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Arbitration - Ecuador

Ecuador to investigate investment arbitration obligations

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Background

Creation of CAITISA

Comment

With several investment arbitrations underway against Ecuador, the government has established a high-level commission with a wide range of powers to audit the ratification process for its bilateral investment treaties (BITs) - most of which were signed in the 1990s - as well as the various arbitration proceedings initiated under these treaties. The audit powers of the commission include current arbitration proceedings.

Background

Despite the small size of its economy and the comparatively limited weight of its foreign investment sector, Ecuador is one of the countries in Latin America with the highest number of investment arbitration complaints. While most arbitrations have arisen in the energy and mining fields, other sectors (eg, water) have also been affected.

Faced with this flood of international arbitral complaints, in 2007 Ecuador began to adopt several steps to withdraw from the BIT system. That same year, Ecuador denounced the International Centre for Settlement of Investment Disputes Convention and has subsequently proceeded to denounce all BITs that were in force.

At the request of the president, the Constitutional Tribunal issued a decision in 2007 declaring all BITs unconstitutional, giving the denunciations a basis in national law. In 2008 a new Constitution was enacted that included a provision prohibiting the ratification of any international treaties:

"in which the Ecuadorian State cedes its sovereign jurisdiction to international arbitral courts, in disputes of a contractual or of an otherwise commercial nature, between the State and private parties" (Article 422).

This clause gave full constitutional cover to the denunciation of the BITs, all of which have now been denounced. The denunciation began in 2007 and increased rapidly when the new Constitution came into effect

Creation of CAITISA

The latest step towards revising Ecuador's presence in the international investment arbitration system was the creation of the Commission for the Integral Citizens' Audit of the Treaties of Reciprocal Protection of Investments and of the International Arbitral System on the Subject of Investments (CAITISA). It was established by Executive Decree 1506 and signed by the president on May 6 2013.

Among other things, CAITISA's powers and objectives are to "examine and evaluate":

- the "signature and negotiation process of the bilateral investment treaties (BIT) and other agreements on investment signed by Ecuador", as well as "the consequences of their application";
- "the content and compatibility of these treaties with Ecuadorian legislation"; and
- most significantly, the "validity and propriety of the actions and proceedings adopted, and of the awards and decisions issued by the organs and jurisdictions that form part of the international arbitral system on the subject of investment, which have had cognizance of arbitral proceedings against Ecuador".

This last objective is established:

"with the purpose of determining the legality, legitimacy and rightness [licitud] of their decisions and to identify inconsistencies and irregularities that have provoked or may provoke impacts on the Ecuadorian State in economic, social, and environmental terms."

CAITISA's first goal is to "define a methodology" for the "integral audit" it must carry out, which will revise not only the investment treaties to which Ecuador is a party, but also "other instruments of public and private international law related to investment and international arbitration", as well as local laws dedicated to the subject - including all "legal instruments, public and private". The audit must also extend to the application of arbitration clauses, arbitral procedural rules "as they relate to the provisions of the BITs", the actions and decisions adopted by all arbitral tribunals created under the system, and the manner of analysing the impact that the whole structure may have had on Ecuador and its people. One aim is to audit any "deficiencies contained in the actions, awards, and decisions" of international arbitral tribunals.

In its reports, CAITISA will detail:

- whether the "specific provisions and clauses suffer from inconsistencies or are considered contrary to Ecuadorian and public international law";
- any "actions, awards, and decisions in which conflicts of interest, erroneous interpretation or application of international or Ecuadorian law may be detected";
- "the operational process and economic, social, and environmental performance [*desempeño*] of companies" that have brought actions against Ecuador;
- "the existence of probable traces of civil, criminal, and administrative liability" in order to notify the competent authorities; and
- "alternative legal and political measures" to the international investment arbitration system.

In order to complete this vast investigation, CAITISA will have an eight-month period (extendable for a further eight months) and ample access to "all the content of the instruments for the treatment of foreign investment and dispute resolution on the matter". All public institutions are obliged to provide CAITISA with the information it requests.

The members of the commission will include:

- four representatives of the state (a minister and three national secretaries);
- four "experts or international researchers" from civil society, who "specialize or have experience in international law and/or investment law and/or international arbitration", and will be selected by the four State-appointed members; and
- four representatives from "social organizations and/or movements with experience in international law and/or investment law and/or international arbitration", also to be selected by the four state-appointed members.

Comment

Of the powers entrusted to CAITISA, the most relevant is that dealing with current arbitral proceedings and their impact - including awards - on Ecuador's people. After all, the compatibility of the BIT system with Ecuadorean law has already been addressed by the Constitutional Court.

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