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

Enrique Jaramillo (Locke Lord LLP) · Monday, October 30th, 2017

This post is the conclusion of a two-part publication regarding 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).

The first part consisted of a review of the law applicable to entering and withdrawing from the International Centre for Settlement of Investment Disputes (ICSID) Convention (the "Convention"), as well as its different interpretations; and, of Ecuador's concrete steps to distance itself from ISDS. The first part concluded by stating that, even in light of such steps, Ecuador is still subject to international tribunals until 2036.

This part, in turn, refers to investors' alternatives in the current environment; what might be Ecuador's last standing BIT; and, the nation's petroleum sector need of investment protections.

Investors' Final Fig Leaf

Investors unwilling to submit their claims to national courts still have one way to resort to arbitration. As mentioned in the previous post, a country can consent to arbitration by treaty, but also by contract.

Ecuadorian law still allows the Government to consent to international arbitration in certain instances. For example, for claims arising out of public/private partnerships, as well as of investment, and petroleum contracts. Such consent, however, is subject to some constraints.

The Constitution provides the most important restriction. It 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. In light of such limitation, one particular venue seems to be well-suited to hear claims against Ecuador: Santiago de Chile.

In 2004, Chile adopted, without reservations, the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law"). The Model Law, whose scope includes investments, is favored by many experts because its provisions not only restrict intervention by local courts, but also make the latter aides of arbitration tribunals. Chile's capital is also home to the well-reputed

Centro de Arbitraje y Mediación de Santiago, which is managed by the *Cámara de Comercio de Santiago* along with 22 bi-national commerce chambers, including the U.S.-Chile Chamber of Commerce.

Furthermore, because Chile is a signatory of both the New York and the Panama conventions, awards issued in Santiago are enforceable in 157 jurisdictions.

Treaty Shopping: A Chain is only as Strong as its Weakest Link

By denouncing its BITs, Ecuador pretended to elude the power of international arbitration tribunals. However, such endeavor can succeed only by terminating every BIT. Leaving only one "alive", would make Ecuador vulnerable to treaty shopping. Namely, foreign investors could incorporate in a country with which Ecuador still has a BIT, and gain access to the protections granted by such a treaty.

This practice has been successfully used in the past by companies such as ExxonMobil and ConocoPhillips, which used the BIT between The Netherlands (NL) and Venezuela to assert claims against the latter (see, e.g., *Venez. Holdings, B.V. v. Bolivarian Republic of Venez., ICSID Case No. ARB/07/27, Decision on Jurisdiction, ¶204 (June 10, 2010)*). Generally, investors prefer the BITs of NL because they afford protection to any company incorporated in that country, even if not domiciled therein.

Regarding Ecuador, there is a strong argument to claim that it did not denounce its BIT with Bolivia properly. Ecuador denounced such treaty via a *note verbale* delivered to Bolivia's embassy in Quito on 19 May 2017. However, Article XII of the BIT states that the denunciation must be notified "one year before the expiration of the validity term", which ends on 15 August 2027. Namely, Ecuador would have to denounce the treaty on 15 August 2026, hence, the *note verbale* mentioned above would be ineffective.

Two arguments this claim. The first one is the very text of the BIT. Unlike other BITs, such as Ecuador's BIT with NL, Article XII of the Bolivia BIT does not say that the denunciation must be submitted <u>at least</u> one year before the expiration of the treaty, giving contracting parties leeway to denounce it at any time before that date. It just says that the denunciation must be made "one year before" the expiration.

The second argument stems from an integral interpretation of the BIT. The treaty's survival clause states that, in case of unilateral termination, the treaty will still be valid for ten years from the date in which the <u>denunciation is notified</u>. As mentioned above, Ecuador notified Bolivia on 19 May 2017, which means the treaty should be valid until 19 May 2027. However, the current validity term of the treaty expires only three months later, on 15 August 2027. Hence, interpreting Article XII of the BIT as allowing parties to denounce it at any point in time <u>at least</u> one year before its expiration would produce the absurd result of-in this scenario-making the survival clause to shorten, instead of extending, the life of the treaty.

The continued existence of the Ecuador-Bolivia BIT would have significant consequences. On one hand, it would continue to provide some investors with substantive protections such as fair and equitable treatment. On the other hand, it would subject Ecuador to the jurisdiction of international arbitration tribunals-at this point-indefinitely.

Even if this BIT continues to exist, however, it is worth to mention that it is not as propitious for treaty shopping as the BIT with NL. In order to benefit from the protections of the former, an investor would not only have to be incorporated in Bolivia, but it would also have to be domiciled therein.

The Return of the Production-Sharing Agreement

In July 2010, Ecuador's Hydrocarbons Law was amended mandating to switch all the country's production-sharing agreements (PSA) to service contracts. With a currently lower oil price, Ecuador now needs to allure foreign capitals to increase its reserves and boosts its production. The formula to attract investors is no secret: increasing profits, and reducing risk.

In order to increase investors' profits, Ecuador is reintroducing the PSA in its next "Intracampos" bidding round to take place in the first quarter of 2018. The PSA, unlike the service contract, compensates investors by giving them ownership over a share of the extracted oil. Nevertheless, the PSA might not be enough to bring foreign capitals ashore. Ecuador's stormy relationship with international oil companies, its withdrawal from ICSID, and the termination of its BITs, will certainly be factors that businesses will consider prior to investing in the country.

There are at least three alternatives capable of reducing investors' risk. The first one consists of submitting disputes arising from petroleum contracts to the jurisdiction of arbitration tribunals in Santiago de Chile.

The second option is treaty shopping. Even assuming that Ecuador denounced all its BITs properly, some of those treaties, such as those with Bolivia and NL, have provisions protecting not only existing, but also new investments, for a fixed term after their denunciation. The Ecuador-NL BIT, for example, protects all investments made before 1 July 2021. Even if this is only a short-term solution, it is worthy of being mentioned because, as mentioned above, investors can easily avail themselves of the protections of this treaty; and, such practice has already been successfully implemented in the past.

The third option is potentially the most effective one, but it is also the most unlikely. Under customary international law and the Vienna Convention on the Law of Treaties ("VCLT"), a state can withdraw a denunciation notice, at any time before such notice takes effect. This practice is not usual but it is not unheard of either. In the sixties, for example, the U.S. withdrew a notice of denunciation to the 1929 Warsaw Convention. Likewise, this year both Gambia and South Africa withdrew their denunciations to the Rome Statute of the International Criminal Court.

Ten of Ecuador's denunciations will only take effect in mid-2018, thus, theoretically, it could still go back on such denunciations. Withdrawal of the denunciations is, however, improbable because it would entail breaching Ecuador's Constitution, which, as mentioned previously, restricts arbitration to Latin American fora.

Final Thoughts

Ecuador's exposure to international arbitration is an issue full of both certainty and doubt.

Although, one can safely assert that the nation is-for the time being-subject to the jurisdiction of non-ICSID tribunals, the jurisdiction of ICSID tribunals is still an open question (see first part of this post). Likewise, one can confidently say that investors can avail themselves of the protections of the NL BIT, which applies to investments made before July 2021. However, whether investors can do the same with the Bolivia BIT will depend of how tribunals decide to interpret such treaty in the future. From a legal viewpoint, arbitration in Santiago seems to be a safe bet but-in absence of precedent-it falls short of providing the same assurances as other venues.

If the South American nation aims to attract foreign capitals, it would be well-advised to revisit its approach to ISDS, and to provide investors with the same certainty as other countries in the region.

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