

# Kluwer Arbitration Blog

## Ecuador Signs the ICSID Convention: Next Steps for Entry Into Force

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On June 21, 2021, Ecuador's Ambassador to the United States, Ivonne Juez Abuchacra de Baki, signed the [Convention on the Settlement of Investment Disputes between States and Nationals of Other States](#) (the "ICSID Convention") on behalf of the Republic of Ecuador ("Ecuador"). With Ecuador, the number of signatory States to the ICSID Convention is now [164](#).

Although under Ecuadorian law, the power to enter into and ratify international treaties lies with the President, a legal discussion has arisen regarding whether the ICSID Convention falls within one of the exceptions to this presidential power. If this were the case, ratification would require prior approval from the National Assembly. The Constitutional Court is the body in charge of deciding if such approval is required or not.<sup>1)</sup>

On the same day that Ambassador Baki signed the ICSID Convention in Washington DC, the Office of President Lasso sent a [letter](#) to the Constitutional Court indicating that its position is that the ICSID Convention does not fall under one of the exceptions to the presidential power to sign and ratify international treaties, and that accordingly the President is authorized to sign the ICSID Convention without authorization from the National Assembly.

In the coming weeks, the Constitutional Court will decide whether it will uphold the President's position, confirm the constitutionality of the ICSID Convention, and thereby allow ratification of the instrument without further approval from the National Assembly.

### Background

Ecuador first signed the ICSID Convention in 1986. In 2009, however, under former President Rafael Correa's government, Ecuador sent a written [notice of denunciation](#) of the ICSID Convention to the World Bank Group, which took effect on January 7, 2010 — in accordance with Article 71 of the ICSID Convention.

The Correa regime denounced the ICSID Convention on the grounds that it was unconstitutional to allocate sovereign jurisdiction to an international arbitral tribunal. In the years following the denunciation of the ICSID Convention, Ecuador [terminated](#) all of its Bilateral Investment Treaties

(“BITS”).

In 2010, Ecuador’s legislative branch enacted the [Organic Production, Trade and Investment Code](#) (“COPCI” for its acronym in Spanish), which sets forth general and specific rules, incentives, guarantees, and protections for domestic and foreign investment in Ecuador.<sup>2)</sup> In March 2015, Ecuador passed new regulations to promote foreign investment through [Public Private Partnership \(PPP\)](#) initiatives (the “PPP Regulation”). Consequently, the current investment protection regime in Ecuador is mainly comprised of these two domestic instruments.

On May 24, 2021, President Guillermo Lasso assumed the presidency in Ecuador, promising to revive the economy and promote private sector investment. As part of President Lasso’s campaign to promote foreign investment, his administration instructed the Ambassador of Ecuador in the US to sign the ICSID Convention on behalf of the country.

Ecuador’s recent accession to the ICSID Convention is an attempt on the part of the new government to show that the country is once again open and willing to comply with its commitments towards foreign investors and offer them further international law protections.

Another indicia of this is that Ecuador is [reportedly](#) setting funds aside to pay an unfavorable ICSID award for US\$ 374 million.

### **Process of Ratification of the ICSID Convention in Ecuador**

Ambassador Baki’s signing of the ICSID Convention does not automatically make Ecuador a member of the Convention. Pursuant to Articles 147(10) and 418 of the Ecuadorian Constitution, the President of Ecuador has the power to sign *and ratify* treaties. The only requirement under Article 418 is a 10-day notice period to the National Assembly before the President ratifies the relevant instrument.

In addition, pursuant to Article 438 of the Constitution, the Constitutional Court of Ecuador shall deliver a binding ruling on the constitutionality of an international treaty signed by the President. Further, under Article 109 of the Organic Act of Jurisdictional Protections and Constitutional Control, the Constitutional Court is also empowered to determine whether prior approval from the National Assembly is required pursuant to Article 419 of the Constitution.

The discussion over the ICSID Convention’s entry into force arises in relation to Article 419 of the Constitution, which provides a list of exceptions to the general rule for the ratification of treaties. Article 419 of the Constitution states that:

*“Article 419: Prior approval by the National Assembly shall be required in order to ratify or denounce international treaties where:*

1. *They involve territorial or boundary matters.*
2. *They set up political or military alliances.*
3. *They contain a commitment to enact, amend or repeal a law.*
4. *They relate to the rights and guarantees laid down in the Constitution.*
5. *They subject the State’s economic policy as laid out in its National Development Plan to conditions set by international financial institutions or transnational*

companies.

6. **They bind the country into integration and trade agreements.**
7. **They confer competences inherent to the domestic legal system to an international or supranational body.**
8. *They compromise the natural heritage, especially water, biodiversity and its genetic resources.”*

(Free translation) (Emphasis added).

Those opposing Ecuador’s accession to the ICSID Convention argue that the ICSID Convention falls within the scope of Article 419(7) of the Constitution and that in accordance with Article 422 of the Constitution, “*no international treaties or instruments may be signed in which the Ecuadorian State surrenders sovereign jurisdiction to international arbitration bodies with regard to contractual or commercial disputes between the State and private natural or legal persons.*”<sup>3)</sup>

On its face, however, the ICSID Convention does not fall within the scope of Article 419.<sup>4)</sup> The ICSID Convention is not an integration or trade agreement, nor does it attribute competences of the domestic legal system to an international or supranational body.<sup>5)</sup> In fact, the ultimate purpose of the ICSID Convention is to “*strengthen the partnership between countries in the cause of economic development.*”<sup>6)</sup>

ICSID is an international body of the World Bank Group that provides a series of services, including facilitating conflict resolution between foreign investors and States through methods such as arbitration and conciliation.<sup>7)</sup> States that have ratified this treaty are not automatically obliged to submit themselves to any of these two dispute resolution methods. This follows from the [preamble](#) of the ICSID Convention:

*“no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration.”*

This is also in line with the *travaux préparatoires* of the ICSID Convention, which provide that the “*Convention establishes the International Centre for Settlement of Investment Disputes as an autonomous international institution (Articles 18-24). The purpose of the Centre is ‘to provide facilities for conciliation and arbitration of investment disputes’ (Article 1(2)). **The Centre will not itself engage in conciliation or arbitration activities. This will be the task of Conciliation Commissions and Arbitral Tribunals constituted in accordance with the provisions of the Convention.***”<sup>8)</sup> (Emphasis added).

In this regard, Prof. Jan Paulsson has commented that the *travaux préparatoires* expressly state that “*consent of the parties [to arbitrate] must exist when the Centre is seized*”<sup>9)</sup> and that this mechanism “*was a vote of confidence in the mechanism created by the ICSID Convention as a manifestation of the rule of law, intended to depoliticize investor-State disputes in a context of equality of arms.*”<sup>10)</sup>

Consequently, to access the services offered by ICSID for the international settlement of investment disputes, not only are States required to be signatories to the ICSID Convention, but they are also required to perform an additional act: consent to arbitrate or mediate disputes that fall within the jurisdiction of the ICSID Convention.<sup>11)</sup> This consent involves a subsequent act, that is independent from the ratification of the ICSID Convention.<sup>12)</sup>

In theory, a State may be a signatory to the ICSID Convention and yet never sign any BITs, enter into arbitration clauses or enact investment laws providing for arbitration or mediation under the [International Centre for Settlement of Investment Disputes Arbitration Rules](#) (the “**ICSID Arbitration Rules**“). Hence, entering into the ICSID Convention alone does not imply the assignment of any sovereignty of the Ecuadorian State. Notably, the situation might be different with respect to entering into BITs or other international agreements that provide for investor-state arbitration.

Acceding to the ICSID Convention allows a State to become a [Member State](#) of an institution created under public international law. As a Member State of the ICSID Convention, each State can participate in its [Administrative Council](#) (the governing body of ICSID that considers and approves the Annual Report of the Centre and adopts the budget of the Centre for the next fiscal year). Among the Administrative Council’s powers is the consideration of proposed amendments to the ICSID Arbitration Rules, which have been frequently [discussed](#) in the last years.

Therefore, ratification of the ICSID Convention should not require prior authorization from the National Assembly, as it does not fall within the exceptions listed in Article 419 of Ecuador’s Constitution. As a result, upon confirmation of the Constitutional Court of the constitutionality of the treaty, it should be sufficient for the President to notify the National Assembly of the signing and subsequent ratification of the ICSID Convention, in accordance with Article 418 of the Constitution.

## Conclusion

Ecuador’s return to the ICSID Convention will allow the country to re-enter the international investment community, and is likely to be of great value for the restarting of the economy after the COVID-19 pandemic. The Constitutional Court is due to rule in the next few weeks on the constitutionality of the signing of the ICSID Convention and whether prior authorization of the National Assembly is required. We look forward to seeing how this legal issue will unfold for Ecuador.

*The views expressed by the authors do not represent the position of Herbert Smith Freehills or its clients.*


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### References

- ?1 *See*, Article 109 of the Organic Act of Jurisdictional Protections and Constitutional Control.
- ?2 Article 100 of the COPCI and Articles 313 and 316 of the Constitution allow for the participation of the private sector in the economy under exceptional grounds.  
Former Minister of Economy [Mr. Diego Borja](#), former presidential candidate [Mr. Andrés Arauz](#), and [Congressman Pabel Muñoz](#) have commented in a series of tweets that the ICSID Convention violates the Constitution, and that authorization by the National Assembly is required for ratification.
- ?3

- See*, Iñigo Salvador Crespo, Mélanie Riofrío Piché, “La denuncia del Convenio del Centro Internacional de Arreglo de Disputas Relativas a Inversiones o la calentura en las sábanas”, *Revista Ecuatoriana de Arbitraje*, 2010, p. 94 (“*Sin embargo, no hay tal cesión de jurisdicción. El artículo 190 de la Constitución reconoce expresamente el arbitraje sin distinguir entre el arbitraje nacional y el internacional: ‘Se reconoce el arbitraje, la mediación y otros procedimientos alterativos para la solución de conflictos. Estos procedimientos se aplicarán con sujeción a la ley, en materias en las que por su naturaleza se puede transigir’. Asimismo, el arbitraje es jurisdicción, la jurisdicción convencional, es decir “la que nace de la convención de las partes, en los casos permitidos por la Ley”.* Así, la resolución de un conflicto por un tribunal arbitral es ejercicio de la jurisdicción convencional, con igual sustento constitucional y legal que la jurisdicción ordinaria de los jueces. No es acertado, por lo tanto, hablar de ‘cesión’ de jurisdicción si ésta no es exclusiva de las cortes locales sino que también se ejerce por árbitros o tribunales arbitrales.”). *See also*, David Toscano, Antonella Cordero, “[Signing the ICSID Convention: a strategic decision that sends a powerful message to the international community](#)”, TADIR Dispute Resolution, June 22, 2021 (“In particular, the ICSID Convention is not a treaty dealing with territorial boundaries; it does not establish or deals with political or military alliances; it does not contain any commitments to issue, modify, or abrogate any laws; it does not deal with constitutional rights or guarantees; it does not jeopardize the economic policy, nor is an economic integration agreement; it does not jeopardize nature; nor does it grant powers to the Center (as Ecuador may, or may not, use it). The purpose of the ICSID Convention was to create a Center for the settlement of investment disputes. However, by ratifying the ICSID Convention, Ecuador will not be providing its consent to resolve any dispute. Such a consent will be given (or not) by a different instrument. Since the ICSID Convention does not fall within any of the exceptions established in article 419 of the Constitution, the President of the Republic can ratify it without prior approval of the National Assembly.”).
- The official World Bank [website](#) states that the ICSID Convention “is a multilateral treaty formulated by the Executive Directors of the World Bank to further the Bank’s objective of promoting international investment. ICSID is an independent, depoliticized and effective dispute-settlement institution. Its availability to investors and States helps to promote international investment by providing confidence in the dispute resolution process. It is also available for state-state disputes under investment treaties and free trade agreements, and as an administrative registry.”
- Christoph H. Schreuer, *The ICSID Convention: A Commentary*, Cambridge University Press, 2001, pp. 124-125 (“The only possible indication of an objective meaning that can be gleaned from the Convention is contained in the Preamble’s first sentence, which speaks of ‘the need for international co-operation for economic development and the role of private international investment therein’. This declared purpose of the Convention is confirmed by the Report of the Executive Directors which points out that the Convention was ‘prompted by the desire to strengthen the partnership between countries in the cause of economic development’.”).
- Yarik Kryvoi, ‘Part I: Development and Structure of ICSID’, in *International Centre for Settlement of Investment Disputes (ICSID)*, Kluwer Law International, 4th edition, 2020, p. 15 (“The Convention sought to remove major impediments and risks to foreign direct investments (FDIs) in the absence of specialized facilities for investment dispute settlement. It created the Centre for Settlement of Investment Disputes as an impartial international forum providing facilities for the resolution of international investment disputes. The Centre facilitates resolution of disputes between foreign investors and states through conciliation or arbitration procedures. Recourse to the ICSID facilities is always voluntary and subject to the parties’ consent.”).
- See*, Lucy Ferguson Reed, Jan Paulsson, Nigel Blackaby, ‘Chapter 1: Introduction to ICSID’, *Guide to ICSID Arbitration*, edited by Ferguson Reed et al., Kluwer Law International, 2010, p. 9



Jan Paulsson, ‘Chapter 7: The Tipping Point’, *Building International Investment Law: The First 50 Years of ICSID*, edited by Meg Kinnear, Kluwer Law International, 2015, p. 86 (“Consent may be given, for example, in a clause included in an investment agreement, providing for the

?9 submission to the Centre of future disputes arising out of that agreement, or ... a host State might in its investment promotion legislation offer to submit disputes arising out of certain classes of investments to the jurisdiction of the Centre, and the investor might give his consent by accepting the offer in writing.”).

?10 *Ibid.*

Georges R. Delaume, “ICSID Arbitration: Practical Considerations”, *Journal of International Arbitration*, 1984, pps. 101, 104–105 (“The scope of such a consent is within the discretion of the parties. In this connection, it should be noted that ratification of the ICSID Convention is, on the part of a Contracting State, only an expression of its willingness to make use of the ICSID

?11 machinery. As such, ratification does not constitute an obligation to use that machinery. That obligation can arise only after the State concerned has specifically agreed to submit to ICSID arbitration a particular dispute or classes of disputes. In other words, the decision of a State to consent to ICSID arbitration is a matter of pure policy and it is within the sole discretion of each Contracting State to determine the type of investment disputes that it considers arbitration in the context of ICSID.”).

Georges R. Delaume, “ICSID Arbitration in Practice”, *International Tax & Business Lawyer*, 1984, p. 60 (“The Convention allows the parties to choose the form of their consent to ICSID arbitration. Consent may be established through an arbitration clause in an investment agreement or through a simple exchange of letters. Consent may also result from the investor’s acceptance of a unilateral offer from the host State if a consent provision is contained in the host’s investment law or in a bilateral treaty with the Contracting State of which the investor is a national”). *See supra* note 8, pp. 13 and 21 (“ICSID also accepts arbitrations that arise from State consent to ICSID arbitration contained in: (a) the host State’s national investment laws; (b) a BIT between

?12 the host State and the investor’s home State; or (c) a multilateral investment treaty (MIT) or free trade agreement between countries that include the host State and the investor’s home State. ... As with arbitration, consent to conciliation by both parties is necessary.”); See also, Hanno Wehland, ‘Chapter 8: Jurisdiction and Admissibility in Proceedings under the ICSID Convention and the ICSID Additional Facility Rules’, in *ICSID Convention after 50 Years: Unsettled Issues*, edited by Crina Baltag, Kluwer Law International 2016, p. 239 (“Apart from the requirements regarding the jurisdiction of the Centre in ICSID proceedings under Article 25 of the Convention, the main jurisdictional requirement in both ICSID and ICSID Additional Facility arbitrations is the existence of an agreement referring the dispute to arbitration under the relevant set of rules.”)

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