

# Ecuador Re-Ratifies The ICSID Convention: Impact Of The Ratification In Ecuador And In The Region

*August 9, 2021*

On July 16, 2021, Ecuador ratified the 1966 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”). On August 4, 2021 Ecuador deposited the instrument of ratification with the World Bank, so the treaty will enter into force with respect to Ecuador on September 3, 2021. This is the second time that Ecuador has ratified the ICSID Convention. Although Ecuador ratified the ICSID Convention for the first time in 1986, in 2009, Ecuador denounced the treaty which resulted in Ecuador ceasing to be a party to the International Centre for Settlement of Investment Disputes (“ICSID”) and to the resolution of disputes administered by the center.

In Ecuador, this event is part of a package of measures to encourage and promote investment, including foreign investment, that the government of current President Guillermo Lasso has promoted. It is relevant to note, however, that other events still need to occur for the ratification of the ICSID Convention to produce the effects expected by Ecuador and investors.

It is still difficult to predict whether Ecuador’s attitude will be replicated in the region. For now, it seems unlikely that countries like Brazil, Bolivia, and Venezuela will follow Ecuador’s lead and join or return to ICSID, unless these countries experience government administration changes similar to those that occurred recently in Ecuador. Furthermore, it seems that other countries in the region, including Peru after the election of Pedro Castillo as president, could take opposite measures than those recently adopted and implemented by Ecuador.

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## 1. Historical Background: Ecuador Was A Party To ICSID But Later Withdrew

Ecuador first signed the ICSID Convention in 1986. Then, in 2007, under the government of Rafael Correa, Ecuador took steps to limit the effects of the treaty, characterizing ICSID as an instrument of “colonialism.”<sup>1</sup> In December of the same year, Ecuador sent a communication to the ICSID Secretariat in order to exclude the jurisdiction of the center with respect to disputes relating to oil, gas, and mining.<sup>2</sup>

Finally, in 2009, Ecuador denounced the ICSID Convention. Such decision took effect as of January 7, 2010, when Ecuador deposited its denunciation with the World Bank.<sup>3</sup> In addition, in May 2017, Ecuador withdrew from the bilateral investment treaties (“BITs”) entered into with 16 countries: Argentina, Bolivia, Canada, Chile, China, France, Germany, Italy, the Netherlands, Peru, Spain, Sweden, Switzerland, the United Kingdom, the United States, and Venezuela.<sup>4</sup> It is not entirely clear whether its withdrawal had the effects sought by Ecuador, since Ecuador was recently ordered to pay significant sums to foreign investors following awards in investor-state arbitrations.<sup>5</sup>

## 2. Recent Developments: Ecuador Ratifies The ICSID Convention For The Second Time

### 2.1 Ecuador Signs The ICSID Convention

<sup>1</sup> <https://latinlawyer.com/ecuador-ratifies-icsid-convention>.

<sup>2</sup> <https://www.scielo.br/j/seq/a/vGsHRG5KDXtG5FB6GkjmGzv/?lang=en>.

<sup>3</sup> [http://arbitrationblog.kluwerarbitration.com/2021/06/30/ecuador-signs-the-icsid-convention-next-steps-for-entry-into-force/#:~:text=The%20purpose%20of%20the%20ICSID,not\)%20by%20a%20different%20instrument](http://arbitrationblog.kluwerarbitration.com/2021/06/30/ecuador-signs-the-icsid-convention-next-steps-for-entry-into-force/#:~:text=The%20purpose%20of%20the%20ICSID,not)%20by%20a%20different%20instrument). See ICSID Convention, Article 71.

<sup>4</sup> <https://www.iisd.org/itn/es/2017/06/12/ecuador-denounces-its-remaining-16-bits-and-publishes-caitisa-audit-report/>.

<sup>5</sup> <https://www.law360.com/articles/1407436/oil-co-reaches-deal-with-ecuador-over-412m-award>. For more information on the effects of the denunciation of the ICSID Convention in Venezuela: [https://www.clearygottlieb.com/-/media/files/why-venezuelas-bondholders-must-litigate-not-arbitrate\\_richcooper\\_boazmorag121517.pdf](https://www.clearygottlieb.com/-/media/files/why-venezuelas-bondholders-must-litigate-not-arbitrate_richcooper_boazmorag121517.pdf).

Guillermo Lasso assumed the presidency of Ecuador on May 24, 2021. In his presidential campaign<sup>6</sup> and during the first days of his administration, he has focused on reactivating the economy and implementing measures to encourage investment, including foreign investment.<sup>7</sup> As part of these efforts, Ecuador re-signed the ICSID Convention.<sup>8</sup>

### 2.2 The Constitutional Court Confirms The Constitutionality Of The Ratification Of The ICSID Convention

Once the ICSID Convention was signed, according to Ecuador’s Law of Jurisdictional Guarantees, it was necessary for the Constitutional Court to determine whether the treaty required approval by the legislature.<sup>9</sup> In cases where the Constitutional Court determines that such approval is necessary, then the National Assembly must give its consent before the treaty in question can be ratified by the President.

The discussion before the Constitutional Court focused on the application of articles 419(7) and 422 of the Constitution, which prevent “ceding sovereign jurisdiction to international arbitration in contractual or commercial disputes between the State and private natural or juridical persons.” Some argued that the ratification of the ICSID Convention did not produce such effect since participating would not result in acceding to the jurisdiction of ICSID tribunals as long as BITs with an ICSID arbitration clause are not

<sup>6</sup> <https://guillermolasso.ec/wp-content/uploads/2020/10/Plan-de-Gobierno-Lasso-Borrero-2021-2025-1.pdf>.

<sup>7</sup> See Official Gazette No. 079, General Secretariat of Communication of the Presidency of Ecuador, June 21, 2021, <https://www.comunicacion.gob.ec/el-ecuador-del-encuentro-da-pasos-firmes-para-la-atraccion-de-inversiones-y-confianza-internacional/>.

<sup>8</sup> [http://arbitrationblog.kluwerarbitration.com/2021/06/30/ecuador-signs-the-icsid-convention-next-steps-for-entry-into-force/#:~:text=The%20purpose%20of%20the%20ICSID,not\)%20by%20a%20different%20instrument](http://arbitrationblog.kluwerarbitration.com/2021/06/30/ecuador-signs-the-icsid-convention-next-steps-for-entry-into-force/#:~:text=The%20purpose%20of%20the%20ICSID,not)%20by%20a%20different%20instrument).

<sup>9</sup> <https://www.elcomercio.com/actualidad/politica/presidente-lasso-ratifica-retorno-ciadi.html>.

signed. Others understood that the signature of the treaty already implied an unconstitutional surrendering of sovereign jurisdiction.

The first of these viewpoints ultimately prevailed and on June 30, 2021, the plenary of the Constitutional Court resolved, by means of a decision against which no appeals were allowed, that the ratification of the ICSID Convention does not require the approval of the National Assembly, and also that a constitutionality opinion by such court would not be needed.<sup>10</sup> The Constitutional Court therefore determined that none of the grounds that require parliamentary approval were applicable to the ratification of the ICSID Convention.<sup>11</sup> However, it seems that the discussion revolving around the constitutionality of signing the ICSID Convention could arise when signing other investment instruments. It could be the case that the Constitutional Court, and eventually the National Assembly, could prevent Ecuador from entering into various BITs, thereby depriving the ICSID Convention of practical effects.

### 2.3 Ratification Of The ICSID Convention And Deposit Of The Instrument

Articles 147(10) and 418 of the Constitution of Ecuador allow the President to ratify international treaties. Using those powers, President Lasso officially ratified the ICSID Convention, through Executive Decree 122 on July 16, 2021.<sup>12</sup>

Generally, ratification of the ICSID Convention becomes effective once the instrument of ratification is deposited with the World Bank. This occurred on

August 4, 2021,<sup>13</sup> and pursuant to Article 68(2) of the ICSID Convention, the treaty will enter into force with respect to Ecuador 30 days later, *i.e.*, on September 3, 2021.<sup>14</sup> From then on, Ecuador may participate in ICSID arbitrations, and may have a representative at the center.<sup>15</sup>

### **3. Next Steps: Expected Effects Of Ratification**

Ratification and deposit of the instrument are not sufficient for an investor to initiate an ICSID arbitration against Ecuador. It is also necessary for an investor to have entered into an agreement with an arbitration clause in which the parties agree to submit their disputes to ICSID,<sup>16</sup> or that the investor's State has signed a BIT or other instrument (*e.g.*, a Free Trade Agreement) with the host country of the investor that provides that disputes that arise in relation to the investment will be resolved through ICSID arbitration.

Regardless, Ecuador's decision to ratify the ICSID Convention is a positive first step for investors. It is also positive for Ecuador since entering into the ICSID Convention and BITs will likely lead to an increase in foreign investment. Indeed, Ecuador is currently negotiating BITs with other countries such as Brazil, Canada, Switzerland,<sup>17</sup> and probably Mexico.<sup>18</sup> Once the text of those treaties is known, it will be important for investors to review the dispute resolution clauses, which may direct disputes to ICSID, but could also establish, for example, that other centers, such as the United Nations Commission on International Trade Law (UNCITRAL), or permanent courts, such as the Permanent Court of Arbitration, can administer the

<sup>10</sup> Constitutional Court of Ecuador, Opinion No. 5-21-TI/21, June 30, 2021,

[http://esacc.corteconstitucional.gob.ec/storage/api/v1/10\\_DL\\_FL/e2NhcNBlDGE6J3RyYW1pdGUnLCBldWlkOidiNDJIODMyYy01MDc4LTQxMDktYWMwMy0xOTc2YzdiNzUyNTUucGRmJ30=](http://esacc.corteconstitucional.gob.ec/storage/api/v1/10_DL_FL/e2NhcNBlDGE6J3RyYW1pdGUnLCBldWlkOidiNDJIODMyYy01MDc4LTQxMDktYWMwMy0xOTc2YzdiNzUyNTUucGRmJ30=).

<sup>11</sup> Constitutional Court of Ecuador, Opinion No. 5-21-TI/21, June 30, 2021,

[http://esacc.corteconstitucional.gob.ec/storage/api/v1/10\\_DL\\_FL/e2NhcNBlDGE6J3RyYW1pdGUnLCBldWlkOidiNDJIODMyYy01MDc4LTQxMDktYWMwMy0xOTc2YzdiNzUyNTUucGRmJ30=](http://esacc.corteconstitucional.gob.ec/storage/api/v1/10_DL_FL/e2NhcNBlDGE6J3RyYW1pdGUnLCBldWlkOidiNDJIODMyYy01MDc4LTQxMDktYWMwMy0xOTc2YzdiNzUyNTUucGRmJ30=).

<sup>12</sup> Ecuadorian Executive Decree No. 122, June 30, 2021, <https://www.presidencia.gob.ec/>.

<sup>13</sup> <https://www.eluniverso.com/noticias/economia/ecuador-ratifica-el-convenio-del-ciadi-nota/>.

<sup>14</sup> ICSID Convention, Article 68(2).

<sup>15</sup> See ICSID Convention, Article 4.

<sup>16</sup> See ICSID Convention, Article 36.

<sup>17</sup>

<https://www.elcomercio.com/actualidad/negocios/ecuador-suiza-negocios-convenio-bilateral.html>;

<https://apnews.com/article/868aab69f4ed98f5526642cc217ec683>.

<sup>18</sup> [https://www.swissinfo.ch/spa/ecuador-m%C3%A9xico\\_ecuador-espera-la-respuesta-de-m%C3%A9xico-para-negociar-el-tlc--dice-ministro/46845976](https://www.swissinfo.ch/spa/ecuador-m%C3%A9xico_ecuador-espera-la-respuesta-de-m%C3%A9xico-para-negociar-el-tlc--dice-ministro/46845976).

disputes, either exclusively or as an alternative to ICSID. The debate by the National Assembly to approve these treaties, as explained above, could exist regardless of which international center or court is designated in the dispute resolution clause. It will also be interesting to see if Ecuador finds ways to avoid this problem by signing agreements that may not require approval by government entities.

In addition, Ecuador seems to have a reserve of funds to pay an eventual unfavorable ICSID award in an amount of approximately US \$375 million,<sup>19</sup> which would also provide certain guarantees to investors.

Finally, it is worth mentioning that ratification of the ICSID Convention did not receive widespread or unanimous support among the different political sectors in Ecuador. The candidate that President Lasso defeated, Andrés Arauz, who obtained a considerable 48% of the vote, has already come out against the ratification of the ICSID Convention. Mr. Arauz has publicly explained that he regrets that the National Assembly was not able to weigh in on this issue which, in his opinion, in the past implied bypassing the Ecuadorian judiciary; allowed foreign companies to violate laws; and could lead to millions of dollars in losses for Ecuador.<sup>20</sup> Other opposition leaders have issued similar opinions, such as Salvador Quishpe, who has stated that the return to ICSID violates the Constitution and allows the extraction of natural wealth by foreigners to the detriment of the Ecuadorian people.<sup>21</sup>

#### 4. Effects In South America: Will Ecuador Impose A Trend In The Region?

As Ecuador became the 164th country to sign the ICSID Convention, 85% of countries in the world

have signed it (164 out of 193 of those belonging to the United Nations). In South America specifically, Brazil, Bolivia, and Venezuela are not party to the Convention: the first because it has never signed it, and the other two because they denounced it in 2005 and 2012, respectively.<sup>22</sup>

There seems to be no indication that the recent events in Ecuador will become a trend in the region since the only country that has experienced a pronounced political change to date is Ecuador. Thus, no changes are expected in Brazil, Bolivia, or Venezuela unless major similar political changes take place.

Recent electoral events in Peru seem to confirm the above. Peru is a party to ICSID, and has successfully attracted foreign investment in recent years. But Pedro Castillo, Peru's new president, has proposed to revise a number of current international investment treaties, and identifies ICSID as one of several instruments of "trade control" from which Castillo would like to free Peru.<sup>23</sup>

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[http://arbitrationblog.kluwerarbitration.com/2021/06/30/ecuador-signs-the-icsid-convention-next-steps-for-entry-into-force/#:~:text=The%20purpose%20of%20the%20ICSID,not\)%20by%20a%20different%20instrument.](http://arbitrationblog.kluwerarbitration.com/2021/06/30/ecuador-signs-the-icsid-convention-next-steps-for-entry-into-force/#:~:text=The%20purpose%20of%20the%20ICSID,not)%20by%20a%20different%20instrument.)

<sup>20</sup> <https://confirmado.net/2021/07/16/andres-arauz-la-experiencia-de-ecuador-con-el-ciadi-ha-sido-terrible-perdimos-2000-millones/>

<sup>21</sup>

<https://www.elcomercio.com/actualidad/politica/presidente-lasso-ratifica-retorno-ciadi.html>.

<sup>22</sup>

<http://arbitrationblog.kluwerarbitration.com/2019/02/26/the-trajectory-of-international-arbitration-in-latin-america-and-current-trends-in-isds/>.

<sup>23</sup> <https://gestion.pe/peru/politica/pedro-castillo-la-revision-de-los-tlc-y-otras-medidas-de-comercio-exterior-de-su-plan-de-gobierno-noticia/?ref=ges>.