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FEATURED Q&A

Are Arbitration Bodies Effective If Parties Won't Pay Up?

Q The International Center for Settlement of Investment Disputes earlier this month awarded U.S.-based glass container manufacturer Owens-Illinois $455 million because of Venezuela's nationalization of two of the company's plants in 2010. However, Venezuela, which withdrew from ICSID in 2012, may seek to annul or otherwise refuse to pay the award, and the company cautioned it could not predict when it would receive the funds. How effective are arbitration bodies like ICSID when countries can refuse to comply with their rulings? What incentive do countries have to comply with arbitration decisions? What recourse do companies have?

A Ryan Mellske, associate at Three Crowns LLP in Washington: "Grounds for annulment are limited (only 13 of 189 ICSID awards have been annulled), and Venezuela might not refuse to pay the award simply because it must honor ICSID rulings to avoid default on certain sovereign bonds. Still, when countries refuse to pay an award, an investor can attempt to recover against assets held by the country in most jurisdictions worldwide. An ICSID award is binding in all member states. Awards rendered under the rules of the United Nations Commission on International Trade Law are usually enforced by the national courts of all members to the New York Convention. An investor can also pressure the country through, for example, contract claims in commercial arbitration against the nation's state-owned entity, claims in national courts against third parties who seek to benefit from the country's wrongful acts and participation by other industry stakeholders in negotiations. The investor may also call on its home state to issue sanctions to induce compliance. These include denying trade benefits, voting against extending loans from multilateral lending institutions and reducing appropriations for foreign

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Peru's Congress Ousts Prime Minister in Rare Censure Vote

Peru's Congress on Monday night censured Prime Minister Ana Jara over alleged spying by the government on thousands of citizens. Jara, who has frequently clashed with legislators, said in response it was an "honor" to be censured by that body. See story on page 2.

File Photo: Andina.

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NEWS BRIEFS

Bolivian Ruling Party Candidates Lose Key Local Elections

Candidates of Bolivian President Evo Morales' Movement Toward Socialism, or MAS, party on Sunday lost races for mayor of La Paz as well as several important governorships, the Associated Press reported Monday. The opposition mayor of the capital city was re-elected, and MAS also lost the governor's office in La Paz province. Morales won a third term in October, garnering 61 percent of the vote.

Jamaica's Labor Party Votes to Keep Holness Despite Setback

Jamaica's opposition Labor Party voted on Monday to keep Andrew Holness as its leader, the *Jamaica Gleaner* reported. At least 13 of the party's members of parliament voted for Holness to retain control, while seven voted for him to step down. Some party members had called on him to resign after Jamaica's Court of Appeal last week upheld a ruling that his use of pre-signed, undated letters of resignation to expel Senators Arthur Williams and Christopher Tufton in 2013 was unconstitutional.

Ecuador: Lower Oil Revenues Weigh on Economic Growth

Ecuador's central bank said Monday the economy expanded by 3.8 percent last year, missing the official target of between 4.5 percent to 5.1 percent, *The Wall Street Journal* reported. Sectors such as fishing, electricity, mines and construction helped make up for a lag in oil-sector activity, according to the report. The price of Ecuador's crude oil has fallen more than 50 percent, from $91 in January 2014 to about $40 this month. In its 2015 fiscal budget, Ecuador forecast an average price of about $80 per barrel of crude oil.

Political News

Peru's Congress Ousts Prime Minister in Rare Censure Vote

Peru's Congress on Monday night censured Prime Minister Ana Jara over alleged spying by the government on thousands of citizens, *El Comercio* reported. Seventy-two legislators voted in favor of the censure and 42 against, with 2 abstentions. Jara, who was sworn in as President Ollanta Humala's seventh prime minister last July, must leave the cabinet within 72 hours. This is the first time the Congress of Peru has deposed a prime minister since 1968, Agence France-Presse reported. The entire cabinet must also resign but can be reappointed, with the exception of Jara, according to *The Wall Street Journal*. Earlier this month, the magazine *Correo Semanal* published a list of Peruvians who had allegedly been investigated by the National Intelligence Directorate, or DINI, which included lawmakers, business people, military leaders, journalists and other citizens. The spying involved gathering information on properties owned by citizens. Jara said she had asked for an investigation and noted the practice went back to 2005, before Humala took power. During congressional debate, Jara and the former head of the DINI, Javier Briceño, had said the spying was aimed at thwarting a terrorist attack on the United States embassy in Lima, *El Comercio* reported, an excuse the spokesman of the Fuerza Popular party, Juan Díaz Dios, described Monday as "unlikely." Supporters of Jara noted the DINI did not technically even report to the prime minister's office, and that much of the alleged spying involved publicly available records. Among the candidates to become the new chief of cabinet could be Production Minister Piero Ghezzi or Housing and Construction Minister Milton von Hesse, the *Journal* reported. Humala is scheduled to leave office in 2016 and cannot immediately run for re-election.

This is the first time the Congress of Peru has deposed a prime minister since 1968.

Economic News

One-Day Strike Expected to Crimp Argentina's Transport System

Some of Argentina's biggest unions are proceeding with a 24-hour national strike today that is expected to cripple the nation's transportation system and hamper commercial activity, *La Nación* reported. The fourth national strike called by the unions against the government of President Cristina Fernández de Kirchner, today's strike is aimed largely at an unpopular income tax measure, as well as rising inflation and assistance for pensioners. The country's major transportation unions, as well as banking and other service-sector unions, are planning to participate in the strike, according to the report. Businesses have been preparing for the labor action. Chile's **LATAM Airlines** said on Monday it was canceling a large number of domestic flights in Argentina as well as some international ones, Reuters reported.

Mexico: Government Revenue Falls for First Time Since 2009

Mexico's finance ministry said Monday that government revenues fell in the first quarter of 2015 for the first time since 2009, *Reforma* reported. Revenue totaled 654 billion pesos ($43 billion), a 1.9 percent drop in real terms compared to the same period last year. Lower oil prices were largely behind the fall, according to the report. In related news, Mexico recorded a sharp increase in its February fiscal deficit compared to the same month last year, rising more than 40 percent, Reuters reported Monday. Public sector spending grew 4.2 percent in the second month of the year, while revenues

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expanded only 0.1 percent. Manufactured exports fell 0.25 percent in February compared with January in seasonally adjusted terms, with auto exports falling 2.12 percent, the finance ministry said last week.

Company News

Harvest Seeking to Raise Cash After Venezuela Blocks Asset Sales

U.S.-based independent oil company **Harvest Natural Resources** said Monday it is seeking to raise cash in debt or equity markets to fund operations and would also consider restructuring after a planned sale of its remaining Venezuelan assets was blocked by the South American country's government, Bloomberg News reported. Harvest, which released its fourth-quarter and 2014 results on Monday, is facing a cash crunch and reported having $6.6 million on hand at the end of 2014 as compared to $120.9 million a year earlier, Reuters reported. Harvest has tried twice to sell its remaining assets in Venezuela, a 20 percent stake in the Petrodelta joint venture with Venezuelan state oil company **PDVSA**, but the government earlier this year blocked a proposed sale of the stake to a unit of Argentina's **Pluspetrol**. A previous sales attempt to Indonesian company **Pertamina** failed in 2013. Harvest said Monday that it is "currently experiencing severe liquidity constraints brought about by the failure of the Venezuelan government to approve Harvest's sale of its Venezuelan asset, the failure to pay dividends and other contractual breaches related to Petrodelta." The company added that it has "begun discussions with PDVSA toward reaching an agreement for an amicable exit from Petrodelta," but that if those discussions don't lead to a fair solution, it will seek arbitration. On Monday, the company reported a net loss of $193.5 million in 2014 compared with net loss of $89.1 million in 2013. Harvest posted a fourth quarter 2014 net loss of $179.7 million compared with a net loss of $122.7 million for the year-earlier period, mainly due to a write-down of the Petrodelta investment.

Featured Q&A

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assistance. As a last resort, the investor's home country could bring a claim against the non-paying state before the International Court of Justice. Failure to comply with a judgment of the ICJ could be referred to the U.N. Security Council for measures to give effect to the judgment. Of course, the vast majority of governments simply pay awards because of their expectations of reciprocity, their belief that the law is legitimate and ought to be obeyed and the reality that non-compliance increases the risk to—and therefore the cost of—future foreign investment. Based on these reasons, even a country that initially refuses to pay an award may in time change its mind."

A Nigel Blackaby, co-head of international arbitration at Freshfields Bruckhaus Deringer in Washington: "ICSID was founded by the 1965 ICSID Convention which requires signatory states automatically to comply with awards. Article 53 states unequivocally, 'Each [state] party shall abide by and comply with the terms of the award.' As a consequence, any country that fails to do so is in breach of its international obligations to all other (roughly 160) signatories to the ICSID Convention. The specific investment treaty will also likely oblige a losing state to comply immediately with an award failing which it will be in breach of its international obligations toward the other party to that treaty. The consequence of these breaches of international law will increase the risk profile (and thus the cost of borrowing and access to borrowing) of the recalcitrant government. It may also cause those countries whose nationals have not received payment of awards to vote negatively in multilateral funding forums such as the IDB and the World Bank. Separately under Article 54 of the ICSID Convention, the courts of the other signatory states have to recognize and enforce that award as if it were a final judgment: 'Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.' So if a government does not comply, the investor can start hunting for and freezing seizable state assets. Ultimately, if a country wishes to participate in the international community, it needs to comply with adverse awards. Even Argentina (which had historically not complied with adverse awards) eventually recognized this fact when in November 2013 it paid five long outstanding awards to British, U.S. and French investors."

> "If a government does not comply, the investor can start hunting for and freezing seizable state assets."
>
> *— Nigel Blackaby*

A Jorge Lara Urbaneja, partner at Arciniegas, Lara, Briceño & Plana in Bogotá: "Decisions from ICSID, or in general from international or supranational institutions, are fully effective depending on the national jurisdictions where they have to be enforced. In those countries where strong institutions and the rule of law are in place, regardless of who is president or how the government is formed, there is great respect for actions or decisions coming from those judicial or political organizations that were created to assure juridical security on issues that may affect legitimate international interests. Such actions or decisions are not always welcomed in the recipient jurisdiction, or by the incumbent government, but once they become fully effective, they are complied with. Those governments and national institutions do not put a country's reputation at risk. With respect to Venezuela, the above considerations do

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Featured Q&A

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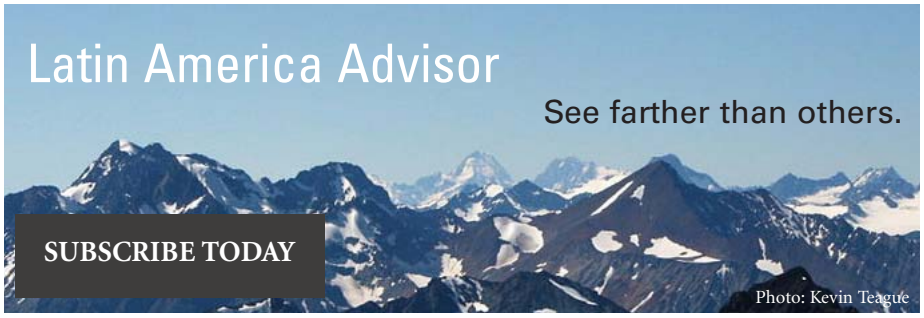
not apply today. Venezuela and its present government are facing their worst-ever economic crisis, an aspect that could explain a default on a dollar-denominated payment. But paying an award to a U.S. company, regardless of the origin and fairness of that international decision, is far beyond what the Venezuelan government will do. The fact that ICSID had awarded that payment prior to the Venezuelan withdrawal from the international organization makes no difference. Private property rights have no legal protection in Venezuela. From the beginning, Chávez instituted expropriation without indemnification. Moreover, the Venezuela government only responds to Cuban interests and, regardless of U.S. diplomatic initiative, Owens-Illinois or any other private company is far from being included in the agenda."

Jaime Martínez Estévez, partner at Rodner, Martínez & Asociados in Caracas: "Venezuela denounced its bilateral investment treaty with the Netherlands in 2008 and the ICSID Convention in 2012. However, both continue to be binding for investments made and arbitrations started prior to their terminations. Venezuelan officials have expressed constitutional and political considerations for the withdrawals, which could be used to justify ignoring the award. However, last year, Rafael Ramírez, then Venezuela's foreign minister, welcomed an ICSID award in the ExxonMobil case as a victory for Venezuela. Procedural actions could delay enforcement. Venezuela questioned the jurisdiction and is likely to request the revision and/or annulment of the decision, as it has done in other cases. Political arguments could be used to delay payment negotiations, as well. Venezuela's pressing economic situation, particularly its level of international reserves, would invite delaying tactics. In the current political and economic circumstances, an award refusal could occur regardless of the forum. ICSID enforcement conditions are better than those under the New York Convention.

> "Paying an award to a U.S. company ... is far beyond what the Venezuelan government will do."
>
> — *Jorge Lara Urbaneja*

Annulment claims have to be settled in accordance with Article 52 of the ICSID Convention, and there is no appeal or recourse (other than per the convention) for enforcement in any of the 159 signatory countries. A refusal will have a negative effect on the prospects and cost of new investments. Venezuela would be induced to payment negotiations to avoid seizure of assets abroad and the increased cost of a forced payment. Plaintiffs will seek freezing assets in advance, based on Article 47 of the convention."

The Advisor *welcomes reactions to the Q&A above. Readers can write editor Gene Kuleta at gkuleta@thedialogue.org with comments.*



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