WHAT COLOMBIAN CASES CAN SAY ABOUT THE CURRENT POSITION OF SOME LATIN AMERICAN COUNTRIES TOWARDS INVESTMENT LAW AND ARBITRATION

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ABSTRACT

This Note examines the historical evolution of the investor state dispute settlement (ISDS) law in Latin America as the context for analyzing a range of innovative practices of various countries in the region in response to perceived imbalances in the application and effect of the ISDS law on national sovereignty. This Note develops a typology of three main trends among the innovations and responses by groups of countries in the region to ISDS law. The Note also analyzes some key decisions of the Colombian Constitutional Court as particularly illuminating of the ways in which one large group of Latin American countries has reconciled their concerns for national sovereignty and regulatory autonomy with the evolving body of treaty-based and customary law of investor protections at the international level.

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I. INTRODUCTION

The role of Latin American countries in investment arbitration has undergone a considerable transformation over the last 30 years. When the World Bank proposed the creation of the International Center for Settlement of Investment Disputes (ICSID) as a center specialized in investor-state dispute settlement (ISDS) during the 1960s,[1] all Latin American countries expressed their opposition in a statement that was referred to as the "No of Tokyo."[2] At that time, the region's practice was centered on the application of the "Calvo Doctrine," formulated by the Argentinian jurist Carlos Calvo.[3] The basis of this doctrine was the

1. *See* Taylor St. John, *Enriching Law with Political History: A Case Study on the Creation of the ICSID Convention*, *in* INTERNATIONAL INVESTMENT LAW AND HISTORY 286, 305 (Stephan W. Schill, Christian J. Tams & Rainer Hofmann, eds., 2018). The creation of a specialized center for the resolution of foreign investment disputes overlaps with the fact that during that period some states, particularly in Latin America, were overcoming the use of import substitution industrialization (ISI) during the 1950s, when States imposed protectionist measures on local production. When States subsequently migrated to a more "complex" or difficult method of production, the presence of foreign enterprises was inevitably required. The direct consequence was that a state's participation in its own economic development was marginalized by external participation from foreign companies. Even though foreign direct investment (FDI) increased, domestic growth did not. This motivated States to nationalize some industries and worried many investors, mainly from the United States, who saw the World Bank as an institution to resolve these kinds of disputes. *See* Maria Antonia Correa Serrano, *Foreign Direct Investment and Development in the Pacific Alliance*, *in* INTERNATIONAL INVESTMENT LAW IN LATIN AMERICA 437, 439–43 (Attila Tanzi et al. eds., 2016).

2. *See* Katia Fach Gómez, *Latin America and ICSID: David versus Goliath?*, 17 L. & BUS. REV. AMERICAS 195, 195 (2011); Mara Valenti, *New Trends in International Investment Law Treaty Practice: Where Does Latin America Stand?*, 39 SEQÜÊNCIA 9, 10 (2018). During the Washington Convention negotiation that created the International Center for the Settlement of Investments Disputes (ICSID), Latin American countries strongly opposed the center's creation. The countries' opposition to the World Bank proposal was expressed in the meeting on September 9, 1964, in which all Latin American countries, the Philippines and Iraq, refused to confer special rights on investors and expressed concern about waiving requirements for exhaustion of local remedies. Rodrigo Polanco Lazo, *The No of Tokyo Revisited: Or How Developed Countries Learned to Start Worrying and Love the Calvo Doctrine*, 30 ICSID REV. 172, 182 (2015).

3. Polanco Lazo, *supra* note 2, at 176.

principle of non-intervention in the internal affairs of a state and the respect of its sovereignty.[4]

Due to the indiscriminate use of diplomatic protection by the states of origin, Latin American countries reacted by limiting the rights of foreigners to the same treatment given to nationals.[5] The Calvo clause was incorporated into all types of contracts with foreign investors, requiring that any dispute arising from such agreements be resolved by local courts, excluding the possibility of direct access to international dispute resolution mechanisms[6] until and after local remedies had been exhausted.[7]

While this practice was in use in Latin America, international investment law was developing the minimum standard of treatment[8] recognized under customary international law.[9] These standards included areas related to expropriation and compensation, the rules of bilateral treaties of Friendship Commerce and Navigation (FCN), the prohibition on the use of force to claim payments of severing debts (Drago-Porter Convention), and a body of jurisprudence from mixed commissions and tribunals.[10] Today, investment law and arbitration are considered as self-contained regimes that require particular expertise and understanding of the evolution of each of the standard of protection granted by contracting states through international agreements. In addition to that, the dispute resolution mechanism designed to address disputes between investors and states has gained more demand in forums such as ICSID.

Recent ICSID statistics show that Latin American countries have become one of the main users of this dispute resolution mechanism. Proof of this is that currently 28% of the disputes administered by ICSID have a Latin American country as a respondent in the international proceedings.[11] We can trace some reasons for the change in the

4. *See* Gómez, *supra* note 2, at 195–96; Valenti, *supra* note 2, at 10.

5. Carlos Bellei Tagle, *Arbitraje de Inversiones en América Latina: de la hostilidad a la búsqueda de nuevas alternativas*, *in* INTERNATIONAL INVESTMENT LAW IN LATIN AMERICA 98, 101–02 (Attila Tanzi et al. eds., 2016).

6. *Id.* at 102.

7. *Id.*

8. Polanco Lazo, *supra* note 2, at 175.

9. Joost Pauwelyn, *Rational Design or Accidental Evolution? The Emergence of International Investment Law*, *in* THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW 11, 21 (Zachary Douglas, Joost Pauwelyn & Jorge E. Viñuales eds., 2014).

10. *Id.* at 22.

11. International Center for Settlement of Investment Disputes [ICSID], *The ICSID Caseload - Statistics: Issue 2021-2*, at 12 (June 30, 2021), https://icsid.worldbank.org/sites/default/files/publications/The_ICSID_Caseload_Statistics_2022-2_ENG.pdf.

valuation of an international adjudication system to the economic crisis of the 1980s, described by some authors as the "lost decade" due to the fall in economic growth in Latin America.[12] As Correa points out, there was a contraction in growth due to the fall in oil prices and, consequently, a reduction in lending by international banks.[13] As a result, international institutions pushed for the adoption of an international framework capable of ensuring the return of foreign capital. Therefore, the idea that international liberalization helped to improve economic development, as well as the notion that international agreements were the best legal instruments to pave the path towards investor's protection over its investment, were implanted for the upcoming years.[14]

Thus, Latin American states abandoned their opposition to the creation of an international center for the administration of investment disputes and opted to sign the Washington Convention. The move towards open economies began during the 1990s when most of the countries in the region, guided by neoliberal theories of economic growth,[15] committed themselves to economic liberalization,[16] signed the ICSID Convention,[17] various Bilateral Investment Treaties (BITs), and investment chapters contained in Free Trade Agreements (FTAs).

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12. Serrano, *supra* note 1, at 453.

13. *Id.*

14. *See* Polanco Lazo, *supra* note 2, at 182–83.

15. *See generally* Muthucumaraswamy Sornarajah, *Disintegration and Change in the International Law on Foreign Investment*, 23 J. INT'L ECON. L. 413 (2020). The international law of foreign investment has evolved rapidly in the last three decades, along with the rise of neoliberalism. As Sornarajah describes "the rise of market capitalism that accompanied the emergence of the USA as the single hegemonic power upon the dissolution of the Soviet Union in 1989 saw international law being shaped to promote rules based on neoliberalism preferences for the liberalization of the flows of trade and investment." *Id.* at 414. Under neoliberal theory, foreign investment is necessary for the economic growth of these countries because they lack the capital investment that foreign companies can provide. For example, «in Latin America, the importance of foreign capital increased from the 1960s, with the implementation of secondary ISI, until the 1980s, when the debt crisis virtually halted such inflows . . . ." JAMES M. CYPHER & JAMES L. DIETZ, THE PROCESS OF ECONOMIC DEVELOPMENT 484 (Routledge 3d ed. 2009).

16. The structural transformation includes not only accepting an international framework for the resolution of investment disputes but limitation of the power of state in other areas, which is what is happening in the system where the States are being sued for having adopted regulatory measures in key economic sectors such as oil, gas and electricity. The adoption of ICSID reduced the number of local courts and opened the door to corporations bringing direct claims against the state. This produced a huge transformation in the system that motivated the exponential increase of ISDS claims and the popularity of ICSID.

17. International Center for Settlement of Investment Disputes [ICSID], *List of ICSID Contracting States* (June 9, 2020), https://icsid.worldbank.org/sites/default/files/ICSID-3.pdf.

The above-mentioned context led one to see Latin American countries' position towards investor-state arbitration as a "parabola,"[18] starting with a strong rejection of ISDS in the 1960s to an open view in favor of international adjudication in the 1990s. The openness to an international adjudicative system declined after legal battles in international tribunals. As a consequence of unexpected results and compensatory damages to be paid to foreign investors, some Latin American countries decided to rescind their consent to the ICSID Convention and to adopt substantial reforms in their policy to attract foreign investment, which also included their approach to economic growth.[19] At present, it is difficult to identify a unique position of Latin American countries as a region towards investor-state dispute settlement, or to identify an alignment of interest of the countries in the region in the current ISDS reform processes as it seemed to be during the Calvo era.[20]

This dissatisfaction with the investor-state dispute settlement is not limited to Latin American countries. It also includes other countries that feel that ISDS needs to rebalance its approach to investment adjudication.[21] Some of the criticisms refer to the broad discretionary power of arbitrators to order states to pay compensation to investors, the lack of consistency, coherence, predictability or correctness of arbitral decisions by ISDS tribunals, the interpretation of the applicable rules perceived as favorable to investors, and the limitations of the regulatory power of the state.[22] The traditional private law paradigm, according to which investment law is driven by private and commercial law, has been challenged because it does not include additional factors that are essential in a comprehensive analysis of a dispute between a private investor and the state in large-scale projects over natural resources.[23]

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18. *See, e.g.*, Valenti, *supra* note 2, at 10–12.

19. As Fach indicates in her paper, "the financial crisis in Argentina and the nationalizations in Latin America carried out by what are generally regarded as leftist populist governments have resulted in a large number of claims being brought before ICSID, which have resulted in substantial condemnatory awards in a good number of cases." Katia Fach Gómez, *Foreign Direct Investment in Latin America*, *in* RESEARCH HANDBOOK ON FOREIGN DIRECT INVESTMENT 494, 497 (Markus Krajewski & Rhea T. Hoffmann eds., Edward Elgar Publishing 2018).

20. Gómez, *supra* note 2, at 225–29.

21. Crina Baltag, *Reforming the ISDS System: In Search of a Balanced Approach?*, 12 CONTEMP. ASIA ARB. J. 279, 288–89 (2019).

22. *See* United Nations Committee on International Trade Law [UNCITRAL], *Possible reform of investor-State dispute settlement (ISDS)*, ¶¶ 9–13 A/CN.9/WG.III/WP.149 (Sept. 5, 2018), https://documents-dds-ny.un.org/doc/UNDOC/LTD/V18/064/96/PDF/V1806496.pdf?OpenElement.

23. *See* Juan Camilo Fandiño-Bravo, *The Role of Constitutional Courts in International Investment Law and Investment Treaty Arbitration: A Latin American Perspective*, 18 MAX PLANCK Y.B. U.N. L.

The reform process is underway in two of the main venues for investment law. On the one hand, the ICSID Secretariat began the Rule Amendment Process in 2017 and is pursuing a final package for the approval of member states in 2022,[24] whereas the United Nations Commission on International Trade Law (UNCITRAL) has appointed a Working Group to collect proposals on substantive reforms including the creation of a permanent court of arbitration and an appellate mechanism, among other issues.[25]

These considerations are evidence that ISDS is undergoing a process of "disintegration,"[26] and Latin American cases may serve as examples to illustrate some of the criticisms raised against the current ISDS mechanisms. Consequently, academics and practitioners are concerned about the future of investment law and arbitration in Latin America and have raised comments about the possibility of a "resurgence" of the application of the Calvo Doctrine.[27] The recent reaction of some states to World Bank facilities and the complaints around arbitrators' decisions ordering excessive awards to investors create indications that Latin American states may be seeking a return to the Calvo

ONLINE 669, 675–77 (2014); *see also* René Urueña & María Angélica Prada-Uribe, *El Arbitraje de Inversión Como Autoridad Pública Global*, *in* DEBATES CONTEMPORÁNEOS DE DERECHO INTERNACIONAL ECONÓMICO: UNA MIRADA DESDE COLOMBIA 493, 503–05 (René Urueña & Enrique Prieto-Ríos eds., 2020).

24. *See* International Center for Settlement of Investment Disputes [ICSID], *Proposals for Amendment of the ICSID Rules* (August 2, 2018), https://icsid.worldbank.org/resources/rules-amendments; International Center for Settlement of Investment Disputes [ICSID], *ICSID Rules and Regulations Amendment* (July 1, 2022), https://icsid.worldbank.org/sites/default/files/publications/WP1_Amendments_Vol_3_WP-updated-9.17.18.pdf.

25. *See generally* United Nations Committee on International Trade Law [UNCITRAL], Possible reform of investor-State dispute settlement (ISDS), ¶¶ 9–13 A/CN.9/WG.III/WP.149 (Sept. 5, 2018), https://documents-dds-ny.un.org/doc/UNDOC/LTD/V18/064/96/PDF/V1806496.pdf?OpenElement.

26. Muthucumaraswamy Sornarajah defines "disintegration" as the process by which states are reshaping the actual system of investment law through the creation of new norms to overcome the fragmentation of international law. *See* Sornarajah, *supra* note 15, at 413. Those new norms include human rights obligations, environmental law and climate change. *Id.* at 419. He argues, among other things, that for a successful reform process, there must be a hierarchy between investment law and human rights or norms of public order that allow arbitration to reach fair results in their decisions. *See id.* at 419, 427–28.

27. *See* Valenti, *supra* note 2, at 12; *see generally* Wenhua Shan, *From North-South Divide to Private-Public Debate: Revival of the Calvo Doctrine and the Changing Landscape in International Investment Law,* 27 NW. J. INT'L L. & BUS. 631 (2007) (explaining how the "calvo clause" in Latin America is re-entering the discussion of investment disputes due to the increase of cases against Latin American countries. Along with the increase in investor claims, states have sought ways to limit the power of investment law and arbitration by using past and seemingly abandoned practices in the region by returning to the notions such as the exhaustion of local remedies).

era.[28] The discussion of a resurgence of the Calvo Doctrine becomes relevant in the current context of the Covid-19 pandemic and justifies the need to explore how states are rethinking their foreign investment attraction policy for the recovery period. In this context, this note will provide elements to discussion on whether states in Latin American are willing to return to the application of a practice similar to the Calvo doctrine, and to identify the trends that will shape the future of investment law and arbitration for the upcoming recovering period.

To this end, Part II identifies the reaction of states towards the ICSID mechanisms and classifies them into three categories: (i) those states that entered into the system but eventually withdrew from the ICSID Convention, (ii) states that never ratified the ICSID mechanism and instead developed their own model for dispute resolution (the Brazilian case), and (iii) those intermediate cases where states have accepted the ICSID facilities but, at the same time, are rethinking their approach to ISDS.

Part III delves into the experience of Colombia as a clear example of the third category of countries that side with ISDS but still consider that the system requires adjustments to ensure its legitimacy. The Colombian case has shown enriching experiences in investor-state arbitration with the recent decision from the constitutional courts, the variety of cases being brought to international investment tribunals, and the institutional reform it has taken due to a public policy for litigation of these matters. It has brought to the jurisprudence, case law, and practitioners new elements from policymaking concerns and institutional challenges that are worth mentioning in the analysis of the region's position and tension towards international adjudication in investment disputes. In part IV, this note will cover the recent notifications of intentions to arbitrate arising out of some measures taken by the states in Latin America to overcome the effects of the pandemic in the provision of public services and in other sectors.

II. The Reaction of States in Latin American Countries Towards ISDS

During the last decade, some Latin American states such as Ecuador, Bolivia, and Venezuela have shown a strong reaction to ISDS due to lengthy litigation processes in international tribunals that has resulted, for the most part, in the declaration of international responsibility of

28. As Fach indicates there is "inconclusive research [suggesting] that the vast majority of Latin American states are still loyal to ICSID and therefore their BITs continue to reference this international institution as a possible option for investors willing to submit their disputes to a non-national organization." Gómez, *supra* note 2, at 213.

the state and the condemnation to pay compensation to private investors. These states have withdrawn their consent to the ICSID Convention and have appealed to an alternative regional dispute resolution mechanism. Countries like Ecuador,[29] Venezuela,[30] and Bolivia[31] are included in the first category of countries rejecting the ICSID dispute resolution mechanism.

The second category of countries, represented by Brazil, has never consented to ICSID's dispute resolution facilities, but have designed their model to attract FDI.[32] This option represents an alternative to the traditional approach to agreeing to international adjudication as the standard for investment protection. This Note decides to include in the second category those countries that have opted for enhanced reliance on local institutions and alternative guarantees to foreign investors other than direct recourse to international tribunals.

The third category of countries continues to view ISDS and ICSID facilities as legitimate and trustworthy for promoting and attracting foreign investment.[33] However, they are not oblivious to the current institutional criticisms and challenges defending government actions in international litigation. As a result, states in this category have found themselves rethinking their approaches to respond to international demands and preserve a coherent policy for attracting foreign investment.[34] In this scenario, states such as Colombia, Peru and Chile are creating specialized agencies for the defense of investment disputes

29. The Republic of Ecuador signed the ICSID Convention on January 15, 1986. The agreement was enforceable on February 14, 1986. On July 6, 2009, Ecuador notified its intention to withdraw its consent which took effect on January 7, 2010. *See* Cythina U. Kassis & Christopher M. Ryan, *Ecuador Rejoins ICSID: Implications for Investors*, Shearman & Sterling (July 19, 2021), https://www.shearman.com/Perspectives/2021/07/Ecuador-Rejoins-ICSID-Implications-for-Investors.

30. The Bolivarian Republic of Venezuela signed the Convention on August 18, 1993, and ratified it on May 2, 1995. On January 24, 2012, Venezuela notified its decision to withdraw its consent to the Convention which took effect on July 25, 2012. *See* Julio César Betancourt, *Why Should Venezuela Re-Join the ICSID Convention?*, 2 ANUARIO VENEZOLANO DE ARBITRAJE NACIONAL E INT'L, 353, 356 (2021).

31. The Republic of Bolivia signed the Convention on May 3, 1999, and ratified it June 23, 1995. Bolivia notified its decision to withdraw its consent on May 2, 2007, and it became effective on November 3, 2007. *See* Katia Fach Gómez, *Latin America and ICSID: David Versus Goliath*, 17 L. & BUS. REV. OF THE AMERICAS, 195, 209–10 (2011).

32. Geraldo Vidigal & Beatriz Stevens, *Brazil¨s New Model of Dispute Settlement for Investment: Return to the Past or Alternative for the Future?*, 19 J. WORLD INV. & TRADE 475, 485–86 (2018).

33. *See, e.g.*, Valeria Moreno & Guillermo Madrigal, *Investment Arbitration in Chile, Colombia and Peru: Where Are We and Where We Are Going?*, KLUWER ARB. BLOG (Apr. 14, 2021), http://arbitrationblog.kluwerarbitration.com/2021/04/14/investment-arbitration-in-chile-colombia-mexico-and-peru-where-are-we-and-where-are-we-going/.

34. *Id.*

and, at the same time, becoming involved in discussions around future reform in international fora through their submission of position papers to ongoing reform processes.[35] In the following part, this Note will describe the characteristics and current status of each category of approaches adopted by Latin American states towards ISDS.

A. *The First Category: Disapproval of the ICSID Dispute Resolution Mechanism*

The countries that embody the ALBA Alliance "Bolivarian Alternative for the Americas" (Bolivia, Ecuador, Venezuela, Cuba, Nicaragua, and others) decided to denounce the ICSID Convention, claiming that the system was not transparent, ordered unreasonable compensations, and entailed high administrative costs.[36] In 2007, Bolivia denounced ISDS as a biased system that promoted a "pro-business" resolution of disputes[37] and committed to the nationalization of the hydrocarbon sectors, followed by a constitutional reform between 2008 and 2009.

The reform stipulated, among other things, that disputes arising from investment claims will be subject to national jurisdiction and, therefore, established a four-year statute of limitations for the state to renegotiate and denounce all those international agreements that contradicted the new constitution.[38] Likewise, Venezuela denounced that ICSID represented a detriment to its sovereignty, alleging that this mechanism contradicted the Venezuelan Constitution, which excluded the solution of foreign disputes in contracts of public interest.[39]

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35. *Id.*

36. José Manuel Álvarez Zárate & Rebecca Pendleton, *The International Rule of Law in Latin American Investment Arbitration: UNASUR's Advances in Arbitrator Appointment and Disqualification*, 17 J. WORLD INV. & TRADE 681, 682–86 (2016); *see* Fach Gómez, *supra* note 31, at 209.

37. Rodrigo Polanco Lazo, *Two Worlds Apart: The Changing Features of International Investment Agreements in Latin America*, *in* INTERNATIONAL INVESTMENT LAW IN LATIN AMERICA 68, 76 (Attila Tanzi et al. eds., 2016).

38. "The international treaties existing prior to the Constitution, which do not contradict it, shall be maintained in the internal legal order with the rank of law. Within the period of four years after the election of the new Executive Organ, the Executive shall renounce and, in that case, renegotiate the international treaties that may be contrary to the Constitution." Plurinational State of Bolivia [Constitution] 2009, at 90, https://www.constituteproject.org/constitution/Bolivia_2009.pdf.

39. Polcano Lazo, *supra* note 37, at 77.

Ecuador's case is particularly relevant for having received one of the more excessive sanctions ever imposed by an ICSID arbitral tribunal.[40] Ecuador's withdrawal from the ICSID Convention took effect on January 7, 2010.[41] However, the state made a drastic change in its position by signing the ICSID Convention for the second time in June 2021. Following doubts about the need for parliamentary approval, the country's Constitutional Court confirmed that the ICSID convention did not fall within any grounds requiring a ratification process.[42]

In addition to the state-led withdrawal initiative, the creation of a regional center to resolve investment disputes within the "Union of South American Nations" (UNASUR) and MERCOSUR has also been discussed.[43] These endeavors represent an ambitious project for a regional system that is not limited to investor-state arbitration, but also state-to-state arbitration, advisory jurisdiction, facilitation and promotion of alternative dispute resolution, and an appeal mechanism.[44] There is skepticism about this proposal due to concerns related to the weakening of international standards in favor of regional ones and the degree of acceptance of these regional mechanisms considering that

40. *See* Ximena Fuentes & Johanna Klein Kranenberg, *Annulment Proceedings in Cases Involving Latin American Countries*, *in* INTERNATIONAL INVESTMENT LAW IN LATIN AMERICA 229, 240 (Attila Tanzi et al. eds., 2016); Occidental Petroleum Corp. v. Republic of Ecuador ICSID Case No. ARB/06/11, Award, ¶ 876 (Oct. 5, 2012), https://www.italaw.com/sites/default/files/case-documents/italaw1094.pdf, the Tribunal rendered an award for US$1,769,625,000.

41. *See* Tagle, *supra* note 5, at 121.

42. In particular, the concern about ratification involved Article 419 of Ecuador¨s Constitution adopted in 2008 following a number of ISDS cases against this country and which contains the limitation on particular issues that require parliamentary approval. In addition to that, Article 422 provided the "[t]reaties or international instruments where the Ecuadorian State yields its sovereign jurisdiction to international arbitration entities in disputes involving contracts or trade between the State and natural persons or legal entities cannot be entered into." Nevertheless, the Constitutional Court reached the decision that no parliamentary approval was required. Lisa Bohmer, *Ecuador's Constitutional Court Finds That Ratification of the ICSID Convention Does Not Require Parliamentary Approval; Dissenters Emphasize Constitutional Prohibition Against the Conclusion of ISDS Treaties*, INV. ARB. REP. (July 01, 2021), https://www.iareporter.com/articles/ecuadors-constitutional-court-finds-that-ratification-of-the-icsid-convention-does-not-require-parliamentary-approval-dissenters-emphasize-constitutional-prohibition-against-the-conclusion-o/.

43. Kathia Fach Gómez & Catharine Titi, *International Investment Law and ISDS: Mapping Contemporary Latin America*, 17 J. World Inv. & Trade 515, 518 (2016); Fach Gómez, *supra* note 31, at 223–25.

44. Polcano Lazo, *supra* note 37, at 78–79; Katia Fach Gómez & Catharine Titi, *UNASUR Centre for the Settlement of Investment Disputes: Comments on the Draft Constitutive Agreement, Investment Treaty News*, IISD (Aug. 10, 2016), https://www.iisd.org/itn/en/2016/08/10/unasur-centre-for-the-settlement-of-investment-disputes-comments-on-the-draft-constitutive-agreement-katia-fach-gomez-catharine-titi/.

states have mixed interest in keeping the relationship with the World Bank institutions.[45] The recovery period will be an opportunity to revive this regional approach to ISDS.

B. *Second Category: Promoting Alternative Approaches Within National Facilities*

Brazil represents this category as a country that has not granted its consent to ICSID facilities in depth, yet this factor has not been a limitation for its economy to receive a massive flow of foreign direct investment.[46] In 2015, Brazil signed the Cooperation and Facilitation Investment Agreements (CFIAs), which allowed it to engage in the conclusion of investment treaties without submitting dispute resolution to an international tribunal.[47] The Brazilian Model emphasized a preventive approach to disputes, increased the dissemination of information between the parties, and enhanced amicable solutions to disputes.[48] The Model is based on dispute prevention, emphasizing planning to minimize the risks of international disputes,[49] and representing an alternative model of investment treaty, which aims to rebalance the set of rights and obligations between states and investors.[50] Brazil's approach to ICSID facilities includes the option to activate the Additional Facility mechanism provided by ICSID for non-signatory Parties to the Convention.[51]

There are many reasons for Brazil's rejection of ISDS. Brazil has always been reluctant to agree to arbitration when the state or one of its organs is involved. However, Brazil considers that by granting such treatment to foreigners, it is agreeing to more favorable treatment to the detriment of its nationals,[52] an approach closely related to the initial formulation of the Calvo doctrine. Brazil has also considered that the signing of such agreements could raise questions of

45. *See* Fatch & Titi, *supra* note 44.

46. *See* Gómez, *supra* note 2, at 218; Valenti, *supra* note 2, at 17.

47. *See* Sufyan Droubi, *Investment Facilitation Mechanisms and Access to Justice in Brazilian Investment Agreements*, Am. Soc'y Int'l L. (May 6,2020), https://www.asil.org/insights/volume/24/issue/9/investment-facilitation-mechanisms-and-access-justice-brazilian.

48. *See id.*

49. *See* Titi, *supra* note 43, at 522–24 for further explanation of the model.

50. Vidigal & Stevens, *supra* note 32, at 477.

51. Tagle, *supra* note 5, at 113–15; s*ee also* Vidigal & Stevens, *supra* note 32, at 486–87 (indicating that Brazil has traditionally been reluctant to use ISDS but that reluctance has not been an obstacle as it is one of the strongest economies in the region. Rather, its FDI flow has increased recently. The Brazilian model for dispute resolution is strengthening dispute prevention and state-to-state arbitration).

52. Tagle, *supra* note 5, at 114.

constitutionality that run counter to the Brazilian rule that any dispute relating to the interests of the state is reserved for the ultimate decision of domestic courts.[53]

Among the novelties of this model are the inclusion of substantive obligations for investors and the additional requirement that dispute settlement be initiated by the investor's home state.[54] The latter feature has been considered an obstacle of the Brazilian model for investors seeking direct access to international tribunals.[55] However, the development of this particular model should not be seen as a limitation to evaluating alternatives approaches to investment litigation with Latin American countries. A subsequent evaluation of the outcome and degree of acceptance will depend mainly on subsequent practice, and the recovery scenario plus the current reform system seem to be a good platform for its exploitation.

C. *Third Category: Playing Within the Rules*

The third category of countries is illustrated by those who have not chosen to take radical decisions to terminate any of their international investment agreements, but continue to consider the promotion of ISDS as part of their policy to attract foreign investment. These countries have taken what has been described as an "intrasystem" and "normative strategy"[56] approach through their active participation in the international discussions on ISDS reforms. This third category is represented by countries such as Chile, Colombia, Mexico, Peru, Argentina, Ecuador, and Costa Rica.[57] Their position is more of adaptation within the system rather than of strong opposition or rejection.

The case of Mexico is also paradigmatic because it was only recently that it decided to ratify the ICSID Convention on July 27, 2018, which entered into force on August 26, 2018.[58] Since then, Mexico has seven pending cases registered under the ICSID Arbitration Rules and has actively participated in the rule amendment process.[59]

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53. *Id.*

54. Vidigal & Stevens, *supra* note 32, at 487.

55. *Id.* at 507.

56. Polcano Lazo, *supra* note 37, at 97.

57. *See, e.g.*, Moreno & Madrigal, *supra* note 33; *see also* Rodrigo Polanco Lazo, *Systems of Legal Defense Used by Latin American Countries in Investment Disputes*, J. WORLD INV. & TRADE, 17 562, 566–87 (2016).

58. Press Release, Mexico Ratifies the ICSID Convention, ICSID (July 27, 2018), https://icsid.worldbank.org/news-and-events/news-releases/mexico-ratifies-icsid-convention.

59. *Archive of Mexico's Pending Cases under ICSID Arbitration Rules*, ICISD, https://icsid.worldbank.org/cases/case-database (last visited Sept. 12, 2022).

The Argentinean cases are particularly relevant for the region because Argentina was an early entrant in the litigation of investment disputes and has since gained experience in investor-state arbitration in the early 2000s in comparison with other states such as Colombia, which began receiving complaints in early 2016.[60] These cases were derived from the context of the economic and political crisis between 1999 and 2002, when the government decided to limit the right to withdraw deposits from bank accounts. To avoid the collapse of the economy, it ordered the devaluation of the peso, thereby affecting its convertibility.[61] As a consequence, the investments of many investors in concession contracts for the provision of public services, for example, were affected by the devaluation of the currency and the expectation of recovery and profits.[62] The Argentinian experiences with ISDS have provided the region and investment law tribunals with decisions dealing with the "state of necessity" defense under public international law in an economic crisis, which becomes relevant in a post-pandemic context.[63] The cases have also shed light on the possibility of including counterclaims based on investors' breaches of human rights obligations.[64]

Argentina has dealt with 62 cases related to ISDS between 1997 and 2019.[65] Its interventions in the ICSID reform process have expressed concerns about the rules and the ICSID procedures. For example, it has vehemently opposed third-party funding but would accept it in case all negotiators involved decide to move forward, in which case it must be regulated and strictly limited. It also has advocated for stricter

60. *See* Gómez, *supra* note 2, at 197–98. At that time, Argentina granted licenses for the operation of public services which provided for a calculation of user's rates in U.S. dollars which were converted to Argentinian pesos at the time of invoicing and adjusted every six months according to the U.S. producer price index. As a result of the economic crisis during 2001 the rates stopped being updated, and Argentina enacted a series of regulations that devalued the convertibility of the Argentinian peso. *Id.* at 198. For the assertion about Colombia, see Nicolás Palau van Hissenhoven, *El Derecho Internacional de Las Inversiones*, 45, 73–74 in DEBATES CONTEMPORÁNEOS DE DERECHO INTERNACIONAL ECONÓMICO: UNA MIRADA DESDE COLOMBIA (Enrique Prieto-Ríos & René Urueña eds, 2020).

61. Fuentes & Klein Kranenberg, *supra* note 40, at 235.

62. *Id.*

63. *Id.* at 234.

64. *See* Stefanny Justinico, *Los Inversionistas Extranjeros Podrían Responder por Violaciones de Derechos Humanos Mediante una Demanda de Reconvención en Arbitraje de Inversión.*, 5 REV. LATINOAMERICANA DE DERECHO COMERCIAL INTERNACIONAL 51, 54 (2017).

65. Investment Dispute Settlement Navigator Search Results for Argentina, INV. POL'Y HUB (Dec. 31, 2021), https://investmentpolicy.unctad.org/investment-dispute-settlement/country/8/argentina.

scrutiny tests to review the request for arbitration to include the ownership structure where an investor is a legal person during the registration phase.[66] However, this active participation does not indicate an intention to withdraw its consent to the Convention.

Peru also has developed a specialized agency for the administration and defense of the state before ISDS tribunals.[67] Its policy for the attraction of foreign investment includes the provision of dispute settlement for investor-state arbitration. Since 2003, when the country started to receive complaints from foreign investors, it sought to design a strategy to respond effectively to those international allegations. Peru's Coordination and Response System for International Investment Disputes represents efforts to centralize information related to foreign investment issues and alert the different state bodies to potential areas where investment claims could arise.[68]

Chile reports seven cases in ISDS starting in 1998.[69] Although this country has few cases, it has engaged in the modernization and specialization of its institutions in order to prevent future disputes. Alongside promoting FDI, it has enhanced its institutional capacity by creating the "Investment Arbitration Defense Program" (*Programa de Defensa de Arbitrajes de Inversion Extranjera*),[70] which coordinates the defense of the state in international tribunals and is in charge of formulating the state's position to the proposed reform of ISDS in UNCITRAL and ICSID.[71]

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66. International Center for Settlement of Investment Disputes [ICSID], *Comments by the Argentine Republic on Proposals for Amendment of the ICSID Rules in Working Paper #4,* at 3–5 (July 31, 2020), https://icsid.worldbank.org/sites/default/files/amendments/state-input/2020-07-31-Argentina%20Working%20Paper%20%234.pdf [hereinafter *Argentina Comments Working Paper #4*].

67. *See* Ricardo Ampuero Llerena, *Penís State Coordination and Response System for International Investment Disputes*, INT'L INST. FOR SUSTAINABLE DEV. (Jan.14, 2013), https://www.iisd.org/itn/en/2013/01/14/perus-state-coordination-and-response-system-for-international-investment-disputes/.

68. *Id.*

69. Investment Dispute Settlement Navigator Search Results for Chile, United Nations Conf. on Trade & Dev. INV. POL'Y HUB (Dec. 31, 2021), https://investmentpolicy.unctad.org/investment-dispute-settlement/country/41/chile.

70. *See* Francisco Sepúlveda Burgos, *La Defensa del Estado de Chile en Arbitrajes de Inversión*, ESTADO DIARIO (July 1, 2020), https://estadodiario.com/al-aire/la-defensa-del-estado-de-chile-en-arbitrajes-de-inversion/.

71. *See id.*; *see, e.g.*, International Center for Settlement of Investment Disputes [ICSID], *Proyecto de Enmiendas a las Regalas y Reglamentos del CIADI Comentarios de la Republica de Chile al Documento de Trabajo No. 4* (July 2020), https://icsid.worldbank.org/sites/default/files/amendments/state-input/REPUBLICA%20DE%20CHILE%20-%20Comentarios%20WP4.pdf.

The second part of this Note will focus on the Colombian case, which will be given a special analysis due to its particularities as a country that has only recently been introduced to the practice of ISDS, but which has already contributed relevant discussions due to the state's institutional mechanisms to respond to investment complaints.

III. An Overview of Colombia and ISDS

This part of the research will focus on the case of Colombia with ISDS, which has provided in the Latin American context good examples of struggles between the international adjudication and new actors such as constitutional courts in the decision of promoting FDI. As expressed in Section I, the third category of countries leads the position that change can be made within the established regulatory system, and part of this change may come from the process of ratifying IIAs that require the approval of constitutional courts. In terms of concern about the lack of inclusion of other actors and other human rights obligations of investors, comes the reaction of constitutional bodies seeking to publicize the impact of foreign investment in other areas of public relevance by seeking to address discomfort with ISDS adjudication.

With a remarkable decision from the Constitutional Court from Colombia, this organ raised the standard to evaluate IIAs in the ratification process. This decision is relevant for the region as a way to control the content of IIAs at the very outset and before international obligations related to investors enter into force for the state.

The significance of this decision for Colombia and the region is that other actors that were not considered in the negotiation of IIAs are now trying to take part in the discussion of which protection should the state grant to foreign investors. As Titi points out, this decision of the Constitutional Court in Colombia is part of a set of four decisions from Ecuador and the European Union that are modifying the traditional process of negotiation of IIAs, and which goes to the point of new trends from states in a post-pandemic scenario.[72] The Colombian case represents a case study of countries where the negotiation and conclusion of IIAs goes hand in hand with the rethinking of investment standards and the defense of its interests in the suits brought by foreign investors.

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72. Catharine Titi, *Control constitucional y derecho internacional de las inversiones a través de cuatro sentencias constitucionales en Colombia, Ecuador, y la Unión Europea* [Constitutional Review and International Investment Law in Light of Four Constitutional Decisions in Columbia, Ecuador and the European Union], Rev. Latinoamericana de Derecho Internacional, Número especial, https://papers.ssrn.com/sol3/papers/cfm?abstract_id=3569510 (forthcoming) (manuscript at 1–3).

A. *Enhancing the Model for the Conclusion of IIAs*

Among the main features of the Colombian Model is the establishment of a narrow definition of "investment" and "investor" by providing elements such as the intention to maintain a long-term presence in the host state and the explicit assumption of risk from the investor.[73]

During 1998-2002, Colombia enhanced its policy for the attraction of foreign direct investment favoring the "internationalization of the economy, focused on increasing exports and attracting FDI."[74] The country has been promoting the flow of investment by signing BITs containing dispositions of dispute settlement mechanisms. Since then, the country has signed 20 BITs[75] and 22 Treaties with Investment Provisions (TIPs).[76] It had also engaged in the defense before investment tribunals with its first ISDS case in 2015.[77] Now Colombia has a list of 14 pending cases and one pending annulment procedure.

Faced with its new cases, in 2017, Colombia updated its IIA Model, reflecting the sophistication of previous models that sought to balance investment protection and the state's regulatory power.[78] Although this Model does not bind the disputes that arose prior to the amendment, future agreements and the renegotiation of current ones might be influenced by this new approach to ISDS. Among the main features of the Model is the establishment of a narrow definition of "investment" and "investor" by providing elements such as the intention to maintain a long-term presence in the host state and the explicit assumption of risk from the investor.[79]

The denial of benefits section includes the possibility of denying the protection of an investment if it is demonstrated that the investor violated the domestic law, or that the investment is involved in "serious" violations of human rights, environmental damage, acts of corruption

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73. Kabir AN Duggal et al., *Colombiás 2017 Model IIA: Something Old, Something New, Something Borrowed*, 34 ICSID REV. 224, 227 (2019).

74. Serrano, *supra* note 1, at 456; *see generally* United Nations Conf. on Trade & Dev., Investment Dispute Settlement Navigator Search Results for Colombia, INV. POL'Y HUB. (Oct. 7, 2021) https://investmentpolicy.unctad.org/international-investment-agreements/countries/45/colombia [hereinafter Colombia Int'l Inv. Agreements].

75. Colombia Int'l Inv. Agreements, *supra* note 74 (listing seventeen in force and five signed and, as of yet, not in force).

76. *See id.*

77. S*ee* Duggal et al., *supra* note 73, at 226.

78. *Id.* at 224. Previous iterations of models include ones in 2003, 2006, 2009, and 2011. *Id.* at 225–26.

79. *Id.* at 227.

or money-laundering activity.[80] The Model also reaffirms in its preamble "[t]he right of each Contracting Party to regulate the investment made in its Territory to protect legitimate public welfare objectives such as human rights, health, public order, and safety labour [sic] rights and environment."[81] It includes references to the discretionary power to develop public policies when establishing that the mere fact that a measure might impact the economic value of an investment does not automatically amount to an expropriator measure.[82] The Model also provides that tribunals should verify that the claim is not frivolous or lacks merits.[83]

In the same year, the state issued a decree granting specific functions to the National Agency for the Legal Defense (*Agencia Nacional de Defensa Juridica del Estado*) to represent the state and coordinate the institutions to respond to the international claims that had been filed with the ISDS.[84] The Agency is also involved in the reform process and has expressed concerns about sensitive issues related to the cost of the proceedings, third-party funding, frivolous claims, and others.[85]

As evidenced, Colombia has followed a practice of the third category of countries with the adoption of specialized bodies within the state to coordinate and centralized the response to international claims related to foreign investment. It has also undertaken the modernization of its BIT Model, including a refined version of the definitions for investment protection as demonstrated by case law and experience in other cases. At this point, it is worth saying that Colombia has drawn on the

80. *Id.* at 230. The wording of the model suggests that the violation of domestic law must be "grave" in order to have an effect on the termination of the procedure.

81. *See* 2017 Model IIA, Bilateral Inv. Treaty Between the Republic of Colombia and [. . .], Preamble (Ministerio de Comercio, Industria y Turismo 2017) (Colom.), https://www.mincit.gov.co/temas-interes/consulta-publica-bit-modelo-colombiano. For the English version, see https://www.mincit.gov.co/temas-interes/documentos/model-bit-2017.aspx.

82. *Id.* at 9 (Expropriation (1)(a), (2)(c)).

83. *Id.* at 18 (Preliminary Questions of Jurisdiction and Admissibility (3)).

84. L. 915/17, mayo 30, 2017, DIARIO OFFICIAL [D.O.] art. 6(3)(iv) (Colom.)

85. L. 915/17, mayo 30, 2017, DIARIO OFFICIAL [D.O.] art. 6(3)(iv) (Colom.) at 65. Through Law 1444 of 2011, the structure of the National Public Administration was modified, and the National Agency for the Legal Defense of the State was created as a Special Administrative Unit, which, as a decentralized entity of the national order with legal personality, administrative and financial autonomy, and its own assets, is attached to the Ministry of Justice and Law. Through Decree Law 4085 of 2011, amended by Decrees 915 of 2017, 1698 of 2019, 2269 of 2019 and 1244 of 2021, the objectives and structure of the Agency were established including the authority of the Agency to represent the State before the ICSID tribunals. See generally Compendium of State and Public Comments, Working Paper # 3, https://icsid.worldbank.org/sites/default/files/amendments/WP_3_Comment_Compendium.pdf; Compendium of State and Public Comments, Working Paper #2 for discussion of the Agency's expressed concerns.

experience advantage of other countries and has adopted their institutional structure to respond to investors' claims.[86] After this short introduction of the Colombian approach to ISDS, the next part will describe (i) the profile of ISDS cases in Colombia, and (ii) the influence of the Constitutional Court's decision in the conclusion of future IIAs. The purpose is to continue showing how in light of the new demands from foreign investors the state has adapted its institutional framework to respond to the international litigation by updating its own BIT model. The next section will discuss the cases that arose in the past. They provide Colombia with a wide range of topics to discuss in international litigation and inform the position of the Constitutional Court with regard to these new topics involving international state responsivity and other international obligations.

B. *The Profile of ISDS Cases in Colombia*

Colombia has had mixed experience with investment arbitration from bittersweet triumphs.[87] The case of *Glencore v. Colombia*, decided in 2019, constituted the first decision to be rendered in investment arbitration matters. In a nutshell, the decision ordered the government to return to *Glencore* the value of an administrative sanction being imposed and rejected the other claims from *Glencore*. This has been considered as a triumph by the Defense Agency due to the reduction in claimant's claims. However, the underlying discussion as to the power of international tribunals to modify internal procedures remains. This concern as well as the implementation of such decisions at the local level have been enriching the debate at the local level.[88] Together with the update of its BIT model came the notification of claims from foreign investors, which led the government to enforce and rethink its strategy towards ISDS, which included the creation, as mentioned, of a specialized agency to coordinate the defense of the state.[89] In this section, the Note aims to provide an overview of the issues and cases involving Colombia to show that litigation touches on different areas of public interest and requires the government to centralize its decisions when a foreign investor is involved.

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86. Moreno & Madrigal, *supra* note 33.

87. *See generally* Enrique Prieto-Rios & René Urueña, *Glencore Contra Colombia: Una Condena Agridulce*, RAZÓN PÚBLICA, Sept. 9, 2019, https://razonpublica.com/glencore-contra-colombia-una-condena-agridulce/.

88. *Id.*

89. Palau van Hissenhoven, *supra* note 60, at 73–75.

During the last 5 years, Colombia has reported an increase in international lawsuits from foreign investors claiming violation of substantive protection of its investment under the different IIAs.[90] Growing concerns about environmental damage and the regulatory actions taken by some administrative agencies have triggered an increase in allegations related to the unjustified treatment of the investments.[91] In an attempt to categorize the cases brought against Colombia, the following is a list of issues that are subject to decision in an ISDS procedure:

(i) Decisions of the tax authorities on the calculation of royalties in long-term concession contracts for the exploration and exploitation of non-renewables resources;[92]
(ii) Decisions of regulatory authorities delimiting certain territories and declared them to be under special protection for environmental reasons,[93] and administrative decisions regulating the investors' right over investments made in mining sectors;[94]

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90. *Id.*; s*ee, e.g.*, René Urueña & María Angélica Prada-Uribe, *El arbitraje de inversión como autoridad pública global*, *in* DEBATES CONTEMPORÁNEOS DE DERECHO INTERNACIONAL ECONÓMICO: UNA MIRADA DESDE COLOMBIA 493, 505 (René Urueña & Enrique Prieto-Ríos eds., 2020) (Colom.).

91. *See* Prieto-Rios & Urueña, *supra* note 87.

92. *See, e.g.*, Glencore Int'l A.G. v. Republic of Colom., ICSID Case No. ARB/16/6, Award, ¶ 135 (Aug. 27, 2019), https://www.italaw.com/sites/default/files/case-documents/italaw10767_0.pdf (dispute arising from a mining contract); Joint Venture Foster Wheeler USA Corp. v. Republic of Colom., ICSID Case No. ARB/19/34, Notice of Intent, ¶¶ 1, 3 (Dec. 26, 2018), https://www.italaw.com/sites/default/files/case-documents/italaw10690_0.pdf (dispute arising over payment of damages related to the refurbishment of an oil refinery); United Nations Conf. on Trade & Dev., Investment Dispute Settlement Navigator Search Results for South32 v. Colombia, INV. POL'Y HUB., https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1045/south32-v-colombia (last visited Sept. 13, 2022) (dispute arising from royalties assessment for the exploitation of nickel).

93. *See, e.g.*, Eco Oro Minerals Corp. v. Republic of Colom., ICSID Case No. ARB/16/41, Request for Arbitration, ¶¶ 10–11 (Dec. 8, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw9443.pdf; Cosigo Resources v. Republic of Colom., Notice of Intent, ¶ 24 (Aug. 5, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw7828_0.pdf (dispute arising from the placement of a park over a mining concession); Censat Aguaviva & Friends of the Earth International, *Three mining co.s to sue Colombian Govt. under free trade agreement with US over mining ban in national park*, BUS. & HUM. RTS. RES. CTR. (Apr. 14, 2016), https://www.business-humanrights.org/en/latest-news/three-mining-cos-to-sue-colombian-govt-under-free-trade-agreement-with-us-over-mining-ban-in-national-park/ (discussing lawsuits arising out of Colombia's decision to create an area of natural protection instead of authorizing mining permits in the Amazon).

94. For information on Glencore International A.G. v. Republic of Colom. (II), ICSID Case No. ARB/19/22, (pending), see *Investment Dispute Settlement Navigator, Glencore and Others v. Colombia (II)*, INV. POL'Y HUB, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/971/glencore-and-others-v-colombia-ii- (last accessed Oct. 19, 2022).

(iii) Claims related to the constitutional courts' decision on issues related to telecommunication,[95] the decision to protect special zones such as the "páramos,"[96] decisions related to the requirement of the previous consultation to communities (*consulta previa*) for the mining activity,[97] and decisions related to the denial of compensation to claimants as a consequence of the mortgage crisis during 1990s;[98]

(iv) Cases related to the decision from regulatory authorities in charge of guarantee the provision of energy service;[99]

(v) Decision related to real estate;[100]

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95. *See, e.g.*, América Móvil S.A.B. de C.V. v. Republic of Colom., ICSID Case No. ARB(AF)/16/5, Award, ¶ 5 (May 7, 2021), https://jusmundi.com/en/document/pdf/decision/es-america-movil-s-a-b-de-c-v-v-republic-of-colombia-laudo-friday-7th-may-2021 (dispute arising out of cellular mobile services); United Nations Conf. on Trade & Dev., Investment Dispute Settlement Navigator Search Results for Telefónica, S.A. v. Republic of Colombia, INV. POL'Y HUB. (Dec. 31, 2021), https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/883/telef-nica-v-colombia (dispute arising out of telecommunications contracts); *see also Colombia faces second telecoms claim*, Glob. Arb. Rev. (Feb. 22, 2018), https://globalarbitrationreview.com/article/colombia-faces-second-telecoms-claim; *Colombia wins telecoms awards as treaty claims loom*, Glob.Arb.Rev. (July 26, 2017), https://globalarbitrationreview.com/article/colombia-wins-telecoms-award-treaty-claims-loom.

96. *See, e.g.*, Red Eagle Expl. Ltd. v. Republic of Colom., ICSID Case No. ARB/18/12, Request for Arbitration, ¶ 6 (Mar. 21, 2018), https://jusmundi.com/en/document/pdf/other/es-red-eagle-exploration-limited-v-republic-of-colombia-request-for-arbitration-wednesday-21st-march-2018 (dispute arising out of the restriction of mining rights in connection with the delimitation of a páramo ecosystem); Galway Gold Inc. v. Republic of Colom., ICSID Case No. ARB/18/13, Request for Arbitration, ¶ 6 (Mar. 21, 2018), https://jusmundi.com/en/document/pdf/other/es-galway-gold-inc-v-republic-of-colombia-solicitud-de-arbitraje-wednesday-21st-march-2018 (same).

97. Gran Colom. Gold Corp. v. Republic of Colom., ICSID Case No. ARB/18/23, Request for Arbitration, ¶ 22 (May 28, 2018), https://www.italaw.com/sites/default/files/case-documents/italaw10736.pdf.

98. *See, e.g.*, Astrida Benita Carrizosa v. Republic of Colom., ICSID Case No. ARB/18/5, Award, ¶¶ 66–84 (Apr. 19, 2021), https://jusmundi.com/en/document/pdf/decision/en-astrida-benita-carrizosa-v-republic-of-colombia-award-monday-19th-april-2021; Alberto Carrizosa Gelzis v. Republic of Colom., PCA Case No. 2018-56, Award, ¶ 5 (May 7, 2021), https://jusmundi.com/en/document/pdf/decision/en-alberto-carrizosa-gelzis-enrique-carrizosa-gelzis-felipe-carrizosa-gelzis-v-republic-of-colombia-award-friday-7th-may-2021.

99. *See* Naturgy Energy Grp., S.A. v. Republic of Colom., ICSID Case No. UNCT/18/1, Award, ¶ 3 (Mar.12, 2021), https://jusmundi.com/en/document/pdf/decision/es-naturgy-energy-group-s-a-and-naturgy-electricidad-colombia-s-l-formerly-gas-natural-sdg-s-a-and-gas-natural-fenosa-electricidad-colombia-s-l-v-republic-of-colombia-laudo-friday-12th-march-2021.

100. *See* Angel Samuel Seda v. Republic of Colom., ICSID Case No. ARB/19/6, Claimant's Reply Memorial, ¶ 4 (Sept. 19, 2021), https://jusmundi.com/en/document/pdf/other/en-angel-samuel-seda-and-others-v-republic-of-colombia-claimants-reply-memorial-sunday-19th-september-2021.

(vi) Concession agreements for the provision of technology services for the state;[101] and
(vii) Banking and financial services.[102]

There is a wide range of issues being discussed in international tribunals that go beyond the traditional litigation over concessions on non-renewables resources. Litigation has extended to other areas such as technology, communication, and real estate matters.[103]

In this context of growing litigation, the Constitutional Court in Colombia has taken an active role during recent years towards protecting particular interests such as the environment and the protection of some communities that somewhat have been affected by the investor's activities.[104] In some cases, investors have claimed that the Constitutional Court has affected their investment with such decisions, and therefore its ruling constitutes, among other things, a violation of the Fair and Equitable Treatment (FET) standard of protection.[105]

As an example, the Court declared that the "paramos," a special zone in the rural areas necessary for the water production, required "enhanced" protection, and therefore any private right over those territories should be limited in favor of the environment.[106] This decision caused investors to sue the state, alleging that the Court's decision constitutes a violation of their property rights granted previously by contracts, which diminished their legitimate expectations to explore these territories.[107]

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101. *See* Neustar, Inc. v. Republic of Colom., ICSID Case No. ARB/20/7, Request for Arbitration, ¶¶ 11, 13, 18 (Dec. 23, 2019), https://jusmundi.com/en/document/pdf/other/en-neustar-inc-v-republic-of-colombia-request-for-arbitration-monday-23rd-december-2019.

102. *See* AFC Inv. Sols. S.L. v. Republic of Colom., ICSID Case No. ARB/20/16, Award on Respondent's Preliminary Objection Under Rule 41(5) of the ICSID Arbitration Rules, ¶¶ 46, 49 (Feb. 24, 2022), https://jusmundi.com/en/document/pdf/decision/es-afc-investment-solutions-s-l-v-republic-of-colombia-laudo-sobre-la-excepcion-preliminar-formulada-por-la-demandada-con-base-en-la-regla-41-5-de-las-reglas-de-arbitraje-ciadi-thursday-24th-february-2022.

103. *See* Prieto-Rios & Urueña, *supra* note 87.

104. *Id.*

105. *Id.*

106. Eco Oro Minerals Corp. v. Republic of Colom., ICSID Case No. ARB/16/41, Request for Arbitration, ¶¶ 10–11 (Dec. 8, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw9443.pdf; Int'l Inst. for Sustainable Dev., *Mayoría de tribunal en Eco Oro vs. Colombia encuentra incumplimiento de nivel mínimo de trato, sostiene que una excepción general ambiental no excluye la obligación de pagar compensación*, Inv. Treaty News (December 20, 2021), https://www.iisd.org/itn/en/2021/12/20/majority-in-eco-oro-v-colombia-finds-violation-of-minimum-standard-of-treatment-holds-that-a-general-environmental-exception-does-not-preclude-obligation-to-pay-compensation/.

107. Int'l Inst. for Sustainable Dev., *supra* note 106.

The Constitutional Court's concerns with ISDS have been extended to the review of other branches of the government, such as the power of the executive branch to enter these IIAs and to rule on the substantive content of such agreements.[108] The effect of the activism of constitutional courts is very much in line with the global awareness and concern about the reform of the system underway at UNCITRAL and ICSID, and is considered an additional element to take into account in the process of negotiating the main source of investment law and arbitration that are IIAs. In this context the power of the constitutional courts to approve or deny ratification of such agreements has an impact on the priorities for promoting economic growth, which becomes relevant in the post-pandemic scenario where states need to prioritize area such as health and access to jobs. The described influence from constitutional courts can be exemplified with a landmark decision from the Constitutional Court in Colombia.

C. *The Constitutional Courts and Their Influence in the Power to Conclude IIAs*

The role of constitutional courts in the investment law and arbitration arenas has attracted the attention of practitioners and policymakers because of the impact of their decisions in international litigation.[109] Tribunals should assess the decisions of constitutional courts broadly as a reference to the state's political and economic justification in applying a measure. Some standards of deference or "margin of appreciation" need to be implemented as a means of containing criticisms of investment tribunal decisions. This approach is particularly relevant in the Latin American context where constitutional courts have found their way to participate through the different mechanisms provided for constitutionality control of IIAs or through their power to resolve disputes between parties. As Fandiño suggests, it is necessary to consider decisions from constitutional courts more broadly as a rule of public law[110] and not as a fact as traditionally assessed by international

108. Corte Constitucional [C.C.] [Constitutional Court], junio 6, 2019, Sentencia C-252/19 (Colom.), *translated in* FOREIGN INVESTMENT BETWEEN INTERNATIONAL AND DOMESTIC LAW: TRANSLATION OF JUDGMENT C-252/2019 OF THE COLOMBIAN CONSTITUTIONAL COURT ON THE BIT BETWEEN FRANCE AND COLOMBIA ¶¶ 43–50 (Enrique Prieto-Ríos, José Manuel Álvarez Zarate & Magdalena Correa Henao eds. 2020), https://www.corteconstitucional.gov.co/transparencia/Foreign%20Investment%20between%20international%20and%20domestic%20law.pdf.

109. *See, e.g.*, Titi, *supra* note 73, at 1–2; C.C., Sentencia C-252/19, supra note 108, at 16-17 (stating that the judgment establishes a strong precedent).

110. *See* Fandiño-Bravo, *supra* note 23, at 697.

tribunals. The Colombian Constitutional Court can be taken as a clear example of a call for a paradigm shift.

In June 2019, the Colombian Constitutional Court rendered a historic decision in the process of reviewing the constitutionality of the Agreement for the Reciprocal Promotion and Protection of Investment between Colombia and France (Agreement), making the ratification of such Agreement a condition to the signing of a joint interpretative declaration clarifying the scope of some substantive provision such as the content of the FET standard.[111] This decision belongs to a set of four decisions coming from the courts of Columbia, Ecuador, and the European Union. They reflect the rising interest over the role of constitutional courts that might be relevant in the post-pandemic scenario to seize legitimate interest in measures enacted by the states during these times.[112]

The judgment from Colombia has been deemed a relevant contribution to the ongoing process of reform of the ISDS system by scholars because it is an example of how constitutional courts are trying to take part in the discussion by using their power to review the treaties to provide further guidance on the content of such international agreements.[113] This has been seen as a way for states to manifest their concerns towards the limitation on regulatory powers and the increase of disputes in international tribunals.[114] When paving the way to a recovery period, states have adopted during the last two years measures to mitigate the effects of the outbreak.

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111. See C.C., Sentencia C-252/19, supra note 108, at ¶¶ 408–11.

112. Besides analyzing the constitutionality of the BIT with France, the Colombian court also reviewed the BIT with Israel and arrived at a similar conclusion approving the agreement subject to certain conditions. *See* Titi, *supra* note 73, at 17. In Ecuador the debate is related to constitutionality of article 422 of the 2008 Constitution. This decision will have an impact on Ecuador's ability to negotiate future investment agreements and provide for international dispute resolution mechanisms. *Id.* at 27. *See generally* Nathalie Bernasconi-Osterwalder et.al., *Protecting Against Investor-State Claims Amidst Covid-19: A call to action for governments*, 5–6 INT'L INST. FOR SUSTAINABLE DEV. (2020); *Arbitration in 2021: The Constitutional Court Promotes International Arbitration in Spain, Regulatory Developments in Different Countries and New IBA Rules,* GARRIGUES (JAN. 27, 2022), https://www.garrigues.com/en_GB/new/arbitration-2021-constitutional-court-promotes-international-arbitration-spain-regulatory (accessed Oct. 9 2022).

113. *See generally See* Titi, *supra* note 73, at 25–26 (The Constitutional Court in the decision under review, imposed conditions on the executive before it can ratify the agreement and make it binding for the parties. This action means that future agreements will have to take into consideration the position of the Constitutional Courts in previous decisions about the ratification of international investment agreements.); *see also* Rafael Tamayo-Álvarez, *Constitutionality of the Colombia-France Bilateral Investment Treaty*, 114 Am. J. Int'l. 471, 471 (2020).

114. Titi, *supra* note 73, at 26; Tamayo-Álvarez, *supra* note 113, at 472.

1. The Decision: Still Within the Paradigm but Sufficient to Raise Concern to Policy Makers

The constitutional control of agreements in Colombia occurs before its ratification and is both substantive and procedural over the text of the Agreement.[115] Notwithstanding this fact, the traditional standard of review of these kinds of Agreements was linked to a procedural rather than a substantive approach to IIAs, meaning that the court applied a low level of scrutiny over the reasons for its ratification and granted special deference to the executive as the leading branch in conducting foreign relations.[116]

In its previous decisions concerning the ratification of IIAs, the Court did not question the utility of IIAs for economic growth and was equally attached to the notion that IIAs enhanced and encouraged FDI.[117] Although controversial, the 2019 decision did not change this traditional approach. Some scholars have criticized it because it could have been an opportunity for the court and policymakers to reflect over the traditional approach to economic growth, but it did not. Therefore, the court in this regard remained embedded in the paradigm linking the signing and ratification of IIAs as necessary to promote FDI.[118]

Despite this fact, what emerges from the decision is the creation of a higher standard of scrutiny for IIAs going forward,[119] which represents a challenge to the current way in which the executive power has negotiated IIAs. This decision signals the first time in Colombian constitutional history that the Court has called for stakeholders to participate in public hearings and present their opinion regarding the benefits and problems with ISDS. The Court considered that the participation of citizens enhanced the executive's decision-making power in concluding international agreements. However, it is still debated whether the Court's decision meant an invasion of the competences of other branches and, therefore, a violation of the principle of division of powers.[120]

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115. Tamayo-Álvarez, *supra* note 113, at 471.

116. *Id.* at 471.

117. *Id.* at 471–72.

118. *Id.* at 478.

119. *Id.* at 472.

120. Eduardo Zuleta & Maria Camila Rincón, *Colombia's Constitutional Court Conditions Ratification of the Colombia-France BIT to the Interpretation of Several Provisions of the Treaty,* KLUWER ARB. BLOG (July 4, 2019), http://arbitrationblog.kluwerarbitration.com/2019/07/04/colombias-constitutional-court-conditions-ratification-of-the-colombia-france-bit-to-the-interpretation-of-several-provisions-of-the-treaty/.

Outside of this discussion, the Court considered that the increase in claims against Colombia indicated issues related to substantive provisions in those IIAs that needed to be revisited, considering a change of circumstances in the law and the current ISDS reforms. It upheld the means and the rationale presented by the government for signing the Agreement[121] and considered that it passed a rational basis test but identified an incompatibility with Article 13 of the Colombian Constitution related to the principle of equality.[122]

The Court noted that the investment treaty regime provided a more favorable treatment protecting foreign investors and not extending the same benefits to domestic investors.[123] The Court made the ratification of the Agreement subject to the condition that the Agreement provided equal treatment to a foreigner and Colombian nationals.[124] As seen, this instruction is a new way of going back to the Calvo Clause and its provision on granting foreigners like treatment as to nationals regarding substantive provisions. It can be considered a modernized Calvo Clause but applied during constitutional control of treaties.

In addition to the equal protection clause, the Court also devoted itself to analyzing the FET obligation.[125] In its view, the vagueness of the standard represented a risk and uncertainty as to the actual content to be applied by tribunals.[126] The Court considered that it was necessary to give legal certainty and to include examples of what constitutes a breach of the FET. It held that the notions of "applicable international law" and "legitimate expectation" provided no clue as to the content of such obligations.[127] The Court's concern was that eventually, a tribunal could be determining its content in a future controversy and, therefore, expose Colombia to an "unlimited" international responsibility.[128] The Court elaborates on the point that the broad reading of these provisions will prevent domestic courts from anticipating circumstances that

121. Corte Constitucional [C.C.] [Constitutional Court], junio 6, 2019, Sentencia C-252/19 (Colom.), *translated in* FOREIGN INVESTMENT BETWEEN INTERNATIONAL AND DOMESTIC LAW: TRANSLATION OF JUDGMENT C-252/2019 OF THE COLOMBIAN CONSTITUTIONAL COURT ON THE BIT BETWEEN FRANCE AND COLOMBIA ¶ 108 (Enrique Prieto-Ríos, José Manuel Álvarez Zarate & Magdalena Correa Henao eds. 2020), https://www.corteconstitucional.gov.co/english/Foreign%20Investment%20between%20international%20and%20domestic%20law.pdf.

122. *Id.* ¶¶ 108–13.

123. *Id.* ¶ 112.

124. *Id.* ¶¶ 120–21.

125. *Id.* ¶ 189.

126. *Id.* ¶¶ 191–98.

127. *Id.* ¶¶ 204–11.

128. *Id.* ¶ 208.

constitute a breach to an IIAs. The Court therefore conditioned its decision on constitutionality to adopt a joint interpretative statement in which parties will include a clear definition of those provisions.[129]

Although the Court did valuable work to enhance the debate in the country towards the current problems and possibilities for ISDS reform, it seems that the Court lost the analysis on the ground and the basic notions on which investment arbitration is based. This is because the evolution of substantive standards of protection is based on common law practice, and therefore arbitral tribunals are tasked with giving content to the provision on a case-by-case analysis. Therefore, it is almost impossible to devise scenarios and include an exhaustive list of what constitutes a legitimate expectation or a violation of fair and equitable treatment until the arbitral tribunal is aware of the facts and evidence in each case.[130]

Finally, the Court's instruction was to sign a joint interpretative statement clarifying the provisions signaled above to approve the ratification. The Parties fulfilled this requirement in an Agreement concluded on August 5, 2020.[131] Some commentators have said that despite the remarkable effort to bring attention to the signing and ratification of international obligations under the scope of IIAs, a joint statement will not probably limit the application of the law developed by international investment tribunals through customary international law. The statement can serve as a source of interpretation at worst.[132] As Tamayo-Alvarez says, this decision can also be regarded as an example of efforts to regulate the substantive content in IIAs to preserve regulatory autonomy.[133]

The Constitutional Court's ruling indicates the existence of new participants in the negotiation of IIAs. Considering that the negotiation of IIAs, and the definition of motives as to why this agreement was necessary to promote economic growth was reserved exclusively to the executive branch. This case is clear evidence that the executive power to conclude IIAs can be restricted to conform with constitutional

129. *Id.* ¶ 215.

130. See Titi, *supra* note 72, at 26–27; Zuleta & Rincón, *supra* note 120; Tamayo-Álvarez, *supra* note 113, at 477.

131. Press Release, Ministerio de Comercio, Industria y Turismo, *Declaración conjunta de los ministerios de Comercio, Industria y Turismo de Colombia y para Europa y de Asuntos Exteriores de Francia* [Joint declaration of the Ministries of Commerce, Industry and Tourism of Colombia and for Europe and of Foreign Affairs of France] (Oct. 14, 2020) (Colom.), https://www.mincit.gov.co/prensa/noticias/comercio/acuerdo-entre-colombia-y-francia-sobre-inversiones.

132. Tamayo-Álvarez, *supra* note 113, at 478.

133. *Id.* at 475.

standards. It also leaves the door open for other branches of government to participate in the definition of means used to reach a given economic objective. Furthermore, it sends a message to the prospective investors to include in their due diligence process the decisions of constitutional courts and, therefore accord their "legitimate expectations" to the evolving jurisprudence when their investment is closely related to one of the interests protected by constitutional courts.

IV. Challenges to Latin America with the Pandemic

Along with the example of the Colombian case, the purpose of this Note is to show how this case can serve as a model to address Covid challenges in a post pandemic scenario, and the relevance of constitutional courts decisions in the substantive analysis of investment disputes. After reviewing the path that Latin American countries have followed with ISDS, it is necessary to comment on the current concerns that have arisen with the outbreak.

We can see the overlap between the ISDS reform process underway globally and the enactment of government measures aimed at protecting public health as well as the economy worldwide, impacting foreign investor expectations with respect to, for example, the provision of energy services and utilities in general. This Note considers that the post-pandemic scenario represents an opportunity to strengthen the discussion around the paradigm shift envisioned by private law and acknowledge that the impact of such a decision goes beyond a dispute between private parties.[134] Investment law and arbitration have dealt with issues of public concern that require a swift evaluation of government measures in light of the public concerns surrounding many of the measures taken during the outbreak.

Therefore, we consider that the regulatory power of the state and the role of IIAs and development will cover part of the discussions in a post-pandemic world.[135] It is undeniable that measures to curb the spread of the pandemic have led to different responses worldwide, and some of

134. See Fandiño-Bravo, *supra* note 23, at 674–79 for a discussion about change of paradigms and Carlos Hernández Duran & Ana Amorín Durán Fernandez, *A Human Rights Perspective on Investment Arbitration after COVID-19: current issues and future trends* at 4 n.9, Uría Menéndez (2022),https://www.uria.com/documentos/publicaciones/7930/documento/01.pdf?id=12798&forceDownload=true (last accessed Oct. 9, 2022).

135. Kabir Duggal, Rekha Rangachari & Kanika Gupta, *Consequences of Crisis and the Great Re-Think: COVID-19's Impact on Energy Investment, Sustainability and the Future of International Investment Agreements*, 14 J. World Energy L. & Bus. 133, 145 (2021).

the measures taken by states are suitable to be challenged under investment agreements and dispute resolution mechanisms.

The Latin American disputes are already reporting claims derived from these circumstances in sensitive sectors such as the energy market. For instance, recently, Chile was notified of initiating proceedings under the Chile-Italy BIT by a construction company involved in a hydroelectric project. The claim is based on the decision of the Chilean government to impose certain fines due to the delays in the construction of the electricity line. Local courts have already decided that there were no grounds to allege force majeure to justify the delay.[136]

Mexico engaged in legislative reform for the energy sector, cutting the income and incentives for renewable energy projects. The international law firm Freshfields in its report signals concern that some states are using the pandemic to put in place political agendas that ultimately benefit state-owned enterprises.[137] Similarly, Peru's courts have taken reforms to the rule of the thermoelectric generators, and recently, Argentina has withdrawn the freeze of gas and electricity sectors and has imposed new remuneration schemes.[138]

The banking and financing sectors in the pension fund business are also calling the attention of practitioners as possible areas where there might be intentions to initiate proceedings as a consequence of the pandemic and the government's decision to allow early withdrawal of funds, and the migration of pension from private to public administration.[139] Claims against Argentina and Bolivia have already been filed, and similarly in Chile, Mexico, Uruguay, Peru. Colombia has been dealing internally with the remuneration of private versus public funds and how the pandemic has triggered the need for resources to the pension schemes.[140]

The cancellation of auctions and projects, the slowdown in energy demand, and the suspension of payments of electricity bills constitute potential scenarios for the initiation of arbitration proceedings.[141]

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136. Lisa Bohmer, *Electricity Distribution Company Lodges ICSID Claim Against Chile*, INV. ARB. REPORTER (Apr. 13, 2021), https://www.iareporter.com/articles/electricity-distribution-company-lodges-icsid-claim-against-chile/.

137. Lluis Paradel, Juan Pomes & Kate Apostolova, *Investment Arbitration Trends*, *in* INT'L ARB. IN 2021 § 6 (Freshfields Bruckhaus Deringer, 2021).

138. *Id.*

139. *Id.*

140. *Id.* at 24.

141. Claudio Salas & Manuel Valderrama, *Energy Arbitration in Latin America: Potential State Defences in Future Covid-19-Related Cases*, GLOBAL ARB. REV. (Oct. 13, 2020), https://globalarbitrationreview.com/review/the-arbitration-review-of-the-americas/2021/article/energy-arbitration-in-latin-america-potential-state-defences-in-future-covid-19-related-cases.

Investors might allege the expropriation of their investment if the measure was so drastic that it affected the internal rate of return or a violation of the fair and equitable treatment standard in cases where the Tribunal finds that there was a discriminatory treatment between what is called "essential" and "non-essential" business for instance.[142] In this case, the challenge would go to the motives and discretion of the state to determine what sectors were allowed to operate during the pandemic.

States also have the resources to defend themselves from those allegations by alleging their right to regulate under extraordinary circumstances by activating the emergency provision in IIAs or alleging any grounds of justification enshrined in customary international law. The new BIT models and the declaratory interpretations of the states will play an essential role by the time the arbitral tribunal will decide the controversy.

Regarding the current reform process, the pandemic heightened the claims by the governments of a substantive reform as evidenced in the recent report by UNCTAD, about the need to accelerate the reform of old-generation IIA in light of the COVID-19 pandemic.[143] The impact of the pandemic in investment law and arbitration has had on the states, strengths the claim that investment law and arbitration requires a swift paradigm that recognizes that arbitral tribunals are international public adjudicators enforcing public functions with the potential to change local institutions.[144]

V. Conclusions

This Note attempts to study the current position of some Latin American countries towards ISDS in light of the legitimacy crisis affecting the system. After years of practice with the Calvo Doctrine, the result is that this provision is no longer applicable, not just because this practice has been abandoned, but also because the approaches to economic growth during the last two decades have taken two different and separable paths.

The result of categorizing the region in three parts is to demonstrate opposing interests within the regions that impede acting as a block in international forums and to return to the complete application of a

142. *Id.*

143. United Nations Conf. on Trade and Dev. [UNCTAD], International Investment Agreements Reforms Accelerator, 2 (2020), https://unctad.org/system/files/official-document/diaepcbinf2020d8_en.pdf.

144. *See* Fandiño-Bravo, *supra* note 23, at 675–79.

Calvo doctrine. However, we can see some subtle applications to something close to the Calvo principles with the Brazilian case, its Model of dispute resolution, and the Colombian Constitutional Court's enhanced standard of review for the ratification of IIA with its concern about the equal protection clause, the vagueness of legitimate expectations, and the fair and equitable treatment standards.

The categorization also serves to identify the following trends:

(i) The intention to create a regional dispute resolution mechanism within the existing regional organizations. That proposal is on the table and will be pushed by countries that are aligned with the economic approach of the first category of states.

(ii) The research indicates that the future of Brazil and its Cooperation Agreements will mark the next generation of IIAs in the region and, if successful, this project might eliminate international adjudication for investor-state disputes. In exchange, what can be seen from this framework is the enhancement of transparency and cooperation obligations from the parties as well as the recourse of other amicable methods for the solution of disputes.

(iii) Still, we see countries that have taken the normative approach and have adapted their institutions and policies to cope with the challenges of ISDS. This is the case with Colombia, Peru, and Chile. All three countries have created a specialized agency within the state in response to investment claims. During the last years, all three states have engaged in reshaping the institutional structure to attack two fronts: (i) the management of ongoing claims and active participation in defense of its interests allowing its public officials to acquire the expertise to conduct such kind of procedure that are external to the legal practice of this countries; (ii) the prevention of future disputes by identifying critical sectors and alerting other organs in the possible effects of a measure in the investor's investment.

(iv) It was clear that constitutional courts have used a lower standard of scrutiny during the previous decades towards the effects of the ratification of IIAs. However, as shown with the Colombian Constitutional Court decision on the Colombia-France BIT ratification, the Court can limit the parties' bargaining power and condition them

to fulfill specific goals and delimit the content of relevant provisions.

(v) The Constitutional Court has also been considered the source of the claims. Its function to resolve cases and controversies had also implied the change of some conditions that existed when investors made their initial investments. We had the example of territories declared of special protection where investors are banned from developing their projects. This factor implies additional obligations for both parties. On the one hand, the investor's due diligence has to include other regulatory risks from changes in the court's decisions. On the other hand, there is a new concern for the coordination between the different branches of the government to oversee possible areas of dispute between the state and foreign investors as a consequence of any regulatory action.

(vi) The approach taken by the third category of countries proved to be effective, as in the recent decision rendered by an arbitral tribunal declaring that Colombia did not breach any of its international obligations in a case brought by an investor, who claimed four billion dollars in compensation. The Tribunal dismissed the investor's claims on the merits.[145]

(vii) Finally, the pandemic has accelerated the intention to reform the system, both substantively and procedurally. States have taken different regulatory measures that need to be considered by a future arbitral tribunal in the global context of a pandemic. It requires different methods for the assessment of measures designed to tackle extraordinary circumstances. There must be significant deference to the discretion of state in taking measures aimed to protect public health, and certainly, the administration of these disputes will be at the core for the definition of the future of investment law in Latin America.

145. Lisa Bohmer, *Billion-Dollar Claims Aga*inst *Colombia is Dismissed on the Merits, but Tribunal Finds that It Lacks Jurisdiction over the State's Counterclaims*, INV. ARB. REPORTER (Mar. 12, 2021), https://www.iareporter.com/articles/breaking-billion-dollar-claim-against-colombia-is-dismissed-on-the-merits-but-tribunal-finds-that-it-lacks-jurisdiction-over-the-states-counterclaim/.