Kluwer Arbitration Blog

EcuadorTLC II: A Shift in Investment Arbitration through the 'Own Acts' Doctrine

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On March 27, 2024, an arbitration tribunal issued its Phase II award in the *EcuadorTLC v. Ecuador II case* ("*EcuadorTLC II*"), a decision that has flown under the radar of systemic analysis. This case is one of a number of new Ecuadorian arbitration cases (here, here) that have come into the public eye in the post-award phase, as the state and its entities have initiated annulment proceedings before the Santiago Court of Appeals. In *EcuadorTLC II*, an Ecuadorian state-owned company, Corporación Eléctrica del Ecuador ("CELEC EP"), has sought to challenge several adverse awards that have now surfaced, including a Phase I partial award dated December 21, 2022, and the Phase II award, both of which are subject to ongoing legal challenges.

The *EcuadorTLC II* award merits closer examination for several reasons. First, it represents a noteworthy application of the 'own acts' doctrine in contract-based investment disputes as a distinct concept, departing from conventional interpretations of international investment law that often rely on the common law estoppel. Second, this case suggests the emergence of a new space for investment adjudication in Latin America, particularly following Ecuador's withdrawal from the international public law investment regime. This emerging space is characterized by the development of a distinct legal community that operates within private law frameworks in Latin American disputes. The following discussion elaborates on these key points.

Background

The *EcuadorTLC II* arbitration arose from a contractual dispute between Ecuador and an oil consortium, including EcuadorTLC, over the early termination of a Production Sharing Agreement ("PSA") in 2010. The PSA, which outlined the rights and responsibilities for oil exploration in Ecuador's rainforest, was unilaterally terminated by Ecuador, prompting most consortium members to initiate arbitration (EcuadorTLC and others v. Ecuador) in 2014. This resulted in a 2018 award that ordered Ecuador to pay 88% of the consortium's liquidation value for the termination, excluding Petromanabi, a state-owned company that was a member of the consortium, with a 12% share, as it did not participate in the proceedings.

Following the 2018 award, the company EcuadorTLC pursued further claims related to Petromanabí's share, arguing that the 12% owed to Petromanabí had been transferred to EcuadorTLC through a 2018 assignment of rights. EcuadorTLC claimed that Ecuador should pay

this additional amount, arguing that the 2018 award's determination of the liquidation value applied to the entire consortium, including Petromanabí. Ecuador objected to this argument, leading to the *EcuadorTLC II* case. One of the interesting points of discussion was that the assignment of Petromanabí's rights entitled it to the remaining 12% and that Ecuador was barred from challenging this under the 'own acts' doctrine, which holds parties responsible for their own conduct.

The Tribunal Decision

The Tribunal's award primarily focused on whether the 2018 award – reached in the initial arbitration between Ecuador and members of the consortium – was binding on all members, including Petromanabí, which had not participated in the earlier proceedings. While the tribunal had previously found that the doctrine of res judicata did not apply, it examined whether Ecuador was nonetheless bound by contractual commitments under the PSA.

The majority of the Tribunal concluded that Ecuador had assumed a contractual obligation in the PSA to abide by the liquidation value determined in the 2018 award. The Tribunal found that Ecuador's failure to distinguish Petromanabí's share in the first arbitration indicated that the liquidation value applied to the entire consortium, including Petromanabí. The Tribunal determined that Ecuador was prevented from re-litigating the matter based on the '*own acts' doctrine [teoría de los actos propios]*, which prevents parties from acting inconsistently with their prior conduct.

The Use of the 'Own Acts' Doctrine in the Case

The Tribunal applied the 'own acts' doctrine based on a three-part standard: (a) assessing whether the State engaged in binding conduct relevant to the case; (b) evaluating whether that conduct was legally significant enough within a 'circle of interests' to create a legitimate expectation on the part of EcuadorTLC; and (c) determining whether subsequent actions contradicted that expectation, potentially giving rise to a duty to compensate.

In addressing the first issue, the Tribunal in particular noted that a 'Settlement Agreement' between Ecuador and the parties to the first arbitration, dated March 19, 2018, provided that Ecuador and the companies in the 2014 Arbitration Consortium would proceed with Ecuador withholding a portion of the payment to settle certain outstanding tax liabilities of the consortium, including those attributable to Petromanabí. This agreement underscores the parties' mutual understanding of the liquidation amount to be a single, final amount applicable to the Consortium as a whole. According to the Tribunal, these actions by Ecuador constituted binding conduct that warranted further analysis to determine whether they were legally significant enough to create legitimate expectations.

Turning to the second part of its analysis, the Tribunal clarified that binding conduct must fall within what it calls the 'circle of interests' — the relevant legal context in each case. For conduct to be binding, it must objectively inspire confidence in the opposing party as a reliable indicator of an attitude towards the legal situation. For the Tribunal, Ecuador's conduct – not only in the May 2018 'Settlement Agreement' but also in its actions following the signing of the contracts and the 2014 arbitration – took place within this 'circle of interests' shared by the opposing parties.

Finally, in the third step, the Tribunal concluded that the State's subsequent actions ultimately frustrated the expectations created by its own conduct.

In a dissenting opinion, Arbitrator Cárdenas Mejía challenged the majority's application of the 'own acts' doctrine, particularly with respect to whether Ecuador's conduct was significant enough to create an expectation. He argued that the first arbitration, which resulted in the 2018 award, did not address whether the liquidation value could vary among claimants because the claimants presented a uniform position that Ecuador collectively defended. Thus, for Cardenas Mejía, Ecuador's position was simply that the value proposed by the claimants was incorrect and lacked the clarity necessary to reasonably inspire confidence in Ecuador's future actions to apply the doctrine.

'Own Acts' in Investment Disputes

The 'own acts' doctrine, a reflection of the broader principle of good faith, has played a role in international investment disputes. Its roots in investment arbitration date back to the 1983 case of Amco Asia Corp. v. Republic of Indonesia, where the tribunal recognized it as a principle of international law. Since then, tribunals have often equated the doctrine with the common law estoppel, although few have explicitly developed it using the phrase 'own acts' or its Latin equivalent, *venire contra factum proprium* (to go against one's own act).

In Nova Scotia Power v. Venezuela, the tribunal took an innovative approach, arguing that the 'own acts' doctrine should be considered a settled principle of international law, rather than merely analogous to estoppel. The tribunal concluded that reliance on a statement or conduct by one party is not sufficient to trigger the doctrine; the opposing party must also have been aware of that conduct and acted on it with the understanding that the first party would not change its original position.

Conversely, the tribunal in Carlos Sastre v. Mexico treated the doctrine as essentially equivalent to estoppel but emphasized its distinct nature under international law. The tribunal emphasized that estoppel here should not be viewed as a direct transplant of the common law concept — particularly as it exists in the United States — but rather as an expression of customary international law equivalent to the 'own acts' from civil law jurisdictions. According to the Tribunal, it holds that a party cannot make a claim at one time only to contradict it later.

What makes the *EcuadorTLC II* award unique is that it invokes the doctrine of 'own acts' independently of both international law and estoppel, drawing directly from civil law traditions without explicitly referring to estoppel principles. In doing so, the tribunal established a distinctive standard based on the 'circle of interest' approach, drawing directly inspiration from the work of Spanish jurist Luis Díez-Picazo.

This marked a departure from conventional international investment law interpretations, which often rely on common law estoppel, general principles of international law, or even legitimate expectations under the fair and equitable treatment standard. Unlike other cases, which often treat 'own acts' as a facet of estoppel, this approach recognized it as a doctrinal tool in its own right.

A Glimpse into Future Latin American Investment Disputes?

The use of the 'own acts' doctrine in *EcuadorTLC II* must be understood within the context of Ecuador's 'exit strategy' from the Investor-State Dispute Settlement ("ISDS") regime. This exit created significant legal ambiguity, and cases like *EcuadorTLC II* offer a glimpse into how investment disputes may evolve through contract-based claims.

The reliance on contract-based claims marks a significant return to private law concepts in the adjudication of investment disputes. This shift has been facilitated by the formation of a legal community composed of arbitrators and practitioners from both Latin America and global firms, working around Ecuadorian investment claims. This community's development is further reflected in the use of Spanish as the language of arbitration, which shaped both the arguments presented by the parties and the Tribunal's reasoning in *EcuadorTLC II*.

The shared linguistic and legal culture within the legal community surrounding the *EcuadorTLC II* case influenced the selection of sources and references that might not have been as prominent in other international arbitration cases. This alignment led the tribunal to draw on unique sources of inspiration — such as Díez-Picazo's work —highlighting the impact of Latin American and Spanish jurisprudence in shaping the case. This approach suggests the possible emergence of a new adjudicative space, rooted in regional legal concepts and operating alongside traditional ISDS frameworks in Latin American cases.

One potential limitation, however, is the reduced visibility of these cases, as they often only come to public attention during the post-award phase, when enforcement or annulment proceedings take place.

Unlike treaty-based claims, which rely on publicly accessible treaties, contract-based claims are generally based on private agreements, often with limited public disclosure of contractual terms. This makes public information on contract-based claims even more scarce, as many details remain confidential throughout the arbitration process. While treaties inherently carry expectations of public accountability and transparency, the text of private contracts is rarely revealed, limiting broader understanding and scrutiny of the claims. In addition, the confidentiality surrounding these cases may prevent other actors, including legal scholars, from gaining insight into how these disputes are resolved, thereby reducing opportunities to shape future arbitration practices.

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