's government is taking over apartments", <http://www.bbc.co.uk/news/mobile/world-latin-america-11756492>.

<sup>42</sup> Ripinsky, Sergey, "Venezuela's Withdrawal from ICSID: What it Does and Does Not Achieve", <https://www.iisd.org/itm/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve>.

<sup>43</sup> Polanco Lazo, Rodrigo, "Is There a Life for Latin American Countries After Denouncing the ICSID Convention") *Transnational Disputes Settlement*, v. 11, 2014, p. 36; Kownacki, Nicolle E., "Prospects for ICSID Arbitration in Post-Denunciation Countries: an Updated Approach", *UCLA Journal of International Law and Foreign Affairs*, v. 15, 2010, p. 529.

<sup>44</sup> Frankenberger, Rolf and Graf, Patricia, "Elections, Democratic Regression and Transitions to Autocracy: Lessons from Russia and Venezuela", in Kneuer, M. (ed.), *Regression of Democracy*, Springer, 2011, pp. 201-219.

<sup>45</sup> Concluding observations regarding Venezuela by the UN Committee on Economic, Social and Cultural Rights (CESCR): "The Committee is concerned about the lack of information on the implementation of the legally established procedure for the appointment and dismissal of judges, as well as the large number of judges who are assigned to posts on a temporary basis and who do not enjoy stability in their functions, which can significantly affect their independence... the Committee notes with concern that the Public

of Human Rights Watch lately declared: “The government of Venezuela uses the justice system as a façade, but the reality is that Venezuelan judges and prosecutors have become obedient soldiers”.<sup>46</sup>

In the context of investor-state dispute settlement (ISDS), it should also be remembered that states have frequently used the argument of a foreign investor’s non-compliance with national legislation to deny arbitral jurisdiction and avoid ICSID condemnation awards. There are also cases in which the respondent state’s allegations of corruption during investment arbitration have neutralized the investor’s claim against the State.<sup>47</sup> Similar rationales are also expected to generate an exculpatory award—or at least an State’s appeal—in the future UNASUR arbitration system that Venezuela so strongly supports.<sup>48</sup>

For all the reasons outlined above, the current Venezuelan legislative framework—including its 2014 Anti-Corruption Law—might pave the way for a devastating outcome for foreign investors. Unfounded accusations of corruption and the resulting judicial condemnation of foreign investors might culminate not only in financial penalties, the expropriation of property and long prison sentences, but also in the subsequent impossibility of obtaining adequate reparation in both the Venezuelan courts and the international arbitral sphere. The Venezuelan press reported that

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Prosecutor’s Office, has not fulfilled its mandate in accordance with the Principles relating to the status and functioning of national institutions protecting and promoting Human Rights (Paris Principles), in particular as regards its independence”. CESCR 55 Session (1 Jun 2015-19 Jun 2015). [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=967&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=967&Lang=en).

<sup>46</sup> “Venezuela: Critics under Threat”, <https://www.hrw.org/news/2015/08/06/venezuela-critics-under-threat>. In the same sense, von Bogdandy, Armin, “Ius Constitutionale Commune en América Latina: una mirada a un constitucionalismo transformador”, *Revista Derecho del Estado*, núm. 34, 2015, p. 24.

<sup>47</sup> Fach Gómez, Katia, “Inversiones internacionales y corrupción en América Latina: la función del arbitraje de inversiones en el avance de la institucionalidad democrática”, von Bogdandy, A. (ed.), *¿Del paradigma de la tensión al paradigma del diálogo? El ius constitutionale commune en derechos humanos en América Latina (ICCAL) y el derecho económico internacional (DEI)*, México, Instituto de Investigaciones Jurídicas, UNAM, 2017, forthcoming.

<sup>48</sup> Fach Gómez, Katia and Titi, Catharine, “UNASUR Centre for the Settlement of Investment Disputes: Comments on the Draft Constitutive Agreement”, *Investment Treaty News*, 2016, <https://www.iisd.org/itin>; Fiezzoni, Silvia Karina, “UNASUR Arbitration Centre: The Present Situation and the Principal Characteristics of Ecuador’s Proposal”, <https://www.iisd.org/itin/2012/01/12/unasur>.

1191 persons were investigated for corruption in 2014, and 777 were ultimately convicted. On this basis, the hypothetical future scenario involving foreign investors sketched above does not seem impossible.<sup>49</sup>

c) The analysis of the 2014 Anti-Corruption Law also leads to reflections on the many practical problems of implementation that the wording of a law may pose, especially if the country concerned —*i. e.*, Venezuela— is itself in a controversial international position. If we focus on aspects of international cooperation addressed by the Venezuelan Anti-Corruption Law, doubts arise as to whether some of its provisions will actually be able to achieve a high level of implementation. At various points, the law specifies that its proper implementation will require assistance from foreign institutions. For example, a Venezuelan judge may request the —foreign— competent authorities to repatriate funds (Articles 98.1 and 98.2). The Venezuelan authorities may also present, either directly or through diplomatic channels, requests for legal assistance in criminal matters relating to the investigation or prosecution of acts of corruption, in accordance with the provisions of its laws and the international agreements ratified by the Bolivarian Republic of Venezuela (Article 98.3, added to the 2014 Anti-Corruption Law).<sup>50</sup>

This type of precept is commonly used in international procedural law texts, and this kind of international assistance is quite usual and effective at interstate level. However, a more practical and cautious reflection on this specific case suggests that some of the requests made by the Venezuelan authorities may move very slowly or even fail to reach a successful culmination. Along with the problems that the Venezuelan authorities may face —lack of material resources, lack of knowledge about how to handle these specialized petitions, etc.—, the requests may encounter additional difficulties in the foreign country in question. Primarily, in cases where the generated relationship would not be strictly inter-judicial —that is, in cases where diplomatic channels are also involved—, Venezuela's current bad press in much of the international community as well as its

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<sup>49</sup> “Más de 700 personas han sido condenadas por corrupción en Venezuela en 2014”, <http://www.latercera.com/noticia/mundo/2014/12/678-608430-9-mas-de-700-personas-han-sido-condenadas-por-corrupcion-en-venezuela-en-2014.shtml>.

<sup>50</sup> Similar references to the need for international cooperation can be found in Article 29.

serious problems with some countries might act against its solicitation. It is therefore questionable whether developed countries with investments in Venezuela would be in favour of providing procedural assistance for the prosecution of their own investors by a state not considered to meet the essential requirements of the rule of law.

The escalation of conflict between the USA and Venezuela is paradigmatic in this sense, as it makes it unrealistic to think that the US authorities will willingly cooperate with Venezuelan authorities that seek to impose tough sanctions on US investors in Venezuela. Reality shows that in this specific case, the United States seems to be focusing its main efforts on the flip side of corruption: pursuing corrupt Venezuelan officials and intermediaries.<sup>51</sup> This is an extraterritorial —expansive— application of the FCPA, which has been doctrinally questioned as it might affect due process safeguards.<sup>52</sup> Actions such as those detailed below can also be seen as measures on the part of the US to put political pressure on Maduro's regime. So far, two Venezuelan businessmen were arrested at the end of 2015 in the States and the U.S. DOJ has brought FCPA charges against them, alleging that they conspired to get energy contracts with the Venezuelan's state-owned oil company PDVSA and two of its Venezuelan subsidiaries by paying high bribes to various Venezuelan officials.<sup>53</sup> Addi-

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<sup>51</sup> The USA has not neglected the legal actions against US nationals or US corporations involved in corruption cases in Venezuela —such as Direct Access Partners, ProEnergy Services and Derwick Associates, Siemens and Pride International Inc.—, Needless to say, however, the States has chosen to punish these individuals and organisations in the USA instead of facilitating their punishment in Venezuela. See Cassin, Richard L., “Two more direct Access Exec charged in Venezuela Bank Bribery”, <http://www.fcipablog.com/blog/2014/4/14/two-more-direct-access-execs-charged-in-venezuela-bank-bribe.html>; de Córdoba, José, and Matthews, Christopher M., “Venezuelan Energy Company Investigated in U.S.”, <http://www.wsj.com/articles/venezuelan-energy-company-derwick-investigated-in-u-s-1407516278>; Kolster, Luis Alejandro, “Ley de prácticas de corrupción en el extranjero”, <http://www.uma.edu.ve/admini/ckfinder/userfiles/files/Articulo%20FCPA%20Venezuela.pdf>.

<sup>52</sup> Fach Gómez, Katia, “Inversiones internacionales y corrupción”, *op. cit.*, note 49; Pereira Fleury, Raúl y Wang, Quián, “FCPA, UKBA, and International Arbitration: Dealing with Corruption in Latin America”, *Transnational Dispute Management 2 (2016), Special Issue on Latin America*.

<sup>53</sup> More details about the case of Roberto Enrique Rincón Fernández y Abraham José Shiera Bastidas in: “Miami Businessman Pleads Guilty to Foreign Bribery and Fraud Charges in Connection with Venezuela Bribery Scheme”, <https://www.justice.gov/opa/pr/miami-businessman-pleads-guilty-foreign-bribery-and-fraud-charges-connection-venezuela>.

tionally, a high-level public official of the Venezuelan state-owned Banco de Desarrollo Económico y Social, who had allegedly received at least \$5 million in bribes, had already been arrested in 2013 while travelling in the States and criminally charged under the FCPA.<sup>54</sup> Another recent example of the US fight against corrupt Venezuelan public officials is the Venezuelan Executive Order 13692 issued by President Obama on March 9, 2015.<sup>55</sup> This order, complementary to the Venezuela Sanctions Regulations issued on July 9, 2015,<sup>56</sup> states that it is aimed at “persons involved in or responsible for the erosion of human rights guarantees, persecution of political opponents, curtailment of press freedoms, use of violence and human rights violations and abuses in response to antigovernment protests, and arbitrary arrest and detention of antigovernment protestors”, adding that it also applies to “the significant public corruption by senior government officials in Venezuela”. US awareness of Venezuelan corruption has brought about a series of tough measures against corrupt Venezuelan officials, who “will have their property and interests in property in the United States blocked or frozen, and U.S. persons are prohibited from doing business with them. The Order also suspends the entry into the United States of individuals meeting the criteria for economic sanctions”.<sup>57</sup>

In recent years, the US Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) have increasingly scrutinized business transactions connected with Venezuela that were suspected of

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<sup>54</sup> Matteson, Ellis, “Latin America’s Top FCPA Stories of 2013”, <http://fcfamericas.com/english/argentina/latin-americas-top-fcpa-stories-2013>. The five officers and employees of the U.S. based broker dealer involved in this case have been sentenced to imprisonment in the States. Morrison & Foerster LLP, “Top Ten International Anti-Corruption Developments for December 2015”, <http://www.lexology.com/library/detail.aspx?g=5c2f390d-490d-4e28-a56d-98d7c47cdd41>.

<sup>55</sup> There are additional U.S. legal initiatives in favour of Venezuelan human rights. For instance, President Obama signed on July 15, 2016 the Venezuela Defense of Human Rights and Civil Society Extension Act of 2016, which extends the 2014 Act through the end of 2019. <http://www.steptointernationalcomplianceblog.com/2016/07/obama-signs-venezuela-sanctions-extension>.

<sup>56</sup> “Part 591. Venezuela Sanctions Regulation”, <http://www.ecfr.gov/cgi-bin/text-idx?SID=34f4e494d18a1410c2546f36a6c0d5ae&mc=true&node=pt31.3.591&rgn=div5>.

<sup>57</sup> “Venezuela Executive Order”, <https://www.whitehouse.gov/the-press-office/2015/03/09/fact-sheet-venezuela-executive-order>.



constituting violations of the US FCPA.<sup>58</sup> Scholars explain this trend, by pointing out that these two U.S. authorities are focusing their enforcement efforts “on firms that do business in poor countries with weak legal institutions”, such as Venezuela.<sup>59</sup>

d) Finally, the 2014 Anti-Corruption Law is a good example of the great importance that developing texts —the 2014 Decreto, in this case— can have when specifying the scope and real impact of the main legal text —the referred 2014 Law—. In this vein, the Venezuelan Anti-Corruption Law briefly announces that the government will create a National Anti-Corruption body that will be directly accountable to the President of the Republic.<sup>60</sup> This announcement was specified in the “Decreto con rango, valor y fuerza de Ley del Cuerpo Nacional contra la Corrupción” issued in December 2014.<sup>61</sup> The new National Anti-Corruption Body’s mission is to plan, organize and carry out the necessary preventative, investigative and operative actions against corruption.<sup>62</sup> Its creation involved the reallocation of competences in respect of the Comptroller General’s Office and the Public Prosecutor’s Office, the organs that had traditionally prosecuted corruption in Venezuela. The measure has been described in Venezuela as a “Maduroism” (“madurada”) and has been severely criticized by Transparency International,<sup>63</sup> which rightly claims that the body is both opaque

<sup>58</sup> An interesting 2016 initiative is the launching by the U.S. DOJ of a one-year pilot program to encourage companies to self-report violations of FCPA and to cooperate with the DOJ’s Fraud Section. Analyzing eight cases involving FCPA violations connected with Venezuela, Epstein, Eva, “Combate contra la corrupción internacional y enfoque en América Latina: Ley FCPA y Nuevo programa del departamento de justicia de los Estados Unidos”, *Rock Center for Corporate Governance at Stanford University*, Working Paper, núm. 218, 2016, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2774491&download=yes](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2774491&download=yes).

<sup>59</sup> Choi, Stephen J. and Davis, Kevin, “Foreign Affairs and Enforcement of the Foreign Corrupt Practices Act”, NYU Law and Economics Research Paper No. 12-15; NYU School of Law, Public Law Research Paper No. 12-35, p. 42, 2013, <http://ssrn.com/abstract=2116487> or <http://dx.doi.org/10.2139/ssrn.2116487>.

<sup>60</sup> Second transitional provision of the 2014 Anti-Corruption Law.

<sup>61</sup> Decreto con rango, valor y fuerza de Ley del Cuerpo Nacional contra la Corrupción, <http://www.gacetaoficialdelarepublicabolivarianadevenezuela.com/2014/index.php/gaceta-oficial-extraordinario/79-gaceta-oficial-extraordinario-n-6-156>.

<sup>62</sup> This National Anti-Corruption body is already operational: “Top State Food Functionaries Arrested for Embezzlement”, <https://venezuelanalysis.com/news/11848>.

<sup>63</sup> “La corrupción no se acabará con un decreto arbitrario que limitará aún más la transparencia”. [http://www.transparency.org/news/pressrelease/la\\_corrupcion\\_no\\_se\\_acabara\\_con\\_un\\_decreto\\_arbitrario\\_que\\_limitara\\_aun\\_mas](http://www.transparency.org/news/pressrelease/la_corrupcion_no_se_acabara_con_un_decreto_arbitrario_que_limitara_aun_mas).



and completely dependent on the Executive. Its creation and broad powers were not previously agreed with Venezuelan civil society, and the criteria used to select the public officials who will work for it are far from transparent—an elite handpicked by Maduro who enjoy confidential identity—. Along the same lines, the Committee on Economic, Social and Cultural Rights (CESCR)' response to the report submitted by Venezuela in 2015 clearly reflects the CESCR and United Nations' concerns regarding the deterioration of the rule of law's standards in Venezuela.<sup>64</sup>

#### IV. FINAL REMARKS: *QUO VADIS*, VENEZUELA?

This article points to the likelihood that a politically remote-controlled application of the 2014 Venezuelan Anti-Corruption Law may cause foreign investors who still have economic interests in Venezuela even more headaches. To reach this conclusion, the article relies on parameters pertaining to the rule of law—such as legality, legal certainty or transparency—, which provide a very useful bird's eye view for contextualizing—and in this case, criticizing—the wording and the possible spirit of a legislative instrument such as the 2014 Anti-corruption Law. The plausibility of a political use of the Anti-Corruption Law against international investment has to be assessed in a current context, in which it is multitudinously alleged that the Bolivarian Republic of Venezuela is falling apart. An essential task of future Venezuelan governments will be the recomposition of the country's

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<sup>64</sup> The Committee states: “Despite the measures taken by Venezuela to combat corruption, the Committee is concerned about the lack of concrete information on the outcome of cases that have been investigated and prosecuted, and about reports suggesting the lack of independence of the bodies established to prevent and combat corruption. The Committee recommends that Venezuela take steps to ensure the independence of the bodies responsible for preventing and combating corruption, according to the terms of the UN Convention against Corruption, measures to enable them to carry out independent and impartial investigations into all cases of corruption and that the persons responsible are held liable; carry out awareness measures, especially aimed at civil servants and members of the legislature, regarding the harmful effects of corruption on the full enjoyment of economic, social and cultural rights, and also at judges, prosecutors and police regarding the need to for strict enforcement of the law, and improve transparency particularly in the performance of public administration's activities”, <http://acnudh.org/2015/06/comite-de-derechos-economicos-sociales-y-culturales-cescr--venezuela-2015/> (author's translation).

lost credibility in the context of international investment. The beginning of a country's new political era is a time when the reception of FDI is particularly necessary.

Assuming that institutional weakness leads to corruption and that corruption affects international investment, the ideas pointed out in this article may also be useful—with all the necessary caveats—in other national contexts. For example, if the political thaw continues, a possibly still socialist Cuba could unexpectedly become the new “el Dorado” for foreign investors in the near future. Detailed examination of the Cuban political and legal status quo would be necessary before taking the risk of making an international investment there. This encompasses considering whether national legislation, including anticorruption legislation, may be used to inconvenience foreign investors at any of the various stages of their normally long-term investment.