

The Ecuador-Canada Free Trade Agreement and the Referendum in Ecuador: An Attack on Constitutional Protections

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In February 2025, the governments of Ecuador and Canada announced the conclusion of negotiations of a free trade agreement (FTA). This treaty contains an investor-state dispute settlement (ISDS) mechanism that allows foreign corporations to sue the Ecuadorian government in private international tribunals when they believe that their expected profits have been or will be affected. However, this mechanism violates article 422 of the 2008 Constitution, which prohibits the state from surrendering its sovereign jurisdiction to international arbitration bodies in disputes with foreign investors.

Ecuador has extensive experience with investment arbitration. The country used to have 30 bilateral investment protection treaties (BITs) containing ISDS mechanisms. The result: 30 claims filed by foreign investors against the Ecuadorian state, which had to pay more than 2.9 billion dollars in compensation by 2024¹. The most high-profile cases involved oil companies, Chevron and Occidental Petroleum, but also ones from the mining, telecommunications and other sectors. In 14 of the 21 cases that have been already concluded, the tribunals ruled in the investors' favour.

Between 2008 and 2017, Ecuador terminated all its BITs. During this time, the Commission for a Comprehensive Citizens' Audit of Reciprocal Investment Protection Treaties (CAITISA) conducted a thorough assessment of these instruments. The commission's final report (2017) demonstrated that the treaties had not led to significant increases in foreign direct investment². The main sources of investment were countries that had not signed investment treaties with Ecuador: Brazil, Mexico and Panama. The treaties did generate, however, millions of dollars of international litigation expenses.

The government now aims to fully reincorporate ISDS mechanisms. In March 2024, President Noboa participated in a mining convention in Toronto, where he announced that Ecuador would offer guarantees of legal security for the investments of Canadian mining corporations in the trade treaty that was being negotiated at the time. Former Production Minister Sonsoles García stated that "the Government of Ecuador is trying to reform the Constitution to allow for the approval of an investment protection mechanism and

¹ Ecuador, impactos del arbitraje internacional. ISDS América Latina. <https://isds-americalatina.org/ecuador/>

² TNI. Ecuador terminates 16 investment treaties. May 22, 2017. <https://www.tni.org/en/article/ecuador-terminates-16-investment-treaties>

international arbitration between private investors and the Government."³ The treaty with Canada incorporates this kind of mechanism in direct violation of article 422 of the Constitution.

This paper examines five dimensions that explain the importance of the Ecuador-Canada treaty today: the geopolitical race for critical minerals such as copper; the history of Canadian mining companies' use of international arbitration; the government's strategy to do away with article 422; Canada's double standard on ISDS, and the proliferation of investment protection agreements with Canadian mining companies to circumvent the constitutional prohibition. It concludes by establishing the connection between this treaty and the upcoming referendum on November 16, 2025, in which one of the questions proposes that a Constituent Assembly be held.

1. The Geopolitical Race for Critical Raw Materials

Ecuador owns 3% of the world's copper reserves. This metal has become a key strategic resource in the global energy transition and technological production. In the competition among world powers for access to critical raw materials, Ecuador has thus grown in geopolitical importance. The Canadian ambassador to Ecuador, Craig Kowalik, declared that in view of the current global tensions, Canadian investors should focus on the Americas⁴.

Copper's centrality is due to its strategic role in the global energy transition. A powerful global player in the mining industry, Canada deploys its corporate architecture to control deposits in the global periphery, while externalizing the socio-environmental costs. The Warintza case is emblematic: the Shuar Arutam territory will be turned into a "sacrifice zone" to feed metropolitan demand for copper and reproducing colonial patterns where indigenous self-determination is incompatible with the imperatives of capital accumulation of globalized mining corporations.

The "Fifth River" of Cuenca—a march of 120,000 people defending the Kimsakocha páramo (a high-altitude wetland ecosystem) in the province of Azuay —and the resistance of the Shuar Arutam people expose a fundamental contradiction between two ways of understanding the territory: transnational corporations see earth and water as commodities that they can use to generate profits, while communities defend them as the basis of their survival. The FTA is not neutral in this conflict: it legalizes dispossession, punishes popular resistance with million-dollar lawsuits and turns Ecuador's ability to make sovereign decisions into something that can be negotiated to serve the needs of Canadian mining corporations.

³ Infobae. El Gobierno de Noboa presenta en Toronto sus reformas para atraer inversión extranjera. March 4, 2024. <https://www.infobae.com/america/agencias/2024/03/04/el-gobierno-de-noboa-presenta-en-toronto-sus-reformas-para-atraer-inversion-extranjera/>

⁴ Biodiversidad. Craig Kowalik: "Canadá pone la mira en minería y agricultura". <https://www.biodiversidadla.org/Documentos/Craig-Kowalik-Canada-pone-la-mira-en-mineria-y-agricultura>

2. The (Sad) History of Canadian Mining Companies and Arbitration

Canadian mining companies know how to use ISDS mechanisms: they have filed 25 international arbitration claims against Latin American countries, including Venezuela, Colombia, Peru and Costa Rica. Canadian mining companies submitted three complaints against Ecuador before it terminated its bilateral investment treaty with Canada. The Copper Mesa vs. Ecuador case illustrates how the ISDS system functions and exposes the asymmetry between corporations and the communities affected by investments.

In 2004, the Canadian company Copper Mesa acquired mining concessions in Junín, Intag, one of the 36 most biodiverse areas in the world.⁵ The communities of Intag, which have been resisting mining projects since 1995, opposed the operation due to risks of deforestation, contamination of rivers and impacts on endangered species. Copper Mesa hired armed personnel in uniform who used tear gas and firearms against residents and local officials. In 2007, the government ordered the company to suspend its activities because of its failure to get an environmental impact study approved and to consult communities. In 2008, under the new mining laws, these issues constituted sufficient grounds to cancel the concession. The company's licenses were revoked.

In 2011, Copper Mesa filed a complaint against Ecuador at an international arbitration tribunal, demanding US\$70 million in compensation, even though it had invested US\$28 million. The tribunal recognized that the company had engaged in "reckless escalation of violence" by "employ[ing] organized armed men in uniform."⁶ However, instead of dismissing the case, the tribunal reduced compensation by 30% and ordered Ecuador to pay US\$24 million dollars, in addition to more than US\$6 million in legal and arbitration costs. The tribunal ruled that the government had not provided sufficient support to the company to deal with the protesters. The system forced the state to put investor's interests before citizens' rights. In the meantime, Canadian courts dismissed a lawsuit by three Ecuadorian citizens against Copper Mesa's directors.

This case is not an anomaly: it reflects the structural logic of the ISDS system, in which corporations have supranational legal instruments at their disposal to sanction states that protect collective rights, while communities have no equivalent mechanism that enables them to sue corporations for environmental damage, human rights violations or non-compliance with prior consultation requirements.⁷

⁵ CEO/TNI/Friends of the Earth. When arbitrators reward mining corporations' human rights abuses. June 2019. <https://www.tni.org/files/copper-mesa-vs-ecuador.pdf>

⁶ *Copper Mesa v. Ecuador*. Permanent Court of Arbitration. March 15, 2016. https://jsumundi.com/en/document/decision/en-copper-mesa-mining-corporation-v-republic-of-ecuador-award-tuesday-15th-march-2016#decision_187

⁷ Viviana Herrera. Canada's mining footprint in Ecuador. A look at some of the impacts of existing Canadian mining investment in Ecuador as negotiations advance towards a Canada-Ecuador Free Trade Agreement. MiningWatch Canada, September 2024. https://miningwatch.ca/sites/default/files/brief_mining_impact_ecuador_fta_2024.pdf

3. The Strategy to Deactivate Article 422

Article 422 of the 2008 Constitution prohibits Ecuador from signing treaties where it cedes jurisdictional sovereignty to international arbitration tribunals in disputes with private companies. This provision arose directly from the traumatic experience with cases such as *Occidental Petroleum vs. Ecuador* (where the state was ordered to pay out US\$1.77 billion) and the Chevron case. In the latter, in 2018, an international arbitration tribunal annulled the ruling by Ecuadorian courts that had ordered Chevron to pay US\$9.5 billion for contaminating the Amazon for decades. It also declared that Ecuador had violated its BIT with the United States.⁸

Article 422 was the Constituent Assembly's response to predatory arbitration cases: it aims to prevent transnational corporations from circumventing Ecuadorian courts and going to private international tribunals to penalize the state for protecting the environment or consulting communities. The Noboa government's push to eliminate the article is not only about "clearing the way" for the arrival of foreign investment. It is an attempt to subordinate the 2008 Constitution to the demands of Canadian mining companies by turning protections that arose from lessons from the past into "obstacles to development."

Since the government of Lenín Moreno, there has been a systematic attack on article 422. Business sectors and their political allies identify this clause as the main impediment to Ecuador's "competitiveness" in attracting mining investments.⁹ At mining conventions and business forums, corporate representatives have openly expressed their opposition to not only article 422, but the entire section of the 2008 Constitution that recognizes the rights of nature, binding prior consultations and the protection of páramos and water as fundamental human rights. The narrative is clear: the 2008 Constitution is "ideological", "anti-business" and an obstacle that must be "modernized." However, Canadian mining investment is the leading source of foreign direct investment in Ecuador: the amount of investment practically tripled between 2018 and 2023. Gold exports grew by more than six times, from US\$170.482 million in 2018 to over US\$1.037 billion in 2023.¹⁰ These mining companies entered the country knowing of the existence of article 422 and that the bilateral treaty between both countries was no longer in effect.

The FTA with Canada will require Ecuador to eliminate article 422 so that Canadian companies will be able to sue the state if their projects are halted by public consultations, community resistance or environmental protections. This is not a matter of "attracting responsible investment": it is about ensuring mining corporations legal immunity to operate by having international tribunals shield them from sovereign decisions that could affect

⁸ Aldo Orellana. Chevron vs Ecuador: International Arbitration and Corporate Impunity. March 2019. <https://amazonwatch.org/news/2019/0327-chevron-vs-ecuador-international-arbitration-and-corporate-impunity>

⁹ La Hora. Consulta Popular: Aprobar el arbitraje internacional abrirá las puertas a inversionistas que ven oportunidades en Ecuador. April 11, 2024. <https://www.lahora.com.ec/archivo/Consulta-Popular-Aprobar-el-arbitraje-internacional-abrira-las-puertas-a-inversionistas-que-ven-oportunidades-en-Ecuador-20240411-0038.html>

¹⁰ Export Development Canada. Doing business in Ecuador: Free trade opens doors for Canadian exporters. June 2, 2025. edc.ca/en/article/doing-business-in-ecuador-exporters.html

their expected profits. This strategy has been reinforced by Executive Order 191 of October 2025, which regulates the Social Transparency Act. The order explicitly prohibits social organizations from "investing, directly or indirectly, in activities aimed at obstructing or interfering with legally authorized mining projects", or risk having their legal status suspended for four years.¹¹ The decree was "coincidentally" issued only six weeks after the Fifth River march in Cuenca against the Loma Larga project in Kimsakocha.

4. Canada's Double Standard with the ISDS Mechanism

Canada eliminated the ISDS mechanism between Canada-United States and Canada-Mexico in the recently renegotiated NAFTA, now called CUSMA, which came into force in 2020. It recognizes that ISDS limits the State's regulatory capacity: "The absence of ISDS alleviates stakeholders' concerns regarding its potential impact on governments' right to regulate and their willingness to implement environmental and sustainable development measures" and that the new treaty preserves the Canadian government's "right to regulate in the public interest."¹² The elimination of the ISDS mechanism from the CUSMA protected Canada's capacity to regulate without the risk of losing millions in lawsuits.

However, in treaties with countries of the Global South, Canada insists on incorporating ISDS mechanisms to protect its investments. The contrast is striking. ISDS is acceptable when it protects Canadian investments in other territories, but unacceptable when it could limit Canada's regulatory sovereignty. This reveals the asymmetric structure of the investment protection system: it is designed to protect interests of transnational capital from the North in countries of the South, not to establish balanced relationships between states.

5. The Signing of Investor-State Agreements with ISDS: An Unconstitutional Practice of Canadian Mining Companies

In August 2023, Dundee Precious Metals (now DPM Metals) signed an investment protection agreement (IPA) with the Ecuadorian government for the Loma Larga project. The agreement grants fiscal stability, tax and customs exemptions, a 5% reduction in income tax (fixed at 20%) and access to international arbitration based in New York. These agreements are confidential and contradict the constitutional prohibition. They are part of the strategy of officially upholding a constitution that limits the power of extractive capital, while granting privileges to companies through instruments that violate the constitution.

DPM is involved in social conflict in Kimsakocha. In October 2025, the state revoked the project's social license, and the company could use the IPA to sue Ecuador in courts in New York. Shortly after, the company announced it was "assessing all available options to

¹¹ Primicias. Noboa expide reglamento de la Ley de Transparencia Social, que regula el financiamiento de las fundaciones. October 27, 2025. <https://www.primicias.ec/politica/noboa-decreto191-reglamento-ley-transparencia-social-fundaciones-108206/>

¹² Final Environmental Assessment of the Canada-United States-Mexico Agreement (CUSMA). July 16, 2020. https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/final_ea-ee_finale.aspx?lang=eng

preserve value and maintain optionality" for its shareholders.¹³ A lawsuit based on the IPA could result in another million-dollar condemnation of the state for protecting water resources. Without article 422, Ecuador would be a territory with no restrictions on large-scale mining. A constitutional reform that eliminates or weakens this article would have serious consequences.

The Danger of the Consultation on November 16

On November 16, 2025, the public consultation and referendum called by President Noboa will be held. The fourth question proposes convening a Constituent Assembly to draft a new constitution. If this question is approved, article 422 will be a priority for economic and political sectors seeking to eliminate limits on foreign investment.

It is evident that the ISDS mechanism is at the heart of the FTA with Canada and that it will require Ecuador to eliminate article 422. This FTA attempts to serve as a legal shield for Canadian extractivism through clauses that put investments before state sovereignty. This legal structure turns collective rights and the commons—water, páramos, indigenous territories—into "obstacles to trade", giving investors grounds to sue the state and force it to pay them compensation.

Voting NO on the proposal to hold a Constituent Assembly defends article 422. This article has protected Ecuador from new investor claims in international arbitration tribunals. The Ecuadorian people had already expressed their opposition to arbitration in the public consultation called by Noboa in April 2024, when nearly 65% of Ecuadorians voted NO to changes to article 422. That consultation had already established that the citizens of Ecuador do not want their government to hand over its sovereign jurisdiction to private tribunals. The treaty with Canada and the November 16 consultation are part of a strategy to dismantle the constitutional protections that limit resource extraction by mining investments.

The Copper Mesa case, the 30 lawsuits against Ecuador, the US\$2.9 billion paid to investors and the current conflict in Kimsakocha are all proof of the consequences of eliminating constitutional protections. Transnational capital must not be allowed to obtain legal privileges over Ecuadorian citizens again. Defending NO in the November 16 public consultation means defending economic sovereignty and territories from extractive projects that prioritize corporate interests over citizen rights and environmental protection.

¹³ DPM Metals Responds to Revocation of the Loma Larga. October 6, 2025. <https://www.globenewswire.com/news-release/2025/10/06/3161956/0/en/DPM-Metals-Responds-to-Revocation-of-the-Loma-Larga-Environmental-Licence.html>