International Investment Law and the Republic of Ecuador: From Arbitral Bilateralism to Judicial Regionalism
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Following more than two decades of unprecedented expansion, the legal regime on the protection of foreign investments has more recently become – again – increasingly controversially debated. There are clear indications in state practice, that an increasing number of countries assume a more cautious or even openly critical position on the current predominant approach in international investment law. This applies also to the recently renewed suspicion displayed by many Latin American countries in this regard. Among the Latin American countries, it is in particular also Ecuador, which has in recent years emerged as one of the main opponents of the current state of international investment law in general and international investment arbitration in particular. Ecuador not only adopted an increasingly critical stance on this issue but has also – in contrast to many other Latin American countries – in fact already employed a variety of measures in the domestic and international realm that clearly signal this state’s intention to exit the present system and to establish a new alternative scheme of international investment protection.

Against this background, the contribution is intended to analyse some international legal implications of Ecuador’s actions aimed at largely disconnecting itself from the present framework of international investment protection. Furthermore, some broader conceptual thoughts on the perspectives for the future design of international investment agreements in the Latin American context will be provided. For this purpose, the contribution has been divided into three main parts. The first part is devoted to an identification and overview of the characteristics and importance of the currently predominant scheme of international investment protection, including certain public interest challenges arising from the present design. In the second part some legal implications and thus possible short-term effects of Ecuador’s recent policy responses to these public interest challenges are evaluated. Finally, the third part includes some thoughts on potential medium-term alternatives enjoyed by Latin American countries to initiate and implement a reformation of the international legal framework on investment protection. In this connection, it will be argued that the adoption of a regional investment agreement including the creation of a Latin American court of investment law – although appearing at first sight a rather ambitious (and not only to many foreign investors probably suspicious) alternative – can in the medium-term perspective be considered as an acceptable, politically feasible and thus viable option to facilitate a reconciliation, on modified terms, between countries like Ecuador and the international legal regime on the protection of foreign investments.