ONLINE

Transformative Constitutionalism and International Investment Law

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International investment law faces five core legitimacy challenges: the state-dependency challenge, the human and constitutional rights challenge, the equality challenge, the standard of protection challenge, and the investor state dispute settlement system challenge.

This Article endorses the claim that constitutional courts can contribute to the solution of those legitimacy challenges when they exercise the power to review the constitutionality of international investment treaties. From a transformative perspective, constitutional courts of host states can: (i) create public deliberation and raise awareness concerning the legitimacy challenges of international investment law; (ii) grant equal treatment to national and foreign investors; (iii) require governments to negotiate balanced and less open-textured provisions in international investment treaties; (iv) safeguard the protection of human and constitutional rights, and other common goods; and (v) raise due process, predictability, transparency, and proportionality standards concerning the investor state dispute settlement system. These judicial undertakings can strengthen the bargaining power of host executive branch authorities in the negotiation of international investment treaties and can narrow down the space of discretion of international investment arbitral tribunals. Both outcomes could render international investment treatises' creation and enforcement more legitimate.

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I. CONSTITUTIONAL COURTS AND THE LEGITIMACY CHALLENGES TO INTERNATIONAL INVESTMENT LAW

International investment law faces five core legitimacy challenges: (i) the state-dependency challenge; (ii) the human and constitutional rights challenge; (iii) the equality challenge; (iv) the standards of protection challenge; and (v) the investor state dispute settlement system (ISDS) challenge.

In the analysis of those challenges, I will refer to "legitimacy" in three senses: legal, sociological, and normative. In a legal sense, a legal rule or institution is legitimate if it is valid within a legal system, that is, if the competent authorities have created it, according to the rules and procedures governing that legal system. In a sociological sense, a legal rule or institution is legitimate if, as a matter of fact, it is accepted by the citizens. In a normative sense, a legal rule or institution is legitimate if it is acceptable or justifiable, namely, if it complies with standards of justice or correctness.[1]

1. *See* PETER FABIENNE, POLITICAL LEGITIMACY (Edward N. Zalta ed., Stan. Encyclopedia of Phil. summer ed. 2017), https://plato.stanford.edu/archives/sum2017/entries/legitimacy/

In the next section I will provide a more detailed explanation of the five above-stated legitimacy challenges to international investment law. Briefly stated, they highlight some factors that undermine the legitimacy of this system of international law: biased and disproportionate awards might create disincentives for state support of the system; the protection of investors might be at odds with the respect of human and constitutional rights; that protection might discriminate domestic investors; the open texture of international investment treaty clauses might lead to biased awards against host states, and the ISDS might not comply with minimum due process guarantees.

What solutions can there be for the legitimacy challenges? There are several possibilities, which aim to preserve the framework of international investment law by improving its legitimacy. Three counts among them:

First, that international investment arbitrators respond to the ISDS legitimacy crisis by issuing balanced rulings and awards.[2] Second, an international reform of ISDS. Since November 2017, the Working Group III: Investor-State Dispute Settlement Reform of the United Nations Commission on International Trade Law has hosted several meetings with the aim of analyzing reform proposals.[3] The set of proposals[4] include a multilateral investment court,[5] and an appellate mechanism.[6] Third, that states negotiate new international investment treaties with models that: (a)

(discussing the senses of legitimacy); *see also* Richard H. Fallon, *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1787–1853 (2005).

2. *See* Malcom Langford & Daniel Behn, *Managing Backlash: The Evolving Investment Treaty Arbitrator?*, 29 EUR. J. INT'L L. 551, 558 (2018) (analyzing the possibility of international investment arbitrators responding to the ISDS legitimacy crisis).

3. *See Working Group III: Investor-State Dispute Settlement Reform*, U.N. COMM. ON INT'L TRADE L., https://uncitral.un.org/en/working_groups/3/investor-state (last visited Feb. 23, 2023) (listing the proposals and discussions of seven meetings celebrated between November 2017 and February 2021); *see also* Ksenia Polonskaya, *Metanarratives as a Trap: Critique of Investor–State Arbitration Reform*, 23 J. INT'L ECON. L. 949 (2020) (analyzing the process and the proposals).

4. *See* Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 AM. J. INT'L L. 361 (2018) (analyzing the most significant reform proposals, including market mechanisms (the good reputation of states, the inclusion of foreign investors protections in contracts, and the use of political risk insurance); political mechanisms (negotiation and mediation); domestic dispute settlement mechanisms (domestic courts, specialized processes, and ombudsman offices); independent interstate adjudicatory mechanisms (ad hoc tribunals and international courts); international adjudicatory mechanisms as substitutes for domestic adjudication (ISDS, and a multilateral permanent investment court); and international adjudicatory mechanisms as complements of domestic adjudication (international review of domestic decisions, international claims after domestic proceedings, and international interpretation at request of domestic courts)).

5. This was a proposal submitted by the European Commission. *See Multilateral Investment Court Project*, EUR. COMM'N (Mar. 20, 2018), https://policy.trade.ec.europa.eu/enforcement-and-protection/multilateral-investment-court-project_en.

6. U.N. Comm'n on Int'l Trade L., Possible Reform of Investor-State Dispute Settlement (ISDS) Appellate and Multilateral Court Mechanisms, U.N. Doc A/CN/9/WG.III/WP.185 (Nov. 29, 2019), https://undocs.org/en/A/CN.9/WG.III/WP.185.

include equal treatment of national investors;[7] (b) entrench foreign investors' protections in more concrete ways; (c) create exceptions concerning the protection of human and constitutional rights and other public good aims; or (d) exclude ISDS[8] or set limitations to this kind of dispute resolution mechanism.

The focus of this Article is the third option. Generally, constitutions grant foreign relations powers to the executive branch. In some jurisdictions, governments share those powers with the legislature or the people.[9] However, domestic and international pressures can create disincentives on host states governments to negotiate and sign international investment treaties that are more balanced or more favorable to host states. The risks of losing foreign investment and not attracting enough new investment generate domestic short time pressures on executive branch authorities.[10] Moreover, host states usually have less bargaining power than home investors' states to negotiate the terms of foreign investment protections.[11]

Those pressures could perpetuate the legitimacy challenges of international investment law. Moreover, if international investment tribunals interpret unbalanced and open-textured treaties in favor of investors, they are likely to generate a regulatory chill.[12] The fear of litigation can intimidate political and administrative authorities of host states. They

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7. The Brazilian Cooperation and Facilitation Investment Agreement provides equal treatment between foreign and national investors. *See* Jose Henrique Vieira Martins, *Acuerdos de Cooperación y Facilitación de Inversiones de Brasil y Últimos Avances*, INV. TREATY NEWS (Mar. 29, 2023), https://www.iisd.org/itn/es/2017/06/12/brazils-cooperation-facilitation-investment-agreements-cfia-recent-developments-jose-henrique-vieira-martins/.

8. The Brazilian Cooperation and Facilitation Investment Agreement does not include an ISDS mechanism. Instead, it institutionalizes preventive mechanisms (a domestic Ombusdsman proceeding and a joint committee between states) and a mechanism of inter-state arbitration. *See* Vivian Gabriel, *The New Brazilian Cooperation and Facilitation Investment Agreement: An Analysis of the Conflict Resolution Mechanism in Light of the Theory of the Shadow of the Law*, 34 CONFLICT RESOL. Q. 141, 145–49 (2016).

9. *See, e.g.*, U.S. CONST. art. II, § 2, cl. 2 (providing that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur"); Missouri Pac. Ry. v. Kansas, 248 U.S. 276, 283–84 (1919) (confirming that the requirement of concurrence of two-thirds of the Senators present refers to two-thirds of a quorum; the Constitution provides that a quorum for business requires the presence of a majority of the members of the Senate). In most Latin American Constitutions, after the executive signs an international treaty, Congress ratifies it. An international treaty is not valid without ratification. Some Latin American constitutions also empower the Constitutional Court to review the treaty after ratification by Congress. If the treaty is unconstitutional, it cannot enter into validity. *See* Víctor Bazán, *El Control de Constitucionalidad de los Tratados Internacionales en América Latina*, 4 ESTUDIOS CONSTITUCIONALES 509 (2006).

10. GUS VAN HARTEN, THE TROUBLE WITH FOREIGN INVESTOR PROTECTION 3 (2020) [hereinafter VAN HARTEN, TROUBLE] (emphasizing the alleged effect of bilateral investment treaties in attracting new foreign investment).

11. *See* Todd Allee & Clint Peinhardt, *Delegating Differences: Bilateral Investment Treaties and Bargaining over Dispute Resolutions Provisions*, 54 INT'L STUD. Q. 1, 1–26 (2010) (discussing the complexity of bargaining power of bilateral investment treaties, particularly concerning ISDS provisions).

12. VAN HARTEN, TROUBLE, *supra* note 10, at 99–132.

might avoid implementing measures to protect human and constitutional rights, and to pursue other common good aims, when this implies limiting the rights and expectations of foreign investors protected under international investment treaties.

Within this context, a broad question is whether constitutional courts can somehow contribute to the solution of the legitimacy challenges of international investment law. Given that those courts ought to adjudicate and enforce constitutional rights, in principle, they have the power to break the regulatory chill of foreign investment. In some jurisdictions, they might even command government authorities to implement immediate protections to constitutional rights, regardless of the impact of that protection on foreign investment. Nevertheless, this possibility might give rise to international investment law litigation that, at the end, could generate international responsibility for the state.[13]

Thus, a narrower question is whether constitutional courts can contribute to the solution of the legitimacy problems when they exercise the power to review the constitutionality of international investment treaties. This review power is a special case of the power to review the constitutionality of international treaties that several constitutions grant to constitutional courts.

A few years ago, Mendez published a survey of this review power,[14] which some constitutions in Europe, Latin America, and Africa entrench as an *ex ante* or an *ex post* competence to review international treaties. Mendez endorsed the adoption of this kind of review to ensure that "treaty making does not escape the salutary reach of domestic constitutionalism" and "greater respect for constitutional standards in the treaty-making process" and for fundamental rights in international law.

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13. For example, judgments by the Colombian Constitutional Court triggered some of the current ICSID claims against Colombia. *See, e.g.*, Corte Constitucional [C.C.] [Constitutional Court], febrero 8, 2016, M.P: G. Delgado, Sentencia C-035/16 (Colom.) [hereinafter Decision C-035/16] (impacting Eco Oro Minerals Corp. v. Colom., ICSID Case No. ARB/16/41 [hereinafter Eco Oro], Red Eagle Exploration v. Colom., ICSID Case No. ARB/18/12 [hereinafter Red Eagle], and Galway Gold Inc. v. Colom., ICSID Case No. ARB/18/13 [hereinafter Galway Gold]); Corte Constitucional [C.C.] [Constitutional Court], agosto 22, 2013, Sentencia C-553/13 (Colom.) [hereinafter Decision C-533/13] (impacting Telefónica, S.A. v Colom., ICSID Case No. ARB/18/3 [hereinafter Telefónica]); Corte Constitucional [C.C.] [Constitutional Court], octubre 1, 1998, Sentencia SU447-11 (Colom.) [hereinafter Decision SU447-11] (impacting Astrida Benita Carrizosa v. Colom., ICSID Case No. ARB/18/5 [hereinafter Astrida Benita Carrizosa] and Alberto Carrizosa Gelzis et al. v. Colom., PCA Case No. 2018-56 [hereinafter Alberto Carrizosa Gelzis]); Corte Constitucional [C.C.] [Constitutional Court], febrero 28, 2017, Sentencia SU133/17 (Colom.) [hereinafter Decision SU133/17] (impacting Aris Mining Corporation (formerly known as GCM Mining Corp. and Gran Colombia Gold Corp.) v. Colom., ICSID Case No. ARB/18/23 [hereinafter Gran Colombia Gold Corp]. In the Decision of the Case: América Móvil S.A.B. de C.V. v. Colom., ICSID Case No. ARB(AF)/16/5 [hereinafter América Móvil S.A.B.], on May 7, 2021, an ICSID tribunal relied on Decision C-553/13 by the Constitutional Court to state that the claimant did not have a right which could be subject to expropriation.

14. On this generic power, see Mario Mendez, *Constitutional Review of Treaties: Lessons for Comparative Constitutional Design and Practice*, 15 INT'L J. CONST. L. 84 (2017).

In the remainder of this Article, I will endorse a positive answer to the question on whether constitutional courts can contribute to the solution of the legitimacy problems when they exercise the power to review the constitutionality of international investment treaties. Specifically, I will argue that, when empowered to review the constitutionality of international investment treaties, by implementing a transformative perspective, constitutional courts of host states can: (i) create public deliberation and raise awareness concerning the legitimacy problems of international investment law; (ii) grant equal treatment to national and foreign investors; (iii) require governments to negotiate balanced and less open-textured provisions in international investment treaties; (iv) safeguard the protection of human and constitutional rights, and other common good aims, and (v) raise the compliance thresholds concerning due process, transparency, and proportionality standards in ISDS. These judicial undertakings can strengthen the bargaining power of host executive branch authorities in the negotiation of international investment treaties and can narrow down the space of discretion of international investment arbitral tribunals.

To justify this argument, I will use, as case study, the Decision 252/2019 by the Colombian Constitutional Court.[15] By means of that Decision, the Colombian Constitutional Court reviewed the constitutionality of a bilateral investment treaty between Colombia and France. During the review process, the Court created a space of deliberation in which relevant stakeholders argued about the legitimacy problems of international investment law, in general, and of the Colombia-France bilateral investment treaty, in particular. Moreover, in its decision, the Court applied heightened rational basis scrutiny. That level of scrutiny led the Court to uphold all provisions of the treaty under the condition that the parties would agree to issue an interpretive declaration for solving the most salient equality and open-textured problems. The declaration was successfully negotiated and signed by both governments, ultimately creating safeguards against a regulatory chill. Nevertheless, the decision failed to include reasonable limitations to the ISDS, especially concerning due process, transparency, and proportionality of possible awards. In any case, this decision is a successful instance of what I will call: transformative constitutional review of international investment treaties. I argue that the exercise of this kind of review can contribute to the solution of the legitimacy problems of international investment law.

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15. Corte Constitucional [C.C.] [Constitutional Court], junio 6, 2019, Sentencia C-252/19 (Colom.), *translated in* FOREIGN INVESTMENT BETWEEN INTERNATIONAL AND DOMESTIC LAW: TRANSLATION OF JUDGMENT C-252/2019 OF THE COLOMBIA CONSTITUTIONAL COURT ON THE BIT BETWEEN FRANCE AND COLOMBIA (Enrique Prieto-Ríos et. al eds., 2020) [hereinafter Decision C-252/19], https://www.corteconstitucional.gov.co/transparencia/Foreign%20Investment%20between%20international%20and%20domestic%20law.pdf.

In section (3), I will highlight how, during the process of constitutional review of the bilateral investment treaty between Colombia and France, the Constitutional Court opened a space of deliberation in which relevant stakeholders argued about the legitimacy problems of international investment law. In section (4), I will explain how Decision C-252/2019 adopted a heightened rational basis scrutiny and solved the equality problem. In section (5), I will account for the way in which that decision approached the standards and the open-texture problems. In section (6), I will analyse the strongest shortcoming of the Decision, namely, that it failed to include reasonable limitations to the ISDS, with regard to due process, transparency, and proportionality of possible awards. Section (7) will summarize the conclusions. Nevertheless, before, in Section (2), I will explain the five legitimacy challenges to International Investment Law.

II. FIVE LEGITIMACY CHALLENGES TO INTERNATIONAL INVESTMENT LAW

A. The State-Dependency Challenge

International investment law is a set of legal rules and institutions protecting foreign investors' rights and expectations against arbitrary and unjustified state action. Bilateral or multilateral investment treaties create those rules and institutions.[16] The legal and sociological legitimacy of international investment law depends upon: (a) the states' willingness to sign, ratify, and maintain the validity of international investment treaties; (b) the states' subjection to the ISDS, and (c) the states' compliance with arbitration awards.[17]

Host states usually enter international investment treaties to attract and preserve foreign investment.[18] Notwithstanding, if, by enforcing those treaties, international arbitration tribunals grant unjustified protection to foreign investors, their awards generate disincentives for the states' permanence in the international investment legal system. Within this context, the state-dependency challenge is: how should international investment law achieve an equilibrium between the protection of foreign investors, on the one hand, and avoiding disincentives for states to withdraw

16. A database of Investment Treaties can be found at ELECTRONIC DATABASE OF INVESTMENT TREATIES, https://edit.wti.org/document/investment-treaty/search (last visited Aug. 14, 2023).

17. *See* Charles B. Rosenberg, *The Intersection of International Trade and International Arbitration: The Use of Trade Benefits to Secure Compliance with Arbitral Awards*, 44 GEO. J. INT'L L. 503 (2013) (discussing several issues concerning compliance with international investment arbitration awards).

18. Nevertheless, there are doubts as to whether the ratification of international investment treaties by host states will attract new investment. *See* Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67 (2005).

from the system, on the other? Too little protection to investors would arguably discourage foreign investment, which is what motivates states to commit to the international investment law system.[19] At the same time, too much protection to investors would lead host states to resent unjustified awards, to consider withdrawing from that legal framework, and, ultimately, to the extinction of international investment law.[20]

B. The Human and Constitutional Rights Challenge

Second, states are under international and domestic obligations to protect human and constitutional rights. Sometimes, state laws, regulations, and judicial decisions aiming to implement and enforce those rights—such as the rights to health, to environmental protections, to water, and to minimum labor standards—may justify or require limitations to rights and legitimate expectations of foreign investors.[21] The human and constitutional rights challenge arises when states breach an international investment obligation for the purpose of protecting human or constitutional rights.[22] This is a special case of an antinomy in international law[23]. This antinomy emerges when, from the perspective of the state, human rights require what international investment law prohibits, or vice versa. This challenge concerns the normative and legal legitimacy of international investment law.

At first glance, it does not seem justifiable to protect foreign investors' rights at the price of violating human and constitutional rights. Hence, it does not seem valid that states be internationally liable for limiting investors' rights for actions that public officials made with the aim to comply with human rights rules and standards.[24] Nevertheless, host states sometimes do

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19. *See* JONATHAN BONNITCHA ET. AL, THE POLITICAL ECONOMY OF THE INVESTMENT TREATY REGIME 155–80 (2017) (discussing this aim of international investment treaties).

20. Not only host-states but also home-states have shown interest in reacquiring control over international investment law. For an analysis of this trend, see RODRIGO POLANCO, THE RETURN OF THE HOME STATE TO INVESTOR-STATE DISPUTES: BRINGING BACK DIPLOMATIC PROTECTION? (2018).

21. Stephan W. Schill & Vladislav Djanic, *Wherefore Art Thou? Towards a Public Interest-Based Justification of International Investment Law*, 33 ICSID REV. 29, 29–30 (2018).

22. *See* Stephan W. Schill & Christian J. Tams, *International Investment Protection and Constitutional Law: Between Conflict and Complementarity*, *in* INTERNATIONAL INVESTMENT PROTECTION AND CONSTITUTIONAL LAW 2–37 (Stephan W. Schill & Christian J. Tams eds., 2022).

23. This antinomy is somehow related to the antinomy that Mills identified in international investment law of attempting to cater for the public regulatory needs of states (which includes regulation aiming to protect constitutional rights and public goods) and private interests of investors. *See* Alex Mills, *Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration*, 14 J. INT'L ECON. L. 469, 488 (2011).

24. This challenge transcends the traditional fragmentation view, according to which, international investment law and human rights are two whole distinct and autonomous legal domains. *See* Pierre-Marie Dupuy, *Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law*, *in* PIERRE-MARIE DUPUY ET. AL, HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 45 (2009). Naturally, both domains can also

not include exceptions to investor protections based on human or constitutional rights obligations in international investment treaties. For this reason, the principle *pacta sunt servanda* grants investors' the right to claim appropriate compensation for those limitations. In this sense, international investment arbitration tribunals sometimes adopt a narrow view, which is focused on the treaty, and do not consider human and constitutional rights obligations as valid defenses of the state.[25] Indeed, there is a strong justification for this choice. According to Article 52(1)(b) of the International Centre for Settlement of Investment Disputes (ICSID) Convention, "the misidentification or non-application of applicable laws" gives rise to a ground for annulment of an arbitral award, namely, that the Tribunal "has manifestly exceeded its powers."[26]

In any case, if host states include exceptions of protections to investors based on human or constitutional rights obligation, this gives rise to a balancing issue. Due to the open texture of clauses specifying human or constitutional rights, arbitrations ought to balance those rights with the rights of investors. There is no universal balancing formula to address this challenging endeavor.

C. The Equality Challenge

Bilateral investment treaties encompass special standards of protection to foreign investors' rights and expectations.[27] In principle, those standards are not accorded to national investors.[28] This creates an equality problem. From that problem derives a challenge to the normative legitimacy of international investment law. If equality is a condition of normative

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partially overlap. A violation of a constitutional or human right can also constitute a violation of an international investment treaty. For example, an extreme violation of the due process of a foreign investor can, at the same time, represent denial of justice under an international investment treaty; or a discrimination might be a violation of the constitutional right to equality and, at the same time, of the national treatment clause of an international investment treaty. *Id.* at 51. However, there can be contradictions or collisions between both systems too. *Id.* at 53.

25. *See, e.g.*, RREEF v. Kingdom of Spain, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, ¶¶ 79–150 (Nov. 30, 2018), https://www.italaw.com/sites/default/files/case-documents/italaw10455_0.pdf (focusing the analysis on the clauses of the treaty).

26. *See* C. L. LIM ET. AL, INTERNATIONAL INVESTMENT LAW AND ARBITRATION: COMMENTARY, AWARDS AND OTHER MATERIALS 153 n.1 (2d ed. 2021).

27. *See* ARNAUD DE NANTEUIL, DROIT INTERNATIONAL DE L'INVESTISSEMENT 320–416 (2d ed. 2014), *translated in* INTERNATIONAL INVESTMENT LAW (2020).

28. A different matter is that, sometimes, engaging with international investment treaties leads host states to improve their legal system concerning the overall protection of investors (including national investors). On this topic, see MAVLUDA SATTOROVA, THE IMPACT OF INVESTMENT TREATY LAW ON HOST STATES: ENABLING GOOD GOVERNANCE? (2018). Nevertheless, this view is somehow in tension with other critical analysis of international investment law. For example, according to Julian Arato, one of the worst effects of international investment law is that it leads to a distortion of domestic private law institutions. *See* Julian Arato, *The Private Law Critique of International Investment Law*, 113 AM. J. INT'L L. 1 (2019).

legitimacy,[29] how can a normative system that discriminates against national investors by granting extraordinary "legal benefits," "powers and protections" only to foreign investors—and essentially entrenching "pro-investor favoritism"—be legitimate?[30]

D. The Standards of Protection Challenge

International investment treaties entrench protection standards by means of open-textured provisions.[31] They include ambiguous concepts, such as, "fair and equitable treatment," "minimum standard of treatment," "national treatment," "most favored nation treatment," and "indirect expropriation."[32] Foreign investors appeal to those provisions to challenge states' laws, policies, regulations, and judicial decisions. There is some evidence that international arbitration tribunals expansively interpret those standards,[33] in pro-investor ways, particularly when large corporations are the claimants.[34] The same evidence shows that sometimes those tribunals exhibit little deference to local authorities. If true, this tendency can undermine the competence of state authorities to introduce justified regulations in economic domains of foreign investment interest.[35] From a constitutional point of view, it is normatively legitimate that states hold the power to introduce such regulations. Within this context, the challenge with respect to the standards of protection is how to find a balanced interpretation of the standards of international investment law? Such interpretation should accord justified protections to foreign investors and, simultaneously, preserve the integrity of the states' regulatory powers.

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29. *See* Alex Levitov, *Normative Legitimacy and the State*, *in* OXFORD HANDBOOK TOPICS IN POLITICS (2016), https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935307.001.0001/oxfordhb-9780199935307-e-131 (discussing the equal treatment of individuals as a condition of political legitimacy under different theories); *see also* Dean J. Machin, *Political Legitimacy, the Egalitarian Challenge, and Democracy*, 29 J. APPLIED PHIL. 101 (2012).

30. VAN HARTEN, TROUBLE, *supra* note 10, at 1–3 (2020).

31. *See* H. L. A. HART, THE CONCEPT OF LAW 123, 128–36 (2d ed. 1994) (discussing the "open texture" of legal rules).

32. The Colombia-France Bilateral Investment Treaty is an example of a treaty containing these concepts. *See infra* note 81.

33. Gus Van Harten, *Leaders in the Expansive and Restrictive Interpretation of Investment Treaties: A Descriptive Study of ISDS Awards to 2010*, 29 EUR. J. INT'L L. 507, 508 (2018).

34. Gus Van Harten, *Arbitrator Behaviour in Asymmetrical Adjudication (Part Two): An Examination of Hypotheses of Bias in Investment Treaty Arbitration*, 53 OSGOODE HALL L.J. 540, 557 (2016).

35. GUS VAN HARTEN, SOVEREIGN CHOICES AND SOVEREIGN CONSTRAINTS: JUDICIAL RESTRAINT IN INVESTMENT TREATY ARBITRATION 74–75 (2013).

E. The ISDS Challenge

Finally, the ISDS challenge relates to the legitimacy crisis in international investment arbitration.[36] State officials and scholars have challenged the normative legitimacy of ISDS for several reasons including: inconsistency between international investment arbitration awards, unpredictability of arbitral decisions, lack of neutrality of arbitration tribunals, lack of transparency of arbitration procedures, absence of an appellate body, inefficiency of the annulment mechanism,[37] and disproportionality of awards.

There are links between some of the stated legitimacy challenges. To a considerable extent, the ISDS legitimacy challenge has triggered issues concerning the state-dependency challenge.[38] Due to the negative economic effects of adverse ICSID awards, Bolivia in 2007, Ecuador in 2009-, and Venezuela in 2012 denounced the ICSID Convention.[39] Moreover, on April 22, 2013, Cuba, Nicaragua, the Dominican Republic, St. Vincent and the Grenadines joined those three countries in a declaration negatively assessing the ICSID, and calling for regional legal and political cooperation initiatives to create alternatives to the existing system.[40] Ecuador went even further. The Constituent Assembly entrenched in Article 422 of the 2008 Constitution a prohibition for Ecuador to sign and ratify "[t]reaties or international instruments where the Ecuadorian State yields its sovereign jurisdiction to international arbitration entities in disputes involving contracts or trade between the State and natural persons or legal entities[.]"[41]

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36. *See* David Schneiderman, *International Investment Law's Unending Legitimation Project*, 49 LOY. U. CHI. L.J. 229 (2017); Daniel Behn, *Legitimacy, Evolution, and Growth in Investment Treaty Arbitration: Empirically Evaluating the State-of-the-Art*, 46 GEO. J. INT'L L. 363 (2015); Daniel Behn, *Performance of Investment Treaty Arbitration*, *in* THE PERFORMANCE OF INTERNATIONAL COURTS AND TRIBUNALS 77 (Theresa Squatrito et. al eds., 2018).

37. Stephan W. Schill, *Reforming Investor–State Dispute Settlement: A (Comparative and International) Constitutional Law Framework*, 20 J. INT'L ECON. L. 649, 652–57 (2017); Raul Vinuesa, *Preface* to INTERNATIONAL INVESTMENT LAW IN LATIN AMERICA, at xi-xiii (Attila Tanzi et. al eds., 2016).

38. *See* Malcolm Langford et. al, *Backlash and State Strategies in International Investment Law*, *in* THE CHANGING PRACTICES OF INTERNATIONAL LAW 70–102 (Tanja Aalberts & Thomas Gammeltoft-Hansen eds., 2018).

39. The ICSID Convention is a treaty on the settlement of investment disputes between states and nationals of other states. The Convention created the International Centre for Settlement of Investment Disputes (ICSID). The Convention entered into force on October 14, 1966. The full text of the Convention is available online. *ICSID Convention*, INT'L CTR. FOR SETTLEMENT OF INV. DISPS. WORLD BANK GROUP, https://icsid.worldbank.org/rules-regulations/convention. For more information on the Convention, see ANTONIO R. PARRA, THE HISTORY OF ICSID (2d ed. 2017); CHRISTOPH H. SCHREUER ET. AL, THE ICSID CONVENTION: A COMMENTARY (2d ed. 2009).

40. Eduardo Silva Romero & Ana Carolina Simões e Silva, *Introductory Note to the Declaration of the 1st Ministerial Meeting of the Latin American States Affected by Transnational Interests*, 52 INT'L LEGAL MATERIALS 1321, 1322 (2013).

41. On the impact of this constitutional entrenchment, see Alexander B. Avtgis, *Rethinking Article 422: A Retrospective on Ecuador's 2008 Constitutional ISDS Recalibration*, 2 IND. J. CONST. DESIGN 1 (2016) (quoting CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADOR, Oct. 20, 2008, art. 422(1)).

Ecuador, Venezuela, Bolivia, Salvador, Nicaragua, and Argentina have also reassessed their commitment to international investment treaties, and have terminated some of them.[42] Beyond Latin America, South Africa has also terminated many of its bilateral investment treaties.[43] Instead, the South African Parliament enacted a statute, which offers foreign investors a special domestic framework of protection.[44]

Furthermore, there is an essential connection between the open texture of bilateral investment treaties provisions, the standards of protections challenge, and the ISDS problem. Because of their open texture, those provisions have a "fringe of vagueness."[45] They become "indeterminate in their application to borderline cases."[46] Impartial arbitrators could reasonably interpret them, when they apply those provisions to unforeseen types of problems. However, if arbitration procedures lack transparency, bias arbitrators could also interpret open-textured standards provisions in an expansive and pro-investor way. This kind of interpretation could lead to disproportionate awards. Due to the absence of a doctrine of precedent in international investment law, and the lack of effective annulment and double instance mechanisms, states would arguably face serious difficulties to challenge those awards. Again, this can lead states to consider withdrawing from the system and undermining it.

III. THE CONSTITUTIONAL REVIEW OF THE BILATERAL INVESTMENT TREATY BETWEEN COLOMBIA AND FRANCE: A SPACE FOR OPEN DELIBERATION ON THE DOMESTIC IMPACT OF INTERNATIONAL INVESTMENT LAW

On 10 July 2014, the French and Colombian Governments signed a bilateral investment treaty.[47] The treaty encompasses typical clauses protecting the rights, interests, and expectation of foreign investors: minimum standard of treatment (Article 4), national treatment (Article 5), most favored nation (Article 5), protection against direct and indirect expropriation (Article 7), and ISDS under the ICSID framework (Article

42. *See* Catharine Titi, *Investment Arbitration in Latin America: The Uncertain Veracity of Preconceived Ideas*, 30 ARB. INT'L 357, 363–66 (2014).

43. *See* Engela C. Schlemmer, *An Overview of South Africa's Bilateral Investment Treaties and Investment Policy*, 31 ICSID REV. - FOREIGN INV. L.J. 167 (2016).

44. *See* Protection of Investment Act 22 of 2015 (S. Afr.).

45. H. L. A. HART, THE CONCEPT OF LAW, *supra* note 31, at 123.

46. *See* Brian Bix, *H. L. A. Hart and the "Open Texture" of Language*, 10 L. & PHIL. 51, 52 (1991) (regarding this feature of open textured provisions).

47. Acuerdo Entre El Gobierno de la República de Colombia y El Gobierno de la República Francesa Sobre El Fometo y Proteccion Reciprocos de Inversiones [Agreement Between the Government of Colombia and the Government of France Concerning the Reciprocal Promotion and Protection of Investments], Colom.-Fr., July 10, 2014, UNCTAD, https://investment policy.unctad.org/international-investment-agreements/treaty-files/4771/download.

15). On 12 July 2017, the Colombian Congress ratified the treaty by means of Act 1840/2017.

Section 10 of Article 241 of the 1991 Colombian Constitution empowers the Constitutional Court to "take a final decision on the execution of international treaties and the laws approving them."[48] This is an *ex ante* constitutional review, namely, before the treaty can enter into force. If the Constitutional Court declares unconstitutional a treaty or a treaty provision, the Government cannot complete the process of ratification. This guarantees the supremacy of the constitution within the framework of a legal system, which is monist in many respects, including international human rights law.

On the grounds of that empowerment, the Constitutional Court reviewed the constitutionality of the bilateral investment treaty (BIT) between Colombia and France. Domestic regulations enable any citizen to participate in constitutional review procedures.[49] This possibility opens a framework for deliberation. In the review of the BIT, the Constitutional Court enhanced that deliberation by requesting academics and experts to submit *amicus curiae* and to present their arguments within in a public hearing. Government officials (working at the ministries of foreign relations and trade, and at the agency of legal defense of the state), the French Ambassador, the CEO of the Colombian-French Chamber of Commerce, academics, practitioners, and arbitrators delivered speeches and presentations at the public hearing. The justices of the Constitutional Court asked relevant normative, legal, empirical, and technical questions to the speakers. The event was broadcasted nationally.

The several written submissions and the public hearing fulfilled three functions. First, they provided the court with normative, legal, and empirical arguments to understand the text and the context of the BIT. These arguments upgraded the epistemic competence of the Court, as a deliberative representative of the people, to decide on the constitutionality of the treaty provisions.[50] Second, they created awareness on the most pressing constitutional, international, political, economic, and social impacts of international investment treaties in Colombia. Third, they generated incentives for compliance with best international standards and treaty practices.[51]

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48. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 241(10) (July 4, 1991).

49. Decreto 2067 de 1991, septiembre 4, 1991, DIARIO OFICIAL [D.O.], art. 7 (Colom.) [hereinafter Decree 2067/91].

50. *See* Robert Alexy, *Balancing, Constitutional Review, and Representation*, 3 INT'L J. CONST. L. 572 (2005) (discussing the role of Constitutional Courts as deliberative representatives of the people).

51. On this role of the public hearings hosted by the German Constitutional Court, see Jay N. Krehbiel, *The Politics of Judicial Procedures: The Role of Public Oral Hearings in the German Constitutional Court*, 60 AM. J. POL. SCI. 990 (2016).

In the hearing, and in written submissions, several parties presented strong legal, political, economic, and social reasons in favor, and against the constitutionality of the BIT.[52]

On the one hand, the Colombian Government and other parties (the French Ambassador, the CEO of the Colombian-French Chamber of Commerce, some academics, practitioners and arbitrators) claimed that bilateral investment treaties are a key tool for strengthening the rule of law in the governance of the global economy. They create a legal framework and dispute settlement mechanisms, which aim to stabilize international investment flows. Arguably, this creates incentives for maintaining and increasing foreign investment, particularly in the Global South, in which, there is not enough national capital for financing infrastructure projects at a great scale. In those countries, foreign investment seems to be essential for achieving targets of economic growth and generating sufficient revenue to fund social welfare programs with the purpose of mitigating poverty and economic inequality.[53] Moreover, some global southern countries show a history of political instability and legal uncertainty. Constitutions with short longevity, coups d'état, expropriation, infringement of rights and legitimate expectations, and an inefficient judiciary engender visible risks. It is understandable that foreign investors seek protections against those risks. Bilateral investment treaties offer suitable protections. All those grounds were particularly relevant concerning the BIT under review. French investors have a significant presence in Colombia and generate hundreds of thousands of jobs. Political and legal instability in the Andean region (Venezuela under Chavez and Maduro, Ecuador under Correa, Bolivia under Morales, and Peru under Castillo) during the last few decades create investors distrust.[54]

On the other hand, several *amicus curiae* pointed to possible incompatibilities between the CIT and the 1991 Colombian Constitution. By the time of the constitutional review, foreign investors had filed twenty claims against Colombia—eleven of them had initiated formal proceedings.[55] In nine of the claims, foreign investors argued that judgments

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52. Decision C-252/19, *supra* note 15, *translated in* OXFORD REPORTS ON INTERNATIONAL LAW (2019), https://opil.ouplaw.com/view/10.1093/law-ildc/3198co19.case.1/law-ildc-3198co19?rskey=ieluCq&result=1&prd=OPIL.

53. *See* STEPHEN D. COHEN, MULTINATIONAL CORPORATIONS AND FOREIGN DIRECT INVESTMENT: AVOIDING SIMPLICITY, EMBRACING COMPLEXITY 179–204 (2007).

54. *See* GEORGE PHILIP, POWERING UP: LATIN AMERICA'S ENERGY CHALLENGES: OIL AND TWENTY-FIRST CENTURY SOCIALISM IN LATIN AMERICA: VENEZUELA AND ECUADOR (Nicholas Kitchen ed., London School of Economics and Political Science 2010); Alejandro Gutiérrez, *Venezuela's Economic and Social Development in the Era of Chavism*, 8 LATIN AM. POL'Y 160 (2017).

55. Glencore International A.G. and C.I Prodeco S.A. v. Colom., ICSID Case No. ARB/16/6; América Móvil S.A.B., *supra* note 13 (deciding on the basis of Decision C-553/13, *supra* note 13); Eco Oro, *supra* note 13 (deciding on the basis of Decision C-035/16, *supra* note 13); Naturgy Energy Group,

of the Colombian Constitutional Court violated the rights that bilateral investment treaties protected.[56] This was arguably a sign of the unconstitutionality of bilateral investment treaty protections. In those judgments, the Constitutional Court aimed to enforce constitutional rights allegedly infringed to guarantee protections to investors. Hence, those protections were arguably unconstitutional.

An example can underscore this point. By means of Judgment C-035/2016 Colombia's Constitutional Court struck down some provisions of the Acts 1450/2011 and 1753/2015.[57] Those provisions granted powers to a Commission on Infrastructure and Strategic Projects to categorize and regulate projects to be undertaken in high altitude wetlands. They also permitted the undertaking of mining, oil, and gas exploration and refining projects in whose wetlands, if the projects had been authorized under concession contracts before certain dates in 2010 and 2011. The Court did not uphold both provisions. The Court claimed that the provisions violated the constitutional rights to a healthy environment and clean water. According to the Court, high altitude wetlands were fragile, they provided as much as 70 percent of Colombia's drinking water, and they had a huge capacity to capture carbon dioxide from the atmosphere. The continuation of mining projects would entail irreversible damages to those ecosystems and would hinder the satisfaction of the constitutional right to water for Colombia's inhabitants.

The judgment rendered legally impossible for several mining companies to carry out their concession contracts. The rights and expectations of some of those companies, namely, Red Eagle Exploration, Galway Gold Inc., and Eco Oro, were protected by bilateral investment treaties ratified by Colombia. Hence, according to those companies, their rights and expectations were infringed upon as a consequence of the Constitutional Court decision. Those companies began procedures under the ICSID jurisdiction. For instance, Eco Oro argued that as a consequence of that decision and other state's measures, that Eco Oro has been deprived from its rights under Concession Contract 3452, and the value of its investments

S.A. and Naturgy Electricidad Colombia, S.L. (formerly Gas Natural SDG, S.A. and Gas Natural Fenosa Electricidad Colombia, S.L.) v. Colom., ICSID Case No. UNCT/18/1 (deciding on the basis of several Constitutional Court Judgments that prohibit the suspension of the electricity to subjects of special constitutional protection, despite unpaid bills); Telefónica, *supra* note 13 (deciding on the basis of Decision C-553/13, *supra* note 13); Astrida Benita Carrizosa, *supra* note 13 (deciding on the basis of Decision SU447-11, *supra* note 13); Red Eagle, *supra* note 13 (deciding on the basis of Decision C-035/16, *supra* note 13); Galway Gold, *supra* note 13 (deciding on the basis of Decision C-035/16, *supra* note 13); Gran Colombia Gold Corp., *supra* note 13 (deciding on the basis of Decision SU133/17, *supra* note 13).

56. Decision C-252/19, *supra* note 15.

57. Decision C-035/16, *supra* note 13.

in the Colombian mining sector has been destroyed.[58] Moreover, Eco Oro claimed that "Colombia has taken measures that interfered with Eco Oro's investments and ultimately deprived Eco Oro of the returns on its investments without paying any compensation," and that "Colombia's measures have breached Colombia's obligations under the [Bilateral Investment] Treaty [between Canada and Colombia] and under international law[.]"[59] In the arbitration award, a majority of the Tribunal held that Colombia's decision to ban mining activities in the wetlands did not amount to unlawful expropriation.[60] Nevertheless, the Tribunal failed to apply the exception concerning environmental matters, incorporated into the BIT, and acknowledged the legal liability of the state.[61]

This scenario presented a dilemma to the Constitutional Court. That state measures arguably required for protecting human and constitutional rights constituted, at the same time, illegal decisions under international investment law. Opponents to bilateral investment treaties and, in particular, to the constitutionality of the BIT between Colombia and France, claimed that the only way out was to declare the unconstitutionality of those kinds of treaties. Furthermore, they argue that those treaties created an international liability that could endanger the survival of the Colombian state and the fulfilment of its mission. A 2019 valuation of the claims against Colombia was: USD 9.525 billion.[62] That amounted to more than 10 per cent of the entire national budget for that fiscal year.

IV. THE STANDARD OF REVIEW, TRANSFORMATIVE CONSTITUTIONALISM, AND THE EQUALITY CHALLENGE

The Colombian Constitutional Court arguably had two alternative extreme standards to review the merits of the BIT between Colombia and France: either applying a very deferential and weak standard of review to uphold the treaty or undertaking a strict scrutiny and declare its unconstitutionality. Until 2019, the Colombian Constitutional case law had

58. Eco Oro Minerals Corp. v. Colom., ICSID Case No. ARB/16/41, Request for Arbitration, ¶ 4 (Dec. 8, 2016) [hereinafter Eco Oro, Request for Arbitration], http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C6086/DS10828_En.pdf.

59. *Id.* ¶ 13(a)-(b).

60. *See* Robert Garden, *Eco Oro v Colombia: The Brave New World of Environmental Exceptions*, 38 ICSID REV. - FOREIGN INV. L.J. 17 (2022) (analyzing the Eco Oro arbitral decision).

61. Eco Oro Minerals Corp. v. Colom., ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum (Sept. 9, 2021), https://www.italaw.com/sites/default/files/case-documents/italaw16212.pdf.

62. This valuation was made in the Decision C-252/19, *supra* note 15, at 73, on the basis of data provided by the Agency of Defense of the Colombian State to the Constitutional Court.

always taken the former way. In a continuous line of precedents,[63] the Constitutional Court had applied a weak standard of review, had been extremely deferential to the Government, and had upheld all provisions of the bilateral investment treaties.

The Court had invoked several reasons for grounding the application of a very weak and formalistic standard of review. First, the Court was not allowed to consider any kind of political, economic, and social reasons in favour or against the ratification of a bilateral investment treaty. Second, according to Articles 189.2 and 150.16 of the 1991 Colombian Constitution, only the Executive and Congress had democratic legitimacy to assess the relevant political reasons and the opportunity for negotiating, signing, and ratifying an international treaty. Hence, the Court lacks that legitimacy. Third, only the Executive and Congress have technical capacity to assess the convenience and fairness of international treaties provisions, and their economic, political, and international impact. The Court also lacks that capacity. Fourth, the Court is also deprived from the ability to assess the fairness and the positive or negative impact of international investment regulations. Political authorities, international organizations, and international courts and arbitration panels are endowed with that capability. Finally, because the constitutional review takes place before the treaty enters into validity, the Court declined to foresee the beneficial or adverse foreseeable impacts of the agreed terms.

Because of the doctrine of precedent, that the Constitutional Court had acknowledged since the Decision C-836/2001, for reviewing the BIT between Colombia and France, the appropriate standard of review was a

63. *See* Corte Constitucional [C.C.] [Constitutional Court], agosto 22, 1996, Sentencia C-379/96 (Colom.) (on the bilateral investment treaty between Colombia and Cuba); Corte Constitucional [C.C.] [Constitutional Court], agosto 14, 1996, Sentencia C-358/96 (Colom.) (on the bilateral investment treaty between Colombia and the United Kingdom); Corte Constitucional [C.C.] [Constitutional Court], enero 23, 1997, Sentencia C-008/97 (Colom.) (on the bilateral investment treaty between Colombia and Peru); Corte Constitucional [C.C.] [Constitutional Court], febrero 17, 1998, Sentencia C-494/98 (Colom.) (on the first bilateral investment treaty between Colombia and Spain); Corte Constitucional [C.C.] [Constitutional Court], abril 23, 2002, Sentencia C-294/02 (Colom.) (on the bilateral investment treaty between Colombia and Chile); Corte Constitucional [C.C.] [Constitutional Court], mayo 3, 2007, Sentencia C-309/07 (Colom.) (on the second bilateral investment treaty between Colombia and Spain); Corte Constitucional [C.C.] [Constitutional Court], marzo 11, 2009, Sentencia C-150/09 (Colom.) (on the bilateral investment treaty between Colombia and Switzerland); Corte Constitucional [C.C.] [Constitutional Court], mayo 19, 2010, Sentencia C-377/2010 (Colom.) (on the second bilateral investment treaty between Colombia and Peru); Corte Constitucional [C.C.] [Constitutional Court], marzo 14, 2012, Sentencia C-199/2012 (Colom.) (on the bilateral investment treaty between Colombia and China); Corte Constitucional [C.C.] [Constitutional Court], febrero 22, 2012, Sentencia C-123/2012 (Colom.) (on the bilateral investment treaty between Colombia and India); Corte Constitucional [C.C.] [Constitutional Court], marzo 7, 2012, Sentencia C-169/2012 (Colom.) (on the second bilateral investment treaty between Colombia and the United Kingdom); Corte Constitucional [C.C.] [Constitutional Court], mayo 13, 2015, Sentencia C-286/2015 (Colom.) (on the bilateral investment treaty between Colombia and Japan).

weak and a deferential one. However, should the Court entirely overlook the arguments against the constitutionality of the treaty, despite their intense impact on constitutional rights?

After a balancing exercise, the Court decided to take a third way. This third way neither implied exercising strong standards of review nor issuing strong remedies. It presupposed for the Court to overrule the precedent concerning the use of a weak and formalistic standard. Thus, the Court applied heightened rational basis scrutiny. By choosing this standard, the Court played a transformative role in the field that relates to the intersection between constitutional law and international investment law. In this way, the Court followed Karl Klare's inspiration, which associated the 1996 South African Constitution with the transformation of the "political and social institutions and power relationships in a democratic, participatory, and egalitarian direction."[64] This pioneering attitude led several Courts in the Global South to raise the intensity of standards of review for the sake of reducing "great disparities in wealth," mitigating "deplorable conditions," "great poverty," "a high level of unemployment, inadequate social security," and lack of a universal "access to clean water or to adequate health services."[65] In Latin America, transformative Courts have attempted to strengthen democracy, the rule of law, and human rights, and to address common problems "such as the exclusion of wide sectors of the population from having a say in government, as well as corruption, hyper-presidentialism,"[66] and the weakness of the institutions.[67]

The first area in which the Constitutional Court applied the heightened rational basis scrutiny in the review of the BIT from a transformative perspective was equality. Since its very beginnings, a fundamental feature of international investment law has been the concession of privileges to foreign investors.[68] This implies that states treat foreign investors better than their own nationals. This preferential treatment has a twofold nature: substantial and procedural. On the one hand, international investment treaties accord substantial rights, expectations, and regulatory benefits only to foreign

64. Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. HUM. RTS. 146, 150 (1998).

65. *Soobramoney v. Minister of Health, Kwazulu-Natal* 1997 SA 1 (CC) (S. Afr.). On the role of apex courts of achieving those aims, see OSCAR VILHENA VIEIRA ET. AL, TRANSFORMATIVE CONSTITUTIONALISM: COMPARING THE APEX COURTS OF BRAZIL, INDIA AND SOUTH AFRICA (2013); ROBERTO GARGARELLA ET. AL, COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR? (2006); COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD (Varun Gauri & Daniel M. Brinks eds., 2009).

66. *See* ARMIN VON BOGDANDY ET. AL, TRANSFORMATIVE CONSTITUTIONALISM IN LATIN AMERICA THE EMERGENCE OF A NEW IUS COMMUNE (2017).

67. *See* Armin von Bogdandy & Rene Uruena, *International Transformative Constitutionalism in Latin America*, 114 AM. J. INT'L L. 403, 438 (2020).

68. C.L. LIM ET. AL, INTERNATIONAL INVESTMENT LAW AND ARBITRATION: COMMENTARY, AWARDS AND OTHER MATERIALS 12–13 (1st ed. 2018).

investors. On the other hand, the ISDS allows foreign investors to skip local justice and directly request international arbitration tribunals to address their claims by means of expedite procedures.

In decisions in the seventies and eighties, the European Court of Human Rights held that those privilege were justified because foreigner investors were "more vulnerable" and "less bound to solidarity" within host states.[69] However, in recent years, several authors have argued that this feature contradicts the principle of equality and undermines the legitimacy of international investment law.[70] It disadvantages domestic investors and creates imbalance in private law relations, in free market competitive environments.

In the deliberation that led to Decision C-252/2019, participants argued that the privileges accorded to French investors violated the constitutional principles of equality and free competition.[71] Also, while reparations to domestic investors should not intensively alter fiscal sustainability, this rule does not bind international investment tribunals.[72] Furthermore, there is no empirical evidence that alleged benefits in attracting foreign investment can justify the infringements to the principle of equality.

Within this framework, the Constitutional Court acknowledged how recent developments in international investment law protected the right to equality of domestic investors granting them a treatment that is no less favourable than the one accorded to foreign investors. In this way, the U.S. *Trade Act* (2002),[73] and the Bipartisan Congressional Trade Priorities and Accountability Act 2015 (TPA-2015)[74] prohibit granting greater substantive rights to foreign investors than those recognized to local investors in the United States. Moreover, following the *Global Economic and Commercial Agreement between Canada and the European Union and its Member States*[75]

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69. James and Others v. United Kingdom, App. No. 8793/79, ¶ 63 (Feb. 21, 1996); Lithgow and Others v. United Kingdom, App. No. 9006/80, 9262/81, 9263/81/, 9265/81, 9266/81, 9313/81, 9405/81 (July 8, 1986).

70. *See* Ivar Alvik, *The Justification of Privilege in International Investment Law: Preferential Treatment of Foreign Investors as a Problem of Legitimacy*, 31 EUR. J. INT'L L. 289 (2020) [hereinafter Alvik, *Justification of Privilege*].

71. *See* Decision C-252/19, *supra* note 15, ¶ 90.

72. *Id.*

73. Trade Act of 2002, 19 U.S.C. §§ 3803–05. "[W]hile ensuring that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States, and to secure for investors important rights comparable to those that would be available under United States legal principles and practice[.]" *Id.* § 3802(b)(3).

74. Bipartisan Congressional Trade Priorities and Accountability Act of 2015, 19 U.S.C. §§ 4201–10. *Cf. Trade Promotion Authority (TPA): Frequently Asked Questions*, EVERY CRS REP. (June 21, 2019), https://www.everycrsreport.com/reports/R43491.html ("[N]o trade agreement is to lead to the granting of foreign investors in the United States greater substantive rights than are granted to U.S. investors in the United States.").

75. EU-Canada Comprehensive Economic and Trade Agreement, EU-Can., Oct. 30, 2016, https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/. This agreement has an investment chapter.

(CETA), of October 10, 2016, the Contracting Parties deemed it necessary to sign a Joint Interpretative Declaration in which they clarified that "CETA will not result in foreign investors being treated more favourably than domestic investors."[76] Moreover, within the framework of the constitutional review of CETA, the French Constitutional Council, in decision No. 2017-749 of July 31, 2017, held that:

> [T]he stipulations of Chapter 8 of the Agreement include, in favour of investors who are not residents of the host State of the investment, provisions relating to certain substantive rights. These, which are, in particular, related to national treatment, most favoured nation treatment, just and equitable treatment, and the protection against direct or indirect expropriations, have the sole purpose of guaranteeing these investors the rights that their national investments benefit from.[77]

Nevertheless, the Council noted that paragraph 6 of the Joint Interpretative Declaration "establishes that the Agreement 'shall not lead to granting a more favourable treatment to foreign investors than to national investors.'"[78] Therefore, the Council concluded that, in this way, CETA did not create difference in treatment. As a result, the treaty was in accordance with Article 6 of the Declaration of the Rights of Man and Citizen of 1789, which protects the right to equality.

Based on these considerations, the Colombian Constitutional Court noted that the treaty between Colombia and France does not explicitly guarantee equal treatment between foreign and domestic investors concerning substantial privileges. The Court required for that equality to be guaranteed. Nevertheless, The Court held that this guarantee could not be extended to the ISDS. Only the principle of reciprocity should guide the analysis of equality concerning the ISDS. Domestic and foreign investor in the host state do not equally share an interest to take their claims to an ISDS. Only foreign investors of the contracting parties share this very same interest. Hence, their right to equality is satisfied if an international investment treaty accords that possibility to both kinds of foreign investors concerning both host states.[79]

For these reasons, the Constitutional Court issued the following declaration of conditional constitutionality of the treaty. The treaty is

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76. General Secretariat of the Council 12865/1/16, Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States, at 4 (Oct. 10, 2016), https://www.consilium.europa.eu/en/documents-publications/public-register/public-register-search/results/?AllLanguagesSearch=False&OnlyPublicDocuments=False&DocumentLanguage=EN&ImmcIdentifier=ST%2012865%202016%20INIT.

77. *See* Conseil constitutionnel [CC] [Constitutional Court] decision No. 2017-749, July 31, 2017 (Fr.) (translated by the author).

78. *Id.*

79. *But see* Alvik, *Justification of Privilege*, *supra* note 70, at 297–302.

constitutional only under the understanding that "none of the provisions that refer to substantive rights will result in more favorable unjustified treatment towards foreign investors with respect to nationals."[80] This declaration aimed to prevent clauses of the treaty—such as the ones related to the scope and protection of legitimate expectations (Articles 4 and 6 of the treaty), the content, scope and limits of compensation (Article 15) or the conditions of payment (Articles 6 and 15)—from being interpreted as unjustified privileges of foreign French investors.

In order to ensure the effectiveness of the declaration of conditional constitutionality the Court instructed the President of the Republic—at the time, President Ivan Duque—that, if, in the exercise of his constitutional competence to manage international relations, he decides to ratify this treaty, within the framework of Article 31 of the Vienna Convention on the Law of Treaties, he shall take the necessary steps to promote the adoption of a joint interpretative declaration with the representative of the French Republic regarding the condition for constitutionality. Both governments signed the declaration, which included the guarantee of substantial equality to national investors.

V. DECISION C-252/2019 AND THE STANDARDS OF PROTECTION CHALLENGE

From a transformative approach, the Constitutional Court also employed heightened rational basis scrutiny to examine several substantive clauses of the BIT with the aim of addressing the challenge concerning the standards of protection. The Court noted that several open-textured provisions might be at odds with the constitutional principle of legal certainty and some constitutional rights. Moreover, if interpreted in pro-investor ways, those provisions could undermine the state regulatory authority and ground unfair rulings and awards.

The Constitutional Court employed the same strategy used with respect to the principle of equality. This strategy was threefold: (i) declaring that a BIT provision allows for at least one unconstitutional interpretation; (ii) upholding that provision under the condition that the unconstitutional interpretation is ruled out; and (iii) requesting the contracting parties to issue a Join Interpretive Declaration to address the matter and adjust the sense of the provision to constitutional standards.

The Court employed this strategy concerning the following provisions:

80. *See* Decision C-252/19, *supra* note 15 (translated by the author).

(a) Article 4, with entrenches clause on the minimum standard of treatment.[81] Concerning this clause, the Court held that:

(i) The expression "in accordance with the international law applicable to the investors of the other Contracting Party and its investments, in its territory"[82] breached the constitutional principle of legal certainty (Article 1 of the Colombian Constitution). The extreme open texture of the provision makes it impossible to the state and the investors to have clarity about the legal framework applicable to their legal relationships. For this reason, the Court upheld the provision "under the condition that the Contracting Parties define its content, so that is compatible with the principle of legal certainty." In a Join Interpretive Declaration, issued by France and Colombia on 5 August 2020, the parties clarified that the applicable public international law sources to interpret this clause are: international treaties (in particular, treaties ratified by the contracting parties), customary international law, judicial decisions, and arbitral awards. This enumeration of sources is not suitable to totally reduce the open texture of the provision. However, it draws a more precise set of legal sources, which is compatible, at the same time with the changing nature of international investment law, and with legal certainty.

(ii) The expression "inter alia" also breached the constitutional principle of legal certainty. Hence, the Court upheld it under the condition that "that it must be interpreted in a restrictive way, in an analogical sense, and not additive."[83] This interpretation

81. The text of this provision is the following: "Article 4. Minimum Standard of Treatment. 1. Each Contracting Party shall accord fair and equitable treatment in accordance with the international law applicable to investors of the other Contracting Party and to their investments, in its territory. For greater certainty, the obligation to provide fair and equitable treatment includes*, inter alia:* a) The obligation not to deny justice in civil, criminal, or administrative proceedings in accordance with the principle of due process. b) The obligation to act in a transparent, non-discriminatory, and non-arbitrary manner towards investors of the other Contracting Party and their Investments. This treatment is consistent with the principles of predictability and the consideration of legitimate expectations of investors. The determination that another provision of this Agreement, or of another international agreement, has been breached shall not imply that this standard has been violated. It is understood that the obligation to provide fair and equitable treatment does not include a legal stabilization clause or prevent a Contracting Party from adapting its legislation in accordance with the terms of this paragraph. 2. Investments made by investors of one Contracting Party shall enjoy full protection and security in the territory of the other Contracting Party in accordance with customary international law. For greater certainty, the obligation to provide full protection and security under this Article requires that each Contracting Party provide Investors and their investments with protection from physical and material damage." Agreement for the Reciprocal Promotion and Protection of Investments between Colombia and France, Colom.–Fr., July 10, 2014 [hereinafter Colombia–France BIT], https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3488/colombia---france-bit-2014 (translated by the author).

82. *See* Decision C-252/19, *supra* note 15.

83. *Id.*

reasonably limits the scope of obligations related to the minimum standard of treatment.

(iii) Finally, in relation to the protection of "legitimate expectations," the Court upheld this expression, under the condition that the parties define it. In the definition, the parties should consider that an expectation is legitimate only if it is the result of specific and reiterated acts executed by the Contracting Party that induce the investor, acting in good faith, to perform or maintain the investment. Also, there is an infringement of a legitimate expectation if authorities undertake abrupt and unexpected political or legal changes that affect the investment. The Join Interpretive Declaration defined the concept of legitimate expectations along these lines.

(b) Article 5, which entrenches the national treatment and most favoured nation clauses.[84]

(i) The Court upheld the expression "similar situation," which appears in number 4, under the condition that the contracting parties render its scope more precise, in a way that is compatible with the constitutional principle of legal certainty. The parties undertook this task in the Joint Interpretive Declaration. They constrained the scope of "similar situations" only to the administration, undertaking, operation, sell, and disposition of investment in the same economic field in the territory of one of the contracting parties.

(ii) The Court also upheld the expression "necessary and proportional," which appears under number 5, under an interpretation compatible with the BIT preamble. This interpretation ought to be compatible with the discretion, margin of appreciation, and the autonomy of national authorities for the

84. The text of this provision is the following: "Article 5. National treatment and most favored nation. 1. Each contracting party shall apply in its territory to investors of the other contracting party, in respect of their investments and activities related to their investments a treatment no less favorable than that accorded in situations similar to its investors or the treatment accorded to investors of the most favored nation whichever is more favorable. 2. This treatment shall not include privileges granted by a contracting party to investors of a third state by virtue of its association or participation in a free trade area, customs union, Common Market, or any other form of regional economic organization or similar agreement; any existing or future. 3. The obligation of a contracting party to extend to investors of the other contracting party treatment not less favorable than that accorded to its own investors, does not prevent a Contracting Party may adopt or maintain measures designed to ensure public order in case of serious threats to the fundamental interests of the state. These measures shall not be arbitrary and should be justified, necessary and proportionate to the objective pursued. 4. For greater clarity, the most-favored-nation treatment to be granted in similar situations and referred to in this agreement shall not apply to Article 1 or dispute settlement mechanisms, such as those contained in Articles 15 and 16 of this agreement, that are provided for in international investment treaties or agreements." Colombia–France BIT, *supra* note 81.

purposes of ensuring the public order and protecting legitimate public policy objectives.

(iii) Finally, the Court upheld the most favoured nation clause under the interpretation—which was later ratified by the parties in the Join Interpretive Declaration—that clauses of other treaties signed by the contracting parties do not constitute "treatment" that should be accorded to the investors of the other party. This interpretation is compatible with the integrity of the foreign affairs power of the executive (that Article 189.2 of the Colombian Constitution institutionalizes).

(c) Article 6, which is about the expropriation and compensation.[85] Concerning this article, the Court upheld the expressions "legitimate expectations" and "necessary and proportional" under the same conditions spelled out about the review of other provisions of the BIT.

The declaration of conditional constitutionality of those provisions, along with the weak remedy of requesting the Colombian Government to promote a Joint Interpretive Declaration was a suitable means to: (i) address the standards of protection challenge; (ii) preserve the foreign affairs power of the President; and (iii) reduce the space of discretion of future arbitral

85. The text of this provision is the following: "Article 6. Expropriation and compensation. 1. Neither Contracting Party shall take against investments made by investors of the other contracting party in its territory, except for public purpose or in the social interest, which shall have a meaning compatible with that of public interest, in particular in the case of establishment of monopolies, and provided that such measures are not discriminatory; any measure of: a) Expropriation; b) Nationalization; c) Or any other measure which effects are equivalent to expropriation or nationalization (hereinafter referred to as "indirect expropriation"). 2. Indirect expropriation results from a measure or a series of measures adopted by a Contracting Party that has an effect equivalent to expropriation without direct formal transfer of title or ownership. In determining whether a measure or series of measures of a contracting party constitutes an indirect expropriation, analysis shall be done on a case-by-case basis, considering among other factors: a) The degree of interference with the right of ownership of the measure or series of measures; b) The economic impact of the measure or series of measures; c) The impact of the measure or series of measures on the legitimate expectations of the investor. The measures taken by a Contracting Party that are designed to protect legitimate public policy objectives, such as public health, safety, and the protection of the environment, do not constitute indirect expropriation, when necessary and proportionate in the light of these objectives and shall be applied in such a manner that they effectively respond to the public policy objectives for which they were designed. 3. All measures of paragraphs 1 and 2 of this article, hereinafter referred to as "expropriation," shall give rise to the payment of prompt, effective and adequate compensation, which shall be equal to the real value of the investment in question and shall be determined in accordance with the normal economic situation existing prior to any threat of expropriation. In case of delay in the payment of compensation, this shall include interest until the date of payment of the compensation, at the current rate of interest. Such compensation, the amounts and terms of payment shall be fixed by the date of expropriation. This compensation shall be freely transferable. 4. The contracting Parties confirm that the Compulsory Issue of Licenses in accordance with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of the World Trade Organization (WTO) may not be challenged under the provisions of this article.". Colombia–France BIT, *supra* note 81.

tribunals, preventing unfair and disproportionate awards. As a result, this strategy conferred legal and normative legitimacy to the BIT.

VI. DECISION C-252/2019 AND THE ISDS CHALLENGE

One of the shortcomings of Decision C-252/2019 was that it did not address the ISDS challenge. As already mentioned, scholars have challenged the normative legitimacy of ISDS for several reasons. In relation to international investment awards, those reasons include unpredictability of arbitral decisions, lack of neutrality of arbitration tribunals, lack of transparency of arbitration procedures, absence of an appellate body, inefficiency of the annulment mechanism, and disproportionality of awards.

Naturally, fully responding to those challenges goes beyond the powers of the Constitutional Court and the scope of the constitutional review of the BIT. However, as I noted in my concurrent opinion concerning the constitutionality of Article 15 of the BIT, the Court ought to have addressed: (i) the application of the UNCITRAL Rules on Transparency in Arbitrations between Investors and States, and (ii) the limits to compensation awards.[86]

Regarding the first issue, according to Article 228 of the Colombian Constitution, all judicial decisions should comply with the principles of the rule of law. Publicity is a principle of the rule of law. Now, Article 15, number 12 of the BIT provides that, if one of the parties opposes to the application of the UNITRAL Rules on Transparency in Arbitrations between Investors and States—which make arbitral proceedings compliant to the principle of publicity—those rules would not be applicable. This exception undermines transparency in ISDS procedures. That transparency is especially important concerning international investment because they relate to public interest issues. In this regard, the issuance, in 2022, of the ICSID rules is a clear advancement of the rule of law, in the sense, that they guarantee greater transparency in ICSID arbitration procedures.[87]

In relation to the second issue, the Court should have reviewed the rules about compensation awards -provided by Article 15(15) of the BIT, in light of the constitutional principles of legal certainty (Article 1 of the Colombian Constitution), equality (Article 13 of the Colombian Constitution) and financial sustainability (Article 334 of the Colombian Constitution). The core problem is that Article 15 of the BIT does not set a maximum limit to compensation awards. This might be at odds with legal certainty. Furthermore, the case law of the State Council about public liability sets precise award limits to domestic investors. Hence, similar damages could

86. My concurrent opinion can be found at the end of the judgment in Decision C-252/19, *supra* note 15.

87. *See* Gary J. Shaw, *The 2022 ICSID Rules: A Leap Towards Greater Transparency in ICSID Arbitration*, 38 ICSID REV. - FOREIGN INV. L.J. 54 (2023).

lead to different award amounts, depending on the nature of the claimant: domestic or foreign. Finally, international investment tribunals previously awarded very significant awards to foreign investors. Complying with those awards could endanger the financial sustainability of the State (which Article 334 of the Colombian Constitution guarantees).

VII. CONCLUSIONS

By means of a critical analysis of Decision C-252/2019, the article showed how, when reviewing the constitutionality of international investment treaties, constitutional courts can contribute to the solution of some legitimacy problems of international investment law. Constitutional courts can raise awareness and catalyze deliberation on the impact of international investment law in the state's compliance with human and constitutional rights and standards. Furthermore, constitutional courts can create leverage that governments of host states can use in bargaining international investment treaties. Those governments can use that leverage for negotiating more balanced and less open-textured provisions, safeguarding regulatory powers, and subjecting ISDS proceedings to the rule of law principles—such as transparency, publicity, coherence, and predictability. This can narrow down the space of discretion of international investment arbitral tribunals. All these undertakings can strengthen the legitimacy of international investment law as a legal means for protecting foreign investors from arbitrariness, while, at the same time, enabling host states to promote the common good and optimize compliance with human and constitutional rights obligations.

The Colombian case study also shows how apex courts can bolster governments and collaborate with them in the exercise of their foreign affair powers. A successful strategy is the combination of a heightened rationality review with a weak remedy. In Decision C-252/2019 the weak remedy was requesting the Colombian Government to promote the signature of a Joint Interpretive Declaration. At the end the Government of France agreed with this request. This also raises the legitimacy threshold of the BIT.