

THE FUND FOR THE PEOPLE OF AFGHANISTAN: AN EXAMPLE FOR VENEZUELA?

José Ignacio Hernández G.

Fellow, Growth Lab-Harvard Kennedy School

The Afghan Fund could be an example to follow regarding Venezuela. In that sense, it is possible to create a Venezuelan Fund as an independent vehicle whose primary purpose will be to benefit the people of Venezuela, particularly the human rights victims, following humanitarian principles and accountability standards. The Venezuela Fund can be financed with external assets of the Government of Venezuela and forfeited properties.

I

Humanitarian crises -triggered by political decays- demonstrate that international sanctions policies cannot be limited to blocking assets and imposing other constraints against targeted states. Although those measures can diminish the ability of rogue and authoritarian regimes to advance in predatory, they are not necessarily providing direct relief to human suffering. The challenge is, then, how to transform sanctions policies into measures that facilitate the use of blocked assets for humanitarian purposes.¹

Afghanistan is a recent example. After the Taliban took over Kabul, the political and humanitarian crisis in the country worsened. According to the U.N. Office for the Coordination of Humanitarian Affairs (OCHA), almost half of the population -4.4 million people- are in humanitarian need.² At the same time, the Central Bank of Afghanistan (DAB) has accounts worldwide -including in the U.S. But the uprising of the Taliban disrupted the ability of the Government of Afghanistan to legally represent the DAB.³

On February 11, 2022, President Biden issued Executive Order (E.O.) 1406, which blocked all the properties of the DAB in the U.S. Also, it ordered the centralization of all its accounts at the Federal Reserve Bank of New York. The plan was to “*facilitate access to \$3.5 billion of those assets for the benefit of the Afghan people and Afghanistan's future pending a judicial decision*”.⁴ For that purpose, that day, OFAC issued a license to instruct the creation of a separate bank account with that amount, to be used for the benefit of the people of Afghanistan -while the rest of the assets remain at disposition for the litigation case of the 9/11 victims.⁵

However, the E.O. and the license only blocked assets. It was necessary to adopt other measures to allow disbursements for the Afghan people -that couldn't be ordered by the DAB due to its lack of legal representation.⁶

For that purpose, on September 14, 2022, the U.S. Government announced the creation of the Afghan Fund in Geneva, Switzerland. Based on the E.O., and under Section 25B of

the Federal Reserve Act, two individuals were authorized to represent the DAB to transfer the money from the blocked account at the Federal Reserve Bank to an account at the Bank of International Settlement (BIS). The Fund is, then, a vehicle to administer humanitarian funding without connection with the Taliban. A Board of Trustees will manage the Fund for that purpose.⁷

II

On January 23, 2019, the U.S. Government recognized the speaker of the fourth legislature of the National Assembly as interim president of Venezuela. As a result, under Section 25B of the Federal Reserve Act, the interim president was authorized to represent Venezuela and the Central Bank (BCV) regarding bank accounts in the U.S. Later on, and based on the Democratic Statute approved by the National Assembly, the interim government appointed an ad-hoc board of the BCV as the exclusive legal representative of the Bank. Simultaneously, all the Government of Venezuela's assets in the U.S. (including the BCV) were blocked, as was reinforced by the E.O. 13884, dated August 5, 2019. Based on OFAC licenses, the accounts of the BCV were centralized at the Federal Reserve Bank.⁸

As a result, only the ad-hoc board can represent the BCV to use the resources deposited at the Federal Reserve Bank. Because they are blocked properties, it is necessary to obtain a license from OFAC. Also, following the Democratic Transition, the National Assembly must authorize disbursements. In any case, those resources have been directly administered by the Interim Government.⁹ A pending litigation in the United Kingdom (U.K.) will decide whether the Maduro regime or the Interim Government can represent the BCV regarding assets deposited at the Bank of England.¹⁰

The main difference regarding the Afghanistan case is that while no polity can represent the DAB, the BCV is represented by the Interim Government. Therefore, it is not necessary for the U.S. creates a vehicle to administer the BCV's assets. Eventually, if the U.K. case is decided against Maduro, the Interim Government could centralize all the BCV assets in the Federal Reserve Bank.¹¹

However, Afghanistan could be an example for Venezuela for the following reasons:

- The mandate of the fourth legislature of the National Assembly -and as a result, the mandate of the interim president- will expire on January 5, 2023.¹² Therefore, on that day, the legal situation of the BCV will be similar to the DAB due to the lack of legal representatives.
- Based on the E.O. issued regarding Venezuela, it will be possible to consolidate all the Government of Venezuela accounts at the Federal Reserve Bank. That will

increase its level of protection, not only regarding legacy creditors but because of the political conflict in Venezuela.

- Neither the interim government nor Maduro's regime can administer humanitarian aid following the humanitarian principles of humanity, neutrality, impartiality, and independence. Hence, creating a neutral vehicle, such as the Afghan Fund, is necessary. Ideally, that vehicle could be based on broader political agreements between Maduro and the Unitary Planform -although the humanitarian assistance cannot be conditioned to political decisions.
- Beyond the Government of Venezuela's assets, it is necessary to consider the assets forfeited by the U.S. Government. It is possible to transfer to the Venezuela Fund part of those assets that will be used to benefit the Venezuelan people, particularly the human rights victims.¹³

For those reasons, it is possible to create a Venezuelan Fund as a neutral vehicle with (i) the financial assets of the Government of Venezuela in the U.S. and (ii) part of the forfeited assets, which primary purpose will be to benefit the people of Venezuela, and particularly, the human rights victims from the humanitarian emergency and the gross human rights violations committed by the Maduro regime. The governance rules of the Fund should be inspired by the humanitarian principles under the administration of a Board of Trustees that will follow international accountability standards.

¹ Regarding the traditional objectives of economic sanctions and their limitations, see Nephew, Richard (2018), *The Art of Sanctions: A View from the Field*, New York: Columbia University Press, 43.

² OCHA (2022), *Humanitarian response plan 2022. Afghanistan*. According to this document, "the 2022 Humanitarian Response Plan requests US\$4.44 billion and aims to reach 22.1 million people in need of life-saving humanitarian support due to the consequences of decades of conflict, recurrent natural disasters, lack of recovery from past disasters, and the added shock from the takeover of the government, subsequent sudden pause in international assistance and resulting economic shocks" (p. 7).

³ After President Ghani was deposed, the Taliban took control of the Government and re-instituted the Islamic Emirate of Afghanistan. From the International Law perspective, the ability to legally represent Afghanistan depends on the so-called "Government recognition", that is, the decision to accept, as a representative of that country, the Government conducted by the Taliban. Without that recognition, the ability to legally represent Afghanistan and the DAB regarding its accounts is severely diminished. See Visoka, Gëzim, *et al.*, "Introduction" in Visoka, Gëzim, *et al.* (ed) (2019) *Routledge Handbook of State Recognition*, Milton: Taylor & Francis Group, 1-23.

⁴ White House, *Executive Order to Preserve Certain Afghanistan Central Bank Assets for the People of Afghanistan*, at: <https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/11/fact-sheet-executive-order-to-preserve-certain-afghanistan-central-bank-assets-for-the-people-of-afghanistan/>

⁵ Southern District Court, New York, *Haolish, et al., v. Bin Laden, et al., and John Does 1 through 7 vs. The Taliban, et al.*, N° 1:02-cv-09848-GDB -SN.

⁶ Anderson, Scott, "What's Happening with Afghanistan's Assets?", *Lawfare*, February 18, 2022, at: <https://www.lawfareblog.com/whats-happening-afghanistans-assets>

⁷ "The Board currently consists of two highly qualified Afghan economic experts with relevant macroeconomic and monetary policy experience, a U.S. government representative, and a Swiss government representative. The Afghan Fund has the support of international partners committed to supporting sustainable monetary and macroeconomic

stability in Afghanistan. An external auditor will monitor and audit the Afghan Fund as required by Swiss law". See U.S. State Department, "The United States and Partners Announce Establishment of Fund for the People of Afghanistan", at: <https://www.state.gov/the-united-states-and-partners-announce-establishment-of-fund-for-the-people-of-afghanistan/>

⁸ Hernández G., José Ignacio (2020), *Bases fundamentales de la transición en Venezuela*, Caracas: Editorial Jurídica Venezolana, 222.

⁹ The National Assembly approved a special budgetary Law to authorize disbursement: the *Special Law for the liberation fund and the attention of vital risks cases* (Legislative Gazette N° 19, dated March 4, 2020). In total, the BCV held 346,9 million at the Federal Reserve Bank. See: <https://asambleanacional-media.s3.amazonaws.com/documentos/documentos/rendicion-de-cuentas-junta-administradora-ad-hoc-bcv-2021-20210728170012.pdf>

¹⁰ As well as the exceed of an extinguished swap agreement. See Hernandez G., José Ignacio (2022), *La defensa judicial del Estado venezolano en el extranjero y la deuda pública legada de Chávez y Maduro (2019-2020)*, Caracas: Editorial Jurídica Venezolana, 224.

¹¹ There is, of course, a relevant quantitative difference due to the relatively small value of the BCV's assets. Not only the Maduro regime defunded the international reserves, but, in addition, he decided to transfer resources out of the U.S. when the sanctions policy started to increase in 2017.

¹² Violating the Venezuela Constitution, the National Assembly decided to restrict its mandate. According to the last reform of the Democratic Transition approved in January 2022, the mandates will expire on January 5, 2023. See Hernández G., José Ignacio (ed.) (2022), *Estudios sobre la reforma del Estatuto de Transición de 2022 y la continuidad administrativa en Venezuela*, Miami: IDEA-Editorial Jurídica Venezolana.

¹³ The U.S. Congress has been debating the creation of a separate fund. For instance, the *Preserving Accountability for National Assets Act of 2021* draft proposes the creation of a fund that is funded with "any funds or assets forfeited to the United States by an individual or entity connected to the regimes of Hugo Chávez and Nicolás Maduro in Venezuela, the funds or assets will be deposited in the Venezuela Restoration Fund established under subsection". However, the draft doesn't create the fund to provide humanitarian relief and reparation for human rights victims, which should be the priority.