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## FEATURED Q&A

# Will New Trade Talks Shake Up the Arbitration System?



Arbitration mechanisms have been at issue in recent discussions about trade agreements. // File Photo: publicdomainpictures.net.

**Q** Controversy related to changes in investment arbitration and dispute resolution mechanisms loomed large in the negotiations over the now-dormant Trans-Pacific Partnership. Meanwhile, arbitration clauses have come up as a likely area to be revisited in the possible renegotiation of the North American Free Trade Agreement. What is at the root of the controversies surrounding dispute resolution? What are the forces shaping the viewpoints and approaches to arbitration and investor-state dispute settlement in today's political and business environment? What have been the shortcomings of arbitration mechanisms in trade accords that are of most importance to Latin America and the Caribbean to date, and how might better ISDS practices be achieved?

**A** Nigel Blackaby, global head of the International Arbitration Group at Freshfields Bruckhaus Deringer: "The root of the current controversy over investor-state dispute resolution (ISDS) is twofold. First, the TTIP and TPP negotiations highlighted the risk of developed states being sued by investors of other developed states (North-North) whereas in the typical scenario the investor from the capital-exporting country sues the capital-importing country (North-South). For example, there have been 15 cases where U.S. investors sued Argentina under the U.S.-Argentina investment treaty, but no Argentine investor has ever sued the United States. Second, civil society (particularly in Germany and France) claimed that ISDS was preventing host states from regulating in the public interest (such as for the environment and public health) for fear of international claims.

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## TODAY'S NEWS

### POLITICAL

## Two Officers Killed, Eight Wounded in Guatemala Attacks

The attacks in Guatemala City and Quetzaltenango department happened after authorities rescued hostages from rioting inmates at a Guatemala City juvenile prison.

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### ECONOMIC

## Argentine Teachers Plan Protests as Strikes Continue

Demonstrations by striking teachers are planned in public squares across Argentina today and are expected to culminate in a large protest Wednesday in Buenos Aires.

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### BUSINESS

## Venezuela Taps Small Banks for Dollar Deals

The government of Venezuelan President Nicolás Maduro is using small banks for correspondent banking services involving dollar-denominated trade deals.

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Maduro // File Photo: Venezuelan Government.

## POLITICAL NEWS

## Two Officers Killed, Eight Wounded in Guatemala Attacks

Two police officers were killed and eight others were wounded in a series of attacks late Monday in Guatemala, Reuters reported. One civilian was also injured in the incidents that happened just hours after riot police rescued four hostages from rioting inmates at a Guatemala City juvenile prison. On Monday night, assailants carried out eight attacks against police officers and patrol vehicles in the capital, while another attack happened in western Quetzaltenango department, according to authorities. The attacks in the capital appeared to have been perpetrated by members of the 18th Street Gang, and seven gang members were detained following the attacks. That gang was the same one at the center of a riot Sunday at the Etapa II juvenile prison in Guatemala City. Gang members rioted to demand the return of 250 fellow gang members who had been transferred to another prison. Two guards were killed during the riot on Sunday, and third died on Monday after sustaining injuries during the incident. One of the four guards who had been taken hostage and then rescued on Monday died after being taken to a hospital, the Associated Press reported, citing police. The riot happened two weeks after a riot at a youth shelter near the capital killed 40 girls after some youths there set fire to a mattress following an escape attempt.

## Argentine Teachers Plan Protests as Strikes Continue

Teachers in Argentina are planning a series of demonstrations today in public squares across the country, which are expected to culminate in a large march on Wednesday to the presidential palace in Buenos Aires, The Wall Street Journal reported. The protests come as teachers in

several school districts are entering the third week of strikes, which have delayed classes for hundreds of thousands of children. Striking teachers are demanding higher wages and



Macri // File Photo: Argentine Government.

blasting President Mauricio Macri, saying he has failed to jump-start the economy and control inflation, which reached 40 percent last year. "I'm completely for this strike, my salary doesn't cover anything," elementary school teacher Diego Sabadell, 29, told the newspaper.

## ECONOMIC NEWS

## Countries Ban Meat From Brazil Amid Bribery Scandal

China, the European Union, South Korea and Chile on Monday announced full or partial suspensions of imports of meat and chicken from Brazil after learning of a bribery scandal in which Brazilian health inspectors were paid off to allow meatpacking companies to keep spoiled meat, some of which was later exported to other countries, on the market, the Financial Times reported. The suspensions caused the stocks of Brazil's biggest meatpackers, JBS and BRF, to drop on Monday. The two companies had suffered dramatic losses on Friday when the scandal was first revealed. "At face value, the developing scandal over Brazil's meat exports could plausibly derail the country's economic recovery," said Capital Economics in a note. The country has been relying on its agriculture sector to help pull the country out of its worst recession in more than a century. Federal police have said that

## NEWS BRIEFS

## Philanthropist, Banker, AS/COA Founder David Rockefeller Dies at 101

Philanthropist and former chairman and chief executive of New York's Chase Manhattan Bank, David Rockefeller, died Monday at age 101 at his home in Pocantico Hills, N.Y. The last surviving grandson of Standard Oil founder John D. Rockefeller, David Rockefeller founded the Americas Society and Council of the Americas in 1965. "A true statesman, David Rockefeller promoted democracy, open markets, and the rule of law in the Western Hemisphere and beyond, leaving behind a legacy that will long outlive him," the organization said Monday in a statement.

## Authorities Find More Mass Graves in Mexico's Veracruz State

The attorney general for Mexico's Veracruz state, Jorge Winckler, said authorities had discovered 47 skulls along with other body parts in several newly discovered mass graves about six miles from the city center of Alvarado, UPI reported Monday. The announcement came just days after authorities announced they had found at least 250 skulls in a massive mass grave in Veracruz state.

## Uruguay to Withdraw Troops From United Nations Mission in Haiti

Uruguayan President Tabaré Vázquez said Monday that the country will soon withdraw its soldiers from a United Nations stabilization mission in Haiti, the Associated Press reported Monday. Vázquez said the approximately 250 Uruguayan soldiers in Haiti will return home in April. The announcement came days after U.N. Secretary-General António Guterres told the body's Security Council "the military component should undergo a staggered but complete withdrawal of the 2,370 personnel" in Haiti.

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The criticism was unfounded, since case law establishes a clear right of the host state to regulate, provided it does so in a non-arbitrary and non-discriminatory way, unless it contradicts specific commitments. In other words, the system properly applied helps support the rule of law and should not promote 'regulatory chill.' Notwithstanding the debate about ISDS in new multilateral treaties, host states of investment know that the existing 3,000 investment treaties provide a big selling point for FDI. While some Latin American states such as Venezuela, Bolivia and Ecuador have denounced ICSID, they still maintain a network of treaties where arbitration can be accessed through the Uncitral rules. Latin American states are nevertheless looking at the content of the treaties, and the most recent examples show the use of more complex model treaties with multiple carve-outs (such as in Colombia)."

**A** **Julissa Reynoso, partner at Chadbourne & Parke, LLP:** "Proponents of investor-state dispute settlement (ISDS) believe that investments should be protected under international law, as they provide an avenue for seeking redress of grievances from an impartial dispute settlement mechanism. Detractors argue that ISDS curtails national sovereignty and forces governments to amend their laws to appease foreign investment interests. Nonetheless, bilateral and multilateral investment treaties with ISDS provisions are ubiquitous. Treaty shopping is a common issue in ISDS, whereby a foreign investor incorporates and uses a holding company in a country that has a more favorable BIT with the target state. It is important that such treaty shopping be taken into consideration when drafting ISDS provisions. In addition, as it pertains to Latin American and the Caribbean, increased consideration must be given to the makeup of arbitration panels so as to ensure better ISDS practices. Current trends reflect a lack of diversity in arbitral tribunals globally. This

is especially concerning for Latin America and the Caribbean, where—more often than not—Spanish-language disputes are conducted in English before non-Spanish speaking, foreign arbitrators with limited experience in the region."

**A** **Carlos José Valderrama, foreign counsel at Sidley Austin, LLP and former president of the Peruvian investment arbitration defense system:** "Beyond any particular treaty, states are experiencing some discomfort as they adapt to an international order where, rather than state-to-state interaction in the spheres of diplomacy and public international law, they face the prospect of international liability and state responsibility in claims by private companies, pursued through a mechanism—international arbi-

**“Overall ... Latin American countries are gaining experience, mounting strong defenses and seeing results.”**

— Carlos José Valderrama

tration—that is more familiar to companies than to states. One means by which states are proposing to adapt that system, in return, is by pressing for procedures that are more familiar to the public administration of justice, such as increased transparency and public access, and possibly even review of arbitral decisions (although not every judicial practice will fit smoothly with an arbitration mechanism intended to finally resolve disputes). Overall, though, while the process has not always been a smooth one, Latin American countries are gaining experience, mounting strong defenses and seeing results."

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21 companies, including JBS and BRF, have allegedly paid bribes to government inspectors in order to help them obtain clearances and health certificates. The companies have denied wrongdoing.

## BUSINESS NEWS

## Venezuela Taps Small Banks for Trade Deals in Dollars

The Venezuelan government is tapping some smaller, little-known banks to provide correspondent banking services, after Citigroup last year stopped serving as an intermediary for dollar-denominated international trade operations, the Associated Press reported Monday. The Venezuelan government has turned to smaller banks to handle such deals, as larger international banks are increasingly wary of the risks of doing business with Venezuela as the government grapples with allegations of corruption and drug trafficking. Venezuelan President Nicolás Maduro has also said the country is struggling to find banks that will provide financial services due to the country's severe economic crisis. Government officials have said the corruption allegations are being used by their adversaries in the United States as part of an "economic war" to undermine the socialist country. Citi is still servicing the payment of state-run oil company PDVSA's high-yielding bonds, due to a contractual obligation. One small bank providing correspondent banking services to Venezuela is Itabank, a Puerto Rican lender owned by Venezuelan entrepreneur Carlos Dorado. The bank has been serving Venezuela since last year. A person close to the government said that without the help of Dorado and his bank, the country would have an even more difficult time importing basic goods. "Thanks to Dorado we have been able to pay for food imports," said a person close to the government who asked not to be identified. He added that Itabank "has processed hundreds of millions of dollars in payments."

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**A** **Judd L. Kessler, partner at Porter, Wright, Morris & Arthur:** “I suspect that the root of recent controversy regarding investor-state dispute settlement (ISDS) does not arise, mainly, from a lack of legitimacy of the system, or alleged flaws in the system for appointing arbitrators, or the competence/character of the arbitrators themselves. It comes, instead, from the discomfort of many governments with the idea of having to comply with international standards

“**In most of Latin America, and many other regions of the world, governments wield almost unlimited power over the property of investors...**”

— Judd L. Kessler

of property rights and fair treatment—or be responsible for the consequences. In most of Latin America, and many other regions of the world, governments wield almost unlimited power over the property of investors and unbridled discretion in making administrative interpretations and rulings. If the affected party is a local citizen, effective legal recourse is generally not available. But if the investor is a foreigner, protected by an investment treaty, there are much greater—and quite appropriate—limits on that power. While there may be historical and cultural reasons for this situation, the consequence of the ISDS system should, hopefully, be that governments learn to act more responsibly, and that the protections applied to foreign investors—such as not to have one’s property expropriated by arbitrary and illegal government action—should also become available to protect local citizens. Commercial arbitration has boomed in Latin America because parties can choose arbitrators who are experts in particular subjects and who

are less likely to be tempted by corruption. With much investment now flowing among Latin American countries, there should be similar insistence on the growth, and further refinement of investment arbitration mechanisms as well.”

**A** **Clara Brillembourg, partner in the international arbitration and litigation practice at Foley Hoag, LLP:** “States around the world, and in Latin America in particular, have become increasingly aware of the potential constraints investment treaties may place on their ability and duty to protect their own citizens. While it is not clear that the treaties themselves impose limitations on a state’s right to regulate in the face of grave public health, environmental and financial concerns, certain investors have used the threat of investment arbitration as a vehicle to challenge bona fide regulations. Recently, Uruguay was forced to defend its tobacco control policies against tobacco giant, Philip Morris. Similarly, El Salvador had to stand up to a suit by a multinational mining company attempting to upend the state’s protection of its environment and people from the impacts of mining operations. In the end, both states won, and the companies were ordered to pay more than \$7 million in costs, but only after each country took the difficult political decision to proceed and face years of arbitration and uncertainty. The responsibility for moving forward lies with all parties concerned. The states are now aware of how some arbitrators are interpreting their vaguely worded treaties and must act to provide greater consideration and clarity to the intended obligations (for both the state and the investors) in their treaties. Arbitrators must heed the treaties’ express text and restrain their creativity in adopting meanings never imagined by the signing parties. And investors should be cognizant of the damage done to the investment arbitration system when they bring claims directly challenging a state’s right and duty to regulate in the public interest.”

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