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Ecuador's Constitutional Court Rules in Favor of Ratification of the ICSID Convention

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On 15 January 1986, Ecuador signed the Convention on the Settlement of Investment Disputes between States and Nationals of other States ("ICSID Convention"). During President Rafael Correa's administration (2007-2017), President Correa publicly expressed his [hostility](#) towards the ICSID Convention and the international investment protection system. In 2008, Ecuador denounced over a third of its bilateral investment treaties (BITs). Later in 2009, President Correa issued Executive Decree N° 1823 denouncing the ICSID Convention, terminating its application to Ecuador.

In the 2021 presidential elections, Guillermo Lasso, a former banker, was elected as the President of Ecuador. President Lasso has vowed to attract foreign investment and break away from the leftist policies adopted during the former administration. On 21 June 2021, Ecuador's Ambassador to the United States, Ivonne Baki, signed the ICSID Convention. Pursuant to articles 147 and 418 of the [Ecuador's Constitution](#), the President has the power to sign and ratify international treaties. After signing a treaty, the President has the obligation to notify the National Assembly in the following 10 days before he can ratify it. Soon after the signature of the Convention, there was an [ongoing discussion](#) as to whether ratification of the ICSID Convention required the prior approval of the National Assembly pursuant to article 419 of the Constitution.

On 30 June 2021, the Constitutional Court ruled that the National Assembly did not need to approve the ratification, and therefore, the President can sign and ratify ICSID directly, under the condition that he notifies the National Assembly 10 days prior its ratification. President Lasso ratified the ICSID Convention on 16 July 2021, through the issuance [Executive Decree No. 122](#).

Did the ICSID Convention require prior legislative approval according to the Constitution?

Pursuant to article 419 of the Constitution of Ecuador, the ratification of international treaties shall require the approval of the National Assembly where they: 1) refer to territorial or boundaries matters; 2) establish political or military alliances; 3) contain the commitment to enact, modify or repeal a law; 4) refer to rights guaranteed in the Constitution; 5) compromise the State's economic policy to international financial institutions or international companies; 6) compromise the country to integration and trade agreements; 7) confer competences of the internal legal order to an international or supranational organization; or 8) compromise the country's natural resources,

water, biodiversity, etc. Local practitioners have different opinions on the scope of this article and its applicability to the ICSID Convention.

Under [domestic laws](#), the Constitutional Court has the power to rule on the constitutionality of international treaties and the necessity of prior legislative approval. On 21 June 2021, President Lasso's General Legal Secretary sent a petition to the Constitutional Court asking them to clarify whether the ratification of the ICSID Convention required legislative approval. In the office's view, it did not.

As mentioned, the Constitutional Court [ruled](#) that ratification of the ICSID Convention did not require prior legislative approval. The Court reasoned that the Convention is an international treaty whose purpose is to create an international institution (ICSID) for the resolution of investment disputes. Since ICSID does not refer to territorial or boundary matters, does not create political or military alliances, does not contain a commitment to enact, modify or repeal a law, does not compromise the economic policy of the Ecuadorian State or compromise cultural or genetic heritage, it does not fall under the categories 1, 2, 3, 4, 5 and 8 established in article 419.

The Court then went on to analyze the two most debated categories under article 419:

Does the ICSID Convention bind the country to integration and trade agreements? The Court clarified that the ICSID Convention does not contain clauses creating obligations intended to regulate trade between its Member States, nor are there any provisions forcing States to enter into a process of economic integration. Although the preamble of the ICSID Convention does consider "the need for international cooperation for economic development" this does not imply that a trade or integration obligation is being acquired. The Court made a distinction between the purpose of a treaty and the effects that it creates, explaining that the sole mention of cooperation and economic development matters does not trigger article 419(6) of the Constitution.

Does the ICSID Convention confer competences of the internal legal order to an international or supranational organization? The Court reasoned that ICSID establishes the possibility, but not the obligation, to submit a dispute to its dispute resolution system. In other words, Ecuador is not forced by the ICSID Convention to submit to arbitration (or conciliation) all disputes falling under its jurisdiction. At the end of the day, investment arbitration, as commercial arbitration, is a creature of consent. Hence, being a party to the ICSID Convention does not translate to automatic consent to arbitrate. Ecuador would have to consent on a separate instrument such as a BIT, a bilateral investment contract, or an investment protection law to arbitrate a specific investment dispute in order to be bound by such agreement. The Court also clarified that the ICSID Convention does not confer competences of its internal legal order to international bodies, because "[the resolution of disputes between States is not a competence of internal legal order](#)". In the Court's view, submitting investment disputes to ICSID arbitration (or to any other international forum) does not imply conferring competences of domestic legal order to international organizations. Thus, the Court concluded that the ratification of the ICSID Convention did not fall under article 419 (7) of the Constitution.

It is worth noting that the voting in the Court's Plenary was not unanimous. Six out of the nine Justices voted in favor of this decision, two Justices issued one [dissenting opinion](#) and one Justice voted against the ruling. On the dissenting opinion, Justices Ramiro Ávila and Enrique Herrería explained that article 422 of the Constitution contains a prohibition for the State to submit disputes to international arbitration, with the exception of controversies between States and Latin American

nationals resolved in regional forums. The dissenting opinion went on and said that the most appropriate decision would have been to discuss such an important topic before the National Assembly, as it is the highest public deliberation institution representing the entire society. However, Article 422 of the Constitution prohibits Ecuador from signing treaties that submit jurisdiction to international arbitral tribunals in *contractual or commercial* disputes. Given that investment arbitration is a completely different creature from commercial arbitration, in the author's opinion, there is no such a constitutional prohibition; and ICSID arbitration is therefore not incompatible with the Constitution.

Conclusion

The ratification of the ICSID Convention did not require prior legislative approval and the Constitutional Court confirmed this by issuing a well-reasoned decision, which is very positive for the country. Ecuador's return to the ICSID Convention shows the current administration's compromise of protecting foreign investment and allows Ecuador to enter into important new agreements within the international community, which will contribute to Ecuador's economic growth.

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