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Ecuador Attempts to Withdraw Consent to ICSID Jurisdiction for Natural Resource Disputes

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Foreign investors' right to bring arbitration claims against Ecuador before ICSID for governmental interference in natural resources investments is under challenge.

On December 4, 2007, the World Bank's International Centre for Settlement of Investment Disputes (ICSID) received a notice from the Republic of Ecuador that it will no longer consent to ICSID jurisdiction as a forum for resolving mining and energy disputes with foreign investors.

ICSID was established by the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention). ICSID provides facilities for conciliation and arbitration of investment disputes between states that are parties to the Convention (Contracting States) and nationals of other Contracting States. Such disputes typically arise under bilateral investment treaties (BITs), which offer certain protections to foreign investors against expropriation and other governmental interference. Ecuador is a party to more than a dozen BITs, including treaties with the United States, Canada, the United Kingdom and Spain, all of which provide for ICSID jurisdiction.

Pursuant to Article 25(4) of the ICSID Convention, a Contracting State may notify the Centre of the class or classes of disputes that the State would or would not consider submitting to the jurisdiction of the Centre. Ecuador's notification to the Centre stipulated that the country will no longer consent to ICSID jurisdiction for disputes arising from investments in the exploitation of natural resources, such as oil, gas and minerals. Ecuador's notification also purports to revoke its consent to ICSID jurisdiction expressed in existing investment treaties and

agreements as to any investors who have not yet expressly consented to ICSID jurisdiction.

Ecuador's notice to ICSID follows a presidential decree issued on October 4, 2007, which mandates an increase of taxes on foreign oil companies earnings. The purported retroactive jurisdictional restriction, coupled with the tax decree, potentially would slash foreign oil companies' profits while limiting their options for redress.

Existing and prospective investors in Ecuador's natural resources must consider the legal consequences of Ecuador's December 4 notice to ICSID. Notice under Article 25(4) should have prospective effect only and does not constitute a reservation under or a withdrawal from the ICSID Convention. (We discussed Bolivia's withdrawal from the ICSID Convention in a May 2007 mailing available online.¹) Even though attempts to argue that a notification of this kind modifies previous consent to ICSID jurisdiction have been rejected by arbitral tribunals in the past, it is to be expected that Ecuador may seek to challenge ICSID jurisdiction on this ground. Some Ecuador BITs offer alternatives to ICSID arbitration, such as ad hoc arbitration conducted under the Arbitration Rules of the United Nations Commission on International Trade Law. ICSID arbitration, however, has unique procedural advantages, such as self-contained provisions on recognition and enforcement of awards and non-appealability of awards in the host state's courts. □

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