The contemporary meaning, nature, and extent of that dual obligation remain questions of general concern to the global community. They are also questions of special concern to states like the applicant, which unquestionably has suffered from nuclear testing, and to the nuclear weapons states named as respondents. Yet this Court's resolution of these questions seems remote, not only because of the Court's narrowed requirements, but also because of the United Kingdom's decision no longer to consent to a case on this issue unless it is joined by the several nuclear weapons states that refused to participate in the litigation under review.

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Sovereign Immunity—diplomatic immunity—employment of local nationals—compliance with local law—execution of judgments—espousal—objections to customary international law

Garcia de Borissow and Others v. Supreme Court of Justice – Labor Chamber, Embassy of the Lebanese Republic in Colombia and Embassy of the United States of America in Colombia. Judgment SU-443/16. *At* http://www.corteconstitucional.gov.co. Constitutional Court of the Republic of Colombia, August 18, 2016.

On August 18, 2016, the Constitutional Court of the Republic of Colombia (Constitutional Court or Court) rendered a significant decision in the *Garcia de Borissow and Others* case on issues of immunity from execution, diplomatic protection, and objections to customary international law in its review of two combined cases brought by former local employees against the embassies of the Lebanese Republic and the United States of America in Bogotá.[1] While upholding the diplomatic missions' immunity from execution of lower court judgments awarding monetary sums, the Constitutional Court instructed the Colombian Ministry of Foreign Affairs (Foreign Ministry) to pursue recovery of such amounts either by diplomatic means or through enforcement of those judgments in Lebanese and American courts. The decision is both unique and problematic as a matter of international and domestic law.

The cases arose in the context of the common practice of states employing local nationals to perform various kinds of service at their embassies (and other diplomatic and consular missions) in other states. The plaintiffs, Ms. Adelaida Garcia de Borissow and Mr. Omar Castaño, both Columbian nationals, worked as local staff at the embassies of the Lebanese Republic and the United States of America, respectively.[2] However, Ms. Garcia de Borissow had not been enrolled in Colombia's national social security system for retirement pensions (a requirement for all employers under Colombian law); moreover, her contract was unilaterally terminated on the basis that Lebanese law only allows individuals to work until

[1] Corte Constitutional [C.C.] [Constitutional Court], agosto 18, 2014, Sentencia SU-443/16, *available* (in Spanish) *at* http://www.corteconstitucional.gov.co/relatoria/2016/SU443-16.htm. No official translation is available; references to the Court's decision are based on the author's own translation.

[2] Ms. Garcia de Borissow worked as a "Secretary" from April 1981 through November 2004; Mr. Castaño worked as a "Real Estate Assistant" from July 1986 until November 2006. *See* Labor Chamber Judgment of September 2, 2008, para. 5; Labor Chamber Judgment of March 10, 2010, paras. 10, 13 (respectively). No further details as to their functions were given.

the age of sixty years old.[3] She sought compensation for unfair dismissal in addition to the payment of the retirement pension emoluments to which she was entitled. Mr. Castaño alleged that he had been wrongfully forced to resign because of "moral pressure against him" and sought to recover his last monthly salary, additional monetary benefits and compensation for unfair dismissal.[4] They brought separate actions against the two diplomatic missions in the Supreme Court of Justice's Labor Chamber (Labor Chamber), seeking a judicial declaration of defendants' obligation to pay original sums plus compensation (paras. 4.1.2, 4.2.2).

In each case, the Labor Chamber determined that a "true labor relationship"[5] had existed between plaintiffs and respondents and that each diplomatic mission was accordingly obligated to pay a specific amount to its respective plaintiff. Unlike the Embassy of the United States of America (which had remained silent throughout the proceedings), the Embassy of the Lebanese Republic unsuccessfully contested the Labor Chamber's jurisdiction on the basis of the principle of "immunity of diplomatic agents."[6] Neither of the respondents complied with the judgments.

The plaintiffs then independently filed new proceedings in the same court seeking to enforce those judgments. The Labor Chamber rejected both requests *in limine* on the basis of the defendants' absolute immunity from execution, which it said "amounted, as established by the Vienna Convention on Diplomatic Relations, into the impossibility of adopting coercive measures against the Embassies to obtain fulfillment of the judicial decisions" (para. 4.1.5). In response, the plaintiffs filed independent "tutelage actions"[7] against the Labor Chamber, arguing that by rejecting their requests for enforcement of the judgments, the Labor Chamber had violated their fundamental rights under the Colombian Constitution to due process and access to justice. In accordance with normal procedure in tutelage actions, the cases were assigned to different courts: Mr. Castaño's suit against the Embassy of the United States of America was sent to the Disciplinary Chamber of the Superior Council of the Judiciary, and Ms. Garcia de Borissow's suit against the Embassy of the Lebanese Republic was referred to the Criminal Chamber of the Supreme Court of Justice.[8] Both courts denied the claims.[9]

[3] Claim of Adelaida Garcia de Borissow, No. 32096, Judgment of September 2, 2008, para. 3.

[4] Claim of Omar Castaño, No. 41916, Judgment of March 10, 2010, paras. 4, 13. Among other damages, he sought living stipends, services bonuses, default interest, and sanctions for non-payment.

[5] When a "true labor relationship" is established (as defined by Article 23 of Colombia's Labor Code), employers are, *ipso jure*, obliged to pay salaries and all of the other compulsory monetary benefits to the employee.

[6] Labor Chamber Judgment of September 2, 2008, para. 7.

[7] Article 86 of the Colombian Constitution permits any Colombian citizen to file a "tutelage action" for the protection of his or her fundamental human rights or constitutional rights. Such an action may be filed against any person alleged to have violated the relevant individual's rights, as well as against any lower court (including the Court of Cassation, Colombia's "Supreme Court of Justice"), if an alleged breach of rights has occurred on the basis of a judicial decision that, although formally a judgment, may materially breach a fundamental constitutional right.

[8] Because all courts in Colombia have jurisdiction over this specific kind of constitutional claims, tutelage actions were randomly assigned to those high courts.

[9] Ms. Garcia de Borissow's constitutional challenge was rejected because the judicial decision was not found to be frivolous, arbitrary, or the product of capriciousness. As tutelage actions against judgments are subsidiary and exceptional, they cannot be used to challenge judicial decisions that are duly founded on the applicable law. Mr. Castaño's challenge was rejected because the so-called immediacy requirement had not been fulfilled: the tutelage action was not filed until March 15, 2011, almost six months after the challenged judicial decision was rendered.

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Those decisions were also appealed. Mr. Castaño's case was sent to the Fifth Chamber of the Superior Council of the Judiciary and Ms. de Borissow's case to the Civil Chamber of the Supreme Court of Justice.[10] These courts reached different conclusions: the tutelage action proceeding in Mr. Castaño's case was annulled, while the judgment in Ms. de Borissow's case was confirmed.[11] Given the conflicting results, the decisions were then selected for review by the Constitutional Court under its authority for "jurisprudential unification."[12]

In order to determine whether the state may enforce judicial decisions of its courts against accredited diplomatic missions, the Constitutional Court noted that it must first establish "whether there are limitations or restrictions, under customary international law, to immunity from execution" (para. 17). The Court recalled the distinction between *acta jure imperii* and *acta jure gestionis*, which it said contributed to the development of the principle of restrictive immunity[13] (paras. 6–7). Acknowledging that a few states still adhere to absolute immunity, it concluded that contemporary international practice reflects a clear trend toward "the consolidation of the thesis of restrictive immunity" (para. 8). It referred specifically to the work undertaken by the International Law Commission (ILC) on the question of sovereign immunity, which eventually led to the adoption of the 2004 UN Convention on the Jurisdictional Immunities of States and Their Property. Although that treaty has not yet entered into force (and Colombia has neither signed nor ratified), the Constitutional Court affirmed that where its provisions "correspond to the codification of customary international law, they are binding upon States as custom" (para. 11).

The Constitutional Court also observed that the development of international law does not depend on "logic or reason" but rather on the political will of states to undertake international obligations vis-à-vis third states. Relying on the International Court of Justice's (ICJ) judgment in the *Fisheries* case,[14] the Court noted that custom requires the agreement of states, which (in light of the consensual nature of international customary law) allows for the recognition of persistent objectors (para. 28).

Since the plaintiffs' claims referred to the enforcement of judicial decisions ordering the payment of certain monetary amounts, the Constitutional Court stated it was required to establish whether there was sufficient evidence of a customary norm permitting Colombia

[10] Because both the Criminal Chamber of the Supreme Court of Justice and the Disciplinary Chamber of the Superior Council of the Judiciary are high courts (but the right to appeal must still be observed), the cases were assigned to different chambers of each court.

[11] Mr. Castaño's appeal was refused, inter alia, on the grounds that tutelage actions are proceedings for the immediate protection of fundamental constitutional rights, but not for the attainment of economic or pecuniary payments. The Civil Chamber of the Supreme Court of Justice rejected Ms. Garcia de Borissow's proceeding as unreviewable for similarly technical reasons.

[12] In Colombian procedure, "judgments on jurisprudential unification" aim at reducing uncertainty through the issuance of a definitive statement on the interpretation of a norm when lower courts have adopted, on constitutional matters, conflicting constructions of the law or legal norms. Since the Constitutional Court is the highest Colombian court, its judgments on jurisprudential unification are binding, final, and not subject to further appeal.

[13] The Constitutional Court referred to: (1) the U.S. Supreme Court's decision in *The Schooner Exchange v. M'Faddon*, 11 U.S. 116 (1812); (2) unidentified decisions of Belgian and Italian courts (paras. 6–7 under "IV. Consideraciones"); (3) the European Convention on State Immunity (1972); and (4) domestic statutes adopted in the United States of America, the United Kingdom of Great Britain and Northern Ireland, the Republic of Singapore, the Islamic Republic of Pakistan, the Republic of South Africa, the Commonwealth of Australia, Canada, and the Argentine Republic.

[14] Fisheries (U.K. v. Nor.), 1951 ICJ Rep. 116 (Dec. 18), *at* http://www.icj-cij.org.

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to execute or attach the property of other states (para. 29). Relying heavily on its own understanding of the ICJ's decision in *Jurisdictional Immunities of the State*,[15] the Court found that it was bound by an obligation to uphold the immunity of another state's property from execution. With no elucidation or argumentation as to its conclusion, it also declared that there was "no evidence" that Colombia, the Lebanese Republic, or the United States of America were "persistent or subsequent objectors to the principle of *absolute* immunity from execution" (para. 30, emphasis added).

In the Constitutional Court's view, only three exceptions exist to the principle of immunity from execution: (1) when the property is used for non-official, non-public service or commercial activities; (2) when the state has consented to the execution or coercive measure in question; or (3) when the state has allocated the property for payment of the relevant debt (para. 34). While execution is permissible against property used for *jure gestionis* acts, the Court expressly stated that the attachment or execution of property of another state would in any case amount to a violation of Colombia's international obligations (para. 36). However, it said, the plaintiffs in these cases had not met the "minimum burden" of identifying such property and demonstrating that it was used for such purposes. Accordingly, the Court concluded, it lacked jurisdiction to order the enforcement of the judgments against the two diplomatic missions (para. 46).

At the same time, the Constitutional Court observed, the limitations flowing from international law "cannot result in absence of protection for Colombian citizens and nationals" (para. 36). If the domestic legal system of the states whose diplomatic missions have engaged in unlawful conduct provides for a mechanism to recognize and enforce foreign judgments, then, in the Court's view, a remedy exists to protect the fundamental constitutional rights of plaintiffs without breaching international obligations (para. 39). In the case of the Lebanese Republic, the Court noted, its Civil Procedural Code provides for *exequatur* proceedings to enforce foreign judgments. In the case of the United States of America, it said, the decisions in *Hilton v. Guyot* and *Erie Railroad Co. v. Tompkins*[16] provide, in principle, for the "acceptance" of the recognition and enforcement of foreign judgments (paras. 40–41).

Accordingly, the Constitutional Court ordered the Foreign Ministry to initiate either *exequatur* proceedings or any other action available under American or Lebanese law in order to "obtain the enforcement of the decisions of the Supreme Court of Justice—Labor Chamber—against the diplomatic missions of both States" (para. 43). Noting that such proceedings might result in complex, expensive, and delayed litigation (and because protection of the fundamental constitutional rights of the plaintiffs must be expedited), the Constitutional Court set one year as the maximum period by which the Foreign Ministry must obtain appropriate decisions from the relevant foreign judicial authorities (para. 44; Third Order). This "one-year timeframe," it said, is aimed at achieving "equity, justice and reasonableness" by balancing the protection of individual rights with the duty of complying with international obligations. It will also provide certainty to plaintiffs that the state will protect their constitutional rights, reinforcing the legitimate confidence of citizens in their government, as well as the principle of good faith (para. 44).

[15] Jurisdictional Immunities of the State (Ger. v. It.; Greece Intervening), 2012 ICJ REP. 99 (Feb. 3).
[16] Hilton v. Guyot, 159 U.S. 113 (1895); Erie Railroad Company v. Tompkins, 304 U.S. 6 (1938).

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The Constitutional Court also observed that since the results of the foreign judicial proceedings cannot be predicted, two situations might occur: (1) the relevant foreign court might not adopt any decision within the one-year deadline; or (2) that court might not recognize or enforce the "compulsory nature of the decisions" of the Labor Chamber. In either situation, the constitutional rights of the plaintiffs would remain "unprotected." Because the president of the republic, in his capacity as head of state, is the one in charge of signing treaties, the Court ordered the Foreign Ministry

> to assume the pecuniary obligations of the Embassies of the Lebanese Republic and the United States of America, . . . in due consideration of the facts that (i) plaintiffs do not have any other remedy available and (ii) as the labor relationship and the absence of payment is proven in both cases, the violation of the right to work is, clearly and indisputably, arbitrary. (Para. 54)

Finally, the Constitutional Court urged the President and the Foreign Ministry to

> arrange whatever [may be] necessary for the effective fulfillment of the decisions of the Courts of the Republic by foreign diplomatic missions, as well as by delegations or missions from international organizations accredited in the State, in relation to the compliance with the labor obligations that arise from labor relationships established in Colombia." (Fourth Order)

* * * *

The Constitutional Court is no stranger to questions of international law. Under the Colombian Constitution, it has the automatic responsibility of reviewing treaties (including those to which Colombia is a signatory and those to which Colombia intends to accede) after they have been approved by an Act of Congress but before the executive branch deposits its instrument of ratification or accession. This is done in order to ensure that Colombia's obligations under the relevant treaty do not conflict with its constitutional provisions.[17] Under the procedure of "*actio popularis* of unconstitutionality," it can also consider challenges to an (unreviewed) treaty[18] on grounds of non-compliance with constitutional provisions and, as in the current case, by review of lower court decisions through tutelage actions. This review may be used to guarantee the protection of individual rights arising out of, inter alia, a human rights treaty in force.

Moreover, the Colombian Constitution contains multiple references to international law and its sources. Ratified human rights treaties are ranked at the same level as the Colombian Constitution, serving as a "parameter of interpretation" for the Constitutional Court when

[17] This duty of review empowers the Constitutional Court to condition a treaty's ratification or accession on, inter alia, the renegotiation of certain provisions or the formulation of specific reservations, interpretative declarations, or conditional interpretative declarations, in order to ensure observance of and conformity with the Colombian Constitution.

[18] Formally, it is the Treaty Approval Act that may be subject to challenge, but the grounds are restricted to the substance of the conventional obligations enshrined in the relevant treaty. Treaties that have not been reviewed include, inter alia, those that were ratified before the establishment of the Constitutional Court. Naturally, the decision arising out of the constitutional examination only has domestic effects, although the Executive Branch is obliged to take actions to assure that the international obligation is adapted to the relevant constitutional provision, or terminated.

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examining the conformity of laws and regulations to constitutional provisions. International humanitarian law (when applicable) has full domestic force, irrespective of the ratification of particular Geneva Conventions. Treaties establishing frontiers, borders, and/or limits enjoy a "special constitutional status."[19] The Constitutional Court has said that *jus cogens*, or peremptory norms, prevail over contrary or inconsistent constitutional provisions and that Andean communitarian law displaces all ordinary laws.[20] All other treaties in force for Colombia (including those of an economic, trade or investment nature) are at the same level as ordinary laws, thus ranking not only below the Constitution but also beneath statutes and the above-referenced international instruments. "Principles of international law" have full domestic force, except for customary international law toward which Colombia is a persistent or subsequent objector, general principles of law recognized by other civilized nations but not by Colombian law, or principles of international law where no conclusive determination exists regarding their acceptance "on the basis of the State of Colombia's unequivocal practice."[21]

Consequently, it was not exceptional for the Constitutional Court in this case to apply its understanding of the customary international law of immunities to overrule decisions of the lower courts. Yet certain aspects of the decision are open to question. First, the Constitutional Court clearly erred in asserting a "complete lack of evidence" that the United States of America is opposed to the principle of *absolute* immunity from execution, since its adherence to the *restrictive* theory is well-known. At the very least, that statement is incomplete, given the various provisions of American law that do in fact permit judgment creditors to enforce their judgments against the property of (foreign) states and their "agenc[ies] and instrumentalit[ies]."[22]

Similarly, the Constitutional Court's treatment of the 2004 UN Convention on the Jurisdictional Immunities of States and Their Property as reflecting customary international law seems overbroad, inasmuch as the Court made no effort to distinguish the specific provisions that constitute binding rules applicable to all states from those representing progressive development and codification applicable only to states parties. In point of fact, only the Lebanese Republic is currently a party to that Convention; neither Colombia nor the United States of America has signed or ratified. The Court's statement that the principles recognized by the Convention are binding as customary international law may be taken as rendering the eventual ongoing assessment of the viability of Colombia's accession pointless. If "the treaty's customary international law provisions bind the State" without further clarification as to the rules that may have only become crystallized with the adoption of the treaty, the state's permission to become a subsequent objector may be impaired. The Constitutional Court's prior decisions[23]—and even this Judgment's dicta—recognized such a prerogative. In practice, however, the broad and far-reaching scope of the affirmation is difficult to reconcile with the precedent.

[19] The term "special constitutional status" means, inter alia, that these treaties complete the content of Article 101 (Title IV, on the "Territory"), even though they are not formally part of the Colombian Constitution.

[20] By way of hypothetical example, if an ordinary law were to conflict with a Decision of the Commission of the Andean Community, the latter would govern the specific circumstances of the case ("displace" the local law) but the ordinary law would, nonetheless, remain in full force.

[21] Corte Constitutional [C.C.] [Constitutional Court], mayo 2, 2014, Sentencia C-269/14.

[22] *See, e.g.*, Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §1610(g).

[23] *See supra* note 21.

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Perhaps most importantly, the Constitutional Court seems to have conflated the concepts of diplomatic and sovereign immunity.[24] They are quite distinct, if often confused. Under Article 22 of the Vienna Convention on Diplomatic Relations (1969), the diplomatic mission is "inviolable" and its premises, furnishings, other property, and means of transport are entitled to immunity from "search, requisition, attachment or execution."[25] However, diplomatic missions are typically considered integral components of the sending state rather than separate entities with their own "legal personality." In addition, employment relationships and other contractual undertakings are normally assumed in the name of the state itself, so that legal proceedings arising from such agreements must be brought (and any resulting judgments enforced) against the state itself. Accordingly, the relevant legal framework is one of sovereign (not diplomatic) immunity, as the Court's references to the 2004 UN Convention on the Jurisdictional Immunities of States and Their Property suggests.

The Constitutional Court does not discuss—at all—what types of duties the two plaintiffs were performing. An analysis of whether the contracts contemplated duties involving official functions (therefore making the state a party) would have been appropriate. It appears that Ms. Borissow served as a "Secretary" within the Embassy of the Lebanese Republic and might therefore have been performing duties legitimately characterized as sovereign or governmental (*acta jure imperii*), while Mr. Castaño seems to have been employed as a "Real Estate Assistant" within the Embassy of the United States of America so that his functions might properly have been characterized as *acta jure gestionis*. These distinctions have proven relevant in the context of the examination of employment disputes at international courts.[26] Without a clear explanation of their duties, however, it is difficult to comprehend the Court's rationale for its decision, especially considering its earlier distinction between *acta jure imperii* and *acta jure gestionis*.

No one disputes that relying on immunity to evade contractual obligations is not a minor matter. Under Article 33(3) of the Vienna Convention on Diplomatic Relations, states must comply with local labor and social security legislation if the relevant requirements are met. But the Constitutional Court evidently did not consider whether a state (acting through its diplomatic representation) is obliged in *all* cases to comply with the labor, social security, and similar requirements of the host state when it hires local nationals.

Clearly, the most unusual and controversial matter is the Constitutional Court's order to the Foreign Ministry to initiate proceedings abroad with the aim of enforcing the Labor Chamber's decisions regarding the defendants' pecuniary obligations and/or to espouse the claims of its nationals to compensation. At first sight, it may make practical sense to require the government to "step into the shoes" of its citizens, since it might well be the only way effectively to guarantee the rights of the individuals involved (especially considering the expense of bringing enforcement actions themselves in the states concerned). It certainly would not be the best approach in all cases, where other mechanisms of international dispute settlement might be available. The decision also seems to overlook the jurisdictional and other

[24] The Court appears to have confused the two concepts in a prior decision, Judgment T-462/15.

[25] Vienna Convention on Diplomatic Relations, Art. 22, Apr. 18, 1961, 23 UST 3227, 500 UNTS 95 (1961).

[26] *See*, *e.g.*, Case C-154/11 Mahamdia v. Algeria, 2012 E.C.R., ECLI:EU:C:2012:491; Cudak v. Lithuania, 51 Eur. Ct. H.R. 15 (2010); Sabeh El Leil v. France, 54 Eur. Ct. H.R. 14 (2012).

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technical difficulties which Colombia may confront in attempting to bring suits in foreign courts on behalf of its citizens.

The Constitutional Court's judgment appears to create a domestic obligation for Colombia to exercise "diplomatic protection" in cases where the fundamental constitutional rights of its nationals or citizens have been breached by the conduct of diplomatic missions (or states themselves) whose assets are entitled to immunity from execution in Colombia. This approach seems to turn "diplomatic protection" on its head. As the ILC has noted, international law imposes no such obligation (although the internal law of a state may oblige it to extend diplomatic protection to its nationals).[27] At least in its classic sense, the right of diplomatic protection entitles a state to take up such issues bilaterally when another state has abused a right owed under international law to its citizens within the latter's territory or jurisdiction. The Constitutional Court's decision, although not prohibiting bilateral negotiations, fails to acknowledge—as a result of its "exequatur-centric approach"—that international dispute settlement may often occur through other peaceful means for the settlement of disputes.

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French Court of Cassation—state immunity from execution—waiver of immunity—attachment of bank accounts

COMMISIMPEX v. REPUBLIC OF CONGO, No. 13-17.751. *At* https://www.legifrance.gouv.fr. Court of Cassation, 1st Chamber, May 13, 2015.

The law in France regarding waivers of foreign state (or sovereign) immunity from execution of judicial judgments (based largely on consideration of international law principles) has recently undergone significant developments. Previously, French case law had required a foreign state's waiver of immunity from execution to be both express and specific to consider valid the attachment of foreign state property allocated to public services (including bank accounts used for the functioning of both diplomatic missions and delegations to international organizations). In 2015, the French Court of Cassation relaxed the criteria it had previously required for giving effect to waivers of sovereign immunity in such situations, thus facilitating the ability of judgment creditors to attach foreign state property in France.[1] Its decision in the *Commisimpex v. Republic of Congo* case appeared to put an end to that requirement by abandoning the criterion of a "specific" waiver on the ground that "customary international law does not require a waiver of immunity from execution other than express." In December 2016, however, the French government enacted new legislation reinstating the need for a specific waiver of immunity for the attachment of the property as well as bank

[27] Int'l Law Comm'n Rep. on the Work of Its Fifty-Eighth Session, UN Doc. A/61/10, Y.B. ILC Vol. II, Pt. Two, Commentary 2, at 29 (2006).

[1] Commisimpex v. Republic of Congo, Cass. Civ. 1st, No. 13–17.751 (May 13, 2015), *available at* https://www.legifrance.gouv.fr. For critical comment, see Horatia Muir Watt, 3 REV. CRIT. DIP 652 (2015); Denis Alland & Thibaut Fleury Graff, 1 REV. CRIT. DIP 3 (2016); Daniel Cohen, 3 REV. ARB. 810 (2016); Sally El Sawah & Philippe Leboulanger, 143 CLUNET 141 (2016).