Constitutional Clash and ISDS: Has Ecuador Become Yet Again the Arena of the Transnational Struggle over International Investment Arbitration?

By:

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Ecuador's relationship with the Investment Treaty Regime is an unsettled issue deeply contested by dueling actors and narratives battling to annihilate each other. Ecuador is one of the top investment disputes' respondent. ISDS awards have been particularly detrimental to its public coffers, and the country has attempted a tailored made constitutional approach to limit the reach of ISDS. Yet, none of this has been enough to reach a minimum consensus and understanding regarding the breadth of foreign investment protection. Remarkably, this endless struggle has paved the way for an increasing confluence of players that put in plain display the multiple transnational interests that shape foreign investment protection.

The most recent chapter of this relationship concerns to a request for the interpretation of Art. 422 of Ecuador's Constitution. A prior Constitutional Court declared ISDS in Bilateral Investment Treaties (BITs) incompatible with the Constitution in seventeen constitutional rulings based on this provision. This in turn underpinned the denunciation of such treaties in May 2017. Art. 422 prohibits the state from entering treaties or instruments that "yield sovereign jurisdiction" to international arbitration in "commercial or contractual disputes" involving the State and foreign private parties. In 2018 the President of the National Assembly, filed a constitutional interpretation action related to the first paragraph of Art. 422, focusing on the category of "contractual or commercial" disputes. The question for interpretation is whether the prohibition set forth in Art. 422 of the Constitution applies to international agreements allowing ISDS in relation to investment arbitration, where the disputes are neither commercial nor contractual. The President of the National Assembly is seeking an interpretation that would endorse the view that investment disputes do not fall within the constitutional prohibition.

This attempt deserves attention at least for the following matters. First, this initiative to re-interpret the constitutional provision derives from the Legislative Branch, whose role is limited to approving certain category of treaties prior to their ratification as long as the Constitutional Court requires so. Since the President is invested with exclusive powers concerning foreign relations and treaty making, as well as to commercial and investment policy, it raises questions about why it is the Legislature rather than the Executive Branch that is seeking an interpretation advocating for exemption of investment treaties from the prohibition in Article 422. This is especially so considering the fact that the Legislature's right to express approval or disapproval to ratify treaties that have ISDS provisions has not been exercised since the promulgation of the Constitution of 2008. Second, and quite significantly the interpretation sought by the Legislature is inconsistent with seventeen prior rulings that found that Art. 422 prohibits treaties with ISDS provisions.

The groups interested in overturning these rulings argue they are flawed and point to inconsistent case law. They argue that interpreting Article 422 to prohibit treaties with ISDS provisions is inconsistent with International Investment Law. In my view, this approach subordinates Constitution's supremacy, spirit and purpose to International Investment Law's principles.

These arguments also disregard the findings of an integral audit process (CAITISA) of the International Investment Regime in Ecuador as well as the significant bulk of unfavorable ISDS awards against Ecuador. Third, the significant formal and informal participation of State and non-State actors triggered by this new process of interpretation, is giving foothold to a multiplicity of transnational interests to reinterpret Ecuador's Constitution.

In this context and thanks to the attention drawn by several interested groups, an apparent domestic issue of constitutional interpretation which sought to be managed discretely as a matter of mere terminology, has come to the center stage. It has exposed a rich and revealing encounter of diverse actors and stances. This includes the submission of amicus curiae by several former Ecuadorian officials engaged in the drafting and promulgation of the Constitution of 2008. Former Members of the National Constituent Assembly and former Commissioners of CAITISA who have underlined the categorical prohibition of the Constitution to adopt BITs providing for investment arbitration because they constitute mechanisms of sovereign subordination and unlimited privilege to private foreign entities and individuals. On the other hand, chambers of commerce and representatives of pro-arbitration organizations, who partnered in the initiative to lodge the ongoing constitutional interpretation action, have opted for lengthy and sophisticated submissions explaining through the lens of International Investment Arbitration why contractual and commercial disputes are different from investment disputes. Without the endorsement of the President office's, the Ministry of Foreign Affairs and the Ministry of Trade and Investment have also submitted a joint amicus curiae relying on the questionable assumption that signing BITs attracts FDI. Unfortunately, but not surprisingly, academics in Ecuador have been (formally) absent of this discussion.

Pro-ISDS submissions cherry pick different sources from international and domestic frameworks, private and public law and case law with a view to demonstrating the lack of consistency of the constitutional rulings at issue, as well as the scarce technical capacities of the former Constitutional Court to grasp the basics of International Investment Law and Arbitration. Besides undervaluing the legal robustness of the previous rulings on the unconstitutionality of ISDS and belittling the quality of other amicus curiae like Sornarajah's, these submissions conveniently neglect not only other applicable

constitutional provisions but the same wording of the constitutional clause referred, which does limit the exercise of sovereignty regarding the adoption of treaties providing for ISDS. As it is widely known, only the exercise of sovereign powers may entail the breach of such treaties, thus engaging international responsibility. Therefore, limiting the scope of the prohibition to the definition of disputes to “commercial or contractual” seems artificial as long as what is at stake is the State’s responsibility under International Law.

Looking beyond the boundaries of the discussion as exclusively about arbitration technicalities, there are noteworthy amicus briefs filed by globally renowned scholars like Katharina Pistor, Muthucumaraswamy Sornarajah and Nicolás Perrone. This level of amici participation by leading academics is very likely quite novel.

In this context, Pistor remarks the effects of BITs “*on the ability of sovereign nation states to govern themselves as part of a broader project that examines the ability of private actors and their lawyers to forge the interpretation of treaties, statutes and rules to their own advantage*”. She also warns about the risk of turning arbitral tribunals into de facto appeals bodies over domestic courts (including the highest courts of the country), pressuring States “*into settling disputes rather than fighting for their rights*”, as well as the moral hazard of arbitrators and arbitral tribunals to hear and uphold cases.

Sornarajah contends that permitting investment arbitration in investment treaties “*would be in violation of constitutional rights of citizens to privilege the foreign investor by enabling him to litigate against the state a matter that is exclusively territorial, when the citizen himself is confined to remedies before the domestic courts. This violates the principle of equality*”. Furthermore, he underlines the unconstitutionality of transferring judicial power of the state to an external body and reminds the legitimacy crisis occurring with the system of investment treaties and investment arbitration and the stance of the states limiting or leaving out investment arbitration altogether (European Union, India, Indonesia, Japan, Korea, The Regional Comprehensive Economic Partnership, United States).

Perrone observes the incomparable privilege provided for in international investment agreements by virtue of which, investors without exhausting local

remedies, are entitled to circumvent the domestic legal system and are able to bring States before international arbitration tribunals where municipal and international law as well as public and private law intersect. Moreover, he points out the double problem underlying this kind of treaties. On the one hand, they put investors' rights above other rights, because the remedy is prompt and expedited, exempted from exhausting local remedies. On the other hand, foreign investors benefit from specialized investment tribunals which adjudicate without taking into consideration other rights and obligations in accordance with the Constitution and other international frameworks protecting for instance, human rights, collective rights and the right to water. To make things more complicated, ISDS tribunals do not make foreign investors accountable like a domestic court would.

These contributions show the seminal role of domestic law as a source of creation, interpretation and enforcement of International Investment Law. In addition, it conveys broad public considerations regarding the functioning of the system as structured from inwards as compared to the usual approach of intervention of interested parties in arbitral proceedings. Likewise, this judicial process in Ecuador unexpectedly triggered participation by different actors may engage in a domestic discussion involving transnational implications, which enhances the process and strengthens transparency.

Finally, this process evidences the encouraging conditions of dialogue and cooperation among different global players raising standards of decision making, accountability and scrutiny which usually excludes citizens and local groups affected by its implementation. In a country with a short-term memory and that conveniently conceals the negative impacts of ISDS, it is important to have a public evaluation of the merits and demerits of ISDS and related mechanisms and the protections and privileges that accompany them. For instance, following the recent decision on annulment of Perenco vs Ecuador, government officials sought to exercise the right of recourse against the former officials who adopted regulatory measures in response to the dramatic rise of international oil prices in the middle of 2000s. This, however, would leave aside the public servants who made freezing commitments regarding extractive industries.

To make this landscape even more complex, Ecuador’s government signed the agreement to rejoin ICSID Convention on June 21st 2021. This activates a fast-track procedure, where the Constitutional Court has to decide whether this treaty can be directly ratified by the President or whether it should be approved previously by the National Assembly, in which case it also requires a prior ruling of constitutionality. By pushing for the direct ratification of this Convention, the Government and pro-ISDS groups are trying to reimpose ISDS treaty-based arbitration system thwarting a prior ruling on the treaty`s constitutionality and public deliberation. This would also result in disregarding constitutional precedents and a pending process of constitutional interpretation.

It remains to be seen how the Constitutional Court will consider the competing arguments in light of the Constitution and their impact on other countries struggling for self-determination. By weighing the potential of this participatory context, the current discussion on ISDS should look closer at the diverse set of actors, tools and narratives interacting inwards, which ultimately, enables the unrestrained deployment of transnational mechanisms for foreign investment protection.

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