

Kluwer Arbitration Blog

Ecuador's Attorney General's Office Seeks Modernization: What To Expect?

Hugo Garcia, Bernarda Muriel (Carmigniani Pérez Abogados) · Sunday, January 2nd, 2022

On November 23, 2021, Ecuador's Attorney General ("AG"), Iñigo Salvador Crespo **announced** the creation of a new institutional framework for handling disputes brought against the state and state entities with the vision of preventing and reducing litigation, particularly costly **international arbitrations**. The **Institutional Strengthening of the Attorney General's Office Project** ("PROFIP" for its initials in Spanish) would initiate its implementation on January 1st, 2022. The AG mentioned that this project intends to: i) safeguard and optimize the state's resources in proceedings initiated against Ecuador; ii) prevent disputes from arising, thus, the reduction of contentious processes; iii) modernize the office's technological resources; iv) train public servants in charge of defending the state and implement a 'career program' for them; and v) develop a communicational strategy to approach the society.

The announcement was introduced as part of a broader initiative to modernize the system of prevention and early resolution of disputes within the public sector which seeks to reduce the caseload of contentious cases. Nowadays, the AG Office **handles** more than 102,450 proceedings before domestic courts, 34 international proceedings, which include arbitrations and other cases before international courts and tribunals, and 291 international proceedings related to Human Rights protection. To these numbers, we should add other **non-contentious proceedings**: 1,160 mediation processes, 540 legal inquiries on the application or interpretation of public laws and regulations, and 350 processes for ex-post legality control **of public procurement contracts** in their three phases: i) preparatory; ii) pre-contractual; and iii) contractual.

We discuss below how this ambitious project will be developed and what we can expect from it.

PROFIP's background

On October 4, 2019, Ecuador entered into a loan **agreement** with the Inter-American Development Bank for US\$ 43 million, within the framework of the modernization of

Ecuador's financial administration. The third component of this modernization process involves the institutional strengthening of the AG Office. Against this background, on October 23 of the same year, the AG and the Ministry of Economy and Finance entered into an **agreement** under which the AG Office received US\$ 4,9 million to increase the efficiency and transparency on the use of public resources through the implementation of a sustainable project between 2019 and 2023: PROFIP.

PROFIP's implementation process

The AG Office **announced** that it would take three immediate actions: i) the design of a process for its implementation; ii) major structural changes, such as the creation of the National System for the State's Legal Defense, comprising a specialized group of lawyers with its own training school, the creation of the National Department for the Enforcement of Decisions and Indemnity Actions, and the creation of the National Department of Audit and Control; and iii) the establishment of **strategic partnerships**.

The project encompasses five stages of development: i) the socialization of the project sessions; ii) the execution of implementation agreements; iii) a test phase with training; iv) the unveiling of the new institutional management model; and v) the implementation of the project. Currently, the fourth phase has been **completed** and the last stage of the project is expected to start in January 2022.

What to expect?

During the third phase, AG Office personnel received **training** in different law fields, including investment arbitration, public law, and alternative dispute resolution methods. The AG Office aims to reduce the expenses in international arbitration proceedings and represent the state with its specialized group of attorneys, hence, this was a major step.

Between 2003 and 2018, the Ecuadorian state spent **US\$ 318,8 million** in legal fees, administrative expenses, and experts reports that involved the representation of Ecuador in 77 international arbitration cases. Only between 2017 and 2020, Ecuador spent **US\$ 52,8 million** in consulting, advisory, and research services in international litigation processes. Likewise, until 2018, the state paid **US\$ 71 million** for legal fees that only involved the defense against the **Chevron** proceedings.

Furthermore, in 2021, Ecuador's Comptroller General Office carried out an **audit** of the payments the AG Office made to international law firms between August 2018 and December 2020. This is not the first time the AG Office faced these types of audits. For instance, an audit process was opened in 2019, for the legal fees paid between **2013 and 2018** to the international law firms hired for Ecuador's defense in the Chevron related proceedings. Accordingly, the AG's decision to train public servants in order to reduce legal expenses in international arbitrations seems correct. The results are likely to be visible in a mid to long-term period, especially when the

training school begins functioning and the AG specialized group of attorneys is formed.

Conversely, the outcomes of the training sessions in public and administrative law should be tangible in a short time basis. The AG informed public servants will receive trainings focused on the review of the legality of public contracts and administrative acts, which should help to reduce and prevent contentious proceedings. This initiative goes by hand with the purpose of the draft bill the AG submitted to the National Assembly in **2019**. The AG proposed to reinstate the AG Office faculty to review the legality of administrative acts and contracts through prior processes, which was lost in 2008, due to legislative reforms. The National Assembly has not yet debated this draft bill.

In addition to the initiatives described before, the AG Office announced the creation of the National Department for the Enforcement of Decisions and Indemnity Actions. This specialized department will be in charge of filing indemnity actions against those public officers who caused the state to incur in liability, and, ultimately, will be focused on recovering public funds.

For instance, as a consequence of the enactment of '**Law 42**' and Presidential Decree 662, which caused **Perenco, Burlington, and Murphy** to bring ICSID proceedings against Ecuador, the state was condemned to pay **US\$ 738 million**. Moreover, the AG has revealed that indemnity actions were also filed on important **human rights cases**. Despite the fact that these decisions are still pending, their rulings will be decisive for future cases, especially considering the fact that the AG submitted a draft bill to the National Assembly on this subject matter in **July 2021**. The project aims to implement an efficient recovery process in favor of the state. The bill has not been discussed yet, but, we hope all these efforts will have positive results.

Finally, the new institutional framework involves **strategic partnerships**. The AG Office reported it will work with other offices such as the President's Office, the National Assembly, the Comptroller's General Office, the Ministries of Labor, Telecommunications, Economy and Finance, and others. **These institutions** will support the AG Office in the following steps: i) proposing legislative reforms for public servants to execute conciliatory agreements; ii) creating specialized monitoring committees; iii) establishing the new National Departments; iv) developing a Digital Agenda; and v) preparing budget reports for major structural changes. We believe cooperation between state institutions is fundamental for PROFIP to be successful. In addition, considering the voices of the private sector and academia would be beneficial too.

State's Legal Defense Handbook

On December 12, 2021, the AG Office published the '**State's Legal Defense Handbook**' as part of PROFIP. The Handbook serves as a *vademécum* for the AG Office personnel, public servants, private practitioners, and the academic community. The Handbook, which compiles caselaw and AG binding opinions, clarifies the

contours and limitations of the powers and prerogatives of the AG Office and aims to avoid the abuse of such prerogatives and ultra vires behavior.

Conclusion

We applaud the AG Office initiatives to standardize processes, train public servants, modernize the institution, promote transparency, and reduce public funds expenditure. We also believe that along with these efforts, the culture within the AG Office and public institutions faces important challenges too. More active roles within defending the state and evaluating possible risks are both welcome and desirable, as well as the reduction of bureaucracies, whereby feasible solutions may be reached, saving time and resources to all the parties involved. We trust these endeavors will flourish as long as institutions work efficiently and comprehensively, but only time will tell.

The views expressed by the authors do not represent the position of Carmigniani Pérez Abogados or its clients.

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