Ecuador and international investment law and policy

Summary

The little relevance of a developing country such as Ecuador in the geopolitical arena contrasts with its high exposure to investment disputes and its unprecedented proposals to react to the foreign investment protection regime.

This study *'Ecuador and International Investment Law and Policy: Between Constitutional Sovereignty and State Responsibility'* undertakes a thorough legal analysis of the Ecuadorian experience—including articulation, enforcement, resistance, abolishment and reconstruction of predominant tools for investment protection.

In light of the constitutional-like principles embedding International Investment Law and their inextricable link to Domestic Law in the delineation of rights, obligations and disputes, this thesis extensively addresses the interplay between Domestic and International Law along the aforementioned stages. Both the creation of Domestic Law and the engagement in International Law constitute forms of State sovereignty. In this regard, the assorted constitutional frameworks and international obligations coexisting since the beginning of the Ecuadorian Republic have shaped the State's sovereign space.

How boundaries are set between Domestic and International Law has rested upon the assumption that the former is not permeated by the latter, as both would operate in different levels disregarding that such interaction affects the final addressees of such rules: citizens.

Adopting a treaty-making process perspective, an isolation of international investment agreements from the essential limits of Domestic Law and contract-based commitments may be noticed. This isolation has proven problematic, considering that the effects derived from the foreign system's deployment at an adjudicatory level have been perceived as illegitimate, which has fueled chauvinist sentiments followed by a mantra to retrieve sovereignty. In addition, the long-standing deference given to the Executive for the adoption of international treaties limited to lax filters of constitutional conformity—along with an apparent monist approach—has triggered odd situations due to the rise of a new constitutional framework and revisited mechanisms of constitutional control.

In the case of Ecuador, targeting the international investment regime through constitutional reforms and the exercise of overhauled mechanisms of constitutional control reveals a deeper engagement of national courts in interpreting International Law; as well as a growing reluctance to use methods of consistent interpretation. This is the case of the constitutional rulings judging that the promulgation of a new Constitution

qualifies as a fundamental change of circumstances disregarding international judicial decisions concerning the scope of Article 62 of the Vienna Convention on the Law of Treaties. In this cases, the domestic narrative developed by the Constitutional Court differs drastically from the cautious approach by the States to this principle, supported by its rare applicability in international courts.

Therefore, scrutinizing *ex post facto* whether international treaties are in conformity with a new Constitution reveals an unsettled—albeit indissoluble—relationship between International and Domestic Law. This thesis contends that defining International Investment Law as a framework drawing the exercise of sovereign powers implies the reconsideration of the position given to Domestic Law to enable, substantiate and enforce international obligations derived therefrom. Within this logic, International Investment Law and Domestic Law develop identical constitutional-like principles under different standards, mutually influenced, evident at the rule-making and adjudicatory levels.

Consequentially, it is suggested that domestic decision-makers reacting to the effects of the investment protection system should be aware of the complex web of links that build the relations of foreign investors. The State must weigh the scope of its commitments either as treaty party, regulator or contractor. Such distinction in the course of a long-term relationship may determine the nature of the controversy involving the State and the investor.

In the international sphere, the State acts as a Contracting Party of investment treaties and, thus, it is subject to the Law of Treaties and the Articles of State responsibility. In this regard, a lesson that should be learned consists of thoroughly assessing the importance of defining the boundaries between primary and secondary obligations for achieving a coherent disengagement of the system, while minimizing the responsibility for wrongfulness. In the case of contracts—as the investment disputes involving the Ecuadorian State show—targeting contractual disputes through sovereign actions, thereby allowing the corresponding Contract Party to resort to the relevant contractual stipulations in order to prompt possible renegotiations, should be avoided.

This thesis also proposes re-editing one of the essential elements of the Calvo Doctrine; stating that aliens should be offered the same protection as locals, in addition to the recognition of international forums to settle disputes, which could lead to greater coherence and coordination between International and Domestic Law.

Finally, it is necessary to highlight that the inextricable relationship between

Domestic Law and International Law in all layers of the foreign investment protection system unfolds the relevant role of the former on enabling and substantiating the latter.

In sum, any measure aimed to redraw the boundaries of the system has to consider the multi-dimensional interactions between Domestic Law and International Law. Consequently, any attempt for reform shall be integral and must be preceded by a comprehensive assessment that gives due consideration to treaties, regulations and contracts. This endeavor should be accompanied by an evaluation of the internal governance structure—built from technical capacities and the identification of regulatory actions that have often triggered investment disputes.