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Possible reform of investor-State dispute settlement (ISDS)

Submission from the Government of Ecuador

Note by the Secretariat

The present note transmits a submission received on 16 July 2019 from the Government of Ecuador in preparation for the thirty-eighth session of Working Group III. The submission is reproduced as an annex in the form in which it was received.



Annex

[Original: Spanish]

Proposal of the Republic of Ecuador regarding the reform of investor-State dispute settlement being discussed in Working Group III

At its thirty-seventh session, the Working Group urged Member States to submit proposals with a view to developing a project schedule for discussing the options for reform of investor-State dispute settlement (ISDS). Many of those options are presented in document [A/CN.9/WG.III/WP.149](#).

With reference to the request made by UNCITRAL in document [A/CN.9/970](#), namely, that a deadline of 15 July 2019 be set for the submission of proposals, the Republic of Ecuador wishes to raise the points outlined below.

I. Introduction

1. In response to Member State concerns about the ISDS regime, a number of proposed changes have been discussed.¹ States have considered the challenges and possible solutions based on their own experience as parties to arbitration processes.
2. Ecuador has been a member of the United Nations Commission on International Trade Law (UNCITRAL) since November 2012. It has often expressed its concerns about investor-State arbitration at meetings of Working Group III and submitted comments as a contribution to the discussion on how to improve the ISDS regime.
3. Ecuador is of the opinion that the reform should cover ISDS in general – rather than just international investment treaties between States – inasmuch as, in some cases, jurisdiction for arbitration derives directly from contracts between States and investors.
4. Among what it considers as priorities, Ecuador has emphasized the need to find solutions to the current ISDS framework with regard to:
 - (i) Establishing a mechanism to fully address issues of coherence, predictability, correctness of arbitral awards and tribunals exceeding their mandates;
 - (ii) Ensuring the independence and impartiality of arbitrators;
 - (iii) Allowing third parties that might be affected by the arbitral award to participate, in a format to be agreed by the tribunal and the parties.

These issues are addressed below.

II. Key issues for Ecuador

A. Review of arbitral awards

5. Investment arbitration lacks *coherence* and *predictability* owing to the absence of binding jurisprudence requiring arbitrators to take decisions that are consistent with earlier ones. The foregoing notwithstanding, arbitral precedent is often invoked by parties and has been cited by tribunals when allowing or rejecting claims.
6. In some cases, for instance, *Austrian Airlines* and *Burlington Resources*, arbitrators have explicitly stated that the decisions of other tribunals were not binding. However, they were of the view that, barring extraordinary circumstances, tribunals

¹ See notes by the UNCITRAL secretariat on the possible reform of investor-State dispute settlement (documents [A/CN.9/WG.III/WP.142](#) and [A/CN.9/WG.III/WP.149](#)).

have a duty to respect the solutions reached consistently in similar cases. This has helped to make for harmonious development of investment law and to ensure that the legitimate expectations of States and investors with regard to predictability are met.

7. Inconsistency in tribunal decisions under the current system has been a source of not infrequent criticism. For example, in *CMS v. Argentina*, *Sempra v. Argentina* and *Enron v. Argentina*, the arbitral tribunal rejected the argument of necessity raised by the State, whereas in *LG&E v. Argentina* and *Continental Casualty v. Argentina*, the tribunal admitted this same defence argument. The patent inconsistency between the awards was due to differing interpretations of the concept of state of necessity under a bilateral investment treaty and under international customary law. Cases like these illustrate the current system's shortcomings.

8. Against this backdrop, and considering that investor-State disputes raise matters of public interest with significant economic consequences, the reform process has to look at effective solutions.

9. Awards by arbitral tribunals are final and not subject to appeal, the latter being a process that could bring consistency to awards and thereby improve coherence and predictability. Furthermore, it is not possible to correct serious errors made by a tribunal. This topic will be explored below.

10. One of the most pressing issues in the area of investment arbitration is the *review of awards*. Currently, the only control exercised is by the national courts. Reviews generally have to do with the validity of the arbitration clause, composition of the tribunal, impartiality or matters of public policy.²

11. Ecuador has noted serious errors by tribunals in terms of exceeding their mandate. It has also been affected by erroneous interpretations of applicable law and by arbitral decisions that cannot be applied within its sovereign territory. Moreover, investment arbitration deals with complex de facto and de jure issues.

12. Based on its own experience, Ecuador is of the view that it would be appropriate for the ISDS regime to allow also for the merits of cases to be reviewed through some arrangement providing recourse to appeal.

13. Ecuador is also of the view that legislation should explicitly identify the reasons for which an appeal may be brought. Doing so would prevent parties from using this remedy improperly or using it to delay the enforcement of an award. In this regard, appeals should be limited to errors made in the application of the law.

14. Having such a mechanism would make it possible for arbitral awards to be reviewed and corrected, thereby providing parties with a coherent and fair decision that is in accordance with the law.

B. Need to ensure the independence and impartiality of arbitrators

15. The Working Group has stressed the need for any reform to address concerns about the appointment and integrity of arbitrators. Documents [A/CN.9/WG.III/WP.142](#) and [A/CN.9/WG.III/WP.146](#) provide relevant information that points to issues concerning the proper conduct, appointment and profile of tribunal members, all of which are issues that undermine the legitimacy of the current system.

16. Despite the different efforts made to resolve these problems, including the adoption of the International Bar Association Guidelines on Conflicts of Interest in International Arbitration, it has become evident in practice that clear criteria must be set in order to guarantee the impartiality and independence of tribunal members throughout the entire arbitration process.

² New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. 5.

17. Ecuador, by dint of its experience with arbitration processes, has seen how the absence of guidelines has led arbitrators to take decisions that not only evince a lack of independence and impartiality but that could also have a severe impact on the arbitration proceedings. This creates uncertainty for the parties, especially given the considerable cost and time involved in arbitration processes.

18. Professional conduct on the part of the arbitrator during the arbitral process is central to the validity and effectiveness of the award. It should be made clear that such standard of conduct must be maintained until the tribunal has fully discharged its mandate. It is necessary to prevent situations in which arbitrators recuse themselves for professional reasons in the middle of the proceedings. The departure of an arbitrator in this way can result in delays and affect outcomes.

19. A further and more significant issue that warrants discussing is that of “double hatting”. While arbitrators are allowed to serve as counsel in other arbitration disputes, this practice requires regulation. Arbitrators might make a decision with a view to being appointed in future disputes or to benefiting parties they represent in other disputes.

20. The standard to be observed for disqualification of an arbitrator is also under discussion. There is no consistency in the criteria used. For example, article 57 of the Arbitration Rules of the International Centre for Settlement of Investment Disputes (ICSID) stipulates that parties may propose the disqualification of any tribunal member on account of a “manifest lack” of the qualities required under article 14 (1), which states that arbitrators must be persons who “may be relied upon to exercise independent judgment”. Meanwhile, article 12 of the UNCITRAL Model Law on International Commercial Arbitration provides for disqualification when there are “justifiable doubts.”³

21. In practice, using criteria such as “manifest lack” or “justifiable doubts” to assess the conduct of arbitrators means that the standard for disqualification can be met more easily in some proceedings than in others, depending on which arbitration rules are used.⁴

22. Ecuador believes it is vital that ISDS reform take into account the importance of an impartial and independent tribunal. Accordingly, discussions need to be held on substantive issues relating to standards for disqualification of arbitrators, clear guidance on the disclosure of conflicts of interest and the integrity of tribunal members.

C. Participation of third parties in arbitral processes

23. The current ISDS regime does not define the scope of decisions reached by arbitral tribunals. That is to say, no account is taken of whether an arbitral award will

³ ICSID, article 57: A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a **manifest lack** of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV.

Article 14 (1): Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who **may be relied upon to exercise independent judgment**. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.

UNCITRAL Model Law, article 12 (1): When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to **justifiable doubts** as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him. [...]

⁴ See *Participaciones Inversiones Portuarias SARL v. Gabonese Republic* (ICSID Case No. ARB/08/17), Decision on the Proposal to Disqualify an Arbitrator, 12 November 2009; *Electricidad Argentina S.A. and EDF International S.A. v. Argentine Republic* (ICSID Case No. ARB/03/22), para. 64; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3).

affect only the parties to the proceedings – i.e., the investor or the State – or whether it might directly affect other parties as well.

24. Ecuador has seen situations where the rights of specific groups with a legitimate interest in a dispute have been affected by an arbitral award and yet those groups were not given the opportunity to be parties to the proceedings. This has occurred in cases where an arbitral award has left null and void documents stipulating responsibilities towards groups other than the parties to the proceedings.

25. It should be noted that the point of this proposal is not for third parties to be included in all arbitral processes. Rather, with the agreement of the tribunal and the parties, and depending on the circumstances, provision should be made to include parties that, aside from having a legitimate interest in a dispute, could also be directly affected by the arbitral award.

26. Allowing such parties to appear before the tribunal would not only enable them to voice their concerns but it would also help to ensure that the arbitral award meets the applicable requirements of fact and of law. Whatever bearing those concerns might have on the final outcome would be at the complete discretion of the arbitral tribunal.

III. Specific solutions proposed by Ecuador

27. While Ecuador respects the various views expressed about the instrument that could serve as the vehicle for ISDS reform, it is of the opinion that the reform could be achieved multilaterally or through actions carried out by each State. Some Governments have elected to modify and supplement existing arbitral rules, some have chosen to limit or eliminate access to arbitration, while others have elected to do away with investment treaties altogether.⁵

28. In this connection, one possible solution that would address the current concerns of Ecuador, without prejudice to any other solutions that may be agreed upon, would be to adopt a multilateral international convention governing relations among States parties in all matters pertaining to investor-State arbitration. Such a convention would cover procedural matters only, not substantive ones.

29. In support of the argument for creating such a multilateral instrument, it would be useful to recall two past experiences with the adoption of an instrument possessing the above-mentioned features.

30. The first relates to the Organization for Economic Cooperation and Development (OECD), whose membership requested the establishment of a multilateral instrument with a view to amending bilateral tax treaties.⁶ This resulted in the adoption of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting.

31. Among the arguments put forward for the adoption of that instrument was the difficulty encountered in quickly and effectively modifying tax agreements. The difficulty lay in the fact that, from a legal standpoint, each agreement is an independent instrument and interpretation is time-consuming, even though the differences between the various agreements are minor.⁷

32. The second experience relates to the Mauritius Convention, which offers a clear example of a multilateral convention adopted to regulate investment arbitration with a focus on transparency.

⁵ Report of UNCITRAL on its fiftieth session, *Official Records of the General Assembly* (A/72/17), para. 245.

⁶ OECD, OECD/G20 Base Erosion and Profit Shifting Project – Developing a Multilateral Instrument to Modify Bilateral Tax Treaties, 2015 Final Report. https://read.oecd-ilibrary.org/taxation/developing-a-multilateral-instrument-to-modify-bilateral-tax-treaties-action-15-2015-final-report_9789264241688-en#page1.

⁷ Ibid.

33. A similar approach could be taken when addressing ISDS in a multilateral instrument with the aim of ensuring coherence, security and efficiency. The instrument would include core elements and opt-in elements for all States who ratify it.

IV. Conclusion

34. The problems described above stem from the shortcomings of the current system, in particular, the lack of a regulatory mechanism to control, oversee and correct errors by tribunals, with the result that parties have been adversely affected by inconsistent arbitral awards. As has also been explained, there is a need to ensure that tribunal members are impartial and independent and to include parties having a legitimate interest in a dispute in investment arbitration proceedings. The proposals made by Ecuador are intended to enhance the current ISDS regime within the limits of international public law and investment law.

35. The foregoing proposals are submitted simply as a contribution to the discussion. They should not be understood as precluding Ecuador from analysing or changing its position in future or from making new proposals at subsequent meetings of Working Group III. Ecuador reserves the right to endorse other solutions proposed by States which may be in its interest. Lastly, this document does not represent the legal position of Ecuador and is not meant for use in any other context.
