Arbitration - Ecuador

The feasibility of enforcing bilateral investment treaty arbitral awards

Contributed by **Coronel & Pérez**

May 09 2013

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Ecuador's legal framework seems open to the enforcement of foreign arbitral awards. Yet recent decisions by the executive and legislative branches of the government and several Constitutional Court rulings have seriously impeded the enforcement of awards issued by international arbitral tribunals established in accordance with bilateral investment treaties. In such cases it seems that the prevailing party can only rely on voluntary compliance or try to enforce the award elsewhere. This shift in public policy must be taken into consideration by international legal counsel.

Background

Despite its historic adherence to the Calvo tradition, Ecuador was one the few Latin American nations to sign the New York Convention in 1958, which it ratified in 1962. In 1973 the Supreme Court ruled on the first case in which the convention was successfully invoked in order to enforce an international commercial award. After years of vacillation and rulings that found submission to a foreign jurisdiction in Ecuador to be illicit, a 1976 law interpreting an article of the Civil Code introduced some flexibility. That statutory interpretation was subsequently granted constitutional status in 1979.

Moreover, in 1986 Ecuador acceded to the International Centre for Settlement of Investment Disputes (ICSID) Convention, and in 1994 regulations were passed allowing arbitration in oil contracts. In 1996 a constitutional amendment acknowledged arbitration as an alternative mechanism for resolving disputes. During the 1990s Ecuador ratified more than two dozen bilateral investment treaties with various countries. In addition, in 1996 Ecuador adopted a new law on arbitration inspired by the United Nations Commission on International Trade Law Model Law. Despite a 2005 amendment which introduced some uncertainty into this new law, the legal climate generally favoured arbitration.

Public policy

However, there was no significant distinction between private or public parties, or arbitration based on an agreement between the parties or an international treaty. Ecuador promoted both types of arbitration until 2008, when doubts about the prior course of action were raised due to a series of shifts in public policy as follows:

- In 2008 President Rafael Correa denounced eight bilateral investment treaties that Ecuador had signed with various developing countries. In his view, these treaties not only infringed state sovereignty, but also failed to meet the economic goals that they had been expected to achieve.
- The new Constitution, which was approved in 2008, went further in introducing a provision forbidding Ecuador from signing treaties containing arbitration clauses such as those commonly found in the bilateral investment treaties that the country had signed during the 1990s.(1)
- In July 2009 Ecuador denounced the ICSID Convention, which was due to come into effect in January 2010.
- Between 2010 and 2013, at the president's request, the Constitutional Court ruled on the constitutionality of a dozen bilateral investment treaties that were still in force. In essence, the court found the arbitration provisions established in these treaties to be incompatible with the new Constitution.
- These rulings were followed by a formal presidential denunciation of the treaties – a process that is still underway.

- In October 2012 the Legislative Assembly convened a special session in order to discuss the award issued in the *Occidental* case, in which Ecuador was ordered to pay damages in the region of $2 billion.(2) While the debate focused primarily on *Occidental*, the assembly's critique extended beyond that particular case; condemnation of the resolution adopted by the legislature may well apply to other bilateral investment treaty awards.

Constitutional Court

One of the arguments advanced by the Constitutional Court in its rulings is particularly significant. Among the reasons why the court found the arbitration provisions contained in bilateral investment treaties to be unconstitutional was the fact that awards issued by tribunals established under the umbrella of bilateral treaties fall outside the court's constitutional control.(3)

This reasoning was grounded in a provision introduced by the 2008 Constitution, which permits a review of the constitutionality of sentences and judicial decisions. This so-called 'extraordinary protection action' may prove a serious threat to the principle of *res judicata* (ie, a matter already judged) by allowing a dissatisfied party to litigate against an issue that has already been settled by a court by arguing that certain constitutional issues were neglected or misruled.

Although neither the Constitution nor the statute that regulates the Constitutional Court's powers includes arbitral awards as susceptible to review, the court has ruled that they fall within the scope of the extraordinary protection action. Moreover, the court has already taken some decisions on both arbitral awards and rulings of ordinary judges and tribunals dealing with the enforcement of arbitral awards.

Given that the Constitutional Court has already decided that arbitration provisions in bilateral investment treaties are unconstitutional, and taking into consideration formal statements made by the executive and legislative branches – all of which are clearly expressions of public policy – it seems unlikely that an Ecuadorean judge will be able to enforce a bilateral investment treaty arbitral award against Ecuador. In addition, the Constitutional Court will likely intervene in the process at the government's request.

Comment

The hurdles that a party trying to enforce an international commercial award in Ecuador may encounter are far less sizeable than those facing a party which is seeking to enforce an award issued by a bilateral investment treaty tribunal or another tribunal established under similar rules. Such obstacles seem almost insurmountable. An Ecuadorean court is unlikely to disregard:

- the statements of the chief of the executive branch;
- the resolution adopted by the legislature in *Occidental*; and
- Constitutional Court rulings finding the arbitral provisions of bilateral investment treaties unconstitutional.

Therefore, in such cases, investors should explore avenues other than the Ecuadorean judiciary (eg, seeking enforcement of the award in other jurisdictions where the losing party may have some assets).

The government is leading an initiative to establish a regional arbitration centre in Latin America to hear investment disputes. However, the structure and functioning of such a centre is expected to accord with the 2008 Constitution – not bilateral investment treaties or other similar arrangements. It remains to be seen not only whether the features of such a centre will satisfy foreign investors' expectations to the point of accepting its jurisdiction, but also whether the awards issued by such a centre will be easily enforced in Ecuador.

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Endnotes

(1) See Article 422 of the 2008 Constitution.

(2) Official Register 832, November 16 2012.

(3) Official Register 359, Supplement, April 10 2011, p13, Col 1.

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