



# Tuna producer awaits award in Ecuador tax dispute

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Cosmo Sanderson



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An UNCITRAL tribunal has finished hearing a Spanish tuna fishing company's treaty claim against Ecuador concerning the imposition of taxes in a free trade zone.

The five-day hearing of the claim by Albacora concluded on 26 January, according to information posted on the website of the Permanent Court of Arbitration in The Hague, which is administering the case. The arbitration is seated in Paris and is being conducted in Spanish.

Miami-based Venezuelan arbitrator **J Eloy Anzola** is chairing the tribunal. Albacora appointed Brazilian arbitrator **José Emilio Nunes Pinto**, while Ecuador appointed Italian arbitrator **Loretta Malintoppi**, a former

of counsel at Eversheds who now practises from 39 Essex Chambers and is based in Singapore.

Albacora is represented by New York disputes boutique Chaffetz Lindsey, with the team led by partner **Anibal Sabater**, and Ecuadorean firm Flor & Hurtado.

Ecuador is using a Baker Botts team including partner **Alejandro Escobar** in London. The same firm helped the state knock out a [US\\$56 million treaty claim](#) by an affiliate of US hedge fund Elliott Associates in 2012, also winning costs.

Albacora made the claim in April 2016, having filed a notice of dispute in the previous year. The Spanish company alleges that Ecuador violated its rights under the Spain-Ecuador bilateral investment treaty by denying tax exemptions to its subsidiaries operating in the Posorja free trade zone on the country's Pacific coast.

While Albacora has paid US\$20 million in taxes so far, it is understood the value of the dispute is closer to US\$100 million, as the investor argues it is entitled to a tax exemption until 2023.

The dispute relates to legislation passed in 1991 that established free trade zones providing for the export of finished and semi-processed goods free of duty and tax as well as granting tax exemptions for business activities in the zones.

Ecuador's tax authorities contend that the exemptions were repealed by fiscal reform measures adopted by the state in 1999 in the midst of a financial crisis. That position was heard and upheld by the Supreme Court for the first time in 2014 in a dispute with another taxpayer, and seven other rulings by the same court have confirmed this view.

Albacora's subsidiaries entered the free trade zone system in 2008 and have challenged every tax assessment made against them before the Ecuadorean courts. The Spanish company argues that the 1999 law did not expressly refer to the tax exemptions granted by the 1991 free trade zone law and therefore could not have the effect of revoking them. It also argues it has been subjected to discriminatory treatment.

According to a 2016 [disclosure](#), Ecuador's attorney general's office maintains that it has not violated the BIT and its tax authorities were applying the regulations in force at the time for users of the zone.

The state also argues that the arbitration deals with matters that are still pending before its own courts.

Albacora holds a 10% stake in a 50-year concession won in 2016 from Ecuador's government by DP World Group to build a deep water port in Posorja, a village at the delta of the country's Guayas River.

In May last year outgoing Ecuadorian president Rafael Correa [terminated](#) the country's BIT with Spain as well as those with 11 other countries, ostensibly with the intention of renegotiating them on more favourable terms.

In 2009 the country declared its withdrawal from the ICSID convention, which it said represented "slavery and colonialism of transnationals."

However, the country's election of Lenín Moreno as president last April brought a [softer stance](#) on these issues with the country's Minister for Foreign Trade Pablo Campana saying the BITs are needed to attract private investment. There have even been suggestions the country could readopt the ICSID convention.

Correa has denounced his successor's more business-friendly approach but was dealt a blow earlier this month when the country voted in a referendum to reinstate a two-term limit for presidents, thus barring him from seeking re-election.

*Albacora SA v La República del Ecuador (UNCITRAL arbitration)*

#### Tribunal

- **J Eloy Anzola** (Venezuela) (chair)
- **José Emilio Nunes Pinto** (Brazil) (appointed by Albacora)
- **Loretta Malintoppi** (Italy) (appointed by Ecuador)

#### Counsel to Albacora

- Chaffetz Lindsey

Partner **Aníbal Sabater** and associates **Rainbow Willard, Justinian Doreste, Meredith Craven and Luis Paternina** in New York

- Flor & Hurtado

Partners **Mario Flor** and **Agustín Hurtado** in Quito

#### Counsel to Ecuador

- State Attorney General's Office

Attorney General **Diego García Carrión** and lawyers **Blanca Gómez de la Torre, Christel Caibor, Xavier Rubio, Daniela Guarderas, Gary López** in Quito

- Baker Botts

Partner **Alejandro Escobar** and associate **Ernesto Félix de Jesús** in London

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