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COLOMBIA'S EXPERIENCES WITH INTERNATIONAL INVESTMENT ARBITRATION: CONTEXT, CASES, TREATIES

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Abstract: This paper analyses Colombia's experiences with international arbitration in disputes with foreign investors. Three periods of roughly 30 years were chosen: *a*) diplomatic protection of great powers' expatriates in Latin America (Colombia) in the era of Imperialist rivalry: the last decades of the nineteenth century and the early years of the twentieth. This protection (sometimes with naval interventions) was meant to uphold a minimum standard of treatment for foreigners and gave rise to the Calvo doctrine as its counter-current protecting Latin American economic sovereignty; *b*) interregnum between the 1960s and 1980s: Calvo (prevalent in Latin America) reincarnated in an economic emancipation drive by post-colonial countries at the United Nations. Yet, the doctrine suffered a setback in the World Bank where the Icsid Convention was adopted despite a collective No vote by Latin American members on an earlier draft in Tokyo; *c*) investor-state arbitration under international investment agreements: expansion and retreat, from 1990 to present. Expansion of such agreements and emergence of a kind of arbitral case-law occurred between the early 1990s (when the Latin American mainstream abandoned Calvo) and the late 2000s. Counter-currents appeared since the early 2000, including treaty clarifications, public policy carve-outs, and withdrawals of Latin American, North American and European states. This periodization allows for comparing Colombia's international investment arbitration consents, relevant awards, treaties, legislation and constitutional case-law over time.

Keywords: international arbitration, sovereign consent, minimum standard of treatment, Calvo doctrine, investor-state dispute settlement.

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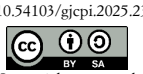

INTRODUCTION

This paper analyses Colombia's experiences with international arbitration in disputes with foreign investors. Three periods of roughly 30 years were chosen. *a*) Diplomatic protection of great powers' expatriates in Latin America (Colombia) in the era of Imperialist rivalry, that is, the last decades of the nineteenth century and the early years of the twentieth. This protection (sometimes with naval interventions) was meant to uphold a minimum standard of treatment for foreigners (Mst) and gave rise to the Calvo doctrine as its counter-current protecting Latin American economic sovereignty. *b*) Interregnum between the 1960s and 1980s: Calvo (prevalent in Latin America) reincarnated in an economic emancipation drive by post-colonial countries at the United Nations. Yet, the doctrine suffered a setback in 1965, when the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States – briefly called Icsid Convention for creating the International Centre for Settlement of Investment Disputes (Icsid), a private investor-state arbitration forum – was adopted in the World Bank, despite a collective "No" vote by Latin American members on an earlier draft in Tokyo. *c*) Expansion of investor-state dispute settlement (Isds) centred on arbitration under International Investment Agreements (Iia), and subsequent backlash: from 1990 to present. Expansion of Iias and emergence of a kind of arbitral case-law occurred between the early 1990s, when the Latin American mainstream abandoned Calvo, and the late 2000s. Counter-currents, however, appeared already since the early 2000s, including treaty clarifications, public policy carves outs, and withdrawals of Latin American, North American and European states[1].

Within this framework, section 1 describes the evolution of the international (mainly North American-European-Latin American) legal-political context, placing some of Colombia's relevant cases and treaties into it. Section 2, in turn, focuses on Colombia's own positions regarding Isds arbitration and key Iias. Section 2 topics from each period include: *a*) the Cerruti affair (1885-1911), and the

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1892 Friendship, Commerce and Navigation Treaty (Fcn) with Italy[2], which contains some Calvo postulates; *b*) the 1965 bilateral investment treaty (Bit)[3] with West Germany[4] (never ratified), which allowed for tripartite state-to-state arbitration, but only after the investor exhausted domestic legal remedies; *c*) the contradictory outcomes of three Icsid cases concerning the Santurbán Páramo[5] mining ban, and of two other cases regarding mobile telephony asset reversion at the end of concession contracts.

Conclusions comprise comparisons across periods regarding Colombia's consents to international investment arbitration and its treaties from Fcns to Iias. Comparisons within the third period cover examples of regulatory chill and resistance to it, the Constitutional Court's (CC) changing view on Isds arbitration, the contradictoriness of arbitral decisions examined, and two recently signed Bits: a 2021 Bit and Interpretative Declaration with Spain[6], and a 2023 Bit with Venezuela[7].

Methodologically, this is a historical-juridical-political documentary analysis with a qualitative approach, tracing international investment arbitration cases, awards and treaties involving Colombia, and pointing to relevant pieces of its legislation and constitutional case-law in order to show policy variations and similarities over time. The first period was chosen because Colombia by then had clear rules in place granting a special status to foreigners and their investments (including compensation for damages suffered during civil wars) in order to prevent intervention by their home countries. The Cerruti affair, a lengthy expropriation dispute of private international law, was selected due to the claimant's closeness to an actual foreign investor (Garibaldi's former artillery officer turned into businessman) settled in Colombia, the arbitrator's high sovereign status (United States President Cleveland), the expanded international jurisdiction (damages awarded to Cerruti for both personal and corporate losses, as well as compensation to creditors), and the award's enforcement by an Italian naval ultimatum. The selection of the other two periods was rather conventional. Still, the outcome of the voting process on the Icsid Convention in the World Bank in the second period is understood as a defeat for Calvo, although

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major Latin American economies kept loyalty to the sovereignty-based doctrine until the early nineties, and Brazil even thereafter. This paper is focused on sovereignty and its forms (Westphalian, international legal, regulatory).

The Santurbán related cases (Eco Oro, Red Eagle and Montauk) served to test Brigitte Stern's (2020) proposition on the dialectics of Isds arbitration (where decisions, not bound by precedent, may contradict each other, enabling rapid correction and even shaping consensus by overcoming contradictions). The Eco Oro panel's 2021 Decision[8] on Colombia's liability for breaching the fair and equitable treatment (Fet) standard, included in the Mst clause of the 2008 Free Trade Agreement with Canada (Fta)[9], was contrasted by the 2024 Red Eagle[10] and Montauk Awards[11]. Then, Eco Oro's proceedings ended with the tribunal unable to award[12] any damage for that Mst-tied Fet breach to the Canadian miner, although a rectification procedure was still underway. Yet, Colombia suffered its first substantial Isds loss in late 2024, when Spanish Telefónica[13] was awarded USD 380 million for Colombia's breach of a standalone Fet provision contained in its 2005 Bit with Spain[14], prompting Bogotá to seize Icsid's limited annulation procedure. This painful ruling – opposed to the 2021 América Móvil Award[15] that found no breach of the Fet-free Colombian-Mexican Fta (G-2), remnant of the 1994 Group of Three (G-3)[16] – induced President Petro's left-wing government to seek adjustment of Isds arbitration clauses in Colombia's Iias.

INTERNATIONAL CONTEXT: TREATIES, RULINGS, CONCEPTS – PAST AND PRESENT

First Period: Diplomatic protection, Mst, Calvo doctrine, eclectic Fcns amid Imperialist rivalry

As Tirado (1976: 103-104) recalls, in the era of "Imperialist repartition" (1870-1914), Colombian authorities granted special

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status to foreigners in order to prevent their home states' interventions. If foreigners suffered damages in civil wars, they were compensated with preference to nationals. They were only required to stay (relatively) neutral in the combats.

Foreigners' claims in Colombia were settled by domestic courts, the government or local arbitration (involving nationals and aliens), but all these domestic procedures only served to cover with a cloak of legality what the claimants obtained by threat of force, rather than judicial evidence (Tirado 1976: 107). Thus, Western powers usually did not need to take the Colombian state to international arbitration in order to obtain compensation for their expatriate investors. One exception was the Cerruti affair, elicited by the expropriation of the assets of a wealthy Italian immigrant (unduly) engaged in a Colombian civil war. The resulting international legal dispute involved Colombia's consent to Spanish mediation and later to United States arbitration under Italy's diplomatic pressure, bolstered by two naval interventions.

Diplomatic protection sought to uphold Mst under customary international law. Western powers pretended that non-Western host states granted Western aliens the same treatment that they would expect receiving in their Western homeland (Dorce 2023: par. 10). The very idea of Mst, demanded by Western powers for their investors, reflected relations of domination (Dorce 2020: par. 2). Latin America's legal-political reaction to (abusive) diplomatic protection was the Calvo doctrine. Based on the work of Argentine jurist Carlos Calvo (1868), which built on the ideas of Chilean Andrés Bello, this doctrine postulated that disputes with foreigners should be resolved by the host country's domestic courts, according to the principles of equality among states, and equivalence between nationals and foreigners (Salcedo 2008; Linares 2019; Dorce 2023).

Contracts with foreigners would include a clause subjecting them to the host state's regulations. The Calvo clause contained foreign contractors' relinquishing diplomatic protection (Salcedo 2008). Thus, the Calvo doctrine/clause protected Latin American economic sovereignty by providing a counter-current to Mst.

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Latin American states sought to include Calvo type provisions in international treaties. While early Fcns between Western and non-Western states were rather unequal, with provisions geared toward Mst, some European powers acceded to add some Calvo postulates in their later Fcns with Latin American partners (Linares 2019). After all, they always could recourse to diplomatic protection (with cannons as last resort). Colombia signed its first (unequal) Fcns with the United States in 1824, and with the United Kingdom, the hegemonic power of the time, in 1825. Eclectic Fcns, mixing Mst-type provisions with some Calvo-style ones, were those signed with France (1856), Germany and Italy (1892) (Cavelier 1982: 242, 441, 450; Linares 2019: 471). Bourgeois (1966: 30-31) listed 26 bilateral treaties between 1874 and 1902 containing non-liability clauses which exempted (host) states from responsibility for damages (to other states' nationals) incurred as a result of insurrection, riot or civil war (Salcedo 2008: par. 94).

The United States opposed Calvo very soon. At the First Pan-American Conference, convened in Washington in 1889-90, the hosts stated: "the foreigner is of better condition than the national and, therefore, the use of force to protect his rights by his native country is justified" (Lemaitre 2003: 250).

Second period: Economic charter and Icsid Convention, Bits' evolution and investors' standing to sue host states

Adopted by the UN General Assembly with the critical mass of post-colonial states, both Resolution 1803/1962 (which formalized the principle of permanent sovereignty over natural resources), and Resolution 3281/1974 (which enshrined the Charter of Economic Rights and Duties of States) recognized the right to nationalise with compensation to private companies for their expropriated assets. Yet, in Calvo's spirit, Resolution 3281 (the Charter) envisaged that disputes on compensation should be settled under the domestic law of the nationalising State and by its tribunals (Art. 2 [2/c])[17] without adding international law as did Resolution 1803 (par. 4).

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Calvo was defeated, however, in the World Bank, where the United States and Western Europe had moved their anti-expropriation – pro-compensation agenda already in the early 1960s, taking advantage of its wealth-based voting system and the absence of most newly independent countries (Van Harten 2020). As a result, the Icsid Convention was adopted in 1965 and entered into force in 1966, despite the Latin Americans' "No" of Tokyo. Nevertheless, early Bits, signed from 1959 on, did not give foreign investors standing to sue host states directly. Investors' initial claims at Icsid were based on contracts between them and host states (or their decentralised entities) that allowed both parties to sue the other in international arbitration. The first Bits combining foreign investors' protections with (their) locus standi were concluded in the late 1960s between former European colonial powers and their former colonies. Yet, the geo-economic moment for Isds only came at the end of the Cold War, when opposition to the power of international investors, led by Latin America and the Soviet Union, weakened (Van Harten 2020)[18].

Third period: Activating Isds under Iias and its key features in the late 2000s

As mentioned before, this last period comprises the proliferation of Iias – including Bits and free trade agreements with investment chapters (Ic-fta) – and the emergence of a kind of arbitral case-law from the early 1990s to the late 2000s, roughly coinciding with the hyper-globalisation era[19]. Counter-currents, however, appeared already since the early 2000s. In the 1990s, when Post-Communist East joined the competition to attract Western investments, the Latin American mainstream, including Colombia, adhered to Icsid and signed Iias, abandoning Calvo and sacrificing sovereignty. The Iias with Isds arbitration clauses were activated by enterprising lawyers, who filed pilot claims on behalf of smaller companies at Icsid and other two fora. As Van Harten (2020: 12, 54) observed, the first cohort of Isds arbitrators, acting on these claims, validated

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the concept of asymmetric sovereign consent, admitted broad definitions of investment, discarded any role for national courts, and enhanced investors' protections with standards such as indirect expropriation (Ie), fair and equitable treatment (Fet) and full protection and security (Fps). In a hundred awards between 1990 and 2010, arbitrators expanded their own powers, the responsibilities of states, and the rights of investors to compensation.

Through Iias, which are part of public international law, states waive the use of their domestic courts to resolve their disputes with partner states' investors and enable a private instrument for this purpose: international Isds arbitration. Thus, host states transfer sovereign competences to this transnational adjudication system or, more specifically, to non-state actors: international investors and arbitrators. Asymmetric sovereign consent means that an Iia establishes in advance a contracting host state's permanent consent to be sued by an unknown class of covered investors from the partner state, and the arbitration agreement is perfected when a specific investor files a request for arbitration, thus accepting the host state's permanent offer, anchored in the treaty's Isds clause (Van Harten 2020: 12; Scheu, Nikolov 2021: 179).

Arbitral tribunals, constituted largely under the rules of Icsid or Uncitral (United Nations Commission on International Trade Law), resolve claims of Iia breaches filed by covered investors. Aside the Iia invoked (the primary source), panels apply relevant rules and principles of international law to Isds cases. Domestic legal norms (of the respondent state) are considered only (as factual elements) to determine whether a treaty violation has occurred. Iias provide covered investors extensive protections (against regulatory takings, unfair treatment, and frustration of legitimate expectations) under international investment law, without assigning them responsibilities under other fields of international law (such as human rights, public health, environment).

Only these international investors – who are not parties, but beneficiaries of the Iias – can file Isds claims. States cannot initiate claims, and not even bring counterclaims except under very specific circumstances. Moreover, foreign investors appoint directly one of

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the arbitrators in each case, just like respondent states, and the two arbitrators choose a third one as president of the panel[20]. Isds panels enjoy broad interpretative discretion and can award claimant investors large monetary damages. Arbitrators – paid with high hourly fees, and sometimes practicing "double hatting" as counsels, expert witnesses, or treaty negotiators – have entrenched interests in Isds.

For defendant states, "winning" an Isds case means not being found liable in any treaty breach. The second-best outcome for them is when the case is resolved in favour of the investor, but damages awarded are minimal (only a fraction of the amount claimed) or even zero (as it happened in Eco Oro). Isds awards are effectively enforced in most countries of the world. Icsid awards must be enforced in member states as if they were domestic final judgments, while those of other arbitral fora are recognized and enforced in accordance with the 1958 New York Convention[21]. Isds awards serve only as soft precedents, since they do not bind other panels. For the sake of efficiency, no appeal on the merits is permitted, only a limited annulment procedure under the Icsid Convention by an ad hoc Committee (Art. 52).

These factors make Isds case-law incoherent, even contradictory. Yet, they may also allow wrong decisions to be corrected from one panel to another, and perhaps even consensus to emerge quite soon through a dialectical process of overcoming contradictions (thus fitting the evolutionary nature of international law). Stern (2020) contrasts this corrective incoherence of arbitration with the risk of lasting incorrect coherence by an eventual Permanent Investment Court. If the first decision of such a (multilateral) court on an issue is wrong, that decision may be repeated for years. Explaining the Latin Americans' 1964 No of Tokyo, Félix Ruiz, World Bank Governor for Chile had stressed that the (proposed) Isds system (which would give the foreign investor the right to sue a sovereign state outside its national territory, dispensing with its courts of law) "would confer a privilege on the foreign investor, placing the nationals of the country in question in a position of inferiority" (Icsid Convention History 1968: 606).

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Van Harten (2020: 9, 56, 144) concludes that Isds arbitration under Iias is part of the global inequality architecture. Compensation payments and legal expenses, which deplete the budgets of defendant states, harm all their citizens, especially their popular classes. Moreover, the threats of multi-million-dollar lawsuits deter host states from regulating in the public interest and induce them to reconfigure their domestic structures to benefit international investors – a phenomenon called regulatory chill. "Paradoxically, the strongest mechanism in international law for enforcing individual rights does not protect the weakest members of society, but international corporations and wealthy individuals".

Counter-currents

The first Iias with Isds were concluded between a developed state and a developing one, where the former had not to fear any claim from the latter's investors. Later, however, developed states also got sued by investors from other developed states under two major treaties with arbitration clauses, which came into force in the mid-1990s, the North American Free Trade Agreement (Nafta) and the Energy Charter Treaty (Ect). Polanco (2015) ironized about how North American and European countries learned to love Calvo inadvertently: they stopped praising Isds, complained of sovereignty breaches and missed their replaced national courts. By the mid-2000s, the United States and Canada started designing second-generation Ic-ftas, which were completer and more precise, and used a restrictive language on Mst, trying to rebalance international investors' protections by increasing states' policy flexibilities (Alschner 2022).

Colombia's Ic-ftas with the United States and Canada – by their acronyms Tpa (Trade Promotion Agreement) and Fta – circumscribed the scope of Fet (and Fsp) to customary Mst (Fta Art. 805[1]; Tpa Art. 10.5[2])[22]. Several arbitral tribunals, however, stressed the evolving nature of these standards, thus recognising a higher level of protection for foreign investors than suggested by

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the traditional interpretation of Mst (Polanco 2015). Therefore, the Comprehensive Economic and Trade Agreement between Canada and the EU with its member states (Ceta), signed in 2016, made two changes meant to restrict adjudicators' discretion: it envisaged an (optional) Investment Court System to be run by Ceta's Parties, and it provided abundant substantive clarifications on a standalone Fet (defined by listing its breaches, including a manifest arbitrariness), and investors' legitimate expectations (related to it).

Nevertheless, Section F on Isds contained in Chapter 8 (Investment) does not apply provisionally like the rest of Ceta since 2017. If and when the treaty is ratified in its entirety (which is still pending despite additional clarifications), its Joint Committee will appoint a tribunal and an appellate tribunal of fifteen members (five nationals of Canada, five of EU member states, and five of third countries), who will be paid a monthly retainer fee to ensure their availability (Art. 8.27[2, 12]). Another difference between Nafta-style reformed Ic-ftas and Ceta is that the former provided general exceptions, modelled on Gatt's Art. XX, to shield host states from international liability for certain public policies, while the latter opted for a different technique: it reasserts the contracting Parties' right to regulate in their territories in order to achieve public policy objectives ranging from health and environment to public morals and even cultural diversity (Ceta, Section D, Art. 8.9, par. 1).

States' defence of their right to regulate forms the basis of regulatory sovereignty, conceived by Bas (2022) as a projection of Westphalian sovereignty and internal sovereignty (only as authority) in Krasner's sense (2001). This right to regulate is at the heart of "national policy space" (World Investment Report 2003), constrained by Isds panels' (external) review of host states' actions, and by regulatory chill (Bas 2022). Bolivia withdrew from Icsid in 2007, followed by Ecuador in 2009, and Venezuela in 2012. Bolivia and Ecuador (which enacted left-leaning constitutions in the late 2000s prohibiting the transfer of sovereign jurisdictions to Isds arbitration) terminated their Iias in subsequent years. Nevertheless, those Iias' sunset (survival) clauses extended their validity for many more

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years regarding investments made before their termination became effective. Importantly, Venezuela did not denounce its Bits, and most are still in force. Ecuador justified the termination of its Iias with an independent audit by regional civil society, including progressive jurists. After a regime change, Ecuador returned to Icsid in 2021, but its government failed to win popular support for bringing back Isds via new Iias in a 2024 referendum. The latest Latin American country to withdrew from Icsid became Honduras, hit by a USD 10.7 billion claim. Yet, the Latin American mainstream, including Colombia, maintained its Icsid affiliation and Iia network (fearing that withdrawal would divert Fdi flows to competitors). Even Argentina, the hardest hit by Isds awards in the 2000s, remained in the system.

As Polanco (2015) noted, not even the rebels did retreat to Calvo-style fully domestic jurisdiction, as illustrated by their support for a South American centre for the settlement of investment disputes with various arbitration options – a project later abandoned. Brazil conduct stands out. Although it signed a dozen Bits in the 1990s, it did ratify none, due to resistance in its Congress. Since 2014, it began signing Investment Cooperation and Facilitation agreements of its own relational design (Alschner 2022). Icfas commit both Parties to appoint an ombudsman to help the partner state's investors (to resolve their disputes with public entities). Under Colombia's 2015 Icfa with Brazil (still not ratified) only the Parties can initiate an arbitration, investors cannot (Art. 23[1]). Under the Trump and Biden administrations, the United States engaged in global trade and technology warfare with China, only to harden under Trump's comeback to power[23]. Even before the war in Ukraine, the EU advocated climate action and renewable energy transition, hindered by intra-EU fossil fuel investors' compensation claims[24].

Nafta successor Usmca (United States-Mexico-Canada Agreement), in force since 2020, eliminated Isds arbitration between the United States and Canada, thus restoring their domestic courts' jurisdiction over disputes with the partner state's investors by 2023. As a reshoring tool, Usmca also severely limited the scope of Isds between the United States and Mexico, with some protections left

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for investors in state dominated energy (oil) and telecoms industries. On the other side of the pond, the EU's Court of Justice (Cjeu) declared the arbitration clauses in intra-EU Bits incompatible with EU law (Treaty on Functioning – Tfeu) in its 2018 Achmea Judgment[25]. The Cjeu reached its conclusion after analysing the arbitral tribunal's key features: its ability to interpret and apply EU law (pars. 39-42), its exceptional status that places it outside the EU's judicial system (pars. 43-49), and the limited judicial review of its awards (pars. 50-55; Scheu, Nikolov 2021: 178). As a result, 23 (of the 27) EU Member States terminated their Bits with each other, concurring mutually not to apply their sunset clauses. Since the signing of their plurilateral agreement in 2020, all terminations were ratified among them.

Yet, Isds tribunals continued to assume jurisdiction in intra-EU cases. They disputed the intra-EU objection whereby the autonomy of EU law invalidates EU states' consent to Isds arbitration under intra-EU Bits. Several panels argued that the EU Treaties and the Bits belonged to different regimes (subsystems) of international law. Two sovereignty transfers by EU states clashed: one granted to the EU [under the Tfeu] and another given [to investors through Isds arbitration] under intra-EU Bits (Stern 2020). In its 2021 Komstroy Judgment, the Cjeu confirmed that its Achmea reasoning applied also to intra-EU Isds arbitrations initiated under the Ect's Art. 26. As Korom and Nagy (2024) noted, after Komstroy, (non-Icsid) Ect tribunals seated in the EU eventually agreed to decline jurisdiction in intra-EU cases, but (truly transnational) Icsid panels resolving intra-EU Ect disputes still refused to do so. In mid-2024, the EU notified its withdrawal from the Ect, after France, Poland, Germany (and Luxembourg) had left unilaterally (as their withdrawal took effect at the end of the one-year post-notification period)[26], and other six EU member states announced their intention to do so[27], since they found the treaty's modernisation (agreed in principle two years before) insufficient for their energy transition needs.

Further, all EU members except Hungary signed a Declaration on Komstroy's legal consequences and a Common understanding on the non-applicability of the Ect's Art. 26 as a basis for intra-EU

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arbitration. Yet, Icsid panels were unlikely to accept these declarations as a valid interpretation or inter-se modification of the Ect, due to its inconsistencies with the Vienna Convention on the Law of Treaties (Vclt). For an agreement on a multilateral treaty's interpretation to be valid, Art. 31 Vclt requires all Contracting Parties of the treaty to be party to it. Conversely, EU states that already left the Ect cannot participate in its interpretation. Moreover, interpretation must not modify or amend the provision being interpreted, let alone cancel it altogether (Korom, Nagy 2024).

With prior blessing of the European Council, on 3 December 2024, those EU member states still party to the Ect[28] and the treaty's other parties adopted the modernised text at the Energy Charter Conference. Amendments only enter into force among Contracting Parties that have ratified them on the ninetieth day after deposit of ratification instruments by three fourths of the Parties (Art 42[4] Ect). This is also true for annex NI, which excludes the protection of certain fossil fuel-based investments in the EU, Switzerland and the United Kingdom within a defined timeframe. For EU member states, investments made in their territories before 3 September 2025 will no longer be protected ten years after the date of entry into force of modifications in Section C and no later than 31 December 2040 (Tropper 2024).

While this still takes a long time, the modernised Ect, including Section C of annex NI, will provisionally apply (as if in force and pending to it) beginning 3 September 2025 (among those Contracting Parties that do not opt out of such provisional application before 3 March 2025). This is also valid for the exclusion of intra-EU arbitration (Article 24(3) modernised Ect)[29]. True, some arbitral tribunals might be reluctant to conclude that investors lose access to intra-EU arbitration or see their protections diminished prior to the modernised Ect's actual entry into force. Yet, unlike declarations made only by EU member states, the approval by the whole Conference reflects the opinion of all Contracting Parties and thus could be understood as a subsequent agreement under Art. 31(3)(a) Vclt (Tropper 2024).

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To sum up, EU member states have adopted different legal instruments to cut their exposure to Isds arbitration initiated by fellow members' investors and return to the use of national courts with limited recourse to the Cjeu. Yet, in extra-EU corporate hubs, like the United States, the United Kingdom or Switzerland, EU based investors have still obtained enforcement of (largely Icsid) Isds awards against EU member states, thus prolonging the collision between EU law and international investment law. By the way, as a next logical step, Brauch, Mayr and Luthin (2024) suggested EU member states to end their (thousand plus) BITs in force with extra-EU partners through another plurilateral instrument. They noted that Isds tribunals constituted under these extra-EU Bits may also interpret and apply EU law, thus raising compatibility doubts. Moreover, these Bits hinder the EU's energy and climate goals, as well as its efforts to build balanced investment partnerships with third states.

COLOMBIA'S OWN ACTIONS AND REACTIONS: CASES AND TREATIES

First period: The Cerruti affair

Kingdom of Italy's subject Ernesto Cerruti, a former officer under Garibaldi, made a fortune from salt and arms business in Colombia, thanks to his close ties to Radical Liberals. After the Regenerators'[30] victory in the 1884-1885 civil war, however, his personal and corporate assets were expropriated by the Sovereign State of Cauca, which accused him of financing and supplying the rebels. The Federal Government in Bogotá censured the expropriation (decreed without prior judicial process) as illegal (Lemaitre 2003: 230). The first Italian intervention was Cerruti's *manu militari* rescue from Buenaventura aboard a corvette, breaching even Colombia's international legal sovereignty, in the sense of Krasner (2001). This incident having been settled, Colombia (already reconciled with its former Motherland) accepted Spain's mediation that culminated in an

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1888 decision announced by Minister of State Segismundo Moret[31]. The mediator found the evidence insufficient to assert that Cerruti had indeed aided the rebels and ruled that the Italian did not lose his immunity as a neutral alien. Moret, although imputing the expropriations entirely to the already defunct Caucan state, concluded that the Colombian government should return Cerruti's movable and immovable assets, and compensate him for what would not be returned (Conclusions 1888; Cavelier 1997: 259-260; Tamburini 2000: 716; Lemaitre 2003: 24).

While Caucan authorities seized Cerruti's share in the company that bore his name, they spared the share of another Italian deemed neutral. Moret rejected such distinctions among shareholders on the grounds that E. Cerruti & Co. was a Colombian company which could be liable, or not, only as a whole (Legal Consideration III 1888; Cavelier 1997: 259). This allowed Colombia's lawyer to argue that it was up to Colombian courts to award compensation for Cerruti as a shareholder. Thus, the Colombian-Italian-Spanish claim commission, set up in Bogotá, was paralysed by dispute on its jurisdiction. After years of futile negotiations, Colombia accepted to invite another arbitrator in 1894. A Colombian-Italian protocol requested United States President Grover Cleveland to decide, which of Cerruti's claims were subject to international arbitration and which belonged to Colombian courts' jurisdiction (Cavelier 1997: 264; Tamburini 2000: 718). Cleveland, however, found that all claims of Cerruti (both personal and corporate) belonged to international jurisdiction, and awarded him a lump sum compensation. Furthermore, his 1897 Award[32] obliged Colombia to assume the debts of E. Cerruti & Co. corresponding to the Italian (Cavelier 1997: 265-266; Lemaitre, 2003: 251). The Award's apparent bias was attributed to early United States aversion to the Calvo doctrine (and to the skills of the influential New York lawyers hired by Cerruti) (Lemaitre 2003; Tamburini 2000).

Faced with Colombia's reluctance to compensate the creditors, Italy sent a squadron to its waters, which threatened to bomb Cartagena. The Italian ultimatum forced the Colombian government to fully obey the Cleveland award (and to pay another advance). The Cerruti affair only ended in 1911, when a new joint commission

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quantified the compensation for the last creditor (Cavelier 1997: 265-266; Lemaitre 2003). The eclectic Fcn with Italy (which entered into force at a moment of détente beginning the Cleveland arbitration in 1894) incorporated a "non-liability clause". Art. 21(3) specified that "the Italian Government shall not hold the Colombian Government liable for any damage caused in time of insurrection or civil war to Italian nationals in the territory of Colombia by the insurgents".

Calvo (1896: Livre XV, Des devoirs mutuels des États) asserted that "a government is not liable for the harm that factions cause to foreigners". As Tamburini (2000: 712; 2002: 82) remarked, the argument that the state should reject such a liability because (if accepted) it would create inequality between foreigners and nationals, satisfied even the broadest interpretation of the Calvo doctrine. Anyway, Art. 21 did not apply to the destruction and expropriation of Cerruti's assets, since those actions were not carried out by the insurgents, but by the triumphant Caucan government and its troops. The Spanish mediator's admission that the Colombian central government bore no responsibility for the expropriation, did not mean at all absolving it from the duty to compensate.

Second period: Early Bit with Germany, Andean investment code, Supreme Court on arbitration clauses

Contract based international arbitration, as the first Icsid cases were, did not apply to Colombia, where state contracts conformed the Calvo clause. Law 110/1912 (National Fiscal Code) had stated that contracts with foreigners should be subject to Colombian law and the jurisdiction of national courts (Art. 42). This provision would govern state contracts for more than 70 years (Linares 2019: 88). Like the Latin American mainstream, Colombia avoided Icsid until the early 1990s. Nevertheless, in 1965, Colombia signed a Bit with West Germany, which provided for ad hoc tripartite arbitration at the request of one Party regarding the claims of an investor of its nationality, after

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exhaustion of the other Party's domestic legal remedies (Art. 11 and annexed Protocol par. 7).

This kind of arbitration was a state-to-state one in the sense that each contracting state would appoint an arbitrator, and the two arbitrators would choose a chair from a third state to be approved by both states (Art. 11[3]). Furthermore, the potential claimant first would have to go through Colombia's judicial process and would need the backing of Germany in order to present its claim to the arbitral tribunal. Still, this early Bit remained on paper, since the external review of domestic judicial decisions was contrary to the Calvo doctrine. Nevertheless, it showed some interest in Colombia for international arbitration in an era of Calvo's regional prevalence (Linares 2019). In the 1970s, Colombia implemented the Andean Pact's supranational investment code (Decision 24/1970) which incorporated the Calvo doctrine[33], and sought to limit foreign participation in sectors and companies.

For more than twenty years, foreign mining and energy firms had to enter joint ventures with state-owned enterprises, like Ecopetrol or Carbocol, to operate in Colombia. Carbocol was created in 1976 to develop Cerrejón (Northern Zone) partnering a subsidiary of ExxonMobil. This huge open-pit coal mine began production in 1986, leaving Carbocol heavily indebted. The Supreme Court reaffirmed in a 1976 judgment (Csj 1976)[34] that arbitration clauses in foreign loan contracts between the state and private multinationals could only refer to domestic arbitration (Linares 2019: 148). According to Salcedo (2008: par. 114), in the same decision, the Court accepted the possibility that the state might be judged by an international tribunal, but only by means of an international convention that guarantees reciprocity. Importantly, economic nationalism in Colombia was much softer than in Mexico or Venezuela, avoiding high-profile expropriations.

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Third period: Colombia, latecomer to Isds under Iias

Although not heavily indebted abroad, Colombia jumped on the neoliberal bandwagon following the United States, its senior partner. Colombia's large economic groups ceased supporting state protection and sought to renew their profits by joining the ranks of the transnational corporate elite. State-owned enterprises lost their regulatory functions, reassigned to administrative agencies (Sankey 2018).

The 2001 Mining Code (Law 685) formalised concession contracts in the sector, including a stability clause[35] attractive to (foreign) investors interested in large-scale mining. Concessions reappeared in the oil industry by the mid-2000s in modernized form. When national company Telecom's (municipal level) services became obsolete by the early 1990, the government extinguished state monopoly and auctioned radio frequencies to concessionaires. Telecom was liquidated in 2003 and replaced with ColTel (Colombia Telecomunicaciones S.A. E.S.P.) to be merged with Spanish Telefónica's Movistar subsidiary nine years later.

Colombia signed the Icsid Convention in 1993, and its membership became effective in 1997. Yet, with the exception of the Group of Three (G-3) Ic-fta, ratification of Iias was delayed until after Legislative Act 1/1999 removed from the Constitution the (remote) possibility of expropriation without compensation (Linares 2021: 60). The Constitutional Court (CC) – created by the 1991 Constitution and charged with reviewing the constitutionality of international treaties (and their enabling laws) before their entry into force – was permeated by economic neoliberalism (arguably incongruent with its guardianship of the "Estado social de derecho")[36]. Thus, the CC, invoking the Constitution's provisions on internationalization (Art. 226) and regional integration (Art. 227), declared constitutional the Icsid Convention and the G-3 (Judgments C-442/1996 and C-178/1995). Yet, the Court could not ignore Art. 58 of the Constitution which authorized expropriation without compensation on equity grounds (in cases to be determined by the legislature). Therefore, in Judgment C-358/1996, it voided Art. 6 of a Bit with

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the United Kingdom which contained the Hull formula (no expropriation without prompt, adequate and effective compensation), and did the same to similar articles of three other Bits.

Although the impasse was resolved by the 1999 constitutional amendment (Legislative Act 1/1999), the serial subscription – and gradual ratification – of Iias with major capital exporters would not resume until the second half of the 2000s (Shan 2007), when public security improved as a result of Plan Colombia[37]. Then, BITs were concluded with Spain (2005), Switzerland (2006)[38] and the United Kingdom (2010)[39], as well as the Ic-ftas with the United States and Canada: the Tpa (2006)[40] and the Fta (2008)[41]. These Iias entered into force between 2007 and 2012. Currently, Colombia has seventeen Iias (eight Bits and nine Ic-ftas) with Isds arbitration clauses in force. Yet only the above five and the G-3 turned G-2 have been invoked in actual cases filed from 2016 to present. For more than two decades, the CC applied only soft constitutionality control to Iias, without deep legal debates. This self-restrained attitude is associated by Pontón-Serra and Prieto-Ríos (2021: 185) with the CC's view of Isds arbitration as a purely commercial dispute resolution mechanism under private international law.

Restructuring by regulatory chill: Sanitas threat

As an example of regulatory chill, Van Harten (2020: 110-112) evoked how Spanish-owned health insurer Sanitas earned privileged access to the highest Colombian authorities by threatening to file an Isds claim in late 2008. Sanitas objected cuts in its profits caused by judicial orders to provide medicines and care at reduced rates or for free to people in need. The government set up a special inter-institutional process to consult with the company and put forward a "payments procedure" by the national funding agency for insurers (public and private), called Health Promoting Entities or Eps, mediating between the patients and the health service (from hospitals to pharmacies). Trade officials also hired a specialized private law firm to assess the Isds risk and help appeasing Sanitas.

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After the Sanitas threat, four ministries (foreign affairs, justice, finance, and trade) developed a national plan to manage Isds risks in 2010. The Santos government completed the system for prevention and handling of disputes with foreign investors. This was led by the Trade Ministry and the National Agency for Legal Defence of the State (Andje) and supported by an inter-institutional technical group and a high-level government body, as Trade Minister Álvarez-Correa (2016) recalled.

Colombia's successful defence against Isds claims

Colombia has defended itself successfully in Isds arbitration, with only one substantial loss among twenty-five cases from 2016 until the end of 2024. The twenty-five cases were filed by investors from the United States under the Tpa (7), from Canada (including a Chinese miner based there) under the Fta (5), from Spain (4), Switzerland (4) and the United Kingdom (3) under the respective Bits, from Mexico under the G-2, and a recent claim (Infrared Infrastructure) was lodged jointly by claimants from the United Kingdom and Spain invoking both Bits.

By sectors, more than half of the cases concerned mining and energy, while three involved telecoms, and other three finances. Twelve cases were pending, but five of them were resolved in original proceedings, although annulment or rectification procedures were still underway. Other two cases were discontinued (both by United Kingdom firms), and a frivolous claim's fate was unknown. That meant a total of fifteen cases resolved at least in original proceedings. In ten of them, panels cleared Colombia from any breach of the Iia invoked or accepted its objections to their jurisdiction. In four cases – Glencore-I, Glencore-II, South32 and Eco Oro – the second-best outcome was achieved. While Colombia was found liable in treaty-breach, investors were awarded only a fraction of the damages claimed, or even zero (Eco Oro). So, they filed for partial

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annulment or rectification of the last three awards. The single substantial compensation to the investor came in the late 2024 Telefónica Award, and here Colombia filed for annulment.

Factors explaining international investors' low harvest could have been that Colombia's legal system is well-developed, disputes concern regulatory actions (not outright expropriations), the multinationals involved are small to medium, except Glencore and América Móvil, and their investments are not too large either, except the huge Cerrejón open-pit coal mine, where Glencore remained the sole concessionaire since 2022, with contracts until 2034. The chill induced internal restructuring operated by the Santos government, while benefitted foreign investors, also might have contributed to subsequent successful Isds defence. Yet, a major part of the merit corresponded to Andje's motivated team that quickly learnt and attracted some of the best arbitrators and counsels.

Contradictory awards related to Santurbán Páramo mining ban

The September 2021 Decision in Eco Oro held Colombia liable in breaching the Fet standard contained in the Fta's Mst clause and thus limited to customary Mst (Art. 805). As Dumberry (2024) noted, this Decision was an outlier in Isds arbitral case-law on Mst-tied Fet (contained in Nafta-style reformed Ic-ftas). This kind of Fet sets the threshold of gravity (for establishing a breach) higher than the standalone Fet typical of European Bits and Ceta.

Nevertheless, the Eco Oro panel's majority, where the chair sided with investor-appointed arbitrator Horacio Grigera, cited evolution of the custom to conclude that Colombia failed to provide Eco Oro a stable business environment, acted arbitrarily toward it, and frustrated its legitimate expectations (Decision 2021; Sands 2021)[42]. That majority found that Colombia – having granted Concession 3452 knowing that it overlapped with the Páramo that it was supposed to protect (Decision par. 776) – continued to give the Canadian miner incentives related to its project and held it up as an example for other firms, only to frustrate its legitimate expectations with its "arbitrary

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vacillation and inaction" on the Páramo's delimitation (par. 821) and with its "near total failure to resolve the competing demands of relevant interests" between royalties and environment (par. 816). After quoting Eco Oro's complaint that it was set on a "regulatory roller coaster" (par. 791), that same majority held that Colombia's conduct amounted to "manifest arbitrariness" for having "inflicted damage to Eco Oro without serving any apparent purpose" (par. 820). It also considered that Colombia's mining exclusion measures on Santurbán Páramo meant a substantial deprivation of Eco Oro's rights to explore and potentially exploit its gold mining concession.

Yet, the panel's other majority, with Colombian-appointed arbitrator Philippe Sands, determined that these measures did not constitute indirect expropriation (Ie), since they were adopted and applied in legitimate exercise of Colombia's police powers under the Fta's Annex 811(2)(b) [43]. They were neither discriminatory nor disproportionate, pursued the objective of protecting the environment, and were taken in good faith, far from falling under the "rare circumstances" cited in that paragraph.

In contrast, the February 2024 Award in Red Eagle, where the chair mostly sided with Sands who repeated as Colombian-appointed arbitrator, reads very much like the latter's dissenting opinion in Eco Oro (Sands 2021). No wonder that it fitted perfectly the orthodox majority of the arbitral case-law on Mst-tied Fet. Thus, the Red Eagle majority reminded that the Fta's Parties, Colombia and Canada, saw the Fet as part of an Mst that cannot be widened through the Mfn clause (Award pars. 298-299). As it noted, Red Eagle did not provide sufficient evidence (in terms of state practice or opinio juris) for the proposition that legitimate expectations, which form part of the Fet in other Iias, might fall within customary Mst (par. 293). Nor could the Canadian miner prove a quasi-contractual commitment where the Colombian state deliberately induced its investment (par. 294)[44]. Far from shocking juridical propriety, this majority did not consider Colombia's conduct even close to arbitrary in its search for balance under competing pressures (par. 309).

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As Heath (2021) described, the (Santos) government was debating among several stakeholders: local and national officials, traditional miners, and clean water defenders backed by city dwellers in protest marches. The dispute spanned all branches of power, including different courts and administrative agencies. In this complex political rebalancing, all investors – domestic and foreign – received mixed signals on the long-term viability of their projects. The majority questioned that Red Eagle had ever acquired the right to engage in mining activities in the Páramo area as a matter of domestic law[45] (recognised as the applicable law to determine the existence of vested rights, rather than international law). Thus, the company's Ie claim failed at the first hurdle (par. 399).

The June 2024 Montauk (ex-Galway Gold) Award – although within the majority view on Fta-tied Fet – sought more balance or even some base for consensus, with Brigitte Stern as arbitrator appointed by Colombia. This panel recognised that Colombia "did not act without fault" in determining the Páramo mining exclusion zones (noting inconsistent action among power branches and delays), but did not find that such conduct amounted to a breach of the Fta's Fet, understood as a minimum standard of international law (par. 937).

The arbitral tribunal also rejected Galway's argument that a change in the CC's position constituted manifest arbitrariness. While in Judgment C-366/2011, the Court had considered the transition regime (which conceded a gradual exit for pre-existent mining activities on Páramos) as compatible with environmental protection, just five years later, in Judgment C-035/2016, it cancelled that regime and ordered a total ban under the precautionary principle. Yet, the panel simply observed that judicial bodies across the globe are widely recognised to lead the way in adapting the law to society's evolving values (pars. 811-812). The tribunal acknowledged that some panels (as in Mobil or Bilcon v. Canada) concluded that customary Mst included protection of investor's legitimate expectations but pointed to the lack of state practice and opinio juris to support such conclusions. It noted that Galway had no legitimate expectations that Colombia would not protect the

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Páramos and concluded that the Mst-tied Fet (with higher gravity threshold than the standalone Fet) was not breached by Colombia whose acts could not be qualified as manifestly arbitrary, grossly unfair or inherently unjust (par. 940).

Galway Gold had only an option contract to acquire the exploitation rights of traditional miner Reina de Oro covered by the transition regime. Galway tried to exercise the option with a view to develop a large-scale project, but did not complete the transfer after Resolution 2090/14 showed a 78.2% overlap of the concession area with Santurbán Páramo. If this overlap deeply reduced the value of Galway's option, Judgment C-035/16 wiped it out altogether (by cancelling Reina de Oro's exploitation right).

Curiously, the Montauk panel agreed with the (much criticised) conclusion of the Eco Oro tribunal that the general environmental exception contained in the Fta's Art. 2201(3) – even if applicable[46] – would not prevent covered investors from claiming compensation under Chapter Eight (Investment). The Red Eagle panel abstained from taking a position on this issue, as its majority found no breach of any primary obligation of that Chapter. The Montauk tribunal did not find Colombian non-compliance either, but decided to clarify its position, perhaps for the sake of balance. By having discarded Ie in its 2021 Decision, the Eco Oro panel had recognized the measures that most affected the Canadian miner's project – from Resolution 2090/14, that first delimited the Páramo, to Resolution Vsc 829, that cut more than half of Concession 3452 by implementing the Judgment C-035/16 – as legitimate exercise of Colombia's police powers. Thus, it had to exclude these lawful deprivations from any damages caused by the Mst-Fet breach (Award pars. 299-302).

The arbitral tribunal identified only one loss of Eco Oro arising from that breach, namely the loss of the opportunity to apply for an environmental license to exploit the part of the original Concession that would remain outside the Páramo after its final delimitation (par. 303). Eco Oro renounced the Concession in 2019, after the National Mining Agency refused to extend its deadline to present a new Works Plan, while Colombia gave itself extensions to re-delimit the Páramo.

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Nevertheless, Eco Oro could not provide guidance regarding the value of this lost opportunity, and the panel could not calculate it either, since there was no indication regarding the final delimitation, nor the authorities' willingness to grant environmental license. Therefore, the majority with Sands concluded in mid-2024 that the only proper approach was to award no damages to Eco Oro, even accepting that Colombia might benefit from its own failure to issue a final delimitation (pars. 316-317).

Recent BITs with Spain and Venezuela

By 2019, the CC – having noticed the widespread criticisms of Iias and seen how several of its judgments (in support of the Estado social de derecho) motivated Isds claims – opted for stricter constitutionality control of new Iias. Therefore, it analysed in depth the clauses of a Bit with France[47] and an Ic-fta with Israel[48], using arbitral awards as auxiliary criteria. Pontón-Serra and Prieto-Ríos (2021: 185) associated this thorough analysis with the Court's acceptance of Isds arbitration as a "decentralized exercise of global public authority" that involves the review of state measures and regulations adopted in exercising sovereignty (Urueña, Prada-Uribe 2019). As a result of its analysis, the CC tied both Iia's entry into force to additional clarifications. The Court implied that several provisions of the two Iias – such as the (standalone) Fet and related legitimate expectations in the French Bit – were open to interpretations contrary to the Constitution, and made ratification contingent on the signing of joint interpretative declarations with both governments that clarified those provisions (C-252/19; Pontón-Serra, Prieto-Ríos 2021: 165).

The September 2021 Bit with Spain and its Joint Interpretative Declaration (both signed at the highest political level) abound in clarifications on a standalone Fet, already included in Art. 2(3) of the 2005 Bit currently in force, but without any reference to legitimate expectations. The Joint Declaration specifies manifest arbitrariness – listed among Fet-breaches in Art. 7(2)(c) of the new Bit

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– as "a total or unjustified repudiation of a law or regulation, or a measure without reason, or a conduct specifically directed at the investor or his/her covered investment for the purpose of inflicting harm" (Decl. par. 2[ii]). As for legitimate expectations, the Declaration suggests arbitral tribunals to consider, when applying Fet, "whether a Party had specifically approached an investor to induce him to make a covered investment, creating reasonable and objective expectations on which the investor relied when deciding to make or maintain a covered investment, and subsequently frustrated those expectations" (par. 3).

Like Ceta, the Spanish Bit omits general exceptions[49]. Instead, the Parties "mutually recognize their right to regulate within their territories by reasonable measures to achieve legitimate public policy objectives", including human rights, health, natural resources, the environment, and many others (Art. 14[1]). The Parties also announce that their Bit's provisions on Isds arbitration will cease to apply upon the entry into force of an international agreement establishing a multilateral investment court and/or a multilateral appellate mechanism (Art. 38). This reads as Colombian support for the EU's project to replace arbitration panels in Isds adjudication with a Multilateral investment court (with full-time, salaried judges appointed by states).

Lifshitz and Shatalova (2023: 44) cautioned that such a Court would create a parallel dispute resolution system alongside Isds arbitration which would continue to exist because the EU's initiative did not enjoy prevalent support. Heath (2022), on the other hand, warned that the Court (even if it attracts universal membership) will not fix the basic trouble with Isds, namely, that a specific class of investors would still be entitled to bring claims against states in international tribunals and obtain monetary damages for breaches of special protections under international law. After the clarifications-rich Spanish Bit and Interpretative Declaration, the Petro government presented its early 2023 Bit with Venezuela to the Colombian Senate as a departure from current Iias' complex standards "difficult to interpret and apply, or simply inconvenient" (Bill 2023: 11; Rueda, Salazar 2023: 34). This heterodox Bit reminds the 1892

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eclectic Fcn with Italy and also evokes the (positive) language of the 1974 UN Charter of Economic Rights and its constant references to (host) states' domestic legal order. Thus, Art. 7 provides that "investments made by the supplying (home) Party's investors may be expropriated or nationalized by the receiving (host) Party", if the requirements of public interest/utility, due process, fair compensation and non-discrimination (under the latter's domestic legal system) are met (par. a).

The Bit provides for national treatment by specifying that it "shall not result in unjustified more favourable treatment of foreign investors over domestic investors" (Art. 6.a). Thus, this treaty also adopts the apparent Calvo equivalence (rendered innocuous by the insertion of the adjective "unjustified"), formulated by the CC in Judgment C-252/2019 and already included in the Joint Interpretative Declarations with France and Spain. Art. 7(c) states that non-discriminatory measures to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute expropriation – a clear and limited carve-out almost identical to the Fta's Annex 811(2)(b) which worked in Eco Oro. Note also that this Bit contains neither backup standards (Mst, Fet, Fsp) that might be breached, nor Mfn to import them from other treaties.

Although the Bit comprises general exceptions (without calling them so, and without any Fta-like application requisite) for many public policies[50], these would not necessarily help avoiding compensation payments, as the Eco Oro Decision and the Montauk Award suggested. In dispute settlement, the Bit offers claimant investors a fork-in-the-road choice between the host Party's domestic courts and ad hoc Isds panels under 1976 Uncitral Rules (Art. 12). Thus, the Maduro government concluded Venezuela's first Bit with an Isds arbitration clause that omits Icsid, abandoned in 2012. Opinions on the Bit were twofold. To some, it offered so few substantive protections that potential claims from investors had little to no prospect of success. To others, Colombia and Venezuela, while governed by the left, still saw value in Bits and the Isds system (Rueda, Salazar 2023: 36).

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Resistance to chill: Sanitas intervened

The Petro government has been less afraid of regulatory chill than its predecessors, as illustrated by a recent intervention in Spanish owned Eps Sanitas. After the Senate shelved a reform bill that would have transformed the role of (all) the Eps, the Health Superintendence replaced the executive boards of Sanitas and other insurers for one year to redress their deficiencies and thus prevent their dissolution (Lizarazo 2024)[51]. Dissolution was the fate of another Spanish owned Colombian firm, Electricaribe, after its intervention by another superintendence had been justified in a 2021 Isds award (Naturgy Case, Icsid Unct/18/1). While the intervention's results were still unclear, it was hard to imagine the government restoring Sanitas-owner Keralty's rights.

Thus, the Keralty Group notified the Trade ministry about the dispute in April 2024 and, after a six months' consultation period, served notice of its intent to submit the dispute to Isds arbitration. That allowed for an early 2025 claim at Icsid or under Uncitral rules (Spanish Bit Art. 10[2,3,4]). Reportedly, Keralty would allege Ie and a Fet-breach. The latter meant impeding the management, maintenance, use, enjoyment and sale of its investments by arbitrary or discriminatory measures (Art. 2[3]).

Telefónica: Colombia's first major Isds-loss – as opposed to América Móvil

In November 2024, an Icsid panel awarded Telefónica nearly USD 380 million in damages (plus interests) for Colombia's breaching the same standalone Fet clause (Art. 2[3]) of the same Bit[52]. By analysing the Fet-claim in the first place, the tribunal concluded that Colombia frustrated Telefónica's legitimate expectations (that reversion on termination of mobile telephony concession contracts would be limited to radio frequencies) by changing the legal framework just after it had made large investments and contracts were about to end (Telefónica Award pars. 439, 441, 443).

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Following a tender in 1993, Colombia's Communications Ministry (MinCom) – later renamed Information and Communication Technology Ministry (MinTic) – signed contracts with six original concessionaires in 1994. True, on termination, they were required not only to return the radio frequencies assigned (spectrum) but also transfer "the elements and goods directly affected [to the concession]" to the ministry's ownership, with no compensation from its part (Clause 33).

Yet, four years later, Law 422/1998 (Art. 4) and then Law 1341/2009 (Art. 68[4]) stipulated that reversion in telecom service concession contracts would only mean returning the spectrum to the state, as an incentive for operators to modernise. For 15 years, public and private stakeholders understood this legal clarification as amending all existing contracts. Based on this general conviction, Telefónica, in 2004, acquired Bellsouth Colombia that integrated three original concessionaires[53], and converted it into Movistar (Telefónica Colombia). Then, in 2012, it merged Movistar into ColTel. As a result, the state's share in ColTel sank to 32.5% and Telefónica's rose to 67,5%. Colombia's behaviour, however, began to change drastically with the CC's Judgment C-555/2013, published in full only in early 2014. While the Court recognised the constitutionality of Laws 422 and 1341, it discarded as unconstitutional any interpretation that these laws might have amended the (stricter) reversion clauses agreed upon in concession contracts signed before their entry into force (C-555/13: 77).

The arbitral tribunal found that Judgment C-555 enshrined a non-equal (differential) treatment between two categories of operators: namely between those compelled to transfer unamortised assets to the state or pay equivalent compensation (that is, buy them back) in order to continue in the market, and new concessionaires that faced no such requirement, since they entered the market with Laws 422 and 1341 already in force. This division made dissenting judge Luis Guerrero save his vote (Award pars. 423, 425). Note that the first operator-category included only ColTel and Comcel, controlled by Telefónica and América Móvil, respectively (Award par. 333). The latter took control of Comcel (Comunicación Celular

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S.A.), one of the other three original concessionaires, in 2002. Then Comcel absorbed the other two[54] in 2004.

The Telefónica panel also observed that the CC (in its judgment) and Colombia (in the proceedings) assumed incorrectly that the operator could ab initio determine the assets to be provided for the entire (twenty years) concession period (pars. 430-431). After two years of talks on the concession contracts' liquidation, MinTic initiated a domestic arbitration in early 2016, demanding ColTel and Comcel to transfer all assets bound into mobile telephony networks, although contract clause 33 was not clear to this respect. Yet, a Colombian panel determined in a 2017 Domestic Award that the contracts indeed required transfer of all those assets to the state, and quantified damages should the two companies fail to do so. ColTel was ordered to pay USD 530 million, with 360 million (67,5%) falling to Telefónica.

According to Telefónica, during talks on the compensation payment, Colombian authorities tried to leverage ColTel's economic and legal troubles for pressuring the parent company to waive its right to file a claim in Isds fora (Telefónica Award pars. 256(vi), 450). The Icsid tribunal regarded this linkage as an example of unreasonable (meaning arbitrary) and discriminatory behaviour (pars. 449-450). It also viewed Colombia's conduct regarding Telefónica's investments as incoherent and contradictory (par. 447) as well as disproportionate due to the sudden and unpredictable suppression of one of the regulatory framework characteristics (par. 454).

To sum up, the Icsid panel's key findings were: The "clarifying effect" of Laws 422 and 1341, limiting reversion to the spectrum, was a fundamental part of the regulatory framework for 15 years (pars. 440-441). Thus, Telefónica expected legitimately that this legal clarification would apply to it, despite clause 33. Yet, its expectations were frustrated by the framework's drastic alteration due to Judgment C-555 and the order to transfer all assets to the state although not fully amortised (pars. 441-442).

Unlike Telefónica, América Móvil failed to recover via Isds arbitration the USD one billon that it had payed through Comcel (now Claro) to comply with the Domestic Award. While the facts

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of the two cases were almost the same, the treaties differed markedly. Under the Colombian-Mexican Fta (originally G-3), América Móvil could only claim expropriation (Art. 17-08), but no Fet-breach. The latter claim had to be abandoned, since a Colombian reservation impeded applying the treaty's Mfn clause (Art. 17-03[2]) to telecom issues (América Móvil Award par. 93).

The Icsid additional facility panel found by majority that no "right to non-reversion" existed in the Colombian legal system, so that it could not be expropriated (Award par. 487). The panel viewed Judgment C-555 and the Domestic Award as irreproachable (par. 486), and América Móvil's theories based on international law (including legitimate expectations) as insufficient to prove the existence of such a right (par. 488). Thus, it concluded that the asset-transfer to the state did not constitute unlawful expropriation (under Art. 17-08) (par. 490).

CONCLUSIONS: COMPARISONS ACROSS AND WITHIN PERIODS

Sovereign consent to international arbitration

Italy's naval interventions breached Colombia's sovereignty, both Westphalian and international legal in Krasner's (2001) sense. The second intervention also showed the irrelevance of adding Calvo type provisions to Mst geared ones in Fcns. Colombia's consents to the Spanish government's mediation and especially to United States President Cleveland's arbitration meant voluntary transfers of Westphalian sovereignty to foreign powers by exercising international legal sovereignty. Yet, both consents were circumscribed in specific Colombian-Italian protocols. Most clearly in the 1894 Castellammare protocol, Colombia consented a specific foreign head of state (Cleveland) to arbitrate in its dispute with a specific foreign investor (Cerruti).

In the 1965 Bit with Germany, Colombia agreed in advance to ad hoc international arbitration over claims of all covered German

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investors, but only under three conditions: the potential claimant should have first exhausted Colombian legal remedies, would need the backing (request) of Germany, and the three arbitrators would be appointed by agreement between the two contracting states. Each state would appoint an arbitrator, and the two would choose a chair from a third state.

In Iias with partner states that include the largest capital exporters, Colombia has consented in advance to be sued directly by all of their covered investors. The potential claimant might be known only three to nine months before filing the arbitration request, when the specific investor initiates consultations with the host government, usually by sending it a notice of dispute or intent, as required by the different Iias. When the request is filed, the arbitration agreement is perfected by the investor's acceptance of Colombia's permanent offer. The investor appoints one arbitrator, Colombia another, and the two choose a chair.

Thus, under its Iias which are part of public international law, capital importer Colombia transfers sovereign competences to a private transnational adjudication system or, more specifically, to non-state actors, such as foreign investors and arbitrators.

From Calvo to Isds: apex courts' views on arbitration

Colombia implemented the Calvo doctrine by Law 110/1912, that required state contracts with foreigners be subject to Colombian law and national courts' jurisdiction. In a 1976 judgment, the Supreme Court reaffirmed that arbitration clauses in foreign loan contracts between the state and private multinationals could only refer to domestic arbitration (although, in principle, it accepted that international arbitration might be viable, but only by means of an international convention) (Csj 1976; Linares 2019; Salcedo 2008).

The CC (created by the 1991 liberal Constitution and tasked with reviewing the constitutionality of international treaties before their entry into force) applied only soft control to Iias – except, or in spite of, an early ratification impasse that led not to modifying

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the treaties' arbitration clauses, but to amending the constitution. This self-restrained attitude was associated with the Court's view of Isds arbitration as a purely commercial dispute resolution mechanism under private international law (Pontón-Serra, Prieto-Ríos 2021).

By 2019, the CC opted for stricter constitutionality control of new Iias, based on thorough analysis of their clauses and the use of arbitral awards as auxiliary criteria. This was associated with the Court's acceptance of Isds arbitration as a decentralised exercise of global public authority that involves the review of state measures adopted in exercising sovereignty. The Court's stricter Iia control and the tying of two ratifications to joint interpretative declarations were a far cry from the Eucj's stab into Isds arbitration in intra-EU context (Pontón-Serra, Prieto-Ríos 2021; Urueña, Prada-Uribe 2019).

Contradictory Santurbán decisions

The Eco Oro Decision interpreted the Fta's Fet (despite its Mst-linkage) broadly, comprising stability and legitimate expectations, and rated Colombia's conduct as arbitrary. The Red Eagle Award understood the Fet narrowly, as limited to traditional customary Mst, and found Colombia's actions far from arbitrary. While the former interpretation was an outlier in arbitral case-law on Mst-tied Fet, the latter fitted perfectly the mainstream. The Montauk Award, although within the mainstream, tried to strike some balance by addressing emerging elements of the custom, but avoiding any excess in assessing arbitrariness.

If consensus was to emerge from the contradictory Santurbán decisions, following Stern's (2020) dialectics, it might be that Colombia's conduct had not transgressed the Mst-tied Fet's higher non-compliance threshold. That would require the Red Eagle and Montauk Awards to overcome the Eco Oro Mst-Fet breach Decision. Yet, the latter was not invalidated neither by the two contrasting awards, nor by the Eco Oro panel's own zero compensation award and its concepts could become undisputed components of

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the custom through state practice sometime in the future. Moreover, on the facts, the Eco Oro case differed significantly from the other two.

Arbitrariness apart, Eco Oro was much more affected by Colombia's extractivist-environmentalist debates than Red Eagle or Galway. Eco Oro's project was twice declared of national strategic importance, and it was praised President Santos and his ministers. Still, its environmental impact study was rejected for failing to consider the pending Páramo exclusion zones. Red Eagle and Galway also planned large scale projects, but they did not even try to submit an environmental study.

Lessons learnt, Aris Mining – formerly known as Gran Colombia Gold, by now 51% holder and operator of a gold-silver project in Soto Norte province, just outside the Páramo's 2014 traced limits – started a smaller scale project which involves formalizing traditional miners into contract partners. Comprising only six municipalities where Aris Mining is sure to find majority support, Soto Norte was decoupled administratively ten years ago from Bucaramanga where opposition is strong.

Prudently, in late 2024, the Petro government unveiled a Temporary Reserve Area for renewable natural resources on Santurbán's Southern side to guarantee drinking water supply for 1,3 million inhabitants of Bucaramanga and its metropolitan area. For two years from early 2025, authorities would protect biodiversity and promote sustainable management in this larger territory, while they might leave final decisions to the next government.

Telefónica Award

The Telefónica Award complicated overcoming Isds arbitration contradictions by adding a standalone Fet breach to the Mst-tied one established in Eco Oro. This widening of the Fet scope made consensus more elusive. The Telefónica panel resolved the case, dormant over three years, rather easily (with Horacio Grigera as investor-appointed arbitrator). By applying the current Spanish

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Bit's Fet to the facts in the first place, it quickly established the breach that made analysis of IE also invoked unnecessary. Legitimate expectations – not even mentioned in the 2005 Bit applied but amply elucidated in the 2021 Bit/Interpretative Declaration – have been central in the Telefónica Award. Signed but not ratified, the Bit/Declaration might have helped Telefónica's cause more than hindered.

The Icsid tribunal found that the clarifying effect of Laws 422 and 1341 (limiting reversion to the spectrum) was part and parcel of the regulatory framework. Thus, Telefónica expected legitimately that this legal clarification would apply to it, but saw its expectations frustrated by the framework's drastic alteration due to Judgment C-555 and the domestic panel's order to transfer all assets to the state or pay equivalent compensation. Furthermore, the Icsid panel regarded Colombia's measures concerning Telefónica and its investments as at times unreasonable, discriminatory, contradictory and disproportionate. By equating arbitrary to unreasonable, it avoided deeper discussion of the former, which is the term that figures in Bit Art. 2(3) invoked. More importantly, the Telefónica Award revised the CC's Judgment and the Domestic Award, as opposed to the América Móvil Award that respected both. While the facts were almost the same, América Móvil could not claim Fet-breach (only expropriation) under the Mexican-Colombian Ic-fta. Colombia filed for the Telefónica Award's annulment, claiming that the Icsid panel seriously broke fundamental rules of procedure.

Seeking to adjust Iias' arbitration clauses

The Petro government strived for a leading role on biodiversity, decarbonisation and green energy. It ditched fracking, stopped issuing oil exploration licences, listened to environmental activists, and appointed some to public office. It also hosted a Conference of UN Biodiversity Convention Parties. Amid constant personnel changes in the administration's upper echelons, Andje's Isds staff saw only one key change when its director was relieved in early

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2024 after seven years with 99% success rate that she described as a cycle. While there was talk about addressing Isds during Tpa revision with the United States, and about renegotiating the Swiss and then the British Bit, priorities laid elsewhere. Yet, the substantial Telefónica loss induced the government to seek adjustment of arbitration clauses in Iias. The Trade Ministry reproached the Icsid panel having disregarded the Domestic Award and held that any litigation on reversion should have been settled at one single forum. This reasoning left a fork-in-the-road choice between domestic tribunals and Isds arbitration as a logical solution, but it would be resisted by multinationals combining both ways in their strategies.

NOTES

[1] For lack of space, other counter-currents, such as United Nations institutions work on Isds reform or growing civil society calls to abolish Isds altogether, are not addressed here. Neither are intersections of Colombia's Isds cases with human rights.

[2] Treaty of Friendship, Commerce and Navigation between the Republic of Colombia and the Kingdom of Italy, signed Bogota 27 October 1892, ratified Bogota 10 August 1894.

[3] Bits are officially called Reciprocal investment promotion and protection agreements.

[4] Treaty between the Federal Republic of Germany and the Republic of Colombia on the Promotion and Reciprocal Protection of Capital Investments, Bundesgesetzblatt, 20, Vol. II, 12 May 1967, p. 1552.

[5] High-altitude wetland, essential for the water cycle.

[6] Agreement between the Republic of Colombia and the Kingdom of Spain for the Promotion and Reciprocal Protection of Investments and Joint Interpretative Declaration (on the same Agreement), both signed on 16 September 2021.

[7] Agreement between the Bolivarian Republic of Venezuela and the Republic of Colombia on the Promotion and Reciprocal Protection of Investments, signed on February 3, 2023.

[8] Decision on jurisdiction, liability and directions on quantum in Eco Oro v. Colombia, Icsid ARB/16/41, 9 September 2021.

[9] Free Trade Agreement between Canada and the Republic of Colombia, signed 21 November 2008, in force 15 August 2011.

[10] Award in Montauk Metals Inc. (formerly known as Galway Gold Inc.) v. Colombia (Icisd ARB/18/13), 7 June 2024.

[11] Award in Red Eagle Exploration Limited v. Colombia (Icsid ARB/18/12), 28 February 2024.

[12] Award on Damages in Eco Oro v. Colombia, Icsid ARB/16/41, 15 July 2024.

[13] Laudo (Award) en el procedimiento de arbitraje entre Telefónica S.A. Demandante y República de Colombia. Demandada, Caso Ciadi No. ARB/18/3, 12 de noviembre de 2024.

[14] Agreement between the Kingdom of Spain and the Republic of Colombia for the Promotion and Reciprocal Protection of Investments (in force since 2007).

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[15] Laudo en el procedimiento de arbitraje entre América Móvil S.A.B. de C.V., Demandante, y República de Colombia, Demandada, Caso Ciadi No. ARB(AF)/16/5, enviado a las Partes: 7 de mayo de 2021 (Icsid Additional Facility, Award on Spanish).

[16] Free Trade Agreement between the Governments of the United Mexican States, the Republic of Colombia and the Republic of Venezuela. Bolivarian Venezuela withdrew in 2006, and after a five year sunset period expired, an Amending Protocol entered into force in 2011, changing the pact's name to Free Trade Agreement between the United Mexican States and the Republic of Colombia.

[17] "[Each State has the right:] To nationalise, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations… In any case where the question of compensation gives rise to controversy, it shall be settled under the domestic law of the nationalising State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States".

[18] The former was hit by the debt crisis (which undermined import-substitution industrialization), and the latter disintegrated.

[19] Geopolitically, the United States enjoyed a "unipolar" moment after the Soviet collapse. Its corporations, followed by German and other European multinationals, offshored production (and jobs) to emerging markets in the former Soviet bloc, Asia and particularly China, which grew spectacularly. East European countries joined Nato and the EU, and China acceded to the Wto as a "responsible stakeholder".

[20] According to Icsid's procedural rules, in case of disagreement, the third arbitrator to preside the panel may be appointed by the Chair of the Administrative Council (i.e. the Chair of the World Bank) on request by either party forwarded through the Secretary General (Arbitration Rule 4).

[21] Convention on Recognition and Enforcement of Foreign Arbitral Awards. Adopted for commercial arbitration awards, the Convention was extended to Isds by first-generation Iias.

[22] The concepts of Fet and Fps "do not require treatment in addition to or beyond that required by the minimum standard of treatment of aliens under customary international law" (Fta, Art. 805 [1]).

[23] United States unipolar moment gave way to multi-polarity by 2017, with China emerging as a peer competitor, and Russia restoring great power status (John Mearsheimer quoted by Jiggens 2023).

[24] Sanctioned for invading Ukraine, Russia saw most of its energy ties to Europe severed, and both sides lost much capital in a multi-sphere decoupling worse than the Cold War one.

[25] Court of Justice of the EU, Grand Chamber: Judgment in Case C-284/16, Slovak Republic v. Achmea B.V., 6 March 2018. ECLI:EU:C: 2018:158.

[26] According to Article 47(3) of the (old) Ect, all the investments covered by the Treaty at the time a withdrawal takes effect, will continue enjoying protection for 20 years.

[27] Namely, the Netherlands, Slovenia, Spain and, more recently, Denmark, Ireland and Portugal. Italy withdrew from the Ect in 2015.

[28] All except the above four that left.

[29] For greater certainty, Art. 26 [the arbitration clause, and others] shall not apply among Contracting Parties that are members of the same Reio [Regional Economic Integration Organisation] in their mutual relations.

[30] Centralist Independent Liberals backed by Conservatives.

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[31] Mediation of the Government of the King of Spain in the Cerruti affair (1886-1888). Facts, Considerations of Law, and Conclusions issued by the Minister of State of His Catholic Majesty Segismundo Moret, Madrid, 26 January 1888, in Documents relating to the Arbitration of the Cerruti Claim, published by the Minister of Foreign Affairs of the Republic of Colombia, 1889, pp. 23-35 (Bogotá: Casa Editorial de J. J. Pérez).

[32] Award of the President of the United States, under the protocol concluded the 18th day of August, in the year 1894, between the Government of the Kingdom of Italy and the Government of the Republic of Colombia. (Award done: 2 March 1897) https://history.state.gov/historicaldocuments/frus1898/d176.

[33] The Parties would not accord more favourable treatment to foreign investors than to domestic investors (Art. 50), nor would they allow any clauses that would remove potential investment disputes from their national jurisdictions (Art. 51).

[34] Supreme Court of Justice, judgment of August 26, 1976, on contested parts of Article 115 of Extraordinary Decree 150 of 1976.

[35] As stated in Art. 46, the mining laws in force at the time of concession contracts conclusion should apply to them until termination (including extensions), and subsequent amendments should apply insofar as they improve concessionaires prerogatives, except modifications in favour of the state. Note that this stability clause referred only to mining laws, but not environmental regulations.

[36] Social state based on the rule of law.

[37] A massive United States-Colombian effort to combat guerrillas and drug traffickers (2000-2015).

[38] Agreement between the Republic of Colombia and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments (in force since 2009).

[39] Bilateral Agreement for the Promotion and Protection of Investments between the Government of the United Kingdom of Great Britain and Northern Ireland and Republic of Colombia (in force since 2014).

[40] In force since 2012.

[41] In force since 2011.

[42] Ph. Sands (9 September 2021), Partial Dissent in Eco Oro (Decision, last annex).

[43] Annex 811(2)(b) states: "Except in rare circumstances, such as when a measure or series of measures is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted in good faith, non-discriminatory measures by a Party that are designed and applied to protect legitimate public welfare objectives, for example health, safety and the protection of the environment, do not constitute indirect expropriation".

[44] Only such a firm and specific commitment could have supported its reasonable expectations and, in the event of their frustration, a breach of Mst.

[45] Following the doctrine of the CC, a right is only "acquired" (vested) when all the requirements for its exercise have been met. In this case, a Work Plan should have been approved and an environmental licence granted (for a large-scale project).

[46] General exceptions in the Fta, including the environmental one, only apply when a breach of a primary obligation is established. Another requirement is that the host state's measures be "necessary" for achieving the objective (protecting the environment).

[47] Agreement between the Government of the Republic of Colombia and the Government of the French Republic on the Reciprocal Promotion and Protection of Investments, in force since October 2020.

[48] Free Trade Agreement between the Republic of Colombia and the State of Israel, in force since August 2020.

[49] Except one related to national security.

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[50] They include human, animal, and environmental protection (Art. 5[a]), essential security interests (Art. 5[b]), and prudential measures in the financial sector (Art. 5[c]), and must not be applied in an arbitrary or unfair manner, nor constitute a disguised restriction on investments of the partner Party's investors (Art. 5, last page).

[51] The Superintendent later said that the intervention was to prevent a financial collapse that would affect the rights of its 5.7 million users, since Sanitas failed to comply with enabling financial requirements.

[52] Investments made by investors of a Contracting Party in the territory of the other Contracting Party shall be treated fairly and equitably and shall enjoy full protection and security, without in any way impeding, by arbitrary or discriminatory measures, the management, maintenance, use, enjoyment and sale or liquidation of such investments (Art. 2[3]).

[53] Cocelco, Celumóvil and Celumóvil de la Costa.

[54] Occel y Celcaribe.

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