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Arbitration - Ecuador

The future of international arbitration in Ecuador: the boomerang effect

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Background

International arbitration has always been controversial in Ecuador. In fact, for a long time, submitting a dispute to international arbitration was considered to violate Ecuadorian public law. However, this aversion has been gradually replaced by a more nuanced approach. In the mid-1970s, a new regime was established that permitted certain disputes to be submitted to arbitration in foreign jurisdictions. However, it was not until 1997 with the passing of the Arbitration and Mediation Law that Ecuador became more receptive to international arbitration as a dispute resolution mechanism. Most significantly, this law permits arbitration agreements in public contracts.

ICSID, BITs, and Ecuador's arbitration boom

Ecuador's ratification of the International Centre for Settlement of Investment Disputes (ICSID) Convention in 2001, combined with the signing of over 40 bilateral investment treaties (BITs) between 1995 and 2001, has demonstrated the country's willingness to submit disputes to international arbitration. Ecuador's assertive entry into such a large number of BITs during the middle of the decade, and thus their implicit agreement to submit investor disputes to arbitration, was eagerly accepted by foreign investors around the world. Consequently, Ecuador has become the second most frequently sued country in investment arbitration, facing more than 20 international arbitrations, due in large part to the Ecuadorian Congress's unilateral modification of oil contracts in 2006.

International arbitration under the 2008 Constitution

Since Ecuador's new, self-proclaimed socialist government took office in January 2007, Ecuador's increased hostility towards international arbitration has been noticeable. Under this new leadership, Ecuador adopted a new Constitution in 2008. Article 422 of this Constitution expressly prohibits the Ecuadorian state from entering into international agreements under which Ecuador would have to cede jurisdiction to international arbitral tribunals in contractual or commercial controversies between the state and individuals or corporations. An assembly member from President Correa's political party, Alianza País, defended the necessity of Article 422's inclusion by contesting that:

"*Historically Ecuador has signed treaties that are considered harmful to the country's best interests by transferring national jurisdiction and competence of transnational commercial or contractual relations to supranational arbitration institutions, in which, it seems, different countries are treated in the same manner as commercial companies*."

Despite Article 422's aspirational nature, the effects of the provision are limited. First, it is important to note that Article 422 forbids only the signature of new international treaties. It does not restrict other agreements from including an arbitration clause. In fact, in a recent decision by Ecuador's Constitutional Court, the court authorized the Ministry of Finance to sign a loan contract with the Inter-American Development Bank (IADB) that included an arbitration clause binding the parties to resolves any disputes in *ex aequo et bono* arbitration.

On the other hand, in an effort to promote Latin America as a site for international arbitrations, Article 422 does not prohibit Ecuador from entering into international

arbitration treaties requiring disputes between Ecuador and citizens of Latin America to be submitted to arbitration, as long as those disputes are submitted to regional arbitral bodies within the Latin American continent.

Anti-arbitration trend: the boomerang effect

In 2008 Ecuador denounced the ICSID Convention and 12 BITs with other Latin American countries. As an explanation for their radical actions, the government stated that the BITs in question were not attracting sufficient foreign capital. The denunciations came as part of the government's unfolding plan to revise the Country's position towards foreign investment.
On September 28 2009, President Correa demanded the denunciation of BITs that Ecuador has signed with Germany, France, Finland, Sweden, Canada, China, the United Kingdom, the Netherlands, Ireland, Argentina, Chile, Venezuela, Switzerland and the United States. He justified this move by arguing that such BITs contain clauses, such as the notorious provision for international arbitration, which both violate the new Ecuadorian Constitution and are harmful to national interests. The President also took issue with the fact that recent international arbitral decisions have been handed down that are in total disregard of Ecuadorian law.

Although the government's intention of preventing state acts from being reviewed by international arbitral tribunals is clear, such a goal will be difficult to achieve in the immediate future. First, more than nine months have passed since the President publicly requested the denunciation of various BITs signed with Ecuador, and the Constitutional Court has yet to hand down a favourable decision on the issue. Second, even if Ecuador's denunciation of the BITs takes place, it will not affect investments made before the notification of termination becomes effective. Therefore, investors will generally still be able to enjoy treaty protection for at least another 10 to 15 years, during which period they will be able to file arbitration claims if their treaty rights are violated. With this in mind, it is quite possible that Ecuador's recent initiative to end international arbitration will ultimately produce the opposite effect because the government's nationalistic discourse against investment treaties may be encouraging foreign investors to file their claims while BIT protection is still available. Thus, Ecuador's behaviour may be creating a boomerang effect, bringing about the precise scenarios that it seeks avoid.

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