**Ecuador withdraws from its remaining bilateral investment treaties**

The Independent Expert on the promotion of a democratic and equitable international order welcomes the announcement by the Government of Ecuador, on 16 May 2017, that Ecuador has unilaterally withdrawn from its remaining 16 bilateral investment treaties (BITs), concluding the termination of 26 treaties signed by the country since 1968. “This is a good example for many countries still suffering the consequences of having entered into agreements that promised development but undermined the rule of law, delivered huge profits for transnational corporations and increased unemployment in many developing countries”.  
  
“The decision to withdraw from these BITs was not sudden, but responded to a governmental review process aimed at complying with the 2008 Constitution of Ecuador, which recognises the human being and human rights above the power of economic capital.” The review process led to the establishment of a joint government-civil society audit commission (known as CAITISA by its Spanish acronym), which verified the lawfulness and legitimacy BITs signed by Ecuador, as well as audited the validity and appropriateness of the awards, procedures, actions and decisions issued by ISDS (the controversial investor-State dispute arbitral tribunals).

“In its 668-page Executive Report, the CAITISA Commission found that BITs were not decisive in attracting FDI to Ecuador[[1]](#footnote-1), contradicted and undermined the development objectives laid down in the Constitution of Ecuador[[2]](#footnote-2) and resulted in high costs while the alleged promises of investment and development have failed to materialise[[3]](#footnote-3).”

The Ecuadorian move parallels similar measures taken in recent years by a growing number of developing countries to withdraw from their bilateral investment treaties, including South Africa, Bolivia, Indonesia and India.

“Other States should establish similar commissions to review their BITs and FTAs. Moreover, domestic courts should refuse to implement arbitral awards that are manifestly ill-founded and violate the *ordre public* of the States concerned, and, where appropriate, invoke article 5 of the New York Convention on the recognition of foreign arbitral awards. The issue of the legality of ISDS and aspects of the BITS should be referred by the UN General Assembly to the International Court of Justice with a view to obtaining an advisory opinion that once and for all declares that when BITs lead to situations contrary to the State’s obligations under international human rights treaties including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, the latter must prevail.”

The Independent Expert has devoted three reports to the adverse impacts of bilateral investment treaties and free trade agreements on the enjoyment of human rights, particularly economic, social and cultural rights in recent years.[[4]](#footnote-4) Following a careful analysis of the advantages and disadvantages of these trade agreements and the absence of empirical evidence that the treaties have significantly helped countries advance their development strategies, the Independent Expert recommended the revision or termination of these agreements. In particular, the Independent Expert found that ISDS is a parallel system of dispute-settlement that violates fundamental principles of the rule of law and escapes the rules of transparency, accountability and appealability, which are the hallmark of public courts. “As documented in reports to the Human Rights Council and the General Assembly, experience has shown that investors have sued States when labour laws have been strengthened, when taxes or the minimum wage have been raised, when construction permits have been denied because of environmental and health hazards”.

Recognizing that international solidarity inspires the Universal Declaration of Human Rights, the Independent Expert called on States to achieve international cooperation in this field by promoting and encouraging respect for human rights, including by encouraging the withdrawal from international treaties that may prevent States from implementing their human rights obligations.

“International solidarity rests on the premise that States in a position to do so should provide international assistance, in a manner consistent with the fundamental principles of international law and international human rights law, to ensure the enjoyment of a social and international order in which all human rights and fundamental freedoms can be fully realized. Under no conditions can it be allowed that an investor interferes in the fiscal and budgetary decisions of sovereign states. This is an abnormal situation under which a considerable number of States – not only developing States – have suffered for long.”

“It bears repeating that the ontology of the State is to legislate in the public interest and the ontology of business is to take risks. To the extent that BITs and FTAs have limited the regulatory space of States and even led to a regulatory chill, these treaties are invalid as *contra bonos mores.”*

1. Ecuador only received 0.79% of global FDI to Latin America and the Caribbean; The principal sources of FDI for Ecuador came from Brazil, Mexico and Panama, none of which have a BIT with Ecuador; Of the 7 largest foreign investors in Ecuador, only 23% come from a country which has a BIT signed with Ecuador. [↑](#footnote-ref-1)
2. Whereas the Constitution mandates the State to regulate foreign investment to ensure it plays a positive role in achieving the national development plan, the BITs signed by Ecuador include clauses that significantly erode that role. [↑](#footnote-ref-2)
3. Ecuador has faced 26 cases in international tribunals based on the BITs; 15 cases ended in awards 13 in favour of the investor (87%); A total of $21.2 billion dollars has been claimed as compensation from Ecuador by corporations for alleged violation of BITs; the total amount disbursed by Ecuador amounts to $1.498 billion dollars, equivalent to 31% of education spending, or 62% of health spending; from the total of cases still pending against Ecuador, the State runs the risk to be obliged to disburse USD 13.4 billion, which is equivalent to 52% of the General State Budget for 2017. [↑](#footnote-ref-3)
4. http://www.ohchr.org/EN/Issues/IntOrder/Pages/Reports.aspx [↑](#footnote-ref-4)