Colombian Constitutional Court—reform of investment law—constitutional review—joint interpretative declarations—legitimate expectations and fair and equitable treatment.

CONSTITUTIONALITY OF THE COLOMBIA-FRANCE BILATERAL INVESTMENT TREATY. Judgment C-252/2019. *At* http://www.corteconstitucional.gov.co.
Republic of Colombia, Constitutional Court, Plenary Chamber, June 6, 2019.

In a judgment issued on June 6, 2019 (Judgment),[1] the Colombian Constitutional Court (Court) examined the constitutionality of the Agreement for the Reciprocal Promotion and Protection of Investments between Colombia and France (Agreement).[2] The Court upheld the constitutionality of the Agreement on the condition that the government adopt a joint interpretative statement with France to clarify some of its provisions and prevent interpretations contrary to the Colombian constitutional order. In doing so, the Court articulated a standard of review that takes into account the benefits and costs of international investment agreements (IIAs), the application of which entailed an insightful examination of the Agreement in light of the decisions of investment tribunals. The judgment raises significant issues of public international law, including the practical implications of conditioning ratification of the Agreement on adoption of a joint interpretative statement and the role of such statements in the interpretation of IIAs. Furthermore, the judgment makes important contributions to the ongoing process of reform of the investment treaty regime and the strategies adopted by states to counter the adverse impacts of IIAs on regulatory autonomy.

By virtue of Article 241-10 of the Political Constitution of Colombia (Constitution), the Court is vested with authority to review the constitutionality of treaties negotiated by the government. Explicating that authority, the Court has asserted that the constitutional control occurs prior to the ratification of the treaty and has a comprehensive scope, covering both procedure and substance (paras. 38–42). The Court has also asserted that the constitutional control is abstract and strictly legal in scope, which means that it does not involve reassessing the treaty's expected benefits nor its political convenience.[3] With respect to IIAs, the Court has justified the former stance on the impossibility of anticipating their drawbacks, the specialized character of international investment law, and the importance for democratic legitimacy of maintaining a deferential approach toward the technical competencies of the executive and legislative branches as the primary decision-making authorities (paras. 44–49).

Nevertheless, the Court had already opened a path toward extending the scope of constitutionality review in relation to free trade agreements. In particular, the Court has acknowledged the importance of considering extralegal factors, such as trade forecasts and differences in the degree of development among trading partners.[4] Likewise, the Court has declared that changes in perceptions about the practical effects of those agreements ought to be considered during the constitutionality review.[5] Yet, before the Judgment, the Court had not applied

[1] Judgment C-252/2019 (Case LAT-445) (Colom. Const. Ct. June 6, 2019) (Colom.) (in Spanish).

[2] Reciprocal Investment Promotion and Protection Agreement, Colom.-Fr. (July 7, 2014) (not yet in force) (hereinafter Colom.-Fr. BIT).

[3] *See* Judgment C-750/2008 (Case LAT-311), at 169 (Colom. Const. Ct., Plenary Chamber July 24, 2008) (Colom.).

[4] *See* Judgment C-031/2009 (Case LAT-323), at 60 (Colom. Const. Ct., Plenary Chamber Jan. 28, 2009).

[5] *Id.* at 61.

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that approach to IIAs.[6] To the contrary, IIAs were scrutinized using a lenient standard of review in which their practical utility and implications were beyond discussion. Further, when determining the scope of the obligations acquired by Colombia, the Court had not examined the substantive provisions enshrined in IIAs in light of their interpretation in investment treaty arbitration.[7] In a way, the Court's legal reasoning featured patterns of bounded rationality similar to those observed in the diffusion of IIAs.[8] Simply put, the Court had underestimated the real costs of IIAs while overestimating their benefits.

Against this backdrop, the Judgment's importance resides in the articulation of a stricter standard of review, a true paradigm shift in the constitutional control of IIAs. Convening a public hearing in which academics, practitioners, and authorities expressed their opinions about the Agreement was an early indicator of the Court's intentions (para. 11). The Judgment described that public hearing, and the variety of arguments articulated therein, as a means to enhance process for the negotiation of IIAs from the perspective of deliberative democracy (para. 55). Accordingly, the Court decided to approach constitutional control as the 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.

Furthermore, insofar as the actual normative content ascribed to the substantive standards found in the Agreement is normally established through the decisions of international arbitration tribunals, the Court reflected on whether those decisions should be taken into consideration during the exercise of constitutionality control (para. 57). In particular, the Court observed that there is growing awareness about the practical effects of IIAs and the interpretation of their substantive standards of protection by investment tribunals (para. 58). In doing so, the Court implicitly accepted that the consequences of IIAs are a function of their interpretation in investment treaty arbitration. The Court also reflected on the ongoing increase in investment claims, particularly against Colombia, and their consequences for regulatory autonomy (paras. 59–63).[9] As such, the Court analyzed how IIAs could compromise the international responsibility of Colombia in light of how arbitrators have interpreted them (para. 64). Some members of the Court dissented on this point. One dissenting judge, for example, criticized the majority opinion for considering arbitral decisions regarding IIAs in which Colombia is not a party, for overlooking investment treaty arbitration's lack of a system of precedent,[10] and for ignoring the fact that international decisions are only a supplementary means for the determination of international obligations.[11]

[6] *See* René Urueña & María Angélica Prada-Uribe, *Constitucionalismo transformador y arbitraje de inversión: elementos para un estándar de revisión constitucional nacional estricto (Transformative Constitutionalism and Investment Arbitration: Towards a Strict National Standard of Review)*, at 27–28 (Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper Series, 2019–05, 2019).

[7] *Id*.

[8] *See* Lauge N. Skovgaard Poulsen, *Bounded Rationality and the Diffusion of Modern Investment Treaties*, 58 INT'L STUD. Q. 1 (2014).

[9] Colombia was the most frequent respondent state in the investor–state disputes initiated in 2018. *See* United Nations Conference on Trade and Development, *World Investment Report 2019*: *Special Economic Zones*, at 103 (UN 2019).

[10] Regardless, investment tribunals have created a de facto system of precedent by constantly citing previous awards. *See* Richard C. Chen, *Precedent and Dialogue in Investment Treaty Arbitration*, 60 HARV. INT'L L.J. 47 (2019).

[11] Dissenting Opinion, Judge Linares, para. 4.

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A majority of the Court's judges observed that a two-pronged reasonableness test was needed (para. 65). That test entailed verifying first, whether the aims pursued by the Agreement were legitimate in the light of the Constitution, and second, whether the Agreement as a whole and each of its provisions considered individually were suitable to fulfill those aims. Through this analytical framework, the Court first addressed the compatibility of the Agreement as a whole with the Constitution. At the first stage of that analysis, the Court observed that the contracting parties had hoped to strengthen economic cooperation between the two countries and create favorable conditions for investments so as to stimulate the transfer of capital and technology, while also preserving regulatory autonomy to pursue legitimate public policy objectives. All these objectives are stipulated in the preamble. According to the Court, those aims are legitimate because they help fulfill a series of constitutional goals, including securing legal certainty as an expression of the rule of law, the internationalization of the Colombian economy, as well as economic development and social welfare (paras. 93–100).

Next, examining the Colombian government justifications for the Agreement, the Court inquired whether the Agreement as a whole was suitable to fulfill the aforesaid constitutional goals. Drawing on the opinion of some interveners who stressed the uncertain nexus between IIAs and foreign direct investment (FDI), the Court acknowledged that the record lacked conclusive empirical evidence to affirm that the Agreement would inevitably catalyze cross-border investment activity; the Court went on to observe, however, that it could also not be argued that the Agreement could not have any effect whatsoever on FDI flows (para. 108). Whereas the interveners did not demonstrate that the Agreement itself was incapable of boosting FDI, the Colombian government supplied data regarding the relative importance of French investments in the Colombian economy and the strategic importance of France as a trading partner (paras. 103–07). The Court considered that this information, coupled with its deferential approach toward the technical decision-making authority of the Colombian government, constituted sufficient basis to overcome the lack of empirical evidence on whether there was a substantial link between the Agreement and capital influx (para. 108).

Nevertheless, before holding that the Agreement as a whole had passed the reasonableness test, the Court went on to examine its compatibility with the principle of equality enshrined in Article 13 of the Constitution (paras. 109–10). Particularly, the Court focused on whether the Agreement could result in inequality or discrimination against domestic investors to whom the substantive protections afforded by the Agreement were not available. The Court noted that the Agreement does not contain any substantive provision protecting domestic investors (para. 112). Simply put, nothing in the Agreement guarantees equality of protection between domestic and foreign investors to prevent discrimination against the former (para. 118). The Court observed that the investment treaty regime has been built upon doctrines and institutions focused on improving the legal environment for foreign capital. However, the Court concluded, based on recent developments in the field, that states are implementing measures to prevent foreign investors from being treated more favorably than domestic ones (paras. 113–17).[12] Consequently, the Court upheld the constitutionality of

[12] *See, e.g.*, Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) Between Canada and the European Union and its Member States (Oct. 30, 2016).

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the Agreement under the condition that none of its substantive provisions requires more favorable treatment of foreign investors than Colombian nationals (paras. 120–21). The Court thus ordered the Colombian government, if it still wishes to ratify the Agreement, to adopt a joint interpretative declaration fulfilling that condition (para. 122).

After declaring the conditional constitutionality of the Agreement as a whole, the Court moved to examine all of its provisions individually. For space reasons, it is not possible to comment on the Court's assessment of each provision. Therefore, the analysis will focus on the legal reasoning deployed by the Court in regard to fair and equitable treatment (FET) and indirect expropriation. These two standards of protection, which are often probable bases for state liability, have long been at the heart of debates about the impact of IIAs on regulatory autonomy.

First, the Agreement contains a qualified FET clause (para. 190). Specifically, each Contracting Party is obliged to afford to foreign investors treatment determined with reference to "applicable international law."[13] Further, the clause contains a catalogue of obligations, particularly, nondenial of justice and transparency. Given that those obligations are preceded by the expression "inter alia," the list appears to be indicative rather than exhaustive.[14] The clause also stipulates that investor treatment shall be consistent with the principles of predictability and consideration of "legitimate expectations."[15]

The Court approached the FET standard as an embodiment of legal principles found in the Constitution (paras. 201–03). As such, the FET clause is not per se incompatible with the Constitution. Nonetheless, examining arbitral practice concerning the normative content of the FET clause, especially with respect to the protection of legitimate expectations, the Court found that there is no single understanding of the obligations embodied in that standard (paras. 191–98). Conversely, the Court observed that recent treaty-making practice shows efforts to limit FET clauses by listing concrete examples of breach (para. 199). Taking this into account, the Court's analysis focused on the terms "applicable international law," "inter alia," and "legitimate expectations" in the FET clause. The Court concluded those terms lacked precision and were thus incompatible with the constitutional principle of legal certainty and could prevent Colombian authorities from exercising their constitutional functions (para. 204).

The Court observed that the term "applicable international law" offered no guidance to identify the rules that would be relevant in determining the scope of the FET obligations (paras. 204–07). Nor did the term "inter alia" offer clear parameters to discern those obligations (paras. 208–09). Therefore, in the Court's opinion, Colombia could have compromised its international responsibility in an unlimited fashion, since only investment tribunals could determine *ex post* the actual scope of the state's FET obligations (para. 208). Meanwhile, referring to "legitimate expectations," the Court concluded that the term required specification to secure predictability and to make it compatible with the protection of expectations in the Colombian constitutional order (paras. 210–12). Moreover, such a term required clarification, according to the Court, to prevent interpretations that might discriminate against domestic investors (para. 211). Without further specification, the open-ended texture of

[13] Colom.-Fr. BIT, *supra* note 2, Art. 4.
[14] *Id.*
[15] *Id.*

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those terms would make it impossible for national authorities to anticipate the circumstances under which their actions would trigger a treaty breach. The Court thus conditioned the constitutionality of the FET clause on the adoption of a joint interpretative declaration (para. 214) that would define with greater precision the meaning of "applicable international law" and "legitimate expectations," as well as whether "inter alia" has an analogic rather than additive meaning (para. 215).

The Court also worried about the open-textured nature of certain expressions found in the Agreement's expropriation clause, which establishes that "legitimate expectations" constitute a factor to be weighed in determining whether a regulatory measure amounts to indirect expropriation.[16] Further, the clause stipulates that regulatory measures aimed at legitimate public policy objectives do not constitute indirect expropriation as long as they are "necessary and proportional."[17] Considering that the clause intersects with some constitutional principles such as legal certainty and good faith, the Court asserted that it is not incompatible per se with the Constitution (paras. 276–79). However, the Court observed that uncertainty about the meaning of "legitimate expectations" also applies with regard to indirect expropriation. Concurrently, the Court examined the expression "necessary and proportional," concluding that it was insufficiently precise and had the potential to restrict national regulatory autonomy if interpreted expansively (para. 280). Accordingly, the Court upheld the constitutionality of the provision on the condition that, through a joint interpretative declaration, the contracting parties make clear the meaning of "legitimate expectations" and explain that the expression "necessary and proportional" shall be interpreted in line with the Agreement's preamble (paras. 281–84).

* * * *

This landmark ruling comes amid a climate of state disenchantment with the present investment treaty regime.[18] Central to this disenchantment are arbitral rulings that prioritize investors' rights over legitimate public policy objectives. A common feature in these arbitral rulings is the expansive interpretation of the substantive standards of protection incorporated into IIAs. IIAs contain open-textured language, which can be highly malleable when left to the discretion of arbitrators. As a result, amending the substantive content of IIAs to preserve regulatory autonomy is a key component of the current agenda to reform the investment treaty regime.[19] The assumption is that more precise treaty language can effectively reduce the delegation of interpretative authority from states to tribunals. Yet, apart from replacing older treaties with alternatives drafted with greater precision, states are increasingly turning to subsequent interpretative agreements to clarify the meaning of the provisions incorporated into existing IIAs and thus retain control over how these are interpreted.[20]

[16] *Id.* Art. 6.

[17] *Id.*

[18] *See* Joachim Pohl, *Societal Benefits and Costs of International Investment Agreements: A Critical Review of Aspects and Available Empirical Evidence* (OECD Working Papers on International Investment 2018/1, 2018).

[19] *See* Caroline Henckels, *Protecting Regulatory Autonomy Through Greater Precision in Investment Treaties: The TPP, CETA, and the TTIP*, 19 J. INT'L ECON. L. 27 (2016).

[20] *See* David Gaukrodger, *The Legal Framework Applicable to Joint Interpretive Agreements of Investment Treaties* (OECD Working Papers on International Investment 2016/01, 2016).

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Certainly, following the conclusion of a treaty, the contracting parties can reach a subsequent agreement regarding its interpretation and application.[21] In the 2018 Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, the United Nations International Law Commission (ILC) commented that although subsequent agreements reflect the parties' common understanding regarding the interpretation of a treaty, they do not necessarily possess a conclusive effect that overrides all other means of interpretation.[22] Nonetheless, the parties can explicitly confer a legally binding effect on a subsequent agreement. The archetype of this in the context of IIAs is the 2001 binding Joint Interpretation by the parties to the North American Free Trade Agreement (NAFTA).[23] In that case, though, NAFTA itself included a special provision stipulating that such joint interpretation would be binding on investment tribunals.[24] Most IIAs, including the Agreement, have no such provision. As such, a key feature of the Judgment is the fact that the Court ordered the Colombian government to adopt an interpretative statement jointly with France, not *after* but *before* ratification. The Court aims to ensure that Colombia will not lose control over the interpretation of the Agreement even before it enters into force. Accordingly, rather than urging Colombia to abandon the investment treaty regime, the Court joined ongoing initiatives to reform that regime. More precisely, the Court could have declared the Agreement unconstitutional because the open-texture language incorporated therein had the potential to hamper regulatory autonomy if interpreted expansively by arbitrators. Instead, by upholding the Agreement's constitutionality on the condition that certain provisions are interpreted in a particular fashion, the Court became involved in the process of reclaiming interpretative authority from investment tribunals through greater precision in the drafting of IIAs.

However, the Court's approach raises significant issues from the perspective of public international law. According to the 2011 ILC Guide to Practice on Reservations to Treaties, interpretative declarations are unilateral statements through which a contracting party purports to clarify the meaning or scope of certain treaty provisions.[25] While these statements can play a key role in the interpretative process, they are not themselves binding.[26] Cognizant of this limitation, and considering the bilateral character of the Agreement, the Court assumes throughout the judgment that the interpretative declaration will be adopted jointly. But to what extent do the clarifications ordered by the Court to ensure the primacy of the Constitution amount to an actual modification of the legal obligations imposed by the Agreement? What if France refuses to conclude the joint interpretative declaration because it considers that those clarifications significantly reduce the level of protection originally envisaged for French investors?[27]

[21] *See* Vienna Convention on the Law of Treaties, Art. 31(3)(a), May 23, 1969, 1155 UNTS 331 (VCLT).

[22] Int'l L. Comm'n Rep. on the Work of Its Seventieth Session, Supp. No. 10, at 25, UN Doc. A/73/10.

[23] *See* NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter Eleven Provisions (July 31, 2001).

[24] North American Free Trade Agreement, Can.-Mex.-U.S., Art. 1131(2), Dec. 17, 1992, 32 ILM 289 (1993).

[25] Int'l L. Comm'n Rep. on the Work of Its 63rd Session, Supp. No. 10, Add. 1, at 62, UN Doc. A/66/10/Add.1.

[26] *Id.* at 70.

[27] At the time of writing, there is not official information on whether Colombia and France have already concluded the joint interpretative declaration ordered by the Court. Yet, before the judgment, the parties had already concluded, on October 23, 2017, an interpretative declaration regarding the meaning of Article 16 of the Agreement (para. 390).

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In practical terms, by demanding greater precision in the drafting of some of the substantive provisions to secure certain interpretative outcomes, the Court essentially ordered a revision of the Agreement. In fact, a dissenting judge criticized the majority opinion for imposing on the contracting parties a particular understanding of the scope and meaning of certain substantive provisions.[28] What then would be the implications of the judgment in the hypothetical scenario in which France is unwilling to negotiate the interpretative declaration but Colombia insists on ratifying the Agreement? A statement formulated unilaterally by Colombia subjecting its consent to be bound by the Agreement upon a particular interpretation of its provisions could be characterized as a conditional interpretative declaration.[29] These are unilateral acts that operate as reservations.[30] Yet, "reservations" to bilateral treaties are really proposals or offers to amend or renegotiate a treaty.[31] If no joint interpretative declaration is successfully negotiated, the Judgment might either lead to the modification of the Agreement or prevent its entry into force by interrupting the ratification process.

Still, the Court conducted the constitutional control on the premise that investment treaty arbitration involves an exercise of public authority.[32] Specifically, it associated the imprecise treaty language with the delegation of significant decision-making authority to arbitrators. The judgment therefore epitomizes how states are endeavoring to regain that authority. Nonetheless, the dissenting opinions are a reminder that there are diverging views on how to reform the investment treaty regime.[33] For example, a dissenting judge considered that the rules of interpretation found in Articles 31–32 of the Vienna Convention on the Law of Treaties, together with the general exceptions conferred by the Agreement, suffice to restrain arbitral discretion.[34] Contrarily, the Court undertook a more systemic approach to reform when addressing the vagueness of legitimate expectations. Specifically, it restricted their protection to circumstances derived from specific and repeated acts by public authorities that induce investors to make or maintain their investments in good faith, which then are abruptly and unexpectedly modified (para. 215). This departs from the protection conferred in investment treaty arbitration where, apart from specific commitments, legitimate expectations can result from the general regulatory framework.[35]

At the same time, the Court's reasoning shows that present demands for a systemic overhaul of the investment treaty regime face epistemic barriers deep-rooted in the legal consciousness of decisionmakers. Granted, the Judgment incarnates the ethos of disillusionment that informs the investment treaty regime reform process and contains a realistic account of how IIAs affect regulatory autonomy. Yet, the Judgment loses its critical edge when considering the indeterminacy of rules.[36] Such indeterminacy is structural and goes

[28] Dissenting Opinion, *supra* note 11, paras. 4–5.

[29] *See* ILC Report, *supra* note 25, at 84.

[30] *Id.* at 87–88.

[31] *Id.* at 110–14.

[32] *See* Gus Van Harten, Investment Treaty Arbitration and Public Law (2007).

[33] *See* Anthea Roberts, *Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration*, 112 AJIL 410 (2018).

[34] Dissenting Opinion, *supra* note 11, paras. 10–15.

[35] Michele Potestà, *Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept*, 28 ICSID Rev. 88, 110 (2013).

[36] For an analysis of legal indeterminacy, see B.S. Chimni, International Law and World Order 123 (2017).

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beyond the semantic ambiguity of the international legal texts. Legal concepts lack objective meaning because legal argumentation inherently involves the interplay of political interests based on contradictory premises. International adjudication is a process whereby political interests confront each other through opposing legal arguments.

In this sense, the Court seems too confident that an interpretative declaration injecting greater precision into the Agreement is enough to secure an objective interpretation of its text. Even with precisely defined obligations, arbitrators could still accommodate their own political conceptions regarding the appropriateness of regulatory action.[37] For instance, NAFTA tribunals have followed, for the most part, the parties' Joint Interpretation linking the FET to customary international law.[38] However, some tribunals circumvent that limitation while paying lip service to the binding character of that interpretation by arguing that the minimum standard of treatment under customary international law has evolved so as to confer a more significant measure of protection.[39]

The Court's assessment of whether IIAs in fact foster FDI flows also warrants further examination. In the second prong of the reasonableness review, the Court tested the suitability of the Agreement as a whole to accomplish a series of constitutional objectives such as social welfare and development. Granted, the Court acknowledged that the Agreement would not necessarily result in an increase of FDI. But the Court ultimately concluded that the Agreement was suitable simply by looking at statistical information. In doing so, the Court overlooked central concerns in the current wave of criticism against IIAs. For instance, it remains unclear whether IIAs attract quality FDI,[40] that is, the kind of investments conducive to social welfare and development. Accordingly, while examining the definition of investment contained in the Agreement, the Court missed an opportunity to address the way in which arbitral tribunals downplay economic development as a constituting element of protected investments.[41] This suggests that while certain elements of the Court's legal reasoning were truly transformative, others remained embedded within the parameters laid down by dominant narratives on investment protection.

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[37] Concerning the influence of politics on arbitrators' decisions, see Todd N. Tucker, Judge Knott: Politics and Development in International Investment Law (2018).

[38] David Gaukrodger, *Addressing the Balance of Interests in Investment Treaties: The Limitation of Fair and Equitable Treatment Provisions to the Minimum Standard of Treatment Under Customary International Law*, at 25 (OECD Working Papers on International Investment 2017/03, 2017).

[39] *See* William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc., v. the Government of Canada, PCA Case No. 2009–04, Award, paras. 430–33 (UNCITRAL, Mar. 17, 2015); Merrill and Ring Forestry L.P. v. Canada, ICSID Case No. UNCT/07/1, Award, paras. 192–94 (Mar. 31, 2010).

[40] *See* Pohl, *supra* note 18, at 37.

[41] *See* Omar E. García-Bolívar, *Economic Development at the Core of the International Investment Regime*, *in* Evolution in Investment Treaty Law and Arbitration 602 (Chester Brown & Kate Miles eds., 2011).

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