

## Arbitration - Ecuador

### New arbitration clause for oil contracts

Contributed by **Coronel & Pérez**

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**Background**  
**New arbitration clause**  
**Comment**

The latest petroleum round launched by Ecuador to attract fresh investment recently came to an end. Although the process did not meet the country's expectations, the call for bids was an opportunity to identify the new framework for the settlement of disputes that Ecuador is ready to accept following its denunciation of the International Centre for Settlement of Investment Disputes (ICSID) Convention and its bilateral investment treaties (BITs).

#### Background

Since 2008, Ecuador has adopted significant steps in the field of investment arbitration. On January 30 2008 it was argued that several BITs – mostly signed with developing countries– had proved of no value for the country's economy.

In October 2008 a new Constitution was approved. The Constitution included a clause prohibiting the state from signing treaties which allowed private investors to bring arbitration claims against the state, except where the treaty provided for the right of the investor to file its claim before "regional arbitration instances" or "jurisdictional organs designated by the signatory states".<sup>(1)</sup> On July 13 2009 the government denounced the ICSID Convention, arguing that the treaty infringed Ecuador's sovereignty.

In January 2010 the president initiated a process to denounce all other BITs that were still in force because of their incompatibility with the new Constitution. In May 2013 the executive created a commission to investigate the ratification of the BITs by Ecuador during the 1990s and made recommendations to the government. Months later, the names of the commissioners were announced.

Despite these steps, Ecuador continued to enter into contracts, especially loan agreements combined with oil purchases, which provided for international arbitration. In at least one instance, the government disclosed that the parties had signed a contract with an arbitration clause under the rules of the London Court of International Arbitration.<sup>(2)</sup> These agreements were legally feasible because the new Constitution, despite its language against BITs, did not bar the state from signing contracts where the parties select a foreign jurisdiction to settle their dispute.

This omission marked a significant departure from previous constitutions which, following the Calvo tradition, had enjoined the state from submitting contractual disputes with foreigners to foreign tribunals. What remained from the Calvo doctrine in the new Constitution was its diplomatic component only: namely, a broad declaration that foreigners, by investing in the country, would relinquish their right to diplomatic protection with regard to their investment.<sup>(3)</sup> The National Assembly went as far as to pass a legal provision that expressly allowed the state and public entities to submit contracts signed with foreign parties to the laws and jurisdiction of third countries.

Thus, while the BITs were found unconstitutional because of their arbitration provisions, the government was free to sign contracts which included international arbitration clauses. This was the case with the contracts that the government was expected to sign with bidders for the Eleventh Oil Round.<sup>(4)</sup>

#### New arbitration clause

The following are some of the features of the new arbitration clause proposed by Ecuador for oil contracts:

- Arbitration will be conducted under the United Nations Commission on International

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#### Trade Law rules.

- If the quantum of the dispute is undetermined or exceeds \$10 million, it will be administered by the Permanent Court of Arbitration at The Hague. In this case the arbitration will take place in Santiago, Chile.
- The Arbitration Centre of the Quito Chamber of Commerce will hear all other disputes.
- The arbitration will be in Spanish.
- The applicable law will be Ecuadorian law.
- Each party will appoint one arbitrator, with the third arbitrator appointed by the other two arbitrators. If any of the parties or the two arbitrators fail to make their appointments, the Permanent Court of Arbitration or the Arbitration Centre of the Quito Chamber of Commerce will step in to appoint the missing arbitrator accordingly.
- The arbitral tribunal will have jurisdiction to hear not only disputes arising out of the contract but also "controversies originated from any Treaty for the Promotion and Protection of Investments that the contractor may invoke".
- The tribunal shall not hear "controversies arising out the declaration of caducity of the contract or connected with its effects". Such controversies "will be solved by the competent tribunals of Ecuador".
- Controversies about decisions of the tax administration will be resolved by the Ecuadorean tribunals.
- The award will be binding on the parties "without prejudice to the recourses that are available under the law of the seat of arbitration (*lex arbitri*)".

#### Comment

The clause brings the arbitration process for oil contracts close to the traditional field of international commercial arbitration. Some elements in the proposed clause may create uncertainty for the parties and the arbitral tribunal. The exclusion of caducity from the jurisdiction of the arbitral tribunal is surprising, since this has been a common source of disputes in the past.

The Eleventh Oil Round attracted no new investors. Of the 13 blocks that were offered, only three companies showed interest. Two of the three companies were foreign state-owned companies (one from Spain and the other from China) that were already operating in Ecuador; the third bidder was a consortium led by Petroamazonas, one of Ecuador's oil state companies. It remains to be seen whether the arbitration clause will replicate exactly the language of the clause proposed by Ecuador, or whether the parties will negotiate a refined version.

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#### Endnotes

(1) Article 422 of the 2008 Constitution.

(2) See [www.elcomercio.ec/negocios/Ecuador-admite-arbitraje-Latinoamerica\\_0\\_344965545.html](http://www.elcomercio.ec/negocios/Ecuador-admite-arbitraje-Latinoamerica_0_344965545.html).

(3) Article 307 of the 2008 Constitution.

(4) See [www.rondasuroriente.gob.ec/download/documentos\\_licitatorios/proyecto\\_de\\_contrato.pdf](http://www.rondasuroriente.gob.ec/download/documentos_licitatorios/proyecto_de_contrato.pdf).

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