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# Rethinking Article 422: A Retrospective on Ecuador's 2008 Constitutional ISDS Recalibration

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# Rethinking Article 422: A Retrospective on Ecuador's 2008 Constitutional ISDS Recalibration

## **Cover Page Footnote**

JD/MPA Candidate at Indiana University's Maurer School of Law and School of Public and Environmental Affairs, and founding Editor-in-Chief of the Indiana Journal of Constitutional Design at Maurer's Center for Constitutional Democracy. The author would like to extend a deep gratitude to Professor Susan H. Williams and David C. Williams for all their assistance and patience in offering advice on the (many) drafts of this piece.

**Rethinking Article 422:  
A Retrospective on Ecuador’s 2008 Constitutional ISDS Recalibration  
By Alexander Basil Avtgis\***

ABSTRACT

*Is Ecuador’s adoption of Article 422 in the 2008 Constitution properly viewed as a “re-statification”<sup>1</sup> of Investor State Dispute Settlement (ISDS)? And, since its implementation, has the constitutional article been effective in institutionally insulating Ecuador from the jurisdictional reach of international ISDS? This paper answers both questions in the negative—but qualifies such an outlook by balancing the drawbacks of Article 422 against its successes. Article 422’s provisions, strident in its attempt to create an alternative development vision, did not achieve all that the Constitution’s drafters had hoped. Nevertheless, in its limited effect of detaching Ecuador from certain ISDS fora, it did productively reorient the country’s engagement with external economic forces in a manner that is hopeful.*

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<sup>1</sup> This term is first used in the title of an article co-authored by the respected international arbitrator, Honorable Charles N. Brower, and the research scholar, Sadie Blanchard. See Charles N. Brower & Sadie Blanchard, *From “Dealing in Virtue” to “Profiting From Injustice”: The Case Against “Re-Statification” of Investment Dispute Settlement*, 55 HARV. INT’L L. J. 45, 45 (2014).

*Article 422(1): Treaties or international instruments where the Ecuadorian State yields its sovereign jurisdiction to international arbitration entities in disputes involving contracts or trade between the State and natural persons or legal entities cannot be entered into.*<sup>2</sup>

*"[T]he Constitution itself can no longer pretend anymore to provide a comprehensive regulatory framework of the state on its own. . . [T]he national Constitution today and in the future is to be considered a 'partial constitution,' which is completed by the other levels of governance."*<sup>3</sup>

*"[International Investment Arbitration] is rooted in international, extra-jurisdictional substitutes for domestic institutional quality. These substitutes . . . have expanded even more rapidly than domestic investments in governance, and allow powerful actors to avoid local judicial institutions."*<sup>4</sup>

## INTRODUCTION

September 2008 heralded much change for Ecuador: its adoption of a new Constitution<sup>5</sup> by popular referendum seemed to turn a new page for the nation. In particular, several of the Constitution's provisions gave rise to the belief that Ecuador had successfully redesigned a novel approach to handling foreign investment<sup>6</sup> and set forth a strategy to separate the country from any external influence over the resolution of disputes that arose from investment.<sup>7</sup> Specifically, Article 422 prohibited the country from entering into treaties that provided jurisdiction to outside arbitral tribunals for the resolution of disputes arising between the State and foreign investors.

This paper will assess the goals and effects of Article 422. It will begin with a discussion of the constitutional mechanism and its textual construction, as well as the contextual anti-neoliberal, alternative development rationale behind its inclusion by the Constituent Assembly in Ecuador's 2008 Constitution. The paper will then contrast the initial enthusiasm of the government's three branches in denouncing the International Investment Treaty framework and Investor State Dispute Settlement System with a longitudinal assessment of the greater part of the last decade—arguing

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<sup>2</sup> CONST. OF THE REPUBLIC OF ECUADOR, Oct. 20, 2008, art. 422(1).

<sup>3</sup> Thomas Cottier & Maya Hertig, *The Prospects of 21st Century Constitutionalism*, 7 MAX PLANCK Y.B. U.N. L. 261, 303–04 (2003). To this effect, this piece is written for constitutional design practitioners, and aspires to lend perspective into the numerous ways that "[p]owers are increasingly shifted from the national level as embodied to international and supranational governance structures." *Id.* at 302.

<sup>4</sup> Tom Ginsburg, *International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance*, 25 INT'L REV. L. & ECON. 107, 107–23 (2005).

<sup>5</sup> CONST. OF THE REPUBLIC OF ECUADOR, Oct. 20, 2008.

<sup>6</sup> See Christina L. Madden, *Laws Gone Wild in Ecuador: Indigenous People and Ecosystems Gain Rights*, POL'Y INNOVATIONS (Oct. 2, 2008), <http://www.policyinnovations.org/ideas/briefings/data/000077>.

<sup>7</sup> See *id.*

that Article 422, instead of successfully disengaging from the country's international investor-state obligations, remains minimally significant in light of the continuing bilateral trade agreements that still subject the country to the long-arm of international treaty arbitration.

To make this case, the paper will explore four distinct aspects of Article 422, each of which detracts from Ecuador's intent to "restatify" ISDS, or completely eliminate any jurisdictional reach of external ISDS bodies over Ecuador's international investment agreements: 1) the constitutional article's inability to remove Ecuador from ongoing, already-initiated arbitration proceedings; 2) the article's silence regarding retroactive application of its prohibition on ceding sovereignty, or regarding a requirement on the government's behalf to affirmatively remove existing treaties that directly contradict 422(1); 3) the article's ambiguity concerning putative treaty claims that arise from Ecuador's investment treaty obligations; and 4) the article's allowance of arbitration clauses in trade agreements and investment contracts under the exception of 422(2) for "regional arbitration entities," and the sustained courting of foreign direct investment in certain industries that results. Each of these lacunas in the text of Article 422, left unaccounted for by Constituent Assembly drafters, detracts from the government's ability to resist neoliberal pressures.

This paper concludes by briefly positing that the functional shortcomings of Article 422 are nonetheless offset by its symbolic success. Undoubtedly, the end effect of Article 422 is reorienting the country toward regional, instead of international, solutions—it does not signify an entire, thorough disengagement from the dominant ISDS paradigm. This should not overshadow the narrative faculty of Article 422 that is still left intact: the constitutional mechanism symbolically instantiates Ecuador's political, socio-cultural sentiment of the environmental, indigenous concept of Sumak Kawsay (SK), in successful resistance to the prevailing international investment framework.

Put differently, the Correa government's intent for Article 422 to operate as a domestic, constitutional bulwark against the jurisdiction of international investment arbitration tribunals was *not* realized. Nevertheless, its inability to inoculate the government entirely from the norms of bilateral investment treaties and, by extension, the international economic investment framework, should not entirely obscure the Article 422's underlying role as a "pre-commitment device"<sup>8</sup> to an alternative development vision antithetical to investment liberalization. Article 422, as such, functions as a constitutional gesture toward regional integration. It is a necessary component in a constitutional domestic re-configuration<sup>9</sup> that paves the way for a South American "hybrid regime

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<sup>8</sup> Stephen Holmes, *Precommitment and the Paradox of Democracy*, in CONSTITUTIONALISM AND DEMOCRACY 195 (Jon Elster & Rune Slagstad eds., 1988); STEPHEN HOLMES, PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY 134–77 (1995); JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS 129–41, 157–62 (2000).

<sup>9</sup> See Tom Ginsburg, *Locking in Democracy: Constitutions, Commitment, and International Law*, 38 NYU J. INT'L L & POL. 707, 719–21 (2006).

for international investment arbitration,<sup>10</sup> premised principally on the regional consortium embodied by UNASUR's Arbitration Centre.<sup>11</sup>

## I. The Legal Recalibration Mechanism of Article 422

Criticism of investment treaty arbitration is not new;<sup>12</sup> the onslaught of constitutional challenges brought to bear upon the current investor-state paradigm is, however, a rather recent phenomenon.<sup>13</sup> Such challenges invoke constitutional vocabulary, including the principles of democracy, the rule of law, human rights, and fairness.<sup>14</sup> The constitutional text of Ecuador's Article 422 embodies these challenges—although, as this paper will argue, it fails to affect the full extent of changes sought in its enactment.

The sentiments of President Correa in urging the Constituent Assembly (“CA”) to draft Article 422 are numerous and generally reflect the anti-neoliberal shift of the South American country over the previous two decades. But, as this article points out, the choices expressed in the constitutional mechanism of Article 422<sup>15</sup>—that make it the lynchpin of repositioning the country beyond the jurisdictional reach of the modern international investor-state protection infrastructure—were insufficient to properly insulate Ecuador from the pressures that force it to engage, to this day, with the very arbitral tribunal entities from which the country sought to separate. The President and the CA might have genuinely desired that Article 422 would enable Ecuador to resist the jurisdiction of distant, foreign, and unfriendly (read *favorable-to-investors*) investor-state arbitral tribunals, such as International Centre for Settlement of Investment Disputes (“ICSID”) or any other of the similarly analogous “investment-protection” bodies.<sup>16</sup> But this has

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<sup>10</sup> See Kendall Grant, *The ICSID Under Siege: UNASUR And The Rise Of A Hybrid Regime For International Investment Arbitration* (Osgoode Legal Studs., Res. Paper No. 26, 2015), available at <http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1103&context=olsrps>.

<sup>11</sup> See *South America Forms Alternative to Free Trade Kangaroo Courts*, TELESUR (Jan. 19, 2016), <http://www.telesurtv.net/english/news/UNASUR-Close-to-Forming-Investor-Dispute-Center-20160119-0036.html>; see also *UNASUR Arbitration Centre One Step Closer to Being Established*, INV. TREATY NEWS (Feb. 29, 2016), <https://www.iisd.org/itn/2016/02/29/unasur-arbitration-centre-one-step-closer-to-being-established>. See generally Silvia Karina Fiezzoni, *UNASUR Arbitration Centre: The Present Situation and the Principal Characteristics of Ecuador's Proposal*, INV. TREATY NEWS (Jan. 12, 2012), <https://www.iisd.org/itn/2012/01/12/unasur/>.

<sup>12</sup> See, e.g., Heinrich Kronstein, *Business Arbitration—Instrument of Private Government*, 54 YALE L.J. 36 (1944); Heinrich Kronstein, *Arbitration is Power*, 38 NYU L. REV. 661 (1963).

<sup>13</sup> See Stephan W. Schill, *Conceptions of Legitimacy of International Arbitration*, in PRACTISING VIRTUE: INSIDE INTERNATIONAL ARBITRATION 106, 113 (David D. Caron et al. eds., 2015).

<sup>14</sup> *Id.* at 112.

<sup>15</sup> These choices might reflect, perhaps, the Assembly's own sentiments, separate from President Correa's or the general will of the people, in drafting the specific text of the article. Or, in a slightly different vein, the textual choices expressed in Article 422 might actually represent the desires of the CA—yet, as practice often differs from theory, the specific choices in the text reflect the Assembly's lack of expertise in the technical matters of international investment law. This latter interpretation, one which highlights the importance in careful, technical constitutional drafting, is more consistent with the spirit of this paper.

<sup>16</sup> See Ibronke T. Odumosu, *The Antinomies of the (Continued) Relevance of ICSID to the Third World*, 8 SAN DIEGO INT'L L.J. 345, 373–75 (2007) (arguing that the legitimacy of the ICSID body is critiqued on the grounds that

not been the result: the current situation in Ecuador supports a narrative divergent from the motivating spirit<sup>17</sup> and actual text of Article 422.

The new Ecuadorian Constitution recognizes arbitration, as had its predecessor, as a generally valid alternative dispute mechanism.<sup>18</sup> Nevertheless, Article 422 singled out international arbitration (the context in which investor-states disputes arise) as a mechanism in the panoply of alternative dispute resolution (“ADR”) and prohibited certain usages prospectively. As the text of Article 422(1) reads, treaties<sup>19</sup> that “yield [Ecuador’s] sovereign jurisdiction”<sup>20</sup> to international arbitration bodies<sup>21</sup> in disputes involving investment<sup>22</sup> cannot be entered into.

For President Correa, who entered the executive post two years prior, the Constitution symbolized an opportunity to recreate the country, to re-establish Amazonian Ecuador upon new environmental and socio-political principles, and to rebuke the decaying neoliberal economics that had crippled the nation since the late 1980s.<sup>23</sup> The first twenty-four months in office were full of far-reaching initiatives and executive actions designed to achieve Correa’s platform, described as the “citizen’s revolution.”<sup>24</sup> But the crucial step to the realization of his goals lay in one of his first acts as President<sup>25</sup> when, in his second decree, Correa called for a popular referendum to take place and decide whether to convene a national body that would have full powers over crafting a new constitutional text.<sup>26</sup> On April 15, 2007, the country voted in favor of forming the Constituent Assembly and, a few months later, a representative body charged with crafting a constitution to be placed for popular vote, was elected.<sup>27</sup> Twenty-four national assembly members, 100 provincial

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it adopts a “single economic rationale for investment protection,” devoid of alternative democratic interests of the host-state and its citizenry).

<sup>17</sup> See generally Jonas Gamso, *A Case of Diversified Dependency: Macrostructural Change and Policy Alternatives in Ecuador*, 43 *LATIN AM. PERSPS.* 109 (2016).

<sup>18</sup> CONST. OF THE REPUBLIC OF ECUADOR, Oct. 20, 2008, art. 190.

<sup>19</sup> For example, the ICSID Convention. See *ICSID Convention*, INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES, <https://icsid.worldbank.org/apps/ICSIDWEB/icsidocs/Pages/ICSID-Convention.aspx> (last visited May 1, 2016).

<sup>20</sup> CONST. OF THE REPUBLIC OF ECUADOR, Oct. 20, 2008, art. 422.

<sup>21</sup> For example, the ICSID arbitral tribunal. See *CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES* arts. 37–47, Mar. 18, 1965, 575 *U.N.T.S.* 159.

<sup>22</sup> More precisely, the text of Article 422 prevents “contracts or trade between the State and natural persons or legal entities.” CONST. OF THE REPUBLIC OF ECUADOR, Oct. 20, 2008, art. 422.

<sup>23</sup> Jennifer N. Collins, *Rafael Correa and the Struggle for a New Ecuador*, 10 *GLOBAL DIALOGUE* (2008), available at <http://www.worlddialogue.org/content.php?id=426> (“For President Correa and his PAIS Alliance (Country Alliance) party, the constitution represents a chance to refound Ecuador on new economic, political, and even social principles, and to exorcise from its body politic the living ghosts of neo-liberalism, political corruption, elite dominance, and social and economic exclusion.”).

<sup>24</sup> See, e.g., *Ecuador’s Citizens’ Revolution: Putting People Before Profit*, TELESUR (Jan. 15, 2016), <http://www.telesurtv.net/english/telesuragenda/Ecuadors-Citizens-Revolution-Putting-People-Before-Profit-20150108-0025.html> (media coverage of Correa’s platform).

<sup>25</sup> See CARTER CTR., *FINAL REPORT ON ECUADOR’S APPROBATORY CONSTITUTIONAL REFERENDUM OF SEPTEMBER 28, 2008* 4 (Oct. 25, 2008), <https://www.ciaonet.org/attachments/15116/uploads>.

<sup>26</sup> See *id.*

<sup>27</sup> See Collins, *supra* note 23. For more on the Constituent Assembly, see generally CARTER CTR., *REPORT ON THE NATIONAL CONSTITUENT ASSEMBLY OF THE REPUBLIC OF ECUADOR* (Jan. 2008), [http://www.cartercenter.org/resources/pdfs/news/peace\\_publications/americas/english\\_The\\_Carter\\_%20Center\\_Report1\\_Ecuador\\_Constituent\\_Assembly\\_January08.pdf](http://www.cartercenter.org/resources/pdfs/news/peace_publications/americas/english_The_Carter_%20Center_Report1_Ecuador_Constituent_Assembly_January08.pdf).

assembly members, and six representatives of migrants living outside the country were selected to serve in the CA, with the President's political movement, the *Patria Activa y Soberana* (PAIS) coalition, winning 80 of the 130 elected seats.<sup>28</sup>

Article 422 originated within the crucial working committee of the CA entitled "Sovereignty, International Relations, and Latin American Integration,"<sup>29</sup> which drafted rules to place appropriate strictures upon the government's capacity to cede sovereignty. With their progress observed closely by the media,<sup>30</sup> the working committee sought to craft constitutional constraints on the executive's ability to sign treaties in several contexts. The rules placed

brakes on the executive's ability to enter into treaties . . . strongly opposed by the public, such as . . . any future attempt to sign a free-trade agreement with the United States, something that previous governments pursued even in the face of strong opposition from the indigenous movement, small farmers, and environmentalists.<sup>31</sup>

The Committee was comprised of PAIS members who deeply resented previous governments' systematic disregard for the interests of the Ecuadorean citizenry in favor of neoliberal investment interests.<sup>32</sup> Their position toward international investor-state arbitration was to prohibit it altogether.<sup>33</sup> The government, in this way, nodded to the principles of the Calvo Doctrine, which considered suits between private parties and governments litigated in international fora as representing an impermissible infringement on the state's national sovereignty.<sup>34</sup> The working committee, then, wished to forge, within the smithy of the 2008 Constitution, the means to "ensure the observance of constitutional principles in economic policy."<sup>35</sup> And, accordingly, the finalized text of Article 422 was held the appropriate mechanism to do so.<sup>36</sup>

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<sup>28</sup> See CARTER CTR., *supra* note 25, at 4.

<sup>29</sup> See KATIA FACH GOMEZ, ECUADOR'S ATTAINMENT OF *SUMAK KAWSAY* AND THE ROLE ASSIGNED TO INTERNATIONAL ARBITRATION (Aug. 4, 2011) (draft at 4), available at [http://papers.ssm.com/sol3/papers.cfm?abstract\\_id=1904715](http://papers.ssm.com/sol3/papers.cfm?abstract_id=1904715). Also, the success of the working group is surprising: halfway into the Assembly's six-month tenure, the only committee to have managed to approve constitutional articles for consideration by the plenary was the Committee on Sovereignty, International Relations and Latin American Integration. See Ecuador: The Constituent Assembly's Three Month Benchmark, WikiLeaks (Mar. 6, 2008), [https://wikileaks.org/plusd/cables/08QUITO223\\_a.html](https://wikileaks.org/plusd/cables/08QUITO223_a.html).

<sup>30</sup> The working group was observed in the international media, *see, e.g.*, Emmanuel Gaillard, *Anti-Arbitration Trends in Latin America*, 239 N.Y. L.J. No. 108 (Jun. 5, 2008), as well as its domestic counterpart, *see, e.g.*, *Solo los arbitrajes de la región serán admitidos por la Constitución*, Editorial, EL COMERCIO, May 21, 2008 (translated as "Only Arbitrations in The Region Will Be Supported by the Constitution").

<sup>31</sup> Collins, *supra* note 23.

<sup>32</sup> *See id.*

<sup>33</sup> See Eric Gillman, *The End of Investor-State Arbitration in Ecuador? An Analysis of Article 422 of the Constitution of 2008*, 19 AM. REV. INT'L ARB. 269, 291 (2008).

<sup>34</sup> *See id.*

<sup>35</sup> Claudia Müller-Hoff, *How Does the New Constitutionalism Respond to the Human Rights Challenges Posed by Transnational Corporations?*, in *NEW CONSTITUTIONALISM IN LATIN AMERICA: PROMISES AND PRACTICES* 333, 333 (Detlef Nolte & Almut Schilling-Vacaflor eds., 2012).

<sup>36</sup> See GOMEZ, *supra* note 29, at 5, n.13.



Note that within the Ecuadorian context those constitutional principles mentioned above include norms consistent in large part with the achievement of “Sumak Kawsay” (“SK”), or the Quechuan concept of “Buen Vivir,” or “Good Living.”<sup>37</sup> SK is understood as a “system of . . . living based on the communion of humans and nature and on the spatial-temporal harmonious totality of existence.”<sup>38</sup> As one commentator notes:

In all, Sumak Kawsay, or its Spanish translation, is mentioned 25 times in Ecuador’s Constitution. Most importantly, it is mentioned in the Constitution’s prologue in the context of the country wanting to create “a new form of citizen coexistence, in diversity and harmony with nature, to achieve “living well”, Sumak Kawsay”. The concept has its own chapter with 25 articles describing to Ecuadorians their basic rights associated with it, but no clear definition is given. The rights include the right to live in a healthy environment, rights to education, access to water, freedom of association, and access to health.<sup>39</sup>

Per this perspective, Article 422 functions as the constitutional mechanism aimed at unhinging the country from the dominant ISDS paradigm—that, in turn, serves as one step in a larger, multifaceted approach in achieving the “people’s right” to SK.<sup>40</sup>

## II. The Initial Impacts of Article 422

This paper turns next to the initial enthusiasm surrounding the passage of Article 422. Each of Ecuador’s three government branches employed the article in different ways. The summation of their combined efforts, all aimed toward the goal of detaching the country from the International Investment Treaty framework and dominant ISDS paradigm, remained insufficient. A comparative bookend sketch of the government’s initial responses illustrates this point.

Article 422 (within the domestic framework of the country’s government, i.e. Ecuador’s *governance vis-à-vis foreign investment*) initiated a reflexive hardening of the government against Investor-State Arbitration. The executive branch led the charge. After an approved plenary request to the Legislative and Audit Commission<sup>41</sup> and a nearly unanimous vote in the National

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<sup>37</sup> Carlos Zorrilla, *The Struggle over Sumak Kawsay in Ecuador*, UPSIDE DOWN WORLD (Apr. 22, 2014), <http://upsidedownworld.org/main/ecuador-archives-49/4810-the-struggle-over-sumak-kawsay-in-ecuador>. See generally DAVID SCHNEIDERMAN, RESISTING ECONOMIC GLOBALIZATION: CRITICAL THEORY AND INTERNATIONAL INVESTMENT LAW 146–50, 156–58 (2013).

<sup>38</sup> Zorrilla, *supra* note 37.

<sup>39</sup> *Id.*

<sup>40</sup> This right to SK, as such, is a life “not based necessarily on an economic-materialistic vision of life and living . . . but rather one based on cultural understandings of what that living well means.” *Id.*

<sup>41</sup> See Registro Oficial No. 632 – Lunes 13 de Julio de 2009 (R.O. 632, July 13, 2009) (Ecuador) [hereinafter *Registro Oficial*], available at <http://www.derechoecuador.com/productos/producto/catalogo/registros-oficiales/2009/julio/code/19315/registro-oficial-no-632---lunes-13-de-julio-de-2009> (“[T]hat the plenary of the Legislative and Oversight Commission, at the 44<sup>th</sup> meeting of June 12, 2009, resolved to approve the complaint [against ICSID].” (translation by author)).

Assembly,<sup>42</sup> President Correa signed Executive Decree 1823, planning to end the country's foreign commitment as signatories to the ICSID Convention.<sup>43</sup> Following the Decree's declaration of "the termination of the Convention on Settlement of Investment Disputes," notice of the denunciation was served upon ICSID on July 6, 2009. After the required six-month exit period,<sup>44</sup> Ecuador ceased to be a party to the international convention.<sup>45</sup> This exit *un*-recognized the jurisdiction of ICSID to resolve international investment claims involving Ecuador.<sup>46</sup>

On September 28, 2009, by way of Official Letter No. 4766-T-09-2216 GMS, Correa also requested that the National Assembly denounce various BITs on grounds that they contained provisions contrary to Article 422.<sup>47</sup> The National Assembly returned this request on procedural grounds—Correa's request required the country's Constitutional Court to determine the treaties as unconstitutional. Starting in June 2010, the Court began to issue a series of judgments declaring the unconstitutionality of articles within the BITs with the United Kingdom, Germany, China, Finland, Sweden, the Netherlands, and France.<sup>48</sup> For the majority of the BITs submitted to the Court, the provisions in contest were the BIT's dispute resolution clauses that, when constructed to submit putative disputes to ICSID or other ISDS-dominant arbitration schemes, directly conflicted with Article 422 of the 2008 Constitution.<sup>49</sup> Since then, the Court has also added to the list similar provisions under BITs entered into agreement with, *inter alia*, Venezuela, Chile, Switzerland, Canada, the United States, Argentina, Bolivia, Peru, Spain, and Italy.<sup>50</sup> Note, though,

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<sup>42</sup> See *Ecuador renunció ayer al Ciadi por decisión de la Comisión Legislativa*, EL UNIVERSO, June 13, 2009, <http://www.eluniverso.com/2009/06/13/1/1355/0A1B8191EE3E40D5A2337486894A24F7.html> ("50 votes in favor, 4 votes against and five abstaining votes." (translation by author)).

<sup>43</sup> See *Registro Oficial*, *supra* note 41.

<sup>44</sup> See Timothy G. Nelson & Marco E. Schnabl, *Ecuador Moves to Denounce and Leave the ICSID Convention, Attempts to Curtail Investor-State Arbitration Rights*, LATIN AM. L. & BUS. REP., June 30, 2009, at 18, available at [https://www.skadden.com/sites/default/files/publications/Publications1854\\_0.pdf](https://www.skadden.com/sites/default/files/publications/Publications1854_0.pdf).

<sup>45</sup> See Eduardo Carmigniani et al., *Arbitration 2016*, LATIN LAWYER (Apr. 13, 2016), <http://latinlawyer.com/reference/topics/45/jurisdictions/32/ecuador>; see also Nelson & Schnabl, *supra* note 44, at 18–19.

<sup>46</sup> See Nelson & Schnabl, *supra* note 44, at 18. Regardless, as discussed in the next section, such a denunciation failed to remove Ecuador from on-going arbitral proceedings by ICSID tribunals.

<sup>47</sup> See AC GARCÉS DEL POZO, EL ALCANCE DE LA PROHIBICIÓN DEL ARTÍCULO 422 DE LA CONSTITUCIÓN COMO MECANISMO PARA BLINDAR AL ESTADO DEL ARBITRAJE INTERNACIONAL 67 (Aug. 2011) (unpublished LL.B. thesis, Universidad San Francisco De Quito), available at <http://repositorio.usfq.edu.ec/bitstream/23000/1214/1/101030.pdf> ("President Rafael Correa made a request to the National Assembly for denouncing the Bilateral Reciprocal Protection of Investments that Ecuador signed with Finland, Sweden, Canada, China, Netherlands, Germany, France, the United Kingdom and Ireland, Argentina, Chile, Venezuela, Switzerland and the United States." (translation by author)).

<sup>48</sup> See GOMEZ, *supra* note 29, at 18, n.49; see also U.N. CONF. TRADE & DEV., WORLD INVESTMENT REPORT 2008: TRANSNATIONAL CORPORATIONS AND THE INFRASTRUCTURE CHALLENGE 65 nn.107, 108 (2008); KARSTEN NOWROT, INTERNATIONAL INVESTMENT LAW AND THE REPUBLIC OF ECUADOR: FROM ARBITRAL BILATERALISM TO JUDICIAL REGIONALISM 6 (MLU Institut für Wirtschaftsrecht 2010), available at [http://telc.jura.uni-halle.de/sites/default/files/altbestand/Heft\\_96.pdf](http://telc.jura.uni-halle.de/sites/default/files/altbestand/Heft_96.pdf).

<sup>49</sup> See *id.*

<sup>50</sup> See Álvaro Galindo & Francisco Endara, *Ecuador, in* RECOGNITION AND ENFORCEMENT OF INTERNATIONAL COMMERCIAL ARBITRAL AWARDS IN LATIN AMERICA: LAW, PRACTICE AND LEADING CASES 121, 123 n.12 (Omar E. García-Bolívar & Hernando Otero eds., 2014). For the most recent account of the Constitutionality of Ecuador's BITs as compiled within the recently leaked document of the Commission for Citizen Integral Audit of the Treaty of

that the government and Court's usage of Article 422 as a launching point for the declaration of unconstitutionality regarding their international agreements did not realize in a full repudiation of their obligations, several of which remain on the books and in force,<sup>51</sup> as the next section will touch upon.

The fervor behind Article 422 continues to the present. In May 2013, Correa created, by executive decree,<sup>52</sup> a joint government-civil society commission to audit Ecuador's bilateral investment treaties and the country's obligations under the international arbitration system.<sup>53</sup> The Commission, referred to as CAITISA,<sup>54</sup> was comprised of a mixture of investment lawyers, civil society representatives, and government officials. Following its launch in October 2013, CAITISA set to its task of determining the "legality, legitimacy and lawfulness of investment treaties, rules and Ecuador's commitments, and the possible inconsistencies and irregularities in the decisions of arbitration tribunals that . . . caused negative impacts to the Ecuadorean state."<sup>55</sup> It is important to note, though, that the majority (eight of twelve individuals) of the Commission's composition came from outside the domestic government<sup>56</sup> and—surprisingly, perhaps—a higher percentage were non-Ecuadorians than natives.<sup>57</sup>

At first glance, the fact that the Ecuadorian government needed to establish a Commission to review BITs and the ISDS framework *in early 2013* is not readily explainable from a legal (domestic) or institutional standpoint. For, beginning in 2008, Ecuador's Constitutional Court started reviewing the ISDS framework under the power granted to it by the country's constitution. The Court already served as an apex judicial entity equipped with sufficient review powers to deal away with the country's entire BIT lattice.<sup>58</sup> In only two years' time, the same Constitutional

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Reciprocal Protection of Investments and the System of International Arbitration Responsible Investment, see COMISIÓN PARA LA AUDITORÍA INTEGRAL CIUDADANA DE LOS TRATADOS DE PROTECCIÓN RECÍPROCA DE INVERSIONES Y DEL SISTEMA DE ARBITRAJE EN MATERIA DE INVERSIONES, CAITISA CONCLUSIONES (Dec. 2015), available at [https://issuu.com/periodicodiagonal/docs/conclusiones\\_caitisa](https://issuu.com/periodicodiagonal/docs/conclusiones_caitisa) [hereinafter CAITISA CONCLUSIONES].

<sup>51</sup> Compare BURGHARD ILGE, TO CHANGE A BIT IS NOT ENOUGH: ON THE NEED TO CREATE SOUND POLICY FRAMEWORKS FOR INVESTMENT 18 (2015), [http://www.s2bnetwork.org/wp-content/uploads/2015/09/To\\_Change\\_a\\_BIT\\_is\\_not\\_enough\\_sept\\_2015\\_HR.pdf](http://www.s2bnetwork.org/wp-content/uploads/2015/09/To_Change_a_BIT_is_not_enough_sept_2015_HR.pdf), with ECUADOR BITS, UNCTAD INVESTMENT POLICY HUB, <http://investmentpolicyhub.unctad.org/IIA/CountryBits/61> (last visited May 15, 2016).

<sup>52</sup> Créase La Comisión Para La Auditoría Integral Ciudadana De Los Tratados De Protección Recíproca De Inversiones Y Del Sistema De Arbitraje Internacional En Materia De Inversiones Caitisa (R.O. 958, May 21, 2013) (Ecuador), available at <http://decretos.cege.gob.ec/decretos/decretos.aspx?id=2009> ("Decree 1506"; search by selecting "Período 2009-2013," entering "1506" for "Número de Decreto" and hitting search field).

<sup>53</sup> See U.N. CONF. TRADE & DEV., TOWARDS A REPOSITORY OF POLICY OPTIONS FOR IIA REFORM (2015), <http://unctad-worldinvestmentforum.org/wp-content/uploads/2015/03/CAITISA.pdf>.

<sup>54</sup> The acronym results from the organization's Spanish name. See Andres G. Arauz, *Ecuador's Experience with International Investment Arbitration*, SO. CTR. INV. POL'Y BRIEF, Aug. 2015, at 1, available at [http://www.southcentre.int/wp-content/uploads/2015/08/IPB5\\_Ecuador%E2%80%99s-Experience-with-Intl-Investment-Arbitration\\_EN.pdf](http://www.southcentre.int/wp-content/uploads/2015/08/IPB5_Ecuador%E2%80%99s-Experience-with-Intl-Investment-Arbitration_EN.pdf).

<sup>55</sup> See Arauz, *supra* note 54.

<sup>56</sup> See U.N. CONF. TRADE & DEV., *supra* note 53.

<sup>57</sup> See *id.*

<sup>58</sup> Under the 2008 Constitution, constitutional judgments contain mandatory binding precedent upon *all* Ecuadorian legislation, see 3RD CONGRESS WORLD CONF. ON CONST. JUSTICE, QUESTIONNAIRE – REPLY BY THE CONSTITUTIONAL COURT OF ECUADOR 4 (Oct. 1, 2014),

Court, a court with “the power to declare the unconstitutionality of laws through constitutional challenges, consultations of norms, and automatic constitutionality control,”<sup>59</sup> had already wielded Article 422 in its judicial review of Ecuador’s BIT and declared certain provisions of several BITs unconstitutional.<sup>60</sup> A separate institution housed in the executive, separate from the judicial branch, would seem superfluous by 2013—had the government followed through on the Constitutional Court decrees and terminated the then-unconstitutional framework of BITs.

Nevertheless, the executive administration created CAITISA, which set about diligently “reviewing” the country’s BITs and determining the effects ISDS had on Ecuador. This paper posits that the establishment of CAITISA parallels a theme running throughout this paper: Ecuador’s “re-”reviewing of its BIT commitments was a doubling down by the government—and perhaps a necessary one—to stir up the necessary political resolve to resist foreign investment tribunals and the trappings of the international dispute settlement system.

For, as far as public international law goes, Ecuador remains a party to several BITs to this date—treaties and treaty clauses that remain *in force* despite their unconstitutional nature at home.<sup>61</sup> This fact comes as a surprise, given Ecuador’s decision in 2008 to inform nine countries—Cuba, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Romania and Uruguay—of its denunciation of the BITs concluded with them,<sup>62</sup> and given that it followed suit in 2010 by concluding its agreement with Finland to follow the Constitutional Court’s declaration of its unconstitutionality.<sup>63</sup> Nevertheless, perhaps against expectation, Ecuador did not likewise follow other, similar proclamations of the Court, and forewent unilaterally terminating *each and every* BIT relationship declared unconstitutional by the Court,<sup>64</sup> leaving several such BITs in force. Those agreements, which are to the present day still in force, continue to subject Ecuador to the

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[http://www.venice.coe.int/WCCJ/Seoul/docs/Ecuador\\_CC\\_reply\\_questionnaire\\_3WCCJ-E.pdf](http://www.venice.coe.int/WCCJ/Seoul/docs/Ecuador_CC_reply_questionnaire_3WCCJ-E.pdf), which seems to suggest that the unconstitutional declaration by the Court of the bilateral investment treaties precludes any need to create a separate entity to review the BITs.

<sup>59</sup> *Id.* at 1. Note that the Constitutional Court established by the 2008 Constitution is unlike the previous document’s Constitutional Tribunal, which merely “issued resolutions (that did not constitute precedent) and did not have judges but tribal members.” *See id.* at 3.

<sup>60</sup> *See* Galindo & Endara, *supra* note 50, at 123.

<sup>61</sup> *See* ECUADOR BITS, *supra* note 51 (listing all BITS that are still in force globally); *see also* NOWROT, *supra* note 48, at 25.

<sup>62</sup> *See* Karsten Nowrot, *Termination and Renegotiation of International Investment Agreements*, in SHIFTING PARADIGMS IN INTERNATIONAL INVESTMENT LAW: MORE BALANCED, LESS ISOLATED, INCREASINGLY DIVERSIFIED 227, 233 (Steffen Hindelang & Markus Krajewski eds., 2016) [hereinafter SHIFTING PARADIGMS].

<sup>63</sup> *See id.*

<sup>64</sup> Note that the avenues, as a matter of international investment law, available to Ecuador—regarding BITs of which it no longer wished to be a part—are few. Upon a finding of incompatibility between the ISDS arbitration clause and Article 422 by the Constitutional Court, the administration would presumably either need to renegotiate the BIT relationship with the appropriate state, or unilaterally terminate it. Both are costly ventures, as seen in Ecuador’s experience, described below. For a brief description of the options available to a nation who wishes to amend an investment treaty, and accompanying theoretical framework explaining those options, *see generally* Yoram Z. Haftel & Alexander Thompson, *When Do States Renegotiate International Treaties? The Case of Bilateral Investment Treaties* (Working Paper Univ. Md., 2013), available at

[http://www.cidcm.umd.edu/workshop/papers/Thompson\\_CIDCM\\_2013.pdf](http://www.cidcm.umd.edu/workshop/papers/Thompson_CIDCM_2013.pdf).

dominant international dispute settlement paradigm—notwithstanding official declarations by the country’s highest Court of their unconstitutionality and conflict with Article 422.<sup>65</sup>

An exploration into the possible constitutional reasoning why such treaties remain in force follows in the next section—and is supported primarily by a textual analysis of Article 422 itself. Before turning to the analytic exercise of interpreting constitutional drafting, however, this paper makes a minor aside. It seeks to soften, in some ways, the stark, largely defiant lattice of investment treaties that Ecuador maintains on the books despite their constitutionally outstanding nature, by briefly outlining the touch political environs of present-day Ecuador.

Tough political and diplomatic choices face the President and National Assembly of a developing South American oil-rich, but economically diversity-poor, country. Both non-judicial branches walk a dangerous tightrope. Ecuador’s internal economy—heavily dependent on investments in its extractive industry<sup>66</sup>—bestows vast significance upon investment treaties.<sup>67</sup> Faced with the decision to either unilaterally terminate or renegotiate the majority of investment treaties currently on the books,<sup>68</sup> the government may seek to avoid making that choice at all costs. Unilateral termination of vital investment treaties would prove disastrous to an already-volatile economy—while renegotiation, the other option typically available to states seeking to amend their investment treaties, is similarly difficult.<sup>69</sup> This problem compounds further given the specific importance that investors place on the protections and procedural rights of BIT clauses making available international investment treaty arbitration.<sup>70</sup> At least in this narrow case,<sup>71</sup> not following the orders of the Constitutional Court to remove unconstitutional BIT clauses might prove politically less

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<sup>65</sup> Compare Galindo & Endara, *supra* note 50, with ECUADOR BITS, *supra* note 51. Comparing the lists and focusing upon the lengthy list on the UNCTAD Investment Policy Hub page of still “in force” agreements, reveals that several of the Court decisions have not been heeded; namely, United Kingdom, China, Sweden, the Netherlands, France, Venezuela, Chile, Switzerland, Canada, the United States, Argentina, Bolivia, Peru, Spain, and Italy all remain on the books, despite the proclamation of the Court of the relevant parts of each agreement as unconstitutional.

<sup>66</sup> See Mary Elizabeth Whittemore, *The Problem of Enforcing Nature’s Rights Under Ecuador’s Constitution: Why the 2008 Environmental Amendments Have No Bite*, 20 PAC. RIM L. & POL’Y J. 659, 662–63; see also SCHNEIDERMAN, *supra* note 37, at 152–56 (describing how Correa saddled up in 2011 to sign the country’s “first large-scale mining project with Chinese-owned Ecuatoriente, agreed to the construction of a hydropower project with China’s Harbin Electric International, and signed contracts with US-based Schlumberger and Argentina’s Tecpetrol worth US \$1.7 billion to develop mature oil reserves” (internal citations omitted)).

<sup>67</sup> See Michelle Caruso-Cabrera, *Ecuador’s Rafael Correa Pushes for Foreign Investment*, CNBC (Oct. 15, 2015), <http://www.cnbc.com/2015/10/15/ecuadors-rafael-correa-pushes-for-foreign-investment.html>.

<sup>68</sup> See ECUADOR BITS, *supra* note 51.

<sup>69</sup> See note 63.

<sup>70</sup> See Susan D. Franck, *Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 337, 340 (2007) (suggesting that the availability of investment treaty arbitration may not directly trigger foreign direct investment but it serves as one factor in an investors decisional matrix).

<sup>71</sup> And, with recourse to no other consequences besides those contemplated in the above paragraph.

difficult for the Executive than alternatively following through on the former's constitutional decree.<sup>72</sup>

Ecuador's government, thus, approaches the role of investment treaties in its national economy with pragmatism. It makes the correct political movement (with alacrity), calling for constitutional provisions to be placed inside the 2008 constitution, forcing itself to refrain from "ceding sovereignty." In this sense, the government declares itself bound, or "pre-committed," to retaining its own sovereignty: all it needs in future investment treaty negotiations is to reference its national constitution—which might provide a bargaining chip on the table.

This decision is easier for the executive to make than actually scrubbing the country clean of its international obligations. Such a move would expend endless amounts of international good will and *will achieve* draining the well of foreign investment—the latter an obvious economic disaster. Alternatively, the call for a revision of the constitution, complete with an anti-investment dispute settlement article, demonstrates commitment without having to expend effort internationally.

The whole process<sup>73</sup> of submitting existing BITs to the Constitutional Court for judicial review is similarly pragmatic. As the Court proclaims certain clauses of agreements unconstitutional, the government can curry favor domestically with its general voting constituencies while neglecting to accompany its domestic action with any corresponding alteration in the international framework of investment treaty—so long as it hints that it is seeking to "renegotiate" the treaties as such. These renegotiations are elusive, however.<sup>74</sup> As the example of negotiations between Ecuador and the United States demonstrates,<sup>75</sup> the government can ably drag its feet when it comes to following through with constructing viable alternatives—to the point that the government's inaction *de facto*

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<sup>72</sup> This is to suggest that the gambit that the President/executive branch (and to a lesser extent, the legislature) runs—by following through and terminating/amending the investment treaties—is greater than the gambit it runs when it decides to disregard the declaration of unconstitutionality. The first ends assuredly in a damaged domestic economy, and ensures the public voting them out of office. In this regard, the executive might have calculated that it would face less by answering to the apex judicial institution, the Constitutional Court, if ever it were to seek to enforce its decisions. This last observation hints at a sad reality of the Ecuadorian judiciary worth mentioning. The country's Constitutional Court, only years into its existence (i.e. the 2008 constitution created the institution), has already obtained a less-than-stellar track record, and has been seen as unreliable for the adjudging of constitutional grievances. *See* Whittemore, *supra* note 67, at 671–75 (noting infrastructural problems within the Court that has made it "vulnerable and unstable," and which have "eroded judicial independence" in the institution).

<sup>73</sup> Or, cynically, the whole "theatrics" of Ecuador's judicial review.

<sup>74</sup> This point lends itself heavily from the observations made by Van Harten. "[O]bviously someone negotiated the [investment] treaties with a degree of appreciation of their consequence and recommended their approval by ministers or by the governing party in the legislature." GUS VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* 178 (2007). In a similar way, someone is (re)negotiating the treaties, with an appreciable understanding of the consequences of not reaching a final amending to the BIT, with a possible eye on maintaining the status quo.

<sup>75</sup> In the U.S. State Department's 2015 Investment Climate Report—the latest Report available at the time of writing—the putative "renegotiation" of the United States-Ecuador BIT was declared non-existent. *See* U.S. DEP'T ST., *ECUADOR INVESTMENT CLIMATE STATEMENT 2015* (June 2015), <http://www.state.gov/documents/organization/241754.pdf>. Also note that declaration of "non-existence" comes from the perspective of the United States, the nation/negotiating entity to which the Ecuadorian government has been mandated to renegotiate (i.e. by the Court's declaration of unconstitutionality).

maintains the status quo.<sup>76</sup> That these negotiations are rarely made public, the government can declare its public intention without needing to enact any change.

### III. The Inability of Article 422 to “Re-Statify” ISDS

This paper now turns to the text of Article 422. As written, the article is unable to “re-statify” international ISDS for Ecuador. It does not remove Ecuador from ongoing proceedings, does not affirmatively remove active bilateral investment treaties, and ambiguously deals with putative treaty claims arising from the country’s investment treaty obligations. And, most importantly, Article 422 leaves open the backdoor to *regional* arbitration under an exception found in 422(2). In each of these ways, Ecuador’s constitutional mechanism’s own language prevents the country from “re-statifying” international ISDS. Accordingly, Article 422 serves only as a partial rejection of investor-state arbitration: it fails to completely unyoke the country from the jurisdiction of outside investment arbitration bodies.

The next section builds out this claim by exploring four distinct textual aspects of the article<sup>77</sup> left unaccounted for by the CA drafters, each of which detracts from its motivating goal of resisting the dominant ISDS paradigm.

#### A. *Article 422’s inability to remove Ecuador from ongoing, already-initiated arbitration proceedings*

The easiest example of the above claim rests in existence of numerous outstanding ICSID claims brought against Ecuador. At the time of writing, fourteen cases against either the Republic itself or its national public sector entities are still meandering through the ICSID’s arbitration process, often taking circuitous routes to completion.<sup>78</sup> These cases, though admittedly outside the crosshairs of Article 422, keep alive the specter of neoliberalism. As the arbitration proceedings progress, each step invites Ecuador’s government and citizens to unwelcome reminders of the country’s unsuccessful decoupling from the dominant ISDS paradigm. Cases initiated prior to 2008, marking the passage of Article 422, cannot be touched nor constitutionally resisted on grounds of the constitutional mechanism.<sup>79</sup>

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<sup>76</sup> See *id.* (announcing, from the U.S. State Department to United States investors, the safe nature of investment in the Ecuadorian economy).

<sup>77</sup> Note that this piece is not the first to have attempted detailed analyses of the entire article’s text, which is deeply telling. Constructions of the text, along with legal interpretations and cultural implications have been considered thoroughly elsewhere as well. See, e.g., GOMEZ, *supra* note 29, at 6–14.

<sup>78</sup> See *ICSID Pending Cases*, INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES, [https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx\(check “Ecuadorian” in “Respondent\(s\)Nationality\(ies\)” field; click search\)](https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx(check+“Ecuadorian”+in+“Respondent(s)Nationality(ies)”+field;+click+search)) (last visited May 15, 2016).

<sup>79</sup> This mostly self-apparent observation is buttressed by the norm of investment tribunal jurisdiction that states that consent (actual included) to the settlement of a dispute is the touchstone to jurisdiction. See Sadie Blanchard, *State Consent, Temporal Jurisdiction, and the Importation of Continuing Circumstances Analysis into International*

*B. Article 422's silence regarding retroactive application of its prohibition on ceding sovereignty or of any requirement to affirmatively remove existing bilateral investment treaties that directly contradict 422(1)*

In its strongest sense, the text of article 422(1) serves only as an affirmative prohibition *prospectively*. Plainly, it declines the option for the government to offer to cede “sovereign jurisdiction” in future investment treaties. As such, the article operates as an active restriction on Ecuador only from entering into such treaties that would then, at that point, obligate the state to relinquish sovereign jurisdiction.

Tellingly, the article does not make clear its intentions for treaties that are not prospective, but, instead, are in force *at the moment when the article passes into existence*.<sup>80</sup> And, nowhere does its prohibition extend to treaties or international instruments that have already been entered into or given force prior to the passage of Article 422. In effect, this means that the article does not contemplate international investment treaties that entered into force before it, itself, had

For, as written, Article 422 is *not* self-executing. It lacks any interpretive, non-preambulatory text demanding real action from any governmental institution—beyond that they refrain from future action. It does not charge any single branch with animating Article 422; thus, no single branch will expend political will to give it bite.<sup>81</sup>

President Correa’s request to the National Assembly to invalidate the BITs on the books<sup>82</sup> was returned for similar reason. When the Executive branch presented the request, the legislature stalled. The momentum behind the President’s request (i.e. an expenditure of political capital) was ultimately thwarted. The legislature hid behind their own lack of mandate, and hung Article 422 on the hook of its own ambiguous, unclear text. Instead of acting on the request by the Correa, they instead looked to the judiciary and ably refrained from acting. They claimed the insufficient procedural go-ahead from the judiciary, and left the existing treaties in play.

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*Investment Arbitration*, 10 WASH. U. GLOBAL STUD. L. REV. 419, 423 (2011); *see also* CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES art. 25, Mar. 18, 1965, 575 U.N.T.S. 159.

<sup>80</sup> As pointed out previously, the text leaves, then, an ambiguity concerning periods of time prior to its own passage (pre-2008).

<sup>81</sup> Without such a mandate, the Constitution requires implementing legislation to retroactively apply it. At present, Ecuador lacks any such legislation. *Cf. Omphemetse S. Sibanda, The Promotion and Protection of Foreign Investment Law Bill: Denunciation of BITs, and the De-Internationalisation of Investor-State Arbitration in South Africa*, 4 BUS. & MANAGE. REV. 159, 160 (2014). Ecuador, in this manner, stands in marked contrast with South Africa, where

on 4 November 2013 South Africa published for public comment the Promotion and Protection of Investment Bill (Bill). Part of the process for a legislative approach toward FDI protection is the termination of BITs, and the restriction, implied though, on the availability of international arbitration of state-investor disputes. The Bill stood in draft form and was open to public comment until 1 February 2014. *Id.*

<sup>82</sup> *See* body text accompanying *supra* notes 47–51, 60–64.



The majority of the country's major investment agreements are still able to remain in force for similar reasons—despite the Constitutional Court's declaration of unconstitutionality.<sup>83</sup> For Ecuador, not actively removing BITs amounts to residual jurisdictional exposure from the investment treaties that remain in force to the present day. At present, the country *still faces* exposure to the dominant ISDS paradigm.

The exposure is also exacerbated because of the gray zone between Ecuador's denunciation of the ICSID Convention on one hand and the state's BIT's provision for ICSID arbitration on the other.<sup>84</sup> Executive Decree 1823 (i.e. Ecuador's unilateral denunciations, as a host state, of the ICSID Convention) did not invalidate the grounds on which investment contract and commercial claims can be brought to ICSID. Many BIT agreements have recourse to ICSID arbitration as clauses nestled within the dispute resolution provisions of the BIT agreement. Investors might still pursue claims under them, relying on the treaty language of the existing BITs, thus bringing Ecuador before a tribunal of the dominant ISDS paradigm.

More importantly, in this sense Article 422 makes claims for future, putative commercial and contractual rights under them still actionable. Ultimately, foreign investors can continue taking Ecuador to ICSID arbitration for investments that occurred after 2008.<sup>85</sup> Any surviving Ecuador BITs to the present opens the door to the dominant ISDS paradigm for investors' future contracts and commercial dispute claims that would have been foreclosed otherwise. Phrased differently: treaties currently in force provide an avenue for relief that is above and beyond the investor's default recourse, had that same treaty not been in force with only a contractual agreement binding Ecuador to the investment.<sup>86</sup>

The current investment trade relationship of Ecuador—taken from the perspective of those states which still have existing BITs with Ecuador on the books—serves as an important datum. Consider the country's relationship with the United States, one of its largest trading partners. In its Investment Climate Statements for the period spanning 2010–14,<sup>87</sup> the United States State

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<sup>83</sup> See CAITISA CONCLUSIONES, *supra* note 50.

<sup>84</sup> Which is to say: Ecuador's denunciation of the ICSID occurred under Article 71 under the Convention. Article 72 of the Convention, which animates and helps interpret Article 71, is ambiguous when it outlines the effects of denunciations. This ambiguity makes relevant the text of surviving BITs—especially for Ecuador, with its handful. See CHRISTIAN TIETJE ET AL., ONCE AND FOREVER? THE LEGAL EFFECTS OF A DENUNCIATION OF ICSID 6 (Martin Luther Halle-Wittenberg School of Law, Inst. Of Econ. L. Res. Paper 74, March 2008), <http://www.wirtschaftsrecht.uni-halle.de/sites/default/files/altbestand/Heft74.pdf>. But see CHRISTOPHER F. DUGAN ET AL., INVESTOR-STATE ARBITRATION 236–41 (2008).

<sup>85</sup> See Fernando Cabrera Diaz, *Ecuador Prepares for Life After ICSID, While Debate Continues over Effect of Its Exit From the Centre*, INV. TREATY NEWS (Sept. 2, 2009), <https://www.iisd.org/itn/2009/08/28/ecuador-prepares-for-life-after-icsid-while-debate-continues-over-effect-of-its-exit-from-the-centre/>; see also CHRISTIAN TIETJE ET AL., *supra* note 92.

<sup>86</sup> See JAN OLE MOSS, THE IMPACT OF INVESTMENT TREATIES ON CONTRACTS BETWEEN HOST STATES AND FOREIGN INVESTORS 81–138 (2011).

<sup>87</sup> Compare 2010 Investment Climate Statement – Ecuador, U.S. DEP'T ST. (2010), <http://www.state.gov/e/eb/rls/othr/ics/2010/138060.htm>, with 2011 Investment Climate Statement – Ecuador, U.S. DEP'T ST. (2011), <http://www.state.gov/e/eb/rls/othr/ics/2011/157270.htm>, 2012 Investment Climate Statement – Ecuador, U.S. DEP'T ST. (2012), <http://www.state.gov/e/eb/rls/othr/ics/2012/191141.htm>, 2013 Investment Climate

Department maintains the following to its investors with regards to the BIT relationship between the United States and Ecuador:

The existing U.S.-Ecuador Bilateral Investment Treaty (BIT) provides for binding international arbitration of disputes between the government and investor *in a venue of the investor's choosing, including the ICSID Convention*. Given Ecuador's 2009 withdrawal from the ICSID Convention, alternative arbitration venues available to U.S. investors include: ICSID's Additional Facility; ad hoc arbitration under UNCITRAL rules; and arbitration administered by any other arbitral institution to which the parties agree. Should the Ecuadorian government terminate the U.S.-Ecuador BIT, the BIT's provisions would be fully in effect for one year from the date of termination notice, and for an additional 10 years for investments existing on the one year anniversary of the termination notice.<sup>88</sup>

Though ICSID's Additional Facility arbitration and ad hoc arbitration under United Nations Commission on International Trade Law (UNCITRAL) rules are not as expeditious for the receipt of the recognition and enforcements of judgment for arbitrated claims compared with the arbitration available to parties adhering to the ICSID convention,<sup>89</sup> they certainly qualify in large part as mechanisms of dominant ISDS paradigm—and ones divergent from the spirit of Article 422.

Note that this above analysis stops short of considering the additional exposure brought about by legal mechanisms that seek to limit the ability of states to peremptorily revoke the protection offered by investment treaties. These “survival clause” mechanisms, built into most, if not all of Ecuador's BITs,<sup>90</sup> extend possible ICSID arbitration for investors after the state has revoked the treaty—thus increasing Ecuador's potential subjection to ICSID jurisdiction.<sup>91</sup> By virtue of the existence of these provisions, the substantive and procedural guarantees of the respective BITs continues to be effective for a further period of ten to fifteen years from the date of termination

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*Statement – Ecuador*, U.S. DEP'T ST. (2013), <http://www.state.gov/e/eb/rls/othr/ics/2013/204634.htm>, and *2014 Investment Climate Statement – Ecuador*, U.S. DEP'T ST. (2014), <http://www.state.gov/e/eb/rls/othr/ics/2014/227868.htm>. Even in the 2015 Report—the latest Investment Climate Report available to date—the putative “renegotiation” of the US-Ecuador BIT was declared non-existent, and the status quo of the above maintained. See U.S. DEP'T ST., *supra* note 76.

<sup>88</sup> *2014 Investment Climate Statement – Ecuador*, *supra* note 95 (emphasis added).

<sup>89</sup> See CHRISTOPHER F. DUGAN ET AL., *supra* note 92, at 81–90.

<sup>90</sup> See NOWROT, *supra* note 48, at 26–27. As Nowrot explains, the primary reason for the “frequent incorporation of these ‘survival clauses’ lies in the specific character of the kind of economic transactions addressed by international investment agreements. As for an example emphasized by Christoph Schreuer and Rudolf Dolzer, “[m]aking a foreign investment is different in nature from engaging in trade transactions. Whereas a trade deal typically consists in a one-time exchange of goods and money, the decision to invest in a foreign country initiates a long-term relationship between the investor and the host state.” . . . [T]he validity of these provisions under current public international law appears to be beyond a reasonable doubt.” *Id.*

<sup>91</sup> See generally James Harrison, *The Life and Death of BITs: Legal Issues Concerning Survival Clauses and the Termination of Investment Treaties*, 13 J. WORLD INV. & TRADE 928 (2012).

with regard to investments made prior,<sup>92</sup> allowing respective foreign investors to launch treaty claims during that period.

*C. Article 422's ambiguity concerning putative treaty claims that arise from Ecuador's investment treaty obligations*

In a manner different than described above, Article 422 also does not shield Ecuador from *treaty* claims from investment treaties that remain in existence post-2008.<sup>93</sup> This category of exposure is separate from the category described in the previous section. Any aforementioned potential claims that Ecuador might face would be brought to an ICSID tribunal (or similar international forum) pursuant to the dispute settlement clause in force (or residually present) within the investment treaty.

This next category of claims that this paper turns to now are a group of second-order claims. They stand as a category of *treaty* claims, brought forth by an investor who asks the tribunal to adjudge whether the host country, in this case Ecuador, breached the investment treaty when it did not provide the protections that it had promised in the treaty mechanism itself, be it either substantive (i.e. in the case of indirect expropriation<sup>94</sup>) or procedural (i.e. in the case of providing for ICSID tribunal arbitration).

In this regard, Article 422(1) has interpretive certainties: it successfully precludes the state from including offers in *future* BITs to arbitrate in the supra-national sphere, while also preventing the state from becoming a *future* member of international organizations that require such arbitration.<sup>95</sup> But, it still has judicially-*un*interpreted ambiguities. These involve the unanswered questions hinted to in the above paragraph of whether Ecuador can be subject to the jurisdiction of arbitral tribunals adjudicating *treaty* claims, regarding international conventions to which it once was a party. Traditionally, this category of treaty claims had been brought alongside (and in addition to) any contractual or commercial claims brought under the mechanism of the investment treaty.<sup>96</sup> But

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<sup>92</sup> See NOWROT, *supra* note 48, at 26–27.

<sup>93</sup> See, e.g., VIENNA CONVENTION ON THE LAW OF TREATIES art. 27, May 23, 1969, 1155 U.N.T.S. 331 (“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”). See generally William W. Park & Alexander A. Yanos, *Treaty Obligations and National Law: Emerging Conflicts in International Arbitration*, 58 HASTINGS L.J. 251 (2006).

<sup>94</sup> See generally SEBASTIÁN LÓPEZ ESCARCENA, *INDIRECT EXPROPRIATION IN INTERNATIONAL LAW* (2014). These types of claims are now being brought creatively against countries, like Ecuador, that have since rescinded their ICSID signatory status. They are occurring commonly in the contexts of regulatory regimes (like tobacco regulations), or sovereign debt default. See David Herlihy et al., *The Increasing Appeal and Novel Use of Bilateral Investment Treaties*, SKADDEN, Apr. 29, 2013, <https://www.skadden.com/insights/increasing-appeal-and-novel-use-bilateral-investment-treaties>.

<sup>95</sup> See GOMEZ, *supra* note 29, at 6.

<sup>96</sup> See Gillman, *supra* note 33, at 295–96. For a background discussion of how investment treaty claims can impact or, in this instant case, give rise to jurisdiction on claims arising between host states and foreign investors, see MOSS, *supra* note 94, at 9–13, 81–138.

now, with Ecuador stepping away from the ICSID convention, Article 422(1) does not deal with putative investors who bring this category of treaty claims solely by itself.

Thus, surviving BITs (with amended investor-state dispute settlement clauses), as well as BITs that Ecuador simply no longer wants to adhere to, provide the potential for claims of this sort brought by investors who wish to demonstrate that Ecuador violated the protections of the treaty itself.<sup>97</sup> With Article 422 having an ambiguous stance with regards to treaty claims (as opposed to its distinct stance on their commercial or contract counterparts), ICSID jurisdiction still reaches into Ecuador. And, increasingly, ISDS tribunals of the dominant paradigm find against Ecuador for treaty claims. Take, for example, the recent arbitration on Ecuador's 2009 windfall tax, a fiscal measure seeking to sharply reduce the profitability of foreign-owned oil operations within Ecuador. As recently as 2012 and 2014, ICSID tribunals found the tax to constitute as an expropriation under the wording of the France-Ecuador and US-Ecuador BITs.<sup>98</sup>

*D. Article 422's allowance of arbitration clauses in trade agreements and investment contracts under the exception of 422(2) for "regional arbitration entities"*

The next subsection considers Article 422 more abstractly than those previous. Mainly, this subsection argues that the exception found within Article 422 swallows any forward progress the mechanism sought to make. In allowing an exception for "regional arbitration entities," as provided in Article 422(2), the constitutional mechanism has simply relocated—more or less—the transnational situs for dominant-style ISDS, without effectively transforming the beast.

The exception in Article 422(2) detracts from the spirit of the mechanism in a twofold manner. It does not inoculate the government from the external pressure of seeking foreign investment, which creates a particularly strong disincentive for Ecuador to renegotiate unconstitutional BITs from which it benefits. And, it does not inoculate the government from courting foreign investment by means of traditional assurances—specifically in this case, BIT clauses that stipulate international arbitration as a means to settle investor-state disputes. This allows the Ecuadorian government to resort to instituting and creating, as evidenced by the push to do so,<sup>99</sup> a *regional* investment dispute settlement body, the Union of South American Nations Arbitration Centre (UNASUR Center),<sup>100</sup> for which to submit future investor-state disputes.

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<sup>97</sup> For a background on why governments break contracts that then may arise as treaty claims, see RACHEL L. WELLHAUSEN, *THE SHIELD OF NATIONALITY: WHEN GOVERNMENTS BREAK CONTRACTS WITH FOREIGN FIRMS* 15–35 (2015). For background on the differences between contractual claims and treaty claims in international investment arbitration, see generally MARIEL DIMSEY, *THE RESOLUTION OF INTERNATIONAL INVESTMENT DISPUTES* 44–54 (2008).

<sup>98</sup> See Julie Bédard et al., *The 'Law 42' Arbitrations Against Ecuador and the Importance of BIT Language*, SKADDEN, Jan. 2015, <https://www.skadden.com/insights/law-42-arbitrations-against-ecuador-and-importance-bit-language>. For another case involving Law 42, see WELLHAUSEN, *supra* note 105, at 87.

<sup>99</sup> See Grant, *supra* note 10, at 25–35.

<sup>100</sup> See *id.* at 1–2.

This section labors to emphasize that the latter of the two scenarios described in the above paragraph is not consistent with the general spirit motivating Article 422. Regional arbitration, as embodied by the UNASUR Center, is particularly distinct from a proper “re-statification” of investor-state disputes. The political will of Ecuador behind enacting Article 422 was to disengage from the dominant ISDS paradigm. Doing this requires a thorough unyoking from international investment dispute arbitration, as well as a proper redirection of the government to create a dispute body *within* the country’s territory, or within the exclusive jurisdiction of Ecuador.

This *territorial-extraterritorial* distinction underlines the different calculus of rights that play out in both scenarios. A territorial, or “stratified,” or state-centric, investment dispute settlement body, necessarily has different public law considerations before it than does its international or, in this case, regional counterpart. As Van Harten makes clear, the latter embodies a “privatization of the judicial function”<sup>101</sup> in the form of transnational adjudication, which serves as a “method of control *alongside* domestic courts.”<sup>102</sup> This contrasts directly with the former, which, in a theoretical sense, pursue domestic *democratic* norms that demand:

- i) that the State undertake, or refrain from, certain conduct within its domestic jurisdiction; (ii) that certain limits be imposed on previously unregulated State conduct within its jurisdiction; or (iii) that the State prohibit, regulate, or permit certain conduct by natural persons and legal entities within its jurisdiction.<sup>103</sup>

The differences between each approach abound. In essence, the latter frequently promotes the interests of economic actors headquartered within capital-exporting states above and beyond the citizen interests of the host states, while the former might seek to re-calibrate those interests of foreign investors in accordance with interests of their own citizens. The project to “re-statify,” or domesticate, ISDS, then is a project of *resistance*,<sup>104</sup> which seeks to “countervail the loss of democratic accountability at supranational levels.”<sup>105</sup>

The best way to illustrate this point regarding Article 422(2)’s exception is by comparison to its regional cousin, Article 320 of Bolivia’s 2009 constitution,<sup>106</sup> to which it stands in marked contrast.

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<sup>101</sup> VAN HARTEN, *supra* note 75, at 177. International arbitration bodies serve not only alongside the (highest) domestic courts, but above those domestic bodies: the apex court’s rulings are often subject to review by the international arbitral body. See Peter-Tobias Stoll & Till Patrik Holterhus, *The ‘Generalization’ of International Investment Law in Constitutional Perspective*, in SHIFTING PARADIGMS, *supra* note 63, at 339, 346. In the case of the Ecuador-Chevron arbitration, the arbitration tribunal found that the Ecuadorian courts had breached Ecuador’s BIT obligations. See L Yves Fortier, *Investor-State Tribunals and National Courts: A Harmony of Spheres?*, in PRACTISING VIRTUE: INSIDE INTERNATIONAL ARBITRATION, *supra* note 13, at 292, 300–05.

<sup>102</sup> See VAN HARTEN, *supra* note 75, at 176 (emphasis added).

<sup>103</sup> Antonios Tzanakopoulos, *Domestic Courts in International Law: The International Judicial Function of National Courts*, 34 LOY. L.A. INT’L & COMP. L. REV. 133, 138–39 (2011).

<sup>104</sup> See generally SCHNEIDERMAN, *supra* note 37.

<sup>105</sup> *Id.* at 164.

<sup>106</sup> BOLIVIA CONST., Art. 320 (2009), available at [https://www.constituteproject.org/constitution/Bolivia\\_2009.pdf](https://www.constituteproject.org/constitution/Bolivia_2009.pdf). The relevant text is provided here: Article 320: Bolivian investment is prioritized over foreign investment: (i) Bolivian investment shall take priority over foreign investment. (ii) Every foreign investment shall submit to Bolivian jurisdiction, laws and authorities, and no one may cite an exceptional situation, nor appeal to diplomatic

the anti-dominant ISDS paradigm, Article 320(2), explicitly rejects in its text international (read *extraterritorial*)<sup>107</sup> arbitration forums. Channeled through Article 410's definition of both "natural and legal" persons (ensuring that Article 320(2)'s "no one" extends also to business, corporations, and other strictly legal persons), Article 320(2) reaches where Ecuador's Article 422 does not: it expressly requires that "every foreign investment shall submit to Bolivian jurisdiction, laws and authorities,"<sup>108</sup> whereas Article 422 allows an open door for crafty ponderings of what forum might sufficiently constitute a "regional [] entity"<sup>109</sup> as to fit under the exception described in Article 422(2). Bolivia's mechanism, then, is surprisingly determinative: by closing off the possibility to any extraterritorial, non-Bolivian jurisdiction, Article 320(2) affirmatively relocates the *situs* for jurisdiction foreign investment within the boundaries of the Bolivian state.

To be clear, this transforms the incentive structures. Bolivian politicians, faced with courting foreign investment by negotiating international investment treaties, are constitutionally prohibited from employing the favorite incentive: the jurisdictional clause providing for international investment arbitration. In a figurative sense, the constitutional mechanism has thus removed the bargaining chip of the dominant ISDS paradigm from Bolivia's treaty negotiation toolkit. This was not the case for Ecuadorian politicians, who were left room by their mechanism to aptly maneuver the negotiating table and speak soft assurances in the ears of investors about how favorable "regional entities" might be to investor interests.

As such, Article 320(2) serves as a heavy-hitting antithesis to the system of the dominant ISDS paradigm, whereas Article 422 was not. Article 320(2) places the burden squarely on Bolivia to re-imagine an ISDS paradigm within their own borders that can somewhat still attract foreign investment. Ecuador's Article 422(2) allows Ecuadorian politicians to hide the ball from their citizens and not re-envision the country's international investment strategy.

## CONCLUSION

Accordingly, Ecuador's current situation is the result of the "gaps [of Article 422(1)] in comparison to the radical position of the . . . Constituent Assembly on [international investment treaty arbitration]."<sup>110</sup> The country still finds itself subject to the jurisdictional domain of

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claims to obtain a more favorable treatment. (iii) The economic relations with foreign states or enterprises shall be carried out under conditions of independence, mutual respect and equity. More favorable conditions may not be granted to foreign States or enterprises than those established for Bolivians. (iv) The State acts independently in all of its decisions on internal economic policy, and shall not accept demands or conditions imposed on this policy by states, banks or Bolivian or foreign financial institutions, multilateral entities or transnational enterprises. *Id.*

<sup>107</sup> Primarily, in the sense discussed in Section 3. The Inability of Article 422 To "Re-Statify" ISDS, *supra*.

<sup>108</sup> BOLIVIA CONST., Art. 320(2) (2009).

<sup>109</sup> See *supra* notes 107–08.

<sup>110</sup> GOMEZ, *supra* note 29, at 7; see also Gillman, *supra* note 33, at 291 (citing Vicente Peralta who stated that the position of the Correa government was to prohibit investor-state arbitration altogether, following the principles laid out in the Calvo Doctrine).

investment treaty arbitral tribunals, in direct contradiction to the motivating spirit behind the enactment of Article 422.

At this point, doubt is properly cast not only on Article 422 as an instrument to properly “re-statify” ISDS, but also upon constitutional mechanism’s dominant narrative *generally*. Put simply: Article 422 cannot be viewed in a strict sense as a constitutional “pre-commitment” on the Ecuadorian government’s ability to engage with the economic forces of globalized trade, or its ability to entangle itself with future international trade obligations. As a factual, empirical, descriptive matter, Ecuador is still very much engaged with the international commercial and investment world.

A substitute explanation, offered in the concluding paragraphs of this paper, considers Article 422 instead as an environmentally-inclusive *social contract*—i.e. as a responsive legal mechanism of sorts (like any other, e.g. statutes or regulations) that aims to curb the deleterious effects of international investment projects upon Ecuador’s environment, its landscape, and its people. In this sense, Article 422 is not viewed as a full constitutional mechanism absolutely ensuring and securing territorial sanctity. Nor can it be viewed as a constitutional arrangement that can insulate the government from its international obligations. Nor can it truly inoculate the government from the external pressures of neoliberal economics.<sup>111</sup>

Rather, it is seen as an article, like others in the 2008 Constitution which embrace the SK ideology. It strengthens self-governance capacity, but it does so in a way that a social mantra might. A social mantra that has reached the level of a governance instrument. In conclusion, while Article 422 a) aims formally to preserve Ecuador’s sovereignty concerns, and b) textually promises to disentangle itself from the interlocking web of international investment treaties, in effect it serves mostly as an optimistic, constitutional banner for the social Sumak Kawasy ideology and the Buen Vivir movement.

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<sup>111</sup> The *coup de grâce*, if not already presented by Article 422’s institutional inability of Ecuador to dismantle the BIT framework that still subjects the country to ISDS, is the external economic pressures that Ecuador itself is unable to resist. The Ecuadorian government has indicated it may be open to negotiating international arbitration clauses within individual contracts, as provided for under the Production Code and the Planning and Public Finance Code—without qualifying in advance the particular ISDS mechanism to which it expects to consent. Similarly, the recent experience of extraction industries, heavily concentrated around a handful of certain investors, indicates the country’s possible incorrigible relationship with the international neoliberal economic system.