The Intervention of Constitutional Courts in International Investment Law: The Case of Colombia†

Alejandro Linares-Cantillo‡

† I would like to specially thank Nicolás Parra-González and Camilo Valdivieso-León for their research assistance for preparing my intervention at the symposium held on Friday, October 16, 2020 as well as for this Article. I also want to thank Muna B. Nudlo, Carolina Olarte-Bácares, Rafael Rincón-Ordoñez, Camila Machado, Destiny Reyes, Melissa Muse, Daniel Currea-Moncada and Santiago García-Jaramillo for organizing the symposium jointly between Cornell Law School and Pontificia Universidad Javeriana (Bogotá) where a draft outline of this Article was presented, as well as for their constructive comments which helped me in writing and reviewing it. All errors are mine alone.

‡ Associate justice at the Colombian Constitutional Court.

Introduction

Binding international investment arbitration allows a private foreign investor, as a third-party beneficiary of an international treaty,[1] to have direct standing to sue a host State before an institutionalized or *ad hoc* international investment tribunal (Investor-State Dispute Settlement or ISDS[2]) and claim damages from a breach of certain substantive protection standards, which are contained in written International Investment Agreements (IIAs), concluded by sovereign nations and governed by international law.[3] In the case of the Republic of Colombia, IIAs comprise both Bilateral Investment Treaties (BITs) and investment chapters in Free Trade Agreements (FTAs).[4] As a result of the "backlash" against international investment law and arbitration that has affected this evolving and rapidly-growing subfield of public international law during the past decade, States, international organizations, scholars, and practitioners have embarked on a debate with a view to determining the necessary substantive and procedural modifications to the system that will help overcome its legitimacy crisis.[5]

---

1. Jan Paulsson, *Arbitration Without Privity*, 10 ICSID Rev.: Foreign Inv. L.J. 232, 232–57 (1995).

2. *See* Joachim Pohl et al., *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey*, *in* Organisation for Economic Co-operation and Development [OECD], OECD Working Papers on Int'l Inv., 2012/02, 1, 3 (2012), https://www.oecd-ilibrary.org/docserver/5k8xb71nf628-en.pdf?expires=1618511917&id=id&accname=guest&checksum=6D11BAE1FCFC71665C9ABF6E2F4FA9E8 [https://perma.cc/4JY7-FPXL]; *see also* David Gaukrodger & Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, *in* Organisation for Economic Co-operation and Development [OECD], OECD Working Papers on Int'l Inv., 2012/03, 1, 9 (2012), https://www.oecd-ilibrary.org/docserver/5k46b1r85j6f-en.pdf?expires=1618512092&id=id&accname=guest&checksum=274B3B7A458A456FE4A92BBD9BDAC87B [https://perma.cc/LLN5-LBN9].

3. Michael Faure & Wanli Ma, *Investor-State Arbitration: Economic and Empirical Perspectives*, 41 Mich. J. Int'l L. 1, 15–16 (2020).

4. For a list of such international treaties ratified by Colombia, *see* Corte Constitucional [C.C.] [Constitutional Court], junio 6, 2019, Sentencia C-252/19, ¶¶ 50–51, https://www.corteconstitucional.gov.co/relatoria/2019/c-252-19.htm [https://perma.cc/7MKU-Z94G].

5. For a summary of the debate until now, see Malcolm Langford et al., *Regime Responsiveness in International Economic Disputes, in* Adjudicating Trade and Investment Disputes: Convergence or Divergence? 244, 244, 246–48 (Szilárd Gáspár-Szilágyi et al. eds., 2020). *See also* Malcolm Langford et al., *Backlash and State Strategies in International Investment Law, in* The Changing Practices of International Law 70, 72–102 (Tanja Aalberts & Thomas Gammeltoft-Hansen eds., 2018); The Backlash Against Investment Arbitration: Perceptions and Reality 1 (Michael Waibel et al. eds., 2010);

The sources of the problem are manifold and range from *procedural* issues—such as the lack of transparency of the proceedings, the conduct of the arbitrators, the decentralized nature of investment arbitration, and the time and costs of the procedures—to *substantive* issues— including the right of regulation, the broad standards of substantive protections, and the unpredictability of the system, due to varied and contradictory solutions given by arbitral tribunals to cases with analogous facts.[6] However, one of the most concerning issues relates to the impact of investment treaty awards (ITAs) rendered by international investment tribunals over the regulatory power of States, which produces a "chilling effect" that hinders the capacity of national authorities in designing and implementing public policies aimed at advancing general public interests.[7] In effect, critics contend that investment tribunals interpret the ambiguous, open-ended standards in IIAs in isolation and, furthermore, that they mainly take into account the rights of investors incorporated in the treaty. Critics argue that this interpretation conflicts with other bodies of public international law, particularly by leaving aside competing interests regulated by other fields, such as human rights, environmental or cultural heritage considerations, and domestic law.[8]

The proposals and attitudes raised to overcome these challenges and strengthen the investment protection system are also wide-ranging.[9] On

---

Asha Kaushal, *Revisiting History: How the Past Matters for the Present Backlash against the Foreign Investment Regime*, 50 HARV. INT'L L.J. 491, 534 (2009); Charles N. Brower & Stephen W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHI. J. INT'L L. 471, 473–77 (2009); Muthucumaraswamy Sornarajah, *A Coming Crisis: Expansionary Trends, in* APPEALS MECHANISM IN INTERNATIONAL INVESTMENTS DISPUTES 39 (Karl P. Sauvant ed., 2008); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1523-24 (2005); Ari Afilalo, *Meaning, Ambiguity and Legitimacy: Judicial (Re-)Construction of NAFTA Chapter 11*, 25 NW. J. INT'L L. & BUS. 279, 282 (2005); Ari Afilalo, *Towards a Common Law of International Investment: How NAFTA Chapter 11 Panels Should Solve Their Legitimacy Crisis*, 17 GEO INT'L ENVTL. L. REV. 51, 88–89 (2004); Charles H. II Brower, *Structure, Legitimacy, and NAFTA's Investment Chapter*, 36 VAND. J. TRANSNAT'L L. 37, 87–93 (2003).

6. *See* Franck, *supra* note 5, at 1545–46; Anthea Roberts, *Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration*, 112 AM. J. INT'L L. 410, 410 (2018). Roberts places States into 3 categories: (1) "incrementalists," who favor retaining ISDS with modest reforms to redress specific concerns; (2) "systemic reformers," who wish to retain the right of foreign investors to seek international relief but champion new ways of structuring dispute resolution(such as through a court or appellate review); and (3) "paradigm shifters," who argue for wholesale replacement of ISDS and embrace alternatives such as domestic courts, ombudsmen, and State-to-State arbitration. *Id.*

7. *See* Kyla Tienhaara, *Regulatory Chill and the Threat of Arbitration: A View from Political Science*, *in* EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION 606 (Chester Brown & Kate Miles eds., 2011); GUS VAN HARTEN, INVESTMENT TREATY LAW ARBITRATION AND PUBLIC LAW 102 (2007); DAVID SCHNEIDERMAN, CONSTITUTIONALIZING ECONOMIC GLOBALIZATION 71–73 (2008); and Kyla Tienhaara, *Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement,* 7 TRANSNAT'L ENV. L. [TEL] 229, 232–33 (2018).

8. MUTHUCUMARASWAMY SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 472 (4th ed. 2017)

9. In a news release published on December 21st, 2020 by the Secretariat of the International Center for the Settlement of Investment Disputes (ICSID), ICSID indicated

the one hand, some States have stopped negotiating and signing new IIAs and have tried to renegotiate old-generation treaties in order to detail and update obligations, and to limit and redefine the broad scope of the stan-

---

that it began 2020 with the release of the fourth working paper on proposed amendments to the ICSID rules. *See* Meg Kinnear, *2020 Year in Review*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (Dec. 21, 2020), https://icsid.worldbank.org/news-and-events/news-releases/2020-year-review [https://perma.cc/96HU-3X84]. The fifth working paper (to be published in the Spring of 2021) will advance text on the few remaining areas where comments have converged. In May 2020, the ICSID and UNCITRAL Secretariats published a much-anticipated draft Code of Conduct for ISDS Adjudicators. Drawing from an extensive review of codes of conduct in investment treaties, arbitration rules applicable to ISDS and international courts, the draft code is a first step towards a more universal set of standards for adjudicators in investor-State disputes. The Code has been discussed and analyzed extensively over the course of 2020, and a compilation of written input on the Code from States and the broader public has been published on the ICSID and UNCITRAL websites. Likewise, the United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) analyzed a paper in its thirty-eighth session in Vienna, 14–18 October 2019; *see Possible Reform of Investor-State Dispute Settlement (ISDS)*, A/CN.9/WG.III/W30, July 2019, Original: English V.19-08195 (E) *1908195*. From February 8–12, 2021, Working Group III will convene a meeting to review issues such as the selection and appointment of ISDS tribunal members in the context of the creation of a standing mechanism, an appellate mechanism and enforcement issues and the draft Code of Conduct for ISDS Adjudicators. On the other hand, the United Nations Conference on Trade and Development published a document as part of a series of revised editions to the UNCTAD Series on Issues in International Investment Agreements; *see* U.N. Conference on Trade and Development, *Investor-State Dispute Settlement: A Sequel,* U.N. DOC. UNCTAD/DIAE/IA/2013/2 (July 23, 2014). Since the publication of the first generation of the Pink Series, the world of IIAs has changed tremendously, and the impact of IIAs has evolved. Many investor-State dispute settlement cases have brought to light unanticipated—and partially undesired—side effects of IIAs. With expansive and sometimes contradictory interpretations, the arbitral process has created a new learning environment for countries and, in particular, for IIA negotiators. Issues of transparency, predictability and policy space have come to the forefront of the debate, as has the objective of ensuring coherence between IIAs and other areas of public policy, such as the protection of the environment (climate change) and public health and safety. This sequel, the sixth in the series, focuses on the ISDS clause—or the ISDS chapter—regularly included in IIAs. In light of the increasing number of ISDS cases, the debate about the pros and cons of the ISDS mechanism has been gaining momentum, especially in those countries and regions where ISDS is on the agenda of IIA negotiations and/or which have faced investor claims that have attracted public attention. The sequel aims at presenting a contribution to the debate by systematically analyzing the components of ISDS, taking stock of developments in the relevant IIA provisions, and outlining policy options for reform. More recently, UNCTAD published *The IIA Reform Accelerator* (November 2020) which aims to expedite the modernization of the existing stock of old-generation IIAs. *See* U.N. Conference on Trade and Development, *The International Investment Agreements Reform Accelerator*, U.N. DOC. UNCTAD/DIAE/PCB/INF/2020/8 (Nov. 8, 2020). It operationalizes the idea of gradual innovation by focusing on the reform of the substantive provisions of IIAs in selected key areas. The *Accelerator* focuses on eight IIA provisions that are most in need of reform and that have seen a clear reform trend in line with the sustainable development goals and safeguarding the State's right to regulate in IIAs: (1) the definition of investment; (2) the definition of investor; (3) national treatment (NT); (4) MFN treatment; (5) FET; (6) full protection and security (FPS); (7) indirect expropriation; and (8) public policy exceptions. The reform-oriented formulations can be directly used at the national, bilateral, regional and multilateral levels with a view to interpreting, amending or replacing old-generation treaties.

dards of protection by defining their elements.[10] Others, such as Bolivia, Nicaragua, Venezuela, and Ecuador, have terminated and denounced their IIAs and even the 1965 Washington Convention that created the International Center for the Settlement of Investment Disputes (ICSID).[11] On the other hand, other States have sponsored the introduction of structural changes to the system with the aim of promoting the coherence and legitimacy, including the imposition of substantive obligations on foreign investors and the possibility of States filing counterclaims.[12] Additionally, some instruments have already established a permanent appellate tribunal to review ITAs in order to unify the interpretations carried out by investment tribunals.[13]

Faithful defenders of the investment protection system have suggested that solutions to close the legitimacy gap can be found within the system itself. International investment law should be understood as one operating in a public law context because it reviews, supervises and limits State conduct for the benefit of individual or private interests, thus exercising global governance functions.[14] Therefore, by means of a comparative public law approach, arbitral tribunals can draw on public law standards developed in domestic constitutional or administrative law with the aim of strengthening the legal foundations of their decisions.[15] In this regard, one can see some

10. *See* Kathryn Gordon & Joachim Pohl, *Investment Treaties over Time – Treaty Practice and Interpretation in a Changing World*, *in* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT [OECD], OECD WORKING PAPERS ON INT'L INV., 2015/02, 37–38 (2015), https://www.oecd-ilibrary.org/docserver/5js7rhd8sq7h-en.pdf?expires=1618512582&id=id&accname=guest&checksum=CA6BEA6232C40819B792677717B63E5B [https://perma.cc/3WUU-TJAQ].

11. Ignacio A. Vincentelli, *The Uncertain Future of ICSID in Latin America*, 16 LAW & BUS. REV. AM. 409, 421–422 (2010); *Contracting States and Measures taken by them for the purpose of the Convention*, ICSID (2019), https://icsid.worldbank.org/sites/default/files/2020_July_ICSID_8_ENG.pdf [https://perma.cc/U4QN-AXTK].

12. *See, e.g.*, Burlington Resources Inc. v. Republic of Ecuador, Case No. ARB/08/5, International Centre for Settlement of Investment Disputes [ICSID] (Dec. 14, 2012); Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador), Case No. ARB/08/6, International Centre for Settlement of Investment Disputes [ICSID] (Aug. 11, 2015); Antoine Goetz et al. v. Republic of Burundi, Case No. ARB/01/2, International Centre for Settlement of Investment Disputes [ICSID] (June 21, 2012).

13. For example, the recent Canada-European Union Comprehensive Economic and Trade Agreement (CETA) which entered into force on September 21, 2017, envisages the constitution of an Appellate Tribunal in order to increase legitimacy and strengthen coherence and predictability of the system. *See* Albert Jan van den Berg, *Appeal Mechanism for ISDS Awards: Interaction with the New York and ICSID Conventions,* ICSID REV. 1, 5 (2019).

14. *See, e.g.*, ARMIN VON BOGDANDY & INGO VENZKE, IN WHOSE NAME? A PUBLIC LAW THEORY OF INTERNATIONAL ADJUDICATION (2016). This book proposes a public law theory of international adjudication. The vast majority of international judicial decisions have been issued since 1990. *Id.* at 92. The increasing activity of international courts over the past two decades is one of the most significant developments within international law. *Id.* It has repercussions on all levels of governance and has challenged perceived understandings of the nature and legitimacy of international courts. *Id.*

15. *See generally* Stephan W. Schill, *Sources of International Investment Law: Multilateralization, Arbitral Precedent, Comparativism, Soft Law, in* THE OXFORD HANDBOOK OF THE SOURCES OF LAW 1109 (Jean d'Aspremont et al. eds., 2017). *See also* William Burke-

efforts to improve the transparency in ISDS with the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration[16] that came into effect on April 1, 2014 and the UN (Mauritius) Convention on Transparency in Treaty-based Investor-State Arbitration,[17] open for signature since March 17, 2015, to States that wish to make the UNCITRAL Transparency Rules applicable to IIAs concluded prior to April 1, 2014.

IIAs transformed the international legal order for the protection of foreign investment from a power-based system into a treaty-based one. Within this context, this Article addresses the judicial intervention of domestic apex courts on international investment disputes—matters that traditionally were considered to fall within the domestic jurisdiction of sovereign nations in Latin America.[18] The Article will describe four situations of domestic intervention by the judiciary and explore judicial coordination, particularly focusing on the *vertical* judicial dialogue that can be articulated between domestic constitutional courts and international investment tribunals in order to balance and harmonize the different interests at stake in this important and evolving sub-field of international law. The focus will be on certain recent judicial interventions undertaken by the Colombian Constitutional Court.

Constitutional courts can be the paramount example of domestic court interaction and intervention with international investment law. Whether conflictive or collaborative, judicial intervention through constitutional courts in investment matters occurs in four specific situations,[19]

White & Andreas von Staden, *The Need for Public Law Standards of Review in Investor-State Arbitrations*, *in* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 689, 689–720 (Stephan W. Schill, ed., 2010).

16. U.N. Comm'n on Int'l Trade L., UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (Effective Date: 1 April 2014), https://uncitral.un.org/en/texts/arbitration/contractualtexts/transparency [https://perma.cc/U8V7-BBCF] (last visited Aug. 5, 2021).

17. U.N. Comm'n on Int'l Trade L., United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014) (the "Mauritius Convention on Transparency"), https://uncitral.un.org/en/texts/arbitration/conventions/transparency [https://perma.cc/A3MF-PRCX] (last visited Apr. 12, 2021).

18. *See, e.g.*, Patrick Juillard, *Calvo Doctrine/Calvo Clause*, MAX PLANK ENCYCLOPEDIA PUBLIC INT'L L. (2007). *See also* DONALD R. SHEA, THE CALVO CLAUSE xiii (1955). One of the essential elements of the historically averse Bello/Calvo doctrine was the equal treatment between nationals and foreigners. SANTIAGO MONTT, WHAT INTERNATIONAL INVESTMENT LAW AND LATIN AMERICA CAN AND SHOULD DEMAND FROM EACH OTHER. UPDATING THE BELLO/CALVO DOCTRINE IN THE BIT GENERATION 8 (2009). Foreigners (and nationals) within the country should exclusively submit to local laws and to the jurisdiction of domestic courts, requiring foreigners to incorporate a "Calvo Clause" in their government contracts, limiting them to local remedies and waiving any international remedies for legal claims against the host State. *Id.* at 38–39. For a summary of the history of the Bello/Calvo doctrine in Colombia, *see* ALEJANDRO LINARES-CANTILLO, EL DERECHO APLICABLE EN EL ARBITRAJE DE INVERSIÓN: LA TENSIÓN CON EL DERECHO INTERNO (2019), at 31-50.

19. This Article will follow the moments proposed by René Urueña & María Prada-Uribe, *Constitucionalismo transformador y arbitraje de inversión: elementos para un estándar de revisión constitucional nacional estricto*, No. 2019-05, *in* MAX PLANCK INSTITUTE [MPIL] RESEARCH PAPER SERIES 1, 10 (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3331056 [https://perma.cc/SE5L-ABLW]; Juan Camilo Fandiño-Bravo, *The Role of Constitutional Courts in International Investment Law and Investment Treaty*

namely, (i) when reviewing the constitutionality of IIAs; (ii) when there is concurrent jurisdiction; (iii) when exercising judicial review for the recognition and enforcement of foreign arbitral awards; and, finally, (iv) when exercising judicial review over legislation passed to implement ITAs.[20] Thus, constitutional courts play a decisive role in establishing a *vertical* communication with international tribunals that can enhance the legitimacy of the investment protection system by outlining the key elements for the protection of general social and cultural rights.

By conducting a case study of Colombia, this article will focus on the primary role that the Colombian Constitutional Court has acquired in investment matters when exercising its jurisdiction as the "guardian of the integrity and supremacy of the Constitution"[21] in the abovementioned situations, opening the path for a new frontier of international investment law reform at the domestic level. Although it can be said that Colombia is a "new player" in the investment field (as there have only been four awards rendered against the State—three of them in 2021),[22] the ten cases currently pending that have Colombia as respondent, some of which by acts of the judiciary,[23] call for an active two-way conversation on the need to strike a balance between wider interests and human rights obligations binding on the State and international investment law.[24]

Despite recognizing the important role of the Colombian Constitutional Court in the international investment field, this Article will cast doubts on how the court has developed its functions when it relies mainly upon domestic law arguments, leaves aside considerations of international

Arbitration: A Latin American Perspective, *in* 18 MAX PLANCK Y.B. U.N. L. 667, 667–745 (2014) (LL.M. Thesis).

20. This article will only reference the first three moments of judicial intervention in international investment law, leaving space for future contributions to explore the scope and effects of potential decisions by the constitutional court in the fourth moment. No reference is made to interim relief or other judicial action requested of domestic courts in international arbitration.

21. CONSITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 241.

22. The award on the case Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia, ICSID Case ARB/16/6, was issued in 2019, but a request for annulment was filed before ICSID (Date of Constitution of *ad hoc* Committee: March 6, 2020). Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colom., ICSID Case ARB/16/6, Award (Aug. 27, 2019); Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colom., ICSID Case ARB/16/6, Request for Annulment (Mar. 6, 2020). The other cases are: Naturgy Energy Group, S.A. and Naturgy Electricidad Colombia, S.L. (formerly Gas Natural SDG, S.A. and Gas Natural Fenosa Electricidad Colombia, S.L.) v. Republic of Colom., ICSID Case UNCT/18/1, Award (March 12, 2021); Astrida Benita Carrizosa v. Republic of Colom., ICSID Case ARB/18/5 Award (April 19, 2021); América Móvil S.A.B. de C.V. v. Republic of Colom., ICSID Case ARB(AF)/16/5 Award (May 7, 2021).

23. *See* Enrique Alberto Prieto-Rios, *BITs y la Constitución Colombiana de 1991: Internacionalización de la Economía dentro de un Estado Social de Derecho*, 13 ESTUDIOS SOCIO-JURÍD. 109, 118 (2011). For a list of current cases, *see* C-252/19, *supra* note 4, ¶ 62.

24. Pierre-Marie Dupuy, *Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law*, *in* HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 45, 45–62 (Pierre-Marie Dupuy et al. eds., 2009).

obligations binding on the State, and disregards the formal sources of international law. The Article will demonstrate that, by failing to undertake a comprehensive approach that adequately considers relevant rules of international law, the Constitutional Court did not encourage the articulation and coordination of an effective dialogue with investment tribunals aimed at reducing the discretionary powers of the latter as well as protecting human rights and safeguarding the regulatory space of the State. Rather, this failure to dialogue implies frictions and contradictions and may increase the discretionary powers of international arbitrators and even set the stage for international State responsibility claims against Colombia.

To this end, the Article will be divided into five sections. Section I will study the public law paradigm[25] to understand international investment arbitration, making particular reference to the standard of "deference" developed by national courts that can be extrapolated to the international realm through a comparative law approach. Section II will address some of the most relevant situations of judicial intervention in the constitutional review of IIAs signed by Colombia, illustrating how the Constitutional Court has expanded its *de facto* powers even though it has limited and constrained its *de jure* powers. One example of the aggrandizement of such powers is the change from a "rational basis" test that the court used in judgment C-358 of 1996[26] that reviewed the 1994 BIT signed with the United Kingdom to a "strict scrutiny" test,[27] used more recently in decision C-252 of 2019,[28] which reviewed the 2014 BIT signed with France.

In Section III, the Article will analyze how, when faced with situations of "concurrent jurisdiction", domestic courts exercise jurisdiction over disputes arising out of the same factual situation involving an international investment.[29] In Colombia, this usually happens under two circumstances: (i) in abstract review of laws passed by Congress when a citizen brings a lawsuit against such law for violation of the Constitution (*actio popularis*), and (ii) by means of the use of a constitutional injunction to protect fundamental rights (*acción de tutela*).[30] In these scenarios, if constitutional judges do not consider the scope of the international obliga-

25. Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping The Investment Treaty System*, 107 AM. J. INT'L L. 45, 48 (2013).

26. *See* Corte Constitucional [C.C.] [Constitutional Court], 1996, Sentencia C-358/96 (Colom.).

27. A stricter constitutional review had been proposed for the "indirect expropriation" provision by Magdalena Correa-Henao. *See* Magdalena Correa-Henao, *El Control de Constitucionalidad de los Acuerdos de Inversión en Colombia. Análisis desde la Clausula de Expropiación Indirecta, in* EL CONSTITUCIONALISMO TRANSFORMADOR EN AMÉRICA LATINA Y EL DERECHO ECONÓMICO INTERNACIONAL. DE LA TENSIÓN AL DIÁLOGO 511, 539–541 (Armin von Bogdandy, et al. eds., 2018). A stricter review has also been proposed for ISDS as it is part of a mechanism that exercises a decentralized form of international public authority. *See* Urueña & Prada-Uribe, *supra* note 19.

28. C-252/19, *supra* note 4.

29. Fandiño-Bravo, *supra* note 19, at 718.

30. Dina Townsend, *The Rights of Nature (Rivers) and Constitutional Actions in Colombia*, GLOBAL NETWORK HUM. RTS. & ENV'T. (July 8, 2019), https://gnhre.org/2019/07/08/the-rights-of-nature-rivers-and-constitutional-actions-in-colombia/.

tions binding on the State when providing a constitutional remedy, they might obstruct the possibility of an effective dialogue with international tribunals and can eventually open the door to claims of denial of justice or of a direct violation of an international obligation imputable to the Colombian judiciary. This Article will rely on two gold mining cases in dispute, initiated by international claims of Canadian investors, to show how judgments by the Constitutional Court in performing abstract control and reviewing *tutela* actions can eventually trigger international State responsibility.

Section IV will discuss the third situation where Colombian apex courts have jurisdiction to intervene at a later stage: when the successful party, in a case of no-voluntary-compliance with the award, is seeking the recognition and enforcement of an ITA in the country.[31] Here, the Article will explore the power to deny recognition or to refuse enforcement of an ITA based on constitutional grounds. It will be argued that through an *ex officio* review of investment treaty awards under the ground of "international public policy" (IPP), the Colombian judiciary may be opening the door to question them through the use of the *tutela* action. This, as will be explained, represents an additional opportunity in which constitutional judges can either rely solely on domestic constitutional law arguments—a problematic view—or take the opportunity to integrate and enmesh into its examination arguments from international law sources, thus taking a step towards reducing tensions and enhancing *vertical* judicial coordination and harmonization.

To conclude, Section V will deliver some brief conclusions that recapitulate what has been stated throughout the Article and will shed some light on redefining the balance and instantiating a fruitful dialogue between international investment treaty arbitrators and domestic apex courts. Ultimately, this might serve as a tool to address the current *backlash* against the ISDS system.

I. The Public Law Analogy in International Investment Law

Understanding the legal nature of international investment law has been particularly problematic from the outset. Although IIAs are creatures of public international law, the direct right they grant to foreign investors to file claims against a sovereign State through the adjudicating form of arbitration, which is not a permanent judicial body, with rules based on a private means of dispute resolution similar to those of traditional international commercial arbitration, blurs the categorization.[32]

31. Fandiño-Bravo, *supra* note 19, at 721.

32. *See* Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 BRIT. Y.B. INT'L L. 151, 151–289 (2003); Joel R. Paul, *The Isolation of Private International Law*, 7 WIS. INT'L LJ. 149 (1988); Alex Mills, *Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration*, 14 J. INT'L ECON. L. 469, 469–503 (2011); Mathias Audit, *Un arbitrage aux confins du droit international public - Observations sur la sentence du 30 octobre 2007 opposant le Group Eurotunnel au Royaume-Uni et à la République francaise*, REVUE DE L'ARBITRAGE 445 (2007); Derek W. Bowett,

Accordingly, in the first cases, arbitrators understood the investment disputes as private disputes, treating the arbitrations as if they were derived from contracts signed between two parties in their private capacities—in a horizontal legal relationship—and not from international law instruments signed between two sovereign nations.[33] Under this vision, characteristics such as confidentiality and equality of arms were proper to this type of dispute settlement.[34] This is what has been called a "private mindset" of investment arbitration.[35]

Today however, after wide criticism from the legal academia,[36] investment treaty arbitration is understood as performing a public law function, and particularly as a "comprehensive form of global administrative law."[37] Indeed, it represents "a uniquely internationalized arm of the governing apparatus of States, [which] employs arbitration to review and control the exercise of public authority."[38] Further, investment arbitration no longer deals with private interests alone, like expropriation or fair and equitable treatment, but in most instances it transcends the specific and immediate dispute, directly touching upon general interests or affecting the entire population of a country.[39] In essence, it is an international review of all aspects of sovereign activities and discretion. As noted by the arbitral tribunal in *Methanex*, "there is an undoubtedly public interest in [investment] arbitration. The substantive issues extend far beyond those raised by the

---

Claims between States and Private Entities: The Twilight Zone of International Law, 35 CATHOLIC U. L. REV. 929 (1985–1986). Charles N. Brower and Shashank P. Kumar identify and discuss developments in fields such as commercial and treaty-based arbitration, arguing that the real distinction today is not between commercial and treaty-based arbitral processes, but between mixed investor–State arbitration. This includes both contractual and treaty mechanisms on the one hand, and purely private commercial arbitration on the other. In light of the hybrid nature of the relationship between foreign investors and host States implicating private rights and public authority, the genus of investomercial arbitration is characterized by an interplay of domestic and international law, and it escapes the rigid dichotomy between private and public dispute settlement processes. *See* Charles N. Brower & Shashank P. Kumar, *Investomercial Arbitration: Whence Cometh It? What Is It? Whither Goeth It?*, 30 ICSID REV. FOREIGN INV. L. J. 35, 35–55 (2015).

33. Roberts, *supra* note 25, at 67. *See also* BG Grp. V. Republic of Arg., 134 S. Ct. 1198, 1215 (2014) (Roberts, J., dissenting).

34. Stephan W. Schill, *International Investment Law and Comparative Public Law – An Introduction, in* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 10, 10–11 (Stephan W. Schill ed., 2010).

35. Rene Urueña, *Subsidiarity and the Public-Private distinction in Investment Treaty Arbitration*, 79 L. & CONTEMP. PROBS. 99, 110 (2016). *See also* MUTHUCUMARASWAMY SORNARAJAH, RESISTANCE AND CHANGE IN THE INTERNATIONAL LAW ON FOREIGN INVESTMENT (2015); Gus Van Harten, *The Public-Private Distinction in the International Arbitration of Individual Claims against the State*, 56 INT'L L. & COMP. L. Q. 371 (2007); Muthucumaraswamy Sornarajah, *The Clash of Globalizations and the International Law on Foreign Investment: The Simon Reisman Lecture in International Trade Policy*", 10 CANADIAN FOREIGN POL'Y J. 13, 13–17 (2003).

36. *See generally* GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW (2008).

37. Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121, 123 (2006).

38. VAN HARTEN, *supra* note 36, at 70.

39. *See* Burke-White & von Staden, *supra* note 15, at 692.

usual transitional arbitration between commercial parties."[40]

Consequently, a new public law paradigm has been proposed, based also on the regulatory power of the State over the investors, under which the latter, the governed, challenge measures adopted by the former in its regulatory capacity, as in domestic administrative or constitutional law.[41] Roberts has drawn two theories in order to explain the public law paradigm as the proper way of understanding investment treaty arbitration.[42] The first, the "public action theory" distinguishes private from public activities by relying on traditional understandings of public actions (*acta iuri imperii)* and private State action (*acta iuri gestionis)* developed in contexts such as sovereign immunity.[43] Applying a "bright-line test," investment treaty arbitration is public in nature because it arises under an international treaty entered into by the State in its public capacity.[44] However, this categorical distinction is blurred by the existence of "umbrella clauses," which upgrade certain domestic compromises and contractual provisions to the international level.[45]

In the second theory, termed "public interest theory," the categorization of investment law as public law is based on the fact that it involves significant matters of public concern that transcend the private rights and obligations of the parties to the dispute.[46] Additionally, Peat recently proposed a third rationale, which he called the "functionalist approach" because investment arbitration imposes restrictions on the powers of the State vis-à-vis private individuals "in the same way domestic public law imposes restrictions on the state's exercise [of] power over those within its jurisdiction."[47]

This Article is written from a "public mindset"[48] perspective and

40. Methanex Corp. v. United States, Decision on the Tribunal on Petitions from Third Persons to Intervene as "Amicus Curiae," NAFTA Ch.11 Arb. Trib., pt. V, ¶ 49 (Jan. 15, 2001).

41. *See* Roberts, *supra* note 25, at 63.

42. *Id.* at 64.

43. *Id.* at 64–65.

44. *Id.*

45. *Id.* at 65.

46. *Id.*

47. Daniel Peat, *Comparative Reasoning in International Courts and Tribunals*, 145 CAMBRIDGE STUD. INT'L COMP. L. 107, 112 (2019). *See also* Ralf Michaels, *The Functional Method of Comparative Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW (Mathias Reimann & Reinhard Zimmerman eds., 2006).

48. *See* ERIC DE BRANDANDERE, INVESTMENT TREATY ARBITRATION AS PUBLIC INTERNATIONAL LAW (2014). On the development of Global Administrative Law (GAL), see Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15 (2005); VAN HARTEN, *supra* note 36; Benedict Kingsbury & Stephan Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality, and the Emerging Global Administrative Law*, *in* 50 YEARS OF THE NEW YORK CONVENTION 5 (Albert Jan Van Den Berg, ed., 2009); Benedict Kingsbury & Stephan Schill, *Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest: The Concept of Proportionality*, in INT'L INV. L. & COMPAR. PUB. L. 75 (Stephan Schill ed., 2010); Alec Stone Sweet, *Investor-State Arbitration: Proportionality's New Frontier,* 4 L. & ETHICS HUM. RTS. 47 (2010); Benedict Kingsbury, *The Concept of Law in Global Administrative Law,* 20 EUR. J. INT'L L. 1 (2009).

therefore will follow the public law paradigm in order to explore the role that the Colombian Constitutional Court has played or might play in improving the coherence and legitimacy of investment treaty arbitration.

II. Constitutional Review of International Investment Agreements[49]

A. History of Constitutional Review of International Investment Agreements (IIAs) in Colombia

For the purpose of assuring the "supremacy of the Constitution" principle,[50] Article 241(10) of the 1991 Colombian Constitution vests the Constitutional Court with the power to review the constitutionality of international treaties negotiated by the government and approved by Congress, including IIAs.[51] In developing this function, the court has assessed that this control is automatic and must be exercised after congressional approval but prior to the ratification of the treaty, turning the constitutional review into a *sine qua non* condition for the perfection and entry into force of any international treaty in the country.[52] Additionally, it has highlighted its *res judicata* effects, as well as its comprehensive or integral scope, covering both procedural and substantive matters of the treaty and its approbatory law.[53] Moreover, it has considered that this constitutional review is abstract and strictly legal, meaning that, in carrying out its analysis, the court must limit itself to legal considerations and must not reassess the treaty's benefits or its political convenience.[54]

In general terms, Colombia's path regarding judicial review of IIAs should be traced back to the enactment of the 1991 Constitution, the platform upon which the country began to internationalize its economy.[55] It was not until this moment that the country started to actively participate in the international trade and investment arena, pursuing the subscription of multiple IIAs with capital exporting countries.[56] In that sense, Colombia entered this field later than other Latin American countries, having taken

49. For a description of the IIAs signed by the Republic of Colombia and a summary of the traditional decisions of our Constitutional Court in reviewing them, see LINARES-CANTILLO, *supra* note 18, at 152–190. An interesting critique of such decisions can be found in the article written by Daniel Rivas-Ramírez. *See El derecho internacional de las inversiones, otro de los desaires de la jurisprudencia constitucional colombiana*, *in* DE ANACRONISMOS Y VATICINIOS: DIAGNÓSTICO SOBRE LAS RELACIONES ENTRE EL DERECHO INTERNACIONAL Y EL DERECHO INTERNO EN LATINOAMÉRICA 627, 627–680 (Juana Inés Acosta López et. al. eds., 2017).

50. This principle seeks to assure that all constitutional amendments and laws passed by Congress are in accordance with the 1991 Constitution. *See* CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] arts. 40, 86, 241–42.

51. *Id.* art. 241(10).

52. LINARES-CANTILLO, *supra* note 18, at 147.

53. *Id.*

54. *See* Corte Constitucional [C.C.] [Constitutional Court], julio 24, 2008, Sentencia C-750/08 (Colom.); C.C., marzo 12, 2012, Sentencia C-169/12; C.C., abril 6, 2016, C-157/16; C.C., abril 14, 2016, Sentencia C-184/16.

55. LINARES-CANTILLO, *supra* note 18, at 81–82, 105, 152.

56. *Id.*

into account the history of IIAs, which dates back to the early 1990's.[57]

Given the Constitutional Court's jurisdiction to determine the constitutionality of different international treaties and agreements once approved by Congress, and the fact that it has the constitutional power to "definitively decide on the constitutionality of international treaties and the laws approving them,"[58] it has become a particularly significant actor when reviewing IIAs. The court's first decision on this matter dates back to 1995, when it studied the constitutionality of the Mexico-Colombia-Venezuela Free Trade Agreement, known as the G-3.[59] In Judgment C-178 of 1995, the court upheld the constitutionality of the G-3 Agreement.[60] However, more importantly, it addressed the possibility that a particular provision contained in an IIA was not in accordance with the Constitution.[61] In fact, when considering the "expropriation clause" of the investment chapter of the G-3, the court confronted it with Article 58 of the Colombian Constitution, which, by then, allowed expropriations to be carried out for equitable reasons without compensation.[62] The court found that

> Colombia deviates from the provisions of the [agreement's] clause that limits the powers of States in these matters, and affirms its constitutional and legal powers in matters of expropriation, even without compensation. . . . Now, the prohibition to establish more restrictive measures in matters of nationalization, expropriation and compensation, contained in the annex to Article 17-08, must be understood in the sense that its transgression compromises the responsibility of the Colombian State with the affected party or parties and not, of course, in conditioning the validity of any future constitutional reforms which are in line with the current treaty. . . .[63]

The extract above seems to imply that, in case of an expropriation without compensation under the G-3 Agreement, the international responsibility of the Colombian State would be compromised, without the need to amend Article 58 of the Constitution. However, just a month after this judgment, the court delivered ruling C-203 of 1995[64] in reviewing the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA), in which it stated the following:

---

57. For a study on the history of Colombia regarding international investment law, *see* LINARES-CANTILLO, *supra* note 18.

58. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 241(10).

59. *See* Corte Constitucional [C.C.] [Constitutional Court], 1995, Sentencia C-178/95 (Colom.).

60. *Id.*

61. *See id.*

62. Article 58 originally established that Congress, through the vote of the absolute majority of the members of both chambers, could determine the cases in which there could be expropriation of private property without compensation. *Id.* The reasons of equity, public utility or social interest invoked by the legislator cannot be challenged in judicial proceedings. *Id.*

63. *See* C-178/95, *supra* note 59.

64. *See* Corte Constitucional [C.C.] [Constitutional Court], 1995, Sentencia C-203/95 (Colom.). Through decision C-203 of 1995, the Constitutional Court determined the constitutionality of the law that approved the adherence of Colombia to the Multilateral Investment Guarantee Agency (MIGA).

> [T]he creation of MIGA favors the flow of investments and contributes immensely to the development of the countries involved in the process, including Colombia. It is not found that the clauses of the agreement violate any constitutional provision. . . In particular, the agreement must be understood in the light of the concept embodied in Article 150.16 of the Constitution, by which, through treaties and also on the basis of equity, reciprocity and national interest, the State partially transfers certain attributions—in this case providing guarantees against non-commercial risks with respect to investments made between member countries—to international organizations (such as the one created by this agreement) in order to promote or consolidate the economic integration between states.[65]

With this new judgment, the court prioritized international economic integration to the point of allowing the transfer of certain attributions of the State to an international organ, as long as it was done on the basis of reciprocity, equity and national interest.[66] However, it was not clear from the decision whether Article 58 of the Constitution posed concerns in light of the economic internationalization to be achieved through the subscription of international treaties and IIAs.

B. Decision C-358 of 1996

The discussions regarding Article 58 of the Constitution and its inconsistency with the so-called Hull formula[67] were addressed in 1996 when the court studied the constitutionality of the 1994 Colombia-United Kingdom BIT. There, without making reference to the precedent established in Judgment C-178 of 1995, the court declared the unconstitutionality of the expropriation provision of such BIT.[68] Particularly, in judgment C-358 of 1996, the court struck down Article 6 of the said BIT, after finding it violated Article 58 of the Constitution.[69] Decision C-358 of 1996 pointed out the problems Article 58 of the Constitution posed for the subscription of IIAs by allowing expropriations without compensation, which disregarded the Hull formula and the international minimum standard of treatment for foreigners.[70]

The BIT with the United Kingdom never entered into force. In turn, this ruling gave way to the enactment of a constitutional amendment (*Acto Legislativo 01 de 1999*) which reformed Article 58 and prohibited expropri-

---

65. *See id.*

66. Corte Constitucional [C.C.] [Constitutional Court], 2019, Sentencia C-069/19 (Colom.). *See also* CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] arts. 150 (16), 227.

67. The Hull formula comes from the famous formula of U.S. Secretary of State Cornell Hull articulated in his response to the Mexican nationalizations of 1917. According to Secretary Hull, "*prompt, adequate and effective*" compensation meant that the investor should be promptly granted an amount equal to the total value of his expropriated investment (adequate) in a freely transferable and exchangeable currency (effective). *See* Letter from the Secretary of State Cornell Hull to the Mexican Ambassador Castillo Nájera (July 21, 1938), *in* FOREIGN RELATIONS OF THE UNITED STATES DIPLOMATIC PAPERS, 1938, THE AMERICAN REPUBLICS 685, 685-696 (Matilda F. Axton et al. eds., vol. 5, 1956).

68. *See* C-178/95, *supra* note 59.

69. *See* C-358/96, *supra* note 26.

70. *See id.*

ation without prior compensation.[71] In that sense, as I have mentioned in previous works,[72] this reform marked a turning point for international investment law in Colombia, as it was not until the prohibition of expropriation without prior compensation that the country actively entered into the policy trend to subscribe and enforce mostly old-generation IIAs. In terms of signing new generation IIAs, Colombia might have lost a decade.[73] By reforming said constitutional provision, Colombia was able to subscribe and enforce multiple BITs[74] and FTAs.[75] Therefore, it was not until the beginning of the twenty-first century that the country actually entered into the trend of subscribing IIAs, having today as many as 18 IIAs in force.

Historically, the Colombian Constitutional Court had always maintained a rather persistent precedent of self-restraint when examining the constitutionality of IIAs. Since its first judgments, the court had been cautious in not overstepping its constitutional authority and respecting the competencies of the executive and legislative branches, which include the power of the President to direct foreign affairs in accordance with article 189-2 of the Constitution,[76] and of Congress to approve treaties signed by the government.[77] Nevertheless, as we will see, the court recently deviated from this long-standing position in a landmark but controversial ruling. The court, for the first time, passed from a "rational basis" test—traditionally used when reviewing international treaties—to the "strict scrutiny" test used in decision C-252 of 2019.[78]

C. Decision C-252 of 2019

The constitutional review process of the BIT signed in 2014 between Colombia and France was marked by several differentiators. Notably, it was the first time the Constitutional Court convened a public hearing to listen to the position of government representatives, stakeholders of the investment regime, academics and the citizenry in general on the matter.[79] Additionally, in judgment C-252 of 2019, the court declared the BIT to be "conditionally constitutional"; it considered that even though the treaty was consistent with the constitutional criteria of national interest, reciprocity, and the internationalization of the political, economic and social rela-

71. Acto Legislativo 1 de 1999, N. 43654, julio 30, 1999, DIARIO OFICIAL [D.O.] (Colom.)

72. *See* LINARES-CANTILLO, *supra* note 18, at 85.

73. *Id.* at 55.

74. As of today, Colombia has 8 BITs, in force with Spain, Switzerland, Peru, China, India, United Kingdom, Japan and France. *See* C-252/19, *supra* note 4, ¶ 50.

75. Currently, Colombia has 10 FTAs with investment chapters, in force with Mexico (Venezuela withdrew from the G-3, which is now known as the G-2 between Colombia and Mexico), Chile, the Northern Triangle (Guatemala, El Salvador and Honduras), the EFTA (Lichtenstein, Norway, Switzerland and Iceland), Canada, the United States, the European Union, South Korea, Costa Rica and Israel. *See id.* ¶ 51.

76. CONSTITUCÍON POLÍTICA DE COLOMBIA [C.P.] art. 189.

77. *Id.*, art. 150.

78. *See* Rafael Tamayo-Álvarez, *Constitutionality of the Colombia-France Bilateral Investment Treaty*, 114 AM. J. INT'L L. 471, 472 (2020).

79. *See* C-252/19, *supra* note 4.

tions of the State, certain conditions were necessary in order to ensure the supremacy of the Constitution.[80] In doing so, the court adopted a strict standard of review in what has been considered by some as an "opportunity to complement the executive branch's decision-making process without openly disregarding the special deference that, for democratic and technical reasons, that branch enjoys when managing the country's foreign affairs."[81]

Before studying the actual clauses of the treaty, the court reflected on the increase in investment claims against Colombia and the consequences of this factor over the regulatory capacity of the State.[82] According to Suárez,[83] nine of the eleven claims undergoing arbitration proceedings were based on alleged international wrongful acts on the basis of judgments issued by the Colombian Constitutional Court, in either *tutela* or constitutionality proceedings. In that sense, it analyzed the potential scenarios in which this BIT could compromise the international responsibility of Colombia, in light of how arbitrators have interpreted similar treaty provisions.[84] Hence, when reviewing the constitutionality of this BIT, it made extensive reference to previous decisions of international investment tribunals.[85] The court went on to compare the Colombia–France BIT with recent developments in the area such as USMCA, CPTPP, the Indian model investment treaty and CETA, as well as domestic law decisions, such as those adopted by the French Constitutional Council for CETA and the 2015 Trade Promotion Authority (TPA) of the United States.[86]

Moreover, to analyze the conformity of the treaty with the national legal order, the court carried out a two-tiered reasonableness test.[87] First, it verified whether the objectives of the agreement were legitimate in light of the Constitution; second, it reviewed the treaty as a whole, as well as each of its individual provisions, to ascertain whether the treaty was suitable to fulfill those objectives.[88] Within this framework, the court began by addressing the compatibility of the treaty as a whole with the Constitution.[89] It observed that the contracting parties had hoped to strengthen the economic cooperation between the two countries, thereby creating favorable conditions for investments in order to stimulate the transfer of capital and technology while preserving their own regulatory space.[90]

80. Federico Suárez-Ricaurte, *Judgment C-252 of 2019 of the Constitutional Court of Colombia: Change of Precedent on the Control of BITs*, INV. TREATY NEWS, INT'L INSTITUTE FOR SUSTAINABLE DEV. [IISD] (Sept. 19, 2019), https://www.iisd.org/itn/en/2019/09/19/judgment-c-252-of-2019-of-the-constitutional-court-of-colombia-change-of-precedent-on-the-control-of-bits-federico-suarez-ricaurte/ [https://perma.cc/7ZF8-SB4P].

81. *See* Tamayo-Álvarez, *supra* note 78, at. 471–78.

82. *See* C-252/19, *supra* note 4.

83. *See* Suárez-Ricaurte, *supra* note 80.

84. *See* Tamayo-Álvarez, *supra* note 78.

85. *See id.*

86. *See* Suárez-Ricaurte, *supra* note 80.

87. *See* Tamayo-Álvarez, *supra* note 78.

88. *See id.*

89. *See id.*

90. *See id.*

According to the court, such goals as established in the treaty's preamble are legitimate because they help fulfill a series of constitutional objectives, including guaranteeing legal certainty (*seguridad jurídica*) as an expression of the rule of law and the internationalizing of the Colombian economy.[91]

The court examined the Colombian government's justifications for the agreement.[92] It sought to judge whether the constitutional goals mentioned above were fulfilled through the treaty.[93] Despite the opinions presented in some interventions during the public hearing that questioned the link between the execution of IIAs and the increase of foreign direct investment, the court concluded that the data provided by the government regarding French investments in Colombia and the importance of France as a trading partner were sufficient to conclude that the agreement could indeed achieve those goals.[94] However, before holding that the BIT as a whole had passed the reasonableness test, the court went on to examine the BIT's compatibility with the principle of equality of treatment between national and foreigners established in Articles 13 and 100 of the Constitution.[95]

In particular, the court focused on whether the treaty could result in situations of inequality or discrimination against domestic investors to whom the substantive protections granted by the agreement were not applicable.[96] It noted that the BIT does not contain any substantive provision protecting domestic investors.[97] The court argued that this type of treaty does not guarantee equal treatment between domestic and foreign investors, which would prevent discrimination against the former.[98] Therefore, after considering that States are currently implementing measures to prevent foreign investors from being treated more favorably than their domestic counterparts, the court concluded that the agreement as a whole was in line with the Constitution, under the condition that none of its substantive provisions could lead to an "unjustified more favorable treatment [of foreign investors] than the treatment accorded to nationals."[99] In that sense, it advised the President that, if he decided to ratify the treaty, he should adopt a joint interpretative declaration with France to fulfill this condition.[100] This condition, which is applicable to the BIT as a whole and recalls the national treatment basis of the Bello/Calvo Doctrine, was lim-

91. *See id.*
92. *See id.*
93. *See* Tamayo-Álvarez, *supra* note 78.
94. *See id.*
95. *See id.*
96. *See id.*
97. *See* C-252/19, *supra* note 4.
98. Carolina Olarte-Bacares et al., *Are Interpretative Declarations Appropriate Instruments to Avoid Uncertainty?* Inv. Treaty News, IISD (Dec. 19, 2020), https://www.iisd.org/itn/en/2020/12/19/are-interpretative-declarations-appropriate-instruments-to-avoid-uncertainty-the-cases-of-the-colombia-france-bit-and-the-colombia-israel-fta-carolina-olarte-bacares-enrique-prieto-rios-juan-ponton-se/ [https://perma.cc/6SM7-DVTR].
99. Suárez-Ricaurte, *supra* note 80.
100. *See* C-252/19, *supra* note 4.

ited to "substantive" guarantees (because local investors do not have access to ISDS) and "unjustified" differential treatment (IIAs and Article 100 of the Constitution are "justified" differential treatments).[101]

After conditioning the constitutionality of the BIT as a whole, the court moved on to examine each of its individual provisions.[102] When analyzing the treaty's clauses, the court also conditioned the constitutionality of several provisions, requiring the Colombian government to clarify the meaning of certain expressions through a joint interpretative declaration, signed also by France.[103] In a way, the court gave the parties an opportunity to make an interpretative declaration to recalibrate certain aspects of the treaty.[104] Again, the court adopted a new standard of review, implementing also a new and "non-rhetoric" method for examining the constitutionality of IIAs. It expressly stated that

> The Court advises caution since a certain clause may allow for several interpretations, at least one of which may be incompatible with the Constitution. In this case, the appropriate remedy is to declare the conditional constitutionality [*exequibilidad condicionada*] of the treaty or any of its articles, then issue a warning to the President in the sense that if, in exercise of its constitutional powers to direct international relations, the President should decide to ratify the treaty, he must take the necessary steps in order to promote the adoption of a joint interpretative declaration with the representative of the other Contracting Party regarding the conditions set by the Court in relation to the treaty or any of its articles. This, of course, lies within the framework of Article 31 of the Vienna Convention on the Law of Treaties.[105]

This judicial remedy to condition the constitutionality of the BIT, although not established in the text of the Constitution, became a practical condition for the perfection and entry into force of the treaty and allowed the court to consolidate several parameters of interpretation which were intended to guide the judicial review of international agreements in the future.[106] The court required both Colombia and France to execute a joint interpretation of the BIT in the form of a joint binding interpretative state-

101. *See id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. Gustavo Prieto, *The Colombian Constitutional Court Judgment C-252/19: A New Frontier for Reform in International Investment Law*, EJIL TALK (July 29, 2019), https://www.ejiltalk.org/the-colombian-constitutional-court-judgment-c-252-19-a-new-frontier-for-reform-in-international-investment-law/ [https://perma.cc/78BZ-DSDA].
106. The same method and standard of review was used in decision C-254 of 2019, in which the court examined the constitutionality of the FTA signed between Colombia and Israel. *See* Olarte-Bacares et al., *supra* note 98. However, this method was only applied when studying the "investment chapter" of the treaty, while the other chapters followed the traditional approach of the court when examining international agreements. *See* C-252/19, *supra* note 4. Additionally, it must be noted that in its latest decisions, the court has abandoned this new method and has continued to apply the traditional standard of review for international agreements. For instance, see Corte Constitucional [C.C.] [Constitutional Court], 2019, Sentencia C-492/19 (adhesion to OECD) and [C.C.], 2020, Sentencia C-098/19 (Agreement for Economic Cooperation, Development and Privileges, Immunities and Facilities Granted to the Organization, signed with the OECD), among many others.

ment on the existing treaty with respect to specific provisions of the treaty.[107] The court followed article 31(3)(a) of the 1969 Vienna Convention on the Law of Treaties (VCLT) with regard to a "subsequent agreement," which is "an agreement between the parties, reached after the conclusion of a treaty, regarding the interpretation of the treaty or the application of its provisions."[108] The court reasoned that the need for this judicial control of the treaty, with the participation of the parties over their interpretation or application of the treaty, was to address the concerns of lack of legal certainty.[109] The idea of the majority opinion[110] was to enhance legal certainty and ensure that Colombia's right of regulation was subject to appropriate legal restraints, given that many investment tribunals still fail to recognize appropriately the legal relevance of the public interest in determining whether a legitimate expectation deserves legal protection.[111]

For example, when examining the Fair and Equitable Treatment (FET) standard, the court determined that the joint interpretative declaration should clarify the ambiguous and undetermined meaning of three terms used under article 4 of the BIT that contained the definition of FET, namely "in accordance with applicable international law,"[112] "*inter alia*,"[113] and "legitimate expectations."[114] In addition to this, the court also adopted this parameter of interpretation for other provisions in the treaty, such as the ones regarding the National Treatment (NT)[115] and

107. Gustavo Prieto, *supra* note 105.

108. Int'l Law Comm'n, Rep. on the Work of Its Sixty-Fifth Session, U.N. Doc. A/68/10, at 12 (2013).

109. Comm. on Int'l Trade Law, Rep. on the Work of Its Thirty-Ninth Session, IA/CN.9/WG.III/WP.191 (2020).

110. The majority was 6-3, with one dissenting opinion (Alberto Rojas-Ríos) and two partial dissenting opinions (Diana Fajardo-Rivera and myself). *See* C-252/19, *supra* note 4.

111. Under EU law, for example, it is undisputed that, "even if the applicant is able to prove a prima facie legitimate expectation, this may be defeated if there is an overriding public interest that trumps the expectation." PAUL CRAIG, EU ADMINISTRATIVE LAW 584 (2d ed. 2012).

112. Regarding this expression, which was incorporated in article 4 of the Agreement, the court considered that the term did not satisfy the principles of legal certainty and sovereignty. Therefore, it determined that the content must be determined by the parties in order to have legal certainty as to what exactly the States are committed to. *See* C-252/19, *supra* note 4, ¶ 204.

113. With respect to this term, which was included in article 4 of the treaty, the court considered that the expression "*inter alia*" created uncertainty for national authorities to act in accordance with international law. In that sense, it determined that the term must be interpreted restrictively, in an analogical sense, and not in a comprehensive one. *See id.* ¶ 208.

114. Prieto, *supra* note 105.

115. Regarding the NT clause contained in article 5 of the BIT, the court considered that the term "similar situations" did not satisfy the principle of legal certainty. Jairo Morales Vecino, *Conditional Constitutionality of the BIT Signed Between Colombia and France*, PEÑA MANCERO ABOGADOS: PM LEGAL NEWS (Sept. 27, 2019), https://www.pmabogados.co/pm-legal-news-en/conditional-constitutionality-between-colombia-france/?lang=EN [https://perma.cc/JP7L-A5E3]. Therefore, it determined that this expression should be defined in a manner that is consistent with this principle. *Id.*

Most Favored Nation (MFN)[116] clauses.

Particularly regarding the expression "legitimate expectations," which was incorporated in Article 4 (applicable to the FET standard) and 6 (applicable to indirect expropriation) of the BIT,[117] the court expressed that it was aligned with the Constitution, justified by Article 83, which establishes a duty to act according to the general principle of "good faith."[118] Nonetheless, based on prior non-binding but persuasive ITAs rendered by several investment arbitration tribunals, the court considered that the expression might allow different interpretations that could affect the principle of equality.[119] Therefore, it conditioned its constitutionality on a joint interpretative declaration by the parties that would limit the understanding of "legitimate expectations" only to those situations derived from "specific, repeated acts carried out by the Contracting Party that induce the good-faith investor to make or maintain the investment and that there are abrupt and unexpected changes made by government that affect their investment."[120]

D. Comments to Decision C-252 of 2019

It is worth noting that, in 2016, the UNCTAD reviewed the BIT signed by France and Colombia as an example of gradual innovation on the reform of the substantive provisions in a IIAs, as part of a systematic reform of the global regime of IIAs through a common approach at all levels (national, bilateral, regional and multilateral).[121] Representing significant progress made when reviewing IIAs signed in 2014, the UNCTAD's review highlighted the policy objectives of the BIT to (i) avoid overexposure to litigation, (ii) preserve the right of regulation in public interest and (iii) focus on investment conducive to development.[122] UNCTAD indicated that the Colombia-France BIT exhibited a refined definition of "investment"; a carve-out for prudential measures in the financial sector; clarification of what does and does not constitute "indirect expropriation"; detailed exceptions from the free-transfer-of-funds obligation; omission of "umbrella clauses"; explicit recognition that parties should not relax health, safety or environmental standards to attract investment; promotion of corporate social responsibility standards and limited access to ISDS.[123]

116. Regarding the MFN, the court considered that it created a *cascade effect* with respect to substantive obligations included in other treaties, going against the bilateral nature of the present BIT. Thus, the court determined that the MFN must be understood in a way that preserves "the power of the President of the Republic with regard to directing international relations, and concluding treaties." Suárez Ricaurte, *supra* note 80.

117. Vecino, *supra* note 115.

118. C-252/19, *supra* note 4, ¶ 210.

119. *Id.* ¶ 68.

120. *Id.* ¶ 212.

121. U.N. Conference on Trade and Development [UNCTAD], *Taking Stock of IIA Reform*, IIA Issues Note No. 1, 1 (March 2016).

122. *Id.* at 18.

123. *Id.*

As mentioned before, decision C-252 of 2019 sought to establish a new standard of review regarding the court's analysis of the constitutionality of international treaties.[124] The decision, which will help the executive in future negotiation of IIAs, was well-researched and persuaded the majority of justices.[125] Yet, this judgment has not only not been applied by the court in subsequent rulings, but it has also been subject to multiple well-founded critiques.[126] In fact, as associate justice of the Colombian Constitutional Court, I submitted a concurring and partial dissenting opinion to decision C-252 of 2019, in which I pointed out several concerns that I had about this ruling.[127] I concurred with the decision to declare the constitutionality of the BIT, but disagreed with some of the arguments and the conditions imposed upon the contracting parties.[128]

First, I stressed the dangers of the new role that the court was assuming when exercising the judicial review of international treaties.[129] The court should not intervene as a "baby-sitter" of the government in the negotiation of IIAs, although I agreed with its "preventive" role with respect to international treaties.[130] In fact, I expressed that, by adopting this new standard of review, the court was exceeding its constitutional powers and interfering with the executive branch's powers to direct and conduct foreign relations, deviating from the court's long-lasting established precedent on the matter.[131] Ultimately, with this ruling, the court was imposing its own interpretation on several provisions of the agreement over the will of two sovereign nations.[132]

---

124. Prieto, *supra* note 105.

125. *Id.*

126. *See, e.g.,* Olarte-Bacares *et al.*, *supra* note 98. The conclusion of this interesting article indicates that

> [f]rom a constitutional and an international standpoint, it seems that the joint interpretative declarations on both treaties are not sufficient to overcome the encryption and uncertainty surrounding IIL. While the Constitutional Court was right to pursue a stricter constitutionality review of the treaties discussed here, the most suitable means to implement it are still to be found.

Id. See also Eduardo Zuleta & María Camila Rincón, *Colombia's Constitutional Court Conditions Ratification of the Colombia-France BIT to the Interpretation of Several Provisions of the Treaty,* Wolters Kluwer: Kluwer Arbitration Blog (July 4, 2019), http://arbitrationblog.kluwerarbitration.com/2019/07/04/colombias-constitutional-court-conditions-ratification-of-the-colombia-france-bit-to-the-interpretation-of-several-provisions-of-the-treaty [https://perma.cc/VN75-Y4ZL]; Prieto, *supra* note 105. Kieran Bradley, on July 31, 2019, commented the following on Prieto's article:

> Thank you, this is a very helpful post. In giving the 'APPRI' conditional approval, the Colombian Constitutional Court appears in effect to have adopted the same technique as the European Court of Justice in Opinion 1/17, which conditioned its endorsement of the CETA to both a particular interpretation of certain essential provisions of the agreement, and the success of certain initiatives to be taken by the authorities of the European Union.

Prieto, *supra* note 105.

127. C-252/19, *supra* note 4, ¶ 239.

128. *Id.* at 240–41.

129. *Id.* at 241.

130. *Id.* at 241–42.

131. *Id.* at 242–43.

132. *Id.* at 245.

Second, in my partial dissenting opinion, I highlighted that, when interpreting the treaty, the court did not consider the traditional sources of public international law established in Article 38(1) of the Statute of the International Court of Justice (ICJ), particularly the customary rules of interpretation set out in the VCLT.[133] More specifically, I pointed out that there was a striking absence of any reference to the customary norm of treaty interpretation codified in articles 31–33 of the VCLT.[134] Additionally, I observed that, in its interpretation of the BIT, the court relied heavily on previous arbitral awards and doctrine, not only to "pay due consideration" to them, but almost using them as a parameter of legal certainty and correct interpretation.[135] In my view, this was an inadequate use of the sources of international law, given that (i) these are only *subsidiary* means for the determination of rules of law, according to Article 38(1)(d) of the Statute of the ICJ; (ii) previous arbitral awards do not bind arbitrators, as there is no rule of *stare decisis* in international investment arbitration, much less when they are interpreting different treaties between different parties, as each IIA has different wording and therefore should be interpreted on its own terms; and (iii) the ITAs used by the court to support its judgment were, in some cases, annulled awards, and, in others, outdated awards that did not necessarily demonstrate the development and evolution of this field of investment law.[136]

In fact, the prevailing view on precedent in investment arbitration seems to be the following, articulated by the majority of the arbitral tribu-

133. Statute of the International Court of Justice, art. 38, ¶ 1.

134. Vienna Convention on the Law of Treaties, art. 31–33, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

135. *See* C-252/19, *supra* note 4.

136. There is a very interesting debate on whether ITAs constitute *quasi* precedent or not in investment arbitration. *See, e.g.,* Jan Paulsson, *The Role of Precedent in Investment Treaty Arbitration*, *in* Arbitration Under International Investment Agreements: A Guide to the Key Issues 81, 81–100 (OUP 2d ed. 2018); Mathias Audit, *La Jurisprudence Arbitrale Comme Source Du Droit International Des Investissements*, *in* Droit International des Investissements et de L'Arbitrage Transnational (Pedone ed., 2015); René Urueña, *Of Precedents and Ideology: Lawmaking by Investment Arbitration Tribunals*, *in* Critical International Law: Postrealism, Postcolonialism, and Transnationalism 282 (Oxford ed., 2014); Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23 Arbitration International 357, 357–78 (2007); Anne-Véronique Schlaepfer et al., *Towards a Uniform International Arbitration Law?*, *in* IAI Series on International Arbitration 249, 249 (Emmanuel Gaillard ed., vol. 3 2005); Yas Banifatemi, *Precedent in International Arbitration, in* IAI Series on International Arbitration 95, 95–96 (Emmanuel Gaillard ed., vol. 5 2008); Eric de Brabandere, *Arbitral Decisions as a Source of International Investment Law*, *in* International Investment Law: The Sources of Rights and Obligations 245, 245–88 (Tarcisio Gazzini & Eric de Brabandere eds., 2012); Thomas Wälde, *Confidential Awards as Precedent in Arbitration: Dynamics and Implication of Award Publication*, *Precedent in International Arbitration*, *in* IAI Series on International Arbitration 113, 113–36 (Emmanuel Gaillard ed., vol. 5, 2008); Andrea K. Bjorklund, *Investment Treaty Arbitral Decisions as Jurisprudence Constante*, *in* International Economic Law: The State and Future of Discipline 265, 265–80 (Hart ed., 2008); August Reinisch, *The Role of Precedent in ICSID Arbitration*, *in* Austrian Arb. Y.B. 495 (Viena, Manz'sche Verlags-und Universitätsbuchhandlung ed., 2008); Jefferey P. Commision, *Precedent in Investment Treaty Arbitration*, *in* 24 J. of Int'l Arb. 129, 129–58 (2007).

nal in *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, paragraph 100 (Dec. 14, 2012):

> The Tribunal considers that it is not bound by previous decisions.[137] At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. The majority believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law, and thereby to meet the legitimate expectations of the community of States and investors towards the certainty of the rule of law. Arbitrator Stern does not analyze the arbitrator's role in the same manner, as she considers it her duty to decide each case on its own merits, independent of any apparent jurisprudential trend.

Third, I pointed out that a reference to ISDS would have been desirable, not only because it would have considered the court's desire to ensure non-differential treatment between foreign and national investors (by definition, local investors in Colombia do not have access to ISDS[138]), but also because of the current *backlash* against the ISDS system and the discussions on the reform of this system currently taking place in the UNCITRAL Working Group III.[139] In fact, in his intervention before the court, Colombian professor Urueña requested the court to condition the constitutionality of the ISDS clause established in Article 15 of the treaty, stressing the need to make the system more transparent in terms of public access, which

137. *See, e.g.*, Saipem S.P.A. v. the People's Republic of Bangl., Decision on Jurisdiction and Recommendation on Provisional Measures, Case No. ARB/05/07, International Centre for Settlement of Investment Disputes [ICSID], ¶ 67 (21 March 2007); AES Corporation v. the Arg. Republic, Decision on Jurisdiction, Case No. ARB/02/17, ICSID, ¶¶ 30–32 (Apr. 26, 2005).

138. The dispute resolution clauses of the 18 International Investment Agreements (both BITs and FTAs) to which Colombia is a party only permit private investors of the nationality of one State party to bring investment claims against the other State Party, which is a sovereign nation. Therefore, the IIAs are not designed to allow Colombian investors to sue the Republic of Colombia via an international investment arbitration (ISDS). *See, e.g.*, Free Trade Agreement art. 14.17, Pan.-Colom., Sept. 20, 2013, http://www.tlc.gov.co/acuerdos/suscrito/panama [https://perma.cc/BDJ6-QYRE] (not yet entered into force); *Id.* art. 22.1, Colom.-U.A.E, Dec. 11, 2017, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5728/download [https://perma.cc/9T2J-6ZUW]; Free Trade Agreement art. 9.16 Colom.-Chile, Nov. 27, 2006, http://www.tlc.gov.co/acuerdos/vigente/acuerdo-de-libre-comercio-chile-colombia/contenido/texto-final-del-alc [https://perma.cc/XL27-BB2J]; Free Trade Agreement art. 8.16, Colom.-S. Kor., Feb. 21, 2013, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2744/download [https://perma.cc/8MKN-W6X2]; BIT Colom.-Spain art. 9, Mar. 31, 2005, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/801/download [https://perma.cc/8PU7-42EY]; Free Trade Agreement Chap. 10, Section B, U.S.-Colom., Nov. 22, 2006, https://ustr.gov/sites/default/files/uploads/agreements/fta/colombia/asset_upload_file747_10195.pdf [https://perma.cc/8FJH-Y6TW]; Free Trade Agreement art. 12.16, Colom.-Costa Rica, May 22, 2013, http://www.tlc.gov.co/TLC/media/media-TLC/Documentos/Capitulo-12-Inversion.pdf [https://perma.cc/DYZ9-ZB8S].

139. *See* Malcom Langford et al., *Special Issue: UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions*, 21 J. WORLD. INV. 167, 167–87 (2020).

is compatible with human rights obligations, and reinforcing third-party participation through written submissions by true friends of the tribunal (*amicus curiae*).[140] Regretfully, the court did not address this issue, missing an opportunity to strengthen and legitimize the ISDS system. Finally, as a more pragmatic concern, I pointed out that, despite the court's efforts in limiting the interpretation of terms like "treatment," a French investor could still rely on the clause to seek more favorable conditions, as provided in other IIAs signed by Colombia, when facing "similar situations."[141] Under the MFN clause, a signatory State (Colombia) could extend to another party that is a beneficiary of the clause (French investor) the most-favorable treatment that it would have granted to a third party pursuant to other IIAs.[142] Under this Colombia-France BIT, this amounts to the host State (Colombia) extending to French investors or investments the most favorable treatment that it would have granted to investors or investments from a third State to the BIT.[143]

France finally agreed to sign a joint interpretative declaration attending the conditions set by the Colombian Constitutional Court, and on August 5, 2020, a year after the decision, representatives from both States subscribed to an instrument "regarding the interpretation of the treaty or the application of its provisions."[144] However, although the court intended to, *inter alia,* clarify the scope and meaning of certain vague expressions of the BIT, like "legitimate expectations" (without referring to the 2007 Colombia Model BIT), the interpretative declaration did not entirely resolve the issue because the definition of the term made reference to another open-ended standard: "reasonable expectations."[145] Thus, the decision of the Constitutional Court opened a web of applicable norms, including the court's judgment, the interpretative declaration, customary international law and the treaty itself—now also part of the domestic legal order. This mixture of sources of law increases the uncertainty over the meaning of the term and strengthens the discretion of arbitral tribunals to review the measures adopted by the State.

In sum, this section has briefly described the history of the Colombian Constitutional Court's judicial review of IIAs. In exercising its role,

---

140. C-252/19, *supra* note 4.

141. *Id.*

142. *See Draft Articles on Most-Favoured-Nation Clauses with Commentaries*, [1978] 2 Y.B. Int'l L. Comm'n 21, U.N. Doc. A/CN.4/SER.A/1978/Add.l (Part 2) (1978).

143. MFN treatment is defined in article 5 of the Draft Articles on MFN Clauses of the International Law Commission (ILC) as "treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less favorable than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State." *See id.* at 21.

144. *Declaracíon Interpretativa Conjunta Entre La República de Colombia y La República Francesa Sobre El Acuerdo Sobre El Fomento y Protección Recíprocos de Inversiones entre Colombia y Francia*, El Gobierno de la República de Colombia (July 10, 2014), http://apw.cancilleria.gov.co/Tratados/adjuntosTratados/17523_DECLARACI%C3%93N%20INTERPRETATIVA%20CONJUNTA%20APPRI%20FRANCIA.PDF [https://perma.cc/BS4R-SYK2].

145. *Id.*

the court has had to interpret abstract international investment standards and determine their constitutionality by confronting them with the Constitution. As was shown, decision C-252 of 2019 was not a precursor to a declaration of unconstitutionality of a provision of an IIA, as the court had already declared the partial unconstitutionality of other agreements. The court had even declared the unconstitutionality of Article 6 of the Colombia-UK BIT in 1996—a judgment that, after the amendment of Article 58 of the Constitution, paved the way for the internationalization of the economy, allowing the subsequent subscription of multiple IIAs.

Further, even though the constitutionality review of IIAs represents a unique opportunity for the Constitutional Court to clarify the meaning of vague standards contained in IIAs, thus reducing the risks of non-compliance by national authorities with those obligations, the fact that the court has seemingly chose not to adhere to the rules of international law, particularly to the customary method of treaty interpretation codified in the VCLT, will prevent constitutional judgments from achieving a fluid judicial dialogue that can bring about practical results. International investment tribunals will retain wide discretionary powers to review State action and interpret IIAs. Moreover, in the absence of an integral treaty reform and a change in mindset, investment arbitrators will continue to be the only ones capable of harmonizing the system.

III. Concurrent Jurisdiction—Can International Investment Tribunals Become the Watchers of the Constitutional Court?

A. Relation between Domestic and International Remedies in ISDS

Traditionally, national courts of Latin-American countries have been perceived as authorities lacking objectivity, incapable of effectively applying international standards to the protection of foreign investors.[146] Thus, to replace the system of diplomatic protection, based on power, the ISDS mechanism and the IIAs, based on law, were conceived as complements to domestic judicial proceedings, intended to address their flaws and to "depoliticize" investment disputes.[147]

In this new system, the requirement of exhaustion of local remedies was abandoned in favor of the possibility of circumventing domestic courts by granting a direct right of action to international investment arbitration.[148] In this regard, some States have chosen to require in their interna-

146. *See* BORZU SABAHI ET AL., INVESTOR-STATE ARBITRATION 15-28 (2d ed. 2019); KLAUS SCHWAB, THE GLOBAL COMPETITIVENESS REPORT (2018).

147. *See* Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 AM. J. OF INT'L LAW 361, 375 (2018).

148. According to Article 26 of the ICSID Convention, "Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention." Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 26, Oct. 14, 1966, 575 U.N.T.S. 159.

tional agreements the prior exhaustion of domestic remedies; some have merely required the investor to pursue national remedies for a definite period of time; and others have just remained silent on the subject.[149] However, most IIAs have opted to include a "fork-in-the-road" clause, requiring the investor to decide at the outset whether to initiate proceedings before national courts or before an international arbitral tribunal.[150] This clause provides for the finality of the decision, prohibiting the investor from initiating multiple proceedings over disputes arising from the same factual situation.[151]

Now, in the absence of fork-in-the road clauses or in cases before a national or international tribunal where the facts cannot be determined, constitutional courts and investment tribunals could come to render disparate decisions in a dispute with the same set of facts. This was the case, for example, of the Mexican-Sweeteners Saga, a set of investment claims under the North American Free Trade Agreement (NAFTA) against Mexico arising out of two governmental orders aimed at protecting the national sugar industry.[152] In that case, constitutional injunctions (*amparos*) were filed before Mexican courts and subsequent investment claims were presented before international tribunals.[153]

Likewise, in relation to Colombia, a set of *tutela* judgments issued by the Constitutional Court that forbid electricity suppliers to suspend the service to defaulting schools and hospitals were challenged before the investment tribunal in *Naturgy v. Colombia*.[154] Interestingly, the tribunal considered this type of case to be part of the regulatory framework of the State.[155]

As such, the jurisdiction of the Constitutional Court in exercising abstract review of legislation passed by Congress and in reviewing *tutela* actions, opens another avenue for a potential dialogue between domestic and international tribunals in the investment field.[156] Two ongoing cases against Colombia before investment tribunals related to gold mining investment disputes, which will be analyzed below, involve judgments of the Constitutional Court that will be reviewed by the arbitral panels in their respective decisions in order to determine whether or not Colombia has breached its obligations under the FTA between Canada and Colombia.[157]

149. *See* Puig & Shaffer, *supra* note 147, at 408.

150. *See id.* at 396–97.

151. See the illustrative paper by Martin Dietrich Brauch, *Exhaustion of Local Remedies in International Investment Law, in* IISD BEST PRACTICES SERIES 1 (2017).

152. *See generally* Sergio Puig, *Investor-State Tribunals and Constitutional Courts: The Mexican Sweetners Saga*, 5 MEX. L. REV. 199 (2012).

153. *See id.* at 225.

154. Naturgy Energy Group, S.A. and Naturgy Electricidad Colombia, S.L. v. Republic of Colom., Award, Case No. UNCT/18/1, Award, International Centre for Settlement of Investment Disputes [ICSID] (March 12, 2021).

155. *See id.* ¶ 435.

156. *See generally* Manuel José Cepeda-Espinosa, *Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Columbian Constitutional Court*, 3 WASH. U. GLOB. STUD. L. REV. 529 (2004).

157. *See* discussion *infra* Sections III.B.1, III.B.2.

They represent interesting cases that show the difficult challenge constitutional courts face when entering into a dialogue with investment tribunals, while defending the normative framework and avoiding triggering international claims of State responsibility. In the end, the question would be whether domestic judicial decisions by apex courts might constitute violations of the State's international obligations towards a foreign investor and, therefore, lead to potential international State liability in investment arbitration.

B. Examples of Concurrent Jurisdiction in Colombia

1. *Abstract Constitutional Review: Moorland Case (ICSID Case No. ARB/16/41)*[158]

The first case involves the company Eco Oro Corp, a Canadian mining company.[159] Since 1995, the company had been conducting exploration activities in its *Angostura* gold project, under concession contract No. 3452, located in the Santander province. The province is partially located in what was later determined, by Resolution 2090 of 2014 issued by the Ministry of the Environment, as the *páramo* (moor) of *Santurbán-Berlín*, the first high-mountain protected ecosystem in the country.[160]

One year later, Law 1753 of 2015 was issued.[161] This law approved President Santos' second-term national development plan.[162] In its Article 173, the plan banned economic activities and the "exploration or exploitation of non-renewable natural resources," as well as the "construction of oil and gas refineries" in areas formally delimited as moors (*páramos*).[163] Nevertheless, it included a phase-out provision allowing mining companies to continue with the performance of their mining contracts provided they had signed contracts and obtained environmental licenses on or before February 9, 2010.[164] Based upon an advisory opinion given in 2014 by

158. Eco Oro Minerals Corp. v. Republic of Colom., Request for Arbitration, Case No. ARB/16/41, International Centre for Settlement of Investment Disputes [ICSID] (Dec. 8, 2018). Two additional claims were filed. Red Eagle Exploration Limited v. Republic of Colom., Request for Arbitration, Case No. ARB/18/12., International Centre for Settlement of Investment Disputes [ICSID] (Mar. 21, 2018); Galway Gold Inc. v. Republic of Colom., Request for Arbitration, Case No. ARB/18/13, International Centre for Settlement of Investment Disputes [ICSID] (Mar. 21, 2018).

159. Eco Oro Gold Corp. was established in August 2011, after the previous company Greystar underwent a restructuring phase and its stakeholders changed. *The Angostura Mining Project in the Paramo of Santurban, Colombia,* ENVIRONNEMENTAL JUSTICE ORGANISATIONS, LIABILITIES AND TRADE [EJOLT] 1 (Feb. 25, 2013).

160. *See generally* Eco Oro Minerals Corp., *supra* note 158.

161. *Id.* at 16.

162. L. 1753/15, junio 9, 2015, DIARIO OFICIAL [D.O.] (Colom.).

163. *Id.* art. 173.

164. Artículo 173. Protección y Delimitación de Páramos. Párrafo 1.

> INCISO 1. Al interior del área delimitada como páramo, las actividades para la exploración y explotación de recursos naturales no renovables que cuenten con contrato y licencia ambiental con el instrumento de control y manejo ambiental equivalente, que hayan sido otorgados con anterioridad al 9 de febrero de 2010 para las actividades de minería, o con anterioridad al 16 de junio de 2011 para la actividad de hidrocarburos, respectivamente, podrán

the Consultative Chamber of the Council of State,[165] the holder of a mining concession could expect to continue its mining activities until the end of the term of the mining contract.[166] Based upon this opinion, Congress included in Article 173, paragraph 1, a phase-out of already existing mining concessions.[167] According to the National Mining Agency (*Agencia Nacional Minera*) there were 36 complex moorlands (*páramos*) to be delimited and more than 475 mining titles (286 in exploitation) which overlap with 28 moorlands in an area of 127,000 hectares.[168]

In a public action of unconstitutionality (*actio popularis*), a Colombian citizen challenged this transitional-exempting provision before the Colombian Constitutional Court,[169] claiming that (i) individual rights, such as

---

> seguir ejecutándose hasta su terminación, sin posibilidad de prórroga. A partir de la entrada en vigencia de la presente ley, las Autoridades Ambientales deberán revisar las Licencias Ambientales otorgadas antes de 1a entrada en vigencia de la prohibición, en las áreas de páramo delimitadas y las mismas estarán sujetas a un control, seguimiento y revisión por parte de las autoridades mineras, de hidrocarburos y ambientales, en el marco de sus competencias y aplicando las directrices que para el efecto defina el Ministerio de Ambiente y Desarrollo Sostenible.
>
> INCISO 2. En todo caso, el incumplimiento de los términos y condiciones en los cuales se otorgaron las autorizaciones mineras o ambientales, dará lugar a la caducidad del título minero de conformidad con lo dispuesto en el código de minas o la revocatoria directa de la licencia ambiental sin el consentimiento del titular y no habrá lugar a compensación alguna.
>
> INCISO 3. Si a pesar de la existencia de la licencia ambiental no es posible prevenir, mitigar, corregir o compensar los posibles daños ambientales sobre el ecosistema de páramo, la actividad minera no podrá seguir desarrollándose.

Id.

165. The courts of last resort in Colombia are the Council of State, the Council of the Judiciary, the Supreme Court of Justice, and the Constitutional Court. Angie Vega, *A Brief Explanation of Colombia's Legal System,* MICH. ST. U. (2018), https://www.animallaw.info/article/brief-explanation-colombia%E2%80%99s-legal-system [https://perma.cc/3SS4-92QB]. The Council of State is the highest administrative court, with a consultative chamber; it has jurisdiction over cases involving claims against administrators or public bodies, which fall within the jurisdiction of administrative courts, for which the Council of State acts as the supreme court of appeal. INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, ORGANIZATION OF AMERICAN STATES 3 (1999). The Superior Council of the Judiciary oversees the conduct of judicial officials. Vega, *supra* note 165. The Supreme Court of Justice has jurisdiction over all civil, labor and criminal matters triable in the judicial system, and is the supreme court of appeal in these cases (*Corte de casación*). INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, *supra* note 165, at 3. The Constitutional Court has jurisdiction over cases involving constitutional issues. *Id.* at 3–4. Collectively, these courts form the topmost tier of the Colombian court system. Vega, *supra* note 165.

166. Consejo de Estado [C.E.] [Council of State], Diciembre 1, 2014, Sentencia 2233 (Colom.).

167. L. 1753/15, art. 173, ¶ 1, junio 9, 2015, DIARIO OFICIAL [D.O.].

168. Edinson Arley Bolaños & Óscar Güeguán Serpa, *Mineria: seguridad jurídica o soberanía?*, EL ESPECTADOR (Mar. 26, 2016, 10:00 PM), https://www.elespectador.com/noticias/economia/mineria-seguridad-juridica-o-soberania [https://perma.cc/K2CR-HUAC]; Marcela Anzola, *Seguridad para las empresas o protección de los páramos?,* LA RAZÓN PÚBLICA (Apr. 4, 2016), https://razonpublica.com/seguridad-para-las-empresas-o-proteccion-de-los-paramos/ [https://perma.cc/W86X-TN5V].

169. Corte Constitucional [C.C.] [Constitutional Court], agosto 2, 2016, Sentencia C-035/16 (Colom.).

those of mining companies, could not prevail over the collective interests of the people of the region, like the rights to healthcare and a healthy environment; and (ii) it violated the people's right to water due to the fact that it authorized activities that could damage the natural resources of one the country's largest sources of fresh water.[170]

In that sense, the court had to examine whether the reestablishment of the legal foundations under which the government had granted environmental licenses and/or mining concession contracts, in order to preserve the acquired rights, constitutionally justified lifting the prohibition of developing mining projects in *páramo* ecosystems.[171] In decision C-035 of 2016, the Constitutional Court declared that the transitional provision was unconstitutional and had to be struck down. It held that there was a constitutional need to protect the *páramo* ecosystems due to their fragility as well as an absence of an adequate legal framework for their protection.[172] Further, it affirmed that economic freedom finds its limits in the common welfare and the social functions of businesses, which are protected by the State's duty to regulate the economy and, in this particular case, the duties of "conserving an area of special ecological importance" (Article 79 of the Constitution) and regulating "the management and use of natural resources, in order to guarantee their sustainable development, conservation, restoration or replacement" to "prevent and control factor[s] of environmental deterioration" (Article 80 of the Constitution).[173] The court concluded that it was disproportionately harmful to sacrifice water and other environmental services provided by the *páramos* for eventual private benefits derived from the extraction of non-renewable resources.[174]

Eventually, Eco Oro Minerals Corp. filed an international investment claim against the Colombian government in late 2016 after its gold mining project in the Santander province was cut in half by the new regulations that expanded wetland protections, as well as by decision C-035 of 2016 issued by the Constitutional Court when exercising abstract review.[175] The company is seeking US$764 million in damages, stating that it had

170. The moors (*páramos*) are high mountain wetland or alpine ecosystems that serve as a vital source of fresh water. *The Angostura Mining Project in the Paramo of Santurban, Colombia*, Environnemental Justice Organisations, Liabilities and Trade [EJOLT] (Feb. 25, 2013), http://www.ejolt.org/wordpress/wp-content/uploads/2013/02/FS_002_Angostura.pdf [https://perma.cc/HA58-66ZJ]. The Colombian moors supply drinking water to more than 70% of the country's population. Sabin Center for Climate Change Law, *Decision C-035 of February 8, 2016*, Climate Change Litigation Databases (last visited Mar. 7, 2021), http://climatecasechart.com/non-us-case/decision-c-03516-of-february-8-2016 [https://perma.cc/R8WZ-EEV6]; Anna Sands, *Does the Investment Treaty Regime Promote Good Governance? The Case of Mining in Santurbán, Colombia*, 11 Inv. Treaty News 14, 15 (2020).

171. *See* C-035/16, *supra* note 169.

172. *Id.*

173. *Id.*

174. *Id.*

175. Eco Oro Minerals Corp., *supra* note 158.

invested US$250 million in developing the project.[176] Amid the legal battle, Eco Oro has pulled out of its *Angostura* gold concession in Colombia because the environmental restrictions have made the project impossible.[177] The company is claiming deprivation by Colombia of the use and enjoyment of its right to mine the *Angostura* project under concession contract 3452, amounting to an indirect and unlawful expropriation under Article 811 and Annex 811 of the investment chapter of the 2008 Canada-Colombia FTA, and unfair and inequitable treatment by Colombia in breach of Article 805(1) of the same treaty, including the frustration of Eco Oro's legitimate expectations, and failure by Colombia to provide a stable and predictable legal and investment environment and full protection and security.[178]

In our joint dissent to the majority decision,[179], we argued that the court's judgment (i) ignored the requirements that the Court itself determined, derived from the principles of interpretation of the Constitution; (ii) seriously restricted democratic principles by stripping Congress of the possibility to issue statutes that provide for transitional rules and harmonize different constitutional interests; and (iii) failed to consider the factual and legal consequences that follow from the decision, as well as the impact of these consequences.[180] Regarding this last point, we stated that the court's decision should have considered that the immediate application of the prohibition, in some cases, could be interpreted in light of clauses incorporated in IIAs ratified by the Colombian State as an indirect expropriation that might eventually compromise the international obligations of the State.[181] Such a risk should have been taken into account by the court, given the importance of complying with international commitments according to Article 9 of the Constitution.[182]

2. Tutela Actions– Gold Mining Dispute (ICSID Case No. ARB/18/23)

This second case involves another Canadian-based company actively undertaking mining activities in Colombia: Gran Colombia Gold (GCG). Currently, GCG is the largest underground gold and silver producer in

176. *Id.*; Julia Symmes Cobb, *Eco Oro Pulls Out of Colombia Gold Concession Amid Legal Battle: Letter*, REUTERS (June 28, 2019), https://www.reuters.com/article/us-eco-oro-minerals-colombia-idUSKCN1TT2M0 [https://perma.cc/7SWD-CN9S].

177. *Id.*

178. Sands, *supra* note 170, at 16. *See also* Eco Oro Minerals Corp., *supra* note 158.

179. The Joint Dissent was filed together with Justice Luis Guillermo Guerrero-Pérez. *See* C-035/16, *supra* note 169 (Luis Guillermo Guerrero, J. & Alejandro Linares Cantillo, J., dissenting).

180. *Id.*

181. *Id.*

182. In the words of Sands:

> The government set out to delimit the páramos and prohibit mining within them. Nonetheless, the prohibition included a sunset clause that allowed those who had already obtained mining licences to continue. A Constitutional Court case found that clause to be unconstitutional and immediately placed a prohibition on mining. The judges were aware that this could bring about investment claims—indeed, it was one of the key reasons for Judge Linares' dissent, arguing for the sunset clause.

Colombia, with several underground mines and two processing plants in operation at its *Segovia* and *Marmato* sites.[183] In 2014, four miners of the *Villonza* mine located in the *Marmato* area, a province of Caldas, filed a *tutela* action seeking the protection of their fundamental rights to consultation, work and due process, given their status as traditional miners of the region.[184] According to the plaintiffs, they have been working as traditional miners in the *Villonza* mine located in *El Burro* hill since 2011.[185] They pointed out that the high part of the hill, where the mine is located, has historically been dedicated to small and traditional mining, while the lower part has been devoted to medium and large-scale mining activities, such as the one performed by GCG.[186] This distribution, plaintiffs asserted, allowed a peaceful coexistence in *Marmato*, until it was placed at risk in 2007 when GCG started to acquire multiple mining titles for the upper part of the hill.[187] After the acquisition of the mining titles located in the upper part of the hill, the company decided to close the mines, depriving the miners of the possibility of working in them.[188]

Given the lack of separate economic opportunities and considering that the closed mines were not being used by the new owners, the unemployed miners decided to re-open them.[189] However, in May of 2014, the Mayor of *Marmato* signed an executive decision ordering the closure of the *Villonza* mine and the eviction of all its miners.[190] In response, the four miners filed the *tutela* contending that (i) the mining authority had wrongfully authorized transferring mining titles which were located in the upper part of the hill to GCG, in an area that was legally and traditionally reserved to small mining; and (ii) the closure of the *Villonza* mine and eviction of the miners had deprived them of the opportunity to work as traditional miners.[191] Regarding the first claim, the four miners stated that the authorization for transferring the mining titles should have involved consulting with the traditional miners who have historically exploited the gold resources in the area.[192] In that sense, the miners requested a prior consultation process with the indigenous and Afro-Colombian communities of

---

Sands, *supra* note 170, at 15.

183. Notice of Intent from Lombardo Paredes Arenas, CEO of Gran Colombia Gold Corp., Legal Rep. of Zandor Cap. S.A. Colombia, Mineros Nacionales S.A.S., Minerales Andinos de Occidente S.A., and Minera Croesus S.A.S., to Directorate of Foreign Inv. & Services (*Dirección de Inversión Extranjera y Servicios*), Ministry of Trade, Indus. and Tourism of the Republic of Colombia (Oct. 10, 2016) (on file with ICSID) (regarding "Investment Protection under the Free Trade Agreement between Canada and the Republic of Colombia"); Eco Oro Minerals Corp., *supra* note 158.

184. Corte Constitucional [C.C.] [Constitutional Court], 2017, Sentencia SU-133/17 (Colom.).

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. Resolution 751 of 2010 was issued within an administrative process concerning mining title CHG-081. SU-133/17, *supra* note 184.

191. *Id.*

192. *Id.*

the region.[193] Regarding the second claim, the miners argued that they had not been notified of the decision to close the mine; that the decision was taken by resorting to a legal provision which was later declared unconstitutional; and that the eviction order violated their right to work and endangered other rights, as they had no other means to provide for their family members.[194]

In light of the above, the Constitutional Court confronted the following questions: (i) whether the mining authority violated the claimants' (as well as the indigenous and Afro-Colombian communities of the region) right to prior consultation when authorizing the transfer of mining titles located in the upper part of the hill to a company dedicated to large-scale mining; (ii) whether the mayor's resolution ordering the closure of the mine violated claimants' right to due process, as it was wrongfully notified and based on a provision that was later declared unconstitutional; and (iii) whether the closure and eviction measures on the mine threatened the claimants' rights, impeding their ability to support their families.[195]

The court, in judgment SU-133 of 2017, held that the authorization to transfer mining title CHG-081 affected the indigenous and Afro-Colombian communities of *Marmato*.[196] In that sense, it determined that such action should have been subject to a prior consultation process with these communities in which the traditional miners of *Marmato* would have had the opportunity to participate.[197] Given that this action was not taken in due time, the court ordered the government to carry out this consultation process in order to discuss the impacts of transferring the mining title mentioned above.[198] Additionally, the court revoked the administrative decision which had ordered the closure of the *Villonza* mine and the eviction of its miners, due to the fact that the mayor's resolution had been wrongfully notified.[199]

In this decision, I once again dissented from the majority opinion.[200] Among many arguments, the dissent considered that (i) the court's judgment created a mining title by means of a judicial decision, when this decision rightfully fell within the purview of the National Mining Agency (*Agencia Nacional de Minería*); (ii) the court's decision was based on Law 66 of 1946, without considering that this statute had undergone multiple modifications, like the one incorporated in Decree 2223 of 1954 from which point the mining exclusivity on the upper part of *El Burro* hill had been modified; (iii) the court's decision to revoke the closure of the *Villonza* mine legitimized the *de facto* actions taken by the miners, which may have constituted an illegal occupation and a violation of the company's

193. *See id.*
194. *See* SU-133/17, *supra* note 184.
195. *See id.*
196. *Id.*
197. *See id.*
198. *See id.*
199. *See id.*
200. In this case, I filed a joint Dissenting Opinion with Justices Luis Guillermo Guerrero-Pérez and Antonio José Lizarazo-Ocampo. *See id* at 209.

legally acquired mining rights; and (iv) the court's decision constituted a retroactive application of Convention 169 of the International Labour Organization[201] and established, in advance, the results of the consultation process, thus, defeating the purpose of the consultation itself.[202]

C. The Risk Constitutional Courts Face of Triggering Claims of State Responsibility

As Demirkol recently indicated, "Judicial acts of States are becoming increasingly subjected to international investment claims."[203] In order for the State to incur international responsibility for a wrongful act committed in the exercise of its judicial function, there are some specific conditions that should be met: The investor must establish that (i) the State is responsible for a breach attributable to an organ of such State (e.g., the judicial branch); (ii) the investment tribunal has jurisdiction over the particular dispute; and (iii) the damage that the investor has suffered is a result of the particular breach of an international obligation.[204] Because there are no special responsibility regimes for different functions of the State, under international law a State may be held responsible for the conduct of any of its organs, including acts committed by the judiciary.[205] Traditionally, acts of the judicial branch have been attributed to the State under two grounds, namely State responsibility derived from a wrongful judicial act, and denial of justice.[206] The two Canadian gold mining cases are good illustrations of international investment disputes solved by domestic courts. The awards of ICSID tribunals will determine whether these domestic judicial rulings might amount to a violation of Colombia's international obligations towards Canadian foreign investors.

Even though domestic judgments can be rendered after a process where there is no irregularity of procedure nor incorrect application of national law, as Fitzmaurice notes, "if they misapply international law, [they will] ipso facto involve the responsibility of the State . . . even though rendered in perfect good faith and by an honest and competent court."[207] Therefore, the judicial act in violation of international law does not need to

201. *See* Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries art. 6, June 27, 1989, 1650 U.N.T.S. 383, 386–87.

202. *See* SU-133/17, *supra* note 184.

203. BERK DEMIRKOL, JUDICIAL ACTS AND INVESTMENT ARBITRATION, intro. (2018).

204. *Id.*

205. *See* G.A. Res. 56/83, annex, Articles on the Responsibility of States for Internationally Wrongful Acts (Jan. 28, 2002), *reprinted in* [2001] 2 Y.B. INT'L L. COMM'N 26, U.N. DOC. A/56/10, U.N. Sales No. E.04.V.17 (Part 2); ALICIA CHICHARRO LÁZARO, LA RESPONSABILIDAD DEL ESTADO EN EL DERECHO INTERNACIONAL 61–65 (2020).

206. *See id.*; Zachary Douglas, *International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed*, 63 INT'L COMP. L. Q. 867, 900 (2014). Douglas concludes that denial of justice is the sole form of international delictual responsibility towards foreign nationals for acts or omissions within an adjudicative procedure for which the State is responsible and that international delictual responsibility to foreign nationals is not the same as international responsibility towards States for the violation of the treaty establishing the international norm.

207. Sir Gerald Gray Fitzmaurice, *The Meaning of the Term Denial of Justice*, 13 BRIT. Y.B. INT'L L. 93, 110 (1932).

amount to a denial of justice in order to be corrected by an international court.[208] In international investment arbitration, the allegedly wrongful acts of the judiciary have been framed under an investment standard, like fair and equitable treatment (FET) or expropriation.[209] For instance, in *Saipem v. Bangladesh*, the arbitral tribunal held that the wrongful conduct of the judiciary amounted to an unlawful expropriation.[210]

On the other hand, it has been settled that denial of justice is an independent *ilicit* in State responsibility, based on acts or omissions of a State in the exercise of its adjudicative process.[211] Denial of justice has been distinguished as the minimum standard of treatment from other international wrongs because it arises only when the entire judicial apparatus has spoken.[212] Although very difficult to define, denial of justice has traditionally been described as either procedural or substantive.[213] It is traditionally defined as any gross miscarriage of justice by domestic courts resulting from the ill-functioning of the State's judicial system.[214] It may thus arise, broadly speaking, out of acts by the judiciary, acts by the executive, and acts by the legislature affecting the administration of justice. A State's duty to ensure the proper administration of justice towards foreigners, whether in criminal, civil, or administrative cases, falls within the more general duty to protect the person and property of foreigners under customary international law. However, in modern international law, denial of justice is always procedural.[215] Therefore, Douglas has defined procedural denial of justice as any "gross or fundamental procedural unfairness" in vindicating a substantive right.[216]

Procedural denial of justice can be committed through the malfeasance or nonfeasance of the adjudicator in the following circumstances: (i) refusal to judge, (ii) unreasonable delay in the administering of justice, or (iii) presence of irregularities in the conduct of the proceeding.[217] Substantive denial of justice denotes the circumstances where a decision by the national courts is tainted with fraud, malice or bias, has been issued in

208. *See* DEMIRKOL, *supra* note 203, at 24.

209. *See id.* at 4.

210. Saipem S.P.A. v. The People's Republic of Bangl., Award, Case No. ARB/05/7, International Centre for Settlement of Investment Disputes [ICSID] (June 30, 2009).

211. JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 57–59 (2005).

212. DEMIRKOL, *supra* note 203.

213. Douglas, *supra* note 206, at 34. Nonetheless, according to Paulsson, there is no place for substantive denial of justice. He suggests that

> numerous international awards demonstrate that the most perplexing and unconvincing national judgments are upheld on the grounds that international law does not overturn determination of national judiciaries with respect to their own law . . . . If a judgment is grossly unjust, it is because the victim has not been afforded fair treatment.

PAULSSON, *supra* note 211, at 82.

214. Carlo Focarelli, *Denial of Justice*, MAX PLANCK ENCYCLOPEDIA PUBLIC INT'L L. (Oct. 2013).

215. *See* PAULSSON, *supra* note 211, at 82.

216. Douglas, *supra* note 206, at 18.

217. *Id.* at 13–15.

gross incompetence, or is in contravention of international law.[218] However, Paulsson argues that these cases are not related to the degree of deference international law gives to the substantive content of the judgments applying domestic law because international tribunals are not called to substitute the judgment. Rather they should recognize it as such, and "rule on the consequences of any violation of international law."[219] Therefore, manifest errors in the application of domestic law are really evidence of a flawed and unjust procedure. It should be noted that claims of denial of justice will succeed only if the investor has exhausted all local remedies; the judgment of a first-instance court would be insufficient grounds to claim this wrong before an international tribunal.[220]

In ISDS, denial of justice is not commonly found as an explicit independent substantive standard of protection in the text of AIIs. However, it is commonly understood to be contained within the FET standard. Furthermore, investment tribunals have observed that the threshold is a demanding one[221] since it requires systemic failures by the national judicial system as a whole to comply and correct errors in observing minimum standards of due process.[222] Such errors need not be "egregious" in order for the propriety of the decision[223] or the process of the administration of justice to be questioned.[224] Although there have been numerous cases in which denial of justice and other wrongful conduct by the judiciary have been claimed, until recently there had not been ITAs based on the actions of constitutional courts.[225]

Yet, on early May 2021, the ICSID Tribunal in *America Mobil v. Colombia* rendered its final award in which it rejected all the claims presented by the Mexican investor and held that the Constitutional Court decision C-555 of 2013 (ordering the reversion of certain telecommunication assets to State control) did not amount to an expropriation under the Colombia-Mexico FTA. It is worth noticing that the Tribunal underscored that international adjudicators had to be deferent to national courts, as their role was not tantamount to that of an appellate court. As such, they had to refer to the interpretation of national law that prevails in domestic jurisprudence and literature and follow the decisions of national judges whenever they had rendered a decision over the same set of facts.[226]

---

218. PAULSSON, *supra* note 211, at 81–82.

219. Id. at 89.

220. *Id.* at 100–02.

221. Hesham Talaat M. Al-Warraq v. The Republic of Indon., Final Award, UNCITRAL, ¶ 376 (Dec. 1, 2014), https://www.italaw.com/sites/default/files/case-documents/italaw4164.pdf [https://perma.cc/UZ78-JBV4].

222. Rupert Binder v. Czech, Final Award, UNCITRAL (July 15, 2011).

223. Mondev International Ltd. v. U.S., Award, Case No. ARB(AF)/99/2, International Centre for Settlement of Investment Disputes [ICSID] (Oct. 11, 2002).

224. Waste Management Inc. v. Mex., Award, Case No. ARB(AF)/00/3, International Centre for Settlement of Investment Disputes [ICSID], ¶ 298 (Apr. 30, 2004).

225. DEMIRKOL, *supra* note 203, at 156–98.

226. América Móvil S.A.B. de C.V. v. Republic of Colom., Award, Case No. ARB(AF)/16/5, International Centre for Settlement of Investment Disputes [ICSID], ¶¶ 334-336 (May 7, 2021). On this issue, however, Arbitrator José A. Martínez de Hoz submitted a

Until the abovementioned award was rendered, the most notorious cases in which the action of constitutional tribunals had been challenged by investors involved conflicting decisions between domestic apex courts.[227] In both cases, the tribunal rejected the claims. In *Phillip Morris v. Uruguay*, the tribunal analyzed whether a conflict between the decisions of two different high courts (the Constitutional Court and the administrative court) amounted to a denial of justice.[228] It held, however, that "it would not be appropriate to find a denial of justice because of this [conflict]. The Claimants were able to have their day (or days) in court, and there was an available judicial body with jurisdiction to hear their challenge . . . ."[229] Similarly, in determining whether there was a denial of justice in a case involving the rejection of a claim by the Constitutional Court after finding the Supreme Court had not violated any constitutional provision and had correctly applied the law in a previous judgment, the arbitral tribunal observed that "a claim for denial of justice must not be confounded with an appeal against decisions of national judiciary," and added that "a legal system that is characterized by a division between public and private law as well as civil and administrative procedures" did not result in an "improper, discreditable or [ ] shocking" disregard of Albanian law.[230] In both cases, the investment tribunals also decided not to second-guess the decisions of domestic apex courts.

In Colombia, the issue of domestic responsibility of the State for the conduct of the judiciary was recently re-examined. Law 270 of 1996 gives the right to any person that has suffered any damage as a result of a judicial error (*via de hecho*) to seek compensation.[231] The Constitutional Court had ruled in 1996 that there was no liability for judicial errors incurred by apex courts.[232] In order to file a claim of State responsibility under these grounds, the claimant must have exhausted all remedies and the contested judgment must be final.[233] Consequently, a simple error is not enough: The decision must be the result of an arbitrary and unfair procedure in violation of the most fundamental elements of due pro-

---

dissenting opinion arguing that investment tribunals should limit their deference towards domestic courts, irrespective of whether the judicial actor was an apex court. In his opinion, the objective of the case before the Tribunal—which is to determine whether the decision of the Constitutional Court constitutes an expropriation—does not necessitate review of the interpretation carried out by the domestic judges of national law.

227. *See* Philip Morris Brands Sàrl v. Oriental Republic of Uru., Award, Case No. ARB/10/7, International Centre for Settlement of Investment Disputes [ICSID] (July 2, 2016); Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Alb., Award, Case No. ARB/11/24, International Centre for Settlement of Investment Disputes [ICSID], ¶¶ 764, 769 (Mar. 30, 2015).

228. Philip Morris Brands Sàrl, *supra* note 227.

229. *Id.* ¶ 527.

230. Mamidoil Jetoil Greek Petroleum Products Societe S.A., *supra* note 227, ¶¶ 764, 769.

231. L. 270/96 art. 65, marzo 7, 1996 DIARIO OFICIAL [D.O.] (Colom.).

232. Corte Constitucional [C.C.] [Constitutional Court], febrero 5, 1996, Sentencia C-037/96 (Colom.).

233. *Id.*

cess.[234] Recently, the Colombian State Council, our highest administrative court, performed a "conventionality control"[235] of said norm and held that Article 66 of Law 270, as reviewed by the Constitutional Court and which excluded the possibility to claim a judicial error by a high court, was inapplicable as a result of its incompatibility with the American Convention on Human Rights.[236] Hence, in Colombia, a judicial error can be committed by any judicial authority, including apex courts. The relevant part for Colombian apex courts is that the State, if found liable, has to seek indemnification to collect from the individuals of the judiciary that caused the damages to a third party (*acción de repetición*), provided they acted with gross negligence (*culpa grave*) or willful misconduct (*dolo*).[237] It remains to be seen whether the State will seek indemnification from members of the judiciary who sign domestic judgments that eventually generate international responsibility for the State.

These international investment disputes that have arisen under the FTA Canada and Colombia signed in November 2008 show two different and parallel views of a same problem. In one universe, Canadian investors want to formally protect their mining rights under an IIA, whereas in the other universe, a domestic apex court, closest to the issues and other public interests, sets examples of a national court determining the balance between the protection of foreign investor's rights and a State's freedom to regulate its natural resources. Mining informality in Colombia and the effective implementation of the rule of law are at the core of the issue. Traditionally, the country has struggled to control illegal mining, granting formal mining titles and establishing requirements for small miners (*minería artesanal*).[238] Colombia unfortunately has certain traits of informality and illegality affecting the foundations of the rule of law, including "weak normativity" and "lack of institutional capacity."[239]

These two cases of Colombian gold mining concessions, in which judgments issued by the Colombian Constitutional Court are currently being challenged before international investment tribunals, will be very illustrative of the role constitutional courts will play in the future in the final resolution of international investment disputes. It seems like two parallel universes with no interaction between them. We will have to wait and see how the ITAs in *Eco Oro Minerals Corp. v. Republic of Colombia* (ICSID Case No. ARB/16/41) and *Gran Colombia Gold Corp. v. Republic of Colom-*

234. *Id.* at 189.

235. *See* Laurence Burgorgue-Larsen, *Conventionality Control: Inter-American Court of Human Rights (IACtHR)*, MAX PLANCK ENCYCLOPEDIA PUBLIC INT'L L. (Dec. 2018).

236. Consejo de Estado [C.E.] [Council of State], Sala de lo Contencioso Administrativo, Sección Tercera, sentencia del treinta de septiembre de 2019, ¶ 7, C.P. Guillermo Sánchez Luque, Rad. 63541 (Colom.).

237. For the legal bases of indemnification, *see* CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 90; *see also* L. 678/01, agosto 3, 2001, DIARIO OFICIAL [D.O.].

238. Fernando Juárez, *La Minería Ilegal en Colombia: un Conflicto de Narrativas*, 16 REVISTA EL AGORA USB 135, 136-38 (2015).

239. *See* Armin Van Bogdady, *Ius Constitutionale Commune en América Latina: Una Mirada a un Constitucionalismo Transformador*, 34 REVISTA DE DERECHO DEL ESTADO 3, 21-22 (2015).

bia (ICSID Case No. ARB/18/23) solve these tensions. Let us hope that in both cases, the investment tribunals decide not to second-guess the decisions of domestic apex courts.

The cases illustrate the impossibility of accepting the dichotomy between national courts and international tribunals in the framework of international investment law. Based on their separate and distinct roles—one applying national standards and the other international law—there is potential to coordinate their relationship through an inter-judicial dialogue. In effect, through the application of the public law standard of "deference," each tribunal can take into account the considerations, concerns and developments of the other in order to inform its own analyses, even in scenarios where they differ in the conclusion reached by the interpretation of the context of the dispute, the facts and the applicable law.

In the universe of international arbitral tribunals, we will see whether the tribunals respect and take into consideration the judgments of constitutional courts that inform their own assessment of the facts of the dispute brought before them and provide them a first-hand insight into the domestic legal order in addition to the political and legal tensions at stake at the national level. This, in turn, could enrich the tribunals' considerations allowing for a more balanced decision that considers the national policy motivations to achieve important public interest goals. Indeed, constitutional courts are the higher authorized interpreters of domestic law.[240]

However, the deference granted to national courts is not prescriptive, and international adjudicators will evaluate in each case the thoroughness of the decisions issued by its domestic counterpart.[241] Therefore, in the universe of domestic apex courts, it is relevant for constitutional courts to understand that they are not applying domestic law in an isolated way, but that their function takes place in an internationalized context. Thus, domestic courts can also refer to the sources of international law in their decisions, not only to better inform their considerations, but also, as Montt suggests, to "cross-fertiliz[e] domestic law with elements and principles of international law."[242] This will help to review and enrich domestic standards and assess their overlap and compatibility with international law, increasing the awareness on the scope of the international obligations of the country.

In this vein, the domestic judiciary must not only comply with human rights procedural safeguards that might prevent a claim of denial of justice, but its high courts—in this case, constitutional courts—must compromise to consider the international obligations binding on the State. Failure to do so, as seems to have been the case in the judgments regarding the *Santurbán* moorland and the mining activities in the *Marmato* site, will not only hinder the inter-institutional judicial dialogue between the courts, but also risk contestation and, eventually, the international responsibility of

240. *See, e.g.*, CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 241.

241. *See* Fandiño-Bravo, *supra* note 19, at 688.

242. SANTIAGO MONTT, STATE LIABILITY IN INVESTMENT TREATY ARBITRATION: GLOBAL CONSTITUTIONAL AND ADMINISTRATIVE LAW IN THE BIT GENERATION 73 (2009).

the State. Once again, if no dialog exists, the deference granted to domestic judgments will be low, and arbitrators will retain broad discretion for interpreting the vague and open-ended investment standards. In the context of review of judicial acts at the international level, although the Colombian Constitutional Court has no superior, an international arbitral tribunal might end up being its "watcher."

IV. Recognition and Enforcement of Investment Treaty Awards: What is "International Public Policy"?

Thus far, we have described three instances in which Colombia's Constitutional Court has intervened, or could intervene, in relation to investment disputes: (i) abstract judicial review of IIAs; (ii) abstract judicial review of laws passed by Congress; and (iii) concrete judicial review of *tutela* actions. Despite the fact that judicial intervention is strictly limited to the express legal circumstances and purposes specifically provided for in local and international arbitration regulations,[243] the potential intervention of constitutional courts in investment matters also extends to the moment of recognition and enforcement of an ITA in the country.

A. ICSID Awards

In Colombia, there are two regimes for the local recognition and enforcement of ITAs currently applicable to the investment field. On the one hand, ICSID awards—because they are part of a procedural system governed entirely by public international law[244] and, therefore, "delocalized" and rendered in a self-contained system—are excepted from judicial control (with its own system of interpretation, revision and annulment of the award) and are treated as final judgments issued by the courts of the State.[245] Article 53(1) of the ICSID Convention establishes in its relevant part that the award "shall be binding on the parties and shall not be subject to any appeal or any other remedy except those provided for in this Convention."[246] In turn, Article 54(1) indicates that "[e]ach Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State."[247] The two gold mining cases referred to above would be subject to these rules, where the only role of domestic courts is to recognize, enforce and execute arbitral awards.

243. L. 1563/12, art. 67, julio 12, 2012, DIARIO OFICIAL [D.O.] (Colom.). International arbitration is governed by articles 62 to 116.

244. Aron Broches, *The Experience of the International Centre for Settlement of Investment Disputes*, 20 STUD. TRANSNAT'L LEGAL POL'Y 75, 88-89 (1985).

245. *See* José Carlos Fernández Rozas, *El Arbitraje Comercial Internacional entre la Autonomía, la Anacionalidad y la Deslocalización*, 57 REVISTA ESPAÑOLA DE DERECHO INTERNACIONAL 605, 605-607 (2005).

246. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *supra* note 148, art. 53(1).

247. *Id.* art. 54(1).

B. Non-ICSID Awards

But let us assume that one of the mentioned cases was not an ICSID arbitration but rather an institutionalized or *ad hoc* arbitration subject to the supervision and control of the competent national courts and anchored in a national jurisdiction (e.g., arbitration under the Arbitration Rules of the ICSID Additional Facility, UNCITRAL or the International Court of Arbitration of the International Chamber of Commerce). In such a scenario, assuming that "commercial arbitration" comprises ITAs, a non-ICSID award must be subject to annulment at the jurisdiction of the seat of arbitration pursuant to domestic applicable laws (*lex arbitri*),[248] as well as a process of recognition and enforcement.[249] In Colombia, Article 68 of the Arbitration Statute regulates the jurisdiction for the annulment of Colombian awards and the recognition and enforcement of foreign arbitral awards, defining that the Council of State (*Sala Plena de la Sección Tercera de la Sala de lo Contencioso Administrativo*) is the competent authority to decide these types of requests whenever a Colombian public entity is a party to the proceedings.[250]

C. International Public Policy (IPP)

Yet, the principle of constitutional supremacy in various Latin American States means that this type of provision cannot inhibit the review of ITAs whenever they are deemed to violate fundamental constitutional rights. For instance, the Argentinian Supreme Court noted:

> It cannot be licitly interpreted that the waiver to appeal an arbitral decision extends to situations in which the terms of the award are contrary to public order, or "*el orden publico*" *ordre públic*, because it would not be logical to foresee, when making such a waiver, that arbitrators would produce a decision with that kind of vice. In this regard, it is worth reminding that the appreciation of facts and the regular application of law are arbitral functions and, consequently, under such conditions, the award issued would not be subject to appeal. To the contrary, the arbitral decision may be judicially challenged whenever it is unconstitutional, illegal or unreasonable.[251]

In Colombia, the Constitutional Court, in a controversial judgment, recently accepted the possibility to challenge, via a *tutela* action, a foreign arbitral award.[252] The Court reiterated its view that, arbitral awards—both local and foreign—are functionally equivalent to judicial decisions and, therefore, capable of violating fundamental constitutional rights.[253] It

248. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. 5(1)(a)-(d), June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997 [hereinafter New York Convention].

249. *Id.* art. 5(2)

250. L. 1563/12, art. 68, julio 12, 2012, DIARIO OFICIAL [D.O.].

251. Corte Suprema de la Justicia de la Nación [CSJN] [National Supreme Court of Justice], 06/1/2004, "José Cartellone Construcciones Civiles S.A. v. Hidroeléctrica Norpatagónica S.A.", J. 87. XXXVII, ¶ 14 (Arg.).

252. *See* Corte Constitucional [C.C.] [Constitutional Court], agosto 6, 2019, Sentencia T-354/19 (Colom.).

253. *Id.* at 7.

noted that the admissibility requirements of a *tutela* action against local judicial decisions are only applicable if the international award is partially governed by Colombian law.[254] Instead, when the substantive law applicable to the merits of the arbitration is foreign, constitutional judges should only apply Colombia's international public policy (IPP) as a parameter of constitutional control.[255]

Thus, in analyzing an action to set aside an international arbitral award rendered in Colombia via *tutela*, or reviewing the request for its annulment or for the recognition and enforcement of an ITA, Colombian apex courts can apply *ex officio* grounds if an award is contrary to the Constitution for the violation of human rights.[256] The ground of IPP, as established in Article V(2)(b) of the New York Convention for non-recognition of awards contrary to the "public policy" of Colombia, is consistent with the taxative grounds incorporated in the Arbitral Statute for both annulment of Colombian arbitral awards and non-recognition of non-Colombian arbitral awards.[257] A more expansive notion of IPP supports such analysis. In applying these concepts when interpreting international arbitration, national judges must also apply Article 64 of the Arbitration Statute, according to which they must take into account (i) the judgment's international character, (ii) the necessity to promote its uniform application in accordance with the principle of good faith, and (iii) general principles that inspire international arbitration in case there is no regulation over a certain issue.[258] These factors prevent an erroneous or expansive interpretation of IPP grounded solely in domestic arguments and provisions of domestic law, disregarding its international nature. Indeed, as "a very unruly horse,"[259] a misleading understanding of this notion can result in uncertainty over the eventual compliance with an ITA.[260]

In this context, the Civil Chamber of our Supreme Court of Justice has established the content of Colombia's IPP in *exequatur* proceedings regarding recognition of foreign judgments and, more recently, foreign arbitral awards not involving publicly owned entities.[261] The Colombian Supreme Court has underscored the flexible nature of this IPP, which varies accord-

254. Eduardo Zuleta, et al., *Colombia's Constitutional Court Declares That Constitutional Injunctions (Tutela) Can Be Upheld Against Awards In International Arbitration*, KLUWER ARB. BLOG (Nov. 4, 2019) http://arbitrationblog.kluwerarbitration.com/2019/11/04/colombias-constitutional-court-declares-that-constitutional-injunctions-tutela-can-be-upheld-against-awards-in-international-arbitration/ [https://perma.cc/8DVS-45HU].

255. *Id.*

256. *Id.*

257. L.1563/12, art. 108(2)(b), julio 12, 2012, DIARIO OFICIAL [D.O.]; *id.* art. 112(b)(ii).

258. *Id.* art. 54.

259. Richardson v. Melish [1824], 130 Eng. Rep. 294, 303 (HL), 2 Bing. 229, 303 (Eng.).

260. Rafael Rincón-Ordoñez, El concepto de Orden Público Internacional y su relevancia constitucional 2 (unpublished manuscript) (on file with author).

261. *See* José Carlos Cano-Valencia, *El Reconocimiento y la Anulación de Laudos Arbitrales Extranjeros en Colombia: An Análisis de la Jurisprudencia de la Corte Suprema de Justicia*, 2 ANUARIO DE DERECHO PRIVADO 141, 141–165 (2020); Juan Pablo Cárdenas, *El*

ing to the historical moment and social conditions.[262] Additionally, it has held that IPP has a restrictive character and is integrated by "all fundamental rights, the values legally protected by criminal law, good faith, prohibition of abuse of law, and other principles that safeguard a minimum of morality within a society."[263] Moreover, it has indicated that this notion of IPP encompasses procedural guarantees, such as impartiality of the tribunal and due process.[264]

In light of the abovementioned jurisprudence of our Supreme Court, the Council of State has also advanced and examined the content of IPP. In an April 17, 2020, judgment that solved a request for recognition and enforcement of an arbitral award rendered in Houston involving a Colombian entity,[265] the State Council distinguished between procedural public policy and substantive public policy. It noted that, from the *procedural* point of view, there was no violation of the defendant's guarantees during the procedure, including the rights to prior notification, of adequate time to prepare a defense and of equal procedural footing. With respect to the *substantive* public policy, the State Council found that the award merely recognized certain contractual breaches committed by both parties and ordered the payment of reciprocal compensation for damages.[266] Hence, given that the arbitral award only affected private interests, it did not impact matters that could have compromised essential values or principles of the State.[267] In line with the above, the Constitutional Court in the abovementioned decision, T-354 of 2019, also suggested that the IPP is integrated by due process and all other fundamental rights and that it goes beyond errors *in procedendo* and can entail new facts and evidence.[268]

Therefore, the IPP notion stands as a crucial device for domestic judges to undertake an *ex officio* review of ITAs with the aim of protecting the public interest, which, as established by Colombian jurisprudence, includes fundamental constitutional rights.[269] Additionally, as conventionality judges under the framework of the Inter-American System of Human Rights, the Constitutional Court can use this notion to deny the enforcement or set aside an award if it violates any human right recognized

---

Concepto de Orden Público en el Arbitraje Internacional, in TEORÍA GENERAL DEL DERECHO INTERNACIONAL PRIVAD 137 (Laura García Matamoros & Antonio Aljure eds., 2016).

262. Corte de Suprema de Justicia [C.S.J.] [Supreme Court], julio 12, 2017, M.P: A. Monsalvo, Expediente 2014-01927-00 (Colom.).

263. Corte Suprema de Justicia [C.S.J.] [Supreme Court], enero 15, 2019, M.P: A. Monsalvo, SC001-2019, Expediente 2016-03020-00, (Colom.).

264. This notion of IPP has been reiterated in multiple decisions by the Corte Suprema de Justicia [Supreme Court]. For example, see decisions Corte Suprema de Justicia [C.S.J] [Supreme Court], diciembre 19, 2018, M.P: M. Blanco, Expediente 2017-03480-00, (Colom.), and Corte Suprema de Justicia [C.S.J.] [Supreme Court], octubre 30, 2017, M.P: L. Puerta, Expediente 2016-03300-00 (Colom.).

265. Consejo de Estado [C.E.] [Colombian Council of State], abril 17, 2020, C.P: M. Marin, Expediente 2019-00015-00 (63266) (Colom).

266. *Id.*

267. *Id.*

268. *See* T-354/19, *supra* note 252.

269. *Id.*

under the American Convention of Human Rights.[270] Thus, the review of ITAs constitutes a new avenue for the harmonization of international investment law with other fields of international law and its integration with domestic law. Nevertheless, apex courts must be cautious when interpreting and applying IPP. They must respect its international and restrictive nature and avoid including more elements that would distort or broaden its meaning. Otherwise, the courts would be opening the door for an "escape valve" to deny the recognition and enforcement of valid ITAs, thus breaching international treaty obligations by the State, particularly Article III of the New York Convention.[271] In such an event, it would not be a surprise if national judicial measures amounted to a violation of the State's international obligations and, in turn, to potential State liability in investment arbitration.

V. Conclusions: Greater Involvement of Domestic Courts or Domestic Law?

This Article has described four instances in which Colombia's Constitutional Court has jurisdiction to intervene in international investment disputes in the context of the proliferation of international judicial bodies from one adjudicative institution, the Permanent Court of Arbitration (PCA) established in 1899, to dozens today. There are more than 2,600 IIAs, most of which provide for ISDS as the forum for the resolution of legal disputes between foreign investors and host States.[272] Colombia and many countries have increasingly vested specialized international tribunals, including ISDS, with the power to interpret and apply IIAs and to create and develop international legal standards, and have transferred to them the jurisdiction to adjudicate legal disputes, which traditionally were functions of domestic courts.[273]

A. Greater Involvement of Domestic Apex Courts

At the same time, strong criticism is constantly growing with regards to ISDS. The discussion focuses on the search for redefining the proper balance between ISDS and domestic courts.[274] Whether the growing criti-

270. *See generally* Claudina Orunesu, *Conventionality Control and International Judicial Supremacy*, 20 OPEN ED. JS. 45, 45–62 (2020) (discussing how domestic judges are bound to apply the American Convention).

271. *See Article V(2)(b)*, N.Y. CONVENTION GUIDE, https://newyorkconvention1958.org/index.php?lvl=CMspage&pageid=10&menu=626&opac_view=-1 [https://perma.cc/XF5E-2AZF] (discussing how the public policy exception is a "safety valve" to recognize awards when legal system would abandon fundamental rights).

272. *See* MENA-OECD Working Group on Investment Policies and Promotion, *Evolution of International Investment Agreements (IIAS) In the Mena Region,* MENA-OECD INVESTMENT PROGRAMME 2 (Dec. 2010).

273. ROMANO, CESARE P ET AL., THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 9 (2014). *See also* EXPERIMENTS IN INTERNATIONAL ADJUDICATION: HISTORICAL ACCOUNTS (Ignacio de la Rasilla & Jorge E. Viñuales eds., 2019)

274. Marco Bronckers, *Is Investor-State Dispute Settlement (ISDS) Superior to Litigation Before Domestic Courts?,* 18 J. INT'L ECO. L. 3, 3 (2015).

cism of ISDS might eventually lead to a greater involvement by domestic apex courts in the resolution of investment disputes remains to be seen. Even if the response is affirmative, the question that emerges is whether this involvement might trigger claims for international State responsibility before international arbitration tribunals in the circumstances described above.[275] In UNCITRAL Working Group III, it was agreed that requiring investors to exhaust local remedies before bringing their claims to investment arbitration was a tool to be considered in reforming ISDS.[276] This is consistent and could be implemented with existing Article 26 of the ICSID Convention which states that a "Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention."[277]

The principle of subsidiarity, which requires decision-making to occur at lower levels unless good reasons exist to shift it upward, and the *vertical* allocation of authority in investment treaty arbitration, may be seen as functions of the public–private distinction.[278] In their universe, foreign investors would want to internationalize and formally protect, under IIAs and through ISDS, their private domestic rights within the context of an effective rule of law, whereas domestic constitutional courts would look at their universe of public law, human rights and wider public interests to resolve international investment disputes.[279] This implies multiple intersections between domestic apex courts and international investment tribunals and suggests a need to think about possible ways to improve future interactions. Kaufmann-Kohler and Potesta have found that such dialogue could go from harmonious coexistence to reinforcing complementation, reciprocal supervision and, occasionally, competition and discord.[280] This may be an opportunity to improve the role of the domestic judiciary that could emerge from the current efforts to reform the system. Education and adequate application of international law by domestic apex courts could be one solution. However, it appears that the existing division of labor is not optimal.[281] Perhaps, as Kaufmann-Kohler and others have suggested, there is a need for improvement by introducing a more fruitful allocation of tasks among domestic and international courts and tribunals.[282]

---

275. Rachel Frid de Vries, Trade and Investment Dispute Settlement: The relations between International and National Tribunals 4 (2020).

276. Comm. on Int'l Trade Law, Report of Working Group III (Investor-State Dispute Settlement Report) on the Work of Its Thirty-Seventh Session, U.N. Doc. A/CN.9/970, ¶ 30 (2019).

277. *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *supra* note 148.

278. Urueña, *supra* note 35, at 99–101.

279. *Id.* at 101, 107.

280. Gabrielle Kaufmann-Kohler & Michele Potestà, Investor-State Dispute Settlement and National Courts: Current Framework and Reform Options 5 (2020).

281. *Id.* at 6.

282. *Id.*

B. Application of International Law by Domestic Courts

Given the many challenges relating to redefining the balance in the relationship between ISDS and domestic apex courts, and the expected wider ramifications, one way forward might be to increase the application of international law by domestic courts. In this sense, constitutional courts would play a crucial role because they intervene at different moments in international investment matters. In exercising their competence, constitutional courts would need to remember that their role would not be isolated to the parties in the dispute but would rather be integrated into international dynamics; their decisions would transcend the borders of the State.[283]

Domestic judges have better knowledge of domestic law and more legitimacy to rule against the State for breach of an IIA. While international arbitrators possess limited expertise, domestic apex courts are closer to the issues and may have superior capacity to make factual and technical assessments.[284] It is also true that domestic judges are unfamiliar with the technicalities of international investment law and arbitration and that international arbitrators have weak knowledge of domestic law and, traditionally, in their parallel universe, do not take into account wider public interests.[285] In this regard, domestic apex courts should be able to interpret and apply IIAs, which are also part of the domestic legal order. In general, ISDS provisions limit or restrict the role local courts can have.[286] Many of them give a role to domestic courts, but, in most cases, international arbitration is always the preferred option.[287] Relatively few IIAs contain dispute settlement clauses that give domestic courts a strong role in dispute resolution.[288] The role of domestic courts could be significantly increased by redrafting the ISDS clauses in IIAs, giving them a more significant function. Nevertheless, this cannot happen in isolation. International investment tribunals might have to do their part as well, mainly by "waking up" in a public mindset to increase the use of the exhaustion of local remedies rule or, for example, by interpreting cooling off periods, exhaustion of local remedies, or fork-in-the-road clauses in more restrictive ways.[289]

C. Wider Juridical Context

Going forward, the possibility of domestic courts directly applying public international law, and particularly IIAs, can have important implications for the "great compact" in international investment arbitration.[290]

283. *See* Laura Bisiani et al., *Application of International Investment Agreements by Domestic Courts,* Trade Law Clinic (E780), U.N. CONFERENCE ON TRADE AND DEVELOPMENT [UNCTAD] 4 (June 10, 2011).
284. *Id.* at 16.
285. *Id.*
286. *Id.* at 4.
287. *Id.* at 11.
288. Laura Bisiani, *supra* note 283, at 4.
289. *Id.* at 9–11.
290. W. Michael Reisman, *The Past and Future of the Great Compact*, 33 ICSID REV. 56, 60 (2018).

Other alternatives to judicial coordination that might be easier to implement for the future of international investment law would be the application by international investment tribunals of (i) a deferential standard of review with respect to domestic judicial decisions,[291] (ii) the interpretation and application of other sources of international law, with a public mindset, in addition to the text of the IIA itself,[292] and (iii) the interpretation and application of the law of the respondent State in the first place,[293] as envisaged by Aron Broches in 1965 and ratified by our Constitutional Court in 1996 when reviewing the constitutionality of the ICSID Convention.[294] This may improve the view of ISDS as a "reliable external applier" of investment laws in a wider juridical context and help to "de-fragment," integrate, and harmonize self-contained and special regimes of international law.[295]

Today, treaty language in IIAs expressly or implicitly points to proportionality balancing or the applicable standard of review, including both the nature and intensity of review.[296] While some tribunals have employed a more deferential means-ends rationality test, other tribunals have employed a more intrusive proportionality-balancing test.[297] In the context of international investment arbitration, adjudicators commonly evaluate decisions of national authorities that have been made in the course of democratic procedures and public deliberation.[298] A highly controversial question is whether international arbitrators should review such judgments *de novo* or show deference to domestic authorities, particularly the judiciary.[299] A

---

291. Stephan W. Schill, *Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review*, 3 J. INT'L DISPUTE SETTLEMENT 577, 577–78 (2012); William Burke-White & Andreas Von Staden, *Private Litigation in a Public Sphere: The Standard of Review in Investor-State Arbitrations*, 35 YALE J. INT'L L. 284, 314 (2010).

292. *See* Asian Agricultural Products Ltd. V. Republic of Sri Lanka, Final Award, Case No. ARB/87/3, International Centre for Settlement of Investment Disputes [ICSID], ¶ 21 (June 27, 1990).

293. *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *supra* note 148.

294. Corte Constitucional [C.C.] [Constitutional Court], 1996, Sentencia C-442/96 (Colom.). *See also* Aron Broches, *The Convention on the Settlement of Investment Disputes,* 9 SECTION OF INT'L & COMP. L. BULLETIN 11, 12 (1965).

295. *See* Int'l Law Comm'n, Rep. on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, U.N. DOC. A/CN.4/L.682 (2006).

296. Federico Ortino, *Taming the Chaos in Investment Treaty Protection*, 294 COLUM. FDI PERSP. 2 (Dec. 28, 2020), http://ccsi.columbia.edu/files/2018/10/No-294-Ortino-FINAL.pdf [https://perma.cc/R8B9-8GK8].

297. *See* CAROLINE HENCKELS, PROPORTIONALITY AND DEFERENCE IN INVESTOR-STATE ARBITRATION: BALANCING INVESTMENT PROTECTION AND REGULATORY AUTONOMY (2018); *see also* Federico Ortino, *The Investment Treaty System as Judicial Review*, 24 AM. REV. INT'L ARB. 437, 437–468 (2013).

298. *See generally* JOHANNES H. FAHNER, JUDICIAL DEFERENCE IN INTERNATIONAL ADJUDICATION (2020).

299. ESMÉ SHIRLOW, JUDGING AT THE INTERFACE: DEFERENCE TO STATE DECISION-MAKING AUTHORITY IN INTERNATIONAL ADJUDICATION (2021). Although not focusing on the domestic judiciary, this book explores how certain international adjudicators, including investment treaty tribunals, have exercised some degree of deference to national decision-makers.

recent book investigates how various international courts and tribunals have responded to this question.[300] Another publication critically examines the practices and outcomes of international economic adjudication through a review of decisions delivered by bilateral, regional and multilateral judiciaries in order to respond to questions and challenges surrounding the proliferation and fragmentation of international adjudication.[301]

On the one hand, Zang reveals the substantial influence on the manner of engagement between certain adjudicators embedded in self-contained international economic regimes, yet she foresees the role of international judicial bodies as regime coordinators.[302] Peat, on the other hand, indicates that domestic law has long been recognized as a source of international law, an inspiration for legal developments, or the benchmark against which a legal system is to be assessed.[303] He reviews the use of domestic law in the interpretation of international law, examining the practice of five international courts and tribunals (including one chapter in ISDS) to demonstrate that domestic law is invoked to interpret international law, often outside the framework of Articles 31 to 33 of the VCLT, as our Constitutional Court did in decision C-252 of 2019.[304]

There are wider debates regarding interpretation and the interaction between domestic and international legal systems. Scholars are concerned with the future of international investment arbitration engagement with human rights.[305] Likewise, some public mindset investor-State arbitrators are exploring when and how arbitrators reach into other international law regimes to interpret and calibrate the content of international investment law standards of protection.[306] Such interpretations, including relevant rules of international law applicable in the relations between the parties to the IIA and domestic law, will indicate a great deal about what international investment law is and is not.[307] Those concerned with contemporary debates over the future of the investment regime will be equally interested in whether such boundary crossings are considered unfortunate "trespassings" or not, and whether they make international investment law more or less fair, consistent or legitimate.[308]

---

300. JOHANNES H. FAHNER, *supra* note 298.

301. MICHELLE ZANG, JUDICIAL ENGAGEMENT OF INTERNATIONAL ECONOMIC COURTS AND TRIBUNALS (2020).

302. *Id.* at 6.

303. Peat, *supra* note 47.

304. *Id. See also The Use of Domestic Law Principles in the Development of International Law-Draft Report*, INT'L L. ASS'N, https://www.ila-hq.org/images/ILA/DraftReports/DraftReportSG_DomesticLawPrinciples.pdf [https://perma.cc/28MW-Z3V9] (last visited Aug. 5, 2021).

305. Eugenia Levine, *Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation*, 29 BERKELEY J. INT'L L. 300 (2011).

306. Stephan W. Schill, *W(h)ither Fragmentation? On Literature and Sociology of International Investment Law*, 22 EUR. J. INT'L L. 875, 875 (2011).

307. Andrew D. Mitchell & James Munro, *Someone Else's Deal: Interpreting International Investment Agreements in the Light of Third-Party Agreements*, 28 EUR. J. INT'L L. 669, 669 (2017).

308. JOSÉ E. ALVAREZ, THE BOUNDARIES OF INVESTMENT ARBITRATION (2018).

D. Change in Mindset

The interaction between international investment law with domestic legal orders in general, and constitutional law in particular, is rich and has the potential to help increase the legitimacy, consistency and coherence of the ISDS system. Shifting the attention from a traditionally private mindset that equated international investment law with pure international commercial arbitration into a public law paradigm, with a public mindset, might allow investor-State arbitrators to recognize the public nature of international investment law and the public governance function that investment tribunals exercise when reviewing State conduct through the interpretation and application of vague treaty standards.[309] The main objective would be for arbitral tribunals to change the mindset, have a wider juridical context and take into account other international commitments in order to ensure, to the extent possible, harmonious interpretation and application of IIAs in the context of other relevant aspects of public international law.[310]

This, in turn, highlights the relevance of public law standards of review developed in domestic and international public law adjudicative bodies that review the conduct of State organs and the need to transpose them to ISDS through a comparative public law approach that recalibrates the very broad substantive protections to foreign investors. Future IIAs should, therefore, clearly identify certain principles of good governance that feature in most public law systems—such as legality, procedural fairness and substantive reasonableness, unreasonable or arbitrary conduct (mainly through the non-impairment and FET clauses)—and recalibrate and adjust the content of the FET standard in that context.[311]

This scenario of parallel universes, criticisms and challenges can pave the way for the development of different tools—what Simma called "emulgators,"[312] designed to solve the fragmentation between different fields of public international law. In this vein, this approach could motivate arbitral tribunals, and even domestic apex courts, to develop the third formal source of international law, general principles of law, in order to enrich

309. Stephan Schill, *The Public Law Paradigm in International Investment Law*, EJIL:TALK! [BLOG OF THE EUR. J. INT'L L.] (Dec. 3, 2013), https://www.ejiltalk.org/the-public-law-paradigm-in-international-investment-law/ [https://perma.cc/T4X7-QR5X].

310. U.N. Conference on Trade and Development, *Investor-State Dispute Settlement, supra* note 9, at 185–86.

311. *See* YULIA LEVASHOVA, THE RIGHT OF STATES TO REGULATE IN INTERNATIONAL INVESTMENT LAW: THE SEARCH FOR BALANCE BETWEEN PUBLIC INTEREST AND FAIR AND EQUITABLE TREATMENT (2019).

312. Judge Bruno Simma calls these alternatives "emulgators," designed to solve the apparent separation of human rights and international investment law. He drew the following analogy:

> Oil and water do not mix, at least not readily. Is this also true of human rights and the protection of foreign investment—here also in the sense that they ought to be kept apart? . . . There is, of course, a way to overcome this separation: [S]cience and industry employ some sort of mediators between the water and the oil (so-called 'emulgators') to achieve this.

Bruno Simma, *Foreign Investment Arbitration: A Place For Human Rights?*, 60 INT'L & COMP. L. Q. 573, 574 (2011).

their analysis and considerations.[313] General principles of law might allow international and domestic adjudicators to have interactions between international and domestic law and to build bridges between the blurred but entrenched private-public dichotomy. As Douglas has suggested, the "most fertile, but underutilized, source of principles for developing coherent conceptions of investment protection standards is general principles of law recognized in municipal legal systems."[314] Additionally, international tribunals should grant deference to the domestic courts of the host States, and *vice-versa*, in order to harmonize domestic and international law with an aim to protecting the general interest and the regulatory space of the State, and, in consequence, to promote a cross-fertilization between both regimes.[315] By articulating this *vertical* inter-institutional dialogue between constitutional courts and international investment tribunals, the discretionary powers of the latter would be limited as they would be called upon to integrate general principles of law, domestic judgments and local considerations into their decisions.[316]

Unlike ISDS procedures that are being discussed at the UNCITRAL Working Group III multilaterally,[317] reforms of substantive investment protections are taking place at national or regional levels only.[318] Parallel reforms and efforts may end up being partial in scope, or simply not pro-

313. There is a growing trend in this regard. Besides the classic book from Bing Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (1953), there are several writings proposing the application of general principles of law: Stephan W. Schill, *General Principles of International Law and International Investment Law, in* INTERNATIONAL INVESTMENT LAW: THE SOURCES OF RIGHTS AND OBLIGATIONS 133 (Tarcisio et al. eds., 2012); GENERAL PRINCIPLES OF LAW - THE ROLE OF THE JUDICIARY (Laura Pineschi ed., 2015); GENERAL PRINCIPLES OF LAW (Stefan Vogenauer & Stephen Weatherill eds., 2017); THE OXFORD HANDBOOK OF THE SOURCES OF INTERNATIONAL LAW (Jean d'Aspremont et al. eds., 2017); CHARLES T. KOTUBY JR. & LOOK A. SOBOTA, GENERAL PRINCIPLES OF LAW AND INTERNATIONAL DUE PROCESS (2017); GENERAL PRINCIPLES OF LAW AND INTERNATIONAL INVESTMENT ARBITRATION (Andrea Gattini et al. eds., 2018); GENERAL PRINCIPLES AND THE COHERENCE OF INTERNATIONAL LAW (Mads Andenas et al. eds., 2019); MARIJA DORDESKA, GENERAL PRINCIPLES OF LAW RECOGNIZED BY CIVILIZED NATIONS (1922–2018) (2020); PATRICK DUMBERRY, A GUIDE TO GENERAL PRINCIPLES OF LAW IN INTERNATIONAL INVESTMENT ARBITRATION (2020); IMOGEN SAUNDERS, GENERAL PRINCIPLES OF LAW OF AS A SOURCE OF INTERNATIONAL LAW (2021).

314. ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 89 (2009) [hereinafter INVESTMENT CLAIMS].

315. MONTT, *supra* note 242, at 44; *see also* INVESTMENT CLAIMS, *supra* note 314, at 58 n. 81, 90–91, 106 (describing the trend towards "increasing harmonisation [sic]" of choice of law rules).

316. *See, e.g., id.* at 121–23 (describing instances in which ICSID arbitration has adapted to, or been altered by, domestic judgments, considerations, and municipal rules).

317. In a special issue of the *Journal of World Investment and Trade*, there is an introduction to the procedural reform process and seven articles on the matter. Malcom Langford et al., *UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions,* 21 J. WORLD. INV. & TRADE (SPECIAL ISSUE) 167 (2020). It concludes with the following statement: "The core of the UNCITRAL WG III reform process is how to address the peculiarities that have emerged from the combination of substantive investor rights under international law with a particular form of international dispute settlement—arbitration." *Id.* at 184.

318. *Id.* at 172.

duce much additional coherence and consistency.[319] The case of Colombia is a good example of substantive reform efforts at the domestic judicial level with decision C-252 of 2019, despite the practical application of the MFN clause.[320] In investment disputes with concurrent jurisdiction, domestic apex courts should take into account international obligations of the State and, in the recognition and enforcement of ITAs, exercise a high degree of deference without reviewing *de novo* the merits of awards.[321] But unless we educate and persuade international investment arbitrators to change from a private into a public mindset in the decision-making process in this context, in the words of Toby Landau, the "time for investment arbitration to save itself may be running out."[322] Or, as Reisman has predicted, "[T]he future of international investment law could be at a critical crossroads."[323]

---

319. *See* discussion *supra* Section III.A.
320. *See* discussion *supra* Section II.C; *see also* C-252/19, *supra* note 4.
321. *See* discussion *supra* Conclusions C; *see also* MONTT, *supra* note 242, at 44.
322. Ortino, *supra* note 296, at 2.
323. W. Michael Reisman, Myres S. McDougal Professor of International Law, Yale Law School, Lamm Lecture, U. of Miami School of Law, *The Past and Future of the Great Compact* (Feb. 9, 2017), *in* 33 ICSID REV. 56, 62 (2018).