Ecuador’s Ordeal: Is International Jurisdiction a Journey with No Return? (Part I)

Kluwer Arbitration Blog
October 12, 2017

Enrique Jaramillo (Assistant Editor for South and Central America) (IHS Markit)

Please refer to this post as: Enrique Jaramillo (Assistant Editor for South and Central America), ‘Ecuador’s Ordeal: Is International Jurisdiction a Journey with No Return? (Part I)’, Kluwer Arbitration Blog, October 12 2017, http://arbitrationblog.kluwerarbitration.com/2017/10/12/ecuadors-ordeal-international-jurisdiction-journey-no-return/

“BITs and arbitration centers, such as ICSID, are an expression of an unjust moral order”, said Ecuador’s former President, Rafael Correa, back in 2014. Such animadversion led the country to denounce all its bilateral investment treaties (BITs) earlier this year. The Latin American nation’s feud with BITs and the International Centre for Settlement of Investment Disputes (ICSID), however, can be traced back far before that.

It is the purpose of this two-part post to assess the situation of investors in Ecuador *vis-á-vis* the country’s efforts to elude the substantive and procedural protections afforded by investor-state dispute settlement (ISDS).

This first part begins with a review of the law governing entering and denouncing the ICSID Convention (the “Convention”), as well as of an important debate on the effects of withdrawing from it. Then, it goes on to revise Ecuador’s concrete steps to distance itself from ISDS; from the first BITs terminated back in 2008 to the last *note verbale* denouncing Ecuador’s final BIT in 2017.

The second part, to be posted in a subsequent publication, will refer to investors’ alternatives after the termination of the BITs, what might be Ecuador’s last standing BIT, and the urgent need to provide investment protections in the face of

the current situation of the country's petroleum sector.

ICSID Convention: You Can Check Out Anytime You Like, But Can You Ever Leave?

This section refers to the legal steps that a nation has to take in order to, first, subject itself to international tribunals and, second, to withdraw from such jurisdiction.

It is no secret that consent is the *sine qua non* requirement of arbitration. Namely, both parties must consent to submit their disputes to an arbitration tribunal. A state can provide such consent in several ways: by treaty, by law, or by contract. Investors, on the other hand, can also give their consent in a number of fashions, e.g., by initiating arbitration. This is what Jan Paulsson calls "arbitration without privity", and it consists of investors bringing claims against states that have previously consented to arbitration by means of, for example, a BIT.

As to ICSID arbitration, there are additional requirements that must be met before a dispute can be decided by a tribunal. Only one relevant to this discussion: the dispute must involve a member of the Convention.

Whereas the requirements to submit to ICSID jurisdiction are clear, the law on how to withdraw from it is far from settled. Under Article 71 of the Convention, any contracting state can denounce the Convention by submitting a written notice. This denunciation takes effect 6 months from the receipt of the notice. Article 72 states, however, that the notice of denunciation does not affect the rights and obligations of contracting states arising from consent to ICSID jurisdiction given before such notice.

The meaning of Article 72 has divided scholars in two groups: the "bilateralists", and the "unilateralists". The former believe that ICSID jurisdiction requires consent by both parties, whereas the latter argue that Article 72 refers only to consent given by contracting states.

This debate matters because states consent to such jurisdiction, predominantly, through BITs. Therefore, from a unilateralist point of view, if such BIT predates a state's denunciation, that state is subject to ICSID jurisdiction for as long as that

BIT is in force. This effect is exacerbated by the fact that BITs usually contain survival clauses-applicable in cases of unilateral termination-that lengthen the life of a treaty's provisions for several years in order to protect existing investments. Consequently, under this interpretation, a state can be subject to the Convention for many years after its denunciation. From a bilateral point of view, on the other hand, a denouncing state is subject to ICSID jurisdiction only if investors consent to it by starting arbitration before the state's denunciation.

The bilateralist view predominates among academics. This, however, is far from meaning that ICSID tribunals favor the scholars' view. On the contrary, the only tribunal that has directly ruled on the matter, in *Venoklim Holding B.V. v. Bolivarian Republic of Venezuela,* stated that Article 72 of the Convention refers only to consent given by the state, not by investors.

Nonetheless, it is worth to mention that the *Venoklim* claim was brought within six months from Venezuela's notice of denunciation, i.e., before the denunciation became effective under Article 71 of the Convention. This is relevant because some bilateralist scholars-as well as some ICSID cases, e.g., *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*-support the position that a denouncing state, which previously consented to arbitration, is still subject to ICSID jurisdiction as long as the claimant initiates the proceeding within such six months. Although no tribunal has decided on the validity of claims brought after this period, there are a number of pending cases that will help to settle the debate. This author is aware of at least one case decided earlier this year, i.e. *Valores Mundiales, S.L. and Consorcio Andino S.L. v. Bolivarian Republic of Venezuela*, where the tribunal might have ruled on the issue. Much to my disappointment, however, the award is not publicly available yet.

Has Ecuador Been Tilting at Windmills?

Ecuador's effort to withdraw from ISDS is comprised of four different steps. All such steps, however, have been either ineffective, at worst, or uncertain, at best.

The first two steps took place in 2008. In January of that year, Ecuador denounced over a third of its BITs. This round of denunciation, however, was less than meaningful because, on one hand, such BITs had no real impact on the economy and, on the other hand, the nation was still a contracting state of the ICSID

Convention. Thus, investors from countries whose BITs Ecuador had not yet denounced, were still able to have their claims decided by ICSID tribunals.

The second step took place in October 2008, when a new Constitution came into force. A provision of this new *Magna Carta* prohibits the Government from submitting disputes to the jurisdiction of international arbitration tribunals, unless such disputes are submitted to Latin American tribunals, whose jurisdiction stems from instruments among Latin American parties. However, because under the Vienna Convention on the Law of Treaties ("VCLT") a state cannot use local law to justify breaching an international treaty, the 2008 Constitution had no effect. From an international perspective, it affected neither existing nor future proceedings against Ecuador. At national level, conversely, such provision afforded the arguments to denounce a second set of BITs a few years later.

The third step took place in 2009. Back then, Ecuador already faced claims for almost 13 billion dollars, and it decided to denounce the ICSID Convention altogether. Although this was the first meaningful step toward escaping from the grip of international tribunals, it was also insufficient. Granted, being a member state is an essential requirement to ICSID jurisdiction, but international arbitration is not only possible under ICSID. Most BITs also provide for arbitration in other centers and under different rules, such as UNCITRAL, or the Additional Facility (AF) rules. This alternative has, actually, enabled several post-denunciation claims against the other ICSID-denouncing countries, i.e., Venezuela and Bolivia.

The last, most decisive step against ISDS took place earlier this year. On 16 May, then-President Correa issued a number of Executive Decrees ordering the termination of all of Ecuador's BITs. A few days later, the *notes verbales* formally denouncing such treaties were submitted to the corresponding embassies. However, the BITs contain several provisions extending their life after their termination, i.e., survival clauses, termination windows, and notice periods similar to that established in Article 71 of the ICSID Convention.

For illustrative purposes, the following chart provides the reader information on Ecuador's most relevant BITs, and the effect of the abovementioned provisions, extending the validity of the treaties into the future.

	Notice Period	Survival Clause	Termination Window	*Note Verbale* notified on	BIT valid until
USA	1 year	10 years	N/A	18 May 2017	18 May 2028
Canada	1 year	15 years	N/A	19 May 2017	19 May 2033
The Netherlands	N/A	15 years	Notification must be submitted before 1 January 2021.	5 June 2017	1 July 2036
France	1 year	15 years	N/A	22 May 2017	22 May 2033
U.K.	1 year	15 years	N/A	18 May 2017	18 May 2033
China	1 year	10 years	N/A	19 May 2017	19 May 2028

To the extent these BITs provide for arbitration under rules other than ICSID, Ecuador is bound to it until the expiration of the relevant treaty. As far as ICSID is concerned, on the other hand, the nation's position is less clear. From a bilateralist perspective, Ecuador is not bound to ICSID jurisdiction as to any claim submitted after its withdrawal from the Convention in 2009. Under a unilateralist perspective, on the contrary, the country is subject to it until the last treaty expires in the year 2036.

Please continue to Part II of this post.