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COORDINADORES

Foreign Investment between international and domestic law:

Translation of Judgment C-252/2019 of the Colombian Constitutional Court on the BIT between France and Colombia

Universidad del Rosario

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INTRODUCTION

International investment law is based on a global network of approximately 3.300 International Investment Agreements (IIAs), including BITs and FTAs.[1] These treaties have a common core structure which usually includes the following clauses: a definition of investor and investment, treatment standards (*National Treatment*, *Most Favoured Nation*, *Fair and Equitable Treatment*), protection against direct and indirect expropriation, and a dispute resolution clause that refers to arbitration.[2] These clauses offer the usual protection to the economic rights of foreign investors.

IIAs' clauses are characterised by their technicity as well as their broadness, which oftentimes make the interpretation process complex and its result unforeseeable. States might foresee a regulatory action as legal, but investors could see something different, thus triggering an arbitration claim that could result in an unexpectedly huge compensation in their favour. Also, some scholars see an encryption

1 UNCTAD, 'WORLD Investment Report 2019' (2019) 99.

2 Enrique Prieto-Ríos. 'Thinking on International Investment Law: From Colonialism to International Systemic Violence' (DPhil Thesis, Birkbeck College University of London, 2017) 29; Rudolf Dolzer and Feliz Bloch, 'Indirect Expropriation: Conceptual Realignments?', (2003) *International Law FORUM du droit international* (5) 155; Chang-fa Lo, 'Plain Packaging and Indirect Expropriation of Trademark Rights Under Bits: Does FCTC Help to Establish a Right to Regulate Tobacco Products?' (2012) Medicine and Law (31) 521.

that embodies the IIAS[3] which grants wide protection and a prompt and effective response to the investors' interests that could cause that the Host-State refrains from the exercise of its regulatory sovereign privilege for fear of being sued by foreign investors (a *regulatory chill* scenario).[4]

Considering this scenario, it has been alleged that the Investor-State Dispute Settlement (ISDS) system requires some changes because it is perceived that it favours an unbalanced relationship between the rights of investors and the rights of States.[5] One of the concerns that has been pointed out and discussed is the way to achieve consistency in interpreting investment agreements with a certain level of legitimacy.[6] In other words, the issue is how to interpret IIAs without affecting the Host-State's right to regulate and grant an optimum level of protection to investors.

Some of these changes have begun to be shaped by national courts when considering the constitutionality of investment treaties prior to their ratification. This authority has been considered as a tool for providing clarity to the rights of investors *vis a vis* the police powers and the right of Host-States to regulate. It is in this context that Judgment C-252/19 of the Colombian Constitutional Court, which analysed the constitutionality of the BIT signed between Colombia and France on 2014, should be studied.

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3 Enrique Prieto-Rios, "Encrypted International Investment Law in the Age of Neo-Colonialism" in Ricardo Sanin-Restrepo, Decrypting Power (Rowman and Littlefield 2018)

4 Gus Van Harten and Dayna Nadine Scott, 'Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada' available: https://www.iisd.org/itn/es/2017/09/26/investment-treaties-internal-vetting-regulatory-proposals-case-study-from-canada-gus-van-harten-dayna-nadine-scott/ accessed June 15, 2020.

5 Jose M. Alvarez, Legitimacy Concerns of the Proposed Multilateral Investment Court: Is Democracy Possible? 59 B.C.L. Rev. 2765 (2018),

6 Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October–2 November 2018), https://undocs.org/en/A/CN.9/964, parr. 27-40.

In Colombia, according to the Constitution, the Constitutional Court must decide on the constitutionality of international treaties as a requirement before undertaking international obligations by means of an international agreement.[7] This control mechanism has the following characteristics: (i) it takes place prior to the ratification of the treaty, and posterior to the Government's approval; (ii) it is automatic; (iii) it has the force of *res judicata*; and (iv) it is a *sine qua non* condition for the ratification of the agreement[8]. Without the decision on the constitutionality of the treaty, the President may not advance actions aimed at the ratification of the instrument by any of the several procedures provided for this purpose in the Vienna Convention on the Law of Treaties or in the treaties themselves.

This kind of judicial behaviour is gaining traction in Latin America, considering that IIAs are now perceived with caution by national courts, as they might contravene certain constitutional principles relevant for the Host-State. Hence, to diminish a negative impact and enforce the treaty, courts may analyse if those international agreements can be framed under constitutional domestic values.[9] Therefore, high national courts are able to define how and to what extent investment treaties should be executed. Thus, protecting domestic interests and deploying the State's sovereignty.[10]

In this regard, the Court formally pursues the synchronisation between the domestic legal order and the treaty,

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7 See Article 241-10, Colombian Political Constitution, 1.

8 Colombian Constitutional Court, Judgment C-150/2009, Switzerland BIT (in force)

9 Schill, Stephan W "W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law", *European Journal of International Law*, Volume 22, Issue 3 (August 2011) 875–908: https://doi.org/10.1093/ejil/chr062, p. 897.

10 Kulick, Andreas. *Global Public Interest in International Investment Law*, Cambridge University Press, (2012) p. 93.

under the framework of the Political Constitution.[11] Furthermore, its decision would set guidelines that provide consistency on the position of the Host-State regarding the international investment regime. These guidelines can influence the policymakers responsible for negotiating treaties.[12] This gives local legitimacy to the treaty.

Before Judgment C-252/2019, IIAs were controlled in a formal way and in a rhetorical manner. They provided general statements such as that investment treaties satisfied a need for integration of the national economy, which responded to the mandates of the Constitution.[13] The Court was guided by a criterion of self-restriction in such matters. These precedents may be explained by the context in which international relations has been driven by the head of State, in Colombia, who has been acting without the imposition of any serious limits by the constitutionalism.[14]

Judgment C-252/2019 provides a deep analysis of an IIA, for the first time since the new Colombian Constitution entered into force in 1991. In this judgment, the Court took a step forward and considered the material effects of the

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11 Titi, Catharine, "Control constitucional y derecho internacional de inversiones a través de cuatro sentencias constitucionales en Colombia, Ecuador, y la Unión Europea" (April 10, 2020). In Gabriel Bottini y Alejandro Chehtman (eds), *Revista Latinoamericana de Derecho Internacional*, Número especial, Forthcoming, p. 2 Available at SSRN: https://ssrn.com/abstract=3569510

12 Bottini, Gabriel. *The dual role of States as respondents and treaty Parties Subsequent practice in the application of the treaty* in Webinar on "Treaty Parties' involvement and control mechanisms on treaty interpretation" from minute 19: https://www.youtube.com/watch?v=CZ0fldCm_XE

13 Preamble and articles 2, 9, 226, 227, 333, 334 of the Constitution. See Decision of constitutionality C-169/2012, United Kingdom BIT (in force); C-309/2007, Spain BIT (in force); C-150/2009, Switzerland BIT (in force); C-178/1995, Mexico BIT (in force); C-751/08, United States of America FTA (in force).

14 For more information, see: Correa Henao, Magdalena. 'El control de constitucionalidad de los Acuerdos de Inversión en Colombia. Análisis desde la cláusula de expropiación indirecta'. In: Armin von Bogdandy, et al. 'El constitucionalismo transformador en América Latina y el derecho económico internacional. De la tensión al diálogo'', UNAM-IIJ-MPIL, México D.F., 2018. Available in: http://ru.juridicas.unam.mx/xmlui/handle/123456789/13820

Agreement's articles. The adjudicatory body deeply analysed whether the Colombia-France BIT complies with the principle of constitutional equality, legal certainty and the regulatory power of the State. For such purpose, this was the first time the Court took into consideration the decisions of Arbitral Investment Tribunals and doctrine on international investment law. Likewise, for the first time, the Court arranged a public hearing to listen to the arguments in favour and against the constitutional coherence of the treaty as a whole and on each of its articles. On this last matter, readers will find the interventions of third interested parties which evidence the growing concern of the effects of these treaties in Colombia, specifically, and in Latin America, generally.

The Court focused on the fact that the Colombia-France BIT implies a tension between the exercise of the State's regulatory powers and the rights granted to the French investors, and as a result the responsibility of the State could be engaged.[15] Furthermore, the Court examined whether this Agreement is providing special treatment to French investors in comparison to national ones, thus disregarding the constitutional principle of equality.[16]

The Court set the guidelines under which the Treaty could be performed and the reach it may have without trespassing the Colombian Constitution.[17] For instance, the adjudicatory body pointed out how the *cascade effect* of the MFN clause could interfere in the executive power's functions to enter into other agreements of this nature, which is a clear violation of the Political Charter.[18] Another good example is the meaning of *legitimate expectations*, as the Court clarified that the concept has a place under the

15 Colombian Constitutional Court, Judgment C-252/2019, parr. 63
16 Colombian Constitutional Court, Judgment C-252/2019, parrs. 113
17 Colombian Constitutional Court, Judgment C-252/2019, parrs. 54-57
18 Colombian Constitutional Court, Judgment C-252/2019, parr. 252

Colombian legal order, provided that it is understood under the constitutional principle of good faith.[19]

It is important to keep in mind that this judgment highlighted the relevance of the principle of equality, emphasising that some interpretations of the Treaty's dispositions may imply an unjustified discriminatory treatment in favour of French investors and to the detriment of national ones.[20] Consequently, the Court addressed a common concern regarding the way this kind of treaties only provides protection to foreign investors, affecting the domestic economy.

As a result, the Court decided the *conditional constitutionality* of the Treaty, to make it compatible with the principles already mentioned. Additionally, it warned that if the Executive decides to ratify the BIT, the President must promote the adoption of a joint interpretative declaration which includes the conditions established by the judgment.[21]

Certainly, this is a historical decision considering the progress it made. Firstly, the judicial organ is adapting this IIA to the Colombian legal context through a detailed analysis of each clause.[22] Thereby, this Judgment may pave the way for governments and domestic tribunals to consider the material effects of the treaties on the regulatory activity of Host States, and the situations of regulatory chill that they could entail.

This Judgment has established a strong precedent. In Judgment C-254/2019, the Constitutional Court decided the conditional constitutionality of the Free Trade Agreement signed between Israel and Colombia (FTA Colombia-Israel) concerning its investment chapter. The entirety of the conditions set forth in this judgment are almost identical to some

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19 Colombian Constitutional Court, Judgment C-252/2019, parr. 279
20 Colombian Constitutional Court, Judgment C-252/2019, parr. 436-437
21 Colombian Constitutional Court, Judgment C-252/2019, parr. 459-460
22 Colombian Constitutional Court, Judgment C-252/2019, parr. 438-458

of those included in the judgment of constitutionality of the Colombia-France BIT.[23]

Secondly, it is foreseeing how a wide and undetermined understanding of a treaty could affect national interests.[24] The position adopted by the Constitutional Court has not only determined how the Agreement will be enforced under the Colombian rule of law, but also how it will influence the way in which this particular Agreement should be interpreted in the event of a dispute. Furthermore, this Judgment will have an impact on how the Colombian government will negotiate future investment agreements, as indeed negotiators cannot ignore the meticulous threshold that has been imposed.

The adoption of the joint interpretative declaration has been considered the biggest challenge set to the Government by judgments C-252/19 and C-254/19. On the one hand, the Colombian and French governments signed a joint interpretative declaration on August 5th, 2020, on which the Parties followed closely judgment C-252/19. In some parts of the declaration, they interpreted the BIT almost in an identical manner to what had been conditioned by the Court. For instance, the Court had declared the expression "legitimate expectations" constitutional under the condition that the Parties defined that the legitimate expectations "will only take place when they are derived from specific and reiterated acts executed by the Contracting Party that induce the investor, acting in good faith, to perform or maintain the investment and that it concerns abrupt and unexpected changes carried out by public authorities and that affect its investment". As such, the joint interpretative declaration establishes that "they refer to whether the Contracting Party had specifically addressed an investor to induce him

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23 Colombian Constitutional Court, Judgment C-254/2019, Israel FTA (in force).
24 Colombian Constitutional Court, Judgment C-252/2019, parr. 122, 459

to make an investment. Thus, creating legitimate expectations that motivate the decision of the former to make or maintain the investment and that, however, end up being frustrated by said Contracting Party".

On the other hand, under the FTA Colombia-Israel, the former presented the proposal for a joint declaration on April 27th, 2020, which was accepted by the latter on July 13th, 2020; the FTA entered into force on 10th August 2020. In this case, the Parties also addressed the conditions set forth by the Court, although they did seem to depart in some respects from what had been established in the judgment. For instance, the interpretation of the expression "reasonable expectations", on which the Parties stated that the recognition of a reasonable expectation "will depend, where relevant, on factors such as whether the government provided binding written guarantees to the investor and the nature and extent of government regulation or potential government regulation in the respective sector". In addition, the expressions "binding and written guarantees", which were neither in the original investment chapter nor in the Court's judgment, and "such as", which allows for an open-ended interpretation, could raise concerns as to whether this interpretation fulfills the conditionings of Judgment C-254/19.

In conclusion, Judgment C-252/19 sets a course in international investment law, by giving voice to the Host-States' concerns and by framing the relationship with investors accordingly.[25] The Colombian Constitutional Court has shown that the judiciary can help to shape international law before ratifying a treaty according to the States' interests provided in the Constitution. This would need to be

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25 Johnson, Lise *The Role of States in Treaty Interpretation* in Webinar on "Treaty Parties' involvement and control mechanisms on treaty interpretation" from minute 43 https://www.youtube.com/watch?v=CZ0fldCm_XE

performed within the limits of its constitutional powers and given well-considered reasons beyond the shallow previous decisions that were full of formalities. Also, it is quite possible that the Decision could have an impact in the Latin American region, thus helping to shape a different Latin-American approach to international investment law.

This joint effort of the Rosario and Externado de Colombia Universities to translate into and publish Judgment C-252/19 in English aims to contribute to the ongoing discussions related to the constitutionality control upon IIAs by domestic courts. It will help to widen the debate on how the role of national powers can help in the development of international investment law. This adds to other voices, in discussing judicial decisions within a bigger picture established by arbitral decisions, academics and practitioners to find new frontiers in this area of law. It is intended to eventually provide more satisfactory solutions to the parties involved.

Finally, we would like to highlight the written and oral interventions before the Constitutional Court in this case and the translation done by the areas of Public International Law, Economic International Law and Constitutional Law of the Rosario and Externado de Colombia Universities. This work had participation and contributions from Enrique Prieto Rios, Juan Pablo Ponton Serra, Laura Cárdenas, Robert Blaise Maclean, Diana Maria Beltrán Vargas, Jose Manuel Alvarez-Zarate, Magdalena Correa Henao, Wilfredo Robayo Galvis, Federico Suarez Ricaurte, Natalia Castro Niño, Daniela Amaya Castro and Maria Camila Camargo Moncayo.

The different perspectives integrated within the interventions provided the Court with a basis for its decision and contributed to the shaping of the constitutionality control over investment treaties in Colombia. We hope it will provide guidance to other courts.

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Bogotá, Colombia, September 2020

JUDGMENT C-252/19

Reference: File LAT-445

Constitutionality control of the Agreement on the Reciprocal Promotion and Protection of Investments between the Government of the Republic of Colombia and the Goverment of the French Republic, suscribed in the city of Bogotá, on July 10, 2014, and constitutionality control of the Law 1840 of July 12, 2017, by means of which this international treaty was approved.

Reporting judge:
CARLOS BERNAL PULIDO

Bogota, June 6th, 2019.

The Full Chamber of the Constitutional Court, in exercise of its constitutional powers, especially, that provided by Article 241.10 of the Political Constitution, ruled the following:

JUDGMENT

In the procedure of constitutionality control of the Agreement on the Reciprocal Promotion and Protection of Investments between the Government of the Republic of Colombia and the Goverment of the French Republic, suscribed in the city of Bogotá, on July 10, 2014, and constitu-

tionality control of the Law 1840 of July 12, 2017, by means of which this international treaty was approved.

I. Background

1. On 17 July 2017, the Legal Secretary of the Presidency of the Republic forwarded to the General Secretariat of this Court official letter number OFI17-00087273 / JMSC110200, being a true copy of Law 1840 of 12 July 2017 and its explanatory statement.[1]

2. By order of 3 August 2017, the Presiding Magistrate (i) took cognizance of the matter of the reference; (ii) decreed the necessary evidence; (iii) transferred a copy of the docket to the Procuraduría General de la Nación*; (iv) set forth the referral process; (v) ordered that the start of this process be communicated to the President of the Republic, the President of Congress, and the Ministers of Foreign Affairs; of Trade, Industry and Tourism and of Finance and Public Credit; (vi) ordered it to be communicated to the deans of various law schools and presidents or directors of different associations and organizations; and, finally, (vii) suspended the terms in the present matter, as ordered in Order 305 of 2017, issued by the Full Chamber of this Court.[2]

3. Through the procedural orders of October 9[3] and December 4[4], 2017, the Presiding Magistrate reiterated his

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1 Cdno. 1, fls 1 and ss

* Translator's note: The Procuraduria General de la Nación is a public institution in charge of overseeing the compliance with the Constitution, the legislation, judicial decisions, and administrative acts (Article 277, paragraph 1 of the Constitution), among others. One of the functions of the Procuraduria is to intervene in judicial and administrative proceedings in defense of the public order, the State's Public property, and of the fundamental rights and guarantees (article 277, paragraph 7 of the Constitution).

2 Cdno. 1, fls. 23 to 25.

3 Cdno. 1, fls. 80.

4 Cdno. 1, fl. 114

request for evidence and ordered that the orders provided for by the order of August 3 of the same year be carried out.

4. By procedural order of 30 October 2018, the Presiding Magistrate ordered the Directorate of Foreign Investment and Services of the Ministry of Trade, Industry and Tourism and the Directorate of International Legal Affairs of the Ministry of Foreign Affairs to forward to him a copy of the preparatory work contained in the files corresponding to the *Agreement between the Government of the Republic of Colombia and the Government of the French Republic on the reciprocal promotion and protection of investments, signed in Bogotá, on 10 July 2014*, the Protocol signed by the Contracting Parties on Article 1 and the interpretative declaration on Article 16.[5]

5. By procedural order 707 of 31 October 2018, the Plenary Chamber of the Constitutional Court ordered, inter alia, (i) that the terms of the present case be lifted and (ii) that a public hearing be convened for 13 December 2018.[6]

6. Upon compliance with the constitutional and legal formalities for this type of process being completed, and after receiving the opinion of the Procuraduría, the Court will proceed to exercise its jurisdiction to control the constitutionality of the international treaty and the law approving it.

II. Norm subject to constitutional control

7. The Agreement on the Reciprocal Promotion and Protection of Investments between the Government of the Republic of Colombia and the Government of the French Republic, suscribed in the city of Bogotá, on 10 July 2014, was approved by Law 1840 of 12 July 2017 (published in the Official Gazette, number 10.191, of the same day)[7]. The

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5 Cdno. 1, fls. 189 and 190.
6 Cdno. 2, fls. 252 to 262.
7 Its full text is available on the website: http://www.imprenta.gov.co.

content of the Agreement will be presented, article by article, in the constitutional material review section.

III. List of acronyms, abbreviations and equivalences

8. The Court will use the following list of acronyms, abbreviations and equivalences to facilitate the reading of this document:

United States-Mexico-Canada Agreement	USMCA
Trans-Pacific Partnership	TPP
EU-Canada Comprehensive Economic and Trade Agreement	CETA
International Investment Agreements	IIA
Agreement for the Promotion and Protection of Investments	BIT
Agreement on Trade-Related Aspects of Intellectual Property Rights	TRIPS
National Agency for Legal Defense of the State	NALDS
National Business Association of Colombia	NBAC
International Centre for Settlement of Investment Disputes	ICSID
United Nations Commission on International Trade Law	UNCITRAL
United Nations Conference on Trade and Development	UNCTAD
Minimum Standard of Treatment	MST
Indirect expropriation	IE
Foreign Direct Investment	FDI
Ministry of Foreign Affairs	Chancellery
Ministry of Trade, Industry and Tourism	MinCIT
Most Favoured Nation	MFN
World Trade Organization	WTO
Full Protection and Security	FPS
Free Trade Agreement	FTA
Fair and Equitable Treatment	FET
National Treatment	NT

Universidad Externado de Colombia	UExternado
Universidad del Rosario	URosario
Universidad Autónoma de Bucaramanga	UNAB

IV. Interventions

9. The Court received 8 written submissions in the present case. Four submissions supported a finding of the constitutionality of the Law and of the treaty; two submissions supported a finding of partial constitutionality of some normative contents; one submission did not formulate support for any specific finding, although it warned incompatibilities between some articles of the Agreement and the Political Constitution of Colombia, and, finally, another supported a finding of constitutionality of Article 16. The interveners and their requests are summarized in the following table:

Citizen interventions		
Intervener	**Purpose and scope of the intervention**	**Request**
MinCIT[8]	- Importance and convenience of this Agreement - Procedure for subscription and approval of the Agreement - Analysis of the Constitutionality of all articles	Constitutionality
URosario[9]	- Purpose of the Agreement - Differences between this Agreement and other BITS - Analysis of articles 1 (e), 1.3 par. 2, 8 (a), 8 (e), 2 par. 5, 5, 6, 15.2 and 16.	Does not make any request for findings, although it notes the incompatibility of such provisions with the Political Constitution of Colombia.

8 Cdno. 1, fls. 48 to 66.
9 Cdno. 1, fls. 71 to 75.

Chancellery[10]	- Importance and convenience of this Agreement - Procedure for suscription and approval of the Agreement - Analysis of the Constitutionality of all articles	Constitutionality
José Manuel Álvarez Zárate[11]	- Deficiencies in the negotiation process and in the incorporation of the Agreement into domestic legislation - Analysis of the Constitutionality Articles 4 (no. 1) and 16, as well as of the interpretative declaration of 23 October 2017	Unconstitutionality of articles 4 (no. 1) and 16
UExternado[12]	- Procedure for suscription and approval of the Agreement - Nature of the BITS' constitutionality control - Deficiencies in the negotiation process and incorporation of the Agreement into domestic law. - Constitutionality Analysis of Articles 1 and 16.	Partial constitutionality of article 1 Conditional constitutionality of article 1 Unconstitutionality of article 16
ANDI[13]	- Procedure for suscription and approval of the Agreement - Compatibility of the Agreement with article 227 of the Political Constitution	Constitutionality
UNAB[14]	- Procedure for suscription and approval of the Agreement - Analysis of the Constitutionality of all articles	Constitutionality

10 Cdno. 1, fls. 145 to 159.
11 Cdno. 1, fls. 160 to 187.
12 Cdno. 2, fls. 319 to 346.
13 Cdno. 2, fls. 347 to 353.
14 Cdno. 2, fls. 490 to 535.

Sebastián Mantilla Blanco[15]	- Analysis of the Constitutionality analysis Article 16 of the Agreement	Constitutionality of art. 16.

10. The arguments and requests for each intervention will be developed in the sections relating to the formal and material control of constitutionality of the Agreement and its approval Law, as the case may be.

V. Public Hearing

11. The public hearing on the constitutionality control of the Agreement and of the Law *sub examine*[*] was held on 13 December 2018. The following table summarizes the thematic focuses, the participants and their specific submissions in this hearing[16]:

Public hearing	
Participant	**Request**
First Thematic Focus: ***rationale, object and scope of the treaty***	
Alejandra Valencia[17] Director of International Legal Affairs, Ministry of Foreign Affairs	Constitutionality
Gautier Mignot[18] Ambassador of France to Colombia (hereinafter referred to as Ambassador)	Constitutionality

15 Cdno. 2, fls. 569 to 574.

* Translator's note: under review.

16 Except for mister Gautier Mignot, Ambassador of France in Colombia, and Alexander Toulemonde, President of the French-Colombian Chamber of Commerce, all the interveners in the audience submitted written interventions about the questions formulated in the Auto 707 of 2018.

17 Cdno. 2, fls. 354 to 357.

18 Did not submit a written intervention.

Alexander Toulemonde[19] President of the French Colombian Chamber of Commerce	Constitutionality
Adriana Vargas[20] 2nd Head of the Colombian delegation in the negotiation of the Agreement	Constitutionality
Magdalena Correa[21] Head of the Constitutional Law Department of the Externado de Colombia University.	Unconstitutionality of the Agreement and its approval under the Law
Second Thematic Axis: *minimum standard of treatment, national treatment and most-favoured-nation*	
José Antonio Rivas[22] Lead Head of the Colombian delegation in the negotiation of the Agreement sub examine	Constitutionality, specifically, of Articles 4, 5 and 16
Rafael Rincón[23] Professor of International Arbitration at the Pontificia Universidad Javeriana	Constitutionality
José Manuel Álvarez[24] Professor of International Law at the Universidad Externado de Colombia	Does not make any request, but reiterates the arguments presented in his intervention on the incompatibility of Articles 4 (1) and 16 with the Constitution.

19 Did not submit a written intervention.
20 Cdno. 2, fls. 604 to 610.
21 Cdno. 2, fls. 449 to 464.
22 Cdno. 2, fls. 593 to 602.
23 Cdno. 2, fls. 576 to 587.
24 Cdno. 2, fls. 429 to 439.

Third thematic axis: *Indirect expropriation*	
Nicolás Palau[25] Director of Foreign Investment, Services and Intellectual Property, MinCIT	Constitutionality
Diana Correa[26] Professor of International Law at the Externado de Colombia University	Constitutionality, specifically, of Article 6
Enrique Prieto[27] Professor of International Law at the Rosario University	Unconstitutionality of Article 6
Fourth Thematic Axis: Investor-Contrating Party Dispute Settlement Mechanism	
Ana María Ordóñez[28] Director of International Legal Defence, ANDJE.	Constitutionality, specifically, of Article 15
Eduardo Silva-Romero[29] International arbitrator	Constitutionality, specifically, of Article 15
René Urueña[30] Director of the International Law Area of the Universidad de los Andes	Conditional constitutionality of Article 15

12. The arguments and requests of each participant will be presented in the sections relating to the material control of constitutionality of the Agreement and its approval Law *sub examine*, as the case may be.

VI. The Procuraduría General de la Nación's Submission

13. On December 12, 2018, the Procurador General de la Nación, hereinafter, the Procurador) requested that the

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25 Cdno. 2, fls. 378 to 426.
26 Cdno. 2, fls. 589 to 592.
27 Cdno. 2, fls. 441 to 445.
28 Cdno. 2, fls. 465 to 489.
29 Cdno. 2, fls. 359 to 377.
30 Cdno. 2, fls. 612 to 633.

international treaty and the enabling Law 1840/2017 *sub examine*[31] be declared constitutional, as they satisfy the formal requirements for their approval and they are compatible with the Political Constitution. He requested in addition that Articles 4 (2) and 16 of the Agreement be declared conditionally enforceable. Therefore, he requested the Court order that the President of the Republic "*when manifesting the consent of the Colombian State to be bound by this Agreement through its ratification in the manner established in Article 18 of the Agreement, shall formulate interpretative declarations to it in the terms conditioned in the corresponding sentence*". His arguments and concrete requests will be set forth in the sections corresponding to the control of formal and material constitutionality.

VII. Jurisdiction

14. The Court is competent to exercice the constitutionality control over international treaties and their approving laws, in accordance with article 241.10 of the Political Constitution. This control implies the analysis of the constitutionality of both formal and material aspects of such normative instruments[32]. Therefore, the Court has jurisdiction to review the formal and material constitutionality of the treaty and the law *sub examine*.

VIII. Legal issues

15. Considering the nature of this matter, the Court will respond, in order, to the following legal issues:

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31 Cdno. 2, flos 537 to 561

32 Judgments C-468 of 1997, C-400 of 1998, C-924 of 2000, C-576 of 2006 and C-184 of 2016, among others.

15.1. Does the international treaty *sub examine* and its approval law meet the formal requirements of the Political Constitution and Law 5 of 1992?

15.2. Are the international treaty and its approving law *sub examine* compatible with the Political Constitution? The Court will formulate specific legal issues in relation to the contents of each clause of the treaty.

IX. Control of constitutionality over formal requirements

16. The Court will conduct the control of constitutionality over the formal aspects of the international treaty and the approving law *sub examine* in three phases, namely (i) initial governmental stage, (ii) the procedure before Congress of the Republic and (iii) the Presidential approval and the corresponding submission of such instruments to the Constitutional Court.

1. Initial governmental stage

17. The control of constitutionality over the formal aspects at this stage of the procedure implies that the Court must verify (i) the validity of the representation of the Colombian State in the negotiation, completion and signing of the international treaty[33]; (ii) whether the approval of this instrument should be submitted for prior consultation and, if so, whether this was carried out,[34] and (iii) whether this

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33 This Court has reiterated that the control of constitutionality of international treaties and their approving laws includes the examination of the powers of the representative of the Colombian State in the negotiation, conclusion and signature of the international treaty. Cfr. Judgments C-582 of 2002, C-933 of 2006, C-534 of 2008, C-537 of 2008, C-039 of 2009, C-378 of 2009, C-047 of 2017, C-214 of 2017 and C-048 of 2018

34 This Court has reiterated that the control of constitutionality of the international treaties and their approving laws includes verifying if these normative instruments have had to be submitted to previous consultation. Cfr. Judgments

instrument was approved by the President of the Republic and submitted to Congress for debate.[35]

18. *The representation of the Colombian State in the negotiation, conclusion and signing phases of the international treaty is valid*. Article 7 of the 1969 Vienna Convention on the Law of Treaties[36] provides that "*A person is considered as representing a State*" if he or she "*produces appropriate full powers*" (art. 7.1.a).[37] The international treaty *sub examine*, the protocol and its interpretative declaration were signed by the Ministers of Trade, Industry and Tourism, Santiago Rojas Arroyo and María Lorena Gutiérrez Botero, in their capacities, and who had full powers to sign them, conferred by the President of the Republic and the Minister of Foreign Affairs on 25 April 2014[38] and 17 October 2017,[39] respectively. Accordingly, the representation of the Colombian State in the signing of this treaty was exercised by those who had full powers for that purpose, and therefore it is considered valid.

C-750 of 2008, C-915 of 2010, C-027 of 2011, C-1021 of 2012, C-217 of 2015, C-157 of 2016, C-184 of 2016, C-214 of 2017 and C-048 of 2018

35 Arts. 189.2 and 241.10 of the PC

36 Transposed into the Colombian legal framework through Law 32 of 1995.Art. 9 of the PC: "The relations of the State are based on (...) the recognition of the international law principles accepted by Colombia"

37 Article 7 of this Convention provides that it is also considered to represent the Sate "It appears from the practice of the States concerned or from other circumstances" from which it follows that the intention of the State "was to consider that person" as its agent (art. 7.1.b). Article 7(2) provides that, by virtue of their functions, they represent the State, (i) "Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty" (ii) "Heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited" and (iii)" Representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ."

38 Cdno. 1, fl. 36.

39 Cdno. 1, fl. 108.

19. *The international treaty and the law sub examine were not to be submitted to prior consultation*. Constitutional jurisprudence has recognized that prior consultation is a fundamental right of indigenous, tribal, Roma, Afro-descendant and Raizal communities.[40] In accordance with article 6.1(a) of the Convention 169 of the International Labour Organization,[41] the Court has ruled that prior consultation is obligatory, provided that it is demonstrated that the subjects entitled to this right are "*directly affected*".[42] In addition, the Court has stated that (i) prior consultation applies to legislative or administrative measures; [43] (ii) the effect that makes prior consultation obligatory must be direct, not accidental or circumstantial, that is, (a) of an entity that alters "*the status of the person or of the community, either by imposing restrictions or charges upon it or, on the contrary, by conferring benefits upon it*". [44] or (b) when it falls within or has the potential to have a direct effect on the territory of the community or on the defining aspects of its cultural identity. The Court has also concluded that (iii) prior consultation seeks "*to materialize the constitutional protection (...) afforded to ethnic groups to participate in decisions affecting them*"[45] (iv) this procedure must be advanced in the light of the principle of good faith, (v) it must be timely and effective[46] and, finally, (vi) its omission

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40 The normative basis for this recognition is the Convention 169 of the International Labour Organization (ILO), which is part of the block of constitutionality in the strict sense (art. 93 of the Constitution), as well as the rights of participation, recognition and protection of the ethnic and cultural diversity of these communities, as provided for in the Constitution (arts. 1, 7, 70 and 330 of the Constitution)

41 Convetion 169 of the ILO. Art. 6.1. "*1. In applying the provisions of this Convention, governments shall: (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly*".

42 Judgments C-615 of 2009, C-915 of 2010 and C-187 of 2011.

43 Judgment C-767 of 2012.

44 Judgments C-030 of 2008, C-461 of 2008, C-750 of 2008 and C-175 of 2009.

45 Cfr. Judgments C-169 of 2001, SU-383 of 2003 y C-187 of 2011.

46 Judgment C-767 of 2012.

"*constitutes a defect which prevents the law from being declared enforceable*" [47].

20. Within the framework of the control of the constitutionality of international treaties and their approving laws, the Court has reiterated that it has the duty to verify whether these instruments have had to be submitted to previous consultation and, if so, if this was carried out. In the light of constitutional jurisprudence, it is only necessary to submit (i) international treaties that directly affect indigenous, tribal, Roma, Afro-descendant and Raizal communities[48] and (ii) legislative and administrative measures adopted in implementation of the treaty that directly affect those same subjects to prior consultation.[49] In the first case, it would be compulsory to carry out the consultation procedure "*before the regulation is submitted to the Congress of the Republic for approval*".[50] On the other hand, the Court has emphasized that it is not necessary to exhaust prior consultation when the treaty or the measures that it develops (i) do not directly affect the territory or the aspects that define the cultural identity of the communities that hold this right; [51] (ii) do not contain provisions that regulate in a favorable or unfavorable manner those subjects, impose limitations, taxes or particular benefits on them; [52] and (iii) only contain general provisions that do not alter the status of those communities,[53] such as those that refer to the conditions of free trade.[54]

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47 Judgments C-461 of 2008, C-175 of 2009, C-767 of 2012 y C-359 of 2013.
48 Judgment C-750 of 2008.
49 Judgment C-027 of 2011.
50 Judgment C-214 of 2017.
51 Judgments C-1051 of 2012 and C-217 of 2015. Cfr. Judgment C-915 of 2010. "On this occasion, the Court concluded that prior consultation was not necessary because the agreement was not specifically addressed to the indigenous communities and its object was not mostly on indigenous territory either".
52 Judgments C-047 of 2017 and C-214 of 2017.
53 Id. Cfr. Judgment C-048 of 2018
54 Judgment C-214 of 2017.

21. Based on the foregoing, the Court finds that the international treaty and the approving law under control were not subject to prior consultation. This is so for three reasons. First, these normative instruments do not contain any measure that directly affects the territory or the cultural identity of the communities entitled to the right to prior consultation. Second, the content of the treaty and its enabling act does not have any differentiated or specific effect on such communities, but rather manifests its general effects upon the State and, by extension, upon society in general. The rights and benefits provided for in this treaty apply to all national investors, natural and legal persons, without any distinction[55] (Art. 1) and without imposing any condition, favourable or unfavourable, upon those subjects entitled to prior consultation for the recognition or exercise of such rights. Thirdly, the only provision of the treaty concerning cultural diversity (Art. 9) expressly provides that this instrument may not be interpreted as preventing the Contracting Parties from adopting measures to preserve and promote cultural and linguistic diversity. Clearly, this provision does not imply any direct involvement of those communities.

22. *Presidential approval and submission of the international treaty to Congress was carried out in accordance with article 189.2 of the Constitution.* This article provides that the President of the Republic is responsible for conducting international relations and concluding treaties with other states that "shall be submitted to Congress for approval". In this specific case, the Court noted that on 21 November 2014, the President

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55 The rights and benefits provided for investors in that treaty imply that they are "natural persons having the nationality of any of the Contracting Parties", "any legal person constituted in the territory of one of the Contracting Parties", or "controlled directly or indirectly by nationals of the Contracting Parties" (Art. 1).

approved the international treaty *sub examine* and ordered that it be submitted to Congress for consideration.[56]

Prior governmental stage	
Requirement	**Compliance**
Validity of the representation of the Colombian State	Complied with
Prior Consultation	N/A
Presidential approval and submission of the treaty to Congress	Complied with

2. Procedure before Congress of the Republic

23. The Constitution does not provide for a special procedure for laws approving international treaties, so in general terms they are subject to the procedure provided for ordinary laws.[57] In this sense, the control of constitutionality over the formal aspects in this phase of the procedure implies that the Court verifies compliance with the constitutional and legal requirements related to (i) the presentation of the draft bill before the Senate of the Republic by the National Government (art. 154 of the PC); (ii) the official publication of the draft bill of approval (art. 156 of Law 5 of 1992); (iii) the initiation of the legislative process in the respective permanent constitutional commission of the Senate of the Republic (art. (iv) Publication of the report for debate in the committees and plenary sessions (arts. 157 and 185 of Law 5 of 1992); (v) Prior announcement of votes (art. 160 of the PC); (vi) Voting and quorum and majority requirements (arts. 145 and 146 of the PC);. (vii) The period between debates (art. 160 of the PC) and, finally, (viii) that the draft

56 Cdno. 1, fl. 37
57 Judgments C-047 of 2017 and C-048 of 2018

bill has not been considered by more than two legislative terms (art. 162 of the PC).

24. *The draft bill was submitted by the National Government to the Senate of the Republic*. On 19 October 2015, the Ministers for Foreign Affairs and for Trade, Industry and Tourism submitted the draft bill approving the treaty *sub examine* together with its explanatory memorandum to the General Secretariat of the Senate of the Republic. This bill was assigned number 108 of 2015 (Senate).[58] In these terms, the Court finds that the provisions of Articles 142.20 of Law 5 of 1992[59] and 154 of the Political Constitution were complied with.[60]

25. *The draft bill was published before it was considered by the respective Commission*. On 19 October 2015, the Secretary-General of the Senate of the Republic sent a copy of draft bill 108 of 2015 (Senate) to the National Press for publication, which was carried out in Congressional Gazette No. 829 of 19 October 2015.[61] In these terms, the Court finds that the provisions of Articles 157 of the Political Constitution[62] and 144 of Law 5 of 1992[63] were complied with.

26. *The draft law started its legislative process in the competent constitutional commission*. On 19 October 2015, draft bill 108 of 2015 (Senate) was distributed to the Second Committee

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58 Cdno. Exhibits1, fls. 1 to 15.

59 Article 142 of Law 5 of 1992. "Private initiative of the government. Laws may only be enacted or reformed on the initiative of the Government in respect of the following matters: 20. Laws approving the Treaties or Agreements which the Government concludes with other States or with entities of international law".

60 Art. 154 of the Constitution: "Draft bills related to taxes shall be introduced in the House of Representatives and those relating to international relations in the Senate."

61 Cdno. Exhibits1, fl. 23

62 *"No bill shall become law without the following requirements: (...) have been published by Congress, before being acted upon by the respective Committee"*

63 *"Upon receipt of a draft bill, the Secretariat will order its publication in the Congressional Gazette."*

of the Senate of the Republic.[64] In these terms, the Court verified that the draft law complied with the constitutional and legal requirement that it be processed by the competent constitutional commission, as provided for in article 2 of Law 3 of 1992.[65]

27. *First debate. During this process, of the debate and approval of the bill in the Second Permanent Constitutional Committee of the Senate of the Republic, the constitutional and legal requirements were observed*. On 29 October 2015, the Secretary-General of the Second Permanent Constitutional Commission of the Senate of the Republic received draft Act No. 108 of 2015 (Senate) and referred it to the Committee's Bureau for appointment as Rapporteur. On 5 November 2015, in exercise of the jurisdiction provided for in article 150 of Act 5 of 1992,[66] this body appointed Senator José David Name Cardozo as rapporteur of this draft bill.[67]

27.1. *Presentation report.* Senator José David Name Cardozo presented his report for first debate to the Secretary

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64 Cdno. Exhibits. 1, fl. 18

65 Article 2 of Law 3 of 1992. "*Both in the Senate and in the House of Representatives there shall be Permanent Constitutional Committees, in charge of giving first debate to the bills of legislative act or law referring to the matters of their competence. There shall be seven (7) Permanent Constitutional Committees in each of the Houses, namely Second Committee. Composed of thirteen (13) members in the Senate and nineteen (19) members in the House of Representatives, it shall deal with: international policy; national defence and public forces; public treaties; diplomatic and consular career; foreign trade and economic integration; port policy; parliamentary, international and supranational relations; diplomatic affairs not reserved constitutionally to the Government; borders; nationality; foreigners; migration; public honours and monuments; military service; free trade and free trade zones; international recruitment*".

66 Article 150 of Law 5 of 1992. "*The appointment of the speakers will be the responsibility of the Board of Directors of the respective Commission. Each bill will have a rapporteur, or several, if the convenience of the situation makes it advisable. In any case, there will be a coordinating rapporteur who, in addition to organizing the work of the presentation, will help the President in the processing of the respective project. (...) When the presentation is collective, the Board of Directors must guarantee the representation of the different groups in the designation of the speakers*".

67 Cdno. Exhibits1, fls. 21 and 22

of the Second Permanent Constitutional Commission.[68] This report was published in the Congressional Gazette No. 104 of March 17, 2016.[69] With this, the Court states that the requirements established in articles 160 of the Political Constitution,[70] as well as 156[71] and 157[72] of Law 5 of 1992, were observed.

27.2. *Prior announcement.* The prior announcement was made on 13 April 2016, as recorded in Act No. 23 of the same day, published in the Congressional Gazette No. 395 of June 9, 2016.[73] At that session, the Secretary of the Com-

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68 Cdno. Exhibits1, fls. 38 to 54. This report contains its general considerations on the initiative, the summary of the articles of the bill, the proposal to approve the paper in the first debate, as well as the three articles of the bill.

69 Cdno. Exhibits1, fls. 62 to 66

70 Art. 160.4 of the CTH. Cf. Judgment C-1040 of 2015. ""Every Bill or Legislative Act must have a report presented to the respective committee in charge of processing it, and the corresponding course must be taken (...) According to the jurisprudence of this Corporation, the report of the presentation is not only obligatory for the beginning of the parliamentary discussion in the respective committees, but in the same way its presentation must be required before the beginning of the debate in the plenary of each Chamber. This was recognized by the Court in Judgment C-1039 of 2004, when it established that by complying with this requirement, the aim is to speed up the processing of draft bills or constitutional reforms by publicizing their content, allowing congressmen to know in advance the matters that will be debated and voted on, in order to achieve a state of deliberative and decision-making rationality. In this regard, appeal was made to the provisions of Article 185 of Law 5 of 1992, according to which: "In the discussion and approval of a project in the second debate, the same procedure established for the first debate shall be followed, as far as is compatible," as a regulatory support to extend its normative application."

71 Article 156 of Law 5 of 1992. "The report shall be submitted in writing, in the original and two copies, to the Secretary of the Permanent Commission. It shall be published in the Gazette of Congress".

72 Article 157 of Law 5 of 1992. "Initiation of the debate. The initiation of the first debate will not take place before the publication of the respective report. It shall not be necessary to read the report, unless the Commission so decides, for reasons of convenience. The rapporteur shall, at the relevant meeting, answer the questions and doubts put to him, after which the debate shall begin. If the rapporteur proposes to debate the draft, this shall be done without a vote on the report. If it is proposed that the draft be shelved or denied, the proposal shall be discussed and put to the vote at the end of the debate".

73 Cdno. Exhibits2, fls. 41 and ss.

mission, at the request of the President of the Commission, announced the debate and vote on the draft bill *sub examine* "for the next session".[74] In these terms, the Court finds that the requirement set out in Article 160 of the Constitution regarding prior notice was met in this specific case.[75]

27.3. *Debate and approval.* As announced, the debate and approval of the draft bill *sub examine* took place in the session of 27 April 2016, as recorded in Act No. 24 of the same day, published in Congressional Gazette No. 395 of June 9, 2016.[76] After reviewing the Act, the Court considers the following requirements to be satisfied:

Requirement	Compliance
Deliberative Quorum	The session began with the verification of the deliberative quorum, which was satisfied by the presence of 9 of the 13 Senators of the Second Permanent Constitutional Commission.

74 Cdno. Exhibit 2, fl. 48. It indicated its title, number of filings, authors, speaker and the Congress Gazettes in which its content was published and the paper for first debate

75 Art. 160 of the C.P. "no bill shall be submitted to a vote in session other than that previously announced". The same provision provides that the duty to carry out the announcement prior to the vote is incumbent upon the President of the House or the respective Commission, and, in any case, must take place "in a session different from the one in which the vote will be held". Cf. Judgments C-644 of 2004, C-305 of 2010 and C-214 of 2017 In these judgments, the Court has developed the following sub-rules regarding the characteristics of prior announcement: (i) it does not require the use of sacramental formulas; (ii) it must determine the future session at which the vote on the draft will take place; (iii) the date of that subsequent session must be certain, determined or, at least, determinable; (iv) a "chain of announcements for the postponement of the vote" must be carried out; and (v) the requirement of "prior announcement of the debate will be satisfied when, despite the fact that the vote is not carried out on the scheduled date, it is finally carried out on the first occasion when it returns to the session".

76 Cdno. Exhibits. 1, fls. 41 and ss

	In this way, the requirement provided for in Article 145 of the Political Constitution was complied with[77].
Decision-making quorum	After the debate on the Sub Examination draft bill, the Secretary of the Commission called the list *"for the approval of the proposal with which the presentation report ends"* and verified the presence of 9 of the 13 Senators of the Second Permanent Constitutional Commission. In these terms, the requirement set out in Article 145 of the Constitution was complied with[78].
Approval of the positive proposal of the presentation report	By "roll call and public vote",[79] 8 senators voted yes and 1 voted no.[80] In this way, the requirements of Articles 133 (nominal vote)[81] and 146 (simple majority)[82] of the Political Constitution were complied with.

77 Art. 145 of the Constitution: "The Congress, the Houses and their committees may not open sessions or deliberate with less than one quarter of their members. Decisions may only be taken with the attendance of a majority of the members of the respective corporation, unless the Constitution determines a different quorum". Judgments C-322 of 2006 and C-750 of 2008.

78 Id. Judgment C-337 of 2015. The Court has reiterated that the existence of the minimum deliberative quorum "does not per se allow the attending parliamentarians to adopt any decision (...) therefore (...) decisions may only be taken with the majority of the members of the respective corporation, unless the Constitution determines a different quorum". Therefore, this provision provides "as a general rule, a decision-making quorum corresponding to half plus one of the authorized members of each corporation or committee, who must be present throughout the voting process to express their will and validly resolve any matter submitted for their consideration"..

79 Cdno. Exhibits. 1, fls. 67

80 Test 1, fl. 41 et seq. The Secretary reported that "eight (8) Honorable Senators voted Yes, one (1) Honorable Senator voted No. Consequently, the final proposition ending the report has been approved.

81 Art. 133 of the PC: "*The members of directly elected collegial bodies represent the people, and must act in consultation with justice and the common good. The vote of their members shall be nominal and public, except in cases determined by law".*

82 Art. 146 of the CP: "In the full Congress, in the Houses and in their permanent committees, decisions shall be taken by a majority of the votes of those present, unless the Constitution expressly requires a special majority". Judgment C-047 of 2017. "The Court has made it clear that, in cases of draft laws

Approval of the proposal to omit the reading of the project's articles	By "roll call and public vote",[83] 8 senators voted yes and 1 voted no.[84] In this way, the requirements of Articles 133 (nominal vote) and 146 (simple majority) of the Political Constitution were complied with.
Approval of the title of the project and of the submission for second debate	By "roll call and public vote",[85] 8 senators voted yes and 1 voted no.[86] In this way, the requirements of Articles 133 (nominal vote) and 146 (simple majority) of the Political Constitution were complied with.

27.4. *Publication of the approved text*. The text of the legal project *sub examine* as approved in the first debate was published in Congressional Gazette No. 323 odf 24 May 2016[87].

First debate	
Requirement	**Compliance**
Publication of the presentation report *Congressional Gazette No. 104, March 17, 2016*	Complied with
Prior announcement *Act No. 23 of 13 April 2016* *Congressional Gazette No. 395 of June 9, 2016*	Complied with
Discussion and approval *Act No. 24 of 27 April 2016* *Congressional Gazette No. 395 of June 9, 2016*	Complied with
Deliberative Quorum	Complied with

approving international treaties, the majority required for their passage is the simple majority. Cf. Judgments C-089 of 2014, C-750 of 2008, C-322 of 2006 and C-008 of 1995.

83 Cdno. Exhibits. 1, fls. 67

84 Test 1, fl. 41 et seq. The Secretary reported that "eight (8) Honorable Senators voted Yes, one (1) Honorable Senator voted No. Consequently, the final proposition ending the report has been approved.

85 Cdno. Exhibits. 1, fls. 67

86 Test 1, fl. 41 et seq. The Secretary reported that "eight (8) Honorable Senators voted Yes, one (1) Honorable Senator voted No. Consequently, the final proposition ending the report has been approved.

87 Cdno. Pruebas 2, fls. 29 and ss.

Decision-making quorum	Complied with
Roll Call and Public Voting	Complied with
Majority approval required	Complied with
Publication of the adopted text *Congressional Gazette No. 323 of May 24, 2016*	Complied with

28. *The period between the first and second debates satisfies the term provided for in article 160 of the Constitution.*[88] *The Court notes that the first debate was held on 27 April 2016, and the second, as will be explained in paragraph 29.3, on 17 November 2016, which means that there was a period of eight days between the first and second debates*

29. *Second debate. During this process, of the debate and approval of the draft bill in the plenary session of the Senate of the Republic, the constitutional and legal requirements were observed. After receiving the draft bill sub examine in the Secretariat of the Senate of the Republic, Senator José David Name Cardozo was maintained as rapporteur of this legislative initiative*

29.1. Report of Rapporteur. On May 24, 2016, Senator José David Name Cardozo presented his Rapporteur's Peport for second debate to the Secretary of the Senate of the Republic.[89] *This report was published in the Congressional Gazette No. 323 of 24 May 2016.*[90] *Accordingly, the Court finds that the constitutional and legal requirements set forth in Articles 160 of the Political Constitution, as well as 156 and 157 of Law 5 of 1992, were observed in this specific case.*

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88 Art. 160 of the CC: "A period of not less than eight days must elapse between the first and second debates, and at least fifteen days must elapse between the approval of the project in one of the chambers and the initiation of the debate in the other".

89 Cdno. Exhibits 1, fls. 69 and ss

90 Cdno. Exhibits 2, fls. 29 et seq. This report contains its general considerations on the initiative, the summary of the articles of the bill, the proposal to approve the paper in the second debate, as well as the three articles of the bill

29.2. Prior notice. The prior notice was made on 16 November 2016, as recorded in Act No. 36 of the same day, published in the Congressional Gazette No. 89 of February 20, 2017.[91] *At that session, the Secretary of the Commission, at the request of the President of the Commission, announced the debate and vote on the draft bill sub examine " was to be considered (...) at the next plenary session of the Senate of the Republic"*[92] *. In these terms, the Court finds that the requirement set forth in Article 160 of the Political Constitution regarding prior notice was met in the specific case.*

29.3. Debate and approval. As announced, the debate and approval of the draft bill sub examine took place in the session of 17 November 2016, as recorded in Act No. 37 of the same day, published in the Congressional Gazette No. 90 of 20 February 2017.[93] *After reviewing this Act, the Court considers that the following requirements have been met:*

Requirement	Compliance
Deliberative Quorum	The session began with the verification of the deliberative quorum, which was satisfied by the presence of 86 of the 101 Senators of the Republic. In these terms, the requirement provided for in Article 145 of the Constitution was complied with.
Decision-making quorum	Following the debate on the draft bill *sub examine*, the number of Senators of the Republic present was 53. In these terms, the requirement provided for in article 145 of the Constitution was complied with.

91 Cdno. Exhibits 1, fl. 105.

92 Id. He also indicated his title and registration number, authors, speaker and the Gazettes of the Congress in which his content was published and the paper for first debate

93 Cdno. Exhibits 1, fls. 108 and ss.

Approval of the positive proposal of the presentation report	By a "roll call and public vote",[94] 47 senators voted yes and 6 voted no.[95] In this way, the requirements of Articles 133 (nominal vote) and 146 (simple majority) of the Political Constitution were observed.
Approval of the proposal to omit the reading of the article, to approve the article of the project, its title and that it be given to the House of Representatives	By a "roll call and public vote",[96] 47 senators voted yes and 6 voted no.[97] In this way, the requirements of Articles 133 (nominal vote) and 146 (simple majority) of the Political Constitution were observed.

29.4. *Publication of the approved text.* The text of the draft bill *sub examine* approved in the second debate was published in the Congressional Gazette No. 1033 of 21 November 2016.[98]

Second debate	
Requirement	**Compliance**
Publication of the presentation report *Congressional Gazette No. 323, 24 May 2016*	Complied with
Prior announcement *Act No. 36 of 16 November 2016* *Congressional Gazette No. 89 of 20 February 2017*	Complied with

94 Cdno. Exhibits 1, fl. 105.

95 Cdno. Exhibits 1, fls. 108 and ss. The Secretary reported "the following result: For the Yes: 56, For the No: 5; Total: 61 votes. Consequently, the omission of the reading of the article, the article as a whole, and the title has been approved and will be dealt with in the House of Representatives".

96 Cdno. Exhibits 1, fl. 105.

97 Cdno. Exhibits 1, fls. 108 and ss. The Secretary reported "the following result: For the Yes: 56, For the No: 5; Total: 61 votes. Consequently, the omission of the reading of the article, the article as a whole, and the title has been approved and will be dealt with in the House of Representatives".

98 Cdno. Exhibits 1, fl. 106.

Discussion and approval *Act No. 37 of 17 November 2016* *Congressional Gazette No. 90 of 20 February 2017*	Complied with
Deliberative Quorum	Complied with
Decision-making quorum	Complied with
Roll Call and Public Voting	Complied with
Majority approval required	Complied with
Publication of the adopted text *Congressional Gazette No. 1033 of 21 November 2016*	Complied with

30. *The period between the second and third debates satisfies the term provided for in article 160 of the Political Constitution.* The Court notes that the second debate was held on November 17, 2016 and the third, as will be explained in paragraph 31.3, on June 6, 2017, thus observing the period of 15 days between the second and third debates.

31. *Third debate. During the process, the debate and approval of the draft bill in the Second Permanent Constitutional Committee of the House of Representatives, the constitutional and legal requirements were met.* After its approval by the Plenary of the Senate, the President of the Senate of the Republic referred to the House of Representatives draft bill No. 108 of 2015 (Senate),[99] which was filed under number 217 of 2016 (House). Once received, the President of the House of Representatives assigned the bill to the Second Permanent Constitutional Committee.[100] The Board of Directors of this Committee, in the exercise of its legal powers, appointed Representative José Luis Pérez Oyuela as rapporteur of this draft bill.[101]

31.1. *Paper report*. After his appointment, Representative José Luis Pérez Oyuela presented his report for the third

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99 Cdno. Exhibits 1, fl. 118.
100 Cdno. Exhibits 1, fl. 119
101 Cdno. Exhibits 1, fl. 121.

debate to the Board of Directors of the Second Permanent Constitutional Commission of the House.[102] This report was published in the Congressional Gazette No. 98 of February 24, 2017.[103] In these terms, the Court finds that the sub judice case complied with the requirements of Article 160 of the Constitution and Articles 156 and 157 of Law 5 of 1992.

31.2. *Prior announcement*. The prior announcement was made on May 31, 2017, as recorded in Minute No. 32 of the same day, published in the Journal of Congress No. 660 of August 8, 2017.[104] At that session, the Secretary of the Commission, at the request of the President of the Commission, announced the debate and vote on the draft bill sub examine "for the next session"[105]. In these terms, the Court finds that the requirement set out in Article 160 of the Constitution regarding prior notice was met in the sub judice case.

31.3. *Debate and approval*. As announced, the debate and approval of the draft bill *sub examine* took place in the session of 6 June 2017, as recorded in Act No. 33 of the same day, published in the Gazette of Congress No. 661 of 8 August 2017.[106] After reviewing this Act, the Court considers that the following requirements have been met:

Requirement	Compliance
Deliberative Quorum	The session began with the verification of the deliberative quorum, which was satisfied by the presence of 12 of the 18 Representatives to the House of the Second Permanent Constitutional Commission.

102 Cdno. Exhibits 1, fls. 124 and ss

103 Cdno. Exhibits 1, fls. 145 et seq. This report contains the reference to the advanced legislative procedure, the objectives of the Law, the text of the international treaty, the benefits of this initiative and the proposal for its approval.

104 Cdno. Exhibits 2, fls. 66 and ss.

105 Cdno. Exhibits 1, fl. 48

106 Cdno. Exhibits 2, fls. 111 and ss

	In these terms, the requirement set forth in Article 145 of the Political Constitution was met.
Decision-making quorum	After the debate on the draft bill *sub examine*, there were 13 Representatives to the House present. In these terms, the requirement of article 145 of the Constitution was met.
Approval of the positive proposal of the presentation report	By "roll call and public vote"[107], 13 representatives voted yes.[108] In this way, the requirements of Articles 133 (nominal vote) and 146 (simple majority) of the Political Constitution were observed.
Approval of the proposal of the draft bill's articles	By "roll call and public vote",[109] 14 representatives voted yes. [110] In this way, the requirements of Articles 133 (nominal vote) and 146 (simple majority) of the Political Constitution were observed.
Approval of the title of the project and of the submission for fourth debate	By "roll call and public vote",[111] 14 representatives voted yes. [112] In this way, the requirements of Articles 133 (nominal vote) and 146 (simple majority) of the Political Constitution were observed.

31.4. *Publication of the approved text*. The text of the draft bill *sub examine* approved in the third debate was published in the *Congressional Gazette* No. 461 of 9 June 2017[113].

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107 Cdno. Exhibits 1, fls. 181 and ss. After the vote, the Secretary reported that "13 honorable Representatives voted, all 13 voted for the Yes, therefore the report of the paper was adopted".
108 Cdno. Exhibits 2, fls. 111 and ss
109 Cdno. Exhibits 2, fls. 111 and ss.
110 Id. The Secretary reported that "14 honorable Representatives voted, all 14 voted for the Yes, therefore the report of the paper was adopted".
111 Cdno. Exhibits 2, fls. 111 and ss.
112 Id. The Secretary reported that "14 honorable Representatives voted, all 14 voted for the Yes, therefore the report of the paper was adopted".
113 Cdno. Exhibits. 2, fls. 29 and ss.

Third debate	
Requirement	**Compliance**
Publication of the presentation report *Congressional Gazette No. 98, March 24, 2017*	Complied
Prior announcement *Act No. 32 of May 31, 2017* *Congressional Gazette No. 660 of August 8, 2017*	Complied
Discussion and approval *Act No. 33 of June 6, 2017* *Congressional Gazette No. 661 of August 8, 2017*	Complied
Deliberative Quorum	Complied
Decision-making quorum	Complied
Roll Call and Public Voting	Complied
Majority approval required	Complied
Publication of the adopted text *Congressional Gazette No. 461 of June 9, 2017*	Complied

32. The period between the third and fourth debates satisfies the term provided for in article 160 of the Constitution. The Court notes that the third debate took place on June 6, 2017 and the fourth, as will be explained in paragraph 33.3, took place on on June 16, 2017, thus allowing for a period of eight "common" days between the third and fourth debates.[114]

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114 Art. 160 of the CC: "A period of not less than eight days shall elapse between the first and second debates, and at least fifteen days shall elapse between the approval of the bill in one of the chambers and the commencement of the debate in the other". Sentence C-565 of 1997. "A period of not less than eight days must elapse between the first and second debate of a bill. These are common". Decision C-446 of 2009. "According to Article 160 of the Charter, the term that must mediate for the approval of a bill in the respective constitutional commission and the plenary, must be "not less than 8 days". And between the approval of the bill in one of the chambers and the initiation of debate in the other, "at least" 15 days. These terms must be counted in common and non-working days". Cf. Judgment C-708 of 1996, C-002 of 1996 and C-1153 of 2005

33. Fourth debate. In the process, the debate and approval of the bill in the Plenary of the House of Representatives was in compliance with the constitutional and legal requirements. After the draft bill was received by the Secretariat of the House of Representatives, Representative José Luis Pérez Oyuela was retained as rapporteur of this legislative initiative.

33.1. Paper report. On June 7, 2017, Representative José Luis Pérez Oyuela presented his report for the fourth debate to the Speaker of the House of Representatives.[115] This report was published in the Congressional Gazette No. 461 of June 9, 2017.[116] In these terms, the Court finds that the draft bill in question complied with the constitutional and legal requirements set forth in Articles 160 of the Political Constitution, as well as 156 and 157 of Law 5 of 1992.

33.2. Prior Announcement. The prior announcement was made on June 15, 2017, as recorded in Act No. 226 of the same day,and published in the Journal of Congress No. 685 of August 10, 2017.[117] At that session, the Secretary of the House, at the request of the President of the House, announced the debate and voted on the draft bill *sub examine* "for tomorrow, June 16". In these terms, the Court finds that the draft bill in question meets the requirement of Article 160 of the Constitution regarding prior notice.

33.3. Debate and approval. As announced, the debate and approval of the draft bill *sub examine* took place in the session of 16 June 2017, as recorded in Act No. 227 of the same day, published in the Gazette of Congress No. 715

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115 Cdno. Exhibits 1. fls. 183 and ss

116 Cdno. Exhibits 2, fls. 130 and ss. This report contains information on the legislative procedure, the objectives of the international treaty, its benefits, its text and the proposal for its approval

117 Cdno. 1, fl. 70.

of 22 August 2017[118]. After reviewing this Act, the Court considers that the following requirements have been met:

Requirement	Compliance
Deliberative Quorum	The session began with the verification of the deliberative quorum, which was satisfied by the presence of 134 of the 165 representatives to the House. In these terms, the requirement provided for in Article 145 of the Constitution was met.
Decision-making quorum	After the debate on the draft bill *sub examine*, the Representatives of the House present were 99. In these terms, the requirement of article 145 of the Constitution was met.
Approval of the positive proposal of the presentation report	By "roll call and public vote,"[119] 76 Representatives of the House voted yes and 13 voted no.[120] In this way, the requirements of Articles 133 (nominal vote) and 146 (simple majority) of the Political Constitution were met.
Approval of the proposal of the draft bill's articles	By "roll call and public vote,"[121] 78 Representatives of the House voted yes and 9 voted no. [122] In this way, the requirements of Articles 133 (nominal vote) and 146 (simple majority) of the Political Constitution were met.

118 Id.
119 Cdno. 1, fl. 42
120 Id. After the vote, the Secretary reported: "the record is closed, the final vote is as follows: For the Yes: 73 electronic and 3 manual votes, for a total of 76 votes for the Yes. By No 13 electronic votes, none manual, for a total by No 13 votes. Mr. President, it has been approved"
121 Cdno. 1, fl. 42
122 Id. The Secretary reported: "the vote is as follows: For the Yes, 74 electronic votes and 4 manual votes for a total of 78 votes for the Yes. For the No 9 electronic votes, none manual for a total of 9 votes. Mr. President, the articles have been approved".

Approval of the title and answer to the question Does the Plenary of the House want this project to become a law of the Republic?	By "roll call and public vote,"[123] 81 Representatives of the House voted yes and 9 voted no. [124] In this way, the requirements of Articles 133 (nominal vote) and 146 (simple majority) of the Political Constitution were met.

33.4. Publication of the approved text: The text of the draft bill s*ub examine* approved in the fourth debate was published in the Congressional Gazette No. 520 of 27 June 2017[125]. The President of the House of Representatives signed a clarifying note regarding the title of the bill: instead of "Congreso de Colombia", as published in the aforementioned Gazette, the expression " Congress of the Republic Decree" was included. This explanatory note was published in the Congressional Gazette No. 694 of 15 August 2017.[126]

Cuarto debate	
Requisito	**Cumplimiento**
Publication of the Report *Congressional Gazette No. 461 9 June 2017*	Complied With
Prior Announcement *Act No. 226 of 15 June 2017* *Congressional Gazette No. 685 odf 10 August 2017*	Complied With
Debate and Approval *Act No. 227 of 16 June 2017* *Congressional Gazette No. 715 of 22 August 2017*	Complied With
Deliberative Quorum	Complied With

123 Cdno. 1, fl. 42

124 Id. The Secretary reported: "the final vote is as follows: For the Yes, 75 electronic votes and 6 manual votes for a total of 81 votes for the Yes. For the No 9 electronic votes, none manual. Mr. President, the title and question on this Bill have been approved".".

125 Cdno. Exhibits 1, fl. 229.

126 Cdno. Exhibits 1, fl. 249

Decision-making Quorum	Complied With
Nominal and Public Voting	Complied With
Approval by the Required Majority	Complied With
Publication of the Final Text as Approved *Congressional Gazette No. 694 of 15 August 2017*	Complied With

34. Finally, the Court noted that the draft bill *sub examine* was not considered in more than two legislative sessions, thus fulfilling the requirement of Article 162 of the Constitution.[127] The bill was introduced in Congress on October 19, 2015 (para. 24) and concluded with debate and approval in the fourth debate held on June 16, 2017 (para. 33.3).[128] Thus, the bill under scrutiny was considered and processed by two legislative sessions, the first from 20 July 2015 to 20 June 2016 and the second from 20 July 2016 to 20 June 2017.

Procedure before Congress of the Republic	
Requirement	**Compliance**
Presentation of the draft bill by the National Government before the Senate of the Republic	Complied With
Publication of the draft bill prior to its implementation	Complied With
Initiation and processing of the draft bill before the competent Permanent Constitutional Commissions	Complied With
Publication of the reports of the four debates	Complied With

127 "No project may be considered in more than two legislative terms".

128 Cf. Judgment C-360 of 2016. Referring to the calculation of the term provided for in Article 162 of the Constitution, the Court noted that "it is verified by observing the date on which the bill was filed with the Senate of the Republic and the date on which it was approved in the fourth debate. Judgment C-150 of 2009. "It is necessary to state that, although in principle it might be thought that full compliance with Superior Article 162, which establishes that "no bill may be considered in more than two legislatures, the truth is that the bill that culminated in Law 1198 of 2008 was considered in less than two legislatures. This conclusion arises from observing the date in which the bill was filed in the Senate of the Republic and the date in which it was approved in the fourth debate".

Prior announcements in the four debates	Complied With
Deliberative quorum in the four debates	Complied With
Decision-making quorum in the four debates	Complied With
Approval by the required majority in the four debates	Complied With

3. Presidential approval and referral to the Constitutional Court

35. The constitutionality check on the formal aspects at this stage of the procedure implies that the Court verifies that the President of the Republic has (i) sanctioned the law and (ii) referred it to the Constitutional Court, within the six-day period provided for in Article 241.10 of the Constitution. In this specific case, the President of the Republic sanctioned the law approving the treaty *sub examine*[129] on July 12, 2017, and sent it to the Court on July 17 of the same year.[130] In these terms, the Court notes that the procedure followed in this phase of the procedure satisfied the constitutional requirements:

Presidential approval and referral to the Constitutional Court	
Requirement	**Compliance**
Presidencial Sanction	Complied With
Referral, in time, to the Constitutional Court	Complied With

36. In response to the legal problem set out in paragraph 15.1, as pointed out by the MinCIT, the Chancillery, UExternado, ANDI, UNAB and the Procuraduria, this Chamber finds that the international treaty and the law *sub examine* met the requirements of the Constitution and of Law 5 of 1992. Therefore, the Chamber proceeds to pronounce on the

129 Cdno. 1, fl. 21.
130 Cdno. 1, fl. 1.

constitutionality of the content of the clauses that make up the international treaty under review

X. Material constitutionality control of the treaty

37. The treaty *sub examine* is a normative instrument that is part of international investment law. Therefore the Court will *(i)* determine the nature, scope, and effects of the material constitutionality control with respect to the BIT, *(ii)* examine the general compatibility of the agreement *sub examine* and its purposes with the Political Constitution, and, finally, *(iii)* review the constitutionality of each of the articles of *(a)* Law 1940 of 2017 and *(b)* the international instrument *sub examine* with its protocol and joint interpretative declaration.

1. The Nature, Scope and Effects of the Material Constitutionality Control of the BIT

38. *The Nature of Constitutionality Control.* Article 241.10 of the Political Constitution provides that the Court has the function of exercising control over the constitutionality of international treaties and their approving laws. This competence of the Constitutional Court comprises the process of negotiation, signing, approval and ratification of international treaties as foreseen by the Constitution. [131]. As part of this process, the Constitution requires the three branches of government to complete sequential stages: "(*i) signature of the treaty by the President of the Republic, (ii) approval of the treaty by the Congress of the Republic, (iii) analysis of the constitutionality of the treaty and its approval law by the Court,*

131 Judgemnt C-446 of 2009. "*For the subscription of a convention that compromises the Colombian State, several successive stages on which the different branches of the public authority intevene for its perfection must be exhausted, – since it is a complex act -*"

and finally (iv) ratification of the treaty by the President of the Republic, as head of State"[132]. Once the treaty has been ratified following the aforementioned stages, the commitments undertaken by the State are fully enforceable within the international and domestic spheres[133].

39. The Court has consistently reiterated that the constitutionality control of international treaties and their approving laws is characterized by being: *(i) prior to the conclusion of the treaty*, but subsequent to Congressional approval and Presidential sanction; (ii) *automatic*, since these normative instruments must be sent to the Constitutional Court by the President of the Republic within 6 days following the governmental sanction; (iii) *comprehensive*, since the constitutionality analysis covers both the formal and material aspects of the law and the treaty; (iv) *it has the force of absolute res judicata*; (v) it is *a sine qua non* requirement for the ratification of the Agreement; and (vi) *it has a preventive function*, as its purpose is to guarantee the supremacy of the Political Constitution and the compliance with the international commitments acquired by the Colombian State[134].

40. The material constitutionality control consists of comparing the content "*of the international treaty sub examine and its approving law, with the totality of the provisions of the Constitution, to determine whether or not they are in conformity with the Political Constitution*"[135]. Moreover, the Court has emphasized that, mostly, in the case of treaties of commercial or economic nature, "*It should be kept in mind that these must be in conformity with the so-called constitutionality*

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132 Judgment C-446 of 2009.

133 See. Art. 46 of the Viena Convention. Cfr. Judgments C-750 of 2008 and C-446 of 2009. Failure to comply with the requirements of domestic law for the conclusion and ratification of a treaty constitutes a defect on consent, which may result in the nullity of the treaty.

134 Judgments C-468 of 1997, C-400 of 1998, C-924 of 2000, C–576 of 2006 and C-184 of 2016, among others.

135 Judgments C-446 of 2009.

block"*[136]. Therefore, according to constitutional jurisprudence, in these cases the material constitutionality control implies an analysis of compatibility between the international treaty and its approving law, on the one hand, and the Political Constitution and the instruments that are part of the constitutionality block in the strict sense, on the other[137].

41. At the same time, the material constitutionality control is exercised over the approving law and the international treaty in its entirety. This control includes the analysis of the general constitutionality of the treaty and its purposes[138], as well as the constitutionality of each of its particular contents, that is, the "*provisions of the international instrument and its approving law*"[139]. In other words, "*the integrity of the text, which includes the annexes, footnotes, as well as any other communication between the parties aimed at agreeing some sense*

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* Translator's note: The 'constitutionality block'is an inherent concept of the constitutional framework in Colombia, which can be defined as follows: "[A]n amplifying device of the catalog of fundamental rights that has its origin in article 93 P.C. Through the block of constitutionality, international norms related to human rights must be understood as an integral part of the Constitution and, therefore, constitute an important parameter of constitutional control. Those provisions are binding at a constitutional level. Then, the judge has the constitutional mandate to use them as a tool when interpreting the constitutionality of a norm." (Rivas Ramírez, Daniel; Acosta Alvarado, Paola Andrea; Acosta López, Juana. *De anacronismos y vaticinios: Diagnóstico sobre las relaciones entre el derecho internacional y el derecho interno en Latinoamérica*. Bogotá: Editorial Universidad Externado de Colombia, 2017, pp. 615.).

136 Judgments C-031 of 2009 and C-150 of 2009. In the constitutional control of treaties in commercial matters: '*Should bear in mind that these must be in conformity with the so-called 'constitutionality block', especially with respect to those norms that have the rank of jus cogens, that is, in the terms of Article 53 of the 1969 Vienna Convention, [that is] those imperative provisions of general international law accepted and recognized by the international community of States as a whole as norms 'that do not admit agreement to the contrary and that can only be modified by a subsequent norm of international law having the same character*'.

137 Judgment C-225 of 1995.

138 See, for instance, judgments C-008 of 1997, C-864 of 2006, C-031 of 2009, C-446 of 2009, C-123 of 2012, C-169 of 2012, C-199 of 2012.

139 Judgment C-199 of 2012.

or scope to the assumed commitments"[140]. In this regard, the Court has clarified that, according to article 2 of the Vienna Convention on the Law of Treaties, a treaty means "*an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation*"[141]. On that basis, the Court has reviewed the compatibility of the normative instruments, annexes and related materials, which are intended to give scope to the provisions of the treaty[142].

42. In such terms, the parameters of carrying out the material and integral constitutionality control of the BIT are made up by "*the totality of the provisions of the Political Constitution*"[143] and those normative instruments that are part of the constitutionality block in the strict sense[144]. This is justified, in part, since international economic, investment or commercial treaties have, "*in general, the normative hierarchy of ordinary laws*"[145]. At the same time, the object of the control includes international treaties and their approving laws, as well as by the other normative instruments, an-

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140 Judgments C-446 of 2009 and C-031 of 2009.

141 Judgment C-446 of 2009.

142 See. Judgments C-249 of 1994, C-294 of 2002, C-750 of 2008 and C-169 of 2012.

143 Id. Cfr. Judgment C-150 of 2009. 'The material control of the international treaty and its approving law by the Court consists, as has been mentioned, in comparing the provisions of the international instrument and its approving law with the totality of the constitutional precepts, in order to determine whether or not they are consistent with the Political Constitution'.

144 Judgments C-031 of 2009 and C-150 of 2009.

145 Judgment C-446 of 2009. '*The international treaties signed by Colombia in economic and commercial matters or those related to European Law do not have this superior normative hierarchy nor do they constitute parameters of constitutionality, since they respond exclusively to economic, commercial, fiscal, customs, investment, etc. aspects, and are therefore alien to the constitutionality block. Consequently, they are not contrasting norms in the constitutional analysis carried out by this Corporation*'.

nexes and related materials, designed to "give some sense or scope to the assumed commitments"[146].

43. *Scope of constitutionality control.* The Court has repeatedly ruled that the material constitutionality control over international treaties "*is eminently a legal study*"[147]. In other words, "*it is not concerned with reviewing the advantages or practical opportunity of an agreement at the economic, social, etc. level, nor its political convenience*"[148]. The Court has recognized that "*the reasons for celebration, although very important to illustrate the interpretation, development and execution of the convention, are not part of the constitutionality control*"[149]. In these terms, it has also considered that "*the judgment over international treaties is not of convenience but legality*"[150].

44. In constitutional jurisprudence it is possible to identify at least four reasons that, explicitly or implicitly, have served as a basis for this constitutional doctrine, namely: *(i)* the democratic legitimacy of the executive and legislative branches, *(ii)* the technical competence of both branches, *(iii)* the technical nature of the rules of international law and the specialized nature of the courts in these matters and, finally, *(iv)* the impossibility of foreseeing the difficulties related to the application of BITs.

45. First, as regards the democratic legitimacy of the executive and legislative branches. The Court has pointed

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146 Judgment C-446 of 2009 and C-031 of 2009.
147 See, among other, judgment C-178 of 1995, C-031 of 2009, C-446 of 2009, C-864 of 2006, C-129 of 2012, C-169 of 2012, C-199 of 2012.
148 Id. Judgment C-446 of 2009.
149 Id.
150 Judgment C-031 de 2009.

out that, among others, articles 189.2[151] and 150.16[152] of the Political Constitution defer the evaluations of practical opportunity and convenience when negotiating, signing, approving and ratifying an international treaty to the President and Congress of the Republic[153], based on the fact that "*the normative ideal governing the international relations of the State imposes on the representatives of the people when negotiating or assuming an international commitment, to verify that the content of the treaty promotes the development and effective application of the essential institutions of our constitutional order*"[154]. Given the foregoing, in this matter the Court has

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151 Art. 189.2 de la CP. '*It is the responsibility of the President of the Republic, as the chief of state, head of the government, and supreme administrative authority to do the following: (…) 2. Direct international relations; (…); conclude with other States and international entities treaties or agreements to be submitted to the approval of Congress*'.

152 Art. 150.16 de la CP. '*It is the responsibility of Congress to enact laws. Through them, it exercises the following functions: (…) 16. To approve or reject treaties that the Government makes with other states or entities in international law. Through such treaties, the State may, on the basis of equity, reciprocity and national convenience, partially transfer certain powers to international organizations whose purpose is to promote or consolidate economic integration with other States*'.

153 Judgment C-446 of 2009. '*Precisely in the matter of FTAs, the Court has repeatedly insisted that the considerations of convenience, opportunity, usefulness or efficiency of the international instrument are alien to the examination that this Court must carry out, given that the analysis in the stages of negotiation and legislative approval of the treaty and its convenience, correspond to the President and the Congress respectively. They are the ones who must, within the jurisdiction of their competencies, evaluate its pertinence and the justification of the adoption of an international agreement in the internal legislation, according to the attributions assigned to each Branch of the Public Power by the Constitution*'.

154 Judgment C-864 of 2006. *'(…) The 1991 Constitution established in its Article 1 that Colombia is a Social State of Law, organized in the form of a democratic republic. In this way, the Constitution determined that the legitimacy of the public power in the country would rest on the observance of diverse values - expressed in the concept of "social rule of law" - and of diverse procedures of the democratic regime. These budgets fundamentally determine the structure and action of the Colombian State and, therefore, also its activity at the international level and the integration processes in which it participates*'.

reiterated that "*it cannot, by means of its functions, invade the spheres of action of the remaining State's organs*"[155].

46. Second, regarding the technical competence of the executive and legislative branches to assess the convenience of these agreements. In this regard, the Court has warned, "*it is complicated to verify the constitutionality of the various balances, advantages and concessions in each of the commitments formally assumed by the contracting parties*"[156]. For this reason, "*these extra normative elements must be evaluated by the Head of State and by Congress, according to the terms of the Political Constitution*"[157]. They "*determine the reasons of convenience, opportunity and utility that made advisable the adoption of the mentioned instrument*"[158], in whose "*analysis they were able to choose to relinquish some interests over others, with the aim of achieving specific objectives in trade*"[159].

47. Third, regarding the technical nature of international investment law rules and the specialized nature of the tribunals in these matters. In this regard, in judgment C-178/1995, the Court held that "*some normative pieces or sectors and parts of the same international order demand legal interpretations governed over by specialized technical judgments or by the application of technical and scientific languages that shall not be carried out by the Court, as the definition of the content corresponds to other national or international judges,*"[160]. In this sense, in the judgment C-358/1996, the Court considered that "*due to the nature of the differences that may arise because of the investments referred to in the Treaty sub examine, it may be much more convenient and appropriate for a specialized international organization or an arbitral tribunal to resolve them.*

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155 Judgment C-178 of 1995 and C-446 of 1995.
156 Judgment C-031 of 2009.
157 Judgment C-178 of 1995.
158 Judgment C-446 of 2009.
159 Id.
160 Judgment C-178 of 1995.

On the other hand, the Court considers that the promotion of the internationalization of political, economic, social and ecological relations would not be possible without recourse, on certain occasions, to international tribunals".

48. Fourth, as to the impossibility of "*foreseeing difficulties that may arise in the application* [of the treaty], *since an abstract revision escapes that detail*"[161]. In this sense, the Court has affirmed that the constitutionality control "*cannot fall (...) on the effects of the treaty provisions (...) insofar as it implies an abstract and objective judgment, and therefore it lacks elements of judgment related to the direct application of the measures to be implemented*"[162]. In this sense, the Court has stated that the control of constitutionality is *a priori*, as "*the effective correctenss* [of the treaties] *will be verified in practice*"[163]. In any case, it has warned that "a*lthough these execution and technical aspects escape the abstract constitutional control,their defense can be achieved through the exercise of the other constitutional and legal actions recognized in the Constitution*"[164]. This is on the understanding that "*in due course, it will be the different authorities, within the framework of their competencies, which in the development, interpretation, compliance and execution of the same, both in decisions of a general nature and those referring to concrete relations, shall act subject to the Constitution and subject to the respective legal and administrative controls for the protection of its integrity and supremacy, and therefore, as a guarantee of the fundamental rights of all Colombians*"[165].

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161 Judgment C-446 of 2009.
162 Id.
163 Judgment C-031 of 2009.
164 Judgments C-864 de 2006 y C-446 de 2009. '*For the Court, any problem that originates in the application of the Annexes and that implies the violation or threat of such constitutional rights, escapes the scope of the abstract control of constitutionality, for which reason its defense can be obtained through the exercise of the other constitutional actions recognized in the Fundamental Charter*'.
165 Judgment C-864 of 2006.

49. Based on such arguments, since judgment C-178 of 1995, the Court has held that "*specific factual situations marked by elements such as the usefulness, effectiveness or efficiency of the public authorities actions*"[166], practical opportunity and political expediency "*must be analyzed by the Head of State and by the Congress of the Republic*"[167]. Therefore, since then, it has held that "*due to the interpretation of the National Constitution and the legal tradition of our system, the constitutional judge (...)* [must] *exercise a prudent and considered juridical authority before the natural vicissitudes that the application and interpretation* [of the treaty] *will give rise to, so that this type of trial is presided over by a good dose of self-control by the constitutional jurisprudence*"[168].

50. Based on this constitutional doctrine, the Court has generally declared the IIAs signed by the President and approved by the Congress of the Republic to be constitutional[169]. In particular, the BITs ratified by Colombia to date and its respective constitutionality control judgments are:

BIT – Approving Law	Judgment
1. Cuba – Law 245 of 1995	C-379 of 1996
2. United Kingdom – Law 246 of 1995	C-358 of 1996
3. Peru – Law 279 of 1994[170]	C-008 of 1997

166 Judgment C-178 of 1995.
167 Judgment C-178 of 1995. Cfr. Judgment C-446 of 2009.
168 Id.
169 Some exceptions are represented in the rulings prior to Legislative Act 1 of 1999, in which the clause outlawing compensation without expropriation, then permitted by art. 58 of the CP, was declared unconstitutional. See, rulings C-379 of 1996, C-385 of 1996, C-008 of 1997 and C-494 of 1996. At the same time, compared to other international investment law instruments, the Court has ordered the signing of interpretative declarations. In this regard, see Judgment C-184 of 2016.
170 Reformed by means of the "Additional Modifying Protocol to the Agreement on Reciprocal Promotion and Protection of Investments between the Government of the Republic of Colombia and the Government of the Republic of Peru", made in Lima on May 7, 2001 and Law 801 of 2003. Judgment C-961 of 2003.

4. Spain I – Law 437 of 1998	C-494 of 1998
5. Chile – Law 672 of 2001	C-294 of 2002
6. Spain II – Law 1069 of 2006	C-309 of 2007
7. Switzerland – Law 1198 of 2008	C-150 of 2009
8. Peru II – Law 1342 of 2009	C-377 of 2010
9. China – Law 1462 of 2011	C-199 of 2012
10. India – Law 1449 of 2011	C-123 of 2012
11. United Kingdom II – Law 1464 of 2011	C-169 of 2012
12. Japan – Law 1720 of 2014	C-286 of 2015

51. In addition to the BITs, Colombia has ratified multiple treaties having investment chapters[171] and with provisions related to international investment law[172], which, in general

171 FTA with Mexico and Venezuela (Law 172 of 1994, declared constitutional by Judgment C-178 of 1995), FTA with the United States (Law 1143 of 2007, declared constitutional by Judgment C-750 of 2008), FTA with El Salvador, Guatemala and Honduras (Law 1241 of 2008, declared constitutional by Judgment C-446 of 2009) FTA with Canada (Law 1363 of 2009), declared constitutional by Judgment C-608 of 2010), Free Trade Agreement between the Republic of Colombia and the Republic of Chile - Additional Protocol to the Economic Complementation Agreement for the Establishment of an Expanded Economic Area between Colombia and Chile (ACE 24) of December 6, 1993 (Law 1189 of 2008, declared constitutional by Judgment C-031 of 2009), Additional Protocol to the Framework Agreement of the Pacific Alliance (Law 1746 of 2014, declared constitutional by Judgment C-620 of 2015), FTA with Costa Rica (Law 1763 of 2015, declared constitutional by Judgment C-157 of 2016), FTA with Korea (Law 1746 of 2014, declared constitutional by Judgment C-184 of 2016), among other.

172 Convention Establishing the Multilateral Investment Agency (Law 149 of 1995, declared enforceable by Judgment C-203 of 1995), Convention on the Settlement of Investment Disputes between States and Nationals of other States (Law 267 of 1995, declared enforceable by Judgment C-442 of 1996), Protocol amending the Andean Sub regional Integration Agreement (Cartagena Agreement - Law 323 of 1996, declared enforceable by Judgment C-231 of 1997), Economic Complementation Agreement between the Governments of the Republic of Argentina, the Federative Republic of Brazil, the Republic of Paraguay, the Eastern Republic of Uruguay, States Parties to MERCOSUR and the Governments of the Republic of Colombia, the Republic of Ecuador and the Bolivarian Republic of Venezuela, member States of the Andean Community and the First Additional Protocol to the Dispute

terms, have been declared constitutional by the Constitutional Court based on the aforementioned doctrine.

52. The Court warns that a considerable part of the interveners in the *sub judice* case, in the written interventions as in the hearing, dealt with the scope and effects of the constitutionality control in face of the BITs. For illustrative purposes, the Ministry of Foreign Affairs and the MinCIT indicated that "*the analysis of convenience and necessity (...) is the responsibility of the executive branch and it could not be taken into account by the Constitutional Court (...) in carrying out the constitutionality analysis*"[173]; Magdalena Correa requested a change in this precedent, since the analysis of the Court is characterized (a) "*by a maximizing application of judicial self-restraint*"[174], (b) for the "*use of the argument ad absurdum of res judicata a priori*"[175], because (c) "*it starts from excessively general premises that ignore the practical implications that such clauses have (...)* [and] *the contents that the arbitrators of the investment arbitration system give to those specific clauses are also unknown*"[176] and (d) "*it has omitted to delve deeper into the consequences that such statements have with respect to the ordinary exercise of legislative, judicial, administrative, fiscal or disciplinary functions*"[177]; for his part, Rafael Rincón stated that, although the evaluations of convenience correspond to the political organs, "*one way to address these tensions* [would be for] *the Court to be able to do (...) a test of reasonableness and proportionality of what [the] criteria may be to base decisions*"[178].

Settlement System (Law 1000 of 2005, declared enforceable by Judgment C-864 of 2006), among other.

173 CD, min. 10:55 and min. 1:39:00. The MinCIT stated that the National Government entity in charge of leading the negotiations of the IIAs, and the determination of its convenience is a decision that falls under the exclusive orbit of the President of the Republic.

174 Cdno. 2, fl. 450.

175 Cdno. 2, fl. 450.

176 Cdno. 2, fl. 450.

177 Id.

178 CD, min. 1:52:10.

In addition, René Urueña stressed that "*it is not enough for the Court to analyse the text of the different clauses on the basis of a merely textual interpretation, but it must do so in the light of their content as interpreted by the arbitration awards*"[179].

53. In view of the foregoing, the Court must review the basis of the aforementioned constitutional doctrine. As indicated in *para. 43 to 49*, this doctrine is based mainly on four arguments: *(i) the democratic legitimacy of the executive and legislative branches, (ii) the technical competence of both to determine the suitability of treaties, (iii) the specialty of the matter and the specialization of the other judges, mainly international, to determine the scope of their technical contents*, and *(iv) the impossibility of foreseeing the vicissitudes related to the application of the BIT, as well as the existence of judicial and legal mechanisms that, a posteriori, safeguard constitutional supremacy*.

54. With regard to the first point, the Court reaffirms that the Constitution, while providing a complex process for the adoption of international treaties in which the three branches of government participate, defers to the President and the Congress of the Republic, in that order, the competences to "*direct international relations (...) and conclude treaties*", as well as to "*approve or disapprove*" such instruments. These competences are based on the principles of sovereignty, the rule of law and representative democracy, which, as this Court has recognized, are characteristic of the Colombian constitutional system. However, it is also true that, in accordance with the provisions of articles 4 and 241 of the Constitution, the Court is responsible for guaranteeing the guardianship and supremacy of the Constitution in its entirety, which, within the framework of the revision of international treaties, implies that it must "*compare the provisions of the international instrument sub examine and that of its approving law, with the totality of the norms provided in*

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179 Cdno. 2, fl. 621.

the higher order"[180]. including article 226, according to which "*the State shall promote the internationalization of political, economic, social and ecological relations on the basis of equity, reciprocity and national convenience*".

55. At the same time, in reaffirming the democratic legitimacy of the powers of the President and the Congress of the Republic in this matter, the Court cannot overlook "*the specificities of the legislative process in the case of laws approving international treaties*"[181] and, in particular, that the Congress of the Republic "*cannot alter their content by introducing new clauses, since its function is to approve or disapprove the whole treaty, since it is a negotiation of the Government*"[182]; in other words, to "*vote en bloc*" on the approval of that instrument. Thus, the constitutionality control of international treaties and their approving laws under the totality of constitutional norms is not only a device to guarantee constitutional supremacy, but also an opportunity to enrich the process of conclusion of international treaties from the deliberative point of view, as has occurred in the present case, given the multiple and varied arguments presented by the interveners and authorities asked to participate. In such terms, the constitutionality control of international treaties is designed to complement, from the point of view of constitutional supremacy and deliberation, the political decisions of the executive and legislative branches. This, of course,is without prejudice to the constitutional duty of both branches to promote scenarios and processes of participation and deliberation, broad and inclusive, that strengthen the process of formation of the will of the State to subscribe and approve international commitments.

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180 Judgment C-864 of 2006.
181 Judgment C-446 of 2009.
182 Id.

56. With regard to the second point, on one side, it is clear to the Court that the President and the Congress of the Republic are the competent authorities to define and evaluate the technical reasons relating to the negotiation and approval of a BIT, respectively. This is so, inasmuch as this Court has recognized, "*it corresponds to the political attributions of the executive* [to manifest the] *reasons of convenience, opportunity and profit, which make the adoption of the mentioned instrument recommendable*"[183], as well as for Congress to approve it. However, it is also clear that in this, as in other matters[184], the technical nature of the rules does not exempt them from constitutionality control, even under a standard of mere reasonableness. This is so as (i) the rule of law, necessarily, implies the absence of matters exempt from control or areas of judicial immunity and (ii) constitutional supremacy requires that, without exception, the integrity of the Constitution be guaranteed "***in any case*** *of incompatibility between* [this] *and the law or another legal norm"* (art. 4 of the PC).

57. Regarding the third argument, for the Court it is clear that the constitutionality control of BITS is neither the opportunity nor the forum to provide normative content to their clauses, that is, that their "*technical and scientific languages (...) shall not be exhausted in this judicial venue*"[185]. Such normative contents are generally determined by the negotiators, when negotiating and concluding these treaties, or by the specialized judges, domestic or international, when applying them. However, the Court warns that, whenever the contents and normative scope of such clauses -determined by such authorities- have constitutional relevance, it is necessary to take them into account in order

183 Judgment C-178 of 1995.
184 For instance, in economic and public policy matters.
185 Judgment C-178 of 1995.

to evaluate their compatibility with the Political Constitution and, thus, to harmonize *(i)* the abstract character of the constitutionality control with the "*concrete and effective meanings that legal provisions acquire (...) in legal and social practice*"[186], as well as (ii) "*the recognition and protection of the autonomy of judicial officials in the interpretation of the law with the function that corresponds to this Court to guard the integrity and supremacy of the Constitution*"[187]. This, despite the fact that, as recognized by international doctrine, in the case of the international investment arbitral tribunals in charge of implementing IIAs, "*its jurisprudence is not subject to appeal instances, as it is in the* WTO*, and it is not formally coordinated,* [but rather] *a loose body of jurisprudence*"[188].

58. Finally, with respect to the fourth argument, it is clear to the Court that although it could have been argued earlier that "*the Court cannot foresee*"[189] the vicissitudes related to the interpretation and application of BITs, this is currently possible, albeit in a partial manner. In this regard, it should be noted that the Court itself recognized, in judgment C-031 of 2009, that "*in domestic law, the declaration of constitutionality of the international treaty is also based on an aprioristic examination of the contents and scope of the conventional clauses, a judgment that may change as the practical effects of the application of the*

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186 Judgment C-569 of 2004.

187 Id. Cfr. Rene Ureña's intervention. '*It is not enough for the Constitutional Court to analyze the text of the different clauses on the basis of a merely textual or literal interpretation of it, but it must do so in the light of their content as interpreted by the arbitration awards*'. Cdno. 2, fls. 612 to 633.

188 Treaties and Subsequent Practice (OUP, 2013). Second Report for the International Law Comission Study Group on Treaties over Time, Jurisprudence Under Special Regimes Related to Subsequent Agreements and Subsequent Practice, 233. Related to this conclusion, as an illustrative purpose, by the end of 2017 alone, 534 investment arbitrations had taken place. See World Investment Report. United Nations Conference on Trade and Development, p. 11. The Court emphasizes that, in light of Article 38 of the Statute of the International Court of Justice, *'the teachings of the most highly qualified publicists of the various nations' are 'subsidiary means for the determination of rules of law*.

189 Judgment C-446 of 2009.

international instrument are perceived over time, being possible to verify by the constitutional judge the possible existence of these fundamental changes in the circumstances".This is because, at both the global and domestic levels, the practical effects of these international instruments are currently partially perceptible, in view of the various interpretations attributable to the clauses that make them up.

59. Globally, an exponential growth in the number of international investment arbitrations is seen. Today, there are more than 3,000 investment treaties, both BIT and FTA[190]. Only by way of illustration, according to official statistics from the International Center for Settlement of Investment Disputes of the World Bank, while the annual average of cases registered before this center between January 1990 and December 1999 was 4.3 cases, between January 2010 and December 2018 it was 44.5 cases[191]. In other words, during this period, a percentage increase of more than 1,000% is observed in this type of litigation. At the same time, according to the same source, 60% of such cases are matters related to BIT[192] and, judging by the geographic location of the states parties to these lawsuits, Latin America is the region in the world that concentrates the second highest number of these cases (23%), after Eastern Europe and Central Asia, which together account for 26%[193]. This is complemented by what MinCIT highlighted as a current and important "*global discussion on* [the] *desirability* [of BITs], [their] *relative impact and the potentialities they offer for developing and developed countries"*[194].

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190 United Nations Conference on Trade and Development, World Investment Report 2018 (Geneve, United Nations, 2018), 88.

191 World Bank. International Center for Settlement of Investment Disputes. The ICSID Caseload – Statistics (Issue 2019-I), 7.

192 Id. P. 10.

193 Id. P. 11.

194 CD, min. 3:20:40.

60. For its part, at the domestic level, according to the official report provided by the MinCIT in the present case, "*to date there are 20 international investment disputes against Colombia, 9 of which are in a period of direct settlement and 11 have initiated an arbitration process to settle the disputes*"[195]. After presenting the information on each case, the MinCIT warned that all these disputes are based on the IIAs ratified by Colombia and that "*the approximate amount of the claims of the disputes that are in the direct settlement stage is USD$ 4,000 million*"[196], as well as that the claims of the controversies that are before arbitral tribunals is of "*USD$5.525 million*"[197]. Therefore, MinCIT concluded that "*the total amount of the claims in the international investment disputes brought against Colombia is nine thousand five hundred and twenty-five million dollars (USD$9,525 million), without interest*"[198]. This is more than 10 % of the approved national budget for 2019[199]. In turn, as reported by the MinCIT, at its hundredth session, the Superior Council of Foreign Trade decided, on these international instruments, *"(i) to maintain and honor the network of treaties it has, (ii) to stop the signing and ratification of new treaties and (iii) to subject the possible negotiation and signing of new treaties to stricter procedural rules in the sense of ensuring and strengthening the discussion of their convenience"*[200], to which the MinCIT explicitly *"invited the Constitutional Court to accompany this process (...) of clarification of international investment law"*[201].

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195 Cdno. 2, fls. 565 et seq.
196 Id.
197 Id.
198 Id.
199 Equivalent to US$ 84.5 billion.
200 CD, min. 3:24:55. The MinCIT emphasized that '*it has tried, after the decisions of the Superior Council of Foreign Trade in its hundredth session, to try to address all the discussions on interpretation, the regulatory cooling effect, on the most-favored nation clause, on the validity and definition of investor in a progressive and methodical way that does not send negative signals*'.
201 CD, min. 4:19:15.

61. Finally, the Court reiterates that legal, judicial, administrative and control mechanisms must guarantee the integrity and supremacy of the Constitution and the protection of fundamental rights; therefore, national authorities can control the "*execution and technical aspects*" of BITS[202]. However, the Court also warns precisely that such measures adopted after the ratification of international investment treaties by judicial, administrative and control bodies have given rise to all the international claims referred to above and are alleged to be "*internationally wrongful acts*"[203]. This is because it is alleged that (*i) "they are attributable to the State under international law"* and *(ii) "they constitute a breach of an*

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202 Judgment C-864 of 2006. C-031 of 2009 and C-446 of 2009. *'Those strictly technical and operative elements resulting from the application of a free trade agreement can be resolved through the exercise of the respective judicial actions* (…) *Finally, even though the contents of the Annexes, previously described, do not generate prima facie any violation of the Constitution, since they correspond to essentially technical and operative aspects that allow the application of the provisions foreseen in the Complementary Agreement signed, this does not mean that some specific matters may arouse controversy in their execution, especially in relation to the protection of fundamental and collective rights. For the Court, any problem that originates in the application of the Annexes and that implies the violation or threat of such constitutional rights, escapes the scope of the abstract control of constitutionality, so its defense can be obtained through the exercise of the other constitutional actions recognized in the Fundamental Charter'.*

203 United Nations. General Assembly. A/RES/56/83. Art. 2: "*Elements of an internationally wrongful act of a State. There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State*". Art. 4: "*Conduct of organs of a State. 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or a territorial unit of the State*". CD, min. 1:21:50. According to José Antonio Rivas. "*The 2011 articles on the international responsability of the State of the International Law Commission codify rules of customary international law. These binds all States. And to these refer articles 15 and 17 of the treaty sub examine. Article 2: "two elements for it to be considered as an internationally wrongful act: (i) the conduct must be attributable to the State according to international law and (ii) the conduct must constitute a breach of an international obligation of the State. If these two elements are present, the State would be internationally responsible".*

international obligation of the State". Moreover, for the Court it is clear that, at the international level, in accordance with the principle *pacta sunt servanda*, established in Article 26 of the Vienna Convention on the Law of Treaties, "*every treaty in force is binding upon the parties to it and must be performed by them in good faith. A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty* "[204].

62. The following table demonstrates the above[205]:

Ongoing investment arbitrations against Colombia		
Case	**Facts or decisions that led to the process**	**Treaty clauses invoked by the claimant**
Glencore International AG and C.I Prodeco S.A.	Ruling of fiscal accountability of the Comptroller General of the Nation	FET (art. 4) Umbrella clause (art. 10) *BIT with Switzerland*
América Móvil S. AB de C.V	Mobile telephone concession contract Judgment C-553 of 2013[206]	EI (art. 17) *FTA with UU.EE*
Eco Oro Minerals Corp. Case	Decision 2090 of 2014 of the Ministry of the Environment[207]	FET (art. 805) EI (art. 811) Dispute Settlement

204 Judgment C-750 of 2008. '*With the exception of the provisions of clause 46 of the Vienna Convention, which regulates the nullity of treaties*'. Cfr. Judgment C-446 of 2009.

205 This table was prepared on the basis of information provided by several interveners, including NALDS in its report filed in the framework of the public hearing held in the present case, and information published by the International Center for Settlement of Investment Disputes (Cdno. 2, fls. 465 et seq.). Other interveners also provided this information, such as Enrique Prieto (Cdno. 2, fl. 441 et seq.) and Eduardo Silva Romero (Cdno. 2, fl. 359 et seq.). Cf. https://icsid.worldbank.org.

206 Cdno. 2, fls. 465 et seq. *'(...) which determined that Laws 422 of 1998 and 1341 of 2009 were not of retroactive application and that the reversion of concessions, in accordance with contracts entered into prior to this date, included assets subject to them'*.

207 Cd no. 2, fls. 465 et seq. '*by means of which the Santurban Paramo is delimited*'.

	Judgment C-035 of 2016[208]	Clause (art. 823) *FTA with Canadá*
Gas Natural SDG S.A. and Gas Natural Fenosa Electricidad Colombia S.L	Failure to exercise control over the the non-payment of the users (General Prosecutor's Office and Judicial Branch) Tutela rulings that order reconnection or prevent power shutdown to subjects of special constitutional protection (Constitutional Court) Superintendency of Public Services intervention Among others.	FET (art. 2) PSP (art. 2) NT and MFN (art. 3) *BIT with Spain*
Telefónica S.A.	Mobile telephone concession contract Judgment C-553 of 2013[209]	FET EI MFN *BIT with Spain*
Astrida Benita Carrizosa	Measures of intervention by the Banking Superintendency Judgment SU447 of 1998[210]	Multiple clauses *FTA with UU.EE* *BIT with India* *BIT with Switzerland*
Alberto Carrizosa Gelzis et al	Measures of intervention by the Banking Superintendency Judgment SU447 of 1998[211]	NT y MFN (art. 12) FET (art. 3) EI (art. 6) *FTA with UU.EE* *BIT with India* *BIT with Suiza*

208 Cd no. 2, fls. 465 et seq. *'which had the effect of prohibiting mining activity in the paramos and ordered the suspension of all mining operations active in that area'.*

209 Cd no. 2, fls. 465 et seq.*'(...) which determined that Laws 422 of 1998 and 1341 of 2009 were not of retroactive application and that the reversion of concessions under contracts entered into prior to this date included assets subject to those'*

210 Cdno. 2, fls. 465 et seq. "*en la que esta Corporación concluyó que la demandante no tenía derecho a una indemnización*".

211 Id.

Red Eagle Exploration	Judgment C-035 of 2016[212]	FET (art. 805) EI (art. 811) Dispute settlement clause (art. 823) *FTA with Canada*
Galway Gold Inc.	Judgment C-035 of 2016[213]	FET (art. 805) EI (art. 811) Dispute settlement clause (art. 823) *FTA with Canada*
Gran Colombia Gold Corp.	Lack of protection against *"demonstrations and invasions by illegal miners (…)"*[214] Judgment SU133 of 2017[215]	FET (art. 805) EI (art. 811) Dispute settlement clause (art. 823) *FTA with Canada*
Cosigo Resources Ltda et al	Decision 2079 of 2009 of the Ministry of the Environment[216]	EI (art. 811) FET (art. 805) NT y MFN (arts. 803 and 804) *FTA with UU.EE.*

63. Thus, the Court finds that the exercise of legal, judicial, administrative and control mechanisms, while being effective for the protection of constitutional supremacy and fundamental rights in a specific case, have the potential to compromise the international responsibility of the Colombian State in the light of investment treaties and, in this

212 Cdno. 2, fls. 465 et seq. "*that had as an effect the prohibition of the mining activity in the paramos and established the suspensión of all the active mining operations in that zone*".

213 Id.

214 Cdno. 2, fls. 465 et seq.

215 Cdno. 2, fls. 465 et seq. '*lack of decision on invaders claiming to be ancestral miners*'.

216 Cdno. 2, fls. 465 et seq. '*which ordered the creation of the Yaigojé Apaporis National Park and the suspension of all mining activities within the territory of the park, including a mining concession over which they claim to have rights*'.

way, to seriously affect constitutional principles such as sovereignty (art. 9 of the PC) and fiscal sustainability (art. 334 of the PC), among others, as well as the exercise of the competences provided by the Political Constitution for state organs, including, as shown in the above table, those of the Constitutional Court.

64. Therefore, to determine the scope of the constitutionality control in the present case, (i) the Court must harmonize its function as guardian of the supremacy and integrity of the Constitution with the particular deference that, for democratic and technical reasons, Articles 189.2 and 150.16 ibid. grant the President of the Republic, to direct international relations and conclude treaties, and the Congress of the Republic, to approve or dismiss these instruments; ii) without attempting to define the content and technical scope of the clauses included in the BIT *sub examine*, the Court must take into account the contents and normative scope of such clauses determined by the treaty itself and by judges specialized in this matter, provided that they have constitutional relevance for purposes of determining their compatibility with the Political Constitution, and finally, *(iii)* given the absolute *res judicata* of this decision, as well as the preventive function of constitutionality control in these cases, the Court must protect constitutional supremacy through effective constitutionality control, as well as prevent and minimize constitutional risks arising from the Colombian State's commitment to international responsibility as a consequence of these instruments. In particular, through its control, the Court must prevent *(i)* the Colombian State from assuming unconstitutional international commitments or *(ii)* that order or permit state acts, that in light of the Political Constitution, give rise to internationally wrongful acts.

65. For this reason, the scope of the material and integral control of constitutionality that the Court will exercise in the case *sub judice* will be carried out by means of a reasonable-

ness judgment[217] that implies verifying (i) that the global purposes and those of each of the clauses of the treaty are legitimate in light of the Political Constitution and (ii) that the treaty as a whole, as well as the measures individually provided for in that instrument, are suitable, that is to say, that there are elements of judgment that allow the conclusion that they will contribute to the attainment of their purposes[218]. This judgment of reasonableness is based on the following premises: (a) the constitutionality control implies "*comparing the provisions of the international instrument sub examine and its approving law, with the totality of the norms provided for in the higher order*"[219], including, of course, Article 226 of the Constitution; (b) the Political Constitution mainly defers to the executive and legislative branches the competence to evaluate the "*convenience, timeliness, usefulness or efficiency*"[220] of international treaties; therefore, in exercising their competences, they must provide reasons and empirical evidence, concrete and sufficient, that justifies the conclusion of the treaty and; (c) the Court must examine the content of the treaty and safeguard "*the fundamental rights, public order* [and] *the full distribution of competences and powers within our rule of law*"[221], as well as "*the mandates, values and principles that ensure the validity of the social State*"[222].

66. *Effects of the constitutionality control*. In settled jurisprudence, the Court has pointed out that rulings on the constitutionality of international treaties and their approving laws have the effect of absolute res judicata (para. 39). This means that, in principle, "*the Court could not rule again*

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217 Judgment C-031 of 2009. *'(...) it should be specified that, in the prior control of constitutionality over free trade agreements, the Court must analyze whether the norms that restrict fundamental rights pass a reasonability test*'.

218 Judgments C-031 and C-446, both from 2009.

219 Judgment C-864 of 2006.

220 Judgment C-446 of 2009.

221 Judgment C-178 of 1996 and C-864 of 2006.

222 Judgment C-864 of 2006.

on this matter"[223], at least within the framework of the abstract control of constitutionality. That said, the exercise of the control of constitutionality described in the preceding paragraphs may result in the Constitutional Court declaring the treaty and its approving law constitutional, meaning that the President may ratify the international instrument. After that, the commitments concluded would be fully enforceable both internationally and domestically. In this case, the President could also abstain from ratifying it, "*even if it had been approved by Congress and even analyzed by the Court, given that constitutionally it is the Head of State who directs international relations (Art. 189-2 C.P.)*"[224].

67. The exercise of constitutionality control in these cases could also result in a declaration of the unconstitutionality of the law or treaty. In this case, "*the absence of constitutional approval prevents the Head of State from taking action to improve the international instrument*"[225]. since the declaration of enforceability is a *conditio sine qua non* for the ratification of the treaty. In cases of incompatibility of any of the clauses of a multilateral treaty, provided that they are not proscribed by the same instrument and do not affect its object and purposes[226], "*reservations*

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223 Judgment C-228 of 2015 and C-010 of 2018.

224 Judgment C-863 of 2006 and C-172 of 2006. Cfr. Judgment C-170 of 1995.

225 Judgment C-446 of 2009.

226 Article 19 of the 1969 Convention on the Law of Treaties states that: "*A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: (a) The reservation is prohibited by the treaty; b) The treaty provides that only specified reservations can be made, which do not include the reservation in question ; (...)*". In practice, the conventional solutions are diverse: certain treaties prohibit any kind of reservations (such as the 1983 Montego Bay Convention on the Law of the Sea or the New York and Rio de Janeiro Conventions on Biological Diversity and Climate Change); others authorize reservations only on certain dispositions (for example Article 42 of the 1952 Refugee Convention) and some exclude certain cathegories of reservations (such as Article 64 of the European Convention on Human Rights that prohibits reservations of vague nature). In a general manner, a reservation expressly permitted by the final dispositions of the treaty shall

may be made"[227]. In this sense, article 217 of Law 5 of 1992 recognizes that "*proposals for reservations may only be formulated to treaties and conventions that provide for this possibility or whose content admits it*". Despite what has been held in some previous decisions[228], the Court emphasizes that ordering reservations is not an adequate remedy in relation to bilateral agreements[229]. This, given that, although reservations to this type of treaty are not prohibited by the Vienna Convention on the Law of Treaties, they would imply "*disagreement*"[230] with what has been agreed, and would therefore "*lose their character as reservations and become requests for renegotiation*"[231]. In this sense, the doctrine points

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not be approved or accepted by the other States (Article 20, paragraph 1, of the 1969 and 1986 Vienna Conventions).

227 The Vienna Convention on the Law of Treaties defines the reservation in article 1-D, as '*means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State*'.

228 For instance, judgment C-012 of 2001 and C-154 of 2005. However, some decisions have recognized the non-viability of reservations in bilateral treaties. For instance, judgment C-819 of 2012 '*It should be remembered that, as the jurisprudence of this Corporation has stated, even though bilateral treaties do not admit reservations because this would constitute a disagreement, 'it is possible for the parties, when perfecting it, to issue interpretative declarations with respect to some of its norms*'. See also judgment C-160 of 2000 and C-780 of 2004.

229 See the clarification of the vote of judges Gloria Stella Ortiz and Alejandro Linares to judgment C-184 of 2016.

230 Judgment C-819 of 2012.

231 The Oxford Guide to Treaties. Edited by Duncan B. Hollies. Treaty Formation. Eduard T Swaine, 278 (OUP, 2014. Guide adopted by the International Law Commission at its sixty-third (63rd) session, in 2011 and submitted to the United Nations General Assembly in the report on the work of the session (A/66/10). Paragraph 1.6.1, entitled *'reservation'* to bilateral treaties, states that '*an unilateral statement, however phrased or named, formulated by a State or an international organization after the signature but before the entry into force of a bilateral treaty, by which that State or that organization purports to obtain from the other party a modification of the provisions of the treaty to which the State or international organization makes the expression of its final consent to be bound by the treaty, does not constitute a reservation within the meaning of the present Guide to Practice*'.

out that reservations in bilateral treaties do not have "*any practical sense or any genuine function, because they would in fact amount to a reopening of the negotiations that have just ended*"[232].

68. Finally, the Court may note that a particular clause admits several interpretations, at least one of which is incompatible with the Political Constitution. In this case, the appropriate remedy is a declaration of conditional enforceability of the treaty or of one of its articles, followed by a warning to the President of the Republic that if, in exercising its constitutional competence to direct international relations, it decides to ratify the treaty, it must take the necessary steps to encourage the adoption of a joint interpretative declaration with the representative of the other Contracting Party(ies) with respect to the conditions laid down by the Court in relation to the treaty or its articles[233]. This is, of course, within the framework of article 31 of the Vienna Convention on the Law of Treaties.

69. These joint interpretative declarations are intended "*to specify or clarify the meaning or scope of a treaty or some of its clauses*"[234]. Although not expressly regulated by the Vienna Convention on the Law of Treaties, its Article 31 provides that for the purpose of the interpretation of a treaty, the following shall be taken into account: "*(a) any agreement relating to the treaty which was concluded between all the parties on the occasion of the conclusion of the treaty*" and "*(b) any instrument formulated by one or more parties due to the conclusion of the*

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232 Introduction to the Law of Treaties. Reuter, Paul. Mexico, Fondo de Cultura Económica, 1999, 98.

233 The Court has ordered joint interpretative statements in multiple judgments. Judgments C-379 of 1996, C-358 of 1996, C-088 of 1997, C-494 of 1998, C-794 of 1998, C-160 of 2000, C-241 of 2004, C-779 of 2004, C-279 of 2006, C-923 of 2007, C-931 of 2007, C-121 of 2008, C-378 of 2009, C-638 of 2009, C-538 of 2010, C-915 of 2010, C-125 of 2011, C-196 of 2012, C-819 of 12, C-350 of 2013, C-677 of 2013, C-334 of 2014.

234 Guide to Practice on Reservations to Treaties. International Law Comision (ILC, 2011). No. 4, 1.2.

treaty and accepted by the others as an instrument relating to the treaty". At the same time, international doctrine recognizes that these interpretations have effects on the interpretation of treaties[235] and some arbitral tribunals have recognized their effects vis-à-vis IIAs[236]. However, with regard to bilateral treaties, the Court emphasizes that, in order to be fully effective, interpretative declarations must be joint, that is, signed by both Contracting Parties, in view of the bilateral nature of this type of instrument[237]. In this sense, the Court reiterates that interpretative declarations, "*to the extent that they are admitted by the other party, constitute general rules of interpretation of the international instrument*"[238] and, therefore, are suitable and effective judicial remedies to exclude unconstitutional interpretations of the agreed clauses.

70. The Court notes that joint interpretative declarations are part of the international practice of the Colombian State. In this regard, the MinCIT clarified that "*Colombia has already signed joint interpretative declarations with countries*

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235 Modern Treaty Law and Practice (2nd dn CUP, Cambridge, 2007), 125. Treaty Intepretation (OUP, 2009) R. Gardiner. 94-9. The Legal Effect of Intepretative Declarations. DM McRae (1978) BYBIL, 156.

236 For instance, *Methanex Corp v US*, UNCITRAL Case, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, *"The parties of a treaty often foresee many of the difficulties of interpretation likely to arise in its intepretation, and in the treaty itself may define certain of the terms used. Or they may in some other way and before, during or after the conclusión of the treaty, agree upon the intepration of a term (…) by a more formal procedure, as by an intepretative declararion or protocol or a suplementary treaty. Such authentic intepretations given by the parties override general rules of intepretation"*.

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238 Judgment C-160 of 2000.

such as Canada, India and France"[239], among others, and the Chancellery argued that in international investment law "*interpretative notes have acquired a particular form, since it has become common for unilateral character to be renounced and, on the contrary, to be carried out jointly*"[240], for the purposes of "*specifying or clarifying the meaning or scope of an expression, without this implying that the treaty is being amended or modified*"[241]. Moreover, it noted that "*declarations become undeniable in a context where arbitral tribunals are free to apply different standards defined in case law to interpret the clauses of international investment treaties*" [242]. Otherwise, the Court acknowledges that MinCIT itself held that, in the *sub judice* case, the Colombian government "*is perfectly willing, if necessary, (...) to advance clarifying notes with the French government*"[243].

71. In short, the constitutionality control ruling of international treaties and their approving laws has the effect of absolute res judicata. The declaration of constitutionality implies that the President of the Republic may ratify the international instrument; and, in the case of the contrary, the declaration of unconstitutionality prevents the President from ratifying it. Lastly, in the case of bilateral treaties, whenever the Court notes that a particular clause admits several interpretations, at least one of which is contrary to the Constitution, it shall declare it conditionally enforceable and shall warn the Presidency of the Republic that if, in exercising its constitutional power to direct international relations, it decides to ratify this treaty, within the framework of Article 31 of the Vienna Convention on the Law of Treaties, it shall take the necessary steps to promote the adoption of a joint interpretative declaration with the

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239 CD, min. 3:27:05.
240 CD, min. 13:00:00.
241 CD, min. 12:45:00.
242 Id.
243 Id.

representative of the other Contracting Party regarding the conditions established by the Court in relation to the treaty or its articles.

72. Finally, the Court clarifies that the scope and effects of the constitutionality control described above apply to the case *sub judice* and, cannot, under any circumstances, affect decisions related to international investment treaties already declared enforceable and ratified by Colombia. This is for three reasons. First, the effects of absolute res judicata of all decisions of the Court on international treaties and their approving laws, which, as noted above, prevent the Court from ruling again on the same instruments. Second, the *ex nunc* effects of abstract constitutionality control rulings[244], which generally prevent consolidated situations from being altered and legal security from being affected. Third, the possible legal, political and economic consequences that the effects of an eventual *ex post* review of such treaties could have for the Colombian State at the international level. This does not prevent, of course, the recognition that this decision has binding force as a precedent in relation to the constitutionality control of future BITS.

73. Based on the above, the Court will review the compatibility of the *sub examine* treaty and the Law 1840 of 2017 with the constitutional norm.

2. General compatibility of the sub examine treaty with the Political Constitution

74. The international treaty *sub examine* is entitled *Agreement between the Government of the Republic of Colombia and the Government of the French Republic on the Reciprocal Promotion and Protection of Investments*. This instrument consists of its preamble and 18 articles. In addition, at the time of signatu-

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244 Law 270 of 1996. Art. 45.

re, the Contracting Parties agreed on a protocol in relation to article 1 of the treaty. In turn, on 23 October 2017, the Contracting Parties signed a joint interpretative declaration to determine the scope of some of the expressions contained in Article 16 of the treaty.

75. In this section, the Court will review the constitutionality of the overall purposes of the treaty, as set out in its preamble in the following terms:

> "The Government of the Republic of Colombia and the Government of the French Republic, hereinafter referred to as the Contracting Parties,
>
> Desiring to strengthen economic cooperation between the two states and to create favorable conditions for French investments in Colombia and Colombian investments in France, without affecting the regulatory power of each Contracting Party and in order to protect legitimate public policy objectives,
>
> Convinced that the reciprocal promotion and protection of these investments will succeed in stimulating the transfer of capital and technology between the two countries in the interest of their economic expansion,
>
> Have agreed the following"

(i) The Opinion of the Procuradora

76. In his view, the preamble is compatible with the constitutional principles of good faith, reciprocity and equity. This, as it seeks to *(i)* strengthen economic cooperation between the two states, *(ii)* create favourable conditions for investment, *(iii)* preserve the regulatory power of the Contracting Parties and *(iv)* encourage the transfer of capital and technology[245].

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245 Cdno. 2, fl. 546.

(ii) Interventions

77. Ten interveners expressed their views regarding the aims of this instrument and the reasons for its celebration. Six explained the reasons justifying it and four questioned such justifications[246].

78. The Chancellery stated that "*in recent years a strategy has been developed for the internationalization of the Colombian economy* [and], *within it, one of the key points is the negotiation and subscription of international investment agreements*"[247]. These agreements "*seek to establish a fair and transparent legal framework that promotes investment through the creation of an environment that protects investors, their investment and related flows*"[248]. It stressed that the *sub examine* treaty (i) forms an integral part of this strategy with the European Union, in particular with France, which it described as "*a highly important trading partner for Colombia*" and (ii) "*will become an important tool for stimulating the flow of investment between Colombia and France and will allow the generation of the advantages of foreign capital inflows, such as technological innovation, knowledge transfer, job creation and the country's economic and social development*"[249]. In addition, it clarified that "*the accumulated flow of foreign direct investment (FDI) from the European Union into Colombia for the period from 2004 to 2014, reached US$ 31,673 million (...) countries of the European Union that have the largest accumulated amounts of FDI in Colombia for the period 2004-2014, France ranks third, with an accumulated investment in the national territory of US $ 1,996.5 million*"[250].

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246 José Manuel Álvarez, UExternado, Magdalena Correa and René Urueña.
247 CD, min. 6:23.
248 CD, min. 6:40.
249 CD, min. 7:30.
250 Cdno. 1, fls. 145 to 159.

79. The Ambassador explained that this agreement is "*fundamental in our bilateral economic relationship*"[251], based on four reasons. First, "*while France's economic presence is important and it is growing, it still has a significant margin for increase*"[252]. The total French investment in Colombia in 2017 was "*3.05 billion dollars with more than 220 French companies*"[253]. However, the amount of French investments in Colombia is lower than comparable countries[254]. Indeed, "*on average, since 2010, France has invested $240 million per year in Colombia, compared to $1.3 billion from Spain, $1.1 billion from the United Kingdom and $360 million from the Netherlands*". In addition, it stressed that "*France is the number one foreign employer in the country*"[255], its investments are stable and socially responsable, "*with strict rules of ethics and respect for laws, in fact, in recent years none have been involved in corruption scandals and illegal practices*"[256]. This argument was reiterated by Alexander Toulemonde, who stated that "*at this moment Colombian investments in France are far below what they should be in the future*"[257], as well as the fact that French investors "*generate the most jobs in the country (...) more than 100,000 employees work in French companies*"[258].

80. Second, the Ambassador insisted that this agreement is reciprocal. Reciprocity in investment flows is "*one of the major objectives of the Agreement*" for France[259]. Although "*for the moment, the presence of Colombian companies in France is reduced,* [this country] *wants to be part of the priority destinations*

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251 CD, min. 17:30
252 CD, min. 17:55.
253 CD, min. 18:00.
254 CD, min. 18:45
255 CD, min. 18:20.
256 CD, min. 18:37.
257 CD, min. 31:30.
258 CD, min. 31:45.
259 CD, min. 22:35.

for them"[260], and affirmed that, based on this Agreement, Colombian companies will feel more secure when investing there. He warned that "*it is true that in the first instance the Agreement will benefit French investors more (...)* [and] *in the same way, the one who will benefit more from an increased investment flow in the first instance will be Colombia*"[261], and therefore described it as a "*win-win and balanced agreement that will benefit both parties*" [262].

81. Third, it noted that this Agreement (i) "*is the first and only of its kind signed by France since the entry into force of the Treaty of Lisbon*"[263], (ii) includes classic provisions on investment protection and dispute settlement[264], (iii) reflects certain recent developments in this type of agreement, for example, "*the legal guarantees offered to investors are very precisely limited in order to avoid excessive legal remedies*"[265], (iv) further ensures a fair balance between the rights of investors and the powers of states "*to regulate in the cultural, social and environmental sectors*"[266] and, in addition, (iv) "*promotes respect for international standards of corporate social responsibility and clearly and precisely demarcates the terms of dispute resolution mechanisms*"[267].

82. Finally, this intervener argued that this Agreement is an instrument to increase French investment in Colombia, given that "*many companies at the time are hesitant to invest in Colombia or to expand their activities at an important level*"[268]. This is due to *(i)* negative experiences that some French companies had in other Latin American countries, *(ii)* the

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260 CD, min. 22:50.
261 CD, min. 23:25.
262 CD, min. 23:45.
263 CD, min. 24:25.
264 CD, min. 23:15.
265 CD, min. 23:39.
266 CD, min. 26:05.
267 CD, min. 26:50.
268 CD, min. 19:32.

Colombian context, inasmuch as "*some French companies that already have investment in Colombia face procedures that seem complicated, slow or not very transparent*"[269], and *(iii)* because the investments are "*long-term and therefore of long-term risk*"[270]. He warned, therefore, that this Agreement is "*a strong and stimulating signal for French investors on the legal framework favorable to the development of their activities in Colombia*".

83. Alejandra Vargas Saldarriaga pointed out that the reasons that justified this Agreement are "(*i) to attract French foreign investment, (ii) to improve the investment climate and (...) (iii) to avoid discrimination on the basis of nationality, to protect private property and to respect due process*"[271]. In her view, these goals are compatible with Conpes* documents 3135 of 2001, 3197 of 2002, 3684 of 2010 and 3771 of 2013, as well as with the national development plans of the last 20 years and the minutes of the 31st session of 27 March 2007 and the 86th session of 27 October 2009 of the High Council for Foreign Trade. She further argued that, after numerous foreign trade studies, the conclusion was that "*it was necessary to negotiate with France, which* [this country] *was ranked 7th in the ranking and the previous ones had already been exhausted by the time the negotiations begin in 2008*"[272]. Finally, she stressed that "*the conclusion and implementation of agreements has a positive and empirically significant influence on foreign direct investment between 20% and 40% and* [that] *(...)* BITS *promote the flow of investment from developed to developing countries*"[273].

84. In addition, in her written submission, she highlighted that "*the technical studies and projections on which the*

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269 CD, min. 19:55.
270 CD, min. 21:03.
271 CD, min. 33.20.
* Translator's note: The National Council of Economic and Social Policy.
272 CD, min. 38.35.
273 CD, min. 1:06:34.

conclusion of this treaty was based were (i) the Fedesarrollo document entitled Impact of Foreign Investment in Colombia: Current Situation and Prospects for 2007, which analyzes the impact of FDI on the following fronts: balance of payments, international trade, company performance, technological change and productivity [and whose conclusion is that] *FDI has had a positive effect on the Colombian economy* [which] *is reflected in a contribution of around one percentage point of average annual growth during the period 2002-2006; (ii) UNCTAD's studies on FDI in the world, especially the Global Investment Report and (iii) the documents of the Higher Council of Foreign Trade"*[274].

85. Finally, she explained that the negotiating agenda of this treaty adhered to the following criteria: "*1. Installed foreign investment. 2. Recent investment flows. 3. Colombian investment abroad. 4. Highly capital-exporting countries. 5. Countries with greater potential to invest in technology. 6. Countries that already have IIAs with Colombia. 7. Countries that have shown interest in IIA negotiations. 8. Countries that have shown interest in TDA negotiations*[275]. According to MinCIT's internal working documents, it was concluded that, "*between 2004 and 2013, France positioned itself as the fourth largest European investor in Colombia by investing US$ 1.776 billion, capital that has arrived through 120 companies from that country. In 2013 alone, Colombia received US$ 543.3 million in investment from France. Most of this investment went to the industrial sector (69%) and the financial sector (21%). Another part went to the real estate sector that made up 7% of the total and other sectors took up the remaining 3%"*[276]. At the same time, she highlighted that it was possible to determine that "*within the investments of France in Colombia in the last year, the Casino Group's investment in the supermarket sector (Éxito),*

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274 Cdno. 2, fl. 607.
275 Cdno. 2, fl. 607.
276 Cdno. 2, fl. 607.

the merger of Andina Acquisition Corporation with Tecnoglass, the joint venture near to US$ 350 million between the AXA Group and Colpatria, Schneider in the energy sector, Teleperformance in the BPO sector, L´Oreal in cosmetics and Accor in the hotel industry stand out"[277].

86. Nicolás Palau, as Director of Foreign Investment, Services and Intellectual Property of the MinCIT, argued that, since 1991, Colombia has initiated a process of internationalization of the economy and, in this context, FDI "*is an engine for the development of the Colombian economy*"[278]. In his opinion, one of the instruments for this purpose are the IIAs. These treaties offer "*reinforced standards of protection for the protection of FDI in the host country*"[279]. He argued that "*65% of FDI is protected by some type of BIT, according to balance of payments flows*"[280] and that France ranks 7th out of 60 countries that should have a BIT with Colombia. Finally, he pointed out that, especially in the 2000s, several IIAs, BITS or FTAs have been signed[281], as well as that Colombia has 15 bilateral investment agreements, while other countries have more than 50, such as Germany and France, or 40, such as Argentina, Ecuador and Chile[282]. In his written submission, he highlighted that France is one of the main foreign investors in the world in terms of FDI accumulation, and that it ranked fifth in 2017, according to the World Investment Report 2018 (WIR18), prepared by UNCTAD. In addition, France is one of the countries that has exported more FDI to Colombia in recent years, with a cumulative investment from 1994 to the third quarter of 2018 more than US$ 3 billion[283].

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277 Cdno. 2, fl. 607.
278 CD, min. 3:14:57.
279 CD, min. 3:15:37.
280 CD, min. 3:18:35.
281 CD, min. 3:16:10.
282 CD, min. 3:18:30
283 Cdno. 2, fls. 378 to 426.

87. Rafael Rincón stressed that this treaty *(i)* is bilateral in nature, and therefore also protects Colombian investment in France, *(ii)* contains exceptions that allow the State to have regulatory power to safeguard its fundamental interests, and *(iii)* does not contain essential variations from other treaties signed by Colombia [284].

88. José Manuel Álvarez expressed his disagreement with "*the justification for the conclusion of these treaties and the economic benefits that some say exist*"[285] and "*with the affirmation that this promotes investment*"[286]. He pointed out that the National Government "*has promoted the idea before Congress and the Constitutional Court that the signing of BITs attracts investment, when nowadays it has already been proven that this is not the case*". Additionally, he stressed that the government "*exalts the potential benefits of FDI, but unfortunately omits to the Congress and the Constitutional Court, in the statements of grounds and defense of constitutionality, that the signing of these treaties can also have high costs and risks for the country*"[287]. In the same vein, René Urueña pointed out that "*an important amount of specialized literature doubts that BITs attract foreign investment; other experts differ from this opinion.* [Therefore], *it is not possible to assume the investment incentive effect of this mechanism. The government needs to go further and explain the need for this mechanism*"[288]..

89. UExternado stressed that "*the effects of this national policy of opening up to foreign investment are primarily negative. (...) Consequences that could have been avoided at the time of the constitutionality review (...) having performed a technical and precise analysis, taking into account past experiences in the implementation of these agreements in Colombia*". In the same

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284 Cdno. 2, fls. 576 to 587.
285 CD, min. 1:54:45.
286 CD, min. 1:54:51.
287 Cdno. 1, fls. 160 to 187.
288 CD, min. 4:56:17.

sense, they stressed that *"(...) in practice, the implementation of this type of agreement ends up leading to the promotion, support and strengthening of unconstitutional acts in order to guarantee and respond to the private interests of investors, thus threatening not only the integrity of our international legal system but the very stability of the State"*.

90. Magdalena Correa held that the Court should declare the treaty *sub examine* unconstitutional[289]. This is because "*the enormously differentiated treatment in favor of investors is not sufficiently justified and, on the contrary, there are serious reservations about the constitutionality of the legal consequences*" of the treaty[290]. She pointed out that "*the unequal treatment that is configured in favor of investors violates the principle of formal and material equality*"[291]. Formal equality, "*implies a violation of equality in the market (...) between foreign and domestic investors (...) and affects the principle of free competition*"[292]. For instance, with indirect expropriation "*property is no longer protected, but beyond, legitimate expectations and mere expectations are protected*"[293]. With this, the "*intervention of the state in the economy becomes per se, to the extent that it affects the economic interests of investors, an unlawful damage (...) deserving compensation*"[294]. In addition, "*with regard to access to justice, the options for conflict resolution pose a differentiated treatment in favor of foreign investors over domestic ones,* [for example] *the payment of indemnities is not subject to the standard of fiscal sustainability*"[295].

91. In her concept, this treaty also violates the principle of material equality. In this regard, she pointed out that the

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289 CD, min. 44:25.
290 CD, min. 44:40.
291 CD, min. 50:30.
292 CD, min. 50:50.
293 CD, min. 52:05.
294 CD, min. 52:19.
295 CD, min. 52:30.

treaty makes "*the investor a sort of subject of special protection*", thus ignoring article 13 of the Constitution. Therefore, "*affirmative actions that are designed in favor of investors modify the principle of the prevalence of the general interest into the prevalence of the particular interest of the investor*"[296]. By applying an equality test, she concluded that "*it is not evident that these incentives to foreign investment benefit the State and its economy*"[297]. Finally, she stressed that the privileges granted to the investor are adequate for the protection of the investment, but not to promote economic cooperation.

Relevant arguments on the BIT justification	
Justifications	The BIT: 1. Promotes FDI (Foreign Direct Investment) 2. Preserves the regulatory power of the Contracting Parties 3. Stimulates the transfer of capital and technology 4. Creates a fair and transparent legal framework for FDI of France in Colombia 5. Was negotiated according to the foreign policy strategy defined by the Conpes and the Executive Council of Foreign Trade 6. Is celebrated with France, which "*is an important strategic partner for Colombia,*" due to the following reasons: *(i)* It occupies the 7th place among 60 prioritized countries to have a BIT with Colombia *(ii)* Between 2004 and 2013, the investment of French companies in Colombia was USD $ 1,996.5 million. And, in 2013, it was USD $ 543.3 million

296 CD, min. 54:20.
297 CD, min. 55:40.

	(iii) Nowadays, French enterprises are the main foreign employers in the country *(iv)* The economic presence of French companies has a margin of growth, compared to the other European countries that have BITS *(i) (v)* Currently, France occupies the 5th position among the main foreign investors worldwide in attention to the accumulated FDI
Questions Raised	1. There is no evidence that BIT's generate FDI 2. The celebration of this BIT lacks justification 3. It violates the principle of formal equality, because it grants privileged treatment to French investors in Colombia, to the detriment of national investors 4. It violates the principle of material equality, as it turns *"the investor into a sort of subject of special protection"*

(iii) The Court's considerations

92. As noted in para. 38 and 42, it is the Court's duty to analyze the general compatibility of the *sub examine* treaty with the Political Constitution. In this section, this analysis will be carried out through a reasonability test *(para. 65)* which implies verifying *(i)* that the overall purposes of the treaty are legitimate in light of the Political Constitution and *(ii)* that the treaty as a whole is suitable, which means, that there are elements that allow us to conclude that it will contribute to achieving its goals. Taking into consideration this last element, the Court will analyze the reasons and the empirical evidence provided in this case to justify the celebration of this treaty, mainly by the National Government.

93. *Legitimacy of the purposes of the BIT*. The Court warns that the purposes of the international sub-exam treaty are compatible with the Political Constitution, because they contribute to the materialization of the constitutional principles *(i)* of the rule of law (art. 1), *(ii)* of the internationalization of economic relations (art. 226 and 227 of the PC), and *(iii)* of the development, the welfare and economic and social prosperity (arts. 1, 2, 333 and 334 of the PC).

94. First, the Court warns that the purposes of the *sub examine* treaty are compatible with the rule of law principle. This principle integrates, among others, *(i)* the legality principle or submission of the State to the law, that is, that the activity of the State "*is ruled by legal norms (...) that adhere to law*"[298], *(ii)* the guarantee of the rights of the individual vis-à-vis the State, *(iii)* legal security, which means, the provision of a system of clear norms that regulate relations and controversies between investors in these states and the Contracting Parties[299], *(iv)* the separation of powers and respect of their competences, and *(v)* the peaceful resolution of disputes by judges and other authorities.

95. Thereon, what the Court has recognized about other BITs is relevant. Treaties such as the one *sub examine* seek to "*establish a legal framework*"[300] or "*set clear rules of the game*"[301] that "*promote mutual investment*"[302], "*protect the investor, their investment and related flows*"[303] and that "*generate confidence in the investor regarding possible disputes arising with the State*"[304], for which it provides mechanisms for resolving disputes. In addition, as expressly stated in its preamble, the *sub examine* treaty aims to preserve "the regulatory power of each Contracting Party," which necessarily implies respecting the exercise of the competences of the various state bodies. In these terms, the purposes of the *sub examine* instrument are compatible with the rule of law, especially if it is taken into account that, before the emergence of international investment regulations, disputes arising between the foreign investor and the State receiving the investment

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298 Judgment SU747 of 1998 and C-251 of 2002.
299 Cf. Judgment C-284 of 2015 and SU072 of 2018.
300 Judgment C-169 of 2012 and C-123 of 2012.
301 Judgment C-286 of 2015.
302 Id.
303 Judgment C-169 of 2012.
304 Judgment C-309 of 2007.

were resolved through the use of force or, at best, through diplomatic efforts[305].

96. Second, the Court warns that the purposes of the *sub examine* treaty are consistent with the internationalization of economic relations. Article 226 of the Political Constitution provides that "*the State shall promote the internationalization of political [and] economic relations (...)*" and Article 227 ibid states that "*the State shall promote economic, social and political integration with other nations*". In this regard, the Court reiterates that, "*nowadays, economic protectionism, which encourages countries to fall back on themselves, ignoring the ebbs and flows of international trade, can only lead to countries that carry it out to submit themselves to ostracism and become a kind of outcast of international society. In this order of ideas, the internationalization of economic relations becomes a necessary fact for the survival and development of states that transcends ideologies and political programs*"[306].

97. In these terms, the Court considers that the purposes of the treaty under study are also in accordance with the constitutional principles of internationalization of economic relations and economic integration with other nations. The Court notes that this treaty is intended to *"promote the entry of foreign capital into the country"*[307], this through *"capital transfer"*, as expressly provided in the preamble, as well as *(ii) "economic cooperation for the benefit of the peoples"*[308], through the creation "*of favorable conditions for French invest-*

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305 See, among others, first report on the Diplomatic Protection of Special Rapporteur John Dugard. A / CN.4 / 506. Session 52 of the International Law Commission (2000); Draft Articles on Diplomatic Protection (2006) Official Records of the General Assembly, Sixty-First Session, Supplement No. 10 (A/61/10); Treaty Arbitration and Its Future – If Any, 7 Y.B. Arb. & Mediation 58 (2015). Kaj Hobe, 5; The International Law of Investment Claims (Cambridge University Press, Cambridge, 2009). P. 11. Principles of International Investment Law (OUP, 2008). R Dolzer and C Schreuer, 215.

306 Judgment C-358 of 1996.

307 Judgment C-309 of 2007.

308 Judgment C-494 of 1998.

ments in Colombia and Colombian investments in France", according to the preamble itself. Thus, the Court confirms that through this treaty it is intended *(iv)* "*the economic integration of the country that is imposed as a result of the globalization of the global economy*"[309], *(v)* to open "*fields of action in markets with greater dynamism*"[310], as well as *(vi)* "to *liberalize [the market] and generate a favorable climate for reciprocal investments*"[311].

98. Third, the Court finds that the purposes of the *sub examine* treaty are compatible with the principles of development, welfare and economic and social prosperity. Article 1 of the Political Constitution provides that *"Colombia is a social State of law*", Article 2 prescribes that *"… essential purposes of the State are: to promote general prosperity (…) [and that] the authorities are instituted (…) to ensure the fulfillment of the social duties of the State "*, Article 333 states that *"the enterprise has a social function (…)* "and Article 334 establishes that the State will intervene in the economy *"to achieve (…) quality improvement in the life of the inhabitants (…) and the benefits of development "*.

99. Accordingly, in such terms, the purposes of the treaty *sub examine* are compatible with the principles of the social rule of law described. Indeed, its preamble emphasizes that this treaty seeks to "*protect the legitimate objectives of public policies*", which are, among others, the social tasks predicted by the Constitution and "*stimulate the transfer of (...) technology*". In addition, as the Court has previously considered other BITS, these instruments seek to "*boost the local economy and, by that means, provide better living conditions for the population*,"[312] "*job creation*,"[313] "*receiving specialized*

309 Judgment C-309 of 2007.
310 Id.
311 Judgment C-031 of 2009.
312 Judgment C-286 of 2015.
313 Judgment C-199 of 2012.

knowledge and specialized personnel"[314] and, consequently, tend to "*promote the general welfare"*[315], as well as *"reach adequate levels of economic development"*[316].

100. In these terms, the Court concludes that the overall purposes of the sub examine treaty are in accordance with the Political Constitution.

101. *Suitability of the treaty and reasons that justify the conclusion of the* BIT. The Court takes note that, although with variations in its content and scope (which will be detailed in relation to each article), this treaty contains the *"standard clauses on investment protection"*[317]. This BIT incorporates provisions related to the definitions necessary for its execution (art. 1), within its extent (art. 2), to the promotion and protection of investments (art. 3), to the MST (Minimum Standard of Treatment) (art. 4), to NT (National Treatment) and MFN (Most Favoured Nation) (art. 5), to expropriation, direct and indirect (art. 6), to compensation (art. 7), to the free transfer of investment and reinvestment (art. 8), to the power of the Contracting Parties to adopt measures to preserve and promote ethnic and cultural diversity (art. 9), as well as the environment, health and labor rights (art. 10) and public order (art. 14); to the incorporation of standards on corporate social responsibility (art. 11), to the publicity of the regulation (art. 12), to guarantees and subrogation (art. 13), to the settlement of differences between an investor and a Contracting Party (art. 15) and between the two Contracting Parties (art. 17), the principle of favorable

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314 Judgment C-286 of 2015.

315 Judgment C-123 of 2012.

316 Judgment C-309 of 2007.

317 Judgments C-008 of 1997 and C-379 of 1996, among others. Cf. Enrique Prieto. Cdno. 2, fls. 441 to 445. '*There are currently 3,600 IIAs, which generally have the same structure that includes: (i) the clause of what is meant by investor; (ii) understood as investment; (iii) standards of treatment (national treatment, most favored nation treatment, fair and equitable treatment); (iv) protection against expropriation (direct and indirect); (v) dispute resolution mechanism (arbitration)'.*

interpretation of the rules (art. 16) and, finally, the entry into force of the agreement (art. 18). Thus, the Court finds that this treaty corresponds to *"pre-established models of an international agreement, of standard structure"*[318], which the three branches of public power have considered in recent decades as a "*legitimate tool*"[319] to achieve the purposes described above.

102. Thus, contrary to the questionings raised by some intervening parties, the Court finds that, in the *sub judice* case, the National Government and the other actors that participated in the constitutionality process did justify the conclusion of this international treaty. This is so, as they demonstrated that (i) the decision to negotiate this BIT is compatible with Colombia's foreign public policy and (ii) the strategic importance of this treaty with France.

103. In relation to the former, from the statement of reasons of this BIT approving law draft, and with the documents contributed to this constitutionality process, the National Government explained the compatibility of this instrument with *(i)* the national plans of development (from the 2002-2006 period to the 2014-2018 period), *(ii)* the Conpes Economic and Social Policy documents No. 3135 of 2001, on policy guidelines for international negotiations of foreign investment agreements[320]; 3197 of 2002, on the management of debt flows in international foreign investment agreements[321]; 3684 of 2010, on the strengthening of the State

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318 Judgment C-150 of 2009.

319 Judgment C-150 of 2009 and C-309 of 2007.

320 '*Foreign investment increases the country's capital stock, acts as a source of external financing and complements domestic savings. It also creates a tangible and intangible transfer that provides technology, training and training of the workforce, generates employment, develops productive processes and strengthens the trade ties and export capacity of the country, making it more competitive*'.

321 '*Foreign investment (FI) is a vital element in economic growth as it complements national investment and allows us to gather productive resources. Thus, the promotion of FI is vital for the promotion of economic growth. The signing of Agreements on Promotion and Protection of Investment (APPI) is an important element in any*

strategy for the prevention and attention of international investment disputes[322], and 3771 of 2013, on the strategy of promoting Colombian direct investment abroad[323]. The Government also documented the compatibility of this treaty with *(iii)* the documents of the Superior Council of Foreign Trade corresponding to the 81st sessions of March 27, 2007[324]and 86 of October 27, 2009[325].

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strategy aimed at promoting FI. These agreements provide the investor with a stable legal framework and reliable rules for decision-making (...) The National Planning Department recommends to CONPES*: Request the Agreements on Promotion and Protection of Investment negotiating team explicitly excepmpt the public debt of the definition of investment contained in these agreements. Likewise, the other conditions established in Document 3135 of 2001 must be maintained so that foreign debt flows are considered investment'.*

322 '*Within the framework of the foreign investment promotion policy in Colombia, the National Government has established the objective of strengthening the protection conditions offered to foreign and national investors through the conclusion of International Investment Agreements –*IIA*–, coming to shape today, an important collection of this type of Agreement, which establishes the possibility of initiating international conciliation and arbitration processes as a means of resolving disputes arising as a result of their interpretation and / or application. It is essential to strengthen the Colombian State in its strategy to guarantee the fulfillment of the international commitments acquired in the* IIAS*, and in the opportune prevention and suitable attention of the controversies that arise between foreign investors and the Colombian State within the framework of these agreements. This document proposes policy guidelines focused on strengthening the State in its institutional capacity to respond to this type of controversy'.*

323 '*Request that the Ministry of Trade, Industry and Tourism, in coordination with the Ministry of Finance and Public Credit, the Ministry of Foreign Affairs and the National Planning Department, propose a negotiating agenda for International Investment Agreements and Inter-Administrative Movement Agreements Temporary Business People, in which the prioritization of countries for negotiations is carried out including as a guiding criterion the promotion of Colombian investment abroad'.*

324 '*For the elaboration of the Joint Negotiation Agenda, figures for 2005 were used, since it was the last year with complete information at national level (source Colombian Central Bank), as well as at international level (source* UNCTAD*). The criteria for the construction of the agenda are the following: 1. Foreign investment installed. 2. Recent investment flows. 3. Colombian investment abroad. 4. Highly capital exporting countries. 5. Countries with the greatest potential to invest in technology. 6. Countries that already have* IIAS *with Colombia. 7. Countries that have shown interest in* IIA *negotiations. 8. Countries that have shown interest in* ADT *negotiations". Cf. Cd no. 2, fl. 606. "As a result of these criteria, France is*

104. Additionally, the Government explained why France is "*a commercial partner of high importance for Colombia*" and, therefore, which reasons justify the conclusion of this BIT. First, it noted that France is the 7th country in the prioritization list among more than 59 countries with which Colombia would hold IIA, according to the negotiating agenda, "*and that the previous ones had already been exhausted by the time negotiations begin in the 2008*"[326]. Second, said it held that "*between 2004 and 2013, France positioned itself as the fourth largest European investor in Colombia investing US $ 1,776 million, capitals that have come through 120 companies in that country. In 2013 alone, Colombia received US $ 543.3 million for investment from France*"[327].

105. Third, it was pointed out that, since 2007, "*the cumulative flow of FDI from France in Colombia has been USD $ 2,196 million (…). This means that France is the sixth highest country in the European Union in terms of investment in Colombia*". Fourth, it was remarked, for the 2004-2014 period, "*in the order of countries of the European Union that have greater accumulated amounts of FDI in Colombia, France is in third place, with an accumulated investment in theNational territory of USS 1,996.5 million*"[328]. Finally, it maintained that, for 2017, "*France is one of the main foreign investors worldwide measured by accumulated FDI, ranking fifth in 2017 according to the 2018 Report on Investments in the World (WIR18) prepared*

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included as a priority country for the subscription of an IIA, occupying the No. 7 position of 59 countries to determine the negotiating agenda'.

325 *'The negotiation of the International Investment Agreements (IIAS), led by the Ministry of Trade, Industry and Tourism has been developed in accordance with the negotiating agenda approved by the Superior Council of Foreign Trade (CSCE) in the session of 81 March 2007 (...) Due to the above, it is necessary to design, promote and adopt new complementary strategies aimed at attracting foreign investment (...) and highlight the importance of both completing this agenda and belonging to the aforementioned forums'.*

326 CD, min. 38:35.

327 Cdno. 2, fl. 607.

328 Cdno. 1, fls. 145 to 159. 32 Cdno. 2, fls. 378 to 426.

by the United Nations Conference on Trade and Development (UNCTAD)"[329].

106. In turn, the Ambassador pointed out that "*France is the Number One foreign employer in the country*"[330] and that, "*on average, since 2010, France has invested 240 million dollars per year in Colombia, compared to 1.3 billion from Spain, 1,100 from the United Kingdom*", which explains, in his opinion, that "*although the economic presence of France is important and growing, it still has a significant margin of increase*"[331]. For his part, Alexander Toulemonde confirmed that French investors "*are the ones that generate the most employment in the country (…) more than 100,000 employees work in French companies*"[332] and that "*at this moment Colombian investments in France are well below what that they should be in the future*"[333].

107. In these terms, the Court concludes that the National Government and other actors that participated in the constitutionality process provided reasons and empirical evidence that justify the conclusion of this treaty and allow it to be concluded that it is a suitable instrument to achieve the aforementioned purposes. However, the Court takes note that some interveners questioned the justifications for the conclusion of this treaty.

108. On the one hand, several interveners argued that it is not proven that this instrument contributes to generating more FDI[334]. In this regard, the Court finds that, in the case file, there is no empirical evidence that demonstrates that the signing of this treaty contributes, unfailingly, to achieving said purpose; but there is no empirical evidence to the

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329 Cdno. 2, fls. 378 to 426.
330 CD, min. 18:20.
331 CD, min. 17:55.
332 CD, min. 31:45.
333 CD, min. 31:45.
334 For instance, René Urueña. Cdno. 2, fls. 612 to 633. Magdalena Correa. Cdno. 2, fls. 449 to 464.

contrary, that is, that this BIT does not have the potential to generate FDI. Indeed, although some interveners questioned the suitability of this instrument to achieve this purpose, none provided evidence to justify such questioning. On the contrary, the Government did provide technical information that accounts for the relevance of French investors and investments in global FDI flows (it occupies the 5th place, according to UNCTAD), as well as its presence and relevance in the Colombian economy, given the magnitude of its investments (ranked 3rd among European investors in the country, between 2004 and 2014). For the Court, such justifications, the place that France occupies among the countries prioritized for the celebration of BIT (7th place among 60) and, ultimately, the political legitimacy of the executive and legislative branches for the negotiation of these instruments, reasonably supplement the lack of concrete empirical evidence that demonstrates that this instrument will increase FDI in the country.

109. On the other hand, one of the interveners argued for its unconstitutionality in its entirety, because, in her opinion, it violates the principle of equality. First, she argued that it is incompatible with the principle of formal equality, while granting privileged and unjustified treatment in terms of property protection and access to justice to French investors in Colombia, among others, to the detriment of national investors (*para. 90*). Second, she indicated that it ignores the principle of material equality, because, as a consequence of the above, this BIT turns "*the investor into a sort of subject of special protection*", by providing for a difference in treatment that "*does not benefit vulnerable groups such as those indicated in the Constitution, but to generally powerful economic actors in respect of whom the special protection is not constitutionally justified*"[335] (para. 91). Therefore, the Court must rule on this.

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335 CD, min. 31:30.

110. Article 13 of the Political Constitution provides that "*all persons are born free and equal before the law, will receive the same protection and treatment from the authorities and will enjoy the same rights, freedoms and opportunities without any discrimination for reasons of (…) national origin*". Article 100 ibid. Provides that "*foreigners will enjoy in Colombia the same civil rights granted to Colombians*". In this regard, the Court takes note that from these articles derive, among others, two constitutional mandates relevant to the present case. On the one hand, a mandate to the public authorities to provide equal treatment to investors and "*investments that come from the other party*"[336] and non-discrimination in favor of the national and against the foreigner, without prejudice to the exceptions provided by Article 100 idem. On the other hand, the Court emphasizes that from these articles is derived another constitutional mandate addressed to the public authorities that consists of treating all investors and all national investments in Colombia with respect to foreigners and non-discrimination against of investors and national investments.

111. Thus, the Court finds that a good part of the substantial provisions of the BIT *sub examine* are aimed at protecting the first of the referred constitutional mandates, that is, equal treatment of investors and "*investments that come from the other party*"[337] and non-discrimination in favor of the national and against the foreigner. As will be explained in detail in the corresponding sections, the clauses of NT,

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336 Judgment C-379 of 1996. Cf. Judgment C-309 of 2007. The Constitutional Court has said in this regard that by virtue of these clauses, "*a State is obliged to give another treatment no less favorable than that accorded to its own nationals or to the nationals of any third State*"; to which he adds: "*Precepts of this nature do not violate the Supreme Law and, on the contrary, are aimed at realizing*" at all times the fundamental equality without discrimination between all interested countries. See, also, Judgments C-150 of 2009, C-377 of 2010 and C-199 of 2012.

337 Id.

expropriation and compensation for losses, among others, have as their objective the materialization of said mandate derived from the principle of equality. Thus, these provisions seek to ensure that the Contracting Party "*applies*" to the foreign investor "*a treatment no less favorab*le" than that accorded to the national investor.

112. However, no provision of the treaty in question is intended to protect the second of such mandates arising from the principle of equality. None of its clauses protects the national investor in the sense that the public authorities, within the framework of the regulation and treatment of the investment, grant him a treatment no less favorable than that granted to the foreign investor. One might well think that the effective guarantee of this constitutional mandate is alien to the treaty in question for two reasons. The first, normative, that is, that equal treatment of the national investor is guaranteed directly by the Political Constitution and, therefore, it is not necessary that it be provided for in this type of treaty. The second, historical, that is, that the substantial provisions of the IIAs and, in general, international investment law, arise to protect the foreign investor against discriminatory treatment in favor of the national investor, and not vice versa[338].

113. Regarding the first statement aforesaid, the Court advises that precisely the constitutionality control in this case seeks to verify whether the provisions of the international treaty are compatible with the Political Constitution,

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338 International Investment Law and Arbitration. Commentary, Awards and Other Materials. C.L. Lim, Jean Ho and Martin Paparinskins. Cambridge University Press. 2018. 12. Contingent Standards: National Treatment and Most-Favoured Nation Treatment. P. 293. "At one point in time, non-discrimination was the issue in the international la on treatment of aliens and foreign inverstment (…) it is fair to say that non-discrimination has lost its central role in the practice of international investment law, and international arbitral tribunals are more likely to determine responsibility arising out of breach of primary obligations of fair and equitable treatment".

in particular, with the principle of equality provided for in article 13. That is, within the framework of this abstract constitutional control, the Court must examine, among others, whether the normative contents of the treaty guarantee equal treatment to the national investor and to his investments in Colombia against investors and foreign investments in this country; or if, on the contrary, the treaty results in the granting of more favorable unfair treatment to investors and foreign investments to the detriment of investors and national investments. For the rest, it is clear that once ratified, the tribunals responsible for its application will only have, as normative references, to the treaty, its protocols and its interpretative declarations, as well as the other sources of international law, not the content of article 13 of the Political Constitution, which explains the need to guarantee equal treatment to the national investor directly in such instruments of international law.

114. Regarding the second, the Court emphasizes that the recent developments in international investment law consider that the IIAs also need to protect the national investor in the sense that the public authorities, within the framework of the regulation and treatment of the investment, grant a treatment no less favorable than that granted to the foreign investor. In this sense, these developments seek to guarantee the aforementioned second mandate derived from the principle of equality, in order to protect equal treatment of local investors in their own country and, thus, guarantee, among other things, the principles of non-discrimination and free competition. Two examples illustrate the above.

115. First, the United States Congress, since the issuance of the *Trade Act (2002),* expressly provided that one of the main objectives of foreign investment is that IIAs do not grant greater substantive rights to foreign investors than

those recognized to local investors in the United States[339]. This mandate, in identical terms, was reiterated in the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (TPA-2015)[340].

116. Second, recently, following the Global Economic and Commercial Agreement between Canada and the European Union and its Member States[341] (hereinafter CETA), on October 10, 2016, the Contracting Parties deemed it necessary to sign a Joint interpretative declaration in which, explicitly, they clarified that "*the agreement will not lead to more favorable treatment towards foreign investors with respect to national investors*[342]". The Court warns that, in its written submission, the Ministry of Foreign Affairs referred to this interpretative declaration and considered it of "*special interest*"[343]..

117. In the study of the constitutionality of CETA, the French Constitutional Council, in decision No. 2017-749 of July 31, 2017, held that "*the articles of Chapter 8 of the Agreement include, in favor of non-national investors of the State receiving the investment, the provisions related to certain substantive rights. These, which relate in particular to national treatment, the most favored nation treatment, fair and equitable*

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339 Trade Act (2002). Trade Negotiation Objectives. (B) Principal Trade Negotiation Objectives (3) Foreing Investment. "(…) while 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".

340 TPA Act (2015). "No 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."

341 IIA instrument integrated, among others, by an investment chapter.

342 General Secretariat of the Council 12865/16. Joint Interpretative Declaration on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States. 10 of October of 2016. "CETA will not result in foreign investors being treated more favourably than domestic investors".

343 Cdno. 2, fl. 357.

treatment and protection against direct or indirect expropriation, are intended solely to guarantee foreign investors the same rights as those whose holders are national investors"[344]. However, the Council noted that paragraph 6 of the joint interpretative declaration "*stipulates that the agreement will not result in more favorable treatment for foreign investors than for national investors*[345]" and therefore concluded that, in this way, no difference in treatment was created, and, in this sense, this regulation was in accordance with article 6 of the Declaration of the Rights of Man and Citizen of 1789. For this, among other reasons, it declared the CETA adjusted to the French constitutional order.

118. Based on the foregoing considerations, the Court concludes that the *sub examine* treaty guarantees, in general terms, the constitutional mandate of equal treatment of investors and foreign investments (in this case, French) in Colombia and the prohibition of discrimination against them and in favor of nationals. This through the substan-

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344 Constitutional Council. Decision No. 2017-749 DC of July 31, 2017. Global Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part. "Regarding respect for the principle of equality before the law: According to Article 6 of the 1789 Declaration, the law "must be the same for all, whether it protects or punishes". The principle of equality does not preclude the legislator from settling different situations differently or from derogating from equality for reasons of public interest, provided that in both cases, the resulting difference in treatment is directly related to the purpose of the law establishing it. In the first place, the provisions of Chapter 8 of the Agreement include, in favor of investors who are not nationals of the host State of the investment, requirements relating to certain substantive rights. These, which relate in particular to national treatment, most-favored-nation treatment, fair and equitable treatment and protection against direct or indirect expropriation, are intended solely to secure to these investors from which national investors benefit. Thus, paragraph 6 (a) of the common interpretative instrument provides that the agreement "shall not lead to more favorable treatment for foreign investors than for domestic investors". Therefore, the stipulations of chapter 8 do not create on this point any difference of treatment ". (Official English translation not available)

345 Id.

tive clauses of NT, expropriation and compensation for losses, among others. However, the Court also concludes that no provision of the treaty in question guarantees the mandate of equal treatment to investors and national investments in Colombia with respect to foreigners, as well as the prohibition of discrimination against them, which, as explained, in addition to deriving from Article 13 of the Political Constitution, have been deemed necessary in recent developments in international investment law and, even, by the French Constitutional Council (Constitutional Court of the Contracting Party in the *sub examine* treaty).

119. The Court clarifies that, in the cases mentioned above, the mandate for equal treatment of investors and local investments in their own country and the prohibition of discrimination against them refers only to substantive clauses provided in the IIAs. This is because, as will be developed further in the constitutionality analysis of article 15 of the BIT, the object of the present case, *(i)* the dispute resolution system requires an analysis of equality between both foreign investors in the countries receiving the investment[346], *(ii)* is based on the principle of reciprocity[347] and,

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346 Court of Justice of the European Union. Opinion 1/17 of April 30, 2019. The Court of Justice of the European Union, in analyzing the dispute resolution system from the perspective of the principle of equality, concluded that: "it is clear that, while Canadian enterprises and natural persons that invest within the Union are, in the light of the object and purpose (…) of inserting in the CETA provisions concerning non-discriminatory treatment and the protection of foreign investments, in a situation that is comparable to that of enterprises and natural persons of Member States that invest in Canada, their situation is not, on the other hand, comparable to that of enterprises and natural persons of Member States that invest within the Union ".

347 Constitutional Council. Decision n ° 2017-749 DC of July 31, 2017. "*Responds however to the double ground of general interest holding, on the one hand, to create, reciprocally, a protective framework for the French investors in Canada and, of the other, to attract Canadian investment to France*". (Official English translation not available)

in any case, *(iii)* is justified in the overall purposes of these instruments[348].

120. Regardless of the foregoing clarification, the Court considers it indispensable, in order to adjust the *sub examine* treaty in its integrity to the Political Constitution and in particular, to Article 13, to declare its conditional constitutionality, in order to avoid unconstitutional interpretations of its clauses, given the annotated lack of protection of the equality of investors and national investments in Colombia. Thus, the Court will declare the conditional exequibility of this treaty and its approving law, 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.

121. This conditioning is indispensable. This is so as to guarantee equal treatment of the investor and local investments in relation to French investors and investments in Colombia. In particular, this conditioning seeks to prevent the clauses of this treaty from being interpreted in such a way as to grant more favorable unjustified treatment to the French investor than to the national investments in Colombia, for example, in relation to the scope and protection of its legitimate expectations (art. 4 and 6 of the *sub examine* treaty), the content, scope and limits of compensation (art. 15 ibidem) or the conditions of payment thereof (art. 6 and 15 idem). In other words, this conditioning seeks to guarantee that all investors, local and foreign, in Colombia are subject to the same protection of their investments, rights and legitimate expectations, and, therefore, that no international responsibility is derived for the Colombian State as a consequence of actions that guarantee this mandate of the principle of equality.

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348 Id.

122. Overall, after a general analysis of the treaty and its purposes, the Court does not find it incompatible with the Political Constitution, since (i) its purposes are legitimate and (ii) it is a suitable instrument to such effects, given the reasons and empirical evidence that justify its celebration. This, notwithstanding the conditioning referred to in the preceding paragraphs, which is necessary to adjust the treaty, as a whole, to the provisions of article 13 of the Political Constitution. In this regard, in accordance with the provisions in para. 68 et seq., the Court will instruct the President of the Republic 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 aforementioned conditioning.

123. Finally, the Court warns that the conclusion of this overall analysis does not compromise the constitutionality analysis of each of the articles of Law 1840 of 2017 or the clauses that make up the BIT *sub examine*, which will be carried out in the following sections.

3. Constitutional control of the articles of Law 1840 of 2017

124. Law 1840 of July 12, 2017, by means of which the "Agreement between the Government of the Republic of Colombia and the Government of the French Republic on the Reciprocal Promotion and Protection of Investments", signed in the city of Bogotá, on the 10th day of the month of July 2014, is approved, contains three articles. The first stipulates that the aforementioned international treaty is approved; the second, that in accordance with article 1 of Law 7 of 1944, this instrument "*shall bind the country from*

the date on which the international linkage with respect to it is perfected"; and, finally, the third one, that this law governs from the date of its publication.

125. The Court reminds that such articles are compatible with the Political Constitution. The first one is compatible with the competence provided by article 150.16 of the Political Constitution, according to which, it is up to Congress to "*approve or improper treaties that the Government concludes with other States or with entities of international law*". The second and third are also in accordance with the consolidated constitutional jurisprudence, according to which, "*the law governs from the moment the respective international linkage is perfected, precision that responds to what is generally provided by international law and the Constitution in matter of laws approving international treaties* "[349].

126. In these terms, the Court considers the three articles from the Law 1840 of 2017 constitutional.

4. Constitutional control of the *sub examine* treaty articles

127. Next, the Court will review the constitutionality of each article of the *sub examine* treaty, in the following order: first, it will transcribe its content; then it will synthesize the arguments of the Procuraduría and the interveners[350]; and, finally, it will make a statement about the constitutionality of each normative text.

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349 Judgment C-446 of 2009 and C-578 of 2002. Cf. Art. 1 of Law 7 of 1944. "Treaties, Agreements, Conventions, Agreements, Arrangements or other international acts approved by Congress, in accordance with articles 69 and 116 of the Constitution, they will not be considered in force as internal laws, as long as they have not been perfected by the Government as such, through the exchange of ratifications or the deposit of the instruments of ratification, or other equivalent formality ".

350 Both of the participants to the audience and those who submitted citizen intervention briefs.

4.1. Definitions (art. 1)

128. The text of article 1 reads as follows:

"**Article 1. Definitions.**

For the purposes of this Agreement:

1. The term "investment" refers to all assets, including goods or rights of all kinds, including in particular but not exclusively:

a) Movable and immovable property as well as any other real rights, such as mortgages, usufructs, garments and similar rights;

b) Shares, share premiums and other kinds of participations, including minority or indirect forms, in companies incorporated in the territory of a Contracting Party;

c) Obligations, credits and rights over benefits that have an economic value;

d) Intellectual, commercial and industrial property rights such as: copyright, patents, licenses, registered trademarks, industrial models, technical processes, know-how, commercial names and *goodwill*.

e) Concessions conferred by law or under contracts, including concessions to prospect, cultivate, extract or exploit natural resources.

It is understood that the assets covered by this Agreement must have been invested by investors from a Contracting Party in the territory of the other Contracting Party, in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made.

Any alteration in the way in which the assets are invested will not affect their investment quality, provided that aforemen-

tioned alteration does not run contrary to the legislation of the Contracting Party in whose territory the investment is made. For the application of this Agreement, the term investment does not include public debt operations, commercial transactions related to the importation and exportation of goods and services, nor the credits destined to its financing nor its interests.

In accordance with number 1 of this article, an investment is characterized at a mínimum by the existence of :

a) A contribution of capital or other resources; and

b) A risk that is, at least partially, assumed by the investor.

2. "Investor" means:

a) Natural persons possessing the nationality of any of the Contracting Parties;

b) Any legal entity incorporated in the territory of one of the Contracting Parties in accordance with the legislation of said Party and having its registered office in the territory of said Party;

c) Any legal person effectively controlled directly or indirectly by nationals of one of the Contracting Parties or by legal entities constituted in the territory of one of the Contracting Parties in accordance with the legislation of that Party and where it has its registered office;

For greater certainty, the legal persons mentioned in paragraphs b) and c) of this article must effectively exercise economic activities in the territory of the Contracting Party where their registered office is located.

3. By "returns" is understood all sums produced by an investment, such as profits, royalties and interest, during a certain period.

> The returns on investments and, in the case of reinvestments, the returns on reinvestments will enjoy the same protection as the investment.
>
> 4. This Agreement applies in the territory of each of the Contracting Parties, defined as follows:
>
> The term "France" means the European and overseas departments of the French Republic, including the territorial sea, and any other area outside the territorial sea in which, in accordance with international law, the French Republic has sovereign rights for the purposes of exploration and exploitation of natural resources of the seabed and subsoil and supra-lying waters;
>
> The term "Colombia" designates the Republic of Colombia and, used geographically, includes its land territory, both continental and insular, its airspace, maritime and underwater areas, and other elements over which it exercises sovereignty, sovereign rights or its jurisdiction, in accordance with the Colombian constitution of 1991 and its legislation, and in accordance with international law, including applicable international treaties".

129. Upon signing the Agreement, the Contracting Parties signed a Protocol, whereby they agreed that:

> "In relation to Article 1, it was agreed that public debt operations are excluded from the definition of investment and therefore from the scope of the Agreement and its provisions on dispute settlement. The public debt contracts signed by the Governments of the Contracting Parties involve a commercial risk and include certain particular procedures for the resolution of differences available in case of differences between the debtor and its creditors".

(i) The Submission of the Procuraduría

130. The Procuraduría pointed out that this article contains "*definitions to give full application to the Agreement, such as*

investment (…), investor, return on investment, and territory of each of the parties where the instrument is applied"[351]. However, he did not present any compatibility analysis of this article with the Political Constitution. Regarding the Protocol, he stated that "*it conforms to the constitutional order regarding the internationalization of political, economic, social and ecological relations on the basis of equity, reciprocity and national convenience, as well as regarding the internal and external indebtedness of the Nation and of the territorial entities and the consequent service of the debt, taking into account that the public indebtedness of the states is a sovereign matter and not of private law* "[352].

(ii) Interventions

131. Five interveners expressed their views on this article. Two of them supported its constitutionality[353]; one explained the justification of this article, without making any argument[354]; finally, two questioned the constitutionality of some of its sections[355].

132. UNAB argued in favour of the constitutionality of this article and indicated that, "*when expressing technical definitions in order to determine the conceptual aspects on which the readers of the regulation must analyse its content, it does not violate the Political Constitution, but rather clarifies on how to technically understand its purpose*"[356]. The Chancellery merely described the content of the article and requested its exequibility.[357].

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351 fl. 546.
352 fl. 560
353 UNAB and the Chancellery.
354 Adriana Vargas
355 URosario and UExternado.
356 fl. 495. He cited extensively judgments C-169 and C-199, both of 2012, as well as C-184 of 2016.
357 fl. 146.

133. In her brief, Adriana Vargas pointed out that "*the justification for establishing the definitions is because both countries have an interest in protecting certain types of investments and not others, since their public policy prioritizes those and not others. For example, Colombia excludes the concept of public debt from the definition of investment because it considers that it is not appropriate to give it the protection of a* BIT, [based on] CONPES *3197 of 2002* ".[358] In her speech at the public hearing, on the "*inclusion of airspace*", she clarified that the definition of the territory of each Party is respected and "*there is no intervention nor is the subject matter of negotiation the scope and elements included in the definition of territory* "[359].

134. URosario submitted that the definition of investment, contained in section (e), includes the "*concessions in the cultivation of resources and future rights over them*", which represents "*an extension of the scope of investment protection to the resources that could be produced in the medium and long term (…) generating great uncertainties for both Contracting Parties (…) and (…) a high risk of property detriment, in case of a future claim"*[360]. Likewise, they stressed that in paragraph 3 of paragraph 2, the returns on investment are expanded, "*by including those produced by reinvestment [which allows] that greater sums of money be subject to the special regime of investment protection, and that, as a consequence, tax levies be reduced*". This explains, in their opinion, that the protection is excessive[361]. However, it made no request in relation to these normative sections.

135. UExternado supported a declaration of unconstitutionality of the expressions *(i)* "*of all nature*" and (ii) "*its airspace*" , as well as declaring the conditional constitutionality of the expression *(iii)* "*natural persons possessing the national-*

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358 fl. 608.
359 CD, min. 1:01:30
360 Cdno. 1, fls. 71 to 75
361 Id.

ity of any of the Contracting Parties", to restrict its application with respect to investors with dual citizenship[362]. These requests were based, respectively, on three reasons. First, "*by including within the definition of investment the expression rights of all kinds, this means that any type of right can be understood as part of an investment, be it real, personal or fundamental (…) This would imply not only having a double legal protection greater than that of Colombian nationals, but it would also mean reifying people's fundamental rights to the point of violating human dignity*"[363]. Second, "*when comparing the definition of the elements that make up each of the States, it can be seen that while airspace is expressly included in the case of Colombia, in the case of France there is silence (…) this omission (…) not only implies a clear contradiction to the principles of equity and reciprocity of international relations (…), but it could mean, in turn, a new limitation to Colombian citizens, in relation to their investments for the use of French airspace*"[364]. Third, "*it is a provision that allows considering the possibility of Colombian-French citizens who can benefit from their choice of the benefits derived from the international treaty, either in Colombia or France (…) so it would become a clear unconstitutional treatment*"[365]. Regarding the latter, it asked the Court to declare the conditional constitutionality "*of Article 1 (numeral 2, subparagraph a), clarifying that, in the case of Colombian investors, the predominant and effective nationality criterion should be applied exclusively*"[366].

136. In summary, the arguments presented by the intervenors on this article are:

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362 2, fls. 319 to 346.
363 Id.
364 Id.
365 Id.
366 Id.

Relevant arguments on article 1	
Constitutionality	1. Includes technical definitions necessary for the BIT. 2. Seeks to delimit the investments that are protected with the BIT. 3. Excludes the public debt from the scope of the BIT. 4. Respects the definition of the elements of the territory of each of the Contracting Parties, according to their legal systems.
Unconstitutionalty	1. The term "*concessions on the cultivation of resources and future rights over them*" creates uncertainty for the Contracting Parties. 2. Numeral 3 of paragraph 2 contains excessive protection, including reinvestment returns. 3. The expression "*of all nature*" would include fundamental rights, which affects human dignity. 4. The term "*natural person possessing the nationality of any of the Contracting Parties*" allows Colombian French citizens to benefit from the privileges of the BIT. 5. The term "*its airspace*" is included in the definition of Colombia, but not of France, which violates the principles of equity and reciprocity.

(iii) The Court's considerations

137. It is for the Court to answer the following legal issue: Is article 1 of the treaty *sub examine* compatible with the Political Constitution? Given the questions raised by the interveners in the present case, the Court will also answer the following legal issues: (i) Does the term "*natural persons possessing the nationality of any of the Contracting Parties*" (num. 2 - a) allow Colombian French citizens to benefit from this BIT and, therefore, violate the principle of equality provided by article 13 of the Political Constitution in relation to Colombians who do not have that dual nationality? and *(ii)* does the inclusion of the expression "*its airspace*" within the definition of the territory of Colombia and the omission of

this element in the definition of the territory of France (num. 4) violate the principles of equity and reciprocity provided by Article 226 of the Political Constitution?

138. As most of the interveners suggest, this article is, in general terms, compatible with the Political Constitution. This, as it provides the technical definitions necessary for the application of this BIT, without threatening or violating any content of the Political Constitution. This article defines the concepts of *(i)* investment, *(ii)* investor, *(iii)* returns and *(iv)* territory. Numeral 1 defines the term "*investment*" as all assets, "*including assets or rights of all kinds*", including movable or immovable property, shares, share premiums and other participations, obligations, credits and rights on economic benefits, intellectual, commercial and industrial property rights and concessions conferred by law or by contracts. . In turn, it provides that *(i)* the assets "*covered by this Agreement*" must have been invested by the investors of a Contracting Party in the territory of the other Contracting Party, in accordance with the legal system of the latter, *(ii)* the alteration in the way in which the assets are invested will not affect their quality of investments, provided that it is carried out according to law and *(iii)* the term investment "*does not include public debt operations, commercial transactions related to the import and export of goods and services, neither the credits destined to its financing nor its interests*". In this regard, the Protocol signed between the Contracting Parties reiterates that public debt operations are excluded from the definition of investment and, therefore, from the scope of the Agreement and its provisions on dispute settlement. Finally, numeral 1 stipulates, in addition, that the minimum characteristics of an investment are: *(i)* contribution of capital or other resources and *(ii)* risk assumed by the investor, even partially.

139. Numeral 2 stipulates that the term "investor" refers to three kind of subjects *(i)* "*natural persons possessing the nationality of either party*", *(ii)* legal persons constituted

in the territory of a Contracting Party and that has its domicile there and *(iii)* legal persons controlled "*directly or indirectly*" by nationals of the Contracting Parties or by legal persons constituted in the territory of a Contracting Party and domiciled there. It requires that, in the case of legal persons, that is, categories *(ii)* and *(iii)*, "*must effectively carry out economic activities in the territory of the Contracting Party where its registered office is located*".

140. Numeral 3 establishes that *(i)* the term "*return on investment*" is understood as all the sums produced by the investment, such as profits, royalties and interests and that *(ii)* the returns on investments and reinvestments will enjoy the same Protection as the investment. Finally, numeral 4 defines the territories of the Contracting Parties in which the Agreement applies. "*France*" is made up of *(i)* the European and overseas departments of the French Republic, including the territorial sea, and *(ii)* any other area outside the territorial sea in which this Republic "*has sovereign rights for the purposes of exploration and exploitation of natural resources of the seabed and subsoil and supra-lying waters*". For its part, "*Colombia*" is composed of *(i)* its land, territorial and insular territory, *(ii)* its airspace, *(iii)* its maritime and underwater areas and *(iv)* other elements over which it exercises its sovereignty, sovereign rights or its jurisdiction.

141. As it has been decided on previous occasions in face of the BIT's[367] definitions clause, the Court will declare its constitutionality in general terms. This, inasmuch as it notes that article 1 defines the scope, the subjects, the kind of investments and the territory to which this treaty refers[368] and "*grants specific meanings to the terms used by the interna-*

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367 Judgment C-358 of 1996, C-379 of 1996, C-008 of 1997, C-494 of 1998, C-294 of 2002, C-309 of 2007, C-150 of 2009, C-377 of 2010, C-123 of 2012, C-169 of 2012, C-199 of 2012 and C-286 of 2015.

368 Judgment C-379 of 1996, C-008 of 1997, C-294 of 2002, C-309 of 2007, C-150 of 2009, C-377 of 2010, C-169 of 2012, C-123 of 2012 and C-286 of 2015.

tional instrument"[369], which are necessary for their correct application. They generate legal certainty[370] and contribute to achieving the objectives proposed by the BIT[371]. The Court has indicated that the scope of such definitions "*is subject to the higher mandates on sovereignty, self-determination of the peoples and recognition of the principles of international law accepted by Colombia (P.C., art. 9)*"[372]. Finally, the Court has endorsed the constitutionality of the exclusion of public debt from the definition of investment. This is because, in this way, "*the flows derived from international loan contracts will remain subject to the regulation on external indebtedness issued by the exchange authority, that is, the Board of Directors of the Republic's Central Bank*"[373], which results in compliance with articles 371 and 372 of the Political Constitution.

142. Far from what is argued by some interveners regarding the definition of investment, the Court does not deem *unreasonable* that section (e) of numeral 1 includes concessions within the concept of investment, nor that numeral 3 of this article prescribes that returns of investments and reinvestments will benefit from the same protection as the investment. It is not unreasonable, since, on the one hand, concessions are precisely one of the ways in which FDI is channeled inside the country and, on the other, it is not contrary to the nature of the BIT, nor to the objectives they pursue, to cover the returns on investment and reinvestments. In the case of returns, the Court notes no reason to

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369 Judgment C-184 of 2016.

370 Id.

371 Id. Cf. Judgment C-446 of 2009. The definitions contribute to "specify technical concepts related to economic and commercial elements and expressions of the agreement. On this type of precepts - those that express the meaning of meanings agreed by the parties -, the Court has highlighted that these are norms that harmonize fully with the Constitution, since its function is given on the basis of giving meaning to the terms used by the corresponding international instrument, for the correct interpretation of its contents ".

372 Judgment C-494 of 1998.

373 Judgment C-379 of 1996 and C-494 of 1998.

question their protection by the BIT. In the case of reinvestments, these are, in themselves, investments made by investors and, therefore, their protection is fully compatible with this international instrument. As to the rest, the Court finds that such normative contents do not generate uncertainty or legal uncertainty, much less compromise, in any way, the contents of the Political Constitution.

143. On the contrary, what the Court considers unreasonable is to assume, as one of the interveners suggests, that the expression "*or rights of all kinds*" includes fundamental rights and that this affects human dignity. This reading, in the opinion of the Court, is completely decontextualized from the definition of "*investment*" provided by the BIT and loses sight of the nature and purpose of this instrument. The Court emphasizes that this treaty seeks the protection of investments and property rights to these associates –which accounts for the list provided by numeral 1–. It is not intended to regulate fundamental rights and, much less, include the latter in the definition of FDI.

144. The Court also does not consider that the term "*natural persons possessing the nationality of any of the Contracting Parties*" (num. 2 - a) violates the principle of equality, by allowing Colombian French citizens to benefit from this BIT at the expense of Colombians who do not have that dual nationality. In this regard, the Court emphasizes that, in multiple decisions, it has considered compatible with the Political Constitution the provision according to which "*in the case of a person of dual nationality, this shall be considered a national of the State of its dominant and effective nationality*" being included in several BITS[374]. On the other hand, under

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374 See, for example, Judgment C-377 of 2010. Law 1342 of 2009. Art. 1. "Investor of a Party, means a Party or company of the State of the same, or a national or company of the Party, which attempts make, through concrete actions, is making or has made an investment in the territory of the other Party; considering, however, that a natural person who has dual nationality

those BITs that limit the definition of "natural or natural person" to all those that "*have the nationality of one of the Contracting Parties in accordance with its legislation*"[375], the Court has indicated that it seeks to prevent "*that the Investor with dual nationality takes advantage of the rules of the agreement to benefit from their prerogatives, adducing the other nationality*"[376] and, consequently, has considered it "*necessary to not distort the purpose of the rules that are part of the Agreement*"[377].

145. Although article 1 does not expressly exclude persons with dual nationality (French and Colombian) from the definition of investor, this does not imply any violation of the principle of equality. This is so for two reasons. First, because as noted in *paras. 109 to 122*, in the face of its substantial clauses, the BIT will not result in a more favorable treatment for foreign investors than for domestic investors. Therefore, in relation to the substantial clauses, the investor with dual nationality (Colombian-French) in Colombia would not be holder or beneficiary, in any way, of a more favorable treatment against the investor who only has Colombian nationality and also carries out its investments in Colombia. Second, because, in relation to the mechanism for the settlement of differences between investors and the State, article 15.5 expressly provides that "*if the investor involved in the dispute is a natural person who possesses the French and Colombian dual nationality, only a national court according to what is defined in paragraph 4 a) may hear the dispute*". In other words, the Colombian-French investor in Colombia, like the investor who only has Colombian nationality and carries out his investments in Colombia, may only submit his dispute to the local courts. Thus, the expression "*natural*

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shall be considered exclusively a national of the State of his dominant and effective nationality ".

375 Law 1609 of 2006 (BIT with Spain). Art. 1

376 Judgment C-239 of 2007.

377 Id.

persons who possess the nationality of any of the Contracting Parties" (num. 2 - a) does not violate the principle of equality provided for in article 13 of the Political Constitution nor does it denature the purpose of the BIT.

146. Finally, the Court considers that the inclusion of the expression "*its airsp*ace" within the definition of the territory of Colombia and the omission of this element in the definition of the territory of France (num. 4) is not contrary to the Political Constitution. This, since, *(i)* in the terms of constitutional jurisprudence, said expression does not violate the principle of reciprocity and *(ii)* the definition of the territory is a consequence of the exercise of the sovereignty of both Contracting Parties, without compromising any component of the Political Constitution.

147. First, the Court has emphasized that, in relation to the principle of reciprocity, "*an isolated control of conventional clauses cannot be advanced. Each provision in the international treaty as a whole should be examined in order to determine whether it is equitable and reciprocal; and, there can only be declared unconstitutional clauses thereof only in cases where they manifestly and grossly violate the Constitution*"[378]. In turn, it pointed out that "*it is natural that there are differences in specific issues between countries when negotiating, [without this being able] to mean, however, lack of reciprocity, because it arises from the balance in conventional clauses, viewed as a whole* [379]. It follows that, under no circumstances, does the principle of reciprocity necessarily imply that the Contracting Parties must agree on similar or identical definitions of territory. It follows from this principle, in terms of the constitutional jurisprudence, that the Contracting Parties should tend to achieve balance with the clauses provided by the international agreement as a whole. Thus, in the specific case, the

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378 Judgment C-750 of 2008.
379 Judgment C-446 of 2009.

inclusion of airspace in the definition of Colombia and its absence in the definition of France does not imply per se, as suggested by an intervener, violation of the principle of reciprocity, especially when it is not demonstrated that the difference between such definitions generates an imbalance in the treaty as a whole.

148. Second, the Court has reiterated that, by virtue of the principle of sovereignty, states "*enjoy autonomy and independence for the regulation of their internal affairs, and may freely accept, without foreign impositions, as equal subjects of the international community, obligations oriented towards peaceful coexistence and the strengthening of relations of cooperation and mutual help*"[380]. Therefore, for the Court it is clear that the definition of the territory within the BITs is a consequence of the exercise of the sovereignty of both Contracting Parties, which have autonomy and independence for the regulation of the elements that make up the State, without this compromising any component of the Political Constitution. Therefore, each Contracting Party is sovereign to define its territory, in accordance with its own legal system, without it being admissible that one of the Contracting Parties imposes on the other a certain definition of territory or the elements that comprise it.

149. Based on the foregoing, the Court shall declare article 1 of the sub examine treaty constitutional.

150. The following table summarizes the above considerations:

Questioning	Decision
The expression "*concessions on the cultivation of resources and future rights over them*" creates uncertainty for the Contracting Parties.	This expression is not unreasonable and does not generate legal uncertainty (*para. 141*).

380 Judgment C-578 of 2002.

Numeral 3 of paragraph 2 contains excessive protection, including reinvestment returns.	It is not unreasonable regarding the nature and purpose of this BIT (*para. 141*).
The expression "*of all nature*" would include fundamental rights, which affects human dignity.	This expression does not violate fundamental rights or human dignity; it refers to the economic rights associated with the investment (*para. 141*).
The expression "*natural persons possessing the nationality of any of the Contracting Parties*" allows Colombian French citizens to benefit from the privileges of the BIT.	This expression is constitutional, given the joint interpretative declaration against the entire treaty (*para. 120*) and the provisions of article 15.5 of this BIT (*para. 144)*
The expression "*their airspace*" is included in the definition of Colombia, but not of France, which violates the principles of equity and reciprocity.	This expression is constitutional.

4.2. Scope of application (art. 2)

151. The text of article 2 reads as follows:

> "**Article 2. Scope of application of the Agreement.**
>
> 1. This agreement is applicable to the investments already made or to be made out after its entry into force according to the legislation of the Contracting Party on whose territory the investment is carried out.
>
> 2. This Agreement shall not apply to the disputes caused or the claims arising before the entry into force of this Agreement or to those arising out of events that have taken place prior to the entry into force of this Agreement.
>
> 3. The investments carried out with capital or assets related to activities of an illicit origin shall not be covered by this Agreement.

4. The provisions of this Agreement shall not apply to tax issues.

5. Nothing in this Agreement shall be construed as preventing a Contracting Party from adopting or maintaining non-discriminatory measures on prudential grounds, including the measures aimed at protecting investors, depositors, policyholders or settlors, or to safeguard the security, solvency, integrity or stability of the financial system. When such measures do not conform with the provisions of this Agreement, they shall not be used as a means of avoiding a Contracting Party's obligations and commitments in those provisions, in particular the obligations of articles 6 (Expropriation and Compensation) and 8 (Free transfer).

For greater certainty, the measures taken on prudential grounds that affect the free transfer shall be temporary".

(i) The Submissions of the Procuraduria

152. The Procuraduria sought a declaration of constitutionality of this article. He considered that "*It is not against the superior order in a strict sense, particularly since it has been made clear that any Contracting Party can take financial regulatory measures on prudential grounds that affect the transfer of assets related to investments and its dividends*"[381].

(ii) Interventions

153. Four interveners pronounced on this article. Three of them requested a statement of constitutionality[382] and one of them questioned paragraph 5, without requests for a findings on the matter[383].

154. The Ministry of Trade, Industry and Tourism, the Chancellery, and the UNAB requested a statement of consti-

381 Cdno. 2, fl. 547.
382 MinCIT, Chancellery and the UNAB.
383 URosario.

tutionality of this article. The MinCIT highlighted that this article is compatible with *(i)* Article 13 of the Constitution, which "*establishes that the standards of treatment will apply to the investments carried out at any moment, before or after the entry into force of the Agreement*"[384], and *(ii)* the principle of non-retroactivity since it provides that this agreement "*does not cover claims originating or that have taken place before the entry into force*"[385]. These considerations were based on judgment C-377 of 2010, the Chancellery and the UNAB limited themselves to describing the content of this article[386].

155. URosario questioned that paragraph 5 of this article "*establishes a temporary limitation when imposing measures related to the security and solvency of the financial system, that is, in case of economic emergency, where the State would intervene to restore the financial equilibrium, this would have a maximum time limit in relation to French investments in national land*"[387]. However, they made no request in this regard.

(iii) The Court's considerations

156. It falls to this Court to answer the following legal issue: Is Article 2 of the treaty under examination compatible with the Political Constitution?

157. This article, in its five numerals, regulates the scope of the Agreement. The first two set the temporal scope of application, while the third and fourth, the material scope of application. The first numeral provides that the Agreement applies to investments "*already carried out or to be carried out after its entry into force*". The second provides that the

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384 Cdno. 1, fl. 55. In this same sense, UNAB pointed out that "the investments made prior to the treaty (…) are covered by [the same, which] does not break any higher standard. Cdno. 2, fl. 496.

385 Id.

386 Cdno. 1, fl. 147

387 Cdno. 1, fls. 71 to 75.

Agreement will not apply to differences or claims "*arising before the effective date (...) or refer to events that had taken place before the effective date*". The third one prescribes that this Agreement "*does not cover*" investments "*made with capital or assets linked to activities of illicit origin*". The fourth institutes that this Agreement does not apply to "*tax matters*".

158. The fifth paragraph prescribes that this Agreement shall not be construed as impeding the Contracting Parties from "*adopting non-discriminatory measures on prudential grounds*", such as *(i)* those related to the protection of investors, depositors, policyholders, or settlors or *(ii)* those related to ensuring the security, solvency, integrity or stability of the financial system. In turn, it provides that these measures should not "*be used as a means of avoiding a Contracting Party's obligations and commitments (...) in particular*" those related to Articles 6 and 8. It also provides that the "*measures (...) that affect the free transfer must be temporary*".

159. This article is compatible with the Political Constitution. As has been reiterated in multiple judgments[388], in general terms, the determination of the scope of application, material and temporary, of the BIT to investments is a direct manifestation of the principle of national sovereignty of both Contracting Parties, as well as of the "*spirit of economic integration developed by article 226* [and] *that promotes economic integration on the basis of equity, reciprocity and national convenience*"[389].

160. Regarding the content of the first numeral, that is, the inclusion of the investments made before the entry into force of the BIT, the Court has indicated that "*it carries out the principle of equality, as it regards guarantees granted by the States to investors both to initiate and to maintain the investment*

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388 Judgments C-358 of 1996, C-379 of 1996, C-008 of 1997, C-494 of 1998, C-294 of 2002, C-309 of 2007, C-150 of 2009, C-377 of 2010, C-123 of 2012, C-169 of 2012, C-199 de 2012 and C-286 of 2015.

389 C-150 of 2009.

and, also, in terms of security, the older entrepreneur is faced with an identical risk as the new, from which it turns out that the real equality enshrined in article 13 of the Charter is best performed with the terms agreed to in the clause under examination than with a blunt reference to future investments"[390]. For its part, the second numeral, by virtue of which the disputes or claims that took place before the BIT came into force are excluded, the Court has stressed that this exclusion "*respects the principle of non-retroactivity*"[391], in light of which the treaty shall only apply to disputes or claims that arise after its entry into force.

161. The Court also considers the third and fourth numerals compatible with the Political Constitution, according to which the treaty covers neither *(i)* investments with assets or capital of illicit origin nor *(ii)* tax matters. This is because, as it has indicated in previous decisions, "*it is constitutional that the Agreement omits to cover capital of illicit origin with the protection offered, (...) it is also constitutional that the measures warn about its neutral impact on tax matters*"[392] Regarding the latter, the exclusion of tax matters from the scope and effects of BIT does not ignore any component of the Political Constitution.

162. In relation to numeral 5, the Court concludes that this interpretative clause, by virtue of which the treaty will not be interpreted as an impediment for the Contracting Parties to "*adopt non-discriminatory measures on prudential*

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390 Judgments C-358 of 1996, C-379 of 1996, C-008 of 1997, C-294 of 2002 and C-309 of 2007.

391 Judgment C-377 of 2010. Cfr. Judgment C-123 of 2012. "The content of article 1 of the agreement protects, on the one hand, the principle of equality (Art.13 Superior) that in this case governs commercial relations and the position of those who as investors were governed by the prerogatives of the previous Agreement and that they cannot be affected with the entry into force of the new agreement under study. It also respects the principle of non-retroactivity, in the sense that it is not applicable to disputes or consolidated situations before its entry into force."

392 Judgment C-309 of 1997. Cfr. Judgment C-199 of 2012.

grounds" in matters of insurance and of the financial system, it is not only adjusted to the Political Constitution, but *(i)* is necessary to preserve the constitutional competence and regulatory autonomy of national authorities on this matter (arts. 150, 189, 371 et seq. of the PC, among others) and *(ii)* is compatible, in particular, with Article 100 of the PC. As regards the first, since the Political Constitution provides that national authorities have powers of intervention and competences to regulate such matters[393] and, for this, in accordance with constitutional jurisprudence, they have been recognized as having broad freedom of configuration in economic matters, such as those related to the financial and insurance system[394]. In this regard, the Court has concluded that this clause "*harmonizes with the mandates of regulation, inspection, surveillance and control of financial, stock exchange, insurance and any other activities related to the management, use and investment of resources collected from the public (arts 150.19 and 189.24 of the PC)*"[395]. As to the second, the Court has held, in a uniform manner, that the exceptions provided in the BIT for the Contracting Parties to adopt measures based on reasons of public order and stability of the financial system are compatible with "*Article 100 of the Constitution that allows for said reasons, to subordinate to special conditions or to deny the exercise of certain civil rights to foreigners*[396].

163. Finally, the Court considers that the expression "the measures taken on prudential grounds that affect free transfer must be temporary" is compatible with Articles 371 and 372 of the Political Constitution, related to the powers of the Central Bank. Article 371 provides that "*the following will be the basic functions of the Central Bank: to regulate the currency, international exchanges and credit; to issue the legal currency; to manage the international reserves; to be a lender of last resort*

393 Judgment C-432 of 2010.
394 Judgment C-354 of 2009.
395 Judgment C-199 of 2012.
396 Judgment C-150 of 2009. Cfr. Judgment C-169 of 2002.

and a banker of credit institutions; and to serve as a government fiscal agent. All of them will be exercised in coordination with the general economic policy". Article 372 prescribes that "*the Board of Directors of the Central Bank will be the monetary, exchange and credit authority, in accordance with the functions assigned to it by law. It will be in charge of the direction and execution of the Bank's functions (…)*".

164. The compatibility of the said expression with articles 371 and 372 of the Political Constitution is explained for two reasons. First, since judgment C-008 of 1997, the Court has indicated that this clause "*respects those competences of the central bank because it gives the parties the possibility of temporarily restricting the repatriation of money related to the investments protected by the Treaty, when there are serious difficulties in the balance of payments, which respects the discretion that the Board of the Issuing Bank has in the regulation and management of the country's international reserves*"[397]. In this regard, in judgment C-184 of 2016, the Court concluded that "*measures on capital transfers without impediments are constitutional, inasmuch as the exceptions that are usually provided for this free flow do not affect the autonomy in the direction of the economy by the States and establish the possibility of actions being taken to control the flow of capital when economic stability is put at risk, with possible material contents that support the decision instead of setting express time limits*".

165. Second, the aforementioned normative expression does not compromise the competences of the Central Bank in "*specific terms of validity, as these can only be established by the competent authority in accordance with the specific circumstances faced in the exercise of its constitutional functions*"[398].

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397 Cfr. Judgments C-358 of 1996, C-294 of 2002 and C-309 of 2007.

398 In Judgment C-184 de 2016, the Court declared the conditioned constitutionality of section (a) of article 2 of Anex 8 (c), Whereby, *the measures regarding payments and capital transfers "do not exceed a period of one year; however, under exceptional circumstances and for justified reasons, a Party may extend the period of application of the measures for an additional year. " This, because "the functions assigned by Article 372 Superior to the Board of Directors of the Central Bank as a*

In other words, this provision does not circumscribe the competences of the Central Bank "*to closed time limits that prevent the exercise of the work entrusted to it, which is not admissible by the Constitution*".[399] In all, this provision is compatible with articles 371 and 372 of the Political Constitution, since constitutional jurisprudence has uniformly reiterated that "*the temporary restriction of the competences of the Central Bank*" [400] is plausible, as long as it does not set closed or definitive time limits.

166. Based on the foregoing, the Court shall declare article 2 of the treaty *sub examine* constitutional.

4.3. Promotion and admission of investments (art. 3)

167. The text of article 3 reads as follows:

> "**Article 3. Promotion and amission of investments.**
>
> 1. Each Contracting Party shall encourage and admit in its territory, in accordance with its legislation, as well as the provisions of this Agreement, the investments made by the investors of the other Contracting Party.
>
> 2. The Contracting Parties, within the framework of their internal legislation, will willingly examine* the applications for

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monetary, banking and credit authority are permanent and are not subject to rigid time limits such as that determined in paragraph "a" of numeral 2 of Annex 8-C. The indefinite nature of the Banck's powers has been considered in other agreements. internationals in which, although the circumstances that enable such measures have been referred to and their transitory nature has been highlighted, the specific terms of validity have not been foreseen, since they can specifically be established by the competent authority according to the concrete circumstances that it faces in the exercise of his constitutional functions".

399 Id.

400 Judgment C-184 of 2016.

* Translator's note: The expression "in good faith", which would seem logical in the context of this provision, is avoided both in the Spanish ("buena voluntad") and the French version ("bienveillance") of the treaty.

entry and authorization to reside, work or travel made by the nationals of a Contracting Party in relation to an investment made in the territory of the other Contracting Party".

(i) Submissions of the Procuraduria

168. The Procuraduria sought the declaration of the constitutionality of this article, inasmuch as it provides that "*the immigration policy, (…) is governed by the sovereignty of each State, which conforms to the higher Colombian regulatory order*"[401].

(ii) Interventions

169. The MinCIT, the Chancellery and the UNAB requested for this article to be declared constitutional. UNAB noted that "*this article reaffirms the interest of promoting investments by each State (…) as well as facilitating applications for admission and authorizing residence, work and travel to nationals [of the other State], [with the respective] internal evaluation of applications, under current regulations*"[402]. The MinCIT and the Chancellery limited themselves to describing the content of this article[403].

(iii) The Court's considerations

170. This Court must answer the following legal problem: Is article 3 of the sub examine treaty compatible with the Constitution?

171. This article contains two numerals. The former foresees the duty of the Contracting Parties to encourage and admit, "*in accordance with their legislation*" and this

401 Cdno. 2, fl. 547.
402 Cdno. 2, fl. 497.
403 Cdno. 1, fls. 48 a 66 and 145 to 159.

Agreement, the investments made by the investors in a reciprocal manner. The second provides that "*within the framework of their domestic legislation*", the Contracting Parties will willingly examine the applications for admission and authorization to "*reside, work or travel*" of the nationals of "*a Contracting Party in relation to an investment made in the territory of the other Contracting Party*".

172. The Court states that, in such terms, this article is compatible with the Political Constitution. On the one hand, the Court has stressed that the commitment to encourage and admit the investments of the investors of the other Contracting Party complies with the Constitution, because "*it contributes to the internationalization of the State's economic relations and responds to clear reasons for national convenience (PC, Article 226)*"[404], as well as "compliance with the objectives of the Agreement"[405] and economic integration[406]. On the other hand, the commitment of a Contracting Party to assess, willingly, the migratory requests of the nationals of the other Party in relation to the "*investment made*" also contributes to achieving the purposes of the Agreement; this, without affecting in any manner the migration competences of the national authorities nor article 100 of the PC. Otherwise, nothing in this article threatens or violates any content of the Political Constitution.

173. Based on the foregoing, the Court shall declare that article 3 of the treaty sub examine is constitutional.

4.4. Minimum standard of treatment (art. 4)

174. The text of Article 4 reads as follows:

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404 Judgment C-358 of 1996. Cfr. Judgment C-199 of 2012.
405 Judgment C-494 of 1998.
406 Judgment C-309 of 2007.

"**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".

(i) The Submissions of the Procuraduria

75. The Procuraduria pointed out that, in general terms, this article "*complies with the constitutional order in terms of*

guaranteeing access to the administration of justice under due process, as well as with regard to the legitimate confidence derived from the principle of good faith".[407] However, with regard to paragraph 2, he pointed out that *"(...) it is contrary to the principle of national convenience [for Colombia to undertake] to guarantee full protection and security to French investors and their investments for physical and material damage caused to them or which they may suffer, which seriously compromises our budgetary resources in a preventive and compensatory manner, because (sic) Colombia is a very unsafe country in terms of crime and the prevention of natural disasters, in addition to the moral or subjective risk that this may entail*".[408] Furthermore, he stressed that "*such an obligation is even more burdensome taking into account that it is a matter of assuming objective responsibility for any risk in matters of protection and security (...) which could be extended to other states on the basis of the most-favoured-nation clause*"."[409].

176. Therefore, it requested the Court to "*declare the Agreement sub examine to be in accordance with the higher order, on the understanding that the concept of full protection and security does not require additional treatment or treatment beyond that required by the minimum standard of treatment of aliens under customary international law and does not create additional substantive rights, on the understanding that the obligation to provide full protection and security requires each party to provide the level of police protection required by customary international law; for greater certainty, the standard of full protection and security does not imply that the State receiving the investment is obliged to provide a more favourable level of police protection to investors than that afforded to nationals of the party in which the investment is made*".[410] In its concept, this conditioning would

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407 Cdno. 2, fl. 547
408 Cdno. 2, fl. 548
409 Id.
410 Cdno. 2, fl. 550

"*materialize with the corresponding interpretative declaration made by the President of the Republic.*"[411].

177. Finally, he pointed out that the expression "*or other international agreements*" would imply that "*anything favourable in terms of investors or investments in all international instruments concluded by all countries and containing provisions more favourable than those established in the Agreement, should automatically apply to French investors and their investments, which does not meet the expectations of clarity in negotiations required in this type of agreement*". However, it did not make any request with respect to this normative section.

(ii) Interventions

178. There were six interventions regarding this clause. Three argued that it be declared constitutional;[412] two explained its content, without making any request,[413] and finally, one requested the unconstitutionality of its first section[414].

179. The MinCIT pointed out that this article is compatible with the Constitution, as it "*protects investments in the area of legal certainty against manifestly arbitrary and discriminatory treatment and in the access of investors to the administration of justice, along with the guarantee of their due process*".[415] The Chancellery and the UNAB merely described the content of this article and requested for it to be declared constitutional[416].

180. In his written submission and in his participation in the hearing, José Antonio Rivas explained that the minimum level of treatment includes "*fair and equitable treatment and*

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411 Id.
412 The Ministry of Trade, Industry and Tourism, the Chancellery and the UNAB
413 José Antonio Rivas and Rafael Rincón
414 José Manuel Álvarez.
415 Cdno. 1, fl. 55.
416 Cdno. 1, fl. 147 and Cdno. 2, fl. 497.

full protection and security"[417]. The FET "*is not a single obligation, but rather is composed of several subobligations that include the obligation of due process in judicial and administrative proceedings, the prohibition of arbitrary or discriminatory treatment and the prohibition of denial of justice (…) the obligation not to affect the legitimate and reasonable expectations of the investor is also part of this standard, but its development is jurisprudential from the case of Waste Management v. Mexico*"[418].

181. He noted that where treaties do not define the content of FET, some tribunals have extended its scope, "*including, in addition, the following obligations: to maintain legal certainty for the foreign investor, to keep the regulatory environment that existed at the time the investment was made stable, and to treat the foreign investor in accordance with the principle of proportionality*"[419]. For this reason, the following clarification was included in Article 4(1)(b): "*It is understood that the obligation to provide fair and equitable treatment does*

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417 CD, min. 1:24:30. Since the min. 1:21:50, the intervener clarified that the 2011 Draft articles on international State responsibility of the United Nations International Law Commission of codify rules of customary international law and are binding on all States. Article 2 provides that "*two elements to constitute an internationally wrongful act are: (i) the conduct must be attributable to the State under international law and (ii) the conduct must constitute a breach of an international obligation of the State. If these two elements are present, the State is internationally liable". Article 4 provides that "according to this article, the conduct of any State organ, whether exercising executive, legislative, judicial or other functions, is considered an act of the State*".

418 CD, min. 1:24:37. In this case, the Court stated: "*the minimum standard of fair and equitable treatment is breached by a conduct attributable to the State and prejudicial to the claimant if the conduct is arbitrary, grossly biased, unfair or idiosyncratic, if it is discriminatory and exposes the claimant to sectional or racial prejudice or involves a lack of due process leading to an outcome that offends what is judicially appropriate, such as a manifest failure to provide natural justice (...) or a total lack of transparency. In applying this standard, it is relevant that the treatment violates the statements made by the host state in which the claimant relied". On the obligation to not deny justice, it clarified that "it is not simply a misapplication of the law, but goes much further (...) it consists of administering justice in a fundamentally unjust manner*".

419 CD, min. 1:27:30

not include a legal stabilization clause or prevent a contracting party from adopting its legislation"[420].

182. In this sense, the intervener clarified that "*the obligation of fair and equitable treatment does not by itself create an obligation to maintain the regulatory environment existing at the time of the investment*"[421]. This is because no investor can reasonably expect the Legislature to freeze its regulatory powers. However, in his opinion, the French investor "*could reasonably expect Colombia not to modify those regulations that the government had promised it would not modify*"[422]. This is based on two principles: pacta sunt servanda and good faith. This premise, in his opinion, is compatible with the principle of legitimate confidence (Judgment C-155 of 2007) whenever the State "*promised something specifically (...) in a contract*"[423].

183. Finally, he held that the obligation of FPS (Full Protection and Security) includes *"the obligation of the State to provide physical protection to the investments of the other party"*.[424] This obligation implies the due diligence of the host State, including "*the monitoring and implementation of measures to protect investments; [but] it only implies an obligation of means and not of results"*[425]. Furthermore, he stressed that Article 4.2 of the BIT "*cannot be interpreted by international tribunals as expanding the obligation of full protection and security to legal certainty*"[426]. The latter interpretation was accepted in the *Siemens v Argentina* case[427]. Finally, in relation to the expression "*inter alia*", he concluded that "*the minimum standard of treatment comprising fair and equitable treatment and full*

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420 CD, min. 1:27:37.
421 CD, min. 1:28:18
422 CD, min. 1:28:46.
423 CD, min. 2:19:12.
424 CD, min. 1:29:50
425 CD, min. 1:30:00
426 CD, min. 1:30:17
427 CD, min. 1:30:47

protection and security is derived from customary international law, which is composed of general practice and opinio juris, both of which are evolving and dynamic"[428].

184. Rafael Rincón noted that the MST "*is not a recent clause (…) [and that] this discussion is almost a century old*"[429], as international investment law has its origin in the law of protection of foreigners.[430] In his opinion, "*with the Neer case, we began to talk about a minimum level of treatment*"[431]. He states that for "*a treatment to constitute an international wrongful act, it must be equivalent to abuse, in bad faith*".[432] Parallel to the minimum standard of treatment, the FET standard emerges. In this regard, he noted that "*while the minimum standard of treatment arises in a customary manner ..., the origins of fair and equitable treatment are conventional*"[433].

185. He stressed that *"fair and equitable treatment is a different, broader standard, but its source is the minimum standard of treatment*"[434]. Article 4 provides that the "*minimum standard of treatment not only includes the Neer standard, but also includes other components of fair and equitable treatment (...) such as transparency, legitimate expectations (...) and predictability of government action*"[435]. In this regard, he held that in the judgment C-150 of 2009, the Court noted that the obligation of fair and equitable treatment "*is equivalent to the principle of legitimate confidence and good faith that must inspire administrative action*"[436]. In his written submission, he noted that "*different Tribunals have understood that the concept of legitimate expectations covers statements, declarations*

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428 CD, min. 2:34:59.
429 CD, min. 1:39:10
430 CD, min. 1:39:20
431 CD, min. 1:41:10
432 CD, min. 1:41:14
433 CD, min. 1:43:23.
434 CD, min. 1:44:12
435 CD, min. 1:45:05
436 CD, min. 1:46:50

or representations that the host State makes, and that the investor had as a justification for making its investment"[437].

186. Finally, this intervener clarified that "*this agreement includes a number of clauses that seek to preserve the regulatory power of the State, [for example] in articles 4, 5, 10 and 14*"[438]. In the light of those clauses, the agreement "*is recognizing the State's ability to regulate*"[439]. With regard to the expression "*inter alia*", contained in article 4, section 1, he noted that "*it is a fairly common wording in this type of clause* [to limit the FET, but] *it does not seek to provide it with an undetermined content*""[440]. Finally, in his written submission, he warned that "*the inclusion of the term inter alia in the Agreement would allow extensive interpretations of the conditions contemplated in the standard of fair and equitable treatment*"[441]. It is therefore "*possible to argue that the MST contained in this Agreement appears to be broader than the minimum level of treatment obligation under customary international law contained in other treaties*"[442].

187. In his written submission, José Manuel Álvarez argued for a finding of the unconstitutionality of Article 4(1). This request was based on the fact that "*Colombia has committed itself to assume international obligations in favor of that country and its investors, contained in all types of international instruments to which it has not been a party. Or even worse, to assume international obligations enjoyed by the French investor in any country where the investor is based or does business, even if Colombia does not have a BIT with those countries*"[443]. He stressed that this article violates national independence (art. 2 of the PC) and national sovereignty

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437 Cdno. 2, fls. 576 to 587.
438 CD, min. 1:48:10.
439 CD, min. 1:49:24.
440 CD, min. 2:36:42.
441 Cdno. 2, fls. 576 to 587
442 Id.
443 Cdno. 1, fls. 160 to 187

(art. 9 of the PC), given that *"they oblige Colombia to all past and future international law, which leaves no room for action to defend national autonomy and independence, and violates the principle of national sovereignty, by depriving it of the power to consent or not to international law to which it could voluntarily accept its application through international negotiations"*[444]. He also highlighted the uncertainty of the expression "*legitimate expectation*". This thesis was reiterated in his intervention during the hearing.[445].

188. In summary, the arguments presented in the interventions on this article are:

Relevant arguments on Article 4	
Constitutionality	1. It is compatible with access to the administration of justice, due process and legitimate confidence. 2. It guarantees legal certainty and it provides protection against manifestly arbitrary and discriminatory treatment. 3. It does not create an obligation to maintain the regulatory environment existing at the time of the investment. 4. It is compatible with the State's obligation to provide physical protection for the other party's investments. 5. It preserves the regulatory capacity of the State. 6. The expression "*inter alia*" is common to this type of clause and recognizes that customary international law is dynamic.

444 Id.

445 CD, min. 2:06:30. He highlighted that fair and equitable treatment, as established in Article 4, implies "in accordance with international law to the investors of the other party, that is, to which they would be entitled in any international situation and in any territory in which they participate".

Unconstitutionality	1. The first section violates national independence (art. 2) and national sovereignty (art. 9), since it "binds Colombia to all past and future international law", as well as to that to which Colombia has not expressed its consent. 2. The expressions "*inter alia*" and "*legitimate expectation*" in the Agreement would allow for extensive and indeterminate interpretations of the standard of fair and equitable treatment. 3. The FPS obligation affects fiscal sustainability and is contrary to the principle of national convenience.
Conditional constitutionality	1. Paragraph 2 is constitutional, on the understanding that the FPS obligation does not require additional treatment or treatment beyond that required by the minimum standard of treatment of aliens under customary international law, and does not create additional substantive rights or imply more favourable police protection.

(iii) The Court's considerations

189. This article is labelled as the minimum standard of treatment and contains two clauses, namely FET (num. 1) and FPS (num. 2). For this reason, and in accordance with the interventions outlined above, the Court will formulate separate legal issues for each clause:

189.1. Is the FET clause compatible with the Constitution? In addition, the Court will also answer the following issues: does the expression "*in accordance with the international law applicable to the investors of the other Contracting Party and to their investments, in its territory*" violate the principles of legal certainty (art. 1 of the PC) and of national sovereignty (art. 9 of the PC)? Do the expressions "*inter alia*" and "*legitimate expectations*" violate the principle of legal certainty (art. 1 of the PC) and threaten the exercise of the constitutional powers of the national authorities?

189.2. Is the FPS obligation in accordance with the Constitution? Due to the questioning formulated by the Procura-

duria, the Court will also resolve the following problem: does the obligation of FPS threaten the principle of fiscal sustainability established in article 334 of the Constitution, as it provides for a regime of "*objective responsibility*" contrary to the one established in article 90 ibid?

190. The Court notes that the first numeral of this article provides for the FET clause, according to which (i) the Contracting Parties must grant an FET "*in accordance with the international law applicable to investors of the other Contracting Party and to their investments, in its territory*" and (ii) the FET obligation "*includes, inter alia (a) the obligation not to deny justice (...) in accordance with the principle of due process and (b) the obligation to act in a transparent, non-discriminatory and non-arbitrary manner towards investors of the other Contracting Party*". In addition, it prescribes that FET *(i) "is consistent with the principles of predictability and the consideration of legitimate expectations of investors*", (ii) there is no violation when *"it is determined that another provision of this Agreement or another international agreement has been breached"* and (iii) *"does not include a legal stabilization clause or prevent a Contracting Party from adapting its legislation"*. The second numeral provides that *"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"*. It further clarifies that, *"for greater certainty"*, this obligation requires each Contracting Party to provide protection to investors and their investments "*against physical and material damage"*.

191. The Court notes that there is no unambiguous definition of fair and equitable treatment in the jurisprudence of international investment tribunals.[446] Moreover, the arbitral

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446 Judgment C-358 of 1996. "the majority position of the international doctrine on the principles of 'fair and equitable treatment' and 'full protection and security' indicates that these are defined in each specific case, in accordance

tribunals themselves have concluded that "*A judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case*"[447] and that "*Evidently the standard is to some extent a flexible one which must be adapted to the circumstances of each case*"[448]. Given the lack of a definition of "*fair and equitable*", IIAs have chosen to define their content on the basis of host State obligations towards investors. After analyzing these obligations, the literature highlights that the FET clause generally seeks to protect the investor and its investment from "*arbitrary, discriminatory or abusive*" measures by the host state[449].

192. Much of the current global discussion of international investment law relates to the scope of the FET clause.[450] In the *Recent Developments in Investor-State Dispute Settlement (ISDS)* reports of 2018, 2017 and 2016, UNCTAD noted *that "in the decisions where the State responsibility is declared, Tribunals very often do so on the basis of violations of fair and equitable treatment and indirect expropriation clauses*"[451]. For this reason, among

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with the rules contained in the respective treaties, not with respect to a rule of justice of an abstract nature".

447 *Mondev International Ltd. v United States of America*, ICSID Case No. ARB (AF)/99/2, 118. "*A judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case. It is part of the essential business of courts and tribunals to make judgments such as these*". (Official Spanish translation not available).

448 *Waste Management, Inc. v United Mexican States* ("Number 2"), ICSID Case No. ARB (AF)/00/3, 98. "*Evidently the standard is to some extent a flexible one which must be adapted to the circumstances of each case*". (Official Spanish translation not available).

449 Fair and Equitable Treatment. UNCTAD. (2012), 1.

450 Principles of International Investment Law, (OUP, 2012), R Dolzer ande C Schreuer. *The Fair and Equitable Standard of Treatment: Whose Fairness? Whose Equity?* M Sornarajah in Investment Treaty Law, Current Issues II: Nationality and Investment Treaty Claims and Fair and Equitable Treatment (London, UCL, 2007).

451 Recent Developments in Investor-State Dispute Settlement (ISDS), (2016) (2017) (2018). "*In the decisions holding the State liable, tribunals most frequently found breaches of the expropriation and the fair and equitable treatment (FET) provisions*". (Official Spanish translation not available).

others, it has concluded that *"the wide application of the FET obligation has revealed its protective value for foreign investors but has also exposed a number of uncertainties and risks"*[452]. In turn, some scholars argue that "*the Tribunals' overly broad reading of FET clauses is one of the main reasons for the current backlash against investment arbitration*"[453]. According to the information provided by the interveners, in 10 of the 11 investment arbitrations in progress against the Colombian State, the violation of this clause is alleged (para. 62).

193. Currently there is a discussion on whether the scope of the FET clause is limited to the classic standard of not denying justice, or whether it allows for more flexible interpretations regarding *(i)* arbitrary or discriminatory treatment, *(ii)* violation of due process and lack of transparency, *(iii)* protection of legitimate expectations, and *(iv)* the obligation to ensure legal stability of investments. The latter is irrelevant in the present case, since Article 4, numeral 1, explicitly states that "*the obligation to accord fair and equitable treatment does not to include a legal stabilization clause or to prevent a Contracting Party from adapting its legislation (…)*". Therefore, this obligation will not be assessed in this analysis.

194. *Arbitrary or discriminatory treatment*. The cases *CMS Gas Transmission Co v. Argentina* and *LG&E Energy Corp. and others v. Argentina* reflect the current trend of investment tribunals in this regard. Both companies alleged, in general terms, a violation of the FET standard, since, accord-

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452 Fair and Equitable Treatment. UNCTAD. (2012) "*The wide application of the FET obligation has revealed its protective value for foreign investors but has also exposed a number of uncertainties and risks*". (Official Spanish translation not available).

453 International Investment Law and Arbitration. Commentary, Awards and Other Materials. C.L. Lim, Jean Ho and Martin Paparinskins. Cambridge University Press. 2018, 260. "*Overly broad readings of FET clauses is one of the principal reasons fueling a backlash against investment arbitration*". (Official Spanish translation not available).

ing to the legal regime prior to the acquisition of operating licenses and shares in such companies, their tariffs would be calculated in dollars and, after the declaration of an economic emergency in 2002 due to the depreciation of the Argentinean peso, the Government ordered the calculation of such tariffs in Argentinean pesos at a rate of 1 peso per 1 dollar. In the first case, the Tribunal concluded that "*Any measure that might involve arbitrariness or discrimination is in itself contrary to fair and equitable treatment*".[454] In the second case, the Tribunal decided that "*the conclusion that the measures were not arbitrary does not mean that they were fair and equitable or that they did not affect the stability of the legal framework of gas transportation in Argentina.* [This, because] *although the measures implemented by Argentina were not the best, they were not taken lightly, without sufficient consideration, (...) they were the result of reasoned judgments and not of simple disregard for the law*"[455].

195. *Violation of due process and lack of transparency*. The most relevant cases on this issue are *Waste Management, Inc. v Mexico* and *Metalclad Corp. v Mexico*. In the first case, *Waste Management*, the garbage disposal concessionaire, alleged

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454 CMS *Gas Transmission Company v The Republic of Argentina*, ICSID Case No. ARB/01/8, 290. "*The standard or protection against arbitrariness and discriminations is related to that of fair and equitable treatment. Any measure that might involve arbitrariness or discrimination is in itself contrary to fair and equitable treatment. The standard is next related to impairment: the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of the investment must be impaired by the measures adopted*".

455 *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v Argentine Republic*, ICSID Case No. ARB/02/1, 162. "*On the contrary, this means that Argentina faced severe economic and social hardships from 2001 onwards and had to react to the circumstances prevailing at the time. Even though the measures adopted by Argentina may not have been the best, they were not taken lightly, without due consideration. This is particularly reflected in the* PPI *adjustments which, before deciding on their postponement, Argentina negotiated with the investors. The Tribunal concludes that the charges imposed by Argentina to Claimants' investment, though unfair and inequitable, were the result of reasoned judgment rather than simple disregard of the rule of law.*".

that Mexico had violated its right to due process, because it had ceased payments on the concession, and the bank that guaranteed the obligation had not made the guarantee effective. In this regard, the Tribunal noted that *" the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard, it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant*".[456].

196. In the second case, the company *Metalclad* alleged that the Mexican authorities violated their duty of transparency, as they denied it a license to operate a waste dump, despite the fact that, they claimed, all the necessary permits had been obtained. In this regard, the Tribunal concluded that, "*Prominent in the statement of principles and rules that introduces the Agreement is the reference to "transparency" (...) The Tribunal understands this to include the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party. There should be no room for doubt or uncertainty on such matters. Once the authorities of the central government of any Party (...) become aware of any scope for misunderstanding or confusion in this connection, it is their duty to ensure that the correct position is promptly determined and clearly stated so that investors can proceed with all*

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456 *Waste Management, Inc. v United Mexican States* ("Number 2"), ICSID Case No. ARB (AF)/00/3, 98

appropriate expedition in the confident belief that they are acting in accordance with all relevant laws" [457].

197. *Protection of legitimate expectations*. It is clear to the Court that, according to the specialized doctrine, the extension of this protection is *"one of the most controversial developments in fair and equitable treatment*.[458] In the case of *International Thunderbird Gaming Corporation v. Mexico*, the Tribunal stressed that " *Having considered recent investment case law and the good faith principle of international customary law, the concept of "legitimate expectations" relates (…) to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the (…) Party to honour those expectations could cause the investor (or investment) to suffer damages. The threshold for legitimate expectations may vary depending on the nature of the violation alleged (...) and the circumstances of the case."*[459]. In Saluka v Czeck Republic, the Tribunal held that *"the Czech Republic (…) has therefore assumed an obligation to treat a foreign investor's investment in a way that does not frustrate the investor's underlying legitimate and reasonable expectations. A foreign investor whose interests are protected under the Treaty is entitled to expect that the Czech Republic will not act in a way that is manifestly inconsistent, non-transparent, unreasonable (i.e. unrelated to some rational policy), or discriminatory (i.e. based on unjustifiable distinctions)"*[460].

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457 *Metalclad Corporation v The United Mexican States*, ICSID Case No. ARB(AF)/97/1

458 International Investment Law and Arbitration. Commentary, Awards and Other Materials. C.L. Lim, Jean Ho and Martin Paparinski. Cambridge University Press. 2018, 269

459 *International Thunderbird Gaming Corporation v The United Mexican States*, UNCITRAL, Award January 26 2006, 147 y 148.

460 *Saluka v Czech Republic*, Partial Award of 17 March 2006, 309. *"The "fair and equitable treatment" standard in Article 3.1 of the Treaty is an autonomous Treaty standard and must be interpreted, in light of the object and purpose of the Treaty, so as to avoid conduct of the Czech Republic that clearly provides disincentives to*

198. In the case of *Tecmed v. Mexico*, the Tribunal stressed that the protection of legitimate expectations " *requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.*"[461].

199. In this scenario, the Court emphasizes that current developments in international investment law seek to limit the scope of the FET clause through closed lists of concrete cases that give rise to its violation or even by omitting the expression "*fair and equitable*". The latter is reflected, for example, in Article 3(1) of the Indian BIT model.[462] However, in relation to the limitation of the scope of the FET clause, Article 8.10 of the investment chapter of the CETA *(i)* defined, in a closed way, the list of obligations inherent in this clause

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foreign investors. The Czech Republic, without undermining its legitimate right to take measures for the protection of the public interest, has therefore assumed an obligation to treat a foreign investor's investment in a way that does not frustrate the investor's underlying legitimate and reasonable expectations. A foreign investor whose interests are protected under the Treaty is entitled to expect that the Czech Republic will not act in a way that is manifestly inconsistent, non-transparent, unreasonable (i.e. unrelated to some rational policy), or discriminatory (i.e. based on unjustifiable distinctions). In applying this standard, the Tribunal will have due regard to all relevant circumstances". (Official Spanish translation not available).

461 *Técnicas Medioambientales Tecmed, S.A. v The United Mexican States*, ICSID Case No. ARB (AF)/00/2, 154

462 Indian Model BIT (2016). "*Each Party shall no subject investments of investors of the other Party to measures which constitute: (i) Denial of justice under customary international law; (ii) Un-remedied and egregious violations of due process; or (iii) Manifestly abusive treatment involving continuous and outrageous coercion or harassment*". (Official Spanish translation not available).

(2)[463] and *(ii)* delimited the concept of legitimate expectations to the specific action of a Party to induce the investor to make or maintain an investment (4)[464]. Finally, Article 9.6 of the Investment Chapter of the TPP explicitly provided on the FET clause that *(i)* it "*does not create additional substantive rights", (ii)* " *the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article* " and *(iii)* " *the mere fact that a subsidy or grant has not been issued, renewed or maintained, or has been modified or reduced, by a Party, does not constitute a breach of this Article*"[465].

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463 CETA. Art. 8.10 (2). "*2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes: (a) denial of justice in criminal, civil or administrative proceedings; (b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings; (c) manifest arbitrariness; (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; (e) abusive treatment of investors, such as coercion, duress and harassment; or (f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.*".

464 CETA. Art. 8.10 (4). "*4. When applying the above fair and equitable treatment obligation, the Tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.*".

465 TPP. Investment Chapter. Art. 9.6. "*Article 9.6: Minimum Standard of Treatment15 1. Each Party shall accord to covered investments treatment in accordance with applicable customary international law principles, including fair and equitable treatment and full protection and security. 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligations in paragraph 1 to provide: (a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and (b) "full protection and security" requires each Party to provide the level of police protection required under customary international law. 3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article. 4. For greater certainty, the mere fact that a Party takes or fails to take an*

200. In relation to the obligation of FPS, aside from the theoretical discussions on the subject,[466] the Court notes that the decisions of international investment arbitral tribunals are non-controversial in stating that this standard implies the maintenance of normal conditions of security and public order. For example, in the case *Channel Tunnel Group and other v UK*, the Tribunal held that the FPS clause implied "*to maintain conditions of normal security and public order*"[467]. In the case of *Tecmed v Mexico*, the Tribunal stressed that "*the guarantee of full protection and security is not absolute and does not impose strict liability upon the State that grants it* "[468]. Finally, in the *Asian Agricultural Products v Sri Lanka* case, the Tribunal concluded that "*is not aware of any case in which the obligation assumed by the host State to provide the nationals of the other Contracting State with "full protection and security" was construed an absolute obligation which guarantees that no damages will be suffered, in the sense that any violation thereof creates automatically a "strict liability" on behalf of the host State* (...) [in other words, this clause] *cannot be construed as the giv-*

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action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result. 5. For greater certainty, the mere fact that a subsidy or grant has not been issued, renewed or maintained, or has been modified or reduced, by a Party, does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result". (Official Spanish translation not available)

466 For instances, those related to the scope of subjective and objective liability in light of this clause, as well as its extension to legal protection of investments

467 *The Channel Tunnel Group Ltd and France: Manche SA v United Kingdom and France*, Partial Award on Jurisdiction, Decision of 30 January 2007, 314. "*It was the incumbent on the Principals, acting through the* IGC *and otherwise, to maintain conditions of normal security and public order in and around the Coquelles terminal*". (Official Spanish translation not available) (Translator's note: there is a mistake in this reference. In the original Decision, the correct paragraph is 319)

468 *Técnicas Medioambientales Tecmed, S.A. v The United Mexican States*, ICSID Case No. ARB (AF)/00/2, 177.

ing of a warranty that property shall never in any circumstances be occupied or disturbed "[469].

201. In this regard, the Court notes that, as it has held in previous decisions,[470] the clauses of FET and FPS are, in general terms, compatible with the Constitution. This is so, since they seek to guarantee "*the principle of juridical security, due process in all judicial proceedings, and the security and protection of investors, in accordance with constitutional principles and state objectives (Preamble, Article 2 and 29 of the Constitution)*"[471]. These are "*developments of equality and reciprocity, principles that guide the country's international relations*"[472] and result in the State being liable for illegal damages that are attributable to it (art. 90 of the Constitution). Similarly, the Court reiterates that the FET clause responds to the "*need to promote conditions of legal certainty to improve trade relations between the Contracting Parties, in the sense that the management, maintenance, use and sale of such investments are not hindered by arbitrary or discriminatory measures*"[473]. Furthermore, in accordance with the judgment C-123 of 2012, the Court

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469 *Products Ltd. v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, 49. "*The arbitral Tribunal is not aware of any case in which the obligation assumed by the host State to provide the nationals of the other Contracting State with "full protection and security" was construed an absolute obligation which guarantees that no damages will be suffered, in the sense that any violation thereof creates automatically a "strict liability" on behalf of the host State (….) cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed*". (Official Spanish translation not available

470 Judgments C-358 of 1996, C-379 of 1996, C-008 of 1997, C-494 of 1998, C-294 of 2002, C-309 of 2007, C-150 of 2009, C-377 of 2010, C-123 of 2012, C-169 of 2012, C-199 of 2012 and C-286 of 2015

471 Judgments C-377 of 2010 and C-286 of 2015

472 Judgment C-008 of 1997

473 Judgment C-169 of 2012: "Thus, the Contracting Parties agree to promote each other's investments, to facilitate each other's investment permits, to grant the required authorizations, and not to hinder the investment process of the other Party".

reiterates that, in any event, the FET clause "*implies no more than granting equal treatment to the nationals of each Party*"[474].

202. The Court finds that the statement "*the obligation to provide fair and equitable treatment includes (…) a) the obligation not to deny justice in civil, criminal, or administrative proceedings, in accordance with the principle of due process*" (art. 4.1-a), as it has been interpreted by the arbitral tribunals, is compatible with the guarantees of due process and access to justice provided by articles 28[475], 29[476], 228[477], and 229[478]

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474 Judgment C-123 of 2012

475 Art. 28 of the PC: "Everyone is free. No one may be disturbed in his person or family, or reduced to prison or arrest, or detained, or his home registered, except by written order of a competent judicial authority, with the legal formalities and for reasons previously defined by law. The person preventively arrested shall be brought before the competent judge within 36 hours so that they can take the appropriate decision within the time limit laid down by law. In no case may there be detention, imprisonment or arrest for debt, or penalties and security measures that are not time-barred".

476 Art. 29 of the PC: "Due process shall apply to all judicial and administrative proceedings. No one may be tried except in accordance with the laws that exist prior to the act of which they are accused, before a competent judge or court and with due regard for the proper forms of each trial. In criminal matters, permissive or favourable law, even if later, shall be applied in preference to restrictive or unfavourable law. Everyone is presumed innocent until they have been found guilty by a court of law. Anyone who is charged with a crime has the right to the defence and assistance of counsel of their own choosing, or of their own motion, during the investigation and trial; to due process of law without undue delay; to present evidence and to challenge evidence adduced against them; to challenge the conviction; and not to be tried twice for the same act. Evidence obtained in violation of due process is null and void.

477 Art. 228 of the PC "The administration of justice is a public service. Its decisions are independent. The proceedings shall be public and permanent with the exceptions established by law and the substantial law shall prevail in them. Procedural terms shall be diligently observed and non-compliance shall be sanctioned. Its operation shall be decentralized and autonomous".

478 Art. 229 of the PC: "The right of every person to have access to the administration of justice is guaranteed. The law shall indicate the cases in which he may do so without the representation of a lawyer".

of the Constitution, and even with the judicial guarantees provided by article 8 of the ACHR[479].

203. In turn, the expression "*the obligation to act in a transparent, non-discriminatory and non-arbitrary manner with respect to the investors of the other Contracting Party and their investments*", as interpreted by the arbitral tribunals, is compatible with the principle of equality (art. 13 of the PC) and the prohibition of arbitrariness, which is inherent to the Rule of law (arts. 1 and 2 of the PC). Similarly, the Court takes note that it is compatible with article 100 of the Constitution, insofar as this clause could not prevent the Colombian Legislature from exercising the competitions provided for it in that article, which is, "*for reasons of public*

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479 Art. 8 of the ACHR "1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature. 2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: a. the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court; b. prior notification in detail to the accused of the charges against him; c. adequate time and means for the preparation of his defense; d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel; e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law; f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts; g. the right not to be compelled to be a witness against himself or to plead guilty; and h. the right to appeal the judgment to a higher court. 3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind. 4. An accused person acquitted by a non-appealable judgment shall not be subjected to a new trial for the same cause. 5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice."

order, to make aliens subject to special conditions or to deny them the exercise of certain civil rights"[480].

204. However, three questions raised by the interveners warrant special consideration. First, the Court considers that the expression "*in accordance with the international law applicable to the investors of the other Contracting Party and to their investments, in its territory*" does not satisfy the principle of legal certainty (Article 1 of the PC) and certain interpretations of it infringe the principle of national sovereignty (Article 9 of the PC). Regarding the first, the Court notes that legal certainty implies "*a guarantee of certainty*"[481] so that in the juridical traffic the subjects and the authorities can "*foresee the rules that will be applied to them and identify what the juridical system orders, prohibits or permits*"[482]. In this sense, the expression referred to does not allow for the identification of, even prima facie, what the parameters are that, within international law, will be applicable to provide content to the FET obligation. It is not possible to determine whether "*the international law applicable*" to investors is customary or conventional law, and if the latter, it is also not possible to clarify precisely whether the treaties and other instruments applicable are those ratified by the state receiving the investment, the state of the investors, or even if another group of international instruments is included. Considering this uncertainty, it is impossible for the State to determine or foresee what is ordered, prohibited or permitted, as well as the specific obligations whose breach may give rise to its international responsibility.

205. With regard to the latter, the Court reiterates that national sovereignty implies, among other things[483], that

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480 Art. 100 of the PC.

481 Judgment C-250 of 2012

482 Judgment SU354 of 2017

483 Judgment C-578 of 2002. "*Despite these developments, three elements of sovereignty remain constant: (i) the understanding of sovereignty as independence, in*

the Colombian State may freely and voluntarily assume international obligations; in other words, "*the right of entering into international engagements is an attribute of State sovereignty*"[484] safeguarded by article 9 of the Constitution and must therefore be protected through constitutionality review. Thus, for the Court it is clear that - besides being singularly broad in comparison with other similar expressions of the FET clause provided by the other IIAs signed by Colombia [485]-, from the normative expression *sub examine* could be derived, as was submitted by an intervenor, normative range in the light of which the Colombian State could become subject to rules of international law to which it has not voluntarily submitted. Consequently, it could become subject to international obligations that it has not freely assumed and could be demanded against under them, thus violating the principle of national sovereignty (art. 9 of the Constitution).

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particular from States with hegemonic claims; (ii) the acceptance that acquiring international obligations does not compromise sovereignty, as well as the recognition that sovereignty cannot be invoked to retract validly acquired obligations; and (iii) the reaffirmation of the principle of immediacy according to which the exercise of State sovereignty is subject, without intermediation by the power of another State, to international law. Understood in this way, sovereignty in the legal sense confers rights and obligations on States, which enjoy autonomy and independence in the regulation of their internal affairs, and can freely accept, without foreign imposition, as equal subjects of the international community, obligations aimed at peaceful coexistence and the strengthening of relations of cooperation and mutual assistance. Sometimes this may require the acceptance of the competence of international bodies on some matters of national competence, or the cession of some national competences to supranational instances. In accordance with the jurisprudence of this Court, this possibility is compatible with our constitutional order, provided that such limitation of sovereignty does not imply a total cession of national competences".

484 Permanent Curt of International Justice 1923, *Wimbledon Case*, World Court Reports, Serie A, No. I

485 Furthermore, as one intervener warned, the reference to "*applicable international law" is clearly broader than that provided for in the treaties previously signed by Colombia, in which the "standard of fair and equitable treatment must be in conformity with or within the minimum level of treatment recognized by customary international law*". Cdno. 2. Fl. 579. Rafael Rincón. Intervention

206. The Court emphasizes that the same reading must applied to the expression "*the obligations emanating from international law*", contained in article 16 of the treaty *sub examine*. It was in this light, as will be developed in the corresponding section, the Colombian and French governments decided, in order to clarify and define its content, to sign the joint interpretative declaration on October 23, 2017. In this regard, the Colombian Government acknowledged that said expression, without the interpretative declaration, "*had a dangerous or risky interpretation in terms of suits for the Colombian State* "[486], while, after the declaration, the Ambassador maintained that the obligations to which he refers "are now even more clearly defined in order to prevent abusive use of that provision".

207. Based on the foregoing, and given the wide wording of the FET clause, as well as its "*uncertainties and risks*"[487], the Court considers it necessary that the content of the statement "*in accordance with international law applicable to investors of the other Contracting Party and to their investments, in its territory*" be limited and determined, in such a way that it satisfies the requirements of the principle of legal certainty (art. 1 of the PC) and its content is clarified (para. 203). This is essential so that the obligations derived from it are foreseeable and determinable by the national authorities and, therefore, they can adjust their actions to those standards of conduct. For this reason, the Court will declare the constitutionality of the clause, under the condition that the Contracting Parties define its content, so that it is compatible with the principle of legal certainty.

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486 CD, min. 3:29:50

487 Fair and Equitable Treatment. UNCTAD. (2012) "*The wide application of the FET obligation has revealed its protective value for foreign investors but has also exposed a number of uncertainties and risks*". (Official Spanish translation not available)

208. Second, the Court notes that the expression "*inter alia*", in the terms provided for in article 4 of the treaty, does not satisfy the principle of legal certainty (art. 1 of the PC) either. This is because if broadly interpreted, *(i)* it renders the content of the FET clause and the obligations that the State assumes, and could eventually breach, indeterminate, which would limitlessly compromise its international liability and *(ii)* it does not even contain basic parameters to make its scope foreseeable and, therefore, it would leave the determination of its content to the arbitral tribunals. The inclusion of this expression in the FET clause generates an invincible uncertainty for national authorities, which, in the exercise of their powers, would find it impossible to determine whether a legislative, judicial, administrative or control decision or measure would represent an international offense that eventually gives rise to the declaration of international responsibility of the Colombian State in the framework of an international investment arbitration.

209. The only interpretation of the expression "*inter alia*" compatible with the principle of legal certainty is the restrictive one, in light of which its only scope is analog, and it cannot be understood that it includes additional obligations, but the ones expressly provided in article 4. Only under this interpretation does the expression "*inter alia*" comply with the principle of legal certainty, as the Contracting Parties would be certain about the obligations that the FET clause contains and, therefore, the normative standards that they must observe, in order to avoid committing an international wrong. For this reason, the Court will declare the constitutionality of the expression "*inter alia*" established in the first section of Article 4 of the treaty, on the condition that it must be interpreted restrictively, in an analogical sense, and not additive.

210. Lastly, the Court highlights that the protection of "*legitimate expectations*", provided in the first numeral, is not something unknown to the national legal order, or contrary

to the Constitution. On the contrary, the protection of legitimate expectations is justified in the principles of legitimate confidence and good faith (art. 83 of the PC). In this regard, the Court has held that its legal protection "*finds its constitutional basis in the principle of legitimate confidence. In this sense, it should be noted that, as a corollary of the principle of good faith, foreign doctrine and jurisprudence, since the mid-1960s, have been developing a theory on legitimate confidence, which has known original and important developments throughout various decisions of this Court*"[488]. In particular, in judgment C-169 of 2012, the Court stated that, in accordance with the principle of legitimate confidence, "*the public authorities are obliged to preserve consistent behavior with respect to previous acts or actions (…) unless there is a compelling public interest involved*"[489]. In the judgments C-031, 2009, C-608, 2010 and C-169 of 2012, the Court noted that the protection of legitimate expectations involves the protection of the investor and its rights "*against sudden and unexpected changes made by the public authorities (…) hence the State is, in these cases, faced with the obligation to provide the affected party with a reasonable period, as well as the means, to adapt to the new situation*".[490] Finally, the Court reiterates that the protection of legitimate expectations supposes "*a damage that is subject to compensation*"[491]. In sum, in light of constitutional jurisprudence, the legitimate expectations of investors are protected as long as *(i)* they are generated in good faith as a consequence of consistent and repeated acts or behavior of public authorities and *(ii)* they are disregarded due to abrupt and untimely changes attributable to the public authorities.

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488 Judgments C-031 and C-050, both of 2009. Cfr. Judgments C-169 and C-199, both of 2012, as well as C-286 of 2015

489 Judgment C-169 of 2012.

490 Judgment C-031 of 2009, C-169 of 2012 and C-608 of 2010

491 Id.

211. However, after reviewing the pronouncements of the arbitral tribunals, the Court cannot ignore that this expression represents "*one of the most controversial developments in fair and equitable treatment*"[492] and that it has not been defined uniformly by the arbitral tribunals. Furthermore, the Court emphasizes that the Tribunals recognize that the " *The threshold for legitimate expectations may vary depending on the nature of the violation alleged (...) and the circumstances of the case*."[493] This, in addition to the uncertainty and the " *flexible*"[494] nature of this clause, explains why for the Court it is essential that its scope to be specified, so that its effects and consequences are foreseeable, the principle of legal certainty is guaranteed (art. 1 of the PC) and it be compatible with the standard of protection established by the constitutional jurisprudence with respect to the legitimate expectations, indicated above. The Court emphasizes that this is also necessary for the purposes of guaranteeing equality (art. 13 of the PC) between the foreign investor and the national investor with respect to the protection of their legitimate expectations related to its investments (*para. 109 et seq*.). In turn, the delimitation of the scope of this concept is completely consistent with recent developments in international investment law in this regard, particularly those included in the CETA and the TPP (*para. 199*).

212. In these terms, the Court will declare constitutional the expression "legitimate expectations" provided in Article 4, on the condition that the Contracting Parties define what

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492 International Investment Law and Arbitration. Commentary, Awards and Other Materials. C.L. Lim, Jean Ho and Martin Paparinskins. Cambridge University Press. 2018, 269

493 *International Thunderbird Gaming Corporation v The United Mexican States*, UNCITRAL, Award, 26 January 2006, 147 and 148.

494 *Waste Management, Inc. v United Mexican States* ("Number 2"), ICSID Case No. ARB (AF)/00/3, 98. "*Evidently the standard is to some extent a flexible one which must be adapted to the circumstances of each case*". (Official Spanish translation not available)

should be understood by legitimate expectations, taking into account that they only could be created if they derived of specific and repeated acts carried out by the Contracting Party that induce the investor in good faith to make or maintain the investment, and that there are sudden and unexpected changes made by public authorities, that affect its investment.

213. Lastly, the Court notes that the questioning posed by the Procuraduria against the FPS clause is unfounded, considering the scope that the international investment tribunals have given to its content. In effect, the Procuraduria maintains that this clause implies "*the assumption of objective responsibility for any risk*", which would imply serious threats to the fiscal sustainability principle (art. 334 of the PC) and, therefore, would be inconvenient (art. 226 of the PC). In this regard, the Court highlights that the Tribunals have consistently held that this clause implies "*maintaining normal conditions of security and public order*", as well as it has considered that it does not provide for an objective liability regime. Consequently, the Court will not grant the request for conditioning this clause made by the Procuraduría. Furthermore, the Court notes that, under the terms of international investment jurisprudence, the standard of protection of the FPS clause of the treaty *sub examine* is analogous to the one provided in the Constitution (arts. 2 and 90), insofar as it seeks the protection and safety of investors, as well as the duty of the State to respond for the unlawful damages that may be attributed to it.

214. Based on the foregoing reasons, the Court will declare the constitutionality of Article 4 of the treaty *sub examine*, in light of the conditions set forth in the preceding paragraphs. In turn, in accordance with the provisions of para. 68 et seq , the Court will inform the President that if, in exercise of his constitutional competence to direct 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 conditionings provided by the Court in relation to expressions *(i) "in accordance with international law applicable to investors of the other Contracting Party and its investments, in its territory"*, provided in the first paragraph, *(ii) "inter alia"*, established in the first numeral, and *(iii) "legitimate expectation "*, included in second the section of the same numeral, in the terms provided in the preceding paragraph.

215. The following table summarizes the foregoing considerations:

Decision	
Article 4	Constitutional
The expression "*in accordance with international law applicable to investors of the other Contracting Party and its investments, in its territory*"	Constitutional, under the condition that the Contracting Parties define its content, so that it is compatible with the principle of legal certainty.
The expression "*inter alia*"	Constitutional, on the understanding that this should be interpreted restrictively, in an analogical sense, and not additive.
The expression "*legitimate expectations*"	Constitutional, under the condition that the Contracting Parties define what should be understood by legitimate expectations, bearing in mind that these expectations are only created so long as they derived from specific and repeated acts carried out by the Contracting Party that induce the investor in good faith to make or maintain the investment, and that it involves abrupt and unexpected changes made by public authorities and that affect its investment.

4.5. National treatment and most favoured nation (art. 5)

216. The text of article 5 reads as follows:

> "**Article 5. National treatment and most favoured 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, treatment no less favourable than the one accorded in like situations to its Investors or the treatment accorded to investors of the most favoured nation, if the latter is more favourable.
>
> 2. This treatment shall not include privileges granted by a Contracting Party to Investors of a third State by virtue of its participation or association in a free trade area, customs union, common market, or any other form of regional economic organization or similar arrangement, existing or future.
>
> 3. The obligation of a Contracting Party to accord to Investors of the other Contracting Party treatment no less favourable than the one accorded to its own Investors shall not prevent the Contracting Party from adopting or maintaining measures designed to ensure public order in the event of threats to the fundamental interests of the State. Such measures shall not be arbitrary and shall be justified, necessary and proportionate to the objective pursued.
>
> 4. For the sake of clarity, the most-favoured-nation treatment to be accorded in similar situations and referred to in this Agreement does not extend to Article 1 or to dispute settlement mechanisms, such as those contained in Articles 15 and 17 of this Agreement, provided in international investment treaties or agreements". (Sic)

(i) The Submissions of the Procuraduria

217. The Procuraduría requested the Court to declare this article constitutional. He noted that the NT and MFN princi-

ples "*are based on non-discrimination in trade and finance*"[495]. The NT seeks to ensure that "*investors of the other contracting party are not given less favourable treatment than that granted in similar situations to their own investors*"[496]. The MFN principle, on the other hand, guarantees that "*the investor of the other contracting party shall be accorded treatment at least as favourable as that accorded to investors of a third State*"[497]. In these terms, the Procuraduria concluded that this article is compatible with "*articles 2 and 13 of the Constitution with respect to the validity of a fair order and without discriminatory treatment, in accordance with the provisions of article 100, ibid*".[498].

(ii) Interventions

218. There were seven interventions regarding this clause. Three argued in favour of its constitutionality[499]; three explained its content[500], with arguments in favor and criticisms against it[501], and one submitted as to the partial unconstitutionality of this provision[502].

219. The MinCIT, the Chancellery and the UNAB requested the declaration of constitutionality of this provision. The MinCIT noted that "*no incompatibility was found between the text analyzed and the Constitution*"[503]. This is because, as recognized by the Court in judgments C-608 and C-377, both of 2010, this clause seeks to ensure that investors are not subjected to any discrimination. The UNAB considered that this provision is "*in harmony with our Constitution, due to its*

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495 Cdno. 2, fl. 552
496 Id
497 Id
498 Id
499 The Ministry of Trade, Industry and Tourism, the Chancellery and the UNAB
500 José Antonio Rivas y Rafael Rincón
501 José Manuel Álvarez
502 URosario
503 Cdno. 1, fl. 56

content being similar to other agreements previously signed and in accordance with national legislation"[504]; this conclusion was based on extensive quotes from judgments C-750 of 2008, C-031 of 2009, C-169 and C-199, both of 2012, and C-184 of 2016. The Chancellery merely described the content of this article and requested its constitutionality[505].

220. José Antonio Rivas argued that NT and MFN clause are "*typical obligations of investment treaties*"[506] and derive from the principles of equality and non-discrimination[507]. The NT requires that French investors be treated "*no less favourably than domestic investors and their investments in similar situations*"[508]. He explained that international tribunals use "*a three-part test to assess whether there has been a violation of national treatment. First, whether the domestic investor is an appropriate comparator with the disputing investor. Second, whether the disputing investor was granted less favourable treatment. Third, whether differential treatment can be justified on public policy legitimate grounds*"[509].

221. The same intervener noted that the MFN clauses "*requires that French investors and their investments to be treated no less favourably than investors and investments from third states in similar situations*"[510]. There is no differential treatment "*in favour of the foreign investor (...) the standard consists in refraining from giving a less favourable treatment, in other words, refraining from giving a worse treatment (...) no better treatment is required*"[511]. International tribunals use "*a three-part test to assess whether an MFN violation has occurred. First, whether the third country foreign investor is an appropri-*

504 Cdno. 2, fl. 503.
505 Cdno. 1, fl. 148
506 CD, min. 1:31:04
507 CD, min. 1:31:24
508 CD, min. 1:31:40
509 CD, min. 1:32:41
510 CD, min. 1:31:49.
511 CD, min. 1:32:10

ate comparator with the disputing investor. Second, whether the disputing investor was granted a less favourable treatment. Third, whether differential treatment can be justified on public policy legitimate grounds"[512].

222. He clarified that the possibility of incorporating more favorable clauses from other international treaties approved by Colombia under the MFN "*exists only with respect to substantial obligations, because there is no reason to treat French investors worse than investors from other states*"[513]. In contrast, article 5 absolutely excludes the use of the MFN clause to import dispute settlement clauses. Finally, he stressed that "*there is nothing in this treaty that affects the sovereign negotiating capacity of the President in future international negotiations*"[514].

223. Rafael Rincón argued that "*the justification for the NT and MFN clauses in the Agreement seems to derive from notions such as equality and non-discrimination*"[515]. In his view, the NT implies that foreign investors are entitled to be treated as if they were domiciled in (or were citizens of) the host state. The MFN clause, on the other hand, *"provides that foreign investors are entitled to treatment no less favourable than the one available to foreign investors from a third State"*[516]. Furthermore, he held that "*the justification for NT and MFN protections in these types of treaties is explained by the efforts to build a liberalized transnational investment regime*"[517]. In turn, the NT and MFN clause in the Agreement contains the clarification that the protections afforded will *apply "in respect of their investments and investment-related activities*", which, in his view, indicates an intention to restrict the scope of the clause. Similarly, he

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512 CD, min. 1:34.12
513 CD, min. 1:34:27
514 CD, min. 1:36:10
515 Cdno. 2, fls. 576 to 587
516 Id
517 Id

stressed that the Colombian State has the discretion to take the necessary measures to protect its "*fundamental interests*", which may be reviewed by international investment tribunals in the context of these disputes.[518] He clarified that, through the MFN clause, an investor may seek to "i*mpor*t" provisions from other agreements that are more favourable and that are different from those included in the respective agreement it concluded with another Contracting State[519].

224. In his written submission, José Manuel Álvarez argued that the NT and the MFN clause guarantee that foreigners are not discriminated against in comparison to nationals or persons from third states[520]. In this sense, any treatment or benefit granted to one or the other and not extended to the foreign investor covered by the BIT constitutes a violation of the standard.[521] In particular regarding the MFN clause, he stressed that its direct effect is that any benefit or advantage granted by Colombia to an investor from any part of the world that the French investor does not enjoy, must be extended to them. Failure to do so would constitute a violation of this standard. Thus, in his submission, the Government agrees to the importation of clauses from other treaties, which could generate potential claims before investment arbitral tribunals against Colombia.[522] He also pointed out that, in the face of the importation of substantial clauses, the position of the tribunals is flexible. In that sense, arbitrators have granted applications to extend the rights contained in the treaty, such as in the case *CME v Czech Republic*, in which the replacement of a treaty provision regarding compensation was allowed. Under the treaty the standard of compensation was fair compensation,

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518 Id
519 Id
520 Cdno. 2, fls. 429 to 439
521 Id.
522 Id.

while in the treaty with the third State the standard was the fair market value.

225. In his intervention at the hearing, the same intervener argued that the MFN clause in the treaty is "*more extensive*"[523], in the sense that it "*will give the best treatment to existing and post-agreement obligations under international law*"[524]. This brings "*a cascading consequence of obligations that the Colombian State could not contain (...) [in light of which] any investor could claim that right"*[525]. On the cumulative effects of MFN, he stressed that "*it is a cascade effect, [which incorporates] hundreds of rights that accumulate and that have the possibility of being demanded by the investor by invoking the clauses of the treaties*"[526]. He clarified that this clause "*has a local and an international dimension, [and that] procedural and other substantial clauses would apply to the latter*"[527]. Finally, he warned that the MFN clause makes "*what is negotiated lose importance; the benefits and effort of negotiation lose importance*"[528] because of the cascade effect, citing the *Maffezini v. Kingdom of Spain* and *Siemens v. Argentina* cases.

226. Finally, URosario noted that article 5 provides for a "*time limit for the State to intervene in cases of economic emergency, which clearly results in inconvenience. In the event of an economic emergency, the Colombian State, under Article 5, has the obligation to wait to take emergency measures, which may have a direct impact on the population."*[529].

227. In summary, the arguments presented in the interventions regarding this article are:

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523 CD, min. 2:01:20
524 CD, min. 2:01:40
525 CD, min. 2:01:55
526 CD, min. 2:08:07
527 CD, min. 2:25:15
528 CD, min. 2:28:50
529 Cdno. 1, fls. 71 to 75

Relevant arguments on article 5	
Constitutionality	1. The NT and MFN guarantee the principles of equality and non-discrimination. 2. This clause does not compromise the State's discretion to take necessary measures to protect its "*fundamental interests*".
Unconstitutionality	1. The MFN clause encourages the import of clauses from other treaties. 2. The MFN clause covers "*obligations under international law existing after and relating to this agreement*". 3. Therefore, the MFN clause generates a cascade effect of obligations on the part of the State towards an investor. 4. The MFN clause makes "*what is negotiated lose importance; the benefits and the effort of negotiation lose importance*". 5. Limiting the State's ability to take measures to ensure public order is contrary to national convenience.

(iii) The Court's considerations

228. This article contains two clauses, namely NT and MFN. For this reason, and in the light of the interventions outlined above, the Court will formulate separate legal issues for each clause:

228.1. Is the NT clause compatible with the Constitution? Does the expression "*like situations*" infringe upon the principle of legal certainty (Art. 1 of the PC), and does the expression "*necessary and proportionate to the objective pursued*" threaten the constitutional powers of national authorities, their freedom of configuration and their regulatory powers?

228.2. Is the MFN clause in conformity with the Constitution? Does this clause threaten the competence of the President to conduct international relations and conclude treaties, as provided for in article 189.2 of the Political Constitution?

229. The first numeral of this article provides that each Contracting Party shall "*apply within its territory to investors of the other Contracting Party, in respect of their investments and activities related to their investments, treatment no less favourable than the one accorded in like situations*" *(i)* to its investors (NT) or *(ii)* to investors of the most favoured nation (MFN), whichever is more favourable. Numerals 2 and 4 include two exceptions to the MFN clause, namely *(a)* "*the privileges accorded by a Contracting Party to investors of a third State pursuant to (…) a free trade area, customs union, common market, or any other form of regional economic organization or similar agreement, now or in the future*" (num. 2) and *(b)* the definitions in Article 1 and the dispute settlement mechanisms between investor and Contracting Party and between Contracting Parties, "*provided in international investment treaties or agreements*" (num. 4). Meanwhile, numeral 3 provides for an exception to the NT, according to which this obligation shall not prevent the State from adopting or maintaining measures aimed at ensuring public order in the event of "*serious threats to the fundamental interests of the State*", provided that they are *(i)* not arbitrary, *(ii)* justified, *(iii)* necessary and *(iv)* proportional.

230. National treatment. The NT clause requires it "*to apply to aliens the same legal treatment as to nationals*"[530]. The Court notes that, in order to apply this clause, international investment tribunals generally use the test formulated in the case *Saluka v Czeck Republic* [531], in the light of which a measure adopted by the State is considered discriminatory, if it is demonstrated that *"(i) similar cases, (ii) are treated differ-*

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530 2001 Articles on State Responsibility for International Wrongful Acts. (Art. 3, commentary 7). International Law Commission. "*National treatment requires States to apply to aliens the same legal treatment as to nationals*". (Official Spanish translation not available)

531 *Saluka v Czech Republic*, Partial Award of 17 March 2006, 313

ently and (iii) without reasonable justification"[532]. With regard to the first of these elements, the Court notes that there is no uniform definition found in the recent jurisprudence of these tribunals[533] and it is possible to identify at least two completely opposite trends. In the case *Occidental v Ecuador*[534], an oil investor alleged that Ecuador had violated the NT clause, because it did not grant him the reimbursement of the value added tax, while it did so with companies in the export sectors of flowers, mining and sea products. Ecuador argued that the term "*like situations*" in the NT clause only covered companies in the same sector and that, in effect, all oil companies had been excluded from the reimbursement of this tax. In this case, the Tribunal accepted the claimant's thesis and concluded that as to the expression "*in similar situations*" it cannot be interpreted "*in the narrow sense advanced by Ecuador as the purpose of national treatment is to protect investors as compared to local producers, and this cannot be done by addressing exclusively the sector in which that particular activity is undertaken*"[535].

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532 *Quiborax SA and Non Metallic Minerals SA v Bolivia*, ICSID Case No. ARB/06/2 Award, 16 September 2015, 247 "*to determine whether the Revocation Decree discriminated against NMM, the Tribunal will apply the three pronged test formulated in Saluka (…) State conduct is discriminatory if (i) similar cases are (ii) treated diferentely (iii) without reasonable justification*". (Official Spanish translation not available)

533 International Investment Law and Arbitration. Commentary, Awards and Other Materials. C.L. Lim, Jean Ho and Martin Paparinskins. Cambridge University Press. 2018, 302. "*Reasonable people may disagree on whether it is posible to identify jurisprudence constante in recent arbitral decisions in relation to likeness*".

534 *Occidental Exploration and Production Co. v Ecuador*, LCIA Case No. UN 3467 Final Award, 1 July 2004, 173

535 Id. "*The Tribunal is of the view that in the context of this particular claim the Claimant is right and its arguments are convincing. In fact, "in like situations" cannot be interpreted in the narrow sense advanced by Ecuador as the purpose of national treatment is to protect investors as compared to local producers, and this cannot be done by addressing exclusively the sector in which that particular activity is undertaken*". (Official Spanish translation not available)

231. In *Methanex Corp v US*[536], the Claimant (a Canadian methanol producer) argued that it was in "*similar situations*" to the American ethanol producers, given the direct competitive relationship between ethanol and methanol products, and therefore different treatment between the two violated the NT clause. For its part, the United States claimed that it had treated all methanol-producing firms, foreign and domestic, equally and had not therefore violated that clause. In this respect, the Tribunal concluded that "*Given the object of Article 1102 and the flexibility which the provision provides in its adoption of ´like circumstances´, it*

536 *Methanex Corp v US*, UNCITRAL Case, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, 16. "*The major distinction between the two proposed methodologies is in the specific method of selecting what the USA called the ´comparator´ for purposes of determining like circumstances. In the formula quoted above, Methanex's methodology begins by assuming that its comparator is the ethanol industry, while the USA proposes a procedure in which the comparator that is to be selected is that domestic investor or domestically-owned investment which is like or, if not like, then close to the foreign investor or investment in all relevant respects, but for nationality of ownership. Despite the difference in approach, it is clear that if the result of the application of the US procedure were to identify the ethanol industry as the comparator, Methanex's methodology would simply be the final sequence in the US methodology. 17. The key question is: who is the proper comparator? Simply to assume that the ethanol industry or a particular ethanol producer is the comparator here would beg that question. Given the object of Article 1102 and the flexibility which the provision provides in its adoption of ´like circumstances´, it would be as perverse to ignore identical comparators if they were available and to use comparators that were less ´like´, as it would be perverse to refuse to find and to apply less ´like´ comparators when no identical comparators existed. The difficulty which Methanex encounters in this regard is that there are comparators which are identical to it. In this respect, the NAFTA award in Pope & Talbot v Canada is instructive. There, a US investor in Canada, which was obliged to pay export fees, alleged that it was in like circumstances with Canadian producers in other provinces that were not subject to export fees. The tribunal, however, rejected the claim for there were more than 500 Canadian producers in other provinces which were subject to the fees. 30 That is, the tribunal selected the entities that were in the most ´like circumstances´ and not comparators that were in less ´like circumstances´. It would be a forced application of Article 1102 if a tribunal were to ignore the identical comparator and to try to lever in an, at best, approximate (and arguably inappropriate) comparator. The fact stands - Methanex did not receive less favorable treatment than the identical domestic comparators, producing methanol*". (Official Spanish translation not available)

would be as perverse to ignore identical comparators if they were available and to use comparators that were less ´like´, as it would be perverse to refuse to find and to apply less ´like´ comparators when no identical comparators existed".[537].

232. Given the uncertainty of the definition of the term "in like situations" provided in the NT clause, the Court notes that recent developments in international investment law have chosen to delimit and define it precisely. Thus, following the approval of the Trans-Pacific Partnership Agreement (TPPA), the parties decided to adopt an interpretative note on that term to the effect that "*For greater certainty, whether treatment is accorded in 'like circumstances' depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives*"[538]. In the same sense, in Article 14.5 of Chapter 14 on Investment of the new Trade Agreement between the United States, Mexico and Canada (USMCA)[539], the parties explicitly agreed that the

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537 Id.

538 TPP Drafters Note on Interpretation of "*in Like Circumstances*" under Article 9.4 (National Treatment) and Article 9.5 (Most-Favoured-Nation Treatment). "*3. The phrase ´in like circumstances´ ensures that comparisons are made only with respect to investors or investments on the basis of relevant characteristics. This is a fact-specific inquiry requiring consideration of the totality of the circumstances, as reflected in paragraphs 4 and 5. Such circumstances include not only competition in the relevant business or economic sectors, but also such circumstances as the applicable legal and regulatory frameworks and whether the differential treatment is based on legitimate public welfare objectives. Accordingly, the Parties agreed to include a new footnote in the text: "For greater certainty, whether treatment is accorded in 'like circumstances' depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives." 4. In considering the phrase "in like circumstances", NAFTA tribunals have held that investors or investments that are "in like circumstances" based on the totality of the circumstances have been discriminated against based on their nationality*". (Official Spanish translation not available)

539 "*For greater certainty, whether treatment is accorded in ´like circumstances´ under this Article depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives*". (Official Spanish translation not available)

scope of the expression "*in like circumstances*" depends on "*the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives*".

233. With regard to the definition of the second element of the *Saluka test*, namely *"the existence of differential treatment"*, the Court notes that the decisions of the arbitral tribunals are uniform in at least two respects. First, the NT obligation proscribes *de jure* and *de facto* discrimination.[540] Second, for the purpose of proving a violation of the NT clause, it is neither necessary nor sufficient to prove the discriminatory intent.[541].

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540 *Archer Daniels Midland and Tate & Lyle Ingredients Americas, Inc. v United Mexican States*, ICSID Case No. ARB (AF)/04/5, 193. "*Article 1102 requires the Member States to accord investors and investments of the other Member States "treatment" that is "no less favorable" than that given to domestic investors and investments in "like circumstances." The basic function of this provision is to protect foreign investors vis-his internal regulation affording more favorable treatment to domestic investors. The national treatment obligation under Article 1102 is an application of the general prohibition of discrimination based on nationality, including both de jure and de facto discrimination. The former refers to measures that on their face treat entities differently, whereas the latter includes measures which are neutral on their face but which result in differential treatment*". (Official Spanish translation not available)

541 *Crystallex International Corporation v Bolivarian Republic of Venezuela*, ICSID Case No. ARB (AF)/11/2. "*To show discrimination the investor must prove that it was subjected to different treatment in similar circumstances without reasonable justification, typically on the basis of its nationality or similar characteristics. The Tribunal believes that, under this standard, the Claimant has not sufficiently established that it was discriminated against by Venezuela. The Tribunal is of the view that no adequate comparator was presented to its attention which would justify a conclusive finding on discrimination. It is true that evidence on the record shows that Venezuela was considering at some point to enter into a joint venture with Rusoro. However, the subsequent events concerning that joint venture in relation to Las Cristinas are not sufficient to found a discrimination claim. Furthermore, it is undisputed that Venezuela subsequently entered into a contractual relationship with the Chinese company* CITIC. *The Tribunal, however, does not find this to be an appropriate comparator either: the record does not furnish much evidence about the exact circumstances around the* CITIC *contract and the subsequent conclusion of a differently framed contract cannot easily be compared to the issue of the treatment of Crystallex within the lifespan of the* MOC. *In other words, the Claimant has not sufficiently established that the fact that Venezuela has entered into a contractual*

234. Finally, with regard to the third element of the *Saluka test*, i.e. reasonable justification for differential treatment, the Court notes that there is a tendency for arbitral tribunals to apply the principle of proportionality in assessing this element. In this sense, in the referenced *Occidental v Ecuador* case, the Tribunal recognized that *"there is a growing body of arbitral law, particularly in the context of* ICSID *arbitrations, which holds that the principle of proportionality is applicable to potential breaches of bilateral investment treaty obligations"*.[542] In this regard, the Court warns that the application of this principle depends on the standards set in the IIA with respect to substantial obligations (mainly by the FER and the IE) and, in any case, is not uniform.

235. In those treaties where no standard is included for State measures to guarantee public order, among others, the Court finds that the Tribunals apply a test of mere reasonableness. Thus, for example, in *Pope and Talbot v. Canada*[543], the Tribunal held that, since article 1102 of NAFTA did not prescribe "*justification*" as an element to be assessed in relation to the NT, *"differences in treatment would presumptively violate* [this article] *unless a reasonable nexus to public policies is demonstrated"*[544]. On the other hand, in the case *William*

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relationship with a Chinese company after the fall-out of its relationship with Crystallex proves discriminatory conduct against Crystallex. The Tribunal has of course not overlooked the repeated and rather derogatory references to "transnationals" and "transnational companies" in the President's and some Ministers' statements. While the Tribunal is not unsympathetic to Crystallex's complains that it was targeted based on its "transnational" nature and cannot exclude that discrimination actually occurred under the circumstances, it is of the view that a showing of discrimination would require more conclusive evidence of facts which are not reflected in the record."

542 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador*, ICSID Case No. ARB/06/11, 404

543 *Pope & Talbot Inc. v Government of Canada*, UNCITRAL Arbitration Rules, Award on the Merits of Phase 2, 10 April 2001, 78.

544 Id. "*Differences in treatment will presumptively violate Article 1102(2), unless they have a reasonable nexus to rational government policies that (1) do not distinguish, on their face or de facto, between foreign-owned and domestic companies, and (2) do*

Ralph Clayton and others v. Canada,[545] the Tribunal concluded that the NT clause guarantees that the states receiving the investment pursue "*reasonable and non-discriminatory domestic policy objectives through appropriate measures even when there is an incidental and reasonably unavoidable burden on foreign enterprises (...) the onus is on the host state to show that a measure is still sustainable within the terms of Article 1102. It is the host state that is in a position to identify and substantiate the case, in terms of its own laws, policies and circumstances, that an apparently discriminatory measure is in fact compliant with the "national treatment" norm set out in Article 1102*"[546].

236. In those treaties where the standard of necessity is included for measures aimed at the preservation of public order, as is the case with the clause *sub examine* , the Court notes that Tribunals resort to Article XX of the GATT[547] and to the WTO case law under it. Thus, in the *Continental v. Argentina* case, the Tribunal concluded that "*Since the text of Art. XI derives from the parallel model clause of the U.S. FCN*

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not otherwise unduly undermine the investment liberalizing objectives of NAFTA". (Official Spanish translation not available)

545 *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v Government of Canada*, UNCITRAL, Permanent Court of Arbitration (PCA) Case No. 2009-04

546 Id. "*The approach taken in Pope & Talbot, would seem to provide legally appropriate latitude for host states, even in the absence of an equivalent of Article XX of the GATT, to pursue reasonable and non-discriminatory domestic policy objectives through appropriate measures even when there is an incidental and reasonably unavoidable burden on foreign enterprises. Consistently with the approach taken in the Feldman case, however, the present Tribunal is also of the view that once a prima facie case is made out under the three-part UPS test, the onus is on the host state to show that a measure is still sustainable within the terms of Article 1102. It is the host state that is in a position to identify and substantiate the case, in terms of its own laws, policies and circumstances, that an apparently discriminatory measure is in fact compliant with the "national treatment" norm set out in Article 1102*". (Official Spanish translation not available)

547 GATT. Artícle XX. "*(…) nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (a) necessary to protect public morals; (b) necessary to protect human, animal or plant life or health*".

treaties and these treaties in turn reflect the formulation of Art. XX of GATT 1947,291 the Tribunal finds it more appropriate to refer to the GATT and WTO case law which has extensively dealt with the concept and requirements of necessity in the context of economic measures derogating from the obligations contained in GATT, rather than to refer to the requirement of necessity under customary international law".[548] In particular, it referred to the opinion in the the Korea Beef case, in which the Appellate Body decided that ". "*the reach of the word ´necessary´ is not limited to that which is ´indispensable´ or ´of absolute necessity´ or ´inevitable´. Measures which are indispensable or of absolute necessity or inevitable to secure compliance certainly fulfill the requirements of Article XX (d). But other measures, too, may fall within the ambit of this exception. As used in Article XX (d), the term ´necessary´ refers in our view to a range of degrees of necessity. At a one end of this continuum lies ´necessary´ understood as ´indispensable´; at the other, is ´necessary´ taken to mean as ´making a contribution to´. We consider that a ´necessary´ measure is, on this continuum, located significantly closer to the pole of ´indispensable´ than to the opposite pole of simply ´making a contribution to´*"[549].

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548 *Continental Casualty Company v The Argentine Republic*, ICSID Case No. ARB/03/9, 192. "*Since the text of Art. XI derives from the parallel model clause of the U.S. FCN treaties and these treaties in turn reflect the formulation of Art. XX of GATT 1947,291 the Tribunal finds it more appropriate to refer to the GATT and WTO case law which has extensively dealt with the concept and requirements of necessity in the context of economic measures derogating to the obligations contained in GATT, rather than to refer to the requirement of necessity under customary international law*". (Official Spanish translation not available)

549 WTO Appellate Body, Korea-Beef, para. 161. "*the reach of the word ´necessary´ is not limited to that which is ´indispensable´ or ´of absolute necessity´ or ´inevitable´. Measures which are indispensable or of absolute necessity or inevitable to secure compliance certainly fulfill the requirements of Article XX (d). But other measures, too, may fall within the ambit of this exception. As used in Article XX (d), the term ´necessary´ refers in our view to a range of degrees of necessity. At a one end of this continuum lies ´necessary´ understood as ´indispensable´; at the other, is ´necessary´ taken to mean as ´making a contribution to´. We consider that a ´necessary´ measure is, in this continuum, located significantly closer to the pole*

237. In *Continental v Argentina*, the Tribunal also stressed that, in order to determine whether a non-essential measure satisfies the requirement of necessity, "*The necessity of a measure should be determined through ´a process of weighing and balancing of factors´ which usually includes the assessment of the following three factors: the relative importance of interests or values furthered by the challenged measures, the contribution of the measure to the realization of the ends pursued by it and the restrictive impact of the measure on international commerce*".[550] In the same sense, it stressed that "*Within the* WTO *a measure is not necessary if there is an alternative consistent measure, or a less inconsistent alternative measure, which the member State concerned could reasonably be expected to employ available: […] an alternative measure may be found not to be ´reasonably available,´ however, where it is merely theoretical in nature, for instance, where the Responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties. Moreover a ´reasonably available´ alternative measure must be a measure that would preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued under paragraph (a) of Article* XIV"[551].

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of ´indispensable´ than to the opposite pole of simply ´making a contribution to´". (Official Spanish translation not available)

550 *Continental Casualty Company v The Argentine Republic*, ICSID Case No. ARB/03/9, 194. "*In order to determine whether a measure which is not indispensable, may nevertheless be ´necessary´: The necessity of a measure should be determined through ´a process of weighing and balancing of factors´ which usually includes the assessment of the following three factors: the relative importance of interests or values furthered by the challenged measures, the contribution of the measure to the realization of the ends pursued by it and the restrictive impact of the measure on international commerce*". (Official Spanish translation not available)

551 *Continental Casualty Company v The Argentine Republic*, ICSID Case No. ARB/03/9, 195. "*Within the* WTO *a measure is not necessary if another treaty consistent, or less inconsistent alternative measure, which the member State concerned could reasonably be expected to employ is available: […] an alternative measure may be found not to be ´reasonable available,´ however, where it is merely theoretical in nature, for instance, where the Responding Member is not capable*

238. For its part, with regard to the requirement of "*proportionality*" of the measures aimed at preserving public order, among other purposes, the tribunals have emphasized that this implies verifying that the measure would not have imposed an excessive burden on the investor. In this sense, in the case *Azurix Corp v Argentina*[552], the Tribunal stressed that "This *proportionality will not be found if the person concerned bears "an individual and excessive burden". (...) such "a measure must be both appropriate for achieving its aim and not disproportionate thereto."* Similarly, in the *Tecmed v Mexico* case, the Tribunal concluded that proportionality implied verifying that *"There must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized"*[553].

239. *Most Favoured Nation*. The MFN clause is also relational, as it applies after a comparison between two or more subjects, and has a "*similar structure*" to the NT, since it seeks to guarantee the investor the "*no less favorable*" treatment granted to investors from third states.[554] The doctrine stresses that this clause has a relevant effect in investment arbitration as it has played a surprisingly significant role in investment arbitration "*as a gateway to more favorable rules in third party treaties*"[555]. It is precisely this aspect that has

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of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties. Moreover a ´reasonable available´ alternative measure must be a measure that would preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued under paragraph (a) of Article XIV.295" (Official Spanish translation not available)

552 *Azurix Corp. v The Argentine Republic*, ICSID Case No. ARB/01/12, 311

553 *Técnicas Medioambientales Tecmed, S.A. v The United Mexican States*, ICSID Case No. ARB (AF)/00/2, 122

554 International Investment Law and Arbitration. Commentary, Awards and Other Materials. C.L. Lim, Jean Ho and Martin Paparinskins. Cambridge University Press. 2018, 309. "MFN treatment obligation has a similar structure (…)"

555 International Investment Law and Arbitration. Commentary, Awards and Other Materials. C.L. Lim, Jean Ho and Martin Paparinskins. Cambridge

become, according to the International Law Commission, "*The central interpretative issue in respect of the MFN clauses [which is] the scope of the (…) and nature of the benefit that can be obtained under it and MFN provision depends on the interpretation of the MNF provision itself*".[556] There is considerable discussion in international law as to whether the MFN clause also applies to dispute settlement mechanisms.[557] However, the latter question is irrelevant to the sub judice issue since Article 5, numeral 4, explicitly excludes from the scope of the MFN clause "*dispute settlement mechanisms*". Rather, the Court considers it necessary to review the scope of this clause in the light of substantive content provided for in other international agreements.

240. In this regard, the general interpretation of the scope of this clause is found in the cases *MTD Equity Sdn Bhd and MTD Chile SA v Chile*[558] and *EDF International SA and others v Argentina*[559]. In the former case, the Tribunal held that the MFN clause "*…attracts any more favourable treatment extended*

University Press. 2018, 309 "*(…) the clause has played a surprisingly significant role in investment arbitration as a gateway to more favorable rules in third party treaties*".

556 Summary Conclusions on the Most-Favoured-Nation Clause (2015). International Law Commission. "*The central interpretative issue in respect of the MFN clauses relates to the scope of the clause and the application of the ejusdem generis principle. That is, the scope and nature of the benefit that can be obtained under and MFN provision depends on the interpretation of the MNF provision itself*". (Official Spanish translation not available)

557 *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v Argentine Republic*, ICSID Case No. ARB/03/23. Decision on Annulment. "*The Committee considers that Hochtief dealt with an entirely different issue, namely whether an MFN clause can be employed so as to give the investor claiming under one BIT the benefit of a more generous arbitration provision in another BIT. That issue has divided tribunals with roughly equal numbers of decisions upholding and rejecting the application of the MFN clause to an arbitration provision*".

558 *MTD Equity Sdn. Bhd. and MTD Chile S.A. v Republic of Chile*, ICSID Case No. ARB/01/7. Decision on Annulment.

559 *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v Argentine Republic*, ICSID Case No. ARB/03/23. Decision on Annulment

to third State investments and does so unconditionally"[560]. In the latter, in response to an application for annulment by the Republic of Argentina for the improper application of the MFN clause, the Tribunal concluded that the MFN clause "*is quite broad enough to embrace the use of an umbrella clause in another BIT. The clause refers to "treatment" accorded to investors of the most favoured nation. If German investors in Argentina have the benefit of a treaty provision requiring the Host State to honour commitments undertaken (or entered into) in relation to their investment, then they are being accorded a form of treatment which is not expressly granted to French investors by the Argentina-France BIT. That situation falls squarely within the terms of the MFN clause. Even if Argentina is right in arguing that MFN clauses should be subjected to an ejusdem generis limitation (...), the umbrella clause is part of the same genus of provisions on substantive protection of investments as the fair and equitable treatment clause and other similar provisions which feature in the Argentina-France BIT (...) The Committee thus rejects the argument that there was a manifest excess of powers when the Tribunal applied the MFN provision to allow the Claimants to rely upon the umbrella clauses in other Argentine BITS*"[561].

241. Finally, recent developments in international investment law limit the scope of the MFN clause. By way of illustration, both the USMCA and CETA include substantial limitations on this clause. Annex 14 E of the USMCA investment chapter explicitly provides that "*For the purposes of this paragraph, the "treatment" referred to in Article 14.5 (Most-*

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560 MTD *Equity Sdn. Bhd. and* MTD *Chile S.A. v Republic of Chile*, Ob. Cit, 64. "*The most-favoured-nation clause in Article 3(1) is not limited to attracting more favourable levels of treatment accorded to investments from third States only where they can be considered to fall within the scope of the fair and equitable treatment standard. Article 3(1) attracts any more favourable treatment extended to third State investments and does so unconditionally*". (Official Spanish translation not available). See also, CME Czeck Republic

561 EDF *International S.A.*, SAUR *International S.A. and León Participaciones Argentinas S.A. v Argentine Republic*, Ob. Cit, 237.

Favored-Nation Treatment) excludes provisions in other international trade or investment agreements that establish international dispute resolution procedures or impose substantive obligations; rather, "treatment" only includes measures adopted or maintained by the other Annex Party, which may include measures adopted or maintained pursuant to or consistent with substantive obligations in other international trade or investment agreements"[562]. In the same sense, Article 8.7 of the CETA investment chapter provides that this clause "*does not include procedures for the resolution of investment disputes between investors and states provided for in other international investment treaties and other trade agreements. Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute "treatment", and thus cannot give rise to a breach of this Article* (…)"[563].

242. Under these considerations, the Court reiterates its jurisprudence that, in general terms, the NT clause provided in *Article 5 sub examine* is compatible with the principle of equality established in Article 13 of the Constitution. As has been pointed out since Judgments C-358 and C-379, both of 1996, the Court considers that the NT "*is aimed at placing investments by foreigners and nationals in conditions of legal*

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562 USMCA. Annex 14 E Investment Chapter. "*For the purposes of this paragraph, the "treatment" referred to in Article 14.5 (Most-Favored-Nation Treatment) excludes provisions in other international trade or investment agreements that establish international dispute resolution procedures or impose substantive obligations; rather, "treatment" only includes measures adopted or maintained by the other Annex Party, which may include measures adopted or maintained pursuant to or consistent with substantive obligations in other international trade or investment agreements*". (Official Spanish translation not available)

563 CETA. Article 8.7 Investment Chapter. "*4. For greater certainty, the "treatment" referred to in paragraphs 1 and 2 does not include procedures for the resolution of investment disputes between investors and states provided for in other international investment treaties and other trade agreements. Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute "treatment", and thus cannot give rise to a breach of this Article, absent measures adopted or maintained by a Party pursuant to those obligations*". (Official Spanish translation not available)

equality. The basic effect of this clause is to eliminate, within the scope of the matters regulated by the Convention that contains it, any present or future legal inequality. In this sense, if a national norm establishes differences between categories of investments, those that are covered by the principle of national treatment must be subject to the same regime as national investments"[564].

243. The MFN clause is also consistent with the principle of equality. Thus, based on the decision of the International Court of Justice (1952)[565], the Court emphasizes that the purpose of this clause is "*to establish and maintain at all times fundamental equality without discrimination between all the countries concerned*"[566] and to "*eliminate any difference between foreign investments benefiting from this treatmen*t"[567]. In this regard, the Court has held that "*from the moment in which the country receiving the investment grants an advantage to a third State, the right of other States to treatment no less favourable arises immediately and extends to the rights and advantages granted before and after the entry into force of the Treaty enshrining the aforementioned clause*"[568].

244. In turn, the Court emphasizes that the aforementioned NT and MFN clauses are compatible with the principle

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564 Judgment C-358 and C-379, both of 1996. Cfr. Judgment C-494 of 1998 and C-286 of 2015.

565 Particularly accepted in the Case concerning the rights of United States nationals in Morocco. (Translator's note: the complete reference of the decision is: International Court of Justice, Rights of Nationals of the United States of America in Morocco -France v. United States of America-, Judgment of 27 August 1952).

566 Judgments C-358 and C-379, both of 1996. Cfr. Judgment C-494 of 1998. See also Judgment C-157 of 2016. "It is noted that both the economic treaties and the review that the Court has made of them have handled the MFN clause as a model principle on which there are no unconstitutional objections, a conclusion that is reiterated on this occasion, since said principle: i) constitutes a manifestation of the principle of equality; ii) ensures commercial reciprocity between States; and iii) facilitates the purposes of the agreement in which it is included"

567 Id

568 Id. Cfr. Judgments C-169 and C-123, both of 2012

of reciprocity provided in article 226 of the Constitution, since they commit the parties "*to give reciprocal treatment to investments coming from the other party, as well as to grant it treatment no less favorable than that received by nationals of the party receiving the investment or of a third State*"[569]. The Court also notes that such compatibility is explained as this clause provides for the same obligation of treatment for both Contracting Parties in relation to investors[570]. Similarly, the Court points out that, as noted in other cases, the NT and MFN clauses "*are subject to the restrictions that article 100 of the Constitution establishes regarding the exercise of the rights of foreigners*"[571]. This is because this article provides that, while foreigners must enjoy the same civil rights granted to Colombians, "*the law may, for reasons of public order, limit or deny the exercise of certain civil rights to foreigners*". For this reason, the Court points out that an international treaty "*cannot prevent the Colombian legislator from using this attribution when the circumstances provided for it in the Constitution arise*"[572].

245. In this order of ideas, the Court has declared the constitutionality of the exceptions to the MFN clause[573]. In

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569 Judgments C-379 of 1996. Cfr. Judgment C-309 of 2007. "The Constitutional Court has said in this regard that by virtue of such clauses, "a State undertakes to accord to another State treatment no less favourable than that accorded to its own nationals or to the nationals of any third State"; to which it adds: "Precepts of this nature do not violate the Supreme Law and, on the contrary, are aimed at giving effect "at all times to fundamental equality without discrimination among all the countries concerned". See also Judgments C-150 of 2009, C-377 of 2010 and C-199 of 2012

570 Judgment C-008 of 1997

571 Cfr. Judgment C-294 of 2002

572 Id.

573 Law 279 of 1994 (BIT with Peru) "Article 5. Exceptions. The provisions of this Convention related to the granting of treatment no less favourable than that granted to nationals or enterprises of either Contracting Party or of any third State shall not be construed so as to require a Contracting Party to extend to nationals or enterprises of the other Contracting Party the benefit of any treatment, preference or privilege resulting therefrom:

particular, in the face of the exception provided in Article 5, numeral 2 *sub examine*, related to the agreements with third States "*aiming at the creation of customs unions or similar advantages in order to stimulate intra-regional trade*"[574], the Court has stressed that "*their purpose is to prevent the conclusion of this agreement from becoming an obstacle to other integration processes and, in this sense, they are constitutionally endorsed*"[575], and, therefore, it has declared them constitutional.

246. Apart from the foregoing, the contents questioned by the interveners and the cited Tribunal decisions deserve special considerations. First, the Court notes that, as explained, the expression "*in like situations*" has not been applied uniformly by the arbitral tribunals. In some cases, the expression "*in like situations*" covers only identical comparators *(Methanex Corp*), while in others (*Occidental*), despite the existence of identical comparators, it uses near comparators. Thus, the "*pattern of comparison*" of "*in like situations*" for the application of NT and MFN clauses is uncertain, threatening legal certainty (art. 1 of the PC) (*see para. 204*). This is because national authorities, in the exercise of their competences, face an invincible uncertainty as to whether the measures they take or the decisions they make that imply differential treatment will shape international wrongful acts giving rise to international liability of the State.[576] For this reason, in addition to recent developments in international investment law on this subject (*para. 232*), the Court will declare the expression "*in like situations*"

(a) any existing or future customs union, common market, free trade area or similar international agreement to which either Contracting Party is or becomes a party, or (b) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation

574 Judgment C-008 of 1994. Cfr. C-294 of 2002, C-309 of 2007, C-150 of 2009, C-199 of 2012 and C-286 of 2015

575 Id

576 United Nations, General Assembly. A/RES/56/83. Art. 2

constitutional, provided that the parties define its content in a manner consistent with the principle of legal certainty.

247. Second, the Court considers that the expression "*necessary and proportional*" allows, within the framework of the jurisprudence of international investment tribunals, at least one reading contrary to the Constitution. Article 5, numeral 3 provides that the NT clause shall not prevent the State from adopting measures to ensure public order, as long as they are not arbitrary and, on the contrary, are justified, which is in accordance with the principle of prohibition of arbitrariness inherent in the Rule of law (Art. 1 of the PC).). However, it also provides that such measures must be "*necessary and proportionate*" to the objective sought. One of the interpretations that could be followed from this expression is that the State can only implement those measures that seek to guarantee public order as long as they are necessary, that is, they are *indispensable*, that there is no other alternative means to achieve this end with the same intensity and that at the same time is more benign to the rights of investors; and proportional, that is, that the satisfaction of public order is *imperativ*e and is at least equivalent to the degree of affectation of other constitutional principles (*Continental and Korea Beef*). Another interpretation that could be derived from this statement is that the state can implement those measures that seek to guarantee public order as long as they are necessary, that is, those that are considered reasonable and appropriate compared to the alternatives available to achieve this end, and proportional, that is, that the satisfaction of public order is *reasonable* and, therefore, justifies the degree of affectation of other constitutional principles (*Pope and Talbot and Azurix Corp*).

248. The first of these interpretations is not compatible with the Political Constitution. This interpretation implies that the freedom of configuration and the regulatory autonomy of the public authorities for the purpose of guaranteeing public order is extremely restricted, as the State

may only adopt the measures that are indispensable for that purpose. The indispensability standard, while plausible for the purpose of assessing restrictions on fundamental rights, is incompatible with the margin of configuration in economic matters (including economic public order). In this sense, the Court has uniformly considered that, in the abstract, the freedom of configuration and the regulatory autonomy of the authorities is restricted whenever it is a question of measures that, for example, affect fundamental rights; contrariwise, in economic matters, constitutional jurisprudence has historically recognized that such freedom of configuration and regulatory autonomy are broad. In short, the standard of indispensability for evaluating State regulation and actions in economic and public order matters is incompatible with the Constitution, as it disregards the freedom and broad scope of action of national authorities in these matters.

249. The second interpretation, however, is compatible with the Constitution. The Colombian constitutional system recognizes that the public authorities and, in particular, the Congress (arts. 100 and 150 of the PC) and the President (art. 189 of the PC) have broad freedom in terms of regulatory autonomy in order to ensure public order and, in economic matters, to choose the specific purposes and appropriate means to achieve that purpose[577]. Therefore, the Court has the duty to preserve them through the constitutional review of the norms that constitute an unjustified restriction. This is because, as noted in paragraph 63, it is the duty of the Court, in reviewing the constitutionality of this type of matter, to safeguard "(...) *the distribution of powers and competences within our Rule of law*"[578].

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577 Judgments C-178 of 1996 and C-864 of 2006.
578 Judgments C-178 of 1996 and C-864 of 2006.

250. Under these terms, in order to guarantee the regulatory autonomy of the State, the Court considers it necessary to safeguard the competence of the public authorities to adopt measures they consider reasonable and appropriate to help guarantee public order. They, being the national public authorities, in the light of the Constitution, are free to determine the degree of satisfaction of public order independently of the investors' affectation, as long as the degree of favoring public order is not unreasonable in comparison with the investor's degree of affectation. This reading is, moreover, the one accepted by the Colombian Government in the new IIA model of 2017, under which the powers of the regulatory authorities are preserved without subjecting them to the requirements of necessity and proportionality. For this reason, the Court will declare the constitutionality of the expression "necessary and proportional", on the understanding that it be interpreted in the context of the preamble of the BIT (which recognizes the regulatory power of each Contracting Party), in a manner that it respects the freedom of configuration and the autonomy of the national authorities for the purpose of guaranteeing public order.

251. Thirdly, the MFN clause, under the terms of Article 5 of the Treaty, is incompatible with the free exercise of the President's competence to conduct international relations and negotiate treaties (Art. 189.2 of the PC). This, considering its cumulative or "*cascade*" effects, compromises to a high degree such competence and renders it an empty power in future negotiations. In effect, after reviewing the cases *MTD Equity Sdn Bhd and MTD Chile SA v Chile*[579] and *EDF International SA and others v Argentina*, the Court finds that the MFN clause established in the treaty results in the practice of arbitral tribunals "*importing*" clauses from other

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579 MTD Equity Sdn. Bhd. and MTD Chile S.A. v Republic of Chile, ICSID Case No. ARB/01/7. Decision on Annulment.

treaties concluded by the investment host state. Thus, as some interveners have pointed out, despite the limitations in numerals 2 and 3 of this article, the MFN clause established the treaty in question inevitably results in a cascading effect with respect to all the substantive obligations provided in any other treaty entered into by the investment host State, or even leads to the replacement of the treaty's clauses with those provided in other instruments, if the latter are more favourable[580], among other things[581]. With this effect, the exercise of the President's competence regarding the negotiation of different clauses with different States, according to the conditions and opportunities of the bargaining, loses its meaning, since, in the end, all the substantial obligations are applicable to the French investor regardless of whether or not these prerogatives were agreed upon in the BIT signed with his country of origin.

252. By virtue of the above-mentioned *cascade effect*, the MFN clause, as provided in the treaty in question, is furthermore incompatible with the bilateral nature of the treaty *sub examine*. This is so, considering that any advantage or beneficial condition that Colombia may grant to investors from a third State, in accordance with the comparative advantages that they may offer and the national convenience of each negotiation, will be extended and applicable to French investors. Thus, under the terms of the treaty, the MFN clause results in the President renouncing the possibility of granting particular benefits or advantages to investors from other States and, therefore, obtaining comparative

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580 CME Czech Republic B.V. v Czech Republic, UNCITRAL, final award, March 14, 2003, 500.

581 Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan, ICSID. ARB/03/29, Decision on Jurisdiction of November 14, 2005. MTD Equity Sdn. Bhd. and MTD Chile S.A. v Republic of Chile, ICSID, ARB/01/7. White Industries Australia Limited v Republic of India, UNCITRAL, award of November 30, 2011

advantages in such negotiations, which affects the free exercise of the competence provided in article 189.2 of the Constitution. The *inter-partes* nature of this BIT is unknown. Therefore, it falls to this Court Court, within the framework of the constitutionality review, to condition this clause in order to materially preserve the President's competence and its availability in future negotiations.

253. Precisely because of the noted consequences of this clause, recent developments in international investment law exclude from the scope of MFN the substantial obligations provided in other treaties, as noted in relation to CETA and USMCA (*para. 241*). In turn, the Court notes that this practice has already been incorporated by the Colombian State in its IIA Model of 2017, under *which "treatment (…) does not involve definitions, substantial standards of treatment, substantive or procedural obligations or dispute settlement mechanisms*".

254. For these reasons, in order to preserve the MFN clause as a mechanism to guarantee equal treatment (*para. 242*) and, at the same time, to safeguard the President's competence as provided in article 189.2 of the Constitution, the Court considers it necessary to condition the constitutionality of the expression "*treatment*" provided in the first numeral of the MFN clause. This, on the understanding that it would be interpreted within the context of the preamble of the BIT, in a manner that it preserves the competence of the President regarding the direction of international relations and the conclusion of treaties, as provided by article 189.2 of the Constitution.

255. Therefore, the Court shall declare the constitutionality of Article 5 of the Treaty *sub examine*, subject to the conditions set out in the preceding paragraphs. In turn, the Court shall inform the President that if, in the exercise of his constitutional competence regarding the direction of 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 with respect to the conditionings set forth in the preceding paragraphs concerning the expressions "*in like situations*", "*necessary and proportional*" and "*treatment*".

256. The following table summarizes the above considerations:

Decision	
Article 5	Constitutional
The expression "in like situations"	Constitutional, on the condition that the parties define its content, in a way that is compatible with the principle of legal certainty.
The expression *"treatment"*	Constitutional, on the understanding that it be interpreted in the context of the preamble to the BIT, in such a way as to preserve the competence of the President of the Republic regarding the conduct of international relations and the conclusion of treaties, as provided for in article 189.2 of the Political Constitution.
The expression *"necessary and proportional"*	Constitutional, on the understanding that it is interpreted in the context of the preamble to the BIT in such a way as to respect the freedom of configuration and the autonomy of national authorities for the purpose of ensuring public order.

4.6. Expropriation and compensation (art. 6)

257. The text of Article 6 reads as follows:

"**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 the public interest or in the social interest, which shall have a meaning compatible with the public interest, in

particular in the case of the establishment of monopolies, and upon the condition that such measures are not discriminatory, any measure of:

a) Expropriation;

b) Nationalization;

c) Or any other measure whose effects are similar to expropriation or nationalization (hereinafter referred to as "indirect expropriation").

2. Indirect expropriation results from a measure or series of measures adopted by a Contracting Party which would have an effect equivalent to direct expropriation without a formal transfer of title or ownership. In determining whether a measure or series of measures adopted by a Contracting Party constitutes an indirect expropriation, a case-by-case analysis shall be made, considering, among other factors the following :

a) the degree of interference with the right of ownership by the measure or set 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 Investor's legitimate expectations.

Measures taken by a Contracting Party which are designed to protect legitimate public policy objectives, such as public health, safety and environmental protection, do not constitute indirect expropriation, as long as they are necessary and proportionate in the light of these objectives and are applied in a manner that they effectively meet the public policy objectives for which they were designed.

3. All measures under numerals 1 and 2 of this Article, hereinafter referred to as "expropriation", shall give rise to the payment of prompt, effective and adequate compensation

equal to the actual value of the investments in question and determined in accordance with the normal economic situation existing prior to any threat of expropriation. In the event of delay in the payment of compensation, this shall include interest up to the date of payment of the compensation, at the prevailing interest rate.
Such compensation, the amounts and terms of payment shall be fixed no later than the date of expropriation. This compensation shall be freely transferable.
4. The Contracting Parties confirm that the issue of compulsory licenses under the provisions of the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) cannot be questioned under the provisions of this Article". (Sic)

(i) The Submissions of the Procuduria

258. The Procuduria requested the declaration of constitutionality of this article. He stressed that "*the exclusion of the issuance of compulsory licences by the Contracting Parties in accordance with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of the World Trade Organization, from the Agreement is compatible with Articles 58 and 365 of the Constitution, regarding expropriation for reasons of public utility and social interest with compensation*"[582].

(ii) Interventions

259. There were eight interventions regarding this article. Five argued in favour of its constitutionality [583] and three against its unconstitutionality[584].

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582 Cdno. 2, fl. 553.
583 TheMinistry of Trade, Industry and Tourism, the Chancellery and the UNAB.
584 URosario, Enrique Prieto and Magdalena Correa.

260. The MinCIT noted that this article provides for two types of expropriation: direct and indirect[585]. The first "*is in harmony with the constitutional text, as determined by the Court*"[586] in judgment C-608 of 2010. The second "*is not excluded from what it's established in the Constitution on expropriation (...) [and] is based on the principle of legitimate confidence*"[587], according to the judgments C-031 of 2009, C-178 of 1995, C-309 of 2007 and C-961 of 2003. Finally, it stressed that "*the necessary reservations to preserve the State's regulatory autonomy in sensitive areas such as public health, security and the environment are maintained in accordance with the Constitution*"[588]. The Chancellery merely described the content of this article[589] and the UNAB quoted in full the considerations of judgments C-169 and C-199, both of 2012, on this aspect[590].

261. In his intervention at the hearing, Nicolás Palau, as Director of Foreign Investment, Services and Intellectual Property of the MinCIT, requested the declaration of constitutionality of this article and pointed out that the expropriation clause is "*the cardinal standard of international investment agreements*"[591]. He stated that this clause does not compromise the regulatory, public policy and control powers of national authorities[592] and that it "*adheres to the principles and standards of negotiation established for previous treaties*"[593]. In his assessment, this standard is necessary "*to give an additional margin of security to the investors (...) [as] the States have the obligation to refrain from expropriating without*

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585 Cdno. 1, fl. 56
586 Id
587 Id
588 Cdno. 1, fl. 56
589 Cdno. 1, fl. 147
590 Cdno. 2, fl. 503
591 CD, min. 3:31:15
592 Cdno. 2, fls. 378 to 426
593 CD, min. 3:34:11

due compensation"[594]. He highlighted the "*difference between direct expropriation, in which there is a transfer of ownership, and indirect expropriation, in which there is no transfer of ownership, but the effects of the expropriation are similar to a direct expropriation*"[595]. In his opinion, several clauses of the treaty constrain this provision, for example "*the general security exception, in which the State reserves the right to take any measure without the obligation to pay compensation or in violation of the non-discrimination standards when it comes to national security issues (...) another that allows the State to take important measures in the declaration of public interest of medicines, others related to the protection of cultural rights of the host country*"[596].

262. In his written submission, Nicolás Palau also pointed out that the provision contained in numeral 4 is limited to the issue of compulsory licenses. In the light of this regulation, the effects of expropriation provided in Article 6 do not cover what is regulated in Article 31 of the TRIPS Agreement, in the light of which, under certain conditions, it is possible to provide for other uses of the subject matter of a patent without the authorization of the rights holder. Therefore, he stressed that an investor could not even claim that the issuance of a compulsory license constitutes an indirect expropriation and, consequently, could not resort to the investor-state dispute settlement system for that purpose.

263. In her intervention at the hearing, Diana Correa argued that this clause should be declared constitutional, because "*article 58 of the Constitution does not establish what type of expropriation, nor does it limit the type of measure (...) [and, therefore, if] the law has not established any difference, the interpreter cannot do so*"[597]. In this regard, she warned that

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594 CD, min. 3:31:28
595 CD, min. 3:31:45
596 CD, min. 3:32:20
597 CD, min. 3:50:30

it is necessary to determine "*to what extent these treaties and particularly this clause limit the normative power of the State*"[598] . To this end, she asked: "What is the meaning of the normative power of the State? *[*To which she replied:*] Everything, really, because the article on the attribution of responsibility of States for internationally wrongful acts [provides] that States are internationally responsible for the acts of their organs, whether legislative, executive or judicial*"[599]. While she acknowledged that "*there is no investment case law*"[600], she highlighted that "*as of today, there is a standard for expropriation (...)*"[601] which, in her opinion, is the one provided in article 811 of the Colombia-Canada FTA[602]. This article requires that the measure have "*a permanent effect, covers (...) all or part of the investment [for which it must be determined] the intensity of the measure, what is the economic effect, [if] we are causing a loss to the investor, the loss of control of the investment or if we are causing the destruction of its investment*"[603]. In her view, such elements will be determined by the Tribunals. Finally, she pointed out that the treaty in its context "*greatly protects the regulatory power of states, as can be clearly seen in reading the preamble (...) and articles 9, 10, 14, 15 (...)*"[604].

264. In her written submission, Diana Correa clarified that, for the application of the indirect expropriation clause, the arbitral tribunals scrutinize and judge whether the measure *(i)* responds to a legitimate purpose, *(ii)* is necessary, *(iii)* is proportional and *(iv)* is not discriminatory[605]. In particular, with respect to the wording of Article 6, she noted that, at first sight, the standard is even lower than that provided

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598 CD, min. 3:39:40
599 CD, min. 3:39:50
600 CD, min. 3:40:42
601 CD, min. 3:41:35
602 CD, min. 3:41:45
603 CD, min. 3:45:09
604 CD, min. 3:47:55
605 Cdno. 2, fls. 589 to 592

by international law, since it only provides that a measure is not considered expropriation if *(i)* it pursues a public purpose or social interest and *(ii)* it is non-discriminatory[606]. However, numeral 2 of this article makes the standard more demanding by excluding from indirect expropriation measures that *(i)* pursue legitimate public utility objectives, and *(ii)* are necessary and *(iii)* proportional[607]. In these terms, she concluded that the standard of indirect expropriation provided in this treaty is "*relatively high*", in that the public officials must comply with all of these requirements in order to avoid their actions giving rise to litigation against the State[608].

265. In his intervention at the hearing, Enrique Prieto pointed out that "*regulatory expropriation is alien to our legal system*"[609] and that, by providing for it, Article 6 of the BIT "*may end up violating the principles of reciprocity and national convenience recognized in article 226 of the Constitution. Similarly, as a result of regulatory cooling, the State's duty to guarantee the constitutional rights recognized in Article 2 of the Constitution may be affected (...) as well as Article 58, as this provision only refers to direct expropriation*"[610].

266. As a basis for the foregoing, in his oral submission at the hearing and in his written submission, he explained that "*regulatory cooling is the voluntary decision of the public authorities of a State according to which it refrains from regulating certain issues, specifically those of common interest, for fear of being sued on the basis of a BIT*"[611]. In this sense, the indirect expropriation "*could generate regulatory cooling on issues of*

606 Id
607 Id
608 Id
609 CD, min. 4:10:17
610 CD, min.4:02:10
611 CD, min. 3:52:32

public interest, for example, the environment"[612]. In his view, this occurs for two reasons. First, "*the encryption of the clause*"[613], which is caused "*by the lack of clarity regarding the elements and requirements to be met in order to understand that a measure should be considered as equivalent to an indirect expropriation*"[614]. In this regard, he pointed out that "*the main points of dispute in the interpretation of this type of clause are three: (i) the element of analysis, (ii) the level of State intervention, and (iii) the time element*"[615]. Second, "*the high costs associated with this type of*

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612 CD, min. 3:52:57

613 CD, min. 3:53:13

614 CD, min. 3:53:23

615 CD, min. 3:53:51. Furthermore, he pointed out about the former: "The tribunals have adopted two positions: the first is known as single effect analysis; the second is known as police power analysis. In single-effect analysis, the courts focus on analysing the specific effect that a law, administrative act or judgment may have on the legal position of the investor or investment. No other elements are taken into account. For example, in the Metalclad Corp v Mexico case, the Arbitral Tribunal analysed whether the refusal of local permits to advance the construction of a garbage plant when federal permits were already in place constituted an indirect expropriation. According to the Tribunal, the impairment of the property right is materialized by the partial or total deprivation of the use of the economic benefits derived from the property right by an act of the host State. Regarding the doctrine of police power, what the trinunals take into account in this case when analysing the measure adopted by the host State is the context, purpose and nature of the measure, among other aspects. According to this theory, the State has the legitimate right to regulate without this implying compensation, as long as the measures are not discriminatory and arbitrary. In the case Philip Morris v Uruguay, the Court considered that the measures adopted by the State to reduce cigarette consumption were advanced within the framework of the legitimate police power". On the level of state intervention, "the discussions of several tribunals have focused on whether indirect expropriation is materialised when the investor is deprived of part of its rights (S.D. Mayers v Canada) or whether on the contrary there should be an affectation to all or a substantial part of the investment (Yuri Bognadov v Moldova)". On the issue of temporality, "some courts have pointed out when the effect on the investment is permanent and irreversible (Tecmed v Mexico), others have pointed out that the impact of the measure on the investment must be measured (Wena Hotels v Egypt)". "There is no clarity as to the elements or requirements that any state, such as Colombia, should take into account to assess whether, for example, compliance with an article of the Constitution could be considered an indirect expropriation".

dispute"[616]. The average cost of an arbitral tribunal "*range from $1.5 million to $2.5 million, apart from any finding of an obligation to compensate*"[617].

267. In her written submission , Magdalena Correa pointed out that this article violates the principle of equality in relation to article 58 of the Political Constitution, since, in case of an expropriation, it protects the investor's expectations as though they amount to a right of ownership, so that its reduction becomes compensable. It also violates the principle of equality in relation to Article 90, likewise. This is because, in her concept, the rules of compensation in case of a violation, are not clear. In that regard, she pointed out that arbitral tribunals had chosen to assess the value of the investment under the discounted cash flow method, that is, with the projection of the investment over the entire future period. This calculation is determined from highly speculative elements such as discount rates, fluctuations in the exchange rate, inflation, prices of inputs, interest rates and commercial risks.

268. Finally, URosario pointed out that paragraph 4 of article 6 "*limits the capacity of the State to grant compulsory licenses within the framework of intellectual property, which is controversial, especially in the current context of the discussion between the Swiss pharmaceutical company Novartis and the State, which is considering withdrawing the exclusive patent that Novartis has on Imatinib, a drug for leukemia. This would mean that any national laboratory could produce the same product, but at a lower price. In this regard, it is important to emphasize that article 226 of the Constitution promotes the internationalization of economic relations as long as they are based on national*

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616 CD, min. 3:53:15.

617 CD, min. 3:58:30. On that regard he referred to an empirical study on regulatory cooling off by Prof. Gus Van harten (University of York, Canada), according to which "decisions made by public authorities in the province of Ontario always took into account possible future investment demands".

convenience, among other things, which is problematic, taking into account the series of limitations the Colombian State is contracting for"[618].

269. In summary, the arguments presented by the interveners on this article are:

Relevant arguments on article 6	
Constitutionality	1. Direct expropriation is compatible with article 58 of the Constitution and indirect expropriation with the principle of legitimate confidence. 2. The BIT provides for the necessary exceptions to preserve the State's regulatory autonomy in sensitive areas such as public health, security and the environment. 3. This clause is appropriate and necessary to ensure the security of an investment. 4. This clause adheres to the principles and standards of negotiation provided in previous treaties. 5. Article 6, numeral 4, is compatible with article 31 of the TRIPS Agreement.
Unconstitutionality	1. Since indirect expropriation causes the "*regulatory cooling effect*", it is contrary to the Constitution. 2. It violates the principle of equality in relation to Article 58 of the Constitution, as the expectations of the French investors are protected as if they were private property. 3. Numeral 4 limits the capacity of the State to grant compulsory licenses within the framework of intellectual property, which violates the principle of national convenience.

(iii) The Court's considerations

270. The Court must resolve the following legal issue: is Article 6 of the treaty compatible with the Constitution? Taking into account the questions raised by the interveners,

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618 Cdno. 1, fls. 71 to 75

the Court will also rule on the following problems: is the regulation of direct expropriation compatible with Article 58 of the Constitution? Is the regulation included in numeral 3 concerning the conditions of compensation contrary to the provisions of Article 59 of the Constitution? Does the protection of "*legitimate expectations*" of French investors per se violate the principle of equality with national investors? Does indirect expropriation affect the freedom of configuration and the regulatory competencies of the national authorities and, therefore, is it contrary to the Constitution? Does numeral 4 breach the competence of the State to grant compulsory licenses within the framework of intellectual property and, therefore, violate the Political Constitution?

271. This article provides, in its four numerals, for the regulation of expropriation and compensation. The former provides that the Contracting Parties shall not carry out measures of *(i)* expropriation, *(ii)* nationalization or *(iii)* "*any other measure having similar effects to those of expropriation or nationalization (hereinafter referred to as "indirect expropriation")*", except *(a)* for reasons of public interest and *(b)* as long as it is a non-discriminatory measure. The second numeral defines indirect expropriation as "*a measure or series of measures adopted by a Contracting Party which would have an effect equivalent to direct expropriation without a formal transfer of title or ownership*". It also provides that, in order to determine whether or not a measure constitutes an indirect expropriation, a case-by-case analysis must be done based on the following factors: *(i)* the degree of interference with the ownership right, *(ii)* the economic impact, and *(iii)* the consequences of the measure on "*the legitimate expectations of the investor*". Finally, it establishes that measures *(i)* adopted to protect legitimate public policy objectives, if they are *(ii)* necessary and *(iii)* proportionate, do not constitute indirect expropriation.

272. The third numeral states that *(i)* expropriation, whether direct or indirect, shall give rise "*to the payment of prompt, effective and adequate compensation, which shall be equal to the real value of the investments in question and shall be fixed in accordance with the normal economic situation existing prior to any threat of expropriation*"; *(ii)* in case of delay in this payment, it shall cover the interest up to the date of payment of the compensation; *(iii)* the amounts and conditions of payment shall be fixed no later than the date of expropriation and, finally, *(iv)* that the compensation shall be freely transferable. The fourth numeral provides that the Contracting Parties agree that the rules of expropriation do not apply against the issuance of compulsory licences under the WTO TRIPS Agreement.

273. With regard to the expropriation clause, the Court notes that it is possible to identify two phases in constitutional jurisprudence: before and after the Legislative Act 1 of 1999[619]. Article 58 of the Constitution, in its original version, prescribed that *"(...) the legislator, for reasons of equity, may determine the cases in which compensation is not due"*. Legislative Act 1 of 1999 reformed this article and provided that, "*for reasons of public utility or social interest defined by the legislator, there may be expropriation through a judicial decision and with prior compensation*". That is, before the Legislative Act, the legislator could determine cases in which expropriation without compensation was appropriate, while after this constitutional reform, the legislator does not have this power. For this reason, judgments C-358 and C-379, both from 1996, C-008 from 1997 and C-494 from 1998, declared unconstitutional the expropriation clauses included in the BITS that were analyzed, which, among other things, prohibited expropriation without compensation, that is, "*prohibiting the parties, in a strict manner, a form of expropriation*

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619 See the judgment C-309 of 2007

that Article 58 of the Constitution expressly authorizes"[620]. After Legislative Act 1 of 1999, the Court has uniformly declared constitutional the expropriation regulation provided in BITs.

274. In the present case, the Court will also declare the constitutionality of this clause. This is because, according to the constitutional jurisprudence, this Court notes that *(i)* it is "*compatible with the protection of private property and other acquired rights*"[621] and, consequently, is in conformity with article 58 of the Constitution; *(ii)* it establishes that "*the reasons of public utility and social interest of our Constitution are valid reasons for carrying out expropriations under the protection of this provision*"[622]; *(iii)* seeks to "*safeguard foreign investment [and] create confidence in the investor with respect to the secure treatment of his capital*"[623] and, therefore, is compatible with the overall objectives of this Agreement; *(iv)* "*provides for solutions to events that in practice involve significant damage to the interests of the investor*"[624] and *(v)* determines that, for expropriation to be feasible, it is necessary "*that the measures be non-discriminatory and are accompanied by the payment of prompt, adequate and effective compensation*"[625]. For these reasons, the Court finds that the regulatory provisions of numerals 1 (a) and (b), as well as 3 of article *sub examine*, are in accordance with the Constitution and, in particular, with Article 58. In turn, the Court considers that the regulation

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620 Judgments C-358 and C-379, both of 1996, C-008 of 1997 and C-494 of 1998.
621 Judgment C-294 of 2002
622 Judgment C-169 of 2012
623 Judgment C-309 of 2007
624 Id
625 Id. In the Judgments C-294 of 2002 and C-150 of 2009, the Court clarified that "although the Convention does not expressly state that compensation must be prior and that the decision must be authorized in each specific case by a court judgment, or by administrative means if it is a matter of one of the events that the legislator has expressly indicated, the truth is that (...) this is how it should be understood, since these agreements establish that the measures will be adopted by the contracting States following due process of law".

provided in numeral 3 of this article, regarding the conditions for the payment of compensation, does not prevent the Government from decreeing the need for expropriation without prior compensation, as provided for in Article 59 of the Constitution, in the event of war and in order to meet its requirements.

275. The Court further notes that the limit provided for the amount of compensation is compatible with article 13 of the Constitution. This is so, as it provides that "*the amount of the compensation shall be equal to the real value of the investments in question*", which grants protection analogous to that of the national investor who invests in Colombia and is in the end exposed to the same situations of expropriation provided for in Article 6 of the Agreement. This expression also guarantees that the amount of compensation will not exceed the value of the damages suffered in relation to the investment, which completely excludes the inclusion of punitive damages while quantifying the compensation.

276. The Court also reiterates that, in general terms, indirect expropriation is compatible with the Constitution. In this regard, in judgments C-031 and C-150, both of 2009, the Court found that indirect expropriation is consistent with the Constitution, since it is based, in particular, on the principles of legitimate confidence and good faith (art. 83 of the PC). In this sense, it held that "*indirect expropriation finds its constitutional basis in the principle of legitimate confidence. In this sense, it should be noted that, as a corollary of the principle of good faith, foreign doctrine and jurisprudence, since the mid-sixties, have been developing a theory of legitimate confidence, which has seen original and important developments throughout various pronouncements of this Court*"[626].

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626 Judgments C-031 and C-050, both of 2009. Cfr. Judgments C-169 and C-199, both of 2012, as well as C-286 of 2015

277. For its part, in judgments C-031 of 2009, C-608 of 2010 and C-169 of 2012, the Court stated that, through indirect expropriation, it is recognized that "*the individual must be protected against sudden and unexpected changes made by the public authorities. In this sense, it is not a matter of protecting situations in which the administered party is the owner of an acquired right, since his legal position could be modified by the Administration*"[627]; in other words, it protects an "*expectation that a given factual situation or legal regulation will not be changed in an untimely fashion. In such cases, the State is obliged to provide the affected party with a reasonable period of time and the means to adapt to the new situation*"[628]".

278. In judgment C-608 of 2010, the Court stressed that international arbitral tribunals have qualified as indirect expropriations, governmental acts such as *(i)* the declaration of a protected area for the conservation of a desert plant species, coupled with the denial of a construction permit at the place where the investment would take place[629]; *(ii)* the interference of a government regulatory authority (Media Council), in order to allow the domestic investor to terminate a contract that was deemed important for the foreign investor in order to make its investment[630]; *(iii)* the revocation of a license to operate a toxic waste facility[631]; *(iv)* the imposition of excessive or arbitrary taxes, which have the effect of making the investment economically unsustainable[632]; *(v)* the revocation of the free trade zone certificate and the consequent prohibition of imports[633]; and *(vi)* the imposition of managers, appointed by the host

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627 Judgments C-031 of 2009, C-169 of 2012 and C-608 of 2010
628 Judgments C-031 of 2009, C-169 of 2012 and C-608 of 2010
629 Metalclad Corp. v México, ARB (AF)/97.1, TLCAN, 2001
630 CME v Czech Republic, UNCITRAL Arbitral Tribunal, Parcial Award, 2001
631 Técnicas Medioambientales Tecmed, S.A. v México ARB (AF)/00/2, 2003
632 Revere Copper and Brass Inc. v Overseas Private Investment Corporation, 1978
633 Goetz and Others v Republic of e Burundi, ICSID, 1998

State[634]. In that last moted decision, the Court recognized that, in "*matters of indirect expropriation, not only are at stake the protection of the private property and the primacy of the general interest over the particular, as in the case of direct expropriation, but also the exercise of the State's regulatory powers, aimed at protecting legitimate interests such as public health, security and the environment*"[635].

279. In these terms, the Court notes that the definition of indirect expropriation provided in numeral 2, as well as the factors included for its determination, are compatible with the Constitution. In this sense, the Court reiterates that there is no incompatibility with the Constitution in relation to (i) the definition of expropriation as a measure or series of measures that, without implying the formal transfer of property, have an equivalent effect; (ii) its determination is carried out on a case-by-case basis and takes into account (a) the degree of interference in the right of property, (b) the economic impact of the measure and (c) the consequences of the measure on the legitimate expectations of the investor[636]. On the contrary, it is reiterated, this regulation is compatible with the principle of legitimate confidence and good faith (art. 83 of the PC).

280. However, as the interveners have argued, the Court notes that the expression "*legitimate expectations*", included in section (c) of numeral 2, raises the same problems regarding its indetermination and its uneven application by international arbitral tribunals as those evidenced in relation to the same expression included in the FET clause (*para. 210 et seq*.). In the same way, as suggested by the interveners, the Court notes that the expression "*necessary and proportional*", included in numeral 2, implies the same problems and,

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634 Starrett Housing Corp. v Government of the Islamic Republic of Iran, Irán-US Claims Tribunal, 1983
635 Judgment C-608 of 2010
636 Id

therefore, deserves the same considerations regarding its effect on the freedom of configuration and the regulatory autonomy of the public authorities (*paragraph 247 et seq.*). For this reason, the Court will declare the expressions "*legitimate expectations*" and "*necessary and proportional*", provided for in Article 6, to be constitutional under the same conditions set out in paragraphs 212 and 250, respectively.

281. In these terms, the Court shall declare the expression "*legitimate expectations*" constitutional, provided that the Contracting Parties define what is to be understood by legitimate expectations, taking into account that such expectations shall only arise when they come from specific and repeated acts by the Contracting Party which induce the investor in good faith to make or maintain the investment and when they are abrupt and unexpected changes made by public authorities which affect the investment. In turn, the Court shall declare the expression "*necessary and proportionate*" constitutional, provided that it is interpreted in the context of the preamble of the BIT in such manner that it respects the freedom of configuration and the autonomy of the national authorities to protect legitimate public policy objectives.

282. Finally, the Court concludes that the questioning of one of the interveners against numeral 4 of this clause is unfounded. This is because this provision does not compromise the competence of the national authorities to issue compulsory licenses in accordance with the provisions of the WTO's TRIPS Agreement. On the contrary, the Court considers that this article guarantees such competence of the national authorities, as it excludes it from the effects of the regulation of expropriation.

283. The Court shall therefore declare the constitutionality of article 6 of the treaty *sub examine*. In turn, in accordance with paragraphs 68 et seq., the Court will warn the President that if, in the exercise of his constitutional competence for the conduct of international relations, decides to ratify

this treaty, within the framework of article 31 of the Vienna Convention on the Law of Treaties, he must take the necessary steps to promote the adoption of a joint interpretative declaration with the representative of the French Republic with respect to the conditionings set out in the preceding paragraphs regarding the expressions "*legitimate expectations*" and "*necessary and proportional*".

284. The following table summarizes the above considerations:

Decisión	
Article 6	Constitutional
The expression "*legitimate expectations*"	Constitutional, under the condition that the Contracting Parties define what should be understood by legitimate expectations, taking into account that such expectations can only arise from specific and repeated acts carried out by the Contracting Party that would induce the investor in good faith to make or maintain the investment, and that these are abrupt and unexpected changes made by the public authorities and that affect its investment.
The expression "*necessary and proportional*"	Constitutional, on the understanding that it is interpreted in the context of the BIT's preamble, in a manner that respects the freedom of configuration and the autonomy of national authorities for the purpose of protecting legitimate public policy objectives.

4.7. Compensation for losses (Art. 7)

285. The text of Article 7 reads as follows:

"**Article 7. Compensation for losses.**

1. Investors of a Contracting Party whose investments have suffered losses due to war, any armed conflict, revolution, state of national emergency or revolt in the territory of the other

Contracting Party shall receive from the latter treatment no less favourable than that accorded to its own investors or of the most favoured nation.

2. Notwithstanding paragraph 1, an investor of a Contracting Party who, in the situations referred to in said paragraph, suffers a loss in the territory of the other Contracting Party as a result of requisitioning or destruction of its property by the armed forces or other authorities of the latter Contracting Party, not required by the necessity of the situation, shall receive restitution of its property or appropriate compensation".

(i) Submissions of the Procuraduria

286. The Procuraduria argued in support of a declaration of constitutionality of this article. He noted that compensation for investors' losses means that "*they must receive from [the Contracting Party] treatment no less favourable than that accorded to its own investors or to those of the most favoured nation, which is consistent with Articles 13 and 100 of the Constitution, in regards to the non-discrimination against foreigners in civil matters (...) [and] is in accordance with the provisions of Article 58 of the Constitution with respect to the prohibition of expropriation without compensation, and Article 59 likewise, regarding expropriation and tempoaryl occupation of properties in case of war and Article 90 likewise*"[637].

(ii) Interventions

287. The MinCIT, the Chancellery and UNAB argued in support of the declaration of constitutionality of this article. The MinCIT stated that this provision "*is in full harmony with the Constitution, as it develops the principle of equality already analyzed regarding the national treatment and most favoured*

637 Cdno. 2, fl. 553

nation clauses"[638], according to judgment C-309 of 2007. The Chancellery merely described the content of the article[639] and UNAB stated that this provision "*is not unconstitutional either (...) since the Constitutional Court itself has validated this provision in other similar agreements*"[640].

(iii) The Court's considerations

288. The Court must answer the following legal issue: is Article 7 of the treaty compatible with the Political Constitution?

289. This article regulates, in its two numerals, the issues related to compensation for losses. The first provides for an extension of the NT and MFN clauses in relation to losses suffered by investors of a Contracting Party due to war, armed conflict, revolution, state of national emergency or revolt occurring in the territory of the other Party. This clause provides that, in such cases, the investors shall receive from the Contracting Party treatment "*no less favourable than*" that accorded to its own nationals or to MFN nationals. The second section provides that, "*without prejudice to the foregoing*," an investor of a Contracting Party that, in such situations, "*suffers a loss (...) as a result of the [unnecessary] requisition of its property by the armed forces or other authorities*" shall "*receive restitution of its property or appropriate compensation*".

290. Apart from the considerations set out above in relation to the NT and MFN clauses, the Court considers that Article 7 of the Treaty is compatible with the Constitution. As it has reiterated in relation to the declaration of constitutionality of similar or analogous clauses contained in other

638 Cdno. 1, fl. 58
639 Cdno. 1, fl. 147.
640 Cdno. 2, fl. 508.

BITS[641], the Court notes that these rules "*are an application of the principle of national treatment and the most-favored-nation clause to situations of public disorder that result in losses for the foreign investors, [therefore] the reasons that served as the basis for declaring the aforementioned principles of treatment in accordance with the Colombian Constitution are also valid in this case*"[642]. However, since the expression "treatment" provided in this article is limited to measures taken in situations of "*war, armed conflict, revolution, state of national emergency or revolt occurring in the territory of the other Contracting Party*", that is, measures taken through instruments of domestic law, and not through international instruments, it is unnecessary to conclude a joint interpretative declaration ordered in relation to the same expression included in Article 5, which is justified in order to safeguard the competence of the President regarding the conduct of international relations and the negotiation of treaties (art. 189.2 of the PC).

291. The Court also found that the conditions for restitution or compensation were compatible with "*the postulates that Article 90 of the Constitution enshrines regarding the patrimonial responsibility of the Colombian State*"[643]. Similarly, the Court warns that "*the provisions (...), relating to the requisition of the property of foreign investors by the armed forces or other authorities in cases of disturbance of the public peace, are subject - in their interpretation and application - to the provisions of*"[644]

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641 Judgments C-358 of 1996, C-379 of 1996, C-008 of 1997, C-494 of 1998, C-294 of 2002, C-309 of 2007, C-150 of 2009, C-377 of 2010, C-123 of 2012, C-169 of 2012, C-199 of 2012 and C-286 of 2015

642 Judgments C-358 of 1996, C-379 of 1996, C-008 of 1997, C-150 of 2009 and C-377 of 2010

643 Id

644 Id. Cfr. Judgment C-309 of 2007. "An international treaty could not prevent the Colombian legislator to use this power when the circumstances configured as the constitutional norm provides. Similarly, the norm does not exclude the hypothesis of article 59 of the Constitution, which establishes, in the event of war, expropriation with subsequent compensation." Cfr. C-150 of 2009 and C-377 of 2010.

Article 59 of the Constitution, under which, in order to meet the requirements of the war, "*the need for expropriation may be decreed by the Government without prior compensation*"[645]. Finally, the regulation of restitution and adequate compensation is also subject to the provisions of Article 100 of the Constitution, in the light of which the legislator may, for reasons of public order, render "*foreigners subject to special conditions or deny them the exercise of certain civil rights*"[646].

292. The Court has reiterated that, with regard to Article 100 of the Constitution, "*an international treaty cannot prevent the Colombian legislature from using this power when the circumstances provided in the Constitution occur. Similarly, [it could not exclude] the hypothesis of Article 59 of the Constitution, which enshrines, in the event of war, expropriation with subsequent compensation*"[647]. The Court concludes that nothing in Article 7 precludes that *(i)* in the case provided for in Article 59, likewise, the National Government from decreeing the need for expropriation without prior compensation and *(ii)* the legislature, for the reasons and in the terms provided for in Article 100, in the same way, may limit the exercise of the civil rights of foreigners.

293. On the basis of the foregoing, the Court shall declare the constitutionality of Article 7 of the treaty *sub examine*.

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645 Art. 59 of the PC "In case of war and only to meet its requirements, the need for expropriation may be decreed by the National Government without prior compensation. In this case, the property may only be temporarily occupied, to meet the needs of the war, or to use its products. The State shall always be responsible for the expropriations made by the Government itself or through its agents".

646 Art. 100 of the PC "Foreigners will enjoy in Colombia the same civil rights that are granted to Colombians. However, the law may, for reasons of public order, make aliens subject to special conditions or deny them the exercise of certain civil rights. Aliens shall likewise enjoy, in the territory of the Republic, the guarantees granted to nationals, subject to the limitations established by the Constitution or the law".

647 Judgments C-150 of 2009, C-377 of 2010, C-123 of 2012, C-199 of 2012 and C-286 of 2015

4.8. Free transfer (Art. 8)

294. The text of Article 8 reads as follows:

"**Article 8. Free transfer.**

1. Each Contracting Party in whose territory investments have been made by investors of the other Contracting Party shall ensure to such investors the free transfer of the investment and of the income derived from the investment, and in particular, but not exclusively, from:

a) Interest, dividends, profits and other ordinary income derived from the investment.

b) Royalties deriving from the incorporeal rights defined in Article 1, paragraph 1, sections d and e.

c) Payments made for the repayment of regularly incurred loans.

d) The value of the total or partial liquidation or disposal of the investment, including capital gains on the capital invested.

e) Compensation for expropriation, nationalization or loss as described in Article 6, paragraph 3, and Article 7.

Nationals authorized to work in connection with an investment made in the territory of the other Contracting Party shall be free to transfer their earnings to their country of origin.

2. The transfers mentioned in the previous paragraphs shall be made without delay in a freely convertible currency at the exchange rate in force, in accordance with the regulations in force.

3. Notwithstanding the foregoing provisions of this Article, a Contracting Party may, in a fair and non-discriminatory manner and in good faith, in application of its laws or international

obligations, attach conditions to or prohibit the execution of a transfer, as regards:

a) Bankruptcy, corporate restructuring and insolvency proceedings;

b) The enforcement of final judicial, criminal or administrative decisions;

c) Execution of tax and labour obligations; and

d) Financial sanctions and the fight against money laundering.

4. When, in exceptional circumstances, capital movements cause or threaten to cause serious imbalances in the balance of payments or serious difficulties for the operation of monetary policy or foreign exchange, either Contracting Party may take safeguard measures with regard to capital movements for a period not exceeding one year. Such safeguard measures may be maintained beyond that period for justified reasons, when they are necessary to overcome the exceptional circumstances which led to their application. In that case, the Contracting Party which adopted the measure shall inform the other Contracting Party in due time the reasons justifying its maintenance.

Such measures shall be strictly necessary, executed on a fair and non-discriminatory basis and in good faith, and shall be consistent with the Articles of Agreement of the International Monetary Fund.

5. The provisions of the preceding paragraphs of this Article shall not preclude the exercise in good faith by a Contracting Party of its international obligations and of its rights and obligations pursuant to its participation in, or association with, a free trade area, a customs union, a common market, an economic and monetary union or any other form of regional co-operation or integration. (Sic)

(i) Submissions of the Procuraduria

295. The Procuraduria argued in support of the declaration of constitutionality of this article. He submitted that "*it is compatible with our country's sovereignty in relation to exchange and monetary matters under the terms established in Article 371 of the Constitution, as well as respect for national sovereignty in matters related with international relations with organizations of regional cooperation or integration*"[648].

(ii) Interventions

296. The MinCIT, the Chancellery and UNAB argued in support of the declaration of constitutionality of this article. The MinCIT concluded that this provision "*is in complete harmony with the constitutional text, since it establishes that the agile and unobstructed transfer of the amounts belonging to the investors is permitted*"[649], but, regardless, it provides for situations "*within which it is possible to restrict that right*"[650]. In its assessment, this regulation is compatible with judgments C-309 of 2007 and C-377 of 2010. The Foreign Ministry merely described the content of the article[651]. UNAB pointed out that the Court has analyzed the constitutionality of a similar regulation in judgments C-169 and C-199, both of 2012, and declared it constitutional[652]. With regard to the one-year period for maintaining the necessary measures to restrict capital movements, it submitted that "*it does not violate the rules of our Constitution with regard to the functions*

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648 Cdno. 2, fl. 554.
649 Cdno. 1, fl. 58
650 Id
651 Cdno. 1, fl. 147
652 Cdno. 2, fl. 509

of the Central Bank, since after that year the constitutional powers in that regard can be maintained"[653].

(iii) The Court's considerations

297. The Court must answer the following legal issue: is Article 8 of the treaty compatible with the Politcal Constitution, in particular with Articles 371 and 372?

298. Article 8 contains 5 numerals. The first provides that each Contracting Party shall ensure to investors of the other Party "*the free transfer of the investment and the income derived from the investment*", among other things, from *(i)* "*interest, dividends, profits and other income derived from the investment*"; *(ii)* "*royalties derived from the incorporeal rights defined in Article 1, paragraph 1, sections d and e*"; *(iii)* "*payments made in repayment of loans*"; *(iv)* "*the value of the total or partial liquidation or disposal of the investment, including capital gains on invested capital*"; and *(v)* "*compensation for expropriation, nationalization or loss*" as provided for in Articles 6.3 and 7. It also provides that nationals authorized to work "*in connection with an investment (…) shall be free to transfer their earnings to their country of origin*". The second establishes that all such transfers "*shall be made without delay in a freely convertible currency at the prevailing exchange rate*", in accordance with the regulations in force.

299. The third numeral establishes that, without prejudice to the foregoing, a Contracting Party may, "*in a fair and non-discriminatory manner and in good faith",* in application of its legislation and international obligations, "*condition the execution of a transfer or prohibit its execution*", as far as it relates to *(i)* "*bankruptcy, company reconstruction and insolvency proceedings*"; *(ii)* "*enforcement of final judicial, criminal or administrative decisions*"; *(iii)* "*enforcement of tax or labour*

653 Cdno. 2, fl. 510

obligations" and *(iv)* "*financial penalties and combating money laundering*".

300. The fourth numeral provides that the Contracting Parties "*may take safeguard measures with respect to movements of capital, for a period not exceeding one year*", when "*in exceptional circumstances*", "*the movements of capital cause or threaten to cause serious imbalances in the balance of payments or serious difficulties for the operation of monetary exchange policy*". In any event, it states that "*these safeguard measures may be maintained beyond that period for justified reasons, when necessary*", and that, in this case, "*the Contracting Party that adopted the measure shall inform the other Contracting Party [of such] reasons in due time*". It further provides that these measures must be *(i)* necessary to overcome the exceptional circumstances which led to their application, *(ii)* non-discriminatory, *(iii)* in good faith and *(iv)* in conformity with the Articles of Agreement of the International Monetary Fund.

301. Finally, the fifth numeral states that the provisions of this article do not preclude the "*exercise in good faith by a Contracting Party of its international obligations and of its rights and obligations*" by virtue of its participation or association with a trade zone, customs union, common market, economic and monetary union or any other form of regional cooperation or integration.

302. The regulation of transfers provided for in Article 8 is compatible with the Constitution. In regard to the first and second numerals, the Court reiterates that, as it has held in relation to other BITS[654], this clause regulates "*the transfers required for the investment, which is, the payments necessary for the realization of the investment*"[655] and, therefore, aims

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654 Judgments C-379 of 1996, C-358 of 1996, C-008 of 1997, C-494 of 1998, C-294 of 2002, C-309 of 2007, C-150 of 2009, C-377 of 2010, C-123 of 2012, C-169 of 2012, C-199 of 2012 and C-286 of 2015

655 Judgments C-309 of 2007, C-150 of 2009, C-377 of 2010, C-123 of 2012, C-169 of 2012, C-199 of 2012 and C-286 of 2015

to "*materialize the protection that the States that have signed the treaty offer to the foreign investment*"[656]. In this sense, it is compatible with the overall purposes of the treaty. In any case, the Court has warned that, since "*the transfer of capital abroad is a typical operation of the exchange market, (...) it is necessary that [there be no disregard for] the competences that, by mandate of the Constitution, correspond exclusively to the Board of Directors of the Central Bank*"[657].

303. Regarding the third numeral, the Court has indicated that it is compatible with the principle of national sovereignty. It is constitutional to grant the Contracting Parties "*the possibility of conditioning or preventing transfers through the equitable, non-discriminatory and good faith application of their laws relating to (i) bankruptcy, enterprise restructuring or insolvency proceedings; (ii) enforcement of final judicial, arbitral or administrative decisions and awards; and (iii) the enforcement of labour or tax obligations*"[658]. This clause does not affect the Constitution and, on the contrary, safeguards the authorities' competences in such cases.

304. The Court also considers that the fourth numeral is compatible with the Constitution, in particular with Articles 371 and 372 (*see para. 163*). This is because it provides that capital movements may be restricted for a period not exceeding one year, but that "*these safeguard measures may be maintained beyond that period for justified reasons*." In this regard, the Court notes that the provisions according to which capital transfers may be temporarily restricted have

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656 Judgment C-008 of 1997. Judgment C-379 of 1996. "The economic reality determines that any capital coming from abroad generally allows the development of a lucrative business and, consequently, any attempt to attract such capital would be unfeasible if in practice the repatriation of the investment's profits were prevented".

657 Id

658 Judgment C-169 of 2012

been considered to be in accordance with the Constitution[659]. Since judgment C-008 of 1997, the Court has stated that this clause "*respects these powers of the central bank, since it grants the parties the possibility of temporarily restricting the repatriation of money related to investments protected by the Treaty, when there are serious difficulties in the balance of payments, thus respecting the discretion of the Board of the Central Bank with respect to the regulation and management of the country's international reserves*"[660]. In turn, through judgment C-184 of 2016, the Court concluded that "*the measures on unimpeded capital transfers are constitutional, as the exceptions usually provided for this free flow safeguard the autonomy of States in the management of the economy and establish the possibility of taking action to control the flow of capital when economic stability is at risk, without setting express time limits*".

305. The Court notes that while, in principle, this provision establishes a time limit of 1 year for the adoption of safeguard measures in respect of capital movements, it is also true that then it provides that such measures "*may be maintained beyond that time limit for justified reasons*". In these terms, the aforementioned clause does not compromise the competences of the Central Bank in "*specific terms of validity, since these can only be established by the competent authority in accordance with the specific circumstances that it faces in the exercise of its constitutional functions*"[661]. Thus, for the Court,

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659 Judgments C-309 of 2007, C-377 of 2010, C-199 of 2012 and C-286 of 2015. Cf. Judgments C-008 of 1997 and C-494 of 1998. This provision establishes "the powers of the central bank, since it grants the parties the possibility of temporarily restricting the repatriation of money related to treaty protected investments, when there are serious difficulties affecting the balance of payments ".

660 Cfr. Judgments C-358 of 1996, C-294 of 2002 and C-309 of 2007

661 In the Judgment C-184 of 2016, the Court declared the conditional constitutionality of section (a) of Article 2 of Annex 8 (c) of the FTA with Korea, according to which measures regarding payments and capital transfers "shall not exceed a period of one year; however, under exceptional circumstances and for justified reasons, a Party may extend the period of application of

this provision does not limit the competences of the Central Bank "*to specific time limits that prevent the exercise of the work entrusted to it, which is not admissible by the Constitution*"[662]. In sum, this provision is compatible with Articles 371 and 372 of the Constitution, since constitutional jurisprudence has uniformly reiterated that "*the temporary restriction of the powers of the Central Bank is plausibl*e"[663], without setting specific and definitive limits to the exercise of the powers of this body.

306. However, with regard to the same numeral 4, the Court considers that the expression "*such measures shall be strictly necessary, executed on a fair and non-discriminatory basis and in good faith*" is also compatible with the Constitution. Firstly, considering that in this matter, the measures restricting the transfer of capital intensely affect, prima facie, the economic freedoms of investors, protected by Article 333 of the PC, it is therefore justifiable that only those measures considered necessary to confront arising macroeconomic situations should be adopted. The second, given the foregoing, such measures must be, in any case, in accordance with the principle of non-discrimination (Art. 13 of the PC) and good faith (Art. 83 of the PC). Likewise, the Court reiterates that "*the fact that such measures must be compatible with or in accordance with the agreements of the IMF does not render them unconstitutional per se, since Colombia is*

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such measures for an additional year". This is because "the functions that Article 372 Superior assigned to the Board of Directors of the Bank of the Republic as monetary, banking and credit authority are permanent and are not subject to rigid time limits as determined in subparagraph "a" of paragraph 2 of Annex 8-C. The indefinite nature of the Bank's competences has been considered in other international agreements in which, although the circumstances that enable this type of measures have been referred to and their transitory nature has been highlighted, no specific terms of validity have been foreseen, since these can only be established by the competent authority in accordance with the specific circumstances it faces in the exercise of its constitutional functions".

662 Id

663 Judgment C-184 of 2016

a State Party to the agreement constituting said fund -Law 96 of 1945- and its amendments, the agreements that are issued in its development must be in accordance with the commitments taken on by the States Parties to the IMF statute. Therefore, the reference to the agreements made by the clause studied, rather than being considered contrary to the Constitution, is a recognition of what has been agreed to in the treaty to which Colombia is a party, which obliges it to comply with the agreed stipulations and to respect the competences assigned by said agreement"[664].

307. Finally, the Court notes that numeral 5 of this article is compatible with the Constitution, in particular with the principle of sovereignty (Art. 9 of the PC) and economic integration (Art. 227 of the PC), since it provides that the regulation of transfers does not preclude compliance with international obligations or the prerogatives of the State under other instruments, or its participation or association in any form of regional cooperation or integration. This is also in accordance with the international law principles of *pacta sunt servanda* and good faith (Preamble of the Vienna Convention on the Law of Treaties)[665] and, therefore, with Article 9 of the PC, according to which foreign relations "*are based on the recognition of the principles of international law accepted by Colombia*".

308. On the basis of the foregoing, the Court shall declare Article 8 of the treaty *sub examine* constitutional.

4.9. Cultural and linguistic diversity (Art. 9)

309. The text of Article 9 reads as follows:

"**Article 9. Cultural and linguistic diversity.**

Without prejudice to Article 6, nothing in this Agreement shall be interpreted as an impediment to one of Contracting Party

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664 Id. Cfr. Judgment C-123 of 2012

665 Vienna Convention on the Law of Treaties. Preamble. Cfr. Law 32 1985

taking any action to govern investments made by foreign investors and the conditions of their activities, within the framework of measures to preserve and promote cultural and linguistic diversity."

(i) Submissions of the Procuraduria

310. The Procuraduria argued in support of a declaration of constitutionality of this article. He stressed that it respects "*the sovereignty of each of the Contracting Parties to govern the investments made by foreign investors and the conditions of their activities, within the framework of measures to preserve and promote cultural and linguistic diversity, which is in accordance with the provisions of Article 7 of the Political Constitution, regarding the obligation of the Colombian State to recognize and protect the ethnic and cultural diversity of the Colombian nation*"[666].

(ii) Interventions

311. The MinCIT[667], the Chancellery[668], and UNAB[669] merely described the content of this article and requested its declaration of constitutionality.

(iii) The Court's considerations

312. The Court must answer the following legal issue: is Article 9 of the treaty *sub examine* compatible with the Constitution?

313. . The Court notes that this article contains an interpretation clause of the Agreement. According to this clause, without prejudice to the provisions on expropriation, the

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666 Cdno. 2, fl. 554
667 Cdno. 1, fls. 48 to 66
668 Cdno. 1, fl. 148
669 Cdno. 2, fl. 520

Agreement may not be interpreted as preventing the Contracting Parties from regulating foreign investments and the conditions of such investors within the framework of measures to preserve and promote cultural and linguistic diversity. In this regard, the BIT *sub examine* shall not be interpreted as preventing or impeding all domestic authorities from regulating and adopting the measures they deem appropriate to preserve and promote cultural and linguistic diversity.

314. In these terms, the Court considers that this article is compatible with the Constitution, as it does not compromise or affect the powers of the national authorities in relation to the preservation and promotion of cultural and linguistic diversity. In particular, this article is consistent with Articles 7 and 70 of the Political Constitution, according to which, respectively, *(i)* "*the State recognizes and protects the ethnic and cultural diversity of the Colombian Nation*" and *(ii)* "*culture in its diverse manifestations is the foundation of nationality. The State recognizes the equality and dignity of all those who live in the country. The State shall promote research, science, development and the dissemination of the cultural values of the Nation*".

315. Therefore, the Court shall declare that this article is constitutional.

4.10. Measures related to the environment, health and labour rights (Art. 10)

316. The text of article 10 reads as follows:

> "**Article 10. Measures related to the environment, health and labour rights.**
>
> 1. Without prejudice to Article 6, nothing in this Agreement shall be interpreted as as an impediment to any Contracting Party adopting, maintaining or enforcing any measure that guarantees that the investment activities in its territory are

carried out in compliance with environmental, health and labour laws of that Contracting Party, provided that the effect of the measure is non-discriminatory and proportionate to the objectives pursued.

2. The Contracting Parties recognize that it is not appropriate to encourage investment by lowering their environmental, health or labour standards. Therefore, each Contracting Party guarantees that it shall not modify or waive, or offer to modify or waive, such legislation to encourage the establishment, acquisition, maintenance or expansion of an investment in its territory to the extent that such modification or waiver would result in a lowering of its environmental, health or labour standards".

(i) Submissions of the Procuraduría

317. The Procuraduria argued in support of a declaration of constitutionality of this article. He emphasized that "*it responds to the constitutional mandates regarding the guarantee of labor and health rights, and the preservation of the environment, within a conventional range of progressivity and non-regressivity in terms of human rights, in addition to guaranteeing economic freedom in equal conditions, avoiding unfair competition among the States Parties*".

(ii) Interventions

318. The MinCIT[670], the Chancellery[671] and UNAB[672] also requested the declaration of constitutionality of this article[673]. The Chancellery stated that "*this provision seeks to preserve the regulatory margin for adopting or enforcing measures to protect*

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670 Cdno. 1, fls 48 to 66.
671 Cdno. 1, fl. 148
672 Cdno. 2, fl. 519.
673 Id.

environmental, health and labour interests, as long as these are not discriminatory or disproportionate"[674].

(iii) The Court's considerations

319. The Court must answer the following legal issue: is Article 10 of the treaty compatible with the Political Constitution?

320. The Court notes that the first numeral of this article contains an interpretation clause of the Agreement compatible with the Constitution. According to this clause, without prejudice to the provisions on expropriation, the Agreement may not be interpreted as preventing the Contracting Parties from providing, maintaining or enforcing measures to ensure that the investment complies with environmental, health and labor regulations, as long as their effects are not discriminatory and disproportionate. As has been held in relation to similar clauses in other BITS[675], the first numeral of this clause (i) is compatible with national sovereignty[676] and (ii) "*allows for the real protection of the mentioned sectors, which are essential purposes of the State and constitutional guarantees of a core nature*"[677]. In sum, the first numeral of this article preserves the powers and regulatory autonomy of national authorities to dispose or to enforce measures related to the regulation of environmental, health and labor issues.

321. In particular, with regard to measures related to the environment, in judgment C-169 of 2012, the Court concluded that "*this is a rule (...) that is limited to recogniz-*

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674 Cdno. 1, fls. 145 to 159.

675 Judgments C-377 of 2010, C-123 of 2012, C-169 of 2012, C-199 of 2012 and C-286 of 2015

676 Judgment C-286 of 2015.

677 Judgment C-377 of 2010. "Health, safety and environmental protection have constitutional rank as rights, essential services and, in addition, their guarantee, promotion and protection are the main duties of the State (Art. 2, 49 and 79)".

ing the sovereignty of each State, as well as the constitutional duty to protect the diversity and integrity of the environment. The protection of the environment is a principle that radiates throughout our legal system, since the Constitution (i) provides for the obligation of the State to protect the natural wealth of the Nation; (ii) enshrines the right of individuals to enjoy a healthy environment; and (iii) contemplates a set of obligations imposed on the authorities and individuals for its preservation. In this sense, (...) the clause is compatible with Articles 9, 79 and 80 of the Constitution"[678].

322. The Court notes that the second numeral of this article also compatible with the Constitution. This numeral contains *(i)* the recognition of both Parties that it is not appropriate to promote investment by lowering "*environmental, health or labor standards*", as well as *(ii)* the obligation of the Parties not to modify or repeal regulations to lower those standards, nor to promise to do so, in order to encourage the establishment, acquisition, maintenance or expansion of foreign investment. In this regard, the Court notes that both the recognition of both Parties and the obligation referred to safeguard "*the duty of the State to guarantee the effectiveness of the principles, rights and duties provided for in the Constitution*" (art. 2 of the PC) and to discourage the attraction of FDI through practices that lower the standards of protection of environmental, health and labor rights, is also compatible with the principle of progressivity in the field of social rights and the rule of non-regressivity (Art. 4 of the ICESCR)[679].

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678 Judgment C-169 of 2012. Cfr. Judgment C-123 of 2012

679 Art. 4 of the ICESCR. " The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society". Cfr. Judgments C-115 of 2017

323. On the basis of the foregoing, the Court shall declare the constitutionality of Article 10 of the treaty *sub examine*.

4.11. Corporate social responsibility (Art. 11)

324. The texto f article 11 reads as follows:

> "**Article 11. Corporate social responsibility.**
>
> Each Contracting Party shall encourage enterprises operating in its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility into their internal policies, such as declarations of principles that have been approved or are endorsed by the Contracting Parties, such as the Guidelines of the Organization for Economic Co-operation and Development (OECD) for Multinationals. These principles address issues such as labour rights, the environment, human rights, relations with civil society and the fight against corruption.
>
> The Contracting Parties remind such companies of the importance of incorporating such corporate social responsibility standards in their internal policies".

(i) Submissions of the Procuraduría

325. The Procuraduría argued in support of a declaration of constitutionality of this article. He emphasized that it is "*compatible with the essential purpose of the State to ensure peaceful coexistence and the validity of a fair order based upon solidarity and public morality in the terms of articles 2, 95 and 209 of the Political Charter, as well as the social function of corporate property established in Articles 58 and 333*"[680].

680 Cdno. 2, fl. 555

(ii) Interventions

326. The MinCIT[681], the Chancellery[682] and UNAB also requested the declaration of constitutionality of this article. In addition, UNAB stressed that it is compatible with "*a company that has a social function in accordance with Articles 1 and 333 of our Constitution and the Agreement of Accession to the Organization for Economic Cooperation and Development (OECD) signed on 30 May 2018*"[683].

(iii) The Court's considerations

327. The Court must answer the following legal issue: is Article 11 of the treaty compatible with the Constitution?

328. The Court considers this article to be compatible with the Constitution. I This is because it provides for the obligation of the Contracting Parties to encourage all companies to voluntarily include corporate social responsibility standards within their internal policies. The article refers to, among others, *(i)* the declarations of principles approved or supported by the Contracting Parties and *(ii)* the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinationals. The article also states that the Contracting Parties must "*remind such enterprises of the importance of including such corporate standards of social responsibility in their internal policies*".

329. In these terms, this article is compatible with Article 333 of the Political Constitution, which provides that "*free economic competition is a right for all that entails responsibilities. The company, as the basis of development, has a social function*

681 Cdno. 1, fls. 48 to 66
682 Cdno. 1, fl. 148
683 Id

that implies obligations"[684]. This is because the obligation to promote among companies the inclusion of corporate social responsibility standards allows for the strengthening of "*the idea that the company is one of the main actors within a community and that its activity should be an instrument for social improvement, environmental protection and respect for fundamental rights, among other elements of social construction*"[685]. Furthermore, the Court notes that this obligation is also compatible with the Socal Rule of law and the principle of solidarity (art. 1 of the PC).

330. In turn, with regard to the inclusion of obligations and declarations relating to social responsibility in BITS, in the judgment C-608 of 2010, the Court noted that "*it considers it of the utmost importance that the postulates of so-called corporate social responsibility (CSR) are elevated to conventional international positive law, since their normative sources are usually found in 'soft law' provisions, such as declarations and resolutions. In this sense, including the principles of CSR in a free trade agreement such as the present one contributes to the fulfilment of constitutional values and principles such as solidarity, the dignity of work, respect for the environment and, in general, the fulfilment of companies' obligations in the human rights matters*"[686].

331. On the basis of the foregoing, the Court shall declare the constitutionality of Article 11 of the treaty *sub examine*.

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684 Judgment C-915 of 2010. "Article 6 [of the Agreement] which obliges the parties to encourage voluntary corporate social responsibility practices 'to strengthen the coherence between economic and social objectives' is constitutional because it is part of the social function of the company enshrined in Article 333 of the Political Charter."

685 Judgments T-247 of 2010 and T-781 of 2014

686 Judgment C-708 of 2010

4.12. Transparency (Art. 12)

332. The text of article 12 reads as follows:

> "**Article 12. Transparency.**
>
> Each Contracting Party shall ensure that any regulations having an impact on investments or investors are published or made publicly available".

(i) Submissions of the Procuraduría

333. The Procuraduría argued in support of a declaration of constitutionality of this article. He pointed out that the duty imposed on the Contracting Party "*corresponds to the right of every person to have access to public documents, regulated by Article 74 of the Constitution, and to the principles of publicity and transparency that likewise rule the public service in the terms of Article 209.* "[687].

(ii) Interventions

334. TheMinCIT[688], the Chancellery[689] and the UNAB[690] supported the declaration of constitutionality of this article. In addition, UNAB noted that this article provides for "*continued non-discriminatory and fair and desirable treatment which inspires confidence in facilitating and attracting investment in each territory*"[691].

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687 Cdno. 2, fl. 555
688 Cdno. 1, fls. 48 to 66
689 Cdno. 1, fl. 148
690 Cdno. 2, fl. 521
691 Cdno. 2, fl. 521.

(iii) The Court's considerations

335. The Court must answer the following legal issue: is Article 12 of the treaty *sub examine* compatible with the Political Constitution?

336. The Court considers that this article is compatible with the Constitution, as it provides for the obligation of the Contracting Parties to publish and make "*publicly available*" the regulations related to the investors and their investments, which is inherent to the Rule of law (Art. 1 of the PC), as well as the right of access to public documents (Art. 74 of the PC). As has highlighted on other occasions, the Court reiterates that "*the main objective sought by States in negotiating a treaty on the Promotion and Protection of Investments (BIT) is to establish a fair and transparent legal framework that promotes investment through the creation of an environment that protects the investor, its investment and related flows, without creating obstacles to investments from the other party of the treaty. In other words, it seeks to establish clear rules of the game for investors of both Parties, which provide mutual protection and security in the treatment of investments in order to create incentives for the attraction of foreign investment*"[692].

337. In these terms, the Court shall declare the constitutionality of Article 12 of the treaty *sub examine*.

4.13. Guarantees and subordination (Art. 13)

338. The text of Article 13 reads as follows:

"**Article 13. Guarantees and subordination.**

1. If one of the Contracting Parties or a guarantee organ particularly its designated agency (the first Contracting Party) makes a payment under a non-commercial guarantee granted

692 Judgment C-169 of 2012. Cfr. Judgment C-377 of 2010 and C-286 of 2015.

for an investment in the territory of the other Contracting Party (the second Contracting Party), the second Contracting Party shall accord to the first Contracting Party full rights of subrogation with respect to the rights and claims of the investor benefiting from such guarantee.

2. These payments do not affect the rights of the beneficiary of the guarantee to have recourse to the procedures for the settlement of disputes provided for in Article 15 or to attempt the actions thus introduced until the procedure for full compensation of the damage has been completed, without these actions giving rise to double compensation".

(i) Submissions of the Procuraduria

339. The Procuraduria argued in support of a declaration of constitutionality of this article. He noted that this regulation "*relates to the freedom of contract that the parties have without compromising the Colombian constitutional order, responding, on the contrary, to the validity of a just system and the principles of equity and reciprocity that rule international relations*"[693].

(ii) Interventions

340. The MinCIT[694], the Chancellery[695] and UNAB merely described the content of this article and requested its constitutionality[696].

(iii) The Court's considerations

341. The Court must answer the following legal issue : is Article 13 of the treaty *sub examine* compatible with the Constitution?

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693 Cdno. 2, fl. 556.
694 Cdno. 1, fls. 48 to 66
695 Cdno. 1, fl. 148
696 Cdno. 2, fl. 522.

342. This article provides for the regulation of guarantees and subrogation in two numerals. The first provides that, if a Contracting Party or a guarantee agency "*makes a payment under a non-commercial guarantee granted for an investment in the territory of the other Contracting Party*", the latter shall recognize in favour of the former rights of subrogation over "*the rights and claims of the investor benefiting from such guarantee*". The second provides that such payments do not affect the right of the guarantee beneficiary to resort to the dispute settlement mechanism provided in article 15 or to other actions for full compensation of damage, "*without such actions giving rise to double compensation*".

343. The Court considers this article to be compatible with the Constitution. As it has held in relation to analogous or similar clauses in other BITS [697], the Court takes note that these "*guarantee mechanisms seek to cover the risks involved in any international investment and are intended to transfer these risks from the private investor to the guarantee body*"[698]. In this sense, "*they reflect systems previously agreed to on the responsibilities of the States Parties towards their investors, with the*

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697 Judgments C-358 of 1996, C-379 of 1996, C-008 of 1997, C-494 of 1998, C-294 of 2002, C-309 of 2007, C-150 of 2009, C-123 of 2012, C-169 of 2012, C-199 of 2012 and C-286 of 2015.

698 Judgment C-358 of 1996. Cf. Judgments C-379 of 1996, C-008 of 1997, C-309 of 2007, C-294 of 2002 and C-150 of 2009. "It is well known that, in general, this form of foreign investment protection can be achieved through two types of provisions: 1) national mechanisms; 2) international mechanisms. The first ones are presented when the Government of a certain country assumes the guarantee of the investments that its nationals and companies make abroad, on the other hand, the international law mechanisms of guarantee are exercised by some organization of public international law, created by virtue of a multilateral treaty, in order to guarantee the investments that the nationals of the States Parties make abroad". Judgment C-494 of 1998. "In the field of international negotiations, the mechanism of subrogation is commonly used, in order to regulate what is related to the responsibility of the Parties towards their investors, generating greater security in the compliance with the commitments and guarantees adopted to protect foreign capital investments from the risks and vicissitudes they may incur. Its enshrinement in nothing contradicts the Political Charter".

objective to assure the security and stability of the investments"[699]. In particular, with regard to the subrogation mechanisms provided in the BIT, the Court has pointed out that "*they do not modify the obligations that the parties undertake by subscribing to the Convention*"[700] and "*they do not interfere with any power of the national government with regard to the execution or compliance with the Agreement, since this figure only regulates the relations of the foreign investor with its government or with such international law body that invokes the corresponding guarantee mechanism*"[701]. In these terms, the Court finds that this clause does not compromise or affect any content of the Constitution.

344. On this basis, the Court shall declare the constitutionality of Article 13 of the treaty.

4.14. Security exception (art. 14)

345. The text of article 14 reads as follows:

> "**Article 14. Security exception.**
>
> Nothing in this Agreement shall be interpreted so as to prevent any Contracting Party from adopting, maintaining or enforcing any measure necessary to preserve public order, to perform its functions for the maintenance or restoration of international peace and security, or for the protection of its essential security interests" (Sic)

(i) Submissions of the Procuraduria

346. The Procuraduria argued in support of a declaration of constitutionality of this article. He concluded that "*the*

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699 Id
700 Id
701 Id

security exception, consisting of the fact that the Agreement does not prevent or interfere with the decisions and actions taken by each Contracting Party to preserve the public order of its country, international peace and security and the protection of its essential security interests, (…) respects the sovereignty of each State to manage its security and police affairs in times of peace and in times of internal or international disturbance in the terms of Articles 9, 212, 213, 217 and 218 of the Political Charter"[702].

(ii) Interventions

347. The MinCIT, the Chancellery and UNAB supported the declaration of constitutionality of this article. The Chancellery stated that it "*reserves the power of the State to take measures for security reasons necessary for the preservation of public order, to fulfil the functions for the maintenance or restoration of international peace and security*"[703]. The UNAB submitted that this article does not "*remove or diminish the sovereign power of the parties to issue, maintain and execute those measures that are aimed at defending internal and external peace and in general at defending their essential security interests*"[704]. The MinCIT limited itself to describing the content of this article[705].

(iii) The Court's considerations

348. The Court must answer the following legal issue: is Article 14 of the treaty *sub examine* compatible with the Political Constitution?

349. The Court considers that the interpretation clause of the agreement provided in this article is compatible with the Constitution. According to this clause, the Agreement

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702 Cdno. 2, fl. 556.
703 Cdno. 1, fl. 148
704 Cdno. 2, fl. 524
705 Cdno. 1, fls. 48 to 66

may not be interpreted as preventing the Contracting Parties from providing, maintaining or enforcing measures to *(i)* preserve public order, *(ii)* maintain or restore international peace and security and *(iii)* protect their essential security interests. In these terms, the objective of this clause is to maintain "*the power of the State to control public order at the various levels, as a clear manifestation of national sovereignty and the essential purposes of the State as enshrined in article 2 of the Constitution*"[706], and to guarantee the peace (art. 22 of the PC).

350. Therefore, the Court will declare the constitutionality of Article 14 of the treaty *sub examine*.

4.15. Settlement of disputes between an investor and a Contracting Party (Art. 15)

351. The text of Article 15 reads as follows:

> "**Article 15. Settlement of disputes between an investor and a Contracting Party.**
>
> 1. Any dispute related to the Investments between a Contracting Party and an investor of the other Contragting Party where it is alledged that the Contracting Party has breached an obligation under this Agreement, thus causing injury to the Investor, shall be settled amicably between the parties involved in the dispute by any non-judicial remedies. This phase includes a phase of discussion between the investor and the authority that has issued the administrative act that is the object of dispute if the Contracting Party's legislation so requires.
>
> 2. This article will only apply to the disputes between a Contracting Party and an investor of the other Contracting Party related to an alleged breach of an obligation of this Agreement,

706 Judgment C-199 of 2012

except for articles 3 (admission and promotion), 10.2 (Measures related to the environment and labour rights), when the investor has suffered damages as a consequence of said breach.
3. The phase mentioned in paragraph 1 begins with a written notification of the dispute, hereafter "Notification of Dispute", submitted by the investor to the Contracting Party host of the investment.

4. If the dispute has not been settled amicably within a period of 6 months from the date of the Notification of Dispute, it may be submitted at the choice of the Investor:

a) to the competent tribunal of the Contracting Party, being a party to the dispute; or

b) after a 180 day notice, to an *ad hoc* arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or

c) after a 180 days notice; to an international arbitration under the International Centre for the Settlement of Investment Disputes (ICSID), created by the Convention on the Settlement of Investment Disputes between States and Nations of other States, signed at Washington DC on 18 March 1965*.

d) after a 180 day notice, to an arbitral tribunal established under other arbitration rules or under another arbitration institution according to the agreement between contending parties.

5. If the investor involved in the dispute is a natural person that holds dual French and Colombian nationality, only a national court as defined in paragraph 4 a) can hear the dispute.

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* Translator's note: The expression "or" at the end of paragraph c) is omitted in the Spanish version of the treaty. However, the expression is included in the French version of the treaty. While it is likely that this is nothing different than a mistake, we remain faithful to the Spanish version as well as to the original judgment.

6. The choice of one of the procedures provided in paragraph 4 shall be final.

7. The notice required by paragraph 4 b), c) and d) shall be subject to a written notification submitted by the investor to the Contracting Party host of the investment specifying its intent to present a request for arbitration, hereafter "Notification of Intent". This notification of intent shall specify the name and the address of the claimant investor and specify in a detailed manner the facts and law provisions invoked and the estimated value of the damages and interests and any other relief sought.

8. Each Contracting Party gives in advance its irrevocable consent to the submission of a dispute related to the investments to any of the arbitral proceedings established in paragraph 4 b), c) and d).

9. The arbitration award shall be final and binding to the disputing parties.

10. The investor may not present a request for arbitration if more than 4 years have elapsed since the date the investor had knowledge of the alleged breach of this Agreement.

11. None of the Contracting Parties will pursue diplomatic protection regarding disputes that one of its investors and the Other Contracting Party have submitted to the arbitration proceedings provided in this Agreement, unless one of the parties to the dispute has failed to comply with the decision pronounced on the occasion of the dispute.

12. Subject to the agreement between contending parties, the UNCITRAL Rules on Transparency will apply to the arbitrations initiated under this article.

If under a year after the entry into force of this Agreement, none of the Contracting Parties objects, through the submsission of a written notification to the other Contracting Party, the UNCITRAL Rules on Transparency will automatically apply.

13. Notwithstanding the applicable arbitration rules, upon request of the Contracting Party in the dispute, the tribunal may decide on the preliminary questions of competence or admissibility, as soon as possible.

14. If the tribunal deems that a claim has been frivolous, it shall award against the claimant the costs that it deems justified.

15. The tribunal, in its award, will expose its conclusins of fact and law, accompanied by the reasons for its decision, and may, upon request of the claimant, award any of the following forms of relief:

a) pecuniary compensation, that shall include the interest since the moment on which the the damages were caused until the payment;

b) the restitution, in which case the award shall order that the respondent may pay a pecuniary compensation instead of the restitution when the restitution is not feasible; and

c) upon agreement by the contending parties, any other form of relief.

16. The tribunal shall not be competent to rule on the legality of a measure as a matter of domestic law.

17. The submission of the notification of dispute, the notification of intent and any other document shall be sent:

- to France, to the Directorate of Legal Matters of the Ministry of Foreign Relations and to the Subdirectorate in charge of International Investments of the Directorate General of Treasury;

- to Colombia, to the Directorate in charge of foreign investment of the Ministry of Trade, Industry and Tourism or whoever serves as such;

18. Unless otherwise agreed by the disputing parties, the tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties. If the tribunal has not been constituted in 60 days, after the date that a claim has been submitted to arbitration in accordance with this article, the Secretary-General of ICSID, upon request of one contending party, following consultation with the parties, shall appoint at its discretion the unappointed arbitor or arbitrators. The Secretary-General of ICSID shall not appoint as President of the tribunal any citizen of either of the Contracting Parties.

19. The arbitrators shall:

a) have experience or expertise in international public law, international investment law, or in dispute settlement derived from international investment agreements;

b) be independent from the Contracting Parties and from the claimant, and not be affiliated to or receive instructions from neither of them.

21. The decision of any challenge to an arbitration shall be taken by the selected authority by the contending parties, or in case that no agreement about the appointment is reached, by the President of the Administrative Counsel of ICSID.

21. The disputing parties may agree upon the fees to be paid to the arbitrators. If no agreement is reached on the fees to be paid to the arbitrators before the constitution of the tribunal, the fees for arbitrators established by the ICSID will apply.

22. Upon request of any of the parties to the dispute, the tribunal, before issuing a decision or award on responsibility, shall communicate its proposal for a decision or award to the disputing parties. Within 30 days after the communication of said proposal of decision or award, the parties to the dispute

may submit written comments to the tribunal relating to any aspect of the proposal of decision or award.

The tribunal will consider said comments and will issue its decision or award within 60 days after the communication of its proposal of decision or award to the contening parties.

23. In those cases in which two or more claims have been submitted to arbitration separatedly under this article and the claims raise common fact or law issues and arise from the same facts or circumstances, any disputing party may attempt to obtain an accumulation order, in accordance with the agreement of all the disputing parties in respect of whom the accumulation order is sought or in accordance with the terms of this article.

24. The contending party that seeks to obtain an accumulation order in accordance with this article, will submit a written request to the Secretary-General of ICSID and to all the contending parties in respect of whom the accumulation order is sought and will specify in the request: The name and address of all the contending parties respect of whom the accumulation order is sought; the nature of the requested accumulation order; and the ground on which the request is based. If the Secretary-General of ICSID determines, within a period of 30 days subsequent to the reception of the request, that the accumulation is in order, a tribunal will be established in accordance with this article". (Sic)

(i) Submissions of the Procuraduria

352. The Procuraduria described the content of this article and argued in support of a declaration of constitutionality[707].

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707 Cdno. 2, fl. 556.

(ii) Interventions

353. Eleven interveners pronounced on this article. Four argued in support of declaration of constitutionality[708]; five explained its content and exposed criticisms about it, without making any request[709]; one requested its unconstituionality[710] and another its conditional constitutionality[711].

354. The MinCIT noted that "*the resort to dispute settlement mechanisms when the disputing parties so agree, is fully in accordance with the Political Charter*"[712]. This conclusion was based upon on three arguments. First, such mechanisms have been declared constitutional in the judgments C-C-442 of 1996 and C-294 of 2002. Second, *"the international arbitration is an optional mechanism at the choice of the investor"*[713]. Third, international arbitration is in conformity with article 116 of the Constitution and the article 8 of Law 270 of 1996. The Chancellery also signaled that *"the possibility of solving a dispute between an investor and the host State of the investment through international arbitral tribunals (…) has been recognized in past Agreements (…) approved by the Congress and (…) by the Court"*[714]. In the same sense was the intervention of the UNAB, in which it quoted *in extenso* the judgments C-169 and C-199, both from 2012, as well as the C-184 de 2016[715].

355. In her intervention at the hearing, Ana María Ordóñez requested a declaration of constitutionality on the basis of two reasons. First, "*it improves the investment*

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708 The Ministry of Trade, Industry and Tourism, the Chancellery, the UNAB y and the National Juridical Defense Agency.
709 Adriana Vargas, José Manuel Álvarez, URosario, Enrique Prieto and Eduardo Silva-Romero.
710 Magdalena Correa.
711 René Urueña.
712 Cdno. 1, fl. 58.
713 Cdno. 1, fl. 59.
714 Cdno. 1, fl. 149.
715 Cdno. 1.

climate"[716]. Second, "*the international system for the settlement of investor – State disputes is conceveid as a neutral and adequate forum*[717]. In her view, investment arbitration "*is created as an alternative that allows the settlement of international disputes in a peaceful way (…) and (…) to depoliticize the disputes that arise between foreign investors and host states*"[718]. At the same time, "*it is a more specialized scenario to settle the disputes submitted by investors*"[719]. She highlighted that "*if national courts were*

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716 CD, min. 4:24:50.

717 CD, min. 4:25:50.

718 CD, min. 4:26:11. In her written submission, she pointed that specialized doctrine on the subject affirms that host State courts are not an appropriate forum to solve this kind of disputes, for several reasons: (a) The disputes between the host State and a foreign investor are governed by international law. In international law, State is only one. The conduct of every organ of the State, be it that it performs legislative, executive, judicial or any other kind of functions, is considered an act or fact of State. This way, to the investor, the resort to domestic courts of the host State would mean the acceptance that the counterpart (the State) is also judge of the dispute. (b) In some cases, the domestic court's decisions are the reason in itself of the dispute between the investor and the State. The international wrongful act alleged by the investor is a definitive judicial conduct as it would be, for instance, a judgment of the Constitutional Court. In this way, in these cases it would be impossible that the claims of the investor would be solved by domestic courts. The domestic court's decisions were the leading cause of disputes (7 disputes) between foreign investors and host States of the investment in the last year. (c) Impossibility of claiming breaches derived from the domestic legislation. In these cases, the domestic courts would be obliged to enforce the law and the local constitution and, therefore, they would not be an adequate forum to solve the dispute. On this point, however, it is important to point out that arbitration tribunals lack competence to decide on the the legality or constitutionality of a determined measure. Investment arbitration tribunals have competence exclusively to pronounce on the economical rights (compensation) that arise for the investor in case that it is proved that the measures were contrary to the international obligations of the host State under the IIA. See. Cdno. 2, fls. 465 to 489.

719 CD, min. 4:27:41. In her written sumbission, she warned that the claims of the investors under the IIA arise, in general terms, out of a violation of international law, not a violation of domestic law. Even if the investors are enabled to present claims for the breach of an IIA, the possibility that domestic courts hear this kind of clams is unconvenient for speciality and impartiality reasons: (i) Speciality: the domestic courts often lack an expertise on international investment law nor on international public law. Therefore,

the only ones able to solve international investment disputes we could find ourselves in a situation in which a national court will have to take a decision about the international responsibility that's being attributed to the State to which it belongs as a result of one of its own decisions"[720]. Lastly, she clarified that "*the scope of clause 15 is limited (…) in fact the numeral 2 closes any possibility of starting arbitrations for measures related to the environment or labour rights and numeral 5 does not allow a Colombian-French investor to start an investment arbitration against the State.* [At the same time] *only claims related to measures known by the investor within no more than 4 years after the beginning of the process are allowed*"[721].

356. In her written submission, Ana María Ordóñez pointed that, according to OECD studies on the subject, aproximately 96% of BITS in force in the world contain this settlement of disputes clause [722]. At the same time, she held that this mechanism does not breach the right to equality by offering enhanced procedural rights to foreign investors. In her assessment, to understand the *"egalitarian reasonableness"* of this mechanism, the inherent reciprocity to these treaties must be considered. To the extent that they have the aim of promoting foreign investment between two States, the comparison in order to apply the equality test is the scope of the rights given to foreign investors of both states. Therefore, in the case of the Agreement *sub examine* one must examine if the French investors in Colombia would have

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they would not be a specialized forum to settle this kind of disputes; and (ii) Impartiality: There's a riskt that domestic courts do not advance the process with impartiality. The foreign investors perceive that domestic courts tend to favour the local part (the State) on their decisions. It may be posible likewise that, despite the impartiality of domestic courts, the executive Branch refuses to comply with an unfavourable decision. See. Cdno. 2, fls. 465 to 489.

720 CD, min. 4:28:44.

721 CD, min. 4:29:18.

722 Cdno. 2, fls. 465 to 489.

more or less procedural rights than Colombian investors in France. In her view, this does not occur[723]. French investors in Colombia can access the national courts and an international tribunal to submit claims in the same manner that Colombian investors are able to in France[724].

357. In the same vein, she stated that, in the investment arbitration system, international tribunals rule mostly in favour of States[725]. In accordance with the last UNCTAD report, *"World Invesmtent Report 2018"*, by the end of the year 2018, 548 investment arbitrations had been carried out[726]. Of these, 37% were decided in favor of the State, while only 25% were decided in favour of the investor. Additionally, she emphasized that investment arbitration is transparent in its procedures, based upon the following arguments: *(i)* confidentiality in arbitration is not equivalent to a lack of transparency; *(ii)* the confidentiality of arbitration procedures is a matter subject to the agreement of the parties; *(iii)* most of the investment arbitrations are confidential only as long as the procedure is pending; afterwards, the awards are published in databases of public access; *(iv)* the procedural rules of the ICSID allow interested third parties to intervene in the procedures through the submission of *amicus curiae* and the attendance at the hearings; *(v)* transparency has been positioned in the last years as a global tendency of investment arbitration[727]. Finally, she highlighted that *(i)* the clause of Article 15 is identical to the ones included in other BITS that have been declared constitutional by the Constitutional Court and *(ii*) no study has demonstrated

723 Id.
724 Id.
725 Id.
726 Id.
727 Id.

that investment arbitrations have had any *"chilling effects"* regarding the regulatory powers of States[728].

358. In his intervention at the hearing, Eduardo Silva-Romero argued that *"the justification of Article 15 is historical, in the sense that both previous methods failed; the first was the gunboat diplomacy policy (…) the second was the diplomatic protection"*[729] and, thereby, *"the investment arbitration is a conquest of humanity through international law"*[730]. He highlighted that *"Article 15 of the treaty allows us to qualify the treaty as a modern one, this is, an article that contains additional dispositions in comparison with the rest of treaties, which encompasses important limits and innovations. Regarding the limits: (i) paragraph 1 provides that only disputes related to breaches of the treaty obligations can be submitted to investment arbitration; this disposition excludes disputes related to domestic law or to contracts governed by domestic law; (ii) only matters on which the investor establishes that there is damage can be submitted to arbitration; (iii) paragraph 6 (known as fork in the road) provides that if the investor choses the domestic route, he may not afterwards begin an international arbitration and (iv) paragraph 16, according to which the investment tribunal shall not rule on the legality of a measure on domestic law, that is to say that the tribunal is not a super constitutional court or a super court of cassation"*[731]. As for the innovations, he outlined three examples: *"(i) paragraph 12,* (sic) *arbitration must be transparent, (ii) the provided time limits before the arbitration is started in order for the entities to have enough time to negotiate and (iii) under paragraph 22,* (sic) *the tribunal shall send to the parties a draft of the award, ask the parties to make comments about the draft award and then issues the award, which gives the parties the option to compromise"*[732].

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728 Id.
729 CD, min. 4:45:15.
730 CD, min. 4:47:13.
731 CD, min. 4:39:38.
732 CD, min. 4:42:39.

359. In his intervention at the hearing, Rafael Rincón pointed out that this mechanism of dispute settlement does not imply *"a resignation from the natural judge* [given that] *there is not a natural judge for international investment disputes. What we have is multiple judges that can possibly hear the dispute"*[733]. For her part, in her intervention at the hearing, Adriana Vargas highlighted that article provides that *"if the investor is a natural person who holds dual French and Colombian nationality, only a national court can hear the dispute"*[734].

360. In his intervention at the hearing, José Manuel Álvarez disagreed with the consideration that *"national courts are impartial or lack speciality on international law"*[735]. In turn, he highlighted that, based on the UNCTAD statistics on international investment tribunals, *"the State has won 208 cases in general, the 54% have been won by the State and the investor 48,5%"*[736]; in relation to the cases on which the merits of the dispute have been decided, *"109 claims have been won by the States and 176 by the investors (…) the State only wins 38% of times and the investor 61.75%"*[737]; and, in Latin America, *"to date 108 cases have concluded, (…) if we remove the cases that do not surpass jurisdiction, we find that the State has only won 19 times compared to 63 times on which the investor won"*[738].

361. In his intervention at the hearing, René Urueña argued for a declaration of constitutionality *"as long as its necessity is justified and that interpretative declarations are issued in three ways: (i) the arbitral jurisdiction shall be compatible with the Human Rights obligations acquired by Colombia, (ii) the UNCITRAL Rules on Transparency should not be optional and there*

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733 CD, min. 1:49:55.
734 CD, min. 1:09:38.
735 CD, min. 1:54:27.
736 CD, min. 1:56:35.
737 CD, min. 1:57:45.
738 CD, min. 1:58:27

should be a special right of participation for indigenous communitiesint the international arbitration process, and (iii) the exercise of the arbitral jurisdiction should adopt a deferential standard of scrutiny that reflects considerations towards the Constitutional Court's decisions"[739]. This argument was based upon *"…the mechanism implies a possible restriction to the regulatory freedom of the Colombian State"*[740], insofar as *"its practical effect is the potential revision of laws, administrative acts and judicial rulings by an international authority concerning standards included in the investment protection instruments themselves"*[741].

362. He stated that *"the Constitution, in Article 150.16, does allow the partial transference of State attributions to international bodies with the aim of promoting economic integration"*[742]. However, he warned that *"investment arbitral tribunals make decisions on public policies, and as suchthey should guarantee citizen participation; and, in consequence, the exercice of the arbitral jurisditction must also be subject to the democratic principle"*[743]. In this regard, he highlighted that *"the investment arbitration system has ceased to be a simple dispute settlement forum and has become a descentralized mechanism for the exercise of pubic power with an international forum"*[744].

363. Finally, concerning the eventual review of the Constitutional Court's decisions by an international arbitral tribunal, he argued that *"the dominant standard is the denial of justice (…) that is the traditional way that it has been understood; however, two things must be highlighted. First, the denial of justice is closely linked to the fair and equitable treatment and, in fact as part of a general problem, to the degree that these tribunals are extensive and there is no precedent, the only*

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739 CD, min. 4:53:35.
740 CD, min. 4:54:44.
741 Id.
742 CD, min. 4:52:47.
743 CD, min. 4:57:55.
744 CD, min. 4:52:21.

guarantee that Colombia would have would be the inclusion in the treaty of that deference (…) this in light of the system being highly unpredictable"[745]. At the same time, he argued that *"in the investment arbitration, a Constitutional Court decision will be reviewed by the investment tribunal in light of the treaty standards. Therefore, the Court's decision, even if it is legal by the domestic standard, could be held illegal by the international investment tribunal"*[746]. In conclusion , he mentioned that *"in Human Rights the same thing occurs, but* [with] *the exhaustion of domestic remedies, which implies a big difference (…) that is, deference towards national Courts; in investment arbitration, no"*[747].

364. In her written sumbission, Magdalena Correa warned that this clause violates the formal equality principle, judicial independence and fiscal sustainability[748]. As to the first, as it provides differential treatment for the access to justice, given that it stipulates the possibility of resorting directly to international arbitration, which allows foreign investors to benefit from the generous interpretation of the substantive clauses of the treaty[749]. On the other hand, national investors are deprived of this advantage. As to the second, it is to the extent that international investment arbitration is operated by an exclusive group of people, that come from developed countries, are advocates for the arbitration system and hold a perspective favourable to corporations[750]. And as to the third, the mechanism has the vocation of producing disproportionate expenses out of the

745 CD, min. 5:16:19.
746 CD, min. 5:18:50.
747 CD, min. 5:20:09.
748 Cdno. 2, fls. 449 to 464.
749 Id.
750 Id.

public purse and there is a latent risk of highly expensive awards against the State[751].

365. In summary, the arguments presented by the interveners on this article are:

Relevant arguments on Article 15	
Constitutionality	1. The Court has endorsed international investment arbitration in multiple decisions. 2. International investment arbitration is compatible with Article 116 of the Political Constitution. 3. International investment arbitration is an incentive for investment and is conceived as a neutral forum (depolitized) and adequate (specialized) for the settlement of these disputes. 4. This article provides for time and material limits (e.g. environment and labour conflicts). 5. This clause is common to the BITs in force. 6. This clause gives equal rights to investors (French in Colombia and Colombian in France) and hence, is reciprocal. 7. The investment arbitration procedure is transparent. 8. There is not a natural judge on the subject of international investment law; there are multiple judges that may be competent. 9. This clause provides that dual nationals cannot access the international arbitral tribunals.
Inconstitutionality	1. It breaches the equality principle in relation with Article 90 of the Political Constitution, given that the compensation rules of arbitral tribunals are not clear. For this reason, it also breaches the fiscal sustainability principle.

751 Id.

Request for interpretative declarations	1. International investment arbitration is compatible with Article 116 of the Political Constitution. 2. The effect of this clause is that arbitral tribunals review laws, administratives acts and public policies. 3. Interpretative declarations in the sense that: *a.* Arbitral jurisdiction must be compatible with the Human Rights obligations acquired by Colombia. *b.* UNCITRAL Rules on Transparency should not be optional and there must be a special participation right of indigenous communities in the international arbitration procedure. *c.* The arbitral jurisdiction should adopt a deferential standard of scrutiny towards the Constitutional Court decisions.

(iii) The Court's considerations

366. The Court must resolve the following legal issues: Is the Investor-Contracting State dispute settlement mechanism, laid down in Article 15 *sub examine*, compatible with the Political Constitution? Does this dispute settlement mechanism breach the equality principle established in Article 13 of the PC, as it may create a privilege for foreign investors as compared to Colombian nationals? Do the transparency rules, found in numeral 12, breach the principle of publication of the judicial proceedings prescribed by Article 228 of the PC? Do the compensation rules, provided by numeral 15, breach Articles 13, 90 and 334 of the PC?

367. The article cointains 24 numerals[752] which regulate the Investor-Contracting Party dispute settlement mechanism. In this respect, it establishes that any dispute between these subjects over which a breach of this Agreement[753] by

752 The article contains 24 numerals, but number 21 is repeated twice. There, there are 25 numerals in total.

753 Except for the claims related to breaches of articles 3 and 10.2 of the Agreement (para. 2)

a Contracting Party is alleged, and, as a consequence, has caused a damage to the investor, will first be sought to be settled amicably between both involved parties, through non judicial remedies (num. 1). This phase starts with the *"Notification of dispute"* [754] to be sent by the investor to the Party host of the investment (num. 2).

368. It establishes that, if the dispute is not settled amicably within 6 months from its notification, the investor may present it[755]: *(i)* to the competent tribunal of the disputing Contracting Party or, after a 180 days notice[756], *(ii)* to an *ad hoc* arbitral tribunal that shall be established in accordance with the UNCITRAL Arbitration Rules, or *(iii)* to an arbitral tribunal of the ISCID, created by the Convention on the settlement of investment disputes between states and nationals of other States, signed in Washington the 18 March of 1965 or, finally, *(iv)* to an arbitral tribunal established under other arbitration rules or under another arbitral institution as agreed by the disputing parties (num. 4). If the disputing investor is a natural person who holds dual French Colombian nationality, he may only resort to a national court (num. 5).

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754 The submission of the notification of dispute, the notification of intent and other documents will be sent to:
La presentación de la notificación de diferencia, de la notificación de intención y otros documentos será enviada: to the Directorate of legal matters of the Ministry of Foreign Relations and to the subdirectorate in charge of international investments of the Directorate General of Treasury (France) or the directorate in charge of foreign investment of the Ministry of Trade, Industry and Tourism or whoever serves as such (Colombia). (para. 17)

755 This choice shall be definitive (para. 6). The Contracting Parties give their advance and irrevocable consent that every dispute related to the investments may be submitted to any of the arbitration procedures (para. 8)

756 This notice shall be subject to written notification addressed by the investor to the Contracting Party host of the investment specying its intent to present a request for arbitration, hereafter *"notification of intent"*, outlining the name and address of the claimant investor and indicating in a detailed manner the facts and law points invoked and an estimate amount of claims and claimed interest or any other kind of relief requested (para. 7).

369. In addition, it provides that *(i)* the award shall be definitive and binding upon the disputing parties (num. 9), *(ii)* the investor may not present a request for arbitration if more than 4 years have elapsed from the date on which the investor had knowledge of the alleged breach of the Agreement (num. 10), *(iii)* none of the Contracting Parties will provide diplomatic protection regarding a dispute that one of its investors and the other Contracting Party have submitted to arbitration, unless said Contracting Party has not executed or complied with the decision or award (num. 11), and *(iv*) subject to the disputing party´s agreement, the UNCITRAL Rules on Transparency will apply to the arbitration proceedings started in accordance with this Agreement and, if neither party objects withing a year after the entry into force of this Agreement, the UNCITRAL Rules on Transparency will automatically apply (num. 12).

370. This article stipulates that *(i)* upon request of a party, the tribunal may decide on the preliminary matters of competence and admissibility, as soon as possible (num. 13); *(ii)* in this case, if it determines that the claim is *"frivolous"*, the claimant shall bear the costs (num. 14), and *(iii)* the award shall present its conclusions of law and fact, along with the reasons of its decision and, at the request of the claimant, order *(a)* the pecuniary compensation[757], *(b)* restitution[758] and *(c)* any other form of relief[759] (num. 15). In turn, it establishes that the tribunal is not competent to decide on the legality of the measure under domestic law.

371. This article also states that *(i)* unless otherwise agreed, the tribunal will be composed by three arbitrators, one arbitrator appointed by each of the disputing parties

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757 That shall include the interests since the moment on which the damage is caused until the payment (para. 15 a)

758 In this case the award shall dispose that the defendand may pay a compensation when the restitution is not possible (para. 15 b)

759 This subject to the agreement of the contending parties.

and the third, who will preside over the tribunal, appointed by mutual agreement of the disputing parties (num. 18)[760]; *(ii)* the arbitrators shall: *(a)* have experience or expertise in international public law, international investment law, or in dispute settlement derived from international investment agreements and *(b)* be independent from the Contracting Parties and from the claimant, and not be affiliated to or receive instructions from neither of them. It also regulates matters relating to the challenge of arbitrators (num. 21) and its fees (num. 21).

372. Besides, this article establishes that, upon request of any of the disputing parties, the tribunal, before issuing a decision or award on responsibility, shall communicate to the parties its proposal in this regard. Within 30 days after the communication of said proposal of decision or award, the parties to the dispute may submit written comments to the tribunal relating to any aspect of the proposal of decision or award. The tribunal will consider those comments and will issue its decision or award within 60 days after the communication of its proposal of decision or award to the contening parties. Lastly, this article regulates the matters concerning the accumulation of claims (num. 23 and 14).

373. As decided on previous occasions[761], the Court considers that this clause of dispute settlement as between an investor and a Contracting Party, provided in the article under consideration, is compatible with the Political Con-

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760 If the tribunal has not been constituted within 60 days, since the date on which a claim has been submitted to the arbitration in accordance with this agreement, the Secretary-General of ICSID, upon request of a disputing party, following consultation of the parties, shall appoint at its discretion the unappointed arbitor or arbitrators. The Secretary-General of ICSID shall not appoint as President of the tribunal any citizen of either of the Contracting Parties.

761 Judgments C-358 of 1996, C-379 of 1996, C-008 of 1997, C-494 of 1998, C-294 of 2002, C-309 of 2007, C-150 of 2009, C-377 of 2010, C-123 of 2012, C-169 of 2012, C-199 of 2012 and C-286 of 2015.

stitution. As stated in other decisions, the Court notes that this clause *(i)* creates adequate and peaceful procedural mecahnisms for the settlement of disputles related to the execution of the treaty and *(ii)* is compatible with the duty of promotion of the internationalization of political, economical, social and ecological relations established by the constitutional article 226[762].

374. The rules related to the the dispute settlement mechanisms provided in this clause (num. 1 and 2) are in accordance with the Political Constitution. In this regard, in judgment C-377 of 2010, the Court held that this clause was compatible with the Political Constitution, inasmuch as it was restricted to disputes related to the BIT's obligations. In this regard, the Court held that, *"regarding the disputes that arise between a State Party and an investor, it is observed that the submission to an international arbitration safeguards the national sovereignty, to the extent that said disputes can onlybe related to the application* [of the Agreement]. *It discards the possibility of resolving disputes of a different kind that, because of their nature, must necessarily be resolved through domestic instances"*[763].

375. At the same time, the rules on amicable settlement and on non-judicial remedies, being a previous phase of the dispute settlement process (para. 3 and 4), are also compatible with the Political Constitution. In this regard, the Court has pointed out that *"the necessity of (…) resorting to an amicable agreement, following which, in case of persistence of the dispute, the resort to a national tribunal or an arbitral tribunal is possible demonstrates the Agreement's intention to submit the disputes"* [764] to a phase of direct, amicable and

762 Judgments C-309 of 2007 and C-169 of 2012.
763 Judgment C-377 of 2010.
764 Judgments C-309 of 2007, C-199 of 2012 y C-286 of 2015.

peaceful settlement, that is, of self-settlement, in order to avoid a dispute, which is compatible with the Constitution.

376. The sumbission of the dispute to the national tribunals does not affect the constitutionality of the clause (num. 4). Neither does the submission of the dispute to arbitral tribunals, considering that Article 116 of the Political Constitution expressly states that *"individuals may be invested temporarily of the function of administration of justice in the condition of arbitrators empowered by the parties to issue judgments in law or in equity, on the terms defined by the law"*. In this regard, since the judgment C-358 of 1996, the Court has considered that *"the submission of disputes related to the execution, interpretation and application of the Treaty to the ISCID jurisdiction and to arbitral tribunals, is consistent with the postulates of the Political Constitution of Colombia"*[765] and to *"the peacful dispute settlement mechanisms of the current international economic law, in the terms of the superior Article 9"* [766].

377. The Court also takes note that the rule established by this numeral is in conformity with Article 13 of the PC. Far from what was held by one intervener, this rule does not breach the equality right of national investors by granting a privileged treatment to foreigners. This, is because, as pointed out by the NALDS, the comparison benchmark applicable to this rule is the scope of rights given to foreign investors from both States and, as a result, the comparable groups, in light of said rule, are French investors in Colombia and Colombians in France. Regarding this comparison standard and in relation to the said comparable groups, the Court notes that the treatment provided in paragraph 4 of this article respects the equal treatment (Art. 13 of the PC). In turn, the Court aknowledges precisely that the rule established by paragraph 4, according to which the inves-

765 Judgment C-358 of 1996.
766 Judgments C-031 of 2009 and C-150 of 2009.

tor who holds dual nationality can only resort to national courts, seeks to ensure an appropriate usage of this clause and, as such, to avoid an eventual discriminatory treatment against a national investor who does not hold said double nationality. For this reason, as well this rule is compatible with the Political Constitution.

378. The rules established in numerals sixth and eleventh do not raise any questions of constitutionality. No content of the Constitution is even slightly compromised by *(i)* the definitive character of the choice of either procedure by the investor (num. 6), *(ii)* the rules on the notification of intent (para. 7), *(iii)* the consent of the parties, irrevocable and anticipated, for the disputes to be submitted to the arbitration procedures (num. 8), *(iv)* the definitive and binding character of the award (num. 9), *(v)* the 4 year period to present the request for arbitration (num. 10) and *(vi)* the commitment of the parties to avoid the application of diplomatic protection regarding a dispute, unless the defendant party has not executed or complied with the judgment. On the contrary, the Court notes that these mechanisms ensure in a reasonable manner the due process principle in such procedures.

379. The first subparagraph of paragraph 12 of this article states that *"upon agreement of the disputing parties, the* UNCITRAL *Rules on Transparency will apply to the arbitration started under this article"*. The second subparagraph of this paragraph establishes that said rules will apply automatically if none of the Contracting Parties object within a year from the entry into force of this BIT. This disposition is compatible with Article 228 of the Political Constitution, particularly, with the principle of publication of judicial proceedings.

380. In that regard, Article 228 establishes that, as a general rule, judicial proceedings *"will be public (…) with the exceptions established by law"*. The publicity principle *"imposes upon judicial and administrative authorities the duty of*

making known to the administered and the community in general all the acts issued by them in the exercise of fheir functions" [767].

This principle, in addition, *"(i) operates as a tool of control over judicial activity, to the extent that it ensures the rights of contradiction and challenge, destined to correct the shortcomings of the judge; (ii) gives to the society a way of preserving the transparency and reasonability of judicial decisions that are not subject to reservation; and (iii) leads to the achievement of judicial obeisance in a democratic state"*[768].

381. The aforementioned UNCITRAL *Rules on Transparency on the Investor-State Arbitrations Under a Treaty* were issued by the General Assembly of the UNCITRAL[769], in view of *"the public interest that is affected by arbitrations of this kind"*, as well as for the sake of *"the establishment of a harmonised legal framework to resolve, in an equitable and efficient manner, international disputes on investments, to increase transparency and accountability and to promote good governance"*. With those objectives, it contains 8 articles that establish measures of transparency and publicity for international investment arbitration procedures[770], during its different procedural phases and proceedings, including the regulation on the written submissions by third parties and by the parties to

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767 Judgments C-980 of 2010 and C-341 of 2014.

768 Judgment C-641 of 2002.

769 Created by the General Assemby of the United Nations through Resolution 2205 (XX) of 17 December 1966, to promote the progressive harmonization and unification of international trade law. It's the main legal organ of the United Nations on the subject of international trade law. Cfr. http://www.uncitral.org/uncitral/es/about/origin.html *"The Commission is integrated by 60 State Parties elected by the General Assembly. Its composition is representative of the different geografical regions and the main economical and legal systems. The members of the Commission are elected for periods of six years and the mandate of half of them expires every three years"*. Colombia integrates this Commission.

770 UNCITRAL *Rules on Transparency in Treaty-based Investor-State Arbitration*. Art. 2. Publication of information at the commencement of arbitral proceedings. Art. 3. Publication of documents. Art. 4. Submission by a third person. Art. 5. Submission by a non-disputing Party to the treaty. Art. 6. Hearings. Art. 7. Exceptions to transparency. Art. 8. Repository of published information.

the treaty that are not litigants. This, of course, is without prejudice to the integrity of the aplicable law to the dispute[771] and to the protection of confidential and protected information[772], among other things.

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771 UNCITRAL *Rules on Transparency in Treaty-based Investor-State Arbitration*. Art. 1. "Where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the disputing parties cannot derogate, that provision shall prevail."

772 UNCITRAL *Rules on Transparency in Treaty-based Investor-State Arbitration*. Art. 7. "*Exceptions to transparency. Confidential or protected information, as defined in paragraph 2 and as identified pursuant to the arrangements referred 11 to in paragraphs 3 and 4, shall not be made available to the public pursuant to articles 2 to 6. 2. Confidential or protected information consists of: (a) Confidential business information; (b) Information that is protected against being made available to the public under the treaty; (c) Information that is protected against being made available to the public, in the case of the information of the respondent State, under the law of the respondent State, and in the case of other information, under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information; or (d) Information the disclosure of which would impede law enforcement. 3. The arbitral tribunal, after consultation with the disputing parties, shall make arrangements to prevent any confidential or protected information from being made available to the public, including by putting in place, as appropriate: (a) Time limits in which a disputing party, non-disputing Party to the treaty or third person shall give notice that it seeks protection for such information in documents; (b) Procedures for the prompt designation and redaction of the particular confidential or protected information in such documents; and (c) Procedures for holding hearings in private to the extent required by article 6, paragraph 2. Any determination as to whether information is confidential or protected shall be made by the arbitral tribunal after consultation with the disputing parties. 4. Where the arbitral tribunal determines that information should not be redacted from a document, or that a document should not be prevented from being made available to the public, any disputing party, non-disputing Party to the treaty or third person that voluntarily introduced the document into the record shall be permitted to withdraw all or part of the document from the record of the arbitral proceedings. 5. Nothing in these Rules requires a respondent State to make available to the public information the disclosure of which it considers to be contrary to its essential security interests. 6. Information shall not be made available to the public pursuant to articles 2 to 6 where the information, if made available to the public, would jeopardize the integrity of the arbitral process as determined pursuant to paragraph 7. 7. The arbitral tribunal may, on its own initiative or upon the application of a disputing party, after consultation with the disputing parties where practicable, take appropriate measures to restrain or delay the publication of information where such publication would jeopardize the integrity of the arbitral process because it could hamper the collection or production of evidence, lead to the intimidation of witnesses, lawyers*

382. In this context, the application of the referenced Rules is compatible with the principle of publicity contained in Article 228 of the Political Constitution, inasmuch as it contains transparency measures on the international investment arbitration procedures. Likewise, to the Court it would not be unreasonable that its application is subject to the agreement between the contending parties, considering that subparagraph 2 of this paragraph establishes expressly that if the contracting parties do not object the application of these Rules within a year after the entry into force of the AII, *"the UNCITRAL Rules on Transparency will apply automatically"*. To the Court, this period is, by all accounts, reasonable, given that, according to Article 18, this Agreement *"will enter into force for an initial period of ten years"* and that, in any case, *"the investments made when it was in force will continue to benefit from the protection of its dispositions for a supplementary period of fifteen years"*. As it stands, the 1-year period after the entry into force of the AII for the automatic application of the transparency rules is reasonable, considering the duration period of the agreement and the lapse of which, after the end of its duration, it will produce effects.

383. The rules established by paragraphs 13 and 14, related to the admissibility and the ruling on costs in cases of *"frivolous"* claims, does not raise any constitutional questions either. The Court notes that the rules related to the contents of the award (para. 15) are also compatible with the Political Constitution, insofar as they regulate in a clear manner the specific forms of relief that a tribunal may award upon request by the claimant. However, in relation to the limit of the compensation that may be awarded by the awards issued by the international investment tribunals, the Court observes that Article 6 limits the amount

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acting for disputing parties or members of the arbitral tribunal, or in comparably exceptional circumstances".

of the compensation *"to the real value of the investments in question"*. As with national investors in Colombia, French investors will be compensated for losses that they suffer as a consequence of wrongful injuries imputable to the State, in conformity with the provision of Article 90 of the PC.

384. Furthermore, the Court notes that the rules related to the limitation of the competence of the tribunal to carry out judgments on the legality of the measures under domestic law (para. 16), the notification of dispute (para. 17), the tribunal's composition (para. 18), the requirements for the appointment of arbitrators (para. 19), the challenges against them (para. 20), their fees (para. 21), the prior communication of the proposal of decision (para. 22) and the accumulation (para. 23 and para 24) are compatible with the Political Constitution.

385. The requests presented by the interveners deserve special considerations. First, for the Court it is innocuous and unnecessary to issue any order in the sense that, as one intervener requests, *"the arbitral jurisdiction must be compatible with the Human Rights obligations acquired by Colombia"*. This inasmuch as such entities, as well as any other jurisdictional body on the international level, have as a source of law all *"international conventions, either general or particular, that establish rules expressly recognized by the disputing States"*, in accordance with Article 38 of the Statute of the International Court of Justice. Among those conventions there are, of course, those related to Human Rights, with which the request for a condition loses is reason to be.

386. Second, in relation with the request for an interpretative declaration in the sense that *"UNCITRAL Rules on Transparency should not be optative and that there should be a special right fod indigenous participation in the international arbitration procedure"*, the Court reiterates that: *(i)* as signaled in *paras. 379 et seq.*, it is not unreasonable that the application of said rules be subject to an agreement by the contending parties, considering that subparagraph 2 of this

paragraph states expressly that if the contracting parties do not object the application of these Rules within the year prior to the entry of force of the IIA, *"the UNCITRAL Rules on Transparency will automatically apply"*, and *(ii)* the participation of third-parties on the international investment arbitrations is ensured by these rules[773], as well as in the UNCITRAL

773 *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.* Article 4. Submission by a third person 1. After consultation with the disputing parties, the arbitral tribunal may allow a person that is not a disputing party, and not a non-disputing Party to the treaty ("third person(s)"), to file a written submission with the arbitral tribunal regarding a matter within the scope of the dispute. 2. A third person wishing to make a submission shall apply to the arbitral tribunal, and shall, in a concise written statement, which is in a language of the arbitration and complies with any page limits set by the arbitral tribunal: (a) Describe the third person, including, where relevant, its membership and legal status (e.g., trade association or other non-governmental organization), its general objectives, the nature of its activities and any parent organization (including any organization that directly or indirectly controls the third person); (b) Disclose any connection, direct or indirect, which the third person has with any disputing party; (c) Provide information on any government, person or organization that has provided to the third person (i) any financial or other assistance in preparing the submission; or (ii) substantial assistance in either of the two years preceding the application by the third person under this article (e.g. funding around 20 per cent of its overall operations annually); 9 (d) Describe the nature of the interest that the third person has in the arbitration; and (e) Identify the specific issues of fact or law in the arbitration that the third person wishes to address in its written submission. 3. In determining whether to allow such a submission, the arbitral tribunal shall take into consideration, among other factors it determines to be relevant: (a) Whether the third person has a significant interest in the arbitral proceedings; and (b) The extent to which the submission would assist the arbitral tribunal in the determination of a factual or legal issue related to the arbitral proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties. 4. The submission filed by the third person shall: (a) Be dated and signed by the person filing the submission on behalf of the third person; (b) Be concise, and in no case longer than as authorized by the arbitral tribunal; (c) Set out a precise statement of the third person's position on issues; and (d) Address only matters within the scope of the dispute. 5. The arbitral tribunal shall ensure that any submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party. 6. The arbitral tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on any submission by the third person. Article 5. Submission by a non-disputing

Rules[774] and ISCID Rules[775]. Therefore, the requested inter-

Party to the treaty 1. The arbitral tribunal shall, subject to paragraph 4, allow, or, after consultation with the disputing parties, may invite, submissions on issues of treaty interpretation from a nondisputing Party to the treaty. 2. The arbitral tribunal, after consultation with the disputing parties, may allow submissions on further matters within the 10 scope of the dispute from a non-disputing Party to the treaty. In determining whether to allow such submissions, the arbitral tribunal shall take into consideration, among other factors it determines to be relevant, the factors referred to in article 4, paragraph 3, and, for greater certainty, the need to avoid submissions which would support the claim of the investor in a manner tantamount to diplomatic protection. 3. The arbitral tribunal shall not draw any inference from the absence of any submission or response to any invitation pursuant to paragraphs 1 or 2. 4. The arbitral tribunal shall ensure that any submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party. 5. The arbitral tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on any submission by a non-disputing Party to the treaty.

774 UNCITRAL *Arbitration Rules. Sección III. Arbitral proceedings General provisions* Article 17. 5. The arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, unless the arbitral tribunal finds, after giving all parties, including the person or persons to be joined, the opportunity to be heard, that joinder should not be permitted 16 because of prejudice to any of those parties. The arbitral tribunal may make a single award or several awards in respect of all parties so involved in the arbitration.

775 ICSID *Rules of Procedure for Arbitration Proceedings*. Rule 32. The Oral Procedure. (1) (1) The oral procedure shall consist of the hearing by the Tribunal of the parties, their agents, counsel and advocates, and of witnesses and experts. (2) Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information. Rule 37. Visits and Inquiries; Submissions of Non-disputing Parties (1) (1) If the Tribunal considers it necessary to visit any place connected with the dispute or to conduct an inquiry there, it shall make an order to this effect. The order shall define the scope of the visit or the subject of the inquiry, the time limit, the procedure to be followed and other particulars. The parties may participate in any visit or inquiry. (2) After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the "nondisputing party") to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal

pretative declaration, related to third-parties participation, becomes innocuous and unnecessary.

387. Third, the request related to an interpretative declaration in the sense that *"the arbitral jurisdiction must adopt a deferential standard of scrutiny towards the Constitutional Court's decisions"* is also unnecessary, pursuant to what was decided regarding the substantive standards of the treaty. Indeed, the Corte observes that, as pointed out in *paras. 247 et seq.*, the application of the different standards provided by the treaty implies a special deference to the State in its entirety (including the Constitutional Court) in order to adopt the measures that it considers reasonable and appropriate to guarantee the public order, protect rights and reach the public policy's legitimate objectives. With this, that the arbitral tribunals hold a special deference towards the Constitutional Court's decisions is guaranteed.

388. Based on the previous considerations, the Court will declare constitutional the article 15 of the treaty *sub examine*.

4.16. Other disposition (art. 16)

389. The text of article 16 reads as follows:

> "**Article 16. Other disposition.**
>
> When the laws of one of the Contracting Parties, or the existing obligations emanating from international law, contain

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shall consider, among other things, the extent to which: (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; (b) the non-disputing party submission would address a matter within the scope of the dispute; (c) the non-disputing party has a significant interest in the proceeding. The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.

> dispositions either general or specific that grant to investors a more favorable treatment than the one provided by the present article, these dispositions will apply to the extent that they are more favourable".

390. On October 23 of 2017, the Contracting Parties signed a Joint Interpretative Declaration about article 16. On this document they declared that:

> "1. The *"obligations emanating from international law"*, mentioned on article 16 of the Agreement refer to treaties concluded by both Contracting Parties,
>
> 2. Article 16 of the Agreement shall not be interpreted as a clause of legal stability of laws and domestic regulations or of international obligations of the Contracting Parties;
>
> 3. A mere contractual breach between a contracting party and an investor from the other party does not amount to a breach of the substantial dispositions of the Agreement"

(i) Submissions of the Procuraduria

391. The Procuraduria pointed that this disposition *"is in violation of the constitutional premise of national convenience that (…) due to a lack of elementary clarity in its content given that it was concluded in an universally open manner, which means that all the existing dispositions, either general or specific, that grant to the investors a more favourable treatment than that provided by the Article, must be applied to French investors and their investments"*[776]. He also stated that this obligation breaches the constitutional principle of national convenience, given that *(i) "France is one of the richest countries in the world and, therefore, for the present case its potential investment capacity*

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776 Cdno. 2, fl. 557.

in Colombia is much bigger than the Colombian potential in France"[777] and *(ii) "what is concluded this clause being analyzed could be extended to the rest of States with which Colombia has concluded or concludes in the future investment protection and promotion treaties, on the basis of the most favoured nation clause"*[778].

392. In his view, the joint declarative interpretation concluded by both governments representatives *"does not resolve the issue presented here because the lack of clarity and legal insecurity remains in the measure. What this means is that all existing dispositions on the treaties concluded* ***by*** *Colombia or* ***by*** *France, either by the State separately with third countries or public international organisations, either by Colombia and France, in force now and the future that contain dispositions either general or specific that grant the investors a more favourable treatment that the one provided in the Article, must be applied to French investors and their investments"*[779] (original bold).

393. Given the above, he requested the Court a declaration of conditional constitutionality of this article, under the understanding that *"1. The 'obligations emanating from international law' mentioned in article 16 of the Agreement refer to the treaties concluded* ***EXCLUSIVELY BETWEEN*** *both Contracting Parties, which excludes international obligations concluded between France and third countries* ***being in Colombia*** *and international obligations concluded between Colombia and third countries* ***being applied in France****; 2. The Article 16 of the Agreement shall not be interpreted as a clause of legal stability of laws and domestic regulations or of the international obligations of the Contracting Parties; 3. A mere contractual breach between a Contracting Party and an investor from the other party does not amount to a breach of the substantial dispositions of the Agree-*

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777 Id.
778 Id.
779 Cdno. 2, fl. 559.

ment, and instructing the President to issue the corresponding interpretative declaration in this regard"[780] (original bold and underlining).

(ii) Interventions

394. Twelve interveners pronounced themselves on this clause and the interpretative declaration concluded on the matter. Two argued in support of the constitutionality of the article[781]; three, its inconstitutionality[782]; two, conceptualized on the content of this clause, without making any request[783] and five referred to the scope and justification of the interpretative declaration[784].

395. The UNAB stated that this article is compatible with the Political Constitution, as it *"is an extension of the Most Favoured Nation Treatment"*[785]. Sebastián Mantilla Blanco requested a declaration of constitutionality of Article 16. He pointed out that *"article 16 of the BIT contains a clause, common in investment treaties, that is known as a non-derogation clause or as a more favourable treatment clause"*[786]. He asserted that these clauses *"have been present in invesmtent agreements since their origins"* and that their objective is *"to avoid that the investment agreement be interpreted as an upper limit of the protection from which the foreign investor benefits"* [787]. He noted that the purpose of this clause is *"to settle possible conflicts and incompatibilities between and investment agreement and external dispositions to the treaty that are applicable to an investor protected by the agreement* [which] *is resolved in favour of the rule*

780 Id.
781 The UNAB and Sebastián Mantilla.
782 José Manuel Álvarez, URosario and UExternado.
783 Diana Correa and Rafael Rincón.
784 The Ambassador, the Chancellery, Alejandra Valencia and Nicolás Palau.
785 Cdno. 2, fl. 532.
786 Cdno. 2, fls. 569 to 574.
787 Id.

most favourable to the investor"[788]. In this regard, he concluded that this clause does *"not have the effect of imposing upon the State new obligations, or of conceding to the investor additional rights"*[789]. Finally, he noted that the interpretative declaration fixed the scope of this disposition and stated that it is limited to *"(i) the case of incompatibilities between the BIT and dispositions of domestic law; and (ii) the case of incompatibilities between the BIT and other treaties concluded by Colombia and France. In this way, for instance, the prevailing application of the most favourable right to the investor does not operate when the most favourable treatment is the result exclusively of customary international law rules"*[790].

396. In his citizen written intervention, José Manuel Álvarez requested the unconstitutionality of Article 16. This request was based on the facts that *"Colombia has committed itself to assume international obligations in favour of this country and its investors, contained in all kinds of international instruments to which Colombia has not been a party. Or, even worse, to assume international obligations of which French investors benefits in any country where the investor has a seat or conducts business, even if Colombia does not have a BIT with those countries"*[791]. Furthermore, he pointed out that this article violates the national independence (Art. 2) and the national sovereignty (Art. 9), since *"they force Colombia in front of all international law, past and future, which leaves no margin for action to defend the national autonomy and sovereignty, by depriving it of the the power of consenting or not to the international law that it may voluntarily accept to be applied through international negotiations"*[792]. At the same time, he stated that this clause *"is absent in the investment agreements of Colombia*

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788 Id.
789 Id.
790 Id.
791 Cdno. 1, fls. 160 to 187.
792 Id.

with the United States, Canada, Turkey, China, nor is it in the Alianza del Pacífico *Agreement. And in the few treaties on which it was agreed, the wording is limited, as is its scope (sic)"*.

397. In his intervention at the hearing, this invervener also stated that the interpretative declaration is unconstitutional for two reasons. First, because *"it is an amendment to Article 16 of the Treaty (…)* [this is] *that it modifies the scope of the obligation"*[793]. Therefore, a Protocol should have been concluded and should have followed the same procedure as the amending protocol of the FTA with the United States. The interpretative note *"lacks any validity because it amends the obligation and did not follow the complete constitutional procedure, that is, it did not go through Congress"*[794]. Second, arbitral tribunals *"have rejected interpretative notes that make amendments to the original obligations and have signaled that they belong to amendments of the treaty that must follow the necessary domestic procedure for it to be effective, as in the case Pop and Talbet* (sic) *v. Canada (2002)"*[795].

398. URosario pointed out that Article 16 *"makes the treaty with France, a convention that will be increasingly broad (…) This would also apply with any obligation emanating from international law, since the article does not even refer to obligations accepted by the Contracting Parties. Doing a literal or exegetical interpretation of this article, it would seem that even an investment protection treaty concluded with any other country, with more favourable dispositions, would be applicable to the protection of French investors in Colombia and viceversa (…) granting an unprecedented standard to French investors"*[796]. Consequently, Colombia (*i*) may be exposed to *"future claims for excessive amounts of money"*, (*ii*) *"will not be able to negotiate any kind of future agreement different than the one negotiated with France"*

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793 CD, min. 2:03:10.
794 CD, min. 2:04:31.
795 CD, min. 2:04:42
796 Cdno. 1, fls. 71 to 75.

and (*iii*) there will not be any *"certainty about the obligations that it is acquiring"*[797].

399. UExternado expressed that Article 16 *"promotes legal instability and the loss of State sovereignty"*[798]. In this regard, it held that *"the disposition in mention allows to those legal relations that have arisen under the protection standards of the treaty (…) French law, past or future, to be applicable when said legal system is more favourable for the investors* [hence, the Colombian State may turn out to be] *obliged to comply with legal dispositions that may be incompatible with our Constitution and/or some of the norms that integrate the constitutional bloc, on pain of incurring a wrongful act that generates an international responsibility on the Colombian State (…) this would suppose a situation of absolute legal instability."*[799]. Additionally, *"it establishes that, with the aim of granting a more favourable treatment to investors, it is also possible to apply obligations emanating from international law prior to or subsequent to this Agreement"*[800]. Again, *"the main inconveniecet arising* [is] *the uncertainty of the applicable law, since in referring to 'the obligations emanating from international law' there is no clarity as to which is the international law referred to. (…)* [which] *extends not only to existing rules, but also to international obligations that may come up in the future"*[801]. Finally, they warned on the extension of this clause to investors from third States by the application of the MFN clause, as well as the *"loss of the regulatory autonomy of the Colombian State internationally as well as nationally"*[802].

400. Diana Correa stated that Article 16 *"is there for a reason: there is already a most favoured nation clause that is in*

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797 Id.
798 Cdno. 2, fls. 319 to 346.
799 Id.
800 Id.
801 Id.
802 Id.

Article 5, it has another objective, it should be looked at carefully (…) but, given that these obligations are their own obligations that Colombia has acquired (…) it is not about going fishing for any obligation in other treaties"[803]. In her written submission, she noted, in addition, that this clause would work as a mixture of an MFN clause with an umbrella clause, by making enforceable against the State any kind of disposition (national or international) most favourable to the investor[804]. She concluded that this disposition gives rise to the incorporation of any obligation that Colombia has acquired and that is more favourable to the investor[805].

401. Rafael Rincón concluded that this Article 16 contains the so-called *"clause of favorability"*, which gallows investors or investments to have acces to more favourable conditions that are in other international treaties or domestic laws[806]. He warned that this favorability regime differs from MFN clauses in the sense that it is not necessary to certify that the investor is in *"similar conditions"* to a third investor to access to a most favourable regime[807]. He also pointed that the conclusion of an interpretative declaration implies, precisely, that the most favourable measures for French investors in Colombia and Colombian investors in France are those included in the domestic legislation of the Parties and in multilateral international treaties – concluded between France and Colombia – or multilaterally – concluded both by France and by Colombia –[808]. In other words, the most favourable measures for the investors of the Parties would be applicable only if they are contained *(i)* in the domestic

803 CD, min. 3:49:46.
804 Cdno. 2, fls. 589 to 592.
805 Id.
806 Cdno. 2, fls. 576 to 587.
807 Id.
808 Id.

legislation of one of the Parties or *(ii)* in the international agreements concluded by both Parties[809].

402. The French Ambassador mentioned that the interpretative declaration was concluded *"by request of the former Colombian government"* and he expressed that *"the obligations emanated from international law"* referred by Article 16 *"are now more clearly defined to close the possibility of an abusive use of said disposition"*. In this sense, the Chancellery pointed out that the interpretative note *sub examine "was concluded to have a record on the spirit of Article 16 and on the intention of the States when negotiating, considering the jurisprudential standards in light of which it should be interpreted in the future"*[810]. This note *"plays a fundamental part in the effect of the present investment agreement, given that the clause presents some difference of translation with its French equivalent"*[811]. Therefore, this note *"does not intend to modify the obligations provided in the Agreement, but on the contrary seeks to give clarity in respect to its correct understanding"*[812].

403. In a written submission for the hearing, Alejandra Valencia also stated that *"the joint interpretative note related to Article 16 of the treaty is divided into two clearly distinguishable segments: The preamble states that said declaration is made on the basis of Article 31 of the Vienna Convention on the Law of Treaties and that its main goal is to reaffirm the mutual understanding between the parties reached at the moment of the negociation of the instrument (…) the operative section is composed by 3 numerals, which seek to establish in a clear and specific manner the scope of the terms contained in Article 16, as well as elucidating the exegetical limitations of this disposition, through the express*

809 Id.
810 CD, min. 14:50.
811 CD, min. 15:30.
812 CD, min. 15:55.

exclusion of some possible interpretations that could be given to the clause in mention"[813].

404. Nicolás Palau, as Director of Foreign Investment, Services and Intellectual Property of the MinCIT, observed that the joint interpretative declaration was concluded because it was warned in Congress that clause 16 *"had a dangerous or risky interpretation in terms of claims against the Colombian State"*[814]. At the same time, he mentioned that this interpretative declaration is legitimate in light of international public law. In his written submission, he stated that *"the place of a 'comma' (,) in different places on the disposition in both languages, allowed an interpretation of the disposition in different meanings. In this regard, it was stated that other IIA – specially with European countries, where this clause is very common – made explicit the 'positive' interpretetaion – the applicable international law must be accepted by 'both parties' –, while the Spanish text of the BIT with France did not. That is precisely why, with the aim of tackling this problem, Colombia and France concluded on 23 October 2017, through its official representatives, a joint interpretative declaration about the Agreement"*.

405. In summary, the arguments presented by the interveners on this article are:

Relevant arguments on Article 16	
Constitutionality	1. It is only an extensión of the MFN clause. 2. It is a favorability clause, which is common in these kinds of treaties. It aims to solve conflicts between applicable rules to the investor and *"does not have the effect of imposing the State new obligations, or of conceding to the investor additional rights"*.

813 Cdno. 2, fl. 356.
814 CD, min. 3:29:50.

	3. The most favorable measures for the investors of the Parties will be applicable exclusively if they are contained *(i)* in the domestic legislation of one of the Parties or *(ii)* in the international agreements concluded by both Parties.
Inconstitutionality	1. Colombia assumes all obligations in favour of French investors contained in all kind of international instruments on which the country has not been a part of, with which the sovereignty and the national independence are breached. 2. Given the above, there is no certainty about which obligations are acquired by Colombia in this IIA, with which the legal stability is affected. 3. This disposition allows that French law, past or future, is applied to those legal relations that have arisen under the protection standards of the treaty. 4. The interpretative declaration is not valid, because *(i)* it amends the content of the clause and *(ii)* thereby, it should have been submitted to approval by Congress.
Justification of the interpretative declaration	1. It does not intend to modify the content of the obligations. 2. It was concluded, by request of the Colombian government, to amend a translation mistake of the article.

(iii) The Court's considerations

406. It is for the Court to answer the following legal issue: Is Article 16 of the treaty compatible with the Political Constitution? Taking into consideration the interventions in the present matter, the Court will answer as well the following problem: Does the expression *"emanating from international law, existing or subsequent to the moment of the present Agreement"* breach the national sovereignty (Art. 9 of the PC) and the principle of legal stability (Art. 1 of the Political Constitution)?

407. The Court takes note that this article provides the clause of favorability. According to this clause, the disposi-

tions, *"to the extent that they are more favourable"*, provided in *(i) "the laws of one of the Contracting Parties"* or in *(ii) "the obligations emanating from international law, existing or subsequent to the moment of the present Agreement"*, general or specific, that grant investors *"a more favourable treatment than that provided in the present Agreement"* will apply. For its part, the joint interpretative declaration clarified that *(i)* the expression *"obligations emanating from international law"* refer to *"treaties concluded by both Contracting Parties"*, *(ii)* this article *"shall not be interpreted as a legal stability clause of"* the domestic regulation or one of the international obligations of one of the Contracting Parties and *(iii) "a conctractual breach between a contracting party and an investor from the other party does not amount to a breach of the substantial dispositions of the Agreement"*.

408. The Court notes that all the objections presented by the interveners against this clause were overcome by the signing of the joint interpretative declaration of 23 October of 2017 between the Colombian government and the French government. As asserted by the National Government, although the wording of the expression *"obligations emanating from international law"* was undetermined and, therefore, dangerous with regard to future claims, the truth is that, with the joint interpretative declaration, its content is determined and, consequently, satisfies the legal stability and national sovereignty principles. Regarding the first one, because the national authorities may know which are the obligations to which that legal expression refers, that is, to those provided in *"treaties concluded by both Contracting Parties"*. Regarding the second one, because, in those terms, said clause does not subject the Colombian State to international rules regarding which it has not given its consent; on the contrary, it subjects the State to the rules established by treaties ratified by *"both Contracting Parties"*.

409. In turn, the Court rules out as unreasonable the interpretation of this clause according to which Colombia

would be subject to French legislation. This is because, in the normative context of Article 16, the expression *"the laws of one of the Contracting Parties"* refers to the laws of the host country of the investment that are more favourable to the investor. The proposal of interpretation presented by the intervener is, in the Court's opinion, contradictory since it is contrary to the good faith principle, as well as to the object, nature and purposes of the IIA and the favorability clauses included on these instruments.

410. Moreover, the Court has found to be in accordance with the constitution, similar clauses included in other BITS[815]. Upon review amongst the FET, NT and MFN principles, the Court has concluded that this clause *(i)* is justified on the principles of equality and non-discrimination[816], as well as on the principle of *"Pacta Sunt Servanda to which the Parties are subject by acquiring obligations by virtue of any written Agreement between the State agencias and an investor from the other Party"*[817], *(ii) it "introduces a favorability rule, according to which, if from the legal dispositions of one of the Contracting Parties, or from the obligations of international law, current or established subsequently between the Contracting Parties, more favourable rules for the investor are derived in regard to the ones provided for in the Agreement under analysis, they will prevail"*[818], and *(iii) "it is compatible with the inspirational principle of economic integration, because it welcomes possible advancesin the foreign investment dynamic in the country"*[819].

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815 Judgments C-358 of 1996, C-379 of 1996, C-008 of 1997, C-494 of 1998, C-309 of 2007, C-150 of 2009, C-123 of 2012, C-169 of 2012 y C-199 of 2012. Law 246 of 1995. Art. 12. Law 245 of 1995. Art. 11. Law 279 of 1994. Art. 11. Law 437 de 1998. Art. 8. Law 1198 of 2008. Art. 11. Law 437 of 1998. Art. 8. Law 1198 of 2008. Art. 11.

816 Judgments C-358 of 1996, C-379 of 1996, C-008 of 1997 and C-494 of 1998.

817 Judgment C-150 of 2009.

818 Judgment C-169 of 2012.

819 Judgment C-309 of 2007.

411. Now, the Court will decide upon the the questions related to the joint interpretative declaration, namely: *(i)* that it lacks validity, since it amends the content of the obligations and *(ii)* that it should have clarified that the legal expression refered to treaties *"exclusively between both contracting parties, which excludes international obligations concluded between France and third countries being applied in Colombia and international obligations concluded between Colombia and third countries being applied in France"*. Regarding the former, the Court considers that the joint interpretative declaration is valid, as long as it was concluded by the representatives of both Contracting Parties and does not contain new obligations nor does it amend the ones provided in the treaty, and only has as an objective to delimit the scope of the second, *"obligations emanating from international law"*. Regarding the latter, to the Court it is clear that the expression *"treaties concluded by both Contracting Parties"*, included in the interpretative declaration, confines its scope in a manner that it limits it to those provided in international instruments to which France and Colombia are parties. This is, in the Court's opinion, the interpretation of this interpretative declaration in conformity with the good faith principle (preamble to the Vienna Convention on the Law of Treaties).

412. Lastly, the Court considers that the clarifications included in the interpretative declaration are also in accordance with the Political Constitution, in the sense that *(i)* this article *"shall not be interpreted as a legal stability clause of"* the domestic regulation or of international obligations of the Contracting Parties and that *(ii) "a contractual breach between a contracting party and an investor from the other party does not amount to a breach of the substantial dispositions of the Agreement"*. The first safeguards the regulatory competences of the national authorities and the second is not incompatible with any content of the Constitution.

413. Therefore, the Court will declare the constitutionality of Article 16 of the treaty *sub examine*.

4.17. Settlement of disputes between Contracting Parties (Art. 17)

414. The text of Article 17 reads as follows:

> "**Article 17. Settlement of disputes between Contracting Parties.**
>
> 1. Disputes related to the interpretation or application of the present Agreement will be settled, as far as possible, through diplomatic channels.
>
> 2. If the dispute has not been settled within a period of six months after the date on which the matter was raised by any of the Contracting Parties, it can be submitted upon request of any of the Contracting Parties to an *ad hoc* arbitral tribunal, in conformity with the dispositions of this article.
>
> 3. Said tribunal will be set up in the following way for each concrete case: each Contracting Party will appoint one arbitrator and the two arbitrators thus appointed shall choose by mutual agreement a national of a third country with which both Contracting Parties have diplomatic relations, who shall be appointed President of the tribunal by the Contracting Parties. All arbitrators shall be appointed within three months following the date of notification by one of the Contracting Parties of its intention to submit the dispute to arbitration.
>
> 4.If the periods indicated in paragraph 3 *supra* are not fulfilled, any of the Contracting Parties, in the absence of any other agreement will invite the President of the International Court of Justice to make the necessary appointments. If the President of the International Court of Justice is a national of any of the Contracting Parties, or if he is unable to fulfill the said func-

tions, the oldest Vicepresident that is not a national of any of the Contracting Parties will make the necessary appointments.

5. The tribunal will reach its decisions by a majority of votes. These decisions will be definitive and legally binding to the Contracting Parties.

6. The tribunal will establish its own rules. It will interpret the award upon request of any of the Contracting Parties. Unless it otherwise decided by the tribunal, according to special circumstances, the legal fees, that include the remuneration to the arbitrators will be distributed equally between both Contracting Parties.

7. The tribunal shall decide on the basis of the dispositions of this Agreement and of the applicable principles of International Law on the matter". (sic)

(i) Submissions of the Procuraduria

415. The Procuraduria argued in support of the declaration of constitutionality of this article. He pointed out that this dispute settlement mechanism *"responds to the essential ends of the Colombian State by assuring peaceful coexistence and the validity of a just order, in this case based upon the freedom to enter into agreements in the international field on with the basis of the principles of national sovereignty in accordance with those established on the subject Aarticles 2 and 9 of the Political Constitution"*[820].

820 Cdno. 2, fl. 559.

(ii) Interventions

416. The MinCit[821] , the Chancellery[822] and the UNAB[823] limited themselves to describing the content of this disposition and requested a declaration of constitutionality.

(iii) The Court's considerations

417. It is for the Court to answer the following legal issue: Is Article 17 of the treaty *sub examine* compatible with the Political Constitution?

418. The Court notes that this article regulates the dispute settlement mechanism between the Contracting Parties. It contains 7 paragraphs. The first states that the disputes related to the interpretation or application of the present Agreement will be resolved, as far as possible, through diplomatic channels. The second provides that the dipute between the Contracting Parties may be submitted to *an ad hoc* arbitral tribunal, provided that it has not been resolved within the 6 months following the date on which it was raised by any of the Parties.

419. The following five numerals provide the rules for the creation and functioning of the tribunal, as follows: *(i)* each party shall appoint an arbitrator and the two arbitrators, by mutual agreement, a third arbitrator, who shall be a national from a third country with which both Parties have diplomatic relations and will perform as President of the tribunal; *(ii)* all of the arbitrators shall be appointed within three months following the date of the notification by a Contracting Party of its intention to submit the dispute to arbitration; *(iii)* in the event that said period is not met, any

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821 Cdno. 1, fls. 48 to 66.
822 Cdno. 1, fl. 149.
823 Cdno. 2, fl. 533.

of the Parties will request the President of the International Court of Justice to make the necessary appointments; *(iv)* if he was a national of any of the State Parties, or if he were unable to perform this function, the most Senior Vicepresident that is not a national of any of the Contracting Parties will be charged with said function; *(v)* the tribunal shall adopt its decisions by a majority of votes, which will be definitive and binding upon to the parties; *(vi)* the tribunal shall establish its own rules and shall interpret the award upon request of any of the Contracting Parties; *(vii)* unless otherwise decided , the fees will be distributed equally between the Contracting Parties and, finally, *(viii*) the tribunal shall decide upon *"the dispositions of this Agreement and the principles of international law applicable on the matter"*.

420. The Court considers that this article is compatible with the Political Constitution. As it was held in relation with analogous or similar articles contained in different BITS[824], the Court observes that: *(i) "the direct settlement and arbitration are civilized mechanisms of peaceful and prompt settlement to the disputes that arise between Contracting Parties (…) on the application, interpretation, developement and execution of the International Instrument that is subject to revision"*[825], *(ii) "the promotion of the internationalization of political, economic, social and ecological relations dealt with Article 226 of the Constitution would not be possible without the recourse, in certain opportunities, to international tribunals"*[826] for the settlement of the disputes between State Parties, and *(iii) "the only disputes between State Parties that may be submitted to arbitration are those that refer to the application or the interpretation of the agreement, ruling out those that may arise on issues that may affect national rights or the State's own interests"*[827]. Moreover,

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824 Judgments C-377 of 2010, C-169 of 2012 and C-286 of 2015.
825 Judgments C-377 of 2010.
826 Id.
827 Judments C-309 of 2007, C-150 of 2009, C-199 of 2012 and C-286 of 2015.

the Court finds that there is no incompatibility between the rules of creation and functioning of the tribunal, on one side, and the Constitution, on the other.

421. Therefore, the Court will declare the constitutionality of Article 17 of the treaty *sub examine*.

4.18. Final dispositions (Art. 18)

422. The text of Article 18 reads as follows:

> "**Article 18. Final dispositions.**
>
> 1. The Contracting Parties shall notify each other of the end of the internally required procedures in connection with the entry into force of this Agreement, which shall enter into force a month after the receipt of the last notification.
>
> 2. The Contracting Parties may agree to amend the present Agreement. Once agreed and approved according to the constitutional requirements of each Contracting Party, an amendment will form an integral part of this Agreement and will enter into force on the date that the Contracting Parties so agree.
>
> 3. The Agreement shall remain in force for an initial ten-year period. After this period, the Agreement will remain in force thereafter, unless one of the Contracting Parties submits written notice of the termination with one year of prior anticipation through diplomatic channels.
>
> 4. In case of denunciation of the present Agreement, the investments made when it was in force will continue to benefit form the protection of its dispositions for a supplementary period of fifteen years" (Sic)

(i) Submissions of the Procuraduria

423. The Procuraduria requested a declaration of constitutionality. He pointed out that the "in force" rules *"are in*

conformity with the constitutional order regarding the internationalization of political, economical, social and ecological relations on the basis of equity, reciprocity and national convenience"[828].

(ii) Interventions

424. The MinCIT[829], the Chancellery[830] and the UNAB[831] described the content of this article and requested that it be declared constitutional.

(iii) The Court's considerations

425. It is for the Court to answer the following legal issue: Is Article 18 of the treaty *sub examine* compatible with the Political Constitution?

426. This article provides the rules of *(i)* entry into force of the treaty, *(ii)* its amendment, *(iii)* its force and extension and, lastly, *(iv)* the protection of investment in case of denunciation of the treaty. Regarding the first point, it establishes that the treaty will enter into force a month after the receipt of the last notification of the Contracting Parties of the termination of the internally required proceedings to that effect. On the second point, it stipulates that the Parties may amend the Agreement and that the amendment will enter into force once it is agreed upon and approved according to the constitutional requirements of each Contracting Party. On the third point, it provides that the Agreement will be in force for an initial period of ten years, after which *"it will continue to be in force thereafter, unless one of the parties submits a written notice of termination with one year of prior anticipation through dipolomatic channels"*. Lastly, it instructs

828 Cdno. 2, fl. 560.
829 Cdno. 1, fls. 48 to 66.
830 Cdno. 1, fl. 149.
831 Cdno. 2, fl. 535.

that, in case of denunciation of the treaty, investments *"made when it was in force will continue to benefit from the protection of its dispositions for a supplementary period of fifteen years"*.

427. The Court considers that this article is compatible with the Political Constitution. Indeed, the Court has declared the constitutionality of the clauses that provide rules for the entry into force and the execution of BITs[832], given that *"they are necessary for the application and execution of any International Public Law instrument"*[833] and that *"it is a faculty of the parties to any convention, bilateral or multilateral, on the private or public level, or on the international relations field, to define when the observance of the agreement begins and what should be the term of its duration"*[834], among others things.

428. The rules to amend the BIT are also compatible with the Constitution, insofar as they recognize that the amendment should be approved in accordance with the constitutional requirements of each of the Contracting Parties. On that subject, the Court has pointed out that *"said Instruments shall be subject to the constitutional proceedings of approbation by the Congress of the Republic and revision by the Constituional Court, in accordance with the provisions of Articles 150-16, 189-2 and 241 of the Political Constitution, as long as the amendment creates new obligations, modifies or additions to the Convention initially concluded"*[835]. Likewise, it has admitted the possibility of simplified Agreements when it is a question of *"complementary agreements or of development*

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832 Judgments C-358 of 1996, C-376 of 1996, C-008 of 1997, C-494 of 1998, C-309 of 2007, C-294 of 2002, C-150 of 2009, C-377 of 2010, C-123 of 2012, C-169 of 2012, C-169 of 2012 and C-286 of 2015.

833 Judgments C-358 of 1996. Cfr. C-294 of 2002, C-309 of 2007 and C-286 of 2015. See, also, C-377 of 2010. *"It is observed that the dispositiones contained on this section do not admit constitutionality reservetions since its purpose is to asure the enforcement of the rules of the Agreement and their effective realization"*. C-169 of 2012. *"norms of peremptory character fundamental to the application and execution of the Agreement"*.

834 Id.

835 Judgment C-123 of 2012.

of treaties already incorporated into the Colombian legislation, insofar as they are (…) instruments that seek to comply with the substantive clauses of a treaty already in force and that do not create new obligations, nor do they exceed obligations already acquired by the Colombian State"[836].

429. The Court considers that the "in-force" period of 10 years of the BIT *sub examine* is reasonable. This is because it extends the protection of the treaty for an appropriate time frame to reach the goals that are meant to be reached with this instrument. Furthermore, the rule according to which the BIT *"shall remain in forcethereafter, unless one of the parties submits a written notice of termination with a year of prior anticipation through diplomatic channels"* does not result in being unreasonable, since it enables the parties to terminate said treaty, with a prior notice that should be presented within a prudential period. Nonetheless, the Court highlights that the successive prolongation of this treaty does not under any understanding exempt the Presidency of the Republic from exercising its constitutional competence to direct international relations and to assess the equity, reciprocity and national convenience of Treaties (Arts. 189.2 and 226 of the PC). Accordingly, in the exercice of said competence, it is duty of the President of the Republic to evaluate periodically the convenience of this treaty and its effectiveness with relation to the purposes that it aims to achieve, so as to establish if, after the initial 10 years, there are reasons and empirical, concrete and sufficient evidence that justify that the treaty *sub examine* remains in force.

430. Finally, the Court holds that the extension of the investment for a supplementary period of 15 years in case of denunciation of the treaty is reasonable and does not contradict any content of the Political Constitution. It is not unreasonable, in light of the good faith and legitimate

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836 Id.

expectation principles, that this period is agreed in order that, in the event of a denunciation of the treaty, the investments made can be repatriated, terminated or liquidated and, therefore, said decision does not have surprising effects in relation with the investors. In that sense, in relation with article 17.4 of the BIT with India[837], the Court considered that *"this extension is reasonable, considering that it is a question of an international Agreement that intends to promote investments within a framework of confidence and economic and legal stability; 10 years of extension are a prudential period for the investments made or acquired prior to the termination of the Agreement, being repatriated, terminated or definitely liquidated (…) The Court does not find that this extension breaches any text of the Constitution, on the contrary, it forms a part of the requirements of an international Instrument intended to promote economic relations on the basis of transparency, equity and reciprocity"*[838].

431. Therefore, the Court will declare the constitutionality of Article 18 of the treaty under analysis.

XI. Synthesis of the decision

432. The Court exercised the constitutionality control of the Agreement between the Government of the Republic of Colombia and the Government of the French Republic on the Promotion and Protection of Reciprocal Investments, signed in the city of Bogota, on July 10th of 2014, which was approved under Law 1840 of July 12th of 2017.

433. Considering the nature of this subject, the Court formulated two legal issues: *(i)* does the international treaty

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837 Law 1449 of 2011. *"17.4. No obstante la terminación de este Acuerdo conforme con el párrafo 2 de este artículo, el mismo continuará siendo efectivo por un período adicional de diez (10) años contados a partir de la fecha de su terminación con respecto a las inversiones efectuadas o adquiridas con anterioridad a la mencionada fecha de terminación del Acuerdo".* Judgment C-123 of 2012.

838 Judgment C-123 of 2012.

and the approving law under consideration satisfy the formal requirements prescribed by the Political Constitution and the Law 5 of 1992? and *(ii)* are the international treaty and the enabling law *sub examine* compatible with the Political Constitution? To answer this second legal issue, the Court raised specific legal issues in relation to the contents of each treaty clause.

434. Regarding the first legal issue, the Court concluded that the treaty and its approving law fulfill the formal requirements in the required phases *(i) prior government authorization, ii) procedure before the Congress and (iii) Presidential signature and submission of the regulations to the Constitutional Court*. The requirements of each phase were accredited in the following way: *(i) in the prior government authorization*, the Court observed that *(a)* the representation of Colombian State in the negotiation, celebration and signature of the international treaty was valid; *(b)* the international treaty and its approving law, should not be submitted to a preliminary consultation and *(c)* the Presidential approval and the submission of the international treaty to the Congress of the Republic was carried out according to Article 189.2 of the Political Constitution; *(ii) in the procedure before the Congress of the Republic*, the Court verified that *(a)* the draft law was presented to the National Government before the Senate of the Republic, *(b)* it was published before being processed in the in the respective commission, *(c)* Its legislative procedure was initiated in the competent constitutional commission *(d)* in each of the chambers the constitutional and legal requirements for its procedure, debate and approval were observed, including the period between debates established in Article 160 of the Constitution and *(e)* it was not considered in more than two legislative sessions; finally *(iii) in the presidential signature and in the submission of the norm to the Constitutional Court*, the Court highlighted that *(a)* the President of the Republic signed the approving law of the treaty on July 12th of 2017 and *(b)* he submitted it to

the Court on July 17th of the same year. In brief, the treaty under consideration and the law approving it, satisfied the formal requirements established by the Political Constitution and Law 5 of 1992.

435. Regarding the second legal issue, the Court studied: *(i)* the nature, scope and effects of the material constitutionality control of BITS; *(ii)* the general compatibility of the treaty and its purposes with the Political Constitution and (iii) the constitutionality of each of the articles that integrate *(a)* the Law 1840 of 2017 and *(b)* the treaty at issue, with its protocol and interpretative declaration.

436. *General compatibility of the treaty under consideration with the Constitution*. The Court analyzed the compatibility of the Treaty under consideration, through a judgment of reasonableness. Thereon, it concluded that *(i)* the global purposes of the international treaty comply with the Political Constitution, as far as they contribute to the materialization of constitutional principles *(a)* of Rule of law, *(b)* internationalization of economic relationships (Arts. 226 and 227 of the PC) and *(c)* development, wealth and social and economic prosperity (Arts. 1, 2, 333 and 334 of PC). Likewise, the Court warned that *(ii)* the treaty, as a whole, is suitable to achieve its goals, since it contains *"the standard clauses on investment protection"*, which correspond to *"preestablished models of an International Convention, of a standard structure"* that the three branches of public power have considered as a *"legitimate tool"* to achieve the objectives previously described. Furthermore, the conclusion of the treaty is justified, because according to the reasons and empirical evidence provided by the Government and different actors, the decision of negotiating this BIT is consistent with the foreign public policy of Colombia.

437. Even if the treaty is compatible in a general form with the Constitution, some possible interpretations of its dispositions could result in being incompatible with the rule of equal treatment as to the investor and national in-

vestments in Colombia regarding the foreign investor, as well as the prohibition of discrimination against the former. This rule derived from the principle of equality has been recognized and guaranteed by recent developments in international investment law. Therefore, the Court declared constitutional the treaty and the law that approves it, on the understanding that none of the provisions that refer to substantive rights will lead to more favorable unjustified treatment for international investors with respect to the nationals.

438. The Court also concluded that the three articles of the approving law conform to the Constitution. Regarding the constitutionality of the treaty articles, the legal bases of the judgment are synthetized as follows:

439. *Article 1. Definitions*. The Court *(i)* examined the compatibility of the article with the Constitution and, particularly, *(ii)* evaluated if the expression *"natural persons possessing the nationality of any of the Contracting Parties"* allows that Colombian-French citizens benefit from this BIT and, hence, infringes the principle of equality. Likewise, *(iii)* it studied whether the inclusion of the expression *"its airspace"* in the Colombian definition of territory breaches the Political Constitution. In relation to the first issue, the Court concluded that the article establishes the necessary technical definitions to apply this BIT, which does not pose a threat or violates any content of the Political Constitution. Regarding the second issue, the Court noted that the expression *"natural persons possessing the nationality of any of the Contracting Parties"* does not breach the principle of equality by benefiting Colombian-French citizens, given that *(a)* the BIT dispositions that refer to substantive rights will not grant a more favorable unjustified treatment to the international investors with respect to national investors, in light of the conditions established in regard to the treaty as a whole and *(b)* the Article 15.1 of the BIT establishes that the Colombian-French investor in Colombia may only submit

its disputes before the local courts. Finally, in relation to the third issue, the Court notes that the inclusion of the expression *"its airspace"* in the Colombian definition of territory and the omission of this element in the French definition of territory is not contrary to the Constitution, considering that its definition is a consequence of the exercise of sovereignty of both Contracting Parties without this compromising any content of the Constitution.

440. *Article 2. Scope of application.* This article is compatible with the Constitution because: *(a)* the inclusion of the investments performed prior to the entry into force of the BIT *"achieve the equality principle, as far it concerns the guarantees granted by the States to the investors to initiate and maintain the investment"*; *(b)* the exclusion of the differences or claims that have taken place before the entry into force of the BIT guarantees the principle of non-retrospectivity; *(c)* the exclusion of the funds arising from illicit sources and of tax issues does not disregard any component of the Constitution; *(d)* the adoption of non-discriminatory measures in the field of insurance and the financial system is necessary to preserve the regulatory autonomy of the competent authorities and *is compatible* with the Constitution because it establishes the competences of intervention and regulation of the authorities; finally *(e)* the expression *"the measures that are taken for prudential reasons that affect the free competition must be temporary"* upholds the competences of the Central Bank to limit the repatriation of money related to the investments protected by the Treaty and do not restrict them to "*temporary closed limits that deter the exercise of the task that was commissioned to it, which is inadmissible for the Constitution*".

441. *Article 3. Promotion and admission of investments.* The two numerals of this article are constitutional because *(i)* the commitment to promote and admit the investments of the investors of the other Contracting Party *"contributes to the internationalization of the economic relations of the State*

and responds to clear reasons of national convenience (C.P. article 226)", and *(ii)* to evaluate, in good faith, the migratory requests of the nationals of the other Party in relation to the *"investment carried out"* also contributes to the achievement of the objectives of the agreement, without affecting the migratory competences of the national authorities nor Article 100 of the Political Constitution.

442. *Article 4. Minimum standard of treatment – fair and equitable treatment.* In relation to the FET clause, the Court analyzed *(a)* its compatibility with the Political Constitution, *(b)* if the expression *"in accordance with the international law applicable to the investors of the other Contracting Party and its investments, in its territory"* breaches the legal certainty principle (Art. 1 of the PC) and the national sovereignty (Art. 9 of the PC) and *(c)* if the expressions *"inter alia"* and *"legitimate expectations"* violate the legal certainty principle (Art. 1 of the PC) and threaten the constitutional competences of the national authorities. Regarding the first issue, the Court found that, in general terms, and according to the interpretation made by the arbitral tribunals, the FET clause is consistent with the Constitution, because it responds to the requirement of propitiating legal certainty conditions to improve the relations related to foreign investment. Concerning the second issue, the expression *"in accordance with the international law applicable to the investors of the other Contracting Party and its investments, in its territory",* the Court concluded that the uncertainty of this expression breaches the legal certainty principle (art. 1 of the PC), according to which the State and the investors must have clear the legal framework that is applied in its relations – whether it is about customary or conventional international law or both and, if it is the former, to which instruments does it it refer, among other things. Therefore, the Court declared constitutional said expression, under the condition that the Contracting Parties define its content, in a way that is compatible with the legal certainty principle. In relation

to the third issue, the Court concluded that the expression *"inter alia"*, also fails to satisfy the legal certainty principle (Art. 1 of the PC), given its uncertainty, so it was declared constitutional on the understanding that it must be interpreted in a restrictive way, in an analogical sense, and not additive. Finally, in relation to the *legitimate expectations* protection, the Court declared constitutional this expression, under the condition that the parties define what should be understood as "*legitimate expectations*", considering that they will only take place when they are derived from specific and reiterated acts executed by the Contracting Party that induce the investor, acting in good faith, to perform or maintain the investment and that it concerns abrupt and unexpected changes carried out by public authorities and that affect its investment. In this sense, such expression is congruent to legal certainty (Art. 1 of the PC) and good faith (Art. 83 of the PC).

443. *Article 4. Minimum standard of treatment - full protection and security.* In relation to the FPS clause, the Court analyzed whether that obligation is in accordance with the Political Constitution, considering that, according to the Procuraduria it establishes a *"strict liability regime"*. The Court verified that this standard implies maintaining the normal conditions of security and public order and, as emphasized on previous occasions, is consistent with the Constitution because it aims to guarantee the legal certainty, due process, equality and reciprocity. Furthermore, considering the decisions of the international investment tribunals, the Court concluded that this clause does not establish a strict liability regime. Therefore, it concluded that it is consistent with the Constitution (Arts. 2 and 90).

444. *Article 5. National Treatment and Most-Favoured-Nation.* Regarding the NT and MFN, the Court analyzed *(a)* its compatibility with the Political Constitution; *(b)* if the expression *"necessary and proportional"* threatens the constitutional competences of the national authorities, its

freedom of configuration and its regulatory powers, and *(c)* if the clause of MFN threatens the Presidential competence to conduct international relations and conclude treaties, established by Article 189.2 of the Political Constitution. Regarding the first issue, the Court noted that the NT and MFN clauses established in Article 5 under consideration are consistent with the equality (Art. 13 of the PC) and reciprocity (Art. 226 of the PC) principles. Notwithstanding the forgoing, the Court took note that that the comparison pattern of *"similar situations"* that allows the application of the NT and MFN clauses is uncertain, which threatens legal certainty (Art. 1 of the PC). Nonetheless, recent developments of international investment law protect this constitutional principle, to the extent that they delimit the scope of the expression, in the sense that it involves the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments over the basis of legitimate objectives of public policy. Based upon the foregoing, the Court declared constitutional the expression *"similar situations"*, under the condition that the parties define its content, in a way that is compatible with the legal certainty principle.

445. Regarding the second issue, the expression *"necessary and proportional"* admits interpretations contrary to the Political Constitution. Therefore, the Court declared constitutional such expression, on the understanding that is should be interpreted within the context of the BIT preamble, in such a way that it respects the freedom of configuration and the autonomy of national authorities for the purposes respectively of ensuring the public order and protecting the legitimate objectives of public policy. In relation to the third issue, the Court concluded that the MFN clause has in practice led arbitral tribunals of international investment law to import clauses of other treaties concluded by the host State of the investment, which threatens the competence of the President to conduct international relations and ne-

gotiate treaties (Art. 189.2 of the PC). Likewise, the Court warned that recent developments of international investment protect such competence, inasmuch as it delimits the expression "*treatment*" in the sense that substantive clauses established in other international investment law or trade agreements do not constitute by themselves "treatment". Consequently they cannot give rise to an infringement of this clause. Based upon the foregoing, the Court declared as constitutional the expression "*treatment*" established in article 5, under the understanding that it should be interpreted in the context of the BIT preamble, in such a manner that it preserves the presidential competence of conducting international relations and concluding treaties, established in Article 189.2 of the Political Constitution.

446. *Article 6. Expropriation and compensation.* Regarding this clause, the Court studied the following legal issues: *(i)* if it is compatible with the Political Constitution; *(ii)* if the protection of *"legitimate expectations"* of the French investors, *per se*, violates the equality principle in opposition to national investors; *(iii)* if the indirect expropriation affects the freedom of configuration and the regulatory competences of the national authorities and, consequently, is unconstitutional and (*iv*) if it violates the State competence to grant compulsory licenses within the framework of intellectual property and, as a result, violates the national convenience principle (art. 226 of the PC). Regarding the first and third issues, the Court declared constitutional the clause, given that it is compatible with the Political Constitution, particularly, with Articles 58 and 13. In relation to the second issue, it was identified that the expressions *"legitimate expectations"* and *"necessary and proportional"* pose challenges owing their uncertainty and the dissimilar application by the international arbitral tribunals, Consequently, the Court declared them constitutional under the same conditions established with regards to the same expressions included in the clauses of fair and equitable treatment (Art. 4) and

of national treatment (Art. 5). Finally, regarding the fourth topic, the Court concluded that this disposition does not undermine the competence of the national authorities to issue compulsory licenses in the development of the provisions of the TRIPS of the WTO.

447. *Article 7. Compensation for loses.* The Court found that this clause *(a)* is consistent with the Constitution because its rules are an application of the NT principle and the MFN clause and that *(b)* the conditions of compensation or restitution established are compatible with Articles 39, 90 and 100 of the Political Constitution.

448. *Article 8. Free transfer.* Regarding this clause, the Court observed that: *(a)* it is consistent with the Political Constitution because it is in line with the global purposes of the treaty in relation to the required payments to perform and protect the foreign investment; *(b)* to grant the Contracting Parties *"the possibility to condition or impede transferences"* is consistent with the national sovereignty principle (art. 9 of the PC); *(c)* the temporary restriction on the capital transfers has been considered as constitutional, particularly under Articles 371 and 372 and *(d)* the regulation on transfers does not oppose the compliance of international obligations nor to the State prerogatives established in other instruments or to its participation or association in any form of cooperation or regional integration.

449. *Article 9. Cultural and linguistic diversity*. This interpretation clause is compatible with the Constitution, insofar as it does not compromise or affect the national authorities' competences related to the preservation and promotion of cultural and linguistic diversity. In particular, this article is in accordance with Articles 7 and 70 of the Political Constitution.

450. *Article 10. Measures related to the environment, health and labour rights.* This clause is in conformity with the Constitution given that *(i)* it preserves the competences and the regulatory autonomy of the national authorities to arrange

or ensure compliance of the investors to the measures related to the regulation of environment, health and labour rights and *(ii)* it discourages the attraction of the foreign direct investment through practices that deteriorate standards of protection of the environment, health and labour rights.

451. *Article 11. Corporate social responsibility.* This article is in accordance with the Political Constitution because it establishes the obligation of the Contracting Parties to encourage companies to voluntarily incorporate standards of corporate social responsibility within their internal policies. In these terms, the Court cautioned that this article is consistent with article 333 of the Political Constitution given that it reinforces the idea that the company is an actor whose activity must be an instrument of social improvement, which is also in conformity with the Social State of Law (art. 1 of the PC).

452. *Article 12. Transparency.* This article is conformity with the Constitution because it establishes the obligation of the Contracting Parties to publish and make *"publicly affordable"* the regulations related to the investors and its investments, inherent to the Rule of Law (Art. 1 of the PC), as well as to the right to access public documents (Art. 74 of the PC).

453. *Article 13. Guarantees and subordination.* This article is in accordance with the Constitution because *(i)* the guarantee mechanisms aim to cover the inherent risks of the international investment and, consequently, constitute prior agreements among the States, with the aim of providing security and stability to investments, and *(ii)* they do not modify the obligations or interfere with the Government powers in relation to the execution or compliance with the Agreement.

454. *Article 14. Security exception.* This article is compatible with the Constitution because it contains an interpretative clause according to which the Agreement cannot be interpreted in the sense of impeding the abilities of the

Contracting Parties to maintain or execute measures to *(i)* preserve public order, *(ii)* maintain or restore international peace and security and *(iii)* protect their essential interests of security.

455. *Article 15. Dispute resolution between an investor and a Contracting Party.* In relation to this clause, the Court addressed the following issues: *(i)* if its content is compatible with the Political Constitution and *(ii)* if the dispute settlement mechanism violates the principle of equality established in Article 13 of the PC, given that it privileges foreign investors over Colombian investors. Regarding the first issue, it was concluded that the clause is, in general terms, compatible with the Political Constitution because it *(i)* creates adequate procedural mechanisms for the settlement of disputes related to the convention and *(b)* respects the duty of promotion of the internationalization of relations. In relation to the second point, it was concluded that the treatment established by numeral 4 of this article is equitable given the scope of the rights granted to the foreign investors of both States. Therefore, the Court concluded that this article was adjusted to the Political Constitution.

456. *Article 16. Other disposition*. Regarding this clause, the Court raised the following issues: *(i)* if its content is compatible with the Constitution and *(ii)* if the expression *"emanating from international law existing or subsequent to the moment of the present agreement"* violates national sovereignty (Art. 9 of the PC) and the principle of legal certainty (Art. 1 of PC). In relation to the first issue, the Court concluded that the favorability clause is justified under the principle of equality and non-discrimination, and under the *pacta sunt servanda* principle. Concerning the second issue, the Court advised that, with the joint interpretative declaration, the Contracting parties determined the content of the clause and, consequently, the legal certainty and national sovereignty principles are fulfilled. Likewise, in relation to the questions about the validity of the interpretative declara-

tion, the Court concluded that it was signed by the representatives of both Contracting Parties and does not contain new obligations nor does it modify the ones established in the treaty. Consequently, the challenges lack legal merit.

457. *Article 17. Settlement of disputes between the Contracting Parties.* This article is compatible with the Constitution, because as the Court had held in relation to analogous or similar articles contained in other BITS, these mechanisms: *(i)* constitute a civilized form of resolving conflicts, *(ii)* promote the internationalization of political, economic and social relations and *(iii)* have a concrete object, circumscribed to the disputes between the Contracting States, concerning the application or interpretation of the convention.

458. *Article 18. Final dispositions.* This article is compatible with the Political Constitution because it contains necessary dispositions for the application and execution of the instrument, namely, *(i)* the date of entry into force of the treaty, *(ii)* the date of entry into force of any eventual amendments, and *(iii)* the duration and extension of the treaty. Regarding the validity period, the Court concluded that it was reasonable and appropriate to accomplish the objectives that are aimed to be achieved with this instrument. Nonetheless, the Court warned that the consecutive extension of the Treaty does not exempt the President, in any case, of exercising its constitutional competence of directing international relations and evaluating equity, reciprocity and national convenience of treaties (Arts. 189.2 and 226 of the PC), consequently he must periodically evaluate the convenience of the treaty and its effects in relation to the objectives that it intends to achieve.

459. Finally, as it was noted in *paras. 68 and seq*, considering the regulatory nature and bilateral character of BITS, as well as in in order for the conditions pointed out in this judgment against the articles to take full effect, the Court warned the President that, if in the exercise of its constitutional competence of conducting international relations,

he decides to ratify this treaty, within the framework of article 31 of the Vienna Convention Law of Treaties, he must undertake the necessary arrangements to promote the adoption of a joint interpretative declaration with the representative of France regarding the conditions pointed out in the operative parts 1 through 7 of this judgment.

460. The joint interpretative declaration concerning the conditions established by the Court in this judgment should not be subject to Congressional approval nor to the constitutionality control that this Court exercises because its object is to define the hermeneutic scope of the expressions declared as constitutional with the corresponding conditionings. This is provided, however, that only if said declaration does not include substantial new clauses or additional obligations or rights. Otherwise, in compliance with constitutional jurisprudence, said instrument must be approved by the Congress and submitted to the control of constitutionality by this Court.

Synthesis of the decision	
Treaty/Law/ Article	**Decision**
IIA with France Law 1840 of 2018 (procedure)	To declare constitutional the Agreement between the Government of the Republic of Colombia and the Government of the French Republic on the Promotion and Protection of Reciprocal Investments, signed in the city of Bogota, on July 10th of 2014. To declare constitutional Law 1480 of July 12th of 2017.
IIA with France Law 1840 of 2018	Constitutional under the understanding that none of the dispositions that refer to the substantive rights will give rise to unjustified more favorable treatment to the foreign investors with respect to the nationals.
Art. 1.	Constitutional

Art. 2.	Constitutional
Art. 3.	Constitutional
Art. 4.	Constitutional To declare CONSTITUTIONAL the expression *"inter alia"* under the understanding that it shall be interpreted in a restrictive way, in an analogical sense, and not additive. To declare CONSTITUTIONAL the expression *"in accordance with the international law applicable to the investors of the other Contracting Party and its investments, in its territory"*, under the condition that the Contracting Parties define its content, in a way which is compatible with the legal certainty principle. To declare CONSTITUTIONAL the expression *"legitimate expectations"* under the condition that the Contracting Parties define what must be understood as *legitimate expectations*, considering that they will only take place when they are derived from specific and reiterated acts executed by the Contracting Party that induce the investor, acting in good faith, to perform or maintain the investment and that it concerns abrupt and unexpected changes carried out by public authorities and that affect its investment.
Art. 5.	Constitutional To declare CONSTITUTIONAL the expression *"similar situations"* under the condition that the parties define its content, in a way which is compatible with the legal certainty principle. To declare CONSTITUTIONAL the expression *"treatment"* under the understanding that it shall be interpreted in the context of the BIT preamble, in a way that preserves the presidential competence of conducting international relations and concluding treaties, established in article 189.2 of the Political Constitution.

	To declare CONSTITUTIONAL the expression *"necessary and proportional"* on the understanding that it is interpreted in the context of the BIT preamble, in such a way that it respects the freedom of configuration and the national authorities' autonomy for the purposes of ensuring public order.
Art. 6.	Constitutional To declare CONSTITUTIONAL the expression *"legitimate expectations"* under the condition that the Contracting Parties define what must be understood as *legitimate expectations*, considering that they will only take place when they are derived from specific and reiterated acts executed by the Contracting Party that induce the investor, acting in good faith, to perform or maintain the investment and that it concerns abrupt and unexpected changes carried out by public authorities and that affect its investment. To declare CONSTITUTIONAL the expression *"necessary and proportional"*, under the understanding that it is interpreted in the context of the BIT preamble, in such a way that it respects the freedom of configuration and the national authorities' autonomy for the purposes protecting the legitimate objectives of public policy.
Art. 7.	Constitutional
Art. 8.	Constitutional
Art. 9.	Constitutional
Art. 10.	Constitutional
Art. 11.	Constitutional
Art. 12.	Constitutional
Art. 13.	Constitutional
Art. 14.	Constitutional
Art. 15.	Constitutional
Art. 16.	Constitutional
Art. 17.	Constitutional
Art. 18.	Constitutional

BIT with France Law 1480 of 2018	Considering the regulatory nature and the bilateral character of BITS, in order to ensure that the condition pointed out in this judgment against the articles take full effect, the Court warned the President that, if in the exercise of its constitutional competence of conducting international relations, he decides to ratify this treaty, within the framework of art. 31 of the Vienna Convention on the Law of Treaties, he must undertake the necessary arrangements to promote the adoption of a joint interpretative declaration with the representative of France regarding the conditions pointed out by the Court in this judgment..

XII. DECISION

For all the foregoing reasons, the Full Chamber of the Constitutional Court, in exercise of its constitutional powers,

DECIDES

First-. Declare CONSTITUTIONAL the Agreement between the Government of the Republic of Colombia and the Government of the French Republic on the Promotion and Protection of Reciprocal Investments, signed in the city of Bogota, on July 10th of 2014 and the Law 1840 of 12th July of 2017, by which this treaty was approved, on the understanding that none of the dispositions that refer to substantive rights will lead to unjustified more favorable treatments to international investors against the nationals.

Second-. Declare CONSTITUTIONAL the expression *"inter alia"* established in the first subparagraph of article 4 of the Treaty, under the understanding that it must be interpreted in a restricted way: in an analogical sense and not additive.

Third-. Declare CONSTITUTIONAL the expression "*in accordance with the international law applicable to the investors of the other Contracting Party and its investments, in its territory*", under the condition that the Contracting Parties define its

content, in a way which is compatible with legal certainty principle

Fourth-. Declare CONSTITUTIONAL the expression "*legitimate expectations*" under the condition that the Contracting Parties define what must be understood as legitimate expectations, considering that they will only take place when they are derived from specific and reiterated acts executed by the Contracting Party that induce the investor, acting in good faith, to perform or maintain the investment and that it concerns abrupt and unexpected changes carried out by public authorities and that affect its investment.

Fifth-. Declare CONSTITUTIONAL the expression "*similar situations*" under the condition that the parties define its content, in a way which is compatible with the legal certainty principle.

Sixth-. Declare CONSTITUTIONAL the expression "*treatment*" established in Article 5, on the understanding that it should be interpreted in the context of IIA preamble, in a way that preserves the presidential competence of conducting international relations and concluding treaties, established in article 189.2 of the Political Constitution.

Seventh-. Declare CONSTITUTIONAL the expression "*necessary and proportional*" on the understanding that it is interpreted in the context of the IIA preamble, in such a way that respects the freedom of configuration and the national authorities' autonomy for the purposes of ensuring public order and protecting the legitimate objectives of public policy.

Eighth-. ADVISES the President that, if in the exercise of its constitutional competence of conducting international relations, he decides to ratify this treaty, within the framework of Art. 31 of the Vienna Convention on the Law of Treaties, he must undertake the necessary arrangements to promote the adoption of a joint interpretative declaration with the representative of France regarding the conditionings pointed out in the operative parts 1 through 7 of this judgment.

To be copied, notified, communicated and complied,

GLORIA STELLA ORTIZ DELGADO
President

CARLOS BERNAL PULIDO
Judge
Clarification of vote

DIANA FAJARDO RIVERA
Judge
Dissenting partial vote

LUIS GUILLERMO GUERRERO PÉREZ
Judge
Absent in commission

ALEJANDRO LINARES CANTILLO
Judge
Clarification of the vote and partial dissenting vote

ANTONIO JOSÉ LIZARAZO OCAMPO
Judge

CRISTINA PARDO SCHLESINGER
Judge

JOSÉ FERNANDO REYES CUARTAS
Judge

ALBERTO ROJAS RÍOS
Judge
Dissenting Vote

MARTHA VICTORIA SÁCHICA MÉNDEZ
General Secretariat

CLARIFICATION OF THE VOTE OF JUDGE
CARLOS BERNAL PULIDO
IN JUDGMENT C-252/19

Reference: File LAT-445

Constitutionality control of the Agreement between the Government of the Republic of Colombia and the Government of the French Republic on the Promotion and Protection of Reciprocal Investments, signed in the city of Bogota, on July 10th of 2014 and the Law 1840 of 12th July of 2017, by which this international treaty was approved.

Judge:
CARLOS BERNAL PULIDO

1. With my accustomed respect to the Full Chamber of the Court's decisions, I present this clarification of vote in relation to the judgment of the reference. I consider that the Court ought to have addressed the legal issue related to the of dispute settlement clause as between an investor and a Contracting Party established in Article 15 of the BIT *sub examine*. In particular, the Court should have pronounced itself in relation to *(i)* the application of the UNCITRAL Rules on Transparency in arbitrations between investors and States, *(ii)* the limit on the compensation awarded in eventual awards issued by international investment arbitral tribunals that are constituted on the basis of this Treaty and *(iii)* the implications of the judgment in the case *Slovak*

Republik v Achmea B.V, issued on March 7th of 2018 by the Court of Justice of the European Union.

2. Regarding the first issue, I consider that the Court should have addressed the issue of whether subjecting the application of said rules to the agreement between the parties breaches Article 228 of the Political Constitution. This, given that according to Article 15, num. 12 of the Treaty, if one of the disputing parties to an arbitration procedure opposes the application of the rules of procedure, those rules would not be applicable. This consequence should have been evaluated by the Court considering the principle of publication that, according to Article 228 of the Constitution, is the general rule in judicial proceedings. This is especially so in the procedures that deal with public interest issues, as is the case for international investment arbitrations. For the same reason, the Court should have pronounced itself on the consequences of any of the Contracting Parties objecting to the application of said rules within a year after the coming into force of the Agreement in accordance with the second clause of said numeral.

3. In relation to the second issue, in my assessment, the rules about the compensation that an international investment arbitral tribunal may award, established in Article 15, num. 15 of the treaty, should have been analyzed in light of the legal certainty (Art. 1 of the PC), equality (Art. 13 of the PC) and financial sustainability (Art. 334 of the PC) principles. Firstly, because numeral 15 is limited to establishing the ways of relief that the Tribunal can grant, at claimant's request, but without establishing the maximum limit of them. This will result in uncertainty without even establishing the amount of the compensation in a concrete case. The second point is because the local investors in Colombia that suffer losses as a consequence of damages attributable to the State, will receive compensation for all the damage *(compensatio lucri cum damno)* and only the damage (to prevent an unjust enrichment), in compliance with Article

90 of the Constitution; while according to numeral 15 of the article *sub examine*, the compensation that should correspond to a French investor in a dispute against Colombia is not subjected, *prima facie*, to this limit. The third point is because, frequently, the amounts awarded in compensation through arbitral awards issued by international investment tribunals are significant and eventually could threaten the financial sustainability of the State (Art. 334 of the PC). Furthermore, the limit of the compensation is established in Article 6 concerning the *"real value of the investments in question"* would apply, at first, to the expropriation events and not to the violation of the other obligations established in the Treaty.

4. In relation to the third issue, I consider that the Court should have taken into account the implications of the judgment issued in the case *Slovak Republic v Achmea B.V*[839], on March 7th of 2018 by the Court of Justice of the European Union. In this judgment, that Court decided that Article 8 of the BIT between Slovakia and Netherlands was not compatible with the European Union law[840]. This disposi-

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839 Case C-284/16, *Slowakische Republik* (*Slovak Republic*) *v Achmea BV*, 6 March 2018, EU:C:2018:158.

840 In this case, Achmea, a company from the Netherlands devoted to the marketing of medical insurances, claimed that in 2006, Slovakia reversed its politics of market liberalization of medical insurances and prohibited the distribution of the revenues generated as the consequence of the liberalization. This decision took effect between 2006 and 2011, year in which, through a law, it was allowed the distribution of such revenues. For the losses suffered during this time period, Achmea convened an arbitration tribunal against Slovakia, based on article 8 of the BIT between Slovakia and the Netherlands. Through the arbitral award of December 7th of 2012, the Tribunal condemned Slovakia to the payment of 22.1 million of euros to Achmea as a compensation. For these reasons, Slovakia presented a request of annulment before the German courts, that was known by the Federal Court of Justice of Germany. This Court submitted the issue to the European Court of Justice because Slovakia argued that the article 8 of the BIT was contrary to the articles 18, 267 and 344 of the Treaty on the Functioning of the European Union.

tion established a dispute settlement clause between an investor and a Contracting Party, through the mechanism of international investment arbitration[841]. In this regard, this Tribunal concluded that "*articles 267 and 344 of the Treaty on the Functioning of the European Union (TFEU) must be interpreted in the sense that they are incompatible with a disposition of an international agreement held between Member States, such as Article 8 of the Agreement on the Reciprocal Promotion and Protection of investments between the Netherlands and the Czech and Slovak Republic, under which an investor of one of those Member States may, in the case of a dispute related to investments*

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841 BIT. Netherlands - Slovakia BIT (1991). Art. 8. *"1) All disputes between one Contracting Party and an investor of the other Contracting Party concerning an investment of the latter shall if possible, be settled amicably. 2) Each Contracting Party hereby consents to submit a dispute referred to in paragraph (1) of this Article, to an arbitral tribunal, if the dispute has not been settled amicably within a period of six months from the date either party to the dispute requested amicable settlement. 3) The arbitral tribunal referred to in paragraph (2) of this Article will be constituted for each individual case in the following way: each party to the dispute appoints one member of the tribunal and the two members thus appointed shall select a national of a third State as Chairman of the tribunal. Each party to the dispute shall appoint its member of the tribunal within two months, and the Chairman shall be appointed within three months from the date on which the investor has notified the other Contracting Party of his decision to submit the dispute to the arbitral tribunal. 4) If the appointments have not been made in the above-mentioned periods, either party to the dispute may invite the President of the Arbitration Institute of the Chamber of Commerce of Stockholm to make the necessary appointments. If the President is a national of either Contracting Party or if he is otherwise prevented from discharging the said function, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is a national of either Contracting Party or if he too is prevented from discharging the said function, the most senior member of the Arbitration Institute who is not a national of either Contracting Party shall be invited to make the necessary appointments. 5) The arbitration tribunal shall determine its own procedure applying the arbitration rules of the United Nations Commission for International Trade Law (UNCITRAL). 6) The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively: the law in force of the Contracting Party concerned; the provisions of this Agreement, and other relevant Agreements between the Contracting Parties; the provisions of special agreements relating to the investment; the general principles of international law. 7) The tribunal takes its decision by majority of votes; such decision shall be final and binding upon the parties to the dispute"*. (Official translation to Spanish is not available).

in the other Member State, initiate a process against the latter State in an arbitral tribunal whose jurisdiction the Member State has committed to accept"[842].

5. That judgment has generated a *huge global discussion* on the validity of the clauses of dispute settlement between investors and States established by BITS signed between the Member States of the European Union. Likewise, such discussion has extended to the validity of the clauses in the BIT between States of the European Union and third States, as well as the validity of the international arbitral tribunals constituted on the basis of such clauses and the effectiveness of the decisions that these organs may have in the countries that make-up the European Union. Consequently, this decision has relevance in the issue *sub judice* since France is a part of the European Union and is the country with whom the treaty in question was subscribed.

6. In my opinion, this discussion has a special constitutional significance for the purpose of determining if the clause is consistent with the equity and reciprocity principles of international relations (Art. 226 of the PC). This ,given that these principles could be compromised if, in practice, said clause turned out to be valid and took effect in a way the French investors could submit their differences in international investment tribunals and the decisions of those organs could take effect, but nontheless, in the case that Colombian investors sought to submit their differences with France before such organs, said clause would

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842 Id. "*On those grounds, the Court (Grand Chamber) hereby rules: Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept*". (Official translation to Spanish is not available).

be considered as invalid and would not take effect or, even, the decisions issued by the tribunals could not be effective owing their incompatibility with the European community law. For this reason, I consider that this discussion and these legal issues should have been addressed in the constitutionality control of Article 15 of the treaty *sub examine*.

Date ut supra,

Carlos Bernal Pulido
Judge

CLARIFICATION OF THE VOTE AND PARTIAL DISSENTING OPINION OF JUDGE ALEJANDRO LINARES CANTILLO IN JUDGMENT C-252/19

Reference: File LAT-445 – Constitutionality control of the Agreement between the Government of the Republic of Colombia and the Government of the French Republic on the Promotion and Protection of Reciprocal Investments, signed in the city of Bogota, on July 10th of 2014 and the Law 1840 of 12th July of 2017 "By means of which the "Agreement between the Government of the Republic of Colombia and the Government of the French Republic about the Promotion and Protection of Reciprocal Investments", signed in Bogotá on July 10th of 2014 is approved".

Reporting Judge: CARLOS BERNAL PULIDO

With the accustomed respect to this Court's decisions, and although I share in general terms the declaration of constitutionality of the Agreement between the Government of the Republic of Colombia and the Government of the French Republic on the Promotion and Protection of Reciprocal Investments, signed in the city of Bogota, on July 10th of 2014 and the Law 1840 of 12th July of 2017 *"By means of which the "Agreement between the Government of the Republic of Colombia and the Government of the French Republic about the Promotion and Protection of Reciprocal Investments", signed in Bogotá on July 10th of 2014, is approved"*, I allow myself to present my partial dissenting vote of certain sections of the resolutive

part of the judgment C-252 of 2019, as well as to clarify my vote regarding some considerations of the part that support the decision adopted by the majority of the Full Chamber.

In this sense, I proceed to (I) explain the reasons for my dissent with the methodology, scope and interpretation of the abstract constitutionality control; and (II) point out the reasons of my dissent with certain sections of the resolutive part of the decision.

I. General considerations on the methodology, scope and interpretation of the abstract constitutionality control carried out by the Court

1. Article 226 of the Constitution establishes that, in a general manner, "*the State will promote the internationalization of political, economic, social, and ecological relations on the basis of equity, reciprocity, and national interest*". An isolated interpretation of this article would suggest that the State, as a whole, is responsible of directing international relations, consequently, the Court would be able to intervene in a comprehensive way in international relations under the argument of protecting constitutional supremacy[843]. Nonetheless, Article 189.2 of the Constitution points out that the President as chief of the State has the function to "[d]*irect international relations. Appoint the members of the diplomatic and consular corps, receive the corresponding foreign officials and conclude international treaties or agreements with other States and international bodies that shall be submitted to the approval of Congress*" (underlining not on the original text).

2. Due to the above, through a systematic and comprehensive reading of the Constitution it is observed that a

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843 Political Constitution of Colombia. Article 241. – "The safeguarding of the integrity and supremacy of the Constitution is entrusted to the Constitutional Court in the strict and precise terms of this article".

specific competence of the Executive branch was given to direct and conduct international relations, which cannot be disregarded by the Court under the argument of ensuring "*the safeguarding of the integrity and supremacy of the Constitution*". The foregoing, considering that according to Article 241 of the Charter, it is entrusted to the Constitutional Court the safeguarding of the integrity and supremacy of the Constitution "*in the strict and precise terms of this article*", for which paragraph 10 of this disposition assigns to this Corporation the competence to examine the constitutionality of the international treaties and their enabling laws[844]. In view of this, this Court has been emphatic in pointing out that its function of studying the international treaties and the laws approving them consists in a *legal objective examination*, that excludes any consideration about political convenience, practical opportunity or utility because these issues correspond to the National Government, in its faculty of celebrating agreements and leading international relations and to *the Congress* at the time of approving or disapproving those agreements (as a whole)[845].

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844 According to article 241, paragraph 10 of the Constitution, it corresponds to the Constitutional Court to: *"Decide in definitive manner on the constitutionality of international treaties and the laws approving them. For this purpose, the government will submit them to the Court within the six days subsequent to their sanction by law. Any citizen may intervene to defend or challenge their constitutionality. Should the Court declare them constitutional, the government may engage in a diplomatic exchange of notes; in the contrary case the laws will not be ratified. When one or several provisions of a multilateral treaty are declared invalid by the Constitutional Court, the President of the Republic alone may ratify it, under reserve of the offending provision".*

845 According to the judgment C-227/1993 *"if the Congress may approve or disapprove all the Treaty, it may also do it partially"*. This demonstrates that is not totally true the argument according to which the Congress does not play a relevant role in the approval process of the treaty. Despite all of this, it must be considered that the faculty of the Congress must respect the exclusive competences of the President of conducting international relations. Indeed, since the Constitution of 1886 it corresponds to the Congress the approval or disapproval of the international treaties (Art. 76, paragraph 20). This faculty was maintained unchanged in the constitutional amendments of 1936, 1945

3. Nevertheless, in the judgment C-252 of 2019, when studying the Agreement, the Court chose to modify the scope of the constitutionality control that the Court performed in international treaties and the rules that approve them by intensifying the level of scrutiny. The above configures a *change in jurisprudence* that, in my opinion, represents an excessive intervention in the Executive faculties of directing and managing international relations.

4. On this occasion, the majority of the Court, under the argument of exercising a "*preventive function*" in the constitutionality control of the Agreement, interpreted the treaty without considering sources of international law and the rules of interpretation of the treaties which led the Court to impose its particular understanding on the sense of certain clauses on two sovereign States. Indeed, to sustain the scope of this preventive control, the Court began with the study of the effects that can be detached from the international investment lawsuits filed against the Colombian State, with the objective of exposing the negative consequences that can be generated with the conclusion of certain international investment agreements with other States. Therefore, the Court analyzed the constitutionality of the agreement from the findings and conclusions of different investment arbitral

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and 1968. This is seen as an expression of the separation of powers, according to which, one of the functions of the Head of State is the conduction of international relations, this is not an exemption of the political control of the legislative branch. In this regard it can be seen German Cavelier, *Legal regime of the international treaties in Colombia,* Third Edition, Ed. Legis, 2000, p.30, in which the author points out that "*the current Colombian constitutional regime on the treaties established in the Constitutions, since 1821 until 1991, the President (chief of State) is the officer with exclusive competence to negotiate and conclude public Treaties with other States or recognized entities of international law"* (it underlines). In consequence, it has no place the argument established in the paragraph 55 of the judgment C-252 of 2019 about the "block vote", as a deliberative deficit, but rather as an institutional manifestation of the distinction of functions designed by the Constituent (embedded in our constitutional tradition).

tribunals, which decided the cases submitted to their consideration under other treaties of which Colombia is not a part. The above, in my concept, constitutes an inappropriate reading of the treaty for different reasons:

(a) First, the Court seems to indicate that there is a precedent based system in international law by elaborating and interpreting legal concepts of the Agreement based, exclusively, on the decisions of investor- State arbitral tribunals. This ignores the system of sources of international law which establishes, as a general rule, that the arbitral decisions constitute auxiliary means for the determination of rules of law[846] and cannot bind to the States that are not parties to the dispute[847].

It is important to clarify that Colombia has not accepted or ratified any international instrument through which the decisions of the arbitral tribunals constitute a precedent or a basic rule of law that compromise its international responsibility. Hence, the Court analysis is originated in premises that are not binding or enforceable to this Agreement.

(b) Second, the Court has incurred in an *indiscriminatory use* of the arbitral decisions to sustain its position. Modern international law recognizes that the judgments and decisions of the international courts and tribunals have a

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846 Statute of the International Court of Justice. Art. 38. *"1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: d. judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law (…)"*. This Statute was adopted by Law 13 of 1945 *"Approving some international instruments"*

847 Statute of the International Court of Justice. Art. 59. *The decision of the Court has no binding force except between the parties and in respect of that particular case.* Likewise, art.53 (1) of the ICSID Convention, approved in Colombia through Law 267 of 1996, establishes that: *The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.*

relevant role in the interpretation of legal rules[848]. Nonetheless, in the case under consideration the Court has omitted the justification of how the cases and the jurisprudence cited are linked to the interpretation of the Agreement. Indeed, despite the extensive and detailed number of cases and judgments quoted, the Court did not make a study of how the facts and applicable law of these cases turn out to be relevant for the interpretation of the specific text of the Agreement.

In consequence, the Court's position is based on auxiliary means to determine the rules of law, without establishing how such means are linked with the agreement.

(c) Finally, the Court ignores international and Colombian law by omitting to interpret the Agreement in accordance with the Vienna Convention on the Law of Treaties of 1969. Indeed, Articles 31 to 33 of the VCLT, which Colombia[849] ratified, establish clear and accurate principles about how

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848 In this regard, see: Niki Aloupi & Caroline Kleiner (Dir.), *Le précédent en droit international: Colloque de Strasbourg*, Editions Pedone, 2016; Gilbert Guillaume, *Le précédent dans la justice et l'arbitrage international,* Journal de Droit International (Clunet, 2010, 685, published by LexisNexis SA). Translated by Brian McGarry 2011, Published by Oxford University Press; Gilbert Guillaume. "*The Use of Precedent by International Judges and Arbitrators*", Journal of International Dispute Settlement, Vol. 2, No. 1, 2011; Gabrielle Kaufmann-Kohler, "*Arbitral Precedent: Dream, Necessity or Excuse?*", Arbitration International, vol. 23 (3), 2007, pp. 357-378; Yas Banifatemi & Emmanuel Gaillard (eds.), Precedent in International Arbitration: IAI Seminar, Paris - December 14, 2007, pp. 105-12, Huntington, NY., JurisNet, LLC, 2008, p. 107; Jeffery P. Commission, *Precedent in Investment Treaty Arbitration*, en: Journal of International Arbitration, vol. 2, Kluwer Law International 2007, Volume 24, Issue 2, pp. 129-158; Anne-Veronique Schlaepfer, Philippe Pinsolle y Louis Degos. *Towards a Uniform International Arbitration Law?*, en: Yas Banifatemi & Emmanuel Gaillard (eds.), Precedent in International Arbitration: IAI Seminar, Paris - December 14, 2007, p. 249; y Hersch Lauterpacht. "*The Development of International Law by the International Court*", Stevens & Sons Limited, 1958, Cambridge, reimpresión de Grotius Publications Limited, 1982; among others.

849 Law 32 of 1985. "*Approving the " Vienna Convention on the law of treaties", signed in Viena on May 23th of 1969.*

to interpret international treaties[850]. Nonetheless, the Court omits the interpretation of the Agreement according to the VCLT, thus incurring in unknown techniques or strange to international law. For example, it is questionable that the Court does not try to justify or, at least, explain the use of arbitral decisions considering Art. 31 of the VCLT[851], but it incurs in multiple and judicious quotations that are far from establishing the relevance and the scope and content of each of the rules established in the Agreement.

In consequence, by basing the interpretation of the agreement on arbitral decisions and doctrine of publicists, which barely constitute *auxiliary means* for the determination of rules of law[852], the Court abandonded the system of sources of international law by conferring to arbitral decisions a greater value than they really have, and omitted to interpret it in an adequate manner, according to the VCLT (1969) dispositions. The non-observance of these basic premises leads to the determination that the conclusions of the Court were motivated by a mere convenience analysis of the Agreement, which is not allowed according to Article 241 of the Constitution. In this regard, by implementing a

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850 The following three books are illustrative of the rules of interpretation of international treaties: Tarcisio Gazzini, *Interpretation of International Investment Treaties*, Hart Publishing, 2016; Andrea Bianchi, Daniel Peat & Mathew Windsor, *Interpretation in International Law*, Oxford University Press, 2015; y J. Romesh Weeramantry, *Treaty Interpretation in Investment Arbitration*, Oxford University Press, 2012.

851 According to the Vienna Convention Law of Treaties. *"31. 1. General rule of interpretation. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 3. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text: c. Any relevant rules of international law applicable in the relations between the parties.*

852 Statute of the International Court of Justice. Art. 38.1: "*The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (d) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law* (…)" (its underline)

strange legal analysis to international law and by using arguments that are foreign to an objective legal analysis, the Court aimed, in pursuit of the legal certainty, to impose its legal view about the specific content of certain clauses, defining how to negotiate, establishing the scope and content of certain expressions of the agreement. In my opinion, the Constitutional Court cannot – and should not - impose upon the Executive the content of those dispositions.

5. I consider that the Court, on these matters, must be especially respectful with the Executive, taking a prudent stance and acting with self-restraint, considering that the Constitution gives to the President of the Republic special powers in the management of international relations. Additionally, the Court must ensure an adequate use of sources of international law and interpret the treaties in accordance with the binding and applicable rules of the Colombian State. When the Court takes distance from these premises, it limits itself to analyzing the convenience of the agreement, by trying to impose upon two sovereign States the scope and content of the clauses that were freely negotiated in the international arena.

6. On the other hand, I do not consider appropriate the argument of the "*deficit of deliberation*" as a basis to elevate the level of scrutiny of this Court in the judicial control of the international treaties. Even though, I have upheld systematically that this Court can be a catalyst of the deficit of deliberation that is eventually presented in the legislative branch, I don not believe that it is appropriate to use this argument each time that the constitutional judge disagrees with a decision of the Congress and much less to ignore the institutional designs that the Constituent included in the Constitution. Precisely, to prevent these type of situations, I have advocated for this Court to supply the deliberative deficit of the legislative branch only when there is a risk for the insular, vulnerable and discrete minorities, that have been historically subjects of special protection or that lack

of an adequate voice in public representation bodies[853]. To point out that the Constitutional Court is the place with more deliberation for the international agreements, since public hearings with wide participation are celebrated, not only ignores the complexity of the process of negotiation and ratification of those treaties, but can have an undesirable effect of raising up the passivity and dysfunction of the legislative organ[854] and decreasing the public scrutiny and political responsibility of the Congress and the Executive.

II. Specific considerations on the conditionings of the resolutive part of the judgment

7. Based on the new scope of the abstract constitutionality control adopted by the decision of the majority of the Full Chamber in the case of international investment agreements, and the methodology used to interpret the Agreement, the Court opted to justify a series of conditions established in the resolutive part of the judgment C-252 of 2019, from which I have decided to turn away partially, for the following reasons.

8. In general terms, I consider necessary to point out that the conditions incorporated in the 1-7 resolutive points, (i) were not necessary, if the conditioned expressions were interpreted according to the rules established in articles 31-33 of the VCLT of 1969; and (ii) they aimed to impose upon two sovereign States a unique, subjective and unfounded constitutional definition of certain undefined legal concepts,

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853 In this sense, see my vote clarification to the judgment SU-214 de 2016.

854 In this regard see: Andrei Marmor, *Randomized Judicial Review,*). USC Law Legal Studies, Paper No. 15-8, (April 2015). Available in SSRN: https://ssrn.com/abstract=2568725 or http://dx.doi.org/10.2139/ssrn.2568725; y Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 Duke Law Journal, 1277-1333 (2001). Available in: https://scholarship.law.duke.edu/dlj/vol50/iss5/4

therefore, configuring an undue interference in the executive competences of conducting international relations, interfering in topics of convenience that must be negotiated and arranged by the parties to the Agreement.

9. Regarding the condition included in the FIRST resolutive point, I consider that it was not essential, because it is not observed that from the text of the agreement, nor from the reciprocity principle, it follows that a less favorable, discriminatory or unjustified treatment is given to the nationals in opposition to the international investors. It seems difficult to understand, except in the context of the ideas of Andres Bello. The condition here incorporated refers to a transversal axis of the whole Agreement, which must have been interpreted according to the reciprocity principle, which is a rule of international law applicable under Articles 9 and 226 of the Constitution and the Vienna Convention on the Law of Treaties of 1969. Therefore, I reiterate that the Court is mistaken when it tries to impose upon two States a particular vision of the principle of equality, without referring to the *national treatment* clause, which aims to reflect a conventional development of the Articles 13 and 100 of the Constitution.

10. Secondly, in relation to the condition incorporated in the SECOND resolutive point, I consider that it was not necessary, since it was enough to interpret the expression *"inter alia"* (which in Latin means "among other things"), based on the rules established in Articles 31-33 of the VCLT of 1969, that is *"in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"*. Additionally, it should be underlined that, in the interpretation of this expression, the majority of the Full Chamber intended to impose upon two sovereign States a specific reading of the complex standard

of fair and equitable treatment[855], which constitutes an overflow of the powers given to the Constitutional Court and a disproportionate interference in the executive competences of conducting international relations.

11. Finally, the determination of whether such standard is enunciative or restricted is an issue that escapes the competence of the Court, because it must be defined by the State Parties, at the moment of negotiating, interpreting or applying the treaty. The arbitral tribunals, at the moment of studying a particular dispute, will be responsible for determining if a particular act is covered by this expression. By trying to impose such a restrictive definition, as the one posed by the Court in this occasion, there is a risk of considering that, in fact, the acquired obligations are being substantially modified, which would constitute a reservation to the content of the agreement, which is prohibited regarding bilateral treaties.

12. Thirdly, I consider that the condition of the expression *"legitimate expectations"* incorporated in the FOURTH resolutive point does not consider: (i) the regime of limitations and exceptions to the Articles 10, 11 and 14 of the Agreement[856]; and (ii) is based upon cases that do not have a similar text

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855 The importance and complexity of the interpretation and application of this standard can be found in: La Patrick Dumberry, *Fair and Equitable Treatment: its interaction with the Minimum Standard and its Customary Status,* Brill, 2018; Fulvio Maria Palombino, *Fair and Equitable Treatment and the Fabric of General Principles,* Springer, 2018; Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment*, Oxford University Press, 2013; Alexandra Diehl, *The Core Standard of International Investment Protection: Fair and Equitable Treatment*, Wolters Kluwer, 2012; Roland Klager, *'Fair and Equitable Treatment' in International Investment Law*, Cambridge University Press, 2011; y Iona Tudor, *The Fair and Equitable Treatment Standard in International Law of Foreign Investment*, Oxford University Press, 2008.

856 In this Agreement, as well as in all the IIAs signed by Colombia, Non-Precluded Measures clauses are included, that in the case of the Agreement with France can be seen in: (i) Preamble – public policy objectives, tax issues (2.4.) (ii) public order (5.3;14); (iii) mandatory licenses (6.4.); cultural diversity (9); and environment, health and labor (10).

to the revised Agreement and to which Colombia is not a party[857], as well as in interpretations made by arbitral tribunals which constitute a simple auxiliary mean of interpretation[858]. Additionally, it must be noted, that in this case, the Court chose to dictate to the State Parties to the agreement a unilateral and unique definition of this expression, without much constitutional support, which could disrupt the object and purpose of the *Minimum Standard of Treatment* clause, configuring a reservation by modifying the negotiated and agreed obligations of both States.

13. On the particular, it should be noted that there is no unique vision of the expression *"legitimate expectations"* given that these, by definition, should consider different aspects such as the market or industry where the investment takes place, the predictability or unpredictability of the changes in the legal framework of the host State or the action of the State at the moment of the investment[859]. In this sense, the Court is mistaken when seeking to impose

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857 In this regard, it can be observed that in paragraph 211 of the Judgment C-252 of the 2019, when studying the concept of *"legitimate expectations"*, it is noted notes that *"the delimitation of the legal scope of this concept is completely consequent with the recent developments in the international investment law, particularly the ones included in the Trans-Pacific Partnership Agreement and in the Comprehensive Economic and Trade Agreement (para. 109)"*.

858 In this regard, it can be observed that the parahraph 211 of the Judgment C-252/19, referring to the concept of *"legitimate expectations"* points out that *"following the decisions of the arbitral tribunals, the Court cannot overlook that the expression represents "one of the most controversial developments of fair and equitable treatment" [493] and that it has not been defined uniformly by the arbitral tribunals. Moreover, the Court highlights that the arbitral tribunals recognize that "the treshold of the legitimate expectations can vary depending on the characteristics of the alleged violation (…) and the circumstances of the case"* (it underlines)

859 In this regard, see: Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law*, Second Edition, Oxford University Press, 2012, pp. 115-116. In the same sense, it can be seen: Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, Wolters Kluwer, 2009, pp. 279-289, where the authors demonstrate how the concept of "legitimate expectations" is used in different ways, considering the protected invested and the legal framework of the State host of the investment, among others aspects.

a priori its own vision by carrying out an abstract constitutionality control on the Agreement. The State parties, at the moment of negotiating or interpreting the Treaty, are entitled to determine the parameters of this term and to take or not a restrictive or expansive interpretation and the arbitral tribunals, when studying a particular dispute, will be in charge of determining when it can be considered that the legitimate expectations have been violated, considering the factual concrete situations and the applicable rules.

14. Fourthly, in relation to the conditioning of the expression *"treatment"* incorporated in the SIXTH resolutive point, I consider that if the interpretation had been made according to the sources of international public law (Article 38.1 of the Statute of the International Court of Justice) instead of resorting to arbitral decisions, it would not have become necessary to include that condition. In addition, it should be noted that it is at the least debatable that the Court, under the argument of protecting the competences of the President, has chosen to made such interpretation to the content of the Agreement , while expanding the control of constitutionality to the international treaties, and in this way interfering with the competences of the executive in relation to the direction and management of international relations.

15. Additionally, regarding the condition on the expression *"necessary and proportional"* incorporated in the SEVENTH resolutive point, I consider that once again, the Court omits the limitations established in the preamble and the Articles 10, 11, and 14 of the Agreement. In this sense, to determine the content of the expression it was enough to turn to the sources of public international law established in Article 38(1) of the Statute of the International Court of Justice and the criteria for interpretation of the VCLT of 1969, instead

of invoking the *"jurisprudence of international tribunals"*[860]. In addition, it should be emphasized that the Court, once again, exceeded its competences by seeking to impose upon the Colombian and the French State a proper understanding, unsupported in international law, of the expression *"necessary and proportional"*, limiting it to such point that it could constitute a different obligation.

16. Moreover, it should be noted that even though the resolutives 1-7 establish condition that, in many cases, determine the sense under which certain clauses should be interpreted, all of them are subjected to resolutive EIGHT, on which the President is cautioned that: "*if in the exercise of its constitutional competence of conducting international relations, it decides to ratify this Treaty (…) it must advance with the necessary arrangements to promote the adoption of a* ***joint interpretative declaration*** *with the representative of the French Republic in relation to the conditionings the highlighted conditionings in the resolutives 1-7 of the present decision*" (bold not on original text).

17. Regarding the above, it should be noted that the orders of the EIGHT resolutive point must be interpreted according to literal a, paragraph 4 of Article 31 of the VCLT of 1969[861]. In this sense, it must be understood that within the framework of a *"subsequent agreement between the parties about the interpretation of the Treaty or the appliance of its dispositions"*, the result of the arrangements advanced by

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860 In this respect, it can be highlighted the paragraph 247 of the judgment C-252 of 2019, which states that: *"the Court considers that the expression "necessary and proportional" admits, in the framework of the jurisprudence of international investments tribunals, at least one reading against the Constitution"*.

861 Vienna Convention on the Law of Treaties of 1969. *"31. 1. General rule of interpretation. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 3. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text: a. Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty"* (underline out of the text)

the Executive should not take any procedure before the Congress because they are not aquirying new obligations nor modifying the existing ones.

18. In this case in which the order to the President is understood as an obligation of result, I consider it necessary to emphasize my position about the inclusion of unilateral interpretative declarations and reserves contained in my dissenting vote to the judgment C-184 of 2016. To interpret it this way would imply a substantial alteration of the object and purpose of the Agreement, through a reservation or unilateral interpretative declaration, which have no place in bilateral international agreements.

In these terms I present my clarification and partial dissenting vote of the decision adopted by the majority of the Full Chamber.

Date *ut supra*,

Alejandro Linares Cantillo
Judge

PARTIAL DISSENTING OPINION OF JUDGE
DIANA FAJARDO RIVERA
IN JUDGMENT C-252/19

Reporting judge: Carlos Bernal Pulido

With the accustomed respect to the judgments of the Court, I partially turn away from the decision adopted by the majority of the Full Chamber in the judgment C-252/19. Although I share, in general terms, the decision of declaring the constitutionality of the Agreement between the Government of the Republic of Colombia and the Government of the Republic of France for the Reciprocal Promotion and Protection of Investments, concluded in the city of Bogota, in July 10th of 2014, as well as the the Law 1840 of July 12th of 2017, by means of which said treaty was approved, I do not share some decisions that were taken in the resolutive part of the judgment and I consider that the judgment set aside from the recurrent jurisprudence of this Court on the scope of the constitutional control in relation to the approving laws of treaties.

Hereinafter, I will refer firstly to the the nature, scope and effects of the material constitutional control on laws approving commercial treaties and the reasons why I consider that Judgment C-252 of 2019 turned away unreasonably from the precedent on this matter. Secondly, I will expose

the arguments which lead me to differ from some points of the resolutive part.

1. The judgment C-252 of 2019 turned away from the precedent regarding the nature, scope and effects of the material constitutionality control on commercial treaties

1.1. The constitutional jurisprudence has pointed out repeatedly that the scope of the material constitutionality review on treaties of commercial nature is circumscribed to an objective legal examination of the clauses in which issues regarding political expediency, opportunity or utility of the conclusion of the Treaty are not considered, given that these issues must be considered by the President and the Congress in the procedure of subscription and approval of the international instrument[862]. In the same way, it has been established that the eventual economic losses that may arise from the subscription of a commercial treaty, cannot generate on its own the unconstitutionality of the norm, because these issues must be asserted by the organs of political decision at the moment of negotiation and approval of the respective treaty.[863]

1.2. The judgment C-252 de 2019 increased the degree of judicial scrutiny regarding the revision that this Court performs in terms of international commercial treaties. This resulted in a modification to the scope of the constitutional control on this matter that disregards the recurring jurisprudential line that confers upon the President and

862 The Constitutional Court has reiterated this line of jurisprudence, among others, in judgments C-178 de 1995. RJ. Fabio Morón Díaz; C-864 de 2006. RJ. Rodrigo Escobar Gil; C-750 de 2008. Clara Inés Vargas Hernández; C-221 de 2013. RJ. Jorge Iván Palacio Palacio; C-667 de 2014. RJ. Gabriel Eduardo Mendoza Martelo; C-157 de 2016. RJ. Gloria Stella Ortiz Delgado; C-210 de 2016. RJ. María Victoria Calle Correa.

863 In this regard it can be consult, among other judgments: C-864 de 2006. RJ. Rodrigo Escobar Gil y C-750 de 2008. Clara Inés Vargas Hernández.

the Congress a great deal of discretion to decide about the convenience and opportunity to conclude these kinds of treaties.

1.3. This change of jurisprudence seems to be adopted on the basis that it is what is requested by some interveners on the constitutionality process[864] and because currently there are in progress several international investment arbitrations in which the State has been sued for substantial amounts of money[865]. Nonetheless, these arguments do not justify a change of precedent, because in these cases the jurisprudence has defined a set of argumentative charges that must be exhausted when the judge undertakes a new jurisprudential direction. Charges of transparency, that refer to the identification of the previous relevant decisions on similar cases; and charges of sufficiency, that explain why a new position is proposed and why a sacrifice of the principles of security, confidence, equality and unity is justified[866]. Thereon, the jurisprudence has pointed out the conditions that can sustain a jurisprudential change: (i) the reform of the constitutional normative parameter whose interpretation led to the precedent; (ii) the transformations in the

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864 In the numeral 52 of the judgment, at the moment of analyzing the nature, scope and effects of the material constitutionality review of the BIT's, are summarized some of the citizen interventions presented to this process, in which is requested a change of precedent.

865 In the numeral 60 of the judgment, is pointed out that the the number of international investment disputes se señala el número de controversias internacionales de inversión que existen en contra de Colombia y el valor de las pretensiones en estos procesos.

866 In accordance with the Unification Judgment SU- 432 of 2015. R.J. María Victoria Calle Correa, these charges include the identification of the current position (transparency charge); the justification of the new position, owing to the transformation of the positive law system, in the axiological order that supports the Constitution, or in the prevailing social conditions (sufficiency charge); and, finally, the justification for why the new position is not only better than the previous one, but that its adoption satisfies the cost it imposes on legal certainty, equality and unity in the interpretation of rights (sufficiency charge 2).

social, economic or political situation that make inadequate the interpretation that the jurisprudence has made on a certain issue; and (iii) when a certain jurisprudence turns out to oppose the values, objectives, principles and rights in which the legal system is based.[867] Nevertheless, the Judgment does not take the argumentative loads requested for the change of jurisprudence, because no warning is given that the precedent fixed by the Court, regarding the scope of the constitucional control on commercial treaties, will be modified. Therefore, this decision is not supported by any of the events defined by jurisprudence to support such determination.

1.4. The Judgment from which I set aside, materializes the aformentioned change of precedent through the introduction of a reasonability judgment that is used as a tool to analyze the constitutionality of a treaty and each one of its clauses. This circumstance implies that the study by the Court of the Agreement concluded between the Colombian State and the French State is carried out, unjustifiably, in a more strict and intense way, and introducing parameters of convenience and opportunity to the constitutional analysis, which, as it was already said, are foreign to this type of process.

1.5. Regarding the aforementioned reasonability judgment, I should point out that the Judgment C-252 of 2019 does not justify why this tool must be introduced into the constitutionality examination of trade-related treaties nor the reasons why this tool is composed only of two steps: one that involves the evaluation of the constitutional legitimacy of *"the overall purposes and each of the clauses of the treaty"* and the *"measures individually provided in such instrument"* to achieve the planned purposes. The only justification that seems to to support the implementation of the reasonability

867 Judgment SU-075 of 2018. RJ. Gloria Stella Ortiz Delgado.

judgment is the quoted Judgment C-031 of 2009. Nonetheless, what this judgment indicates is that only when there are clauses that affect fundamental rights in a free trade agreement, these must overcome a reasonability test to be considered conformed to the Political Constitution. All the other clauses that do not constrain a fundamental right must be analyzed under a mild intensity of constitutional control. In this respect, it was said:

> "Well then, regarding the intensity of the constitutionality control in relation to the free trade agreements, the Court considers that it must be mild, considering the wide margin of discretion enjoyed by the President as the director of international relations and the regulated matter. However, this becomes intense in relation to the conventional clauses that affect the enjoyment of fundamental constitutional rights, such as health and work, as well as the protection of indigenous and raizal communities.
>
> In this sense, it should be specified that, in terms of prior constitutionality review on free trade agreements, the Court must analyze whether the norms that restrict fundamental rights overcome a reasonability test; that the aims to be achieved are constitutional and that the restrictions are adequate"[868]

1.6. Therefore, the introduction of the aforementioned judgment of reasonability into the analysis of constitutionality of commercial international treaties, implies that the Court evaluates issues related to the convenience, opportunity and utility of these instruments. Indeed, the judgment from which I set aside, is claimed that one of the premises on which this judgment is based is that, since the Constitution gives the executive and legislative branches the competence to evaluate the convenience, opportunity, usefulness or effi-

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868 Judgment C-031 of 2009. RJ. Humberto Antonio Sierra Porto.

ciency of international treaties, *"in exercise of its competences, they must provide reasons and empirical, concrete and sufficient evidence, that justify their subscription"*. This forces the Constituional Court to analyze the convenience, opportunity and utility of these international treaties, insofar as it must consider and evaluate the reasons why the Government and the Congress negotiate and approve an international treaty, which is an issue eminently political and not legal.

2. Considerations regarding some points of the resolutive part of the Judgment

2.1. On the basis of this new scope given to the constitutionality control on the matter of comercial treaties, the majority of the Full Chamber decided to condition the constitutionality of some of clauses of the Agreement under review. In this regard, I set aside from the condition set forth in the second, fourth and seventh numerals of the resolutive part of Judgment C-252 of 2019, which declared the conditional constitutionality of the expressions "inter alia", "legitimate expectations" and "necessary and proportional ", terms that did not generate any constitutional reproach nor any interpretation contrary to constitutional rights or principles.

2.2. I consider that the aforementioned condition are constitutionally problematic insofar as the Court imposed upon the signatory States of the Agreement an unnecessary and particular interpretation of those terms, interfering with the wide margin of discretion that the President of the Republic and the Congress of the Republic have in order to decide on the convenience and opportunity to subscribe this kind of treaty.

2.3. When analyzing the expressions "inter alia", "legitimate expectations" and "necessary and proportional", the Court did not consider the rules regarding the interpreta-

tion of treaties, provided in Articles 31[869] and 32[870] of the Vienna Convention on the Law of Treaties, which must be consulted if a certain clause or expression of the respective international instrument raises any doubt about its content or scope. The aforementioned articles indicate that treaties shall be "*interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*", and set forth a series of rules and means of complementary interpretation, that must be followed for such effects. The condition imposed by the Court to declare the constitutionality of the terms turn away from the interpretative rules established in the Vienna Convention and ignore the context of the Agreement concluded by the Government of Colombia and the Government of France.

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869 Vienna Convention on the Law of Treaties. Article 31- GENERAL RULE OF INTERPRETATION 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) Any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended.

870 Vienna Convention on the Law of Treaties. Article 32. SUPPLEMENTARY MEANS OF INTERPRETATION Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 : (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable

2.4. In addition to the above, the condition set forth in the aforementioned expressions are supported by several decisions of investment arbitral tribunals in cases involving other States within the framework of different trade agreements[871]. In this regard, I must point out that, in accordance with international law, these decisions are merely auxiliary criteria of interpretation[872], and according to Article 230 of the Constitution[873], they could not be considered formal sources of law either. Nonetheless, the Judgment leaves out these circumstances and does not justify why, despite this, such decisions can become parameters of constitutional control.

In these terms, I established the reasons why I partially dissent from the vote in this decision.

Date *ut supra*,

Diana Fajardo Rivera
Judge

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871 Analyzing the constitutionality of the expression "legitimate expectations", the judgment indicates in its numeral 211: "after reviewing the pronouncements of the arbitration tribunals, the Court cannot ignore that this expression represents "one of the most controversial developments in fair and equitable treatment". Likewise, in the study of the expression "necessary and proportional", the judgment affirms in the numeral 247: "The "Court considers that the expression "necessary and proportional", admit, in the framework of the jurisprudence of the international investment tribunals, at least one reading against the Constitution".

872 The article 38.1 of the Statute of the International Court of Justice points out that: "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (…) d) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law (…). The constitutional jurisprudence has pointed out that this rule established the sources of international public law (See, among other judgments: T-070 of 2015. RJ. Martha Victoria Sáchica Mendez; SU-443 of 2016. RJ. Gloria Stella Ortiz Delgado; T-316 of 2017. RJ. Antonio José Lizarazo Ocampo; C-080 of 2018. RJ. Antonio José Lizarazo Ocampo).

873 Constitution. Article 230. In their decisions, the judges are bound exclusively by the rule of law. Fairness, jurisprudence, and the general principles of law and doctrine are the auxiliary criteria of judicial proel ultimo document, sin introducción tiene ceedings.

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