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Did Ecuador Just Renounce International Arbitration? The Aftermath of a Complex Referendum

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The Ecuadorian government held a referendum and a public consultation on 21 April 2024. Question D of the referendum asked citizens: "Do you agree that the Ecuadorian State recognizes international arbitration as a method to resolve disputes related to investment, contractual, or commercial matters?" (free translation). The substantive proposal of the question was merely based on a proposed reform of Article 422 of the Ecuadorian Constitution ("Article 422"), as explained further below. Article 422 prohibits Ecuador from executing international treaties that "yield sovereign jurisdiction" to "international arbitration" in "contractual or commercial" disputes between Ecuador and private parties.

The result: a whopping 65% of the respondents rejected the referendum's proposal. While this result might sound undesirable for the arbitral forum, it is important to remark that the status quo of international arbitration in Ecuador—technically—remains unchanged. This article will first discuss two controversial decisions issued by the Constitutional Court of Ecuador ("Court") which served as background to the referendum proposal, and later conclude that the status quo of international arbitration in Ecuador remains the same despite the results of the referendum.

Background

The context of the referendum is crucial for understanding the significance of the results of the referendum in Ecuador. The question arises at a juncture where international arbitration has once again pivoted as a subject of debate across various Ecuadorian social sectors.

Recently, these discussions have once again become relevant after the Court issued two controversial decisions: Decision No. 2-23-TI/23 and Decision No. 8-23-TI/23. Regarding these matters, we have previously addressed some mixed signals of Ecuador's Constitutional Court and its contradictions.

In the former decision, the Court ruled that the provision found in chapter 15.20 of the Trade Association Agreement between Ecuador and Costa Rica was unconstitutional due to a dispute resolution clause that referred any investor-state dispute to ICSID-administrated arbitration; thus allegedly infringing the prohibition contained in Article 422. In contrast, the latter decision ruled that chapter 13 of the Free Trade Agreement between Ecuador and the Popular Republic of

China—lacking a clause referring disputes between investors and the State to arbitration administrated by ICSID—was to be deemed constitutional.

With this context, the current President of Ecuador, Mr. Daniel Noboa, included in the referendum a question aiming to reform Article 422 with the objective of settling the debate on how this article should be interpreted. The reform that was proposed is as follows:

Current Constitutional Text	**Referendum Proposal**
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 through jurisdictional bodies designated by the signatory countries are exempted. Judges of the states that are parties to the dispute, either directly or through their nationals, shall not intervene.	*The Ecuadorian State may enter into treaties or sign international instruments that provide for dispute settlement through international arbitration, whether in investment disputes or disputes of a contractual or commercial nature, between the State and private individuals or legal entities; or in matters related to foreign indebtedness.* (Free translation).
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).	

As mentioned earlier, the result of the referendum rejected the proposal. Technically speaking, the refusal of the proposal brings forth one sole conclusion: Article 422 remains unchanged.

The Referendum Result Does Not Change the State of Circumstances Regarding International Arbitration in Ecuador

While, as mentioned, the substantial objective of the proposal was the amendment of Article 422, it is the wording of the question that raises doubts. As stated, the citizen consultation asked: “Do you agree that the Ecuadorian State recognizes international arbitration as a method to resolve disputes related to investment, contractual, or commercial matters?” The mechanism through which this alleged recognition would have been achieved was the amendment of Article 422. However, certain sectors have (wrongly) interpreted the rejection of the referendum as a systematic rejection of international arbitration. Instead, the legal consequence is solely the rejection of the proposed reform.

Therefore, is it correct to state that Ecuador has renounced international arbitration as a method of

dispute resolution? In our opinion, this is incorrect for the following reasons:

1. The sole purpose of Question D was to amend Article 422, as mentioned above. In this regard, the Ecuadorian Constitution is clear: the public consultation called by the President aims at the reform or amendment of one or more articles of the Constitution. Therefore, even with additional considerations in the body of the question, the legal consequences of the rejection or approval of the referendums are solely focused on the acceptance or rejection of the proposed reform. Therefore, the only effect of the result of the referendum is that Article 422 remains intact, without being reformed. Consequently, the discussion with respect to Article 422 remains also unchanged. Thus, in Ecuador, the debate as to whether the fact of entering into a treaty providing for investor-state arbitration implies yielding sovereign jurisdiction will continue. As we have mentioned in our previous post, the Constitutional Court ruled that an international treaty was unconstitutional for providing for ICSID arbitration. This would not mean, however, that international arbitration as such is forbidden. The result of the referendum does not change this conclusion.
2. Indeed, Article 422 is not the only provision that regulates international arbitration in Ecuador. Other provisions regarding private-state international arbitration contained in Ecuador's Constitution remain the same, such as Article 190, which recognizes arbitration as a dispute settlement mechanism, including with public institutions. Local legislation such as Article 41 of Ecuador's Arbitration and Mediation Law also explicitly admits international arbitration.
3. Moreover, the Organic Code of Production, Commerce, and Investments ("COPCI") not only provides for investment contracts to include an arbitration clause but also virtually mandates that such contracts include clauses to submit contractual disputes to arbitration. In this regard, the unnumbered article following Article 16 of COPCI prescribes that: "The Ecuadorian state shall agree to national or international arbitration to resolve disputes arising from investment contracts, in accordance with the law." Meanwhile, the subsequent article prescribes that: "For investment contracts exceeding ten million United States dollars, the State shall agree to national or international arbitration in law, in accordance with the law."

Given the aforementioned considerations, it is essential to take into account that the adverse outcome in question D of the referendum does not affect future or past contracts entered into between private parties and the State. Therefore, to affirm that the referendum result has the effect of prohibiting international arbitration in Ecuador is not only incorrect but would also be contrary to Ecuadorian law.

Conclusion

The rejection of the amendment to Article 422 of the Constitution indeed reveals public opposition against a somehow politicized (and non-technical) view of international arbitration. Nonetheless, it is crucial to consider that the framework for the application of arbitration in Ecuador remains unchanged. This also applies—under the right to legal certainty contained in Article 82 of the Constitution—to contracts previously executed, where arbitration had already been agreed upon. The same premise applies to future contracts, so that the State (and public entities) may continue to agree to international arbitration.

As the status quo remains the same, the discussion regarding the possibility of the State entering into international treaties that incorporate ICSID arbitration to adjudicate disputes between

investors (private parties) and the State continues to be a topic of debate in the Ecuadorian legal forum, having the Constitutional Court issued two decisions that seem to close the doors for ICSID arbitration on a treaty level.

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