

Client Update

Ecuador to Terminate Investment Treaties

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Ecuador's legislature has approved the termination of all of Ecuador's outstanding bilateral investment treaties ("BITs"). Although existing investments will continue to enjoy treaty protections in the short to medium term, new investors face an evolving and uncertain investment climate.

ECUADOR'S RETREAT FROM INVESTOR-STATE DISPUTE SETTLEMENT

On May 3, 2017, the Ecuadorian National Assembly approved a proposal to terminate Ecuador's BITs with Argentina, Bolivia, Canada, Chile, China, Italy, the Netherlands, Peru, Spain, Switzerland, the United States and Venezuela. Ecuador announced its intention to renegotiate these and other investment treaties on terms that it considers more favorable. Other reasons given for the most recent BIT terminations include the large number and high value of investor claims against Ecuador, the attorneys' fees spent in defending them, and the low foreign investment in Ecuador. Debevoise has obtained several big wins for investors against Ecuador, including one of the largest BIT awards ever issued (which has since been paid) for Occidental Petroleum, and Perenco Ecuador in prevailing on novel jurisdictional, merits and counterclaims issues. Perenco is currently awaiting an award on its claims for over US\$1.5 billion in damages.

Ecuador's announcement is consistent with its retreat from investor-state arbitration in the past decade. In 2008, Ecuador adopted a new Constitution that prohibited the State from entering into treaties that would "yield [Ecuador's] sovereign jurisdiction to international arbitration entities" in investor-state disputes, and Ecuador's Constitutional Court subsequently declared unconstitutional the investor-state dispute provisions of Ecuadorian BITs. Since then, Ecuador has withdrawn from the ICSID Convention and terminated ten other BITs (those with Cuba, Dominican Republic, El Salvador, Finland, Guatemala, Honduras, Nicaragua, Paraguay, Romania and Uruguay). In 2010, the legislature had also approved the termination of Ecuador's BITs with the United

Kingdom, Germany, France and Sweden, but the Government has not yet served the required notice and those treaties remain in force.

TAKEAWAYS FOR INVESTORS

Ecuador has not yet issued formal notices of termination to its BIT counterparties. Once the notices take effect, the treaties will remain in force for a “sunset” period of between five and fifteen years, depending on the BIT. This allows investments made before the termination to continue to enjoy treaty protections as long as arbitration proceedings commence before the sunset period expires. Investments made after the termination takes effect (or, in some cases, after the notice of termination is issued) may not be able to benefit from treaty protections.

While Ecuador has announced that it intends to replace the existing BITs with renegotiated treaties, it is unclear what these treaties will provide or when they will be concluded. Investors will also need to consider the impact of Ecuador’s withdrawal from the ICSID Convention in 2009. Although most of the BITs allow claims to be brought under other mechanisms (such as the UNCITRAL Rules) if ICSID arbitration is not available, the treaties with Chile, France, Germany, Peru and the United Kingdom do not provide for an alternative arbitral forum.

Prospective investors in Ecuador should therefore carefully consider the structure of their investment to ensure they can access both an acceptable dispute resolution mechanism and optimal substantive protections.

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Please do not hesitate to contact any member of the International Disputes Group at Debevoise (contacts [here](#)) with questions about how changes in Ecuador’s investment climate may affect you.