

Ecuadorian BITs' Termination Revisited: Behind the Scenes

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As in García-Marquez's novel, the denunciation of the Ecuadorian bilateral investment treaties ("BITs") represents a chronicle of a death foretold and the Ecuadorian National Assembly and Ecuador's President have taken one of the final steps to terminate them. Along the way, the internal termination proceedings have been highly politicized, international investment arbitration has been demonized, and more questions than answers have arisen.

Notwithstanding the fact that states may sovereignly denounce an international treaty and that BITs usually do regulate their termination, the reasons behind such a polemical decision need to be addressed and cautiously assessed. This post aims to review the steps and arguments that the Republic of Ecuador has embraced, their flaws, and the proposals of what is yet to come in the next years.

Termination proceedings

Since the 1960s, Ecuador has negotiated 30 BITs, 27 of which entered into force. Only one of them - executed with Egypt - terminated in 1995, and almost a decade ago, in 2008, Ecuador denounced nine of these BITs: those executed with Uruguay, the Dominican Republic, Guatemala, El Salvador, Cuba, Nicaragua,

Honduras, Paraguay and Romania (the last six will still be in force until 2018, due to their survival clauses).

Consequently, 17 BITs remained in force and a second denunciation round took place, which has its origins in 2008. The year 2008 is not a coincidence as Ecuador's new Constitution was then enacted bringing with it a particular and controversial prohibition under its article 422, which provides:

Treaties or international instruments where the Ecuadorian State yields its sovereign jurisdiction to international arbitration, in contractual or commercial disputes, between the State and natural persons or legal entities cannot be entered into (...).

According to the Ecuadorian Constitution and local law, denunciation of certain international treaties requires the National Assembly's approval and, additionally, a previous and binding opinion issued by the Constitutional Court. This process was followed and the Constitutional Court considered that all the BITs were incompatible with article 422, a flawed conclusion that would apparently legitimize the termination proceedings.

Fallacies and unconstitutionality

The following fallacies have been constantly repeated during the denunciation proceedings, namely: (i) that the BITs are unconstitutional; (ii) that local law replaces the protections and guarantees of a BIT; and, (iii) that BITs imply more foreign investment.

The termination of the remaining 17 BITs has been mainly based on their so-called unconstitutionality. Unfortunately, the political arguments surpassed the constitutional ones and incompatibility was sought where there was none. The Ecuadorian Constitution forbids entering into treaties or international instruments that provide jurisdiction to international arbitration, though with an important specification: *contractual* or *commercial* disputes.

Thus, the Constitutional Court did not consider that international *investment* arbitration is a very different animal from international *commercial* or *contractual* arbitration. In general terms, the former addresses breaches of international law,

particularly of international standards protected by a BIT (e.g. fair and equitable treatment, full protection and security, most-favored-nation treatment, etc.), while the latter focuses on contractual breaches of a commercial nature, which do not necessarily derive in breach of international law. Tribunals have historically pointed out these differences in several awards.

Regrettably, the National Assembly seconded this argument and a special committee in charge of analyzing the denunciations issued several reports, recommending the termination of the remaining 17 BITs entered into with Argentina, Bolivia, Canada, Chile, China, Finland, France, Germany, Italy, the Netherlands, Peru, Spain, Sweden, Switzerland, the United Kingdom, the United States, and Venezuela. Finally, on May 3, 2017, the National Assembly's Plenary approved the termination of all these BITs, though under the undermined fallacies mentioned above.

The National Assembly replicated the Constitutional Court's unconstitutionality argument without distinguishing that the Constitution does not forbid international *investment* arbitration. Likewise, the National Assembly considered that the 2008 Constitution represents a *fundamental change of circumstances* and, misunderstanding article 62 of the Vienna Convention on the Law of Treaties, it also justified the termination of the BITs under that provision.

As mentioned above, the 2008 Constitution does not forbid international *investment* arbitration; therefore it follows that the BITs are not unconstitutional and that the enactment of the new Constitution does not represent a fundamental change of circumstances. Accordingly, this argument, which tried to legitimize the denunciations, is far from being flawless or, ironically, constitutional.

Interestingly, the reports considered that the BITs do not allow partial termination (i.e. the dispute resolution articles) and, under article 44 of the Vienna Convention, recommended the termination of the entire treaty in each case. The Ecuadorian law, nonetheless, expressly establishes that termination, renegotiation or a constitutional amendment could be sought, but the latter options were not considered.

Substitutes, correlation and causation

Furthermore, the vicarious interpretation that local law would give enough guarantees to foreign investments (i.e. specifically, as noted by the National Assembly, under the Ecuadorian Organic Code of Production, Commerce and Investments) is undermined. Local law does not entirely replace the international obligations that a treaty protects, even if similar standards are conceived. Also, a neutral dispute resolution mechanism is of utmost importance for foreign investors and, when it comes to Ecuadorian courts, unfortunately they are not particularly known for their celerity, and neither for not being politicized or interventionist. Finally, it would be naive to conclude that BITs are necessarily equivalent to more foreign investment.

Correlation does not imply causation, and the mere existence of a BIT does not automatically attract foreign investment. The attractiveness of a country is not just determined by the treaties it has executed, and more complex variables play an important role. Of course, local laws are significant, but if there is no legal certainty, independent courts and political stability (to say the least), foreign investors would naturally be more attracted to other jurisdictions that fulfill these requirements. Conversely, the drastic termination of BITs, instead of improving and amending them through negotiations, does raise concerns within the international community and could give a wrong message to foreign investors.

What is next?

Although Ecuador's fate is uncertain and investors are raising many questions, some lights can be followed and the future debates are apparent from the Government's conduct.

Back in 2013, President Correa created the Commission for Comprehensive Audit of the Reciprocal Investment Treaties and the Investment International Arbitration System (CAITISA, for its initials in Spanish). CAITISA finally made public its report and conclusions on May 8, 2017. Among the general recommendations, CAITISA proposes to eliminate or limit certain BIT provisions, namely: to exclude dispute resolution clauses, to include rights to be claimed by host states, to give standing to the indigenous communities, and to establish performance standards for investors such as technology transfer obligations, capital flow regulations, and others.

However, CAITISA's main recommendation focuses on sponsoring an Alternative Model BIT ("AMB"), suggesting a reinforced focus on human and labor rights, together with protections for the indigenous communities and nature. Also, the AMB proposes giving host states standing to bring claims under the BIT, enforcing sustainable development standards, and supports the creation of an international investment court.

Moreover, the AMB suggests including a specific and strict definition of "investment", requiring two-year minimum duration and limited to direct property owned by the investor. Also, the AMB recommends limiting the "investor" definition by requiring potential investors to have active operations in the host state for at least two years, revealing ownership information, and providing the possibility of losing investor standing if fraud or corruption in the management of the investment is proven.

The AMB recommends to expressly and strictly define the fair and equitable treatment standard, to exclude umbrella and most-favored-nation clauses, to limit survival clauses by establishing fixed-term provisions requiring the States' express intent for renewal, and to exclude protection for indirect expropriation. Interestingly, the AMB suggests replacing full protection and security clauses with provisions enforcing the international minimum standard of treatment of foreign investors.

Finish them (?)

Aside from legal misunderstandings, Ecuador's decision to terminate its BITs seems to be odd and inconsistent with its current foreign policy, which seeks to attract foreign direct investment to palliate the economic crisis. In December 2015, Ecuador enacted a Public-Private Partnerships law seeking to attract foreign investment by providing tax incentives to upcoming strategic allies. The law, although with some flaws, recognizes investors' right to activate dispute resolution clauses under the different BITs in case controversies relating to their investment arise. Additionally, on November 11 2016, Ecuador executed the Accession Protocol to the Multiparty Trade Agreement with the European Union and, on 1 January 2017, Ecuador joined the Trade Agreement.

Finally, on May 16, 2017, President Correa issued the executive decrees that order

the termination of the BITs and the notification to the treaties' state parties. Now, the new negotiations will depend upon President Correa's recently elected successor. The terminations, however, may complicate this process, especially considering that several countries expressed their willingness to renegotiate the current BITs instead of terminating them. Hopefully, Ecuador's next steps will contribute to reinforce the foreign investment regime and not the country's isolation.