The deal with the IMF is an important step in the right direction

Creating Legal Certainty for Investors

Ecuador’s government has unveiled a new law to attract investment. We analyse how much protection it gives investors...

No-one doubts that Ecuador has world-class mining, oil and agricultural investment opportunities. Nor do they question this government’s willingness, even its need, to open these sectors up to international investors. But Ecuador’s volatile political history, peppered with expropriations and defaults, scares off many investors. To assuage fears the government unveiled a new investment and production law. The Ley Orgánica para el Fomento Productivo, Atracción de Inversiones, Generación de Empleo y Estabilidad y Equilibrio Fiscal to give it its full title.

During LatAm INVESTOR’s many interviews with various government officials, from minister level downwards, we repeatedly heard that the new law offers assurances for UK investors. Patricia Armijos, Sub-Secretary of Investment at the Ministry of Production, Foreign Trade, Investment and Fisheries, highlights that the law brings “long-term stability for national and foreign investors”. She notes that “in addition to legal security, it grants a series of incentives for attracting new investments to the country”. In particular, Armijos emphasises that the law allows the private sector to seek arbitration if the state breaks the terms of the investment contract with a company, which she sees as an important guarantee for investors.

Many in the private sector have reacted positively to the new law. In addition to serving as President of the British Chamber of Commerce in Guayaquil, Nick Armstrong is also a director at Ecuadorian feed, seed and fertiliser provider, Agripac. “Along with other leading firms, Agripac made an investment commitment, because the new law offered tax incentives for investors”, says Armstrong. “That encouraged us to buy a seed business from Pronaca and also to upgrade our feed mill and double its capacity so that it can meet growing domestic and international demand.”

Legal perspective

One person especially well placed to analyse the pros and cons of the new law is Javier Robalino Orellana, Managing Partner of Ferrere in Ecuador. Ferrere is the only multi-jurisdictional purely South American law firm, with 250 lawyers in Bolivia, Ecuador, Paraguay and Uruguay. While Robalino has represented multinationals in various local and international commercial and investment disputes. “The new law is an improvement for investors”, says Robalino, “but more protection is needed.”

“In May 2017, one of the last acts of Correa’s government was to cancel Ecuador’s 11 remaining bilateral investment treaties. It was a spiteful act, designed to hamper future foreign investment as it removed security for foreign businesses coming to Ecuador. Three of the investment treaties, those with Italy, Netherlands and Spain, were renewed automatically but they are due to end in 2021-2022. Companies that had already invested before the cancellation are still protected under the treaties’ sunset provision, however, any fresh investment is not. Ecuador is now working to renegotiate the treaties but they will have to be ratified in each country’s parliaments, meaning it will probably take five years to recover all 11.” “In the meantime, the idea is that the new law helps to attract investors by offering...
them some protection. Originally it was hoped that this law would include ‘arbitration without privity’. This would allow private foreign investors, whose business has no contract with the state, to sue Ecuador if the country breached its investments rights, say by asset expropriation. It’s one of the protections that existed in Ecuador’s former bilateral investment treaties, so it was hoped the new law could bring this guarantee back. Unfortunately, the version of the law that was ultimately passed in 2018 was far weaker. It only allows for companies that have a direct contract with the state to have access to arbitration. Moreover, they can only dispute the narrow terms of the law – that is to say the company’s investment pledge and the state’s tax incentives. Arbitration under this law can’t cover something more fundamental, such as expropriation. As a result, new international investors coming to Ecuador now have less power than they would have had under the old bilateral investment agreements.

So, this government has improved the situation but it still has some way to go before it completely repairs the damage of its predecessor. “The new production and investment law enhances the investment protection agreement – known as an IPA or convenio de inversión”, explains Robalino, and “it provides tax incentives and certain protection.” However, “the bilateral investment treaties are a broader umbrella protection that covered issues such as: fair and equitable treatment, expropriation, free remittance of funds, full protection and security and most-favoured nation status. It’s vital that Ecuador signs new treaties. In the meantime, it must look for other ways to reassure investors.”

A lot done, more to do
It’s doing just that, says Armijos. “The government has created the Strategic Committee for Investment Promotion and Attraction [CEPAI by its Spanish acronym], which houses a multidisciplinary body for attracting and maintaining foreign investment in Ecuador. It approves investment projects and helps the private sector realise them.” There is also a big push to improve the business environment, says Armijos, with Ecuador accepting a proposal from the World Bank Group to adopt measures to help the country climb up the Doing Business Rankings.

Indeed, one of the most exciting initiatives is the ‘Single Window’, which will attempt to cut through Ecuador’s notorious red-tape by creating one point of contact for investors that need to interact with various government departments and entities. Finally, it is working on an upgraded version of the investment and production law, which it’s hoped will be passed by congress at the end of this year.

Alejandro Echeverri, Chairman of the British Chamber of Commerce in Quito, is optimistic that conditions will improve for international investors. “A positive trait of this government is that it is willing to listen. We have seen repeated examples of suggested policies being modified after dialogue with the private sector. That’s a marked difference from the previous administration, which would threaten firms that tried to criticise its policies.” Echeverri accepts that “legal security is a big issue for foreign investors coming to Ecuador as our history of changing the rules of the game understandably worries some international companies.” However, he stresses that there are ways to mitigate these risks. For example, the chamber runs a conflict resolution centre that helps companies settle disputes without lengthy litigation in local courts.

Undoing a decade of ‘21st-century socialism’ was never going to be an easy task. This government deserves credit for its efforts, but much still remains to be one. Robalino believes this is a “crucial period” for Ecuador. “In order to get a significant increase in foreign investment, Ecuador needs to show consistency. We need to demonstrate that we’re a serious country. The deal with the IMF is an important step in the right direction, as it binds us to making improvements. Laws are good but what investors really need is stability, effective responses and steady policies.” LatAm INVESTOR readers will be hoping that Ecuador’s world-class investment opportunities are accompanied by better business environment.