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Ecuador's Constitutional Court Does It Again: Declaring A Treaty To Be Constitutional Only Because It Does Not Contain Investor-State Arbitration Provisions

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The Constitutional Court of Ecuador ("***Court***") has recently analyzed the constitutionality of two International Agreements. On 28 July 2023, the Court declared unconstitutional the provision contained in chapter 15.20 of the Trade Association Agreement between Ecuador and Costa Rica (Decision No. 2-23-TI/23), among other reasons, because it incorporated an state-private party (investor) dispute resolution clause providing for ICSID arbitration. According to the Court, that clause falls within the prohibition of article 422 of Ecuador's Constitution that prohibits Ecuador entering into certain international treaties. Following such decision, on 12 October 2023, the Court declared the Free Trade Agreement between Ecuador and the People's Republic of China ("***PRC***" and "***Agreement***") constitutional in Decision No. 8-23-TI/23 ("***Decision***"). The difference between these two treaties is that the latter does not provide for investor-state dispute resolution mechanisms or ICSID arbitration, and it merely contains a state-state dispute resolution clause ("***Chapter 13***").

In the Decision, the Court pointed out the differences between the dispute resolution clauses contained in each of these treaties. It also explained why the Agreement does not fall within the prohibition of article 422 of the Ecuadorian Constitution and declared the Agreement constitutional. This article discusses the Court's reasoning behind the Decision.

The Prohibition Found in Ecuador's Constitution

Article 422 of the Constitution states that:

> "*Treaties or international instruments shall not be entered into wherein the Ecuadorian state yields sovereign jurisdiction to instances of international arbitration in contractual or commercial disputes between the state and natural or legal persons of private nature.*
>
> *Treaties and international instruments establishing the resolution of disputes between states and citizens in Latin America through regional arbitration bodies or*

> *by jurisdictional bodies designated by the signatory countries are exempted. Judges of the states that, as such, or their nationals are parties to the dispute, shall not intervene.*
>
> *In the case of disputes related to external debt, the Ecuadorian state shall promote arbitration solutions based on the origin of the debt and in accordance with the principles of transparency, fairness, and international justice*" (free *translation).*

Accordingly, article 422 of the Constitution prohibits Ecuador from entering into international treaties that (i) yield sovereign jurisdiction in (ii) contractual or commercial disputes (iii) between Ecuador and private parties. These elements were analyzed in Decision No. 2-23-TI/23 (relating to the Costa Rica agreement) and the Decision (on the constitutionality of the China agreement).

The Decision

Considering the recent ruling that declared chapter 15.20 of the Agreement between Ecuador and Costa Rica "unconstitutional", the Constitutional Court decided to explain in the Decision the difference between the Agreement and the treaty with Costa Rica. In sum, the Constitutional Court ruled that the Agreement is "constitutional" for the following reasons:

- **Chapter 13 of the Agreement does not provide for state-investor arbitration, but only for arbitration between states**:

By agreeing to international arbitration in disputes arising between Ecuador and private parties, the Constitutional Court determined in the Decision 2-23-TI that the treaty with Costa Rica falls into the prohibition of article 422 of the Constitution, because the Ecuadorian state "*yields sovereign jurisdiction to instances of international arbitration in contractual or commercial disputes between the state and natural or legal persons of private nature*" (free translation) (second element of the prohibition).

In contrast, Chapter 13 of the Agreement does not provide for state-private party (investor) arbitration, but only for arbitration between states, ("*those that are 'parties' to the Agreement*" – free translation). According to the Court, "*the resolution of disputes between states does not fall under the domestic jurisdiction of a state*". Hence, the Ecuadorian state lacks sovereign jurisdiction over these types of disputes, thus, it cannot be yield. Therefore, the Agreement does not fall within the prohibition of article 422 of the Constitution.

- **Chapter 13 of the Agreement does not refer to contractual or commercial disputes**:

Contrary to the treaty between Ecuador and Costa Rica, the Court held that Chapter 13 of the Agreement does not refer to contractual or commercial disputes (third element of the prohibition). It rather refers to measures or matters which may "*affect the interpretation or application of* [the] *Agreement*" (free translation). Thus, Chapter 13 is not subject to the prohibition outlined in article 422 of the Constitution.

- **Chapter 13 does not involve disputes between the state and private parties (investors)**:

Lastly, the scope of the arbitration provision in Chapter 13 does not involve disputes between the state and private parties (investors), but only between states — Ecuador and China. Therefore, the Court considered that the third element of the prohibition established in article 422 of the Constitution was not fulfilled.

Concurring Opinion

Judge Teresa Nuques Martínez ("***Judge Nuques***") issued a concurring opinion to explain her own reasons on why she considered that the Agreement does not fall under the prohibition of article 422. While she agreed with the majority vote that the scope of the arbitration agreement only covers disputes between states, Judge Nuques argued that even if the Agreement were to contain a state-private party (investor) arbitration agreement, it would not fall under the prohibition of article 422.

She explained that even in cases where an international agreement contemplates arbitration between the state and a private party (investor), such arbitration will not imply yielding of 'sovereign jurisdiction'. According to Judge Nuques, the Ecuadorian Code of Production and Investments ("***COPCI***") provides since 2018 that the Ecuadorian state must agree to national or international arbitration to resolve disputes arising from investment contracts. Therefore, the very same Ecuadorian state itself, in exercise of its sovereign powers (in a statute), has established mandatory arbitration in investment contracts.

The authors consider that the concurring opinion ruled in accordance with general principles of international law and arbitration practice. This, because the "sovereign immunity on jurisdiction principle" prohibits states to yield jurisdiction to courts of other states, which does not extend to international arbitration instances due to the very nature of the latter. Thus, Ecuador does not yield "sovereign jurisdiction" either when it enters into state-state arbitration or when it enters into state-private party (investor) arbitration.

The Constitutional Court Has Not Yet Welcomed Investment Treaty Arbitration

At a first glance, it might seem that the Court opened a door for investment arbitration by ruling in favor of the constitutionality of the Agreement, especially of Chapter 13. However, a careful reading of the Decision necessarily leads to the opposite conclusion. Far from opening a door for investment arbitration, the Court restates that international arbitration provisions in international treaties are constitutional regarding disputes that arise between state parties, as opposed to treaties providing for investor-state arbitration; rehashing its previous ruling in the Decision No. 2-23-TI/23 (§175).

By ignoring concepts of International Law (see our analysis of this decision here), the Court asserted in the Decision the same criteria held in Decision No. 2-23-TI/23. Given the discussions that article 422 has raised since its enactment, Ecuadorian President, Daniel Noboa, is currently attempting to close down this discussion through a public referendum (Executive Decree No. 163) in which, the President proposes to amend article 422 to explicitly allow the Ecuadorian state to enter into treaties or international instruments containing state-private party (investor) international arbitration provisions for investment, contractual or commercial disputes. Ecuadorian citizens will

decide on this matter on April 21, 2024, since the referendum requires public approval.

Conclusion

Unfortunately, the reasoning behind the Decision No. 8-23-TI/23 continues to send a contradictory message from Ecuador to the international community as we concluded in our previous article. By endorsing the criteria laid out in Decision No. 2-23-TI/23 and affirming that arbitration agreements in international treaties are constitutional solely for state-to-state arbitrations, Ecuador's Constitutional Court has established once again a precedent that disadvantages investment arbitration in the country. Through the concurring opinion, there is hope of bringing back into the debate the argument that agreeing to investment arbitration in international treaties does not yield sovereign jurisdiction.

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