CONSTITUTIONAL INJUNCTIONS AGAINST INTERNATIONAL ARBITRAL AWARDS IN LATIN AMERICA AND SPAIN

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Abstract

International arbitration must strike a balance between two often competing principles. On one hand, parties have an interest in obtaining a prompt and final decision resolving their dispute. On the other hand, both states and parties have an interest in assuring that arbitral proceedings are fair and consistent with basic notions of due process. The interplay between these two principles has led to the conclusion that judicial review of arbitral awards must be limited, thus the widespread notion that the only recourse against an award should be an annulment petition under limited grounds related to the jurisdiction of the arbitral tribunal, the integrity of the arbitral procedure, and the public policy of the arbitration's seat. However, that balance may conflict with the constitutional traditions of Spain and several Latin American states. The possibility of filing applications for constitutional injunctions for the protection of constitutional rights in those states begs the question: Is it possible to file an application for a constitutional injunction against an international arbitral award issued in an arbitration seated in a state that allows applications for constitutional injunctions against judicial decisions?

This Article examines court decisions in Spain, Colombia, Peru, and Ecuador on the matter. As context, the Article analyzes the origins of applications for constitutional injunctions, the current contours of such applications, and the relationship between Latin American constitutionalism and international dispute settlement. Then, the Article turns to a discussion of each specific court decision. While Spain has rejected the possibility of filing applications for constitutional injunctions against arbitral awards, the Latin American states have reached the opposite conclusion. This Article argues that the approach taken by the Latin American states fails to strike an optimal balance between the principles of finality and fairness. Reconceptualizing the notion of a violation of public policy as a ground for annulment to include the protection of constitutional rights is necessary to reconcile long-held constitutional traditions

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with the promotion of international arbitration as a fair and efficient method for the resolution of transnational disputes.

I. Introduction

Through an arbitration agreement, parties agree that their disputes will be resolved by private adjudicators and not by the domestic courts of any given country.[1] However, this does not mean that parties want, or that states will accept, a system with no form of judicial review of arbitral awards, irrespective of whether the dispute is a purely domestic one or one with an international component. From the parties' perspective, one example of their reluctance to submit to an arbitration system with no form of judicial review is the 1985 reform of Belgium's Arbitration

1. Hossein Abedian, *Judicial Review of Arbitral Awards in International Arbitration: A Case for an Efficient System of Judicial Review*, 28 J. Int'l Arb. 553, 553 (2011).

Law.[2] In an attempt to encourage parties to choose seats within Belgium for international arbitrations, the Belgian Senate modified the Law to the effect that when none of the parties was Belgian, there would be no possibility to apply to set aside the award before the Belgian courts.[3] Interestingly, the result was not the one the Senate intended; parties stopped selecting seats located in Belgium for their international arbitrations, forcing the Senate to backtrack the amendment.[4] From the perspective of states, legal systems have consistently provided for the judicial review of arbitral awards.[5] Ever since arbitration established itself as an alternative method for resolving disputes, there has been some form of judicial review of awards.[6] After all, states have an interest in ensuring the integrity and procedural fairness of the adjudication of disputes.[7]

As such, judicial review of arbitral awards seems like a much more desirable alternative to no judicial review at all. The question then becomes: What should be the scope of that judicial review? Parties shy away from seats characterized by undue judicial interference with arbitral awards by national courts.[8] One of the main reasons for parties to prefer one seat over another is the existence of a neutral and impartial legal system that will not interfere with the parties' choice of arbitrating their disputes.[9] But in what might at first glance seem contradictory, users of international arbitration rank national court intervention and the lack of an appeal mechanism on the merits among the worst characteristics of this system of adjudication.[10] One way of making sense of this apparent contradiction is that although parties want a system of judicial review of awards, the scope of review has to be limited.[11]

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2. Albert Jan van den Berg, *Should the Setting Aside of the Arbitral Award be Abolished?*, 29 ICSID REV. 263, 276 (2014).

3. *Id.*

4. *Id.*

5. *Id.* at 265.

6. *Id.*

7. GEORGE A. BERMANN, INTERNATIONAL ARBITRATION AND PRIVATE INTERNATIONAL LAW 380 (2017) (arguing that when the performance of adjudicatory function is delegated to private actors "such performance should be subject to at least a measure of judicial policing to ensure the procedural fairness as well as the overall integrity of the adjudication").

8. *See* Dana H. Freyer & Hamid G. Gharavi, *Finality and Enforceability of Foreign Arbitral Awards: From "Double Exe quatur" to the Enforcement of Annulled Awards: A Suggested Path to Uniformity Amidst Diversity*, 13 ICSID REV. 101, 101 (1998).

9. 2018 INTERNATIONAL ARBITRATION SURVEY: THE EVOLUTION OF INTERNATIONAL ARBITRATION, SCH. INT'L ARB., QUEEN MARY UNIV. LONDON & WHITE & CASE INT'L ARB. GRP. 10 (2018).

10. *Id.* at 8.

11. Abedian, *supra* note 1, at 572.

This discussion on the scope of judicial review highlights one of the inherent tensions of arbitration as a private system of dispute settlement. On the one hand, there is the parties' intent to have a private, speedy, and efficient mechanism for solving their disputes with limited court intervention.[12] On the other hand, both parties and states want to have in place a system of judicial review that protects the integrity of the arbitral process and safeguards basic notions of due process.[13] The UNCITRAL Model Law ("Model Law") strikes a balance between these interests by setting forth a model of judicial review in which the only recourse against an international award is a petition for annulment or setting aside.[14] Under the Model Law, there are limited grounds for setting aside, referring exclusively to the jurisdiction of the arbitral tribunal, the integrity of the arbitral procedure, and the violation of the public policy of the arbitration's seat.[15]

Unfortunately, this model of judicial review may clash with the constitutional traditions of Spain and various Latin American states. These states have instituted a procedure known in Spanish as "*tutela*," "*amparo*," or "*protección*."[16] For purposes of this Article, I will refer to this judicial recourse as an application for a constitutional injunction. Through this judicial recourse, a person or corporation may ask a court to grant injunctive relief when a government institution, or even a private individual, has violated a constitutional right of the petitioner.[17] Many of the states that have instituted this recourse permit the filing of an application for a constitutional injunction against a judicial decision when the petitioner considers that the decision is contrary to a constitutional right.[18] The court seized of the matter has the power to annul the decision.[19] As international arbitration began to expand in Latin America and Spain, courts had to grapple with the question of whether a party may file an application for a constitutional injunction against an

12. *Id.* at 554.

13. *Id.*

14. G.A. Res. 40/72, U.N. Doc. A/40/17, annex I, UNCITRAL Model Law on International Commercial Arbitration, art. 34 (Dec. 11, 1985); G.A. Res. 61/33, U.N. Doc. A/61/17, annex I, art. 34 (Dec. 4. 2006).

15. FRANCO FERRARI & FRIEDRICH ROSENFELD, INTERNATIONAL COMMERCIAL ARBITRATION: A COMPARATIVE INTRODUCTION 175–76 (John Fellas ed., 2021).

16. ALLAN R. BREWER-CARÍAS, THE LATIN AMERICAN "AMPARO". A GENERAL OVERVIEW 9 (2008), https://allanbrewercarias.com/wp-content/uploads/2008/04/1028.-Brewer.-LATIN-AMERICAN-AMPARO.-A-GENERAL-OVERVIEW.pdf.

17. *Id.* at 2, 22.

18. *Id.* at 24.

19. HÉCTOR FIX-ZAMUDIO, *El Derecho de Amparo en México y en España su Influencia Recíproca*, *in* ENSAYOS SOBRE EL DERECHO DE AMPARO 227, 234 (1980).

award issued by a tribunal seated within a state that allows applications for constitutional injunctions against judicial decisions.[20]

The purpose of this Article is to analyze court decisions that have dealt with this question. I will analyze decisions issued by the constitutional courts of Colombia, Peru, and Ecuador on the matter. These courts have held that it is possible for a party to apply for a constitutional injunction against an arbitral award invoking specific grounds related to the violation of constitutional rights that supposedly are different from the grounds for the annulment of an award.[21] Moreover, in these jurisdictions, it is also possible to apply for a constitutional injunction against a court's decision on whether to annul an award or not.[22] As a consequence, these three states have completely broken away from the Model Law's system of judicial review. The possibility of applying for a constitutional injunction against arbitral awards, as it has been interpreted by the constitutional courts of Colombia, Peru, and Ecuador, effectively creates a new ground for setting aside arbitral awards: violations of constitutional rights.[23] Further, as a consequence of these decisions, in these states, there are three post-award judicial recourses: (1) a petition for annulment; (2) an application for a constitutional injunction seeking to vacate the award; and (3) an application for a constitutional injunction seeking to vacate a court's decision on whether to annul the award or not.[24]

After reviewing the decisions from the courts of Colombia, Peru, and Ecuador, I will analyze a recent decision by the Spanish Constitutional Tribunal that provides an interesting contrast to the Latin American jurisdictions. The Constitutional Tribunal has held that parties cannot

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20. *See* Alfredo De Jesús, *La Autonomía del Arbitraje Internacional a la Hora de la Constitucionalización del Arbitraje en América Latina*, *in* ESTUDIOS DE DERECHO PRIVADO EN HOMENAJE A CHRISTIAN LARROUMET 213, 228–30 (Fabricio Mantilla Espinosa & Carlos Pizarro Wilson eds., 2008).

21. Corte Constitucional [C.C.] [Constitutional Court], agosto 6, 2019, Sentencia T-354/19, Gaceta de la Corte Constitucional [G.C.C.] (p. 39) (Colom.) [hereinafter Sentencia T-354/19]; Tribunal Constitucional [T.C.] [Constitutional Tribunal], septiembre 21, 2011, Sentencia No. 00142-2011-PA/TC, ¶ 21 (Peru) [hereinafter Sentencia No. 00142-2011-PA/TC]; Corte Constitucional [C.C.] [Constitutional Court], noviembre 19, 2019, Sentencia No. 31-14-EP/19, ¶ 49 (Ecuador) [hereinafter Sentencia No. 31-14-EP/19].

22. These jurisdictions allow applications for constitutional injunctions against judicial decisions. BREWER-CARÍAS, *supra* note 16, at 24; *see* CONSTITUCIÓN DE LA REPÚBLICA DE ECUADOR [CONSTITUTION] Oct. 20. 2008, cap. 3, art. 94.

23. Sentencia T-354/19, *supra* note 21, at 39; Sentencia No. 00142-2011-PA/TC, *supra* note 21, ¶ 21; Sentencia No. 31-14-EP/19, *supra* note 21, ¶ 49.

24. Sentencia T-354/19, *supra* note 21, at 39; Sentencia No. 00142-2011-PA/TC, *supra* note 21, ¶ 21; Sentencia No. 31-14-EP/19, *supra* note 21, ¶ 49.

apply for a constitutional injunction against an arbitral award.[25] Parties do have the possibility of applying for a constitutional injunction against the decision of a court on whether to annul an award or not.[26] In its Judgment of February 15, 2021, the Constitutional Tribunal vacated a court decision that annulled an award on grounds beyond the ones listed by Spain's Arbitration Law.[27] The system in force in Spain allows the Constitutional Tribunal to have the ultimate say on whether there have been violations of constitutional rights in international arbitrations seated in Spain, but without doing away with the Model Law's system of judicial review.[28] Effectively, the system in force in Spain is no different from a limited right of appeal against a setting aside decision, a procedure compatible with Article 34 of the Model Law.[29]

Considering the above, this Article defends the thesis that the current system of judicial review in force in Colombia, Peru, and Ecuador is inadequate and affects the development of international arbitration in these states. A better way of reconciling the Model Law's system of judicial review with the constitutional traditions of these states is reconceptualizing violations of public policy as grounds for annulment. Violations of constitutional rights serious enough to merit an application for a constitutional injunction should be categorized as violations of public policy. As such, the court seized of an annulment action against an award will play the essential role of ensuring the protection of the constitution. Furthermore, as a way of preserving the effectiveness of applications for constitutional injunctions as a judicial recourse for the protection of constitutional rights, these states could consider only permitting applications for constitutional injunctions against the setting aside decision and, thereby, adopt the long-held position of the Spanish Constitutional Tribunal. This proposal preserves the judicial protection of constitutional rights, prevents the judicial creation of new grounds for annulling awards not contemplated by the Model Law, and is compatible with the basic notion that the only judicial recourse

25. *See* S.T.C., Jan. 17, 2005 (B.O.E., No. 41, p. 57) (Spain); S.T.C., Feb. 15, 2021 (B.O.E., No. 69, p. 23) (Spain).

26. S.T.C., Feb. 15, 2021, *supra* note 25.

27. *Id.* at 19–23.

28. *See* Jesús Remón Peñalver, *Sobre la Anulación del Laudo: el Marco General y Algunos Problemas,* 3 INDRET 1, 9 (2007).

29. For example, in Singapore, a Model Law jurisdiction usually recognized as an arbitration-friendly venue, a setting aside decision taken by a first instance court can be appealed before a court of appeals and before the Supreme Court. *See* BRS v. BRQ & BRR [2020] SGCA 108 (Sing.).

against an international award should be an application for setting aside before the courts of the seat of the arbitration.

This Article has the following structure: Section II provides an overview of the origins and contours of applications for constitutional injunctions in Latin America and Spain. Section III explores the relationship between Latin American constitutionalism and international mechanisms of dispute settlement. Section IV analyzes the decisions rendered by the constitutional courts of Colombia, Peru, Ecuador, and Spain. Section V analyzes these decisions and assesses their impact on the decision of the parties to a contract on whether to choose a seat located in any of these states for an international arbitration. The final section offers some concluding remarks on the delicate balance between constitutional traditions in Spain and Latin America and the promotion of international arbitration as a method for resolving transnational legal disputes.

II. Applications for Constitutional Injunctions in Latin America and Spain

A. *The Origins of Applications for Constitutional Injunctions*

Applications for constitutional injunctions developed in the late nineteenth century in Latin America as a result of American, French, and Spanish influence.[30] In 1835 and 1840, Alexis de Tocqueville published two volumes of *On Democracy in America* (*De La Démocratie en Amérique*).[31] This book explains, among other subjects, the institution of judicial review espoused at that time by the landmark case *Marbury v. Madison*.[32] Alexis de Tocqueville's work was influential among the Mexican lawyers who drafted the 1857 Federal Constitution of Mexico.[33] American influence, together with the influence of civil law systems such as those of France and Spain, led to a new judicial institution distinct from the judicial review of American courts.[34] The drafters of the 1857 Mexican Constitution wanted to incorporate elements from the French and Spanish cassation recourses into applications for constitutional injunctions.[35] Through cassation recourses parties can seek the annulment of lower court judgments before a court of last

30. Fix-Zamudio, *supra* note 19, at 230–31.
31. Brewer-Carías, *supra* note 16, at 8.
32. *Id.*
33. Fix-Zamudio, *supra* note 19, at 230.
34. Brewer-Carías, *supra* note 16, at 8.
35. Fix-Zamudio, *supra* note 19, at 230–31.

resort.[36] The drafters also had in mind the colonial institution of *Audiencias*, the practice of challenging the acts of viceroy governments before colonial courts.[37]

These diverse influences led to the promulgation of Article 101 of the Federal Mexican Constitution that granted federal courts jurisdiction over "all controversies arising out of laws or acts of any authority that violate individual guarantees."[38] This provision created a single mechanism through which Mexican citizens could not only challenge the constitutionality of laws but also of any government act that violated the individual rights and guarantees enshrined in the Constitution.[39] A similar institution was then introduced in the second half of the nineteenth century in other Central American countries, like Guatemala, El Salvador, and Honduras.[40] This novel institution also made its way to various Latin American constitutions of the twentieth century, including the constitutions of Brazil, Panama, Costa Rica, Venezuela, Bolivia, Paraguay, Ecuador, Peru, and Chile.[41] The influence of the 1857 Mexican Constitution led to the inclusion of a similar institution in the 1931 Spanish Constitution.[42] Applications for constitutional injunctions were severely limited in the aftermath of the Spanish Civil War but were reintroduced in the 1978 Constitution.[43] This Constitution, in turn, inspired some modern Latin American constitutions, like the 1991 Colombian Constitution.[44]

The widespread reception of applications for constitutional injunctions in Latin America even led to the recognition in the American Convention on Human Rights of a "[R]ight to [J]udicial [P]rotection."[45] Pursuant to Article 25 of the Convention:

> Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights

36. JAMES G. APPLE & ROBERT P. DEYLING, A PRIMER ON THE CIVIL LAW SYSTEM 29 (1995).

37. FIX-ZAMUDIO, *supra* note 19, at 231.

38. CONSTITUCIÓN FEDERAL DE LOS ESTADOS UNIDOS MEXICANOS [CF] [CONSTITUTION], art. 101, Feb. 5, 1857 (Mex.).

39. FIX-ZAMUDIO, *supra* note 19, at 237–38.

40. BREWER-CARÍAS, *supra* note 16, at 9.

41. *Id.*

42. FIX-ZAMUDIO, *supra* note 19, at 245–46.

43. *See id.* at 252.

44. JOSÉ VICENTE BARRETO RODRÍGUEZ, DERECHO CONSTITUCIONAL 33 (2008).

45. BREWER-CARÍAS, *supra* note 16, at 13 (quoting Habeas Corpus in Emergency Situations, Advisory Opinion OC-8/87, Inter-Am. Ct. H.R. (ser. A) (January 30, 1987).

> recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.[46]

Like the 1857 Mexican Constitution, the American Convention on Human Rights recognizes the right of any person to have access to judicial recourse for the protection of fundamental rights recognized by the constitution.[47]

B. *The Modern Contours of Applications for Constitutional Injunctions*

After this brief historical review, it is important to highlight the common contours of modern applications for constitutional injunctions in Latin America and Spain. Applications for constitutional injunctions are judicial remedies that seek to protect constitutional rights from the action or inaction of public authorities and individuals.[48] Constitutional courts are called upon to protect a right that is being threatened, or that has already been violated.[49] Courts seized of an application for a constitutional injunction have wide discretion to grant an appropriate remedy.[50] This may include ordering the defendant to stop an action that threatens a constitutional right or an order seeking the restoration of the circumstances in place before the violation occurred.[51] Applications for constitutional injunctions are considered extraordinary in the sense that a person can only apply for an injunction in the absence of "other effective judicial means" for the immediate protection of the constitutional right that is being threatened, or that has been violated.[52] In terms of standing, the general trend is that individuals and corporations, irrespective of their nationality, can apply for a constitutional injunction,[53] the only exception being that a foreigner cannot file an application for a constitutional injunction seeking the protection of a right that is exclusive to nationals of a state, like the right to vote in elections.[54]

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46. Organization of American States, American Convention on Human Rights, art. 25, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

47. BREWER-CARÍAS, *supra* note 16, at 13.

48. *Id.* at 1.

49. *Id.* at 2.

50. *Id.* at 19.

51. *Id.* at 2.

52. *Id.* at 18.

53. *Id.* at 21.

54. *See, e.g.*, Corte Constitucional [C.C.] [Constitutional Court], julio 24, 2018, Sentencia T-295/18, Gaceta de la Corte Constitucional [G.C.C.] (p. 20) (Colom.).

For the purposes of this Article, it is important to refer to the question of whether it is possible to apply for an injunction arguing that an act by a court threatens or has violated a constitutional right. This is an issue in relation to which the approach varies between the different countries where applications for constitutional injunctions exist. Some countries consider that courts, like any other government institution, should not infringe on the rights and liberties recognized in the constitution.[55] Under this interpretation, a party to a judicial proceeding could file an application for a constitutional injunction, arguing that a decision by the court seized of the matter threatens or violates a constitutional right.[56] Some of the countries that have adopted this approach are Colombia, Honduras, Guatemala, Mexico, Panama, Peru, and Venezuela.[57] This approach seems consistent with the historical origins of constitutional injunctions. As mentioned above, among the main sources of influence in the creation of applications for constitutional injunctions were the Spanish and French cassation recourses. The purpose of a cassation recourse is essentially the annulment of lower court judgments before a court of last resort.[58] Furthermore, the interpretation prevailing under the 1857 Mexican Constitution was that it was possible to file a constitutional injunction against the judgments of any Mexican court.[59]

A second group of countries, including Argentina, Uruguay, Costa Rica, The Dominican Republic, Panama, El Salvador, Honduras, Nicaragua, and Paraguay, have rejected the possibility of applying for a constitutional injunction against judicial decisions.[60] The Constitutional Court of Colombia summarized the arguments against allowing parties to apply for constitutional injunctions against judicial decisions.[61] The Colombian Constitutional Court held that the rules of civil procedure give parties effective mechanisms for challenging judicial decisions and correcting factual, legal, and procedural errors committed by courts.[62] Once these remedies have been exhausted, the principle of *res judicata* prevents further discussion, through an application for a constitutional

55. *See* BREWER-CARÍAS, *supra* note 16, at 24.

56. *Id.*

57. *Id.*

58. APPLE & DEYLING, *supra* note 36, at 29.

59. FIX-ZAMUDIO, *supra* note 19, at 233–34.

60. BREWER-CARÍAS, *supra* note 16, at 24.

61. Corte Constitucional [C.C.] [Constitutional Court], octubre 1, 1992, Sentencia C-543/92, Gaceta de la Corte Constitucional [G.C.C.] (p. 18 *et seq.*) (Colom.).

62. *Id.* at 19.

injunction, of what has already been decided.[63] The Court, however, eventually changed its position and held that judges, like any other public authority, are subject to applications for constitutional injunctions.[64]

C. *Applications for Constitutional Injunctions in Colombia, Peru, Ecuador, and Spain*

A brief overview of the constitutional and legal provisions concerning applications for constitutional injunctions in the analyzed jurisdictions provides the context for each of the decisions discussed in this Article. The 1991 Colombian Constitution refers to applications for constitutional injunctions in the following terms:

> Every person will have a claim for protective action before judges, at any time and place, through a preferential and speedy procedure, acting on his or her own behalf or through a representative, the immediate protection of his or her fundamental constitutional rights, whenever these are being violated or threatened by the action or omission of any public authority.[65]

The provision then states that a court decision resolving an application for a constitutional injunction will be subject to appeal.[66] Both the Constitution and the Decree that regulates the procedure for applying for a constitutional injunction set forth that either a first instance judgment that has not been appealed or a second instance judgment must be referred to the Constitutional Court, which has the discretion to decide whether to review the judgment or not.[67]

The 1993 Peruvian Constitution says the following: "Constitutional guarantees are: . . . Applications for injunctions, which proceed against the action or omission, by any authority, official or person, that violates or threatens any right recognized by the Constitution."[68] The Law on

63. *Id.* at 21.

64. *See* Corte Constitucional [C.C.] [Constitutional Court], febrero 26, 1993, Sentencia T-079/93, Gaceta de la Corte Constitucional [G.C.C.] (p. 11) (Colom.).

65. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] [CONSTITUTION] July 4, 1991, art. 86 (Colom.).

66. *Id.*

67. *Id.*; D. 2591/91, noviembre 19, 1991, DIARIO OFICIAL [D.O.], art. 32–33 (Colom.).

68. CONSTITUCIÓN POLÍTICA DEL PERÚ [C.P.] [CONSTITUTION] Dec. 29, 1993, art. 200(2) (Peru).

Habeas Corpus and Constitutional Injunctions clarifies that the decision on whether to grant or not grant a constitutional injunction is subject to appeal.[69] The Constitution then grants the Constitutional Tribunal the ultimate authority to review decisions that deny an injunction if the losing party chooses to file a further appeal.[70]

Unlike the constitutions of Colombia and Peru, the 2008 Constitution of Ecuador distinguishes between applications for ordinary and extraordinary constitutional injunctions.[71] Concerning applications for ordinary constitutional injunctions, Article 88 states that their purpose "is the direct and effective protection of the rights recognized in the constitution, and can be filed when there is a violation of constitutional rights, by acts or omissions of any non-judicial public authority."[72] On applications for extraordinary constitutional injunctions, Article 94 sets forth that they "can be filed against judgments or definitive writs that violate through action or omission rights recognized in the constitution; they must be filed before the Constitutional Court."[73] Applications for constitutional injunctions against arbitral awards are considered extraordinary, so they must be filed before the Constitutional Court.[74]

Finally, Article 53 of the 1978 Spanish Constitution states that:

> Every citizen may request the protection of the liberties and rights recognized in Article 14[75] and in the first section of the second chapter[76] before the ordinary tribunals through a procedure based on the principles of preference and speediness and . . . through an application for a constitutional injunction before the Constitutional Tribunal.[77]

Article 44 of the Organic Law of the Constitutional Tribunal grants jurisdiction to this Tribunal over applications for constitutional

69. L. 28237/04, mayo 31, 2004, DIARIO OFICIAL [D.O.] art. 57 (Peru).

70. CONSTITUCIÓN POLÍTICA DEL PERÚ [C.P.] [CONSTITUTION] Dec. 29, 1993, art. 202 (Peru).

71. CONSTITUCIÓN DE LA REPÚBLICA DE ECUADOR [CONSTITUTION] Oct. 20. 2008, cap. 3, art. 88, 94.

72. *Id.* art. 88.

73. *Id.* art. 94.

74. *See* Corte Constitucional [C.C.] [Constitutional Court], 19 de Noviembre 2019, No. 323-13-EP/19, ¶ 38 (Ecuador).

75. Article 14 recognizes the rights to equality and non-discrimination. CONSTITUCIÓN ESPAñOLA [C.E.] [CONSTITUTION], Dec. 29, 1978, B.O.E. n. 311, art. 14 (Spain).

76. This section deals with fundamental rights and public liberties. *Id.* tit. I, ch. 2.

77. *Id.* art. 53.

injunctions related to the acts or omissions of judicial authorities.[78] As mentioned before, the Constitutional Tribunal has rejected the possibility of applying for constitutional injunctions against arbitral awards. Only set aside decisions can be challenged through an application for a constitutional injunction,[79] following the procedure set forth in the Organic Law of the Constitutional Tribunal.[80]

III. The Relationship Between Latin American Constitutionalism and International Arbitration

After reviewing the contours of applications for constitutional injunctions, it is important to analyze the broader relationship between Latin American constitutionalism and international arbitration as a method for resolving transnational legal disputes. This relationship contextualizes the approach taken by Latin American courts to the ultimate issue analyzed in this Article, namely, the possibility of applying for a constitutional injunction against an international arbitral award rendered in an arbitration seated in one of the analyzed jurisdictions.[81]

A. *Distrust by Latin American States Towards Mechanisms of International Dispute Settlement*

With the exception of Spain, the constitutions of all the analyzed jurisdictions recognize arbitration as a mechanism of alternative dispute resolution.[82] Article 116 of the Colombian Constitution states that: "Individuals can be transitorily granted the function of administering justice in the position of . . . arbitrators empowered by the parties to issue decisions in law or equity."[83] Article 62 of the Peruvian Constitution says that: "Conflicts arising out of a contractual relationship can only be solved through arbitration or before the judiciary, in accordance with the protection mechanisms envisaged in the contract or in the law."[84] Lastly, Article 190 of the Ecuadorian Constitution

78. Ley Orgánica del Tribunal Constitucional [L.O.T.C.] [Constitutional Court Organizational Act] art. XLIV (B.O.E. 1979, 239) (Spain).

79. S.T.C., Jan. 17, 2005, *supra* note 25, at 52; S.T.C., Feb. 15, 2021, *supra* note 25.

80. L.O.T.C., supra note 78, art. XLIV.

81. *See, e.g.*, Sentencia T-354/19, *supra* note 21; Sentencia No. 00142-2011-PA/TC, *supra* note 21; Sentencia No. 31-14-EP/19, *supra* note 21.

82. *See* Constitución Política de Colombia [C.P.] [Constitution] July 4, 1991, art. 116 (Colom.); Constitución Política del Perú [C.P.] [Constitution] Dec. 29, 1993, art. 62 (Peru); Constitución de la República de Ecuador [Constitution] Oct. 20. 2008, cap. 4, art. 190.

83. Constitución Política de Colombia [C.P.] [Constitution] July 4, 1991, art. 116 (Colom.).

84. Constitución Política del Perú [C.P.] [Constitution] Dec. 29, 1993, art. 62 (Peru).

recognizes "arbitration, mediation, and other alternative procedures for dispute resolution."[85] This can be interpreted as an endorsement of the use of arbitration. However, a historical analysis demonstrates the lukewarm relationship of Latin America with the methods of international dispute settlement mentioned in this section.[86]

The early twentieth century was marked by the use of force as a way of settling transnational disputes.[87] The Roosevelt Corollary to the Monroe Doctrine authorized the use of American troops to collect debts owed by foreign states to American citizens.[88] Under this doctrine, the United States intervened on several occasions in Latin America until President Franklin D. Roosevelt's administration changed course and adopted the Good Neighbor Policy.[89] The relevant standards for settling disputes were also hotly disputed. As part of the agrarian reforms following the Mexican Revolution, Mexico expropriated the farmlands of American citizens.[90] U.S. Secretary of State Cordell Hull famously demanded "prompt, adequate, and effective compensation."[91] As a response to the use of gunboat diplomacy and the demands for the application of international standards to settle disputes, South American states adopted the Calvo Doctrine.[92] There are two aspects of this Doctrine. First, foreign investors enjoyed only the same rights as national investors.[93] Second, any dispute involving a foreign investor had to be settled before domestic courts, waiving any possibility of having recourse to international remedies.[94]

Although the Calvo Doctrine was eventually rejected, there have been several instances that demonstrate that Latin American states maintain a certain distrust towards international dispute settlement. One example is Venezuela's and Bolivia's denouncement of the Convention on the Settlement of Investment Disputes between States

85. CONSTITUCIÓN DE LA REPÚBLICA DE ECUADOR [CONSTITUTION] Oct. 20. 2008, cap. 4, art. 190.

86. Cristián Conejero Roos, *La Constitución y el Arbitraje Internacional: ¿Hacia un Nuevo Lenguaje?,* 7 REVISTA CHILENA DE DERECHO PRIVADO 235, 236 (2006).

87. Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 157, 160–61 (2005).

88. *Id.* at 161.

89. *Id.*

90. Monique Sasson, *Introduction: History and Policy Background to the Development of Bilateral and Multilateral Investment Treaties*, *in* INTERNATIONAL INVESTMENT ARBITRATION IN A NUTSHELL 13, 19 (Franco Ferrari & D. Brian King eds., 2020).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

and Nationals of Other States.[95] Ecuador also denounced the Convention,[96] but it recently signed it again to regain its status as a state party.[97] Another example is Colombia's denouncement of the Convention that gave the International Court of Justice (ICJ) jurisdiction to solve border disputes between Nicaragua and Colombia after the ICJ issued a decision unfavorable to Colombia.[98] This distrust towards methods of international dispute settlement explains to some degree why constitutional courts in Latin America have reserved for themselves the possibility of reviewing whether an international arbitral award is contrary to a constitutional provision.[99]

B. *Endorsement of a Legal or Constitutional Theory of Arbitration*

The recognition of arbitration in constitutional texts can also be interpreted as states endorsing a legal (or constitutional) theory of arbitration. Under this theory, arbitrators derive their power to solve a dispute from the fact that the constitution grants them authority akin to the state function of administering justice.[100] As such, the ultimate source of the arbitrator's authority is not the agreement between the parties but the legal or constitutional provision that allows parties to submit certain disputes to arbitration.[101] The obvious consequence of this approach is that arbitrators could be considered tantamount to judges, and their awards tantamount to judicial decisions.[102] If that were the case, there would be no reason to disallow the challenge of awards through the same means used to challenge judicial decisions, including applications for constitutional injunctions. Under this view, the recognition of arbitration in the constitutions of Colombia, Peru, and Ecuador seems less like an endorsement of arbitration and more like a way of asserting jurisdictional control over arbitration.

The legal or constitutional theory in force in Latin America contrasts with the contractual theory of arbitration, which Spanish courts seem

95. Sergey Ripinsky, *Venezuela's Withdrawal From ICSID: What it Does and Does Not Achieve*, INV. TREATY NEWS (Apr. 13, 2012), https://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve.

96. *Id.*

97. *Ecuador Signs the ICSID Convention*, ICSID (June 21, 2021), https://icsid.worldbank.org/news-and-events/news-releases/ecuador-signs-icsid-convention.

98. René Urueña, *Colombia se Retira del Pacto de Bogotá: Causas y Efectos*, 1 ANUARIO DE DERECHO PÚBLICO 511, 511 (2013).

99. *See* De Jesús, *supra* note 20, at 250.

100. Conejero Roos, *supra* note 86, at 256.

101. *Id.*

102. *Id.*

to have adopted.[103] For the contractual theory, arbitration derives its validity from party autonomy.[104] If parties have the freedom to enter into contracts, they also have the freedom to decide how to settle their contractual disputes, including the possibility of foregoing recourse to domestic courts in favor of private adjudicators.[105] It is for the parties, subject to certain limitations, to decide whether to arbitrate their disputes and how to conduct the arbitration proceedings.[106]

IV. The Decisions Issued in each of the Analyzed Jurisdictions

The first two sections of this Article provided the broader context in which each of the decisions to be discussed hereinafter was rendered. This section will describe in detail the decisions by the constitutional courts of Colombia, Peru, Ecuador, and Spain.

A. *Colombia*

In 2014, Colombia introduced a new Arbitration Law with a dualistic arbitration system: One section regulates domestic arbitration, and a different section, based on the Model Law, regulates international arbitration.[107] The Constitutional Court has issued several decisions endorsing the possibility of applying for a constitutional injunction against a domestic award.[108] This position also prevailed under the previous Arbitration Statute.[109] According to the Constitutional Court, domestic arbitral awards are tantamount to judicial decisions, considering that they definitively settle a dispute, are binding for the parties, and have *res judicata* effects.[110] Under this view, arbitrators have the same duty as

103. Although there are more theories about the nature of arbitration, these two are the ones that can be identified in the reasoning of the constitutional courts of the analyzed jurisdictions.

104. Kenneth S. Carlston, *Theory of the Arbitration Process*, 17 Law & Contemp. Probl. 631, 631–32 (1952).

105. *Id.*

106. Ferrari & Rosenfeld, *supra* note 15, at 5. For a comprehensive study of the limitations to party autonomy, see Limitations to Party Autonomy in International Commercial Arbitration (Franco Ferrari ed., 2016).

107. L. 1563/12, julio 12, 2012, Diario Oficial [D.O.] (Colom.).

108. *E.g.*, Corte Constitucional [C.C.] [Constitutional Court], mayo 3, 2018, Sentencia SU-033/18, Gaceta de la Corte Constitucional [G.C.C.] (Colom.); Corte Constitucional [C.C.] [Constitutional Court], octubre 26, 2017, Sentencia SU-656/17, Gaceta de la Corte Constitucional [G.C.C.] (Colom.).

109. Corte Constitucional [C.C.] [Constitutional Court], febrero 2, 2009, Sentencia T-058/09, Gaceta de la Corte Constitucional [G.C.C.] (¶ 4.4.1) (Colom.).

110. *Id.* ¶ 5.1.

judges to protect the parties' fundamental constitutional rights.[111] The Court identified the following situations in which an award can be considered contrary to the constitutional right to due process: (1) a grave error of law, procedure, or fact; (2) a direct violation of a constitutional provision; (3) an award that is not reasoned; and (4) an award procured by fraud.[112] However, as a way of respecting the parties' agreement of not solving their dispute through the court system, a court seized of an application for a constitutional injunction against an arbitral award has to be deferential to the findings of the arbitral tribunal and only vacate an award in case of a manifest violation of constitutional rights.[113]

Until recently, no court in Colombia had considered whether this reasoning would also apply to a constitutional injunction against an international arbitral award rendered by a tribunal seated in Colombia.[114] The first court to address this matter was the Supreme Court of Justice in a decision dated May 15, 2018.[115] A Spanish company filed an application for a constitutional injunction against an arbitral tribunal constituted under the auspices of the International Chamber of Commerce.[116] The petitioner claimed that the arbitral tribunal violated its constitutional right to due process because the arbitral tribunal issued an award without properly considering the evidence, without providing adequate and sufficient reasoning, and without properly applying the substantive law chosen by the parties.[117] Surprisingly, the Supreme Court did not address the threshold question of whether it was permissible to apply for a constitutional injunction against an international arbitral award.[118] This despite the fact that the sole arbitrator filed a brief arguing that international awards were not subject to applications for constitutional injunctions.[119] The Supreme Court cited prior case law on the possibility of challenging domestic awards through an application for a constitutional injunction. It held that it is

111. *See id.* ¶ 5.2.

112. Corte Constitucional [C.C.] [Constitutional Court], junio 8, 2005, Sentencia C-590/05, Gaceta de la Corte Constitucional [G.C.C.] (¶ 25) (Colom.).

113. Corte Constitucional [C.C.] [Constitutional Court], mayo 8, 2008, Sentencia T-443/08, Gaceta de la Corte Constitucional [G.C.C.] (¶ 2.5) (Colom.).

114. Santiago Talero Rueda, *Tutela Contra Laudos Arbitrales: Hacia una Solución en el Arbitraje Local e Internacional*, 3 ANUARIO DE DERECHO PRIVADO 9, 23 (2021).

115. Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Civil. mayo 15, 2008, M.P: A. Salazar, Expediente 2018-0120000, Gaceta Judicial [G.J.] (Colom.).

116. *Id.* at 1.

117. *Id.* at 1–2.

118. C.S.J., *supra* note 115.

119. *Id.* at 8.

well settled under Colombian law that courts must be deferential to the findings of arbitral tribunals.[120] Only manifest errors of law, fact, or procedure could affect the constitutional right to due process.[121] The Supreme Court rejected the application for a constitutional injunction, finding no such errors in the present case.[122]

The question arose again when a Colombian state-owned company filed an application for a constitutional injunction against an international arbitral tribunal constituted under the auspices of the Bogota Chamber of Commerce.[123] In this case, the Constitutional Court engaged in an in-depth analysis of whether it was possible to file an application for a constitutional injunction against an international arbitral award rendered by a tribunal seated in Colombia.[124] The facts of the case were the following: A Colombian state-owned company entered into an engineering, procurement, and construction contract with a consortium of two Chinese companies for a project involving a thermoelectric plant.[125] The parties had several disagreements about issues such as the contract term, the payment of certain invoices, and the imposition of a contractual penalty.[126] Under the arbitration agreement included in the contract, the Chinese consortium initiated an arbitration, and the arbitral tribunal issued an award partially unfavorable to the Colombian state-owned company.[127] The Colombian company filed an application for a constitutional injunction arguing that the arbitral tribunal committed manifest errors of fact and law, including the retroactive application of the new Arbitration Law to a contract concluded while the prior law was in force.[128] In parallel, the Colombian company filed an application for setting aside the award.[129]

Considering that one of the parties was a state-owned company, the Fourth Chamber of the Colombian State Council heard the application for the constitutional injunction, acting as the court of first instance. The Chamber ruled against the Colombian company, arguing that the issue had no constitutional relevance because the petitioner just wanted to revisit issues that had been definitively settled by the arbitral

120. *See id.* at 11.
121. *Id.* at 23.
122. *Id.* at 24.
123. Sentencia T-354/19, *supra* note 21, at 3.
124. Talero Rueda, *supra* note 114, at 23.
125. Sentencia T-354/19, *supra* note 21, at 3–4.
126. *Id.* at 4–5.
127. *Id.* at 5, 6–8.
128. *Id.* at 12–19.
129. *Id.* at 8.

award.[130] The Colombian company appealed before the Fifth Chamber of the State Council, which affirmed the ruling of the Fourth Chamber but on different grounds. The Fifth Chamber held that the argument about the retroactive application of the new Arbitration Law could be addressed in the application for setting aside the award.[131] As such, the application for the constitutional injunction was inadmissible because there was another judicial recourse for the effective protection of the constitutional right allegedly violated.[132] The Chamber then held that, although the arguments concerning manifest errors of law or fact were not within the scope of an application for setting aside the award, any decision on the matter could be rendered moot by the decision on whether to set aside the award or not.[133] Consequently, the Chamber dismissed the application for the constitutional injunction.

The Constitutional Court chose the case for review, and several institutions filed *amicus curiae* briefs.[134] The Latin American Association of Arbitration summarized the arguments against allowing parties to apply for a constitutional injunction against international arbitral awards. First, Article 107 of the Colombian Arbitration Law, based on Article 34 of the Model Law, states that the only recourse against an award is an application for annulment.[135] Second, international arbitrators do not perform the state function of administering justice or something akin to it as if they were domestic judges.[136] Third, serious violations of due process could lead to an award being annulled for being contrary to Colombia's public policy.[137] As such, applications for constitutional injunctions are unnecessary, given that an application for setting aside is an effective mechanism for protecting the parties' constitutional right to due process.[138]

The Constitutional Court rejected these arguments. The Court first held that an ordinary law, like the Colombian Arbitration Law, could not be interpreted in a way that limits the possibility set forth in the Colombian Constitution of applying for constitutional injunctions for the protection of fundamental constitutional rights.[139] The Court

130. *Id.* at 23–24.
131. *Id.* at 25.
132. *Id.*
133. *Id.*
134. *Id.* at 26–27.
135. *Id.* at 28–29.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.* at 39.

made reference to its prior case law, holding that domestic arbitral awards are tantamount to judicial decisions given that they resolve a dispute with *res judicata* effects.[140] The Court did not explain why the decisions concerning applications for constitutional injunctions against domestic awards were applicable to the issues discussed in this case.[141] The Court clarified that, although a party could apply for a constitutional injunction against an international award, the findings of fact and law of international arbitral tribunals were entitled to even greater deference than the findings of domestic arbitral tribunals.[142] The Court reasoned that this was compatible with the legislative intent of limiting judicial review of international awards.[143] The Court also clarified that an application for a constitutional injunction was only permissible when the seat of the arbitration was in Colombia, and the applicable law to the merits was in whole or in part Colombian law.[144]

Referring specifically to the grounds a party could invoke for applying for a constitutional injunction against an arbitral award, the Court held that a party could only apply for a constitutional injunction against an international award when the arguments for doing so could not be raised in a petition for annulment.[145] However, the Court failed to address which arguments that could be raised in an application for a constitutional injunction against an award could not also be considered as arguments that the award violates Colombia's public policy.[146] After this decision, it is unclear under which grounds or arguments a party could apply for a constitutional injunction against an international arbitral award. Outside these narrow (and unidentified) grounds, a party could still file a petition for a constitutional injunction but only against the decision resolving the petition for annulment of the award. Under the Constitutional Court's reasoning, it remains unclear whether errors of law, fact, or procedure so severe as to infringe a party's right to due process should be considered as a violation of Colombia's public policy that can be addressed in a petition for

140. *Id.* at 32.

141. Eduardo Zuleta & María Camila Rincón, *Colombia's Constitutional Court Declares That Constitutional Injunctions (Tutela) Can Be Upheld Against Awards in International Arbitration*, KLUWER ARB. BLOG (Nov. 4, 2019), http://arbitrationblog.kluwerarbitration.com/2019/11/04/colombias-constitutional-court-declares-that-constitutional-injunctions-tutela-can-be-upheld-against-awards-in-international-arbitration/.

142. Sentencia T-354/19, *supra* note 21, at 40.

143. *Id.*

144. *Id.* at 41.

145. *Id.* at 44.

146. *Id.* at 43–44.

annulment or as a violation of constitutional rights that can only be addressed in an application for a constitutional injunction.[147]

Turning to the specific case, the Court denied the application for a constitutional injunction because it considered that the arguments raised by the petitioner against the award could be raised in an application for the annulment of the award.[148] The petitioner had to exhaust the petition for annulment and could only file an application for a constitutional injunction against the decision on whether to annul the award or not.[149]

B. *Peru*

Peru is a Model Law jurisdiction and has a monistic system.[150] The grounds for setting aside a domestic award are substantially similar to those for setting aside international awards, although the public-policy ground for annulment only applies to international arbitrations.[151] With that clarification, we may now turn to the judgment of the Constitutional Tribunal dated September 21, 2011.[152] In this judgment, the Tribunal resolved the question of whether it is possible to apply for a constitutional injunction against an arbitral award. The judgment refers to a domestic award, but its rationale may well apply by analogy to international arbitrations, considering that Peru is a monistic jurisdiction and that the grounds for annulment for domestic and international awards are substantially similar.[153] Also, the Tribunal relied on Article 63(1)(f) of the Peruvian Arbitration Law, which is applicable to international arbitrations only, in support of its decision.[154] This is further indication that the Tribunal did not intend to limit its decision to domestic arbitrations. Despite these arguments, commentators have expressed concern that extending the holding of this judgment to international arbitral awards will hinder the development of international arbitration in Peru.[155]

147. *See* Talero Rueda, *supra* note 114, at 39–40.

148. Sentencia T-354/19, *supra* note 21, at 49.

149. *Id.* at 49.

150. Decreto Legislativo que norma el arbitraje, DL. N° 1071, Dirección de Arbitraje Administrativo del OSCE, 01-09-2018 (Peru).

151. *Id.* art. 63.

152. Sentencia No. 00142-2011-PA/TC, *supra* note 21.

153. Decreto Legislativo que norma el arbitraje, *supra* note 150, art. 63.

154. *Id.* art. 63(1)(f).

155. Verónica de Noriega, *Amparos Arbitrales: ¿La Puerta Volvió a Abrirse?*, SIMONS & DE NORIEGA (Nov. 17, 2020), https://simonsabogados.com/amparos-arbitrales-la-puerta-volvio-a-abrirse/.

The facts of the case are the following: Sociedad Minera de Responsabilidad Ltda. María Julia (María Julia) entered into a concession contract for the exploration and exploitation of a mine.[156] There was a controversy regarding the date on which the exploration stage was supposed to start.[157] In accordance with the arbitration agreement included in the concession contract, an arbitral tribunal comprised of a sole arbitrator resolved the dispute between the parties.[158] María Julia then applied for a constitutional injunction against the award, arguing that the arbitrator breached the duty of rendering a reasoned award, applied the wrong rules of law to the interpretation of the contract, and failed to adequately consider the documents submitted by María Julia.[159] The Fifth Constitutional Court of Lima dismissed the application for the injunction on the ground that the petitioner had to first exhaust the petition for the setting aside of the award.[160] The Third Civil Chamber of the Superior Court of Justice of Lima affirmed, noting that the petition for setting aside was equally effective for protecting the constitutional rights invoked by the petitioner.[161]

Given that the courts below had denied the injunction, María Julia had the possibility of a further appeal before the Constitutional Tribunal, and it indeed filed this appeal. The Constitutional Tribunal held that arbitrators administer justice.[162] Consequently, as any other authority that performs this function, arbitrators are bound by the principles and rights enshrined in the Peruvian Constitution.[163] That said, the Tribunal considered that a petition for the setting aside of an award is generally an effective mechanism for the protection of the parties' constitutional rights. The Tribunal considered that a violation of constitutional rights could lead to the annulment of a domestic award for lack of objective arbitrability,[164] given that under Peruvian law constitutional rights are not matters capable of being settled through arbitration.[165] For international awards, a violation of constitutional rights could also lead to the annulment of the award on the ground that the

156. Sentencia No. 00142-2011-PA/TC, *supra* note 21, ¶ 28.
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.* ¶ 29.
161. *Id.* at 1–2.
162. *Id.* ¶ 12.
163. *Id.*
164. *See id.* ¶ 20(d).
165. *See id.*

award is contrary to Peru's public policy.[166] In any case, the petitioner has the possibility of applying for a constitutional injunction against the decision on whether to set aside the award or not.[167]

Despite this reasoning, the Tribunal then held that there are three specific cases in which it is possible to apply for a constitutional injunction against an arbitral award.[168] The cases are the following: (1) when an arbitral tribunal disregards the Constitutional Tribunal's mandatory case law; (2) when an arbitral tribunal declares unconstitutional a law[169] that the Constitutional Tribunal or another Peruvian court held was constitutional; and (3) when a third party considers that the award is contrary to his or her constitutional rights.[170] In any of these scenarios the petitioner can apply for a constitutional injunction against the award, and the court seized of the matter may vacate the award and remand the case back to the arbitral tribunal for it to take a decision consistent with the court's findings.[171]

The Tribunal then turned to the arguments of the petitioner. For the Tribunal, the petitioner's application for a constitutional injunction was based on a disagreement with the factual and legal reasoning of the arbitral tribunal.[172] Revisiting the factual and legal aspects of the controversy is beyond the scope of an application for a constitutional injunction, and, therefore, the Tribunal ruled against María Julia.[173]

Justice Urviola Hani wrote a dissenting opinion in which he recognized that arbitral awards cannot be exempted from judicial review to ensure that they comply with the Peruvian Constitution.[174] However, Justice Urviola Hani argued that that role can be adequately performed by courts seized of a petition for annulment.[175] As such, there is no reason to allow a person to apply for a constitutional injunction to vacate an award because that may lead to an excessive judicialization of arbitration, affecting its status as an alternative and speedy method of dispute

166. *See id.*

167. *Id.* ¶ 20(f).

168. *Id.* ¶ 21.

169. The Tribunal says that a natural consequence of its finding that arbitrators perform the public function of administering justice is that they have the power granted by Article 138 of the Peruvian Constitutional to all judges to declare laws unconstitutional. *Id.* ¶ 24.

170. *Id.* ¶ 21.

171. *Id.*

172. *Id.* ¶ 28.

173. *Id.* ¶¶ 28–29.

174. *See* Sentencia No. 00142-2011-PA/TC, ¶ 6 (Urviola Hani, J., dissenting).

175. *Id.* ¶ 5.

settlement.[176] Finally, Justice Urviola Hani argued that the possibility of filing a constitutional injunction against the decision on whether to annul an award or not is enough to ensure the supremacy of the constitution.[177]

C. *Ecuador*

Unlike Colombia, Peru, and Spain, Ecuador is not a Model Law jurisdiction. Although the Arbitration Law of Ecuador distinguishes between domestic and international arbitration,[178] the Law does not comprehensively regulate international arbitration.[179] Article 42 of the Ecuadorian Arbitration Law simply states that international arbitrations seated in Ecuador will be regulated by the "treaties, conventions, protocols and other acts of international law signed and ratified by Ecuador."[180] The same provision then sets forth that international awards will have the same effects and will be enforced in the same manner as domestic awards.[181] Notably, the law lists no grounds for the annulment of international arbitral awards.[182] Given that no international law instrument sets forth grounds for the annulment of awards, it appears reasonable to consider that the grounds for the annulment of domestic awards would also apply to international awards. The grounds for annulling awards under the Ecuadorian Arbitration Law are, to some extent, similar to the ones listed by the Model Law.[183] According to Article 31, the grounds for annulling an arbitral award are (1) lack of proper service of process that impairs the right of one of the parties to be heard; (2) failure by the tribunal to engage in the taking of evidence; (3) the award deals with a dispute not contemplated by the terms of the submission to arbitration; and (4) the composition of the arbitral tribunal was not in accordance with the arbitration law or the agreement of the parties.[184]

With those clarifications in mind, we must now refer to the Constitutional Court's ruling dated November 19, 2019, in which the

176. *Id.* ¶ 12.

177. *Id.* ¶¶ 7–8.

178. Ley de Arbitraje y Mediación, art. 41–42, Registro Oficial [RO] 14-12-2006, últimas reformas RO 21-08-2018 (Ecuador).

179. *Id.*

180. *Id.* art. 42.

181. *Id.*

182. *Id.* art. 41–42.

183. *Compare* Ley de Arbitraje y Mediación, *supra* note 178, art. 31, *with* G.A. Res. 40/72, Model Law on International Commercial Arbitration, *supra* note 14, art. 34.

184. Ley de Arbitraje y Mediación, *supra* note 178, art. 31.

Court resolved the issue of whether it is possible to apply for a constitutional injunction against an arbitral award.[185] The case concerns a domestic award, but its rationale could also apply to international awards, given the particularities of the Ecuadorian Arbitration Law discussed above. The facts of the case are the following: Delgado Constructores Delcon Cía. Ltda. (Delcon) entered into a contract with a municipality of Ecuador for the construction of a sewerage system.[186] Delcon initiated an arbitration against the municipality seeking payment of monies due under the contract.[187] The arbitral tribunal issued an award in favor of Delcon, and the municipality filed an annulment action against the award.[188] The annulment court upheld the award, and the municipality filed a petition for clarifying and complementing the annulment judgment.[189] The court denied the petition, arguing that the municipality's true intention was to challenge the decision and not just clarify unclear points or to ask the court to address unresolved claims.[190] The municipality then applied for a constitutional injunction against this decision before the Constitutional Court.[191]

Even if the application for a constitutional injunction was nominally against the annulment court's refusal to clarify and complement its judgment, the municipality also argued that the award violated its constitutional rights.[192] Specifically, the municipality contended that the arbitral tribunal lacked competence because the arbitration agreement only covered disputes that arose while the contract was being performed.[193] At the moment Delcon initiated the arbitration, all works had been concluded, so the disputes resolved by the arbitral tribunal were outside the scope of the arbitration agreement.[194] The municipality also argued that the arbitral tribunal did not render a reasoned decision because it failed to address its jurisdictional objections in the award.[195]

The Constitutional Court noted that even if the municipality only applied for a constitutional injunction against the decision of the annulment court for not complementing or clarifying its decision, the

185. Sentencia No. 31-14-EP/19, *supra* note 21.
186. *Id.* ¶ 1.
187. *Id.*
188. *Id.* ¶¶ 4–5.
189. *Id.* ¶¶ 8–9.
190. *Id.* ¶ 9.
191. *Id.* ¶ 10.
192. *Id.* ¶ 15.
193. *Id.* ¶ 19.
194. *Id.*
195. *Id.* ¶ 20.

Court also had to address the municipality's arguments that the arbitral award violated its constitutional rights.[196] The Court considered that Article 31 of Ecuador's Arbitration Law lists the exhaustive grounds for annulling an award.[197] That, however, does not foreclose the possibility of applying for a constitutional injunction seeking to vacate the award when the arbitral tribunal violated constitutional rights, including the violation of the right to due process.[198] These violations are beyond the scope of the grounds for annulling an award.[199] According to the Court, this is the only interpretation that protects the effectiveness of the constitutional rights of the parties to an arbitration.[200] Parties can likewise file an application for a constitutional injunction against a court's decision regarding the annulment of an award.[201]

The Court noted that in this case, the municipality had filed a petition for annulment before filing its application for a constitutional injunction. The Court considered that unnecessary because the alleged lack of competence and failure to issue a reasoned award are not grounds for the annulment of an award under Article 31 of Ecuador's Arbitration Law.[202] The Court then denied the constitutional injunction, arguing that the award does not contain the tribunal's decision on its own competence, which was what the municipality actually disputed, because that decision was made in a hearing. The petitioner wrongly applied for an injunction against the award in which the arbitral tribunal had not discussed its own competence. Therefore, the Court denied the municipality's application for a constitutional injunction.[203]

Through this decision, the Court overruled its previous case law in which it had held that "the grounds for annulment of Article 31 of [Ecuador's Arbitration Law were] not exhaustive." In its prior case law, the Court considered that lack of jurisdiction and insufficient reasoning were grounds for annulling an award, even though they are not listed in Article 31.[204]

196. *Id.* ¶ 16.
197. *Id.* ¶ 41.
198. *Id.* ¶ 40.
199. *Id.*
200. *Id.* ¶ 49.
201. *Id.* ¶¶ 54–55.
202. *Id.* ¶ 56.
203. *Id.* ¶¶ 60–61.
204. Andrés Larrea, *To Annul or Not to Annul: The Constitutional Court of Ecuador Finally Set Clear Rules for the Annulment of an Arbitral Award*, KLUWER ARB. BLOG (Feb. 15, 2021), http://arbitrationblog.kluwerarbitration.com/2021/02/15/to-annul-or-not-to-annul-the-constitutional-court-of-ecuador-finally-set-clear-rules-for-the-annulment-of-an-arbitral-award/.

D. *Spain*

Spain is a Model Law jurisdiction with a monistic system.[205] Even before adopting the Model Law, Spain's Constitutional Tribunal held that it was not possible to apply for a constitutional injunction against an arbitral award.[206] According to the Tribunal, arbitral awards are not attributable to a public authority and are, therefore, outside the scope of an application for a constitutional injunction under Article 41(2) of the Organic Law of the Constitutional Tribunal.[207] This interpretation marks the key distinction between Spain and the Latin American jurisdictions analyzed in this Article; in contrast to Spain, a common hallmark of the decisions of the courts of Colombia, Peru, and Ecuador is the adoption of a legal or constitutional view of arbitration.[208] These courts consider that arbitrators have been granted the prerogative of carrying out the public function of administering justice, or at least something akin to it, by the domestic legal system, and, as a consequence, their acts can be challenged through an application for a constitutional injunction.[209] In contrast, the Constitutional Tribunal of Spain seems to adopt the contractual theory of arbitration. Under that theory, arbitrators are private individuals chosen by the parties to solve a dispute, and therefore, the ultimate source of their authority is the parties' contract, not the law or the constitution.[210] As such, the arbitrators' acts are not an exercise of public authority.[211]

In the judgment of February 15, 2021, the Constitutional Tribunal went a step further in its pro-arbitration stance by limiting undue

205. Ley 60/2003, de 23 de diciembre, de Arbitraje (B.O.E. 2003, 309) (Spain).

206. Remón Peñalver, *supra* note 28, at 9.

207. S.T.C., Nov. 11, 1996 (B.O.E. No. 303, p. 20) (Spain). According to this provision: "Applications for constitutional injunctions protect, under the terms established in this law, against the violations of the rights and liberties referred to in the prior section [rights contained in Articles 14 to 29 of the Spanish Constitution] arising out of the decisions, juridical acts, omissions, or actions of the public powers of the State, the Autonomous Communities and other public entities of territorial, corporate or institutional character, as well as of their officials or agents." Ley Orgánica del Tribunal Constitucional art. XLI.II (B.O.E. 1979, 239) (Spain).

208. Sentencia T-354/19, *supra* note 21, at 32; Sentencia No. 00142-2011-PA/TC, *supra* note 21, ¶ 12; Sentencia No. 31-14-EP/19, *supra* note 21, ¶ 49.

209. Sentencia T-354/19, *supra* note 21, at 32; Sentencia No. 00142-2011-PA/TC, *supra* note 21, ¶ 12; Sentencia No. 31-14-EP/19, *supra* note 21, ¶ 49.

210. Carlston, *supra* note 104, at 632.

211. This does not mean that the arbitrators' power is unlimited. The award is still subject to judicial review through an annulment proceeding. Likewise, party autonomy is not unfettered as it is subject to various limitations. LIMITATIONS TO PARTY AUTONOMY IN INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 106.

judicial interference with arbitral awards.[212] Several commentators have noted that this judgment enhances Spain's standing as an attractive seat for international arbitration.[213] The underlying arbitration referred to a dispute between a family company's shareholders. The plaintiffs alleged that the majority shareholder had abused his rights and his controlling stake in the company.[214] An arbitral tribunal comprised of a sole arbitrator issued an award *ex aequo et bono*, in accordance with the arbitration agreement included in the company's bylaws.[215] The arbitral tribunal ruled in favor of the plaintiffs and ordered the dissolution of the company and the liquidation of its assets, as had been requested by the plaintiffs.[216]

The defendant filed a petition for annulment, arguing that the award was contrary to Spanish public policy because it ordered the dissolution of the company without invoking any legal or contractual grounds.[217] The petitioner also argued that the tribunal did not issue a sufficiently reasoned award. Specifically, the tribunal failed to consider that Spanish courts had previously rejected plaintiffs' abuse-of-rights argument.[218] The petitioner also argued that the arbitral tribunal did not analyze the documents on the record that disproved the plaintiffs' allegations.[219] The Superior Tribunal of Madrid annulled the award, agreeing with the petitioner that the tribunal did not issue a sufficiently reasoned award.[220] According to the Superior Tribunal, even an *ex aequo et bono* decision must be based on an adequate analysis of the evidence, something that the arbitral tribunal did not do.[221] This failure to issue a reasoned award is contrary to Spain's public policy.[222] The Superior Tribunal then held that ordering the dissolution of a

212. S.T.C., Feb. 15, 2021, *supra* note 25.

213. Risteard de Paor & Pedro Saghy, *Spanish-Seated Arbitration Enhances Its Standing Through Recent Spanish Constitutional Court Case Law*, DENTONS (Apr. 1, 2021), https://www.dentons.com/en/insights/articles/2021/april/1/spanish-seated-arbitration-enhances-its-standing; Vanessa Alarcón Duvanel & Isabel Fernández de la Cuesta, *The Spanish Constitutional Court Bolsters Arbitration in Spain*, JD SUPRA (Mar. 4, 2021), https://www.jdsupra.com/legalnews/the-spanish-constitutional-court-5225615/.

214. S.T.C., Feb. 15, 2021, *supra* note 25, at 2.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.* at 4.

219. *Id.*

220. *Id.* at 3.

221. *Id.*

222. *Id.* at 5.

company without invoking any legal or contractual grounds also violates Spain's public policy.[223]

The plaintiffs in the arbitration filed an extraordinary petition requesting the annulment of the decision of the Superior Tribunal of Madrid.[224] They argued that their right under Article 24(1) of the Spanish Constitution to effective judicial protection had been violated because the decision was unreasonable and contained manifest errors of law.[225] The Superior Tribunal denied the petition, arguing that the plaintiffs just expressed their disagreement with the setting aside decision but failed to prove a violation of their constitutional rights.[226] At most, they advanced policy arguments about the desirability of limiting judicial interference with the factual and legal reasoning of arbitral awards. These arguments were insufficient for vacating a decision setting aside an arbitral award.[227]

The plaintiffs then applied for a constitutional injunction again under the argument that the setting aside decision was contrary to their right to effective judicial protection.[228] For the plaintiffs, the Superior Tribunal of Madrid applied the same standard of review to the award as the one that would apply to a judicial decision.[229] The plaintiffs contended that the notion that the factual or legal reasoning of an award, or the lack thereof, could affect Spain's public policy was unsubstantiated.[230] Finally, they argued that it was false that the arbitral award did not consider the defendant's evidence and arguments.[231]

The Constitutional Tribunal granted the constitutional injunction and vacated the setting aside decision.[232] The Tribunal reiterated its prior case law, holding that one of the key aspects of arbitration is the minimal interference by domestic courts as a sign of respect for the parties' decision of arbitrating their disputes.[233] The notion of minimal judicial intervention is embodied in the annulment recourse, in which there is limited judicial review pertaining to exhaustive grounds for

223. *Id.* at 15.
224. *Id.* at 4.
225. *Id.* at 5.
226. *Id.*
227. *Id.*
228. *Id.* at 6.
229. *Id.*
230. *Id.* at 7.
231. *Id.*
232. *Id.* at 23.
233. *Id.* at 15.

annulment set out in the Arbitration Law.[234] As such, an application for setting aside an award cannot be equated to an appeal on the merits.[235] The Tribunal then stated that, while it is true that an award can be annulled for violating Spain's public policy, the standard for finding such a violation is quite high.[236] Spain's substantive public policy refers to the political, moral, and economic principles necessary for the conservation of society, including the rights and freedoms enshrined in the Constitution.[237] Procedural public policy is comprised of the essential principles of Spain's procedural system, such as the right to be heard, the equality of the parties, the opportunity of a party to rebut the evidence presented by the opposing party, *res judicata*, and the right to a reasoned decision, among others.[238] Only an award that is arbitrary, illogical, absurd, or irrational may be considered contrary to Spain's substantive or procedural public policy.[239]

Regarding the specific case, the Constitutional Tribunal characterized the decision to set aside the award as irrational.[240] The Superior Tribunal of Madrid annulled the award because it disagreed with the reasoning of the arbitral tribunal. The Superior Tribunal did not adequately consider whether the petitioner had proved one of the exhaustive grounds for annulment set forth in Spain's Arbitration Law.[241] For the Constitutional Tribunal, the arbitral tribunal issued a reasoned decision, and the arguments presented in the award are not irrational.[242] Hence, there was no valid reason for setting aside the award.

V. Critical Analysis of the Decisions: Towards a New Balance Between Constitutional Concerns and the Principle of Finality of International Arbitral Awards

Although the constitutions of Colombia, Peru, Ecuador, and Spain incorporate the institution of applications for constitutional injunctions, the relationship between arbitration and this aspect of constitutional law differs from jurisdiction to jurisdiction. Colombia, Ecuador,

234. *Id.*
235. *Id.* at 16.
236. *Id.* at 19.
237. *Id.* at 15.
238. *Id.* at 17–18.
239. *Id.* at 16.
240. *Id.* at 22.
241. *Id.* at 21–22.
242. *Id.* at 22.

and Peru have adopted a legal or constitutional theory of arbitration.[243] The notion that arbitrators perform functions akin to administering justice and derive their authority from the constitution leads to the notion that their acts can be challenged through the means available for challenging judicial decisions in those states—namely, applications for constitutional injunctions. In contrast, Spain seems to have adopted a contractual theory of arbitration.[244] Under this view, arbitrators derive their authority from the parties' contractual agreement, and their acts are not an exercise of public authority. As a consequence, arbitral awards are beyond the scope of applications for constitutional injunctions.

Even if one were to accept the premises of the constitutional theory, the rationale of the courts of Colombia, Peru, and Ecuador on this matter seems unfounded. The main argument of the courts of these jurisdictions to allow parties to apply for constitutional injunctions against arbitral awards is that arbitral tribunals cannot be exempted from complying with the constitution.[245] Nonetheless, at least from the perspective of Colombian and Peruvian law, the constitutional courts failed to recognize that constitutional rights should be part of the public policy of a state, something that was recognized by Spain's Constitutional Tribunal.[246] The violation of these rights by an arbitral award would entail that such an award could be annulled for being contrary to the public policy of the arbitration's seat.[247] The Colombian Constitutional Court, for example, did not even attempt to explain which violations of constitutional rights would not be contrary to Colombia's public policy and, as a consequence, could not be addressed in a petition for annulment.[248] This is surprising considering that, for the Court, such unidentified violations would allow a party to apply for a constitutional injunction to vacate an international arbitral award.[249] Although the Peruvian Constitutional Court did identify the violations of constitutional rights that would be outside the scope of an annulment petition and thus can only be addressed through a constitutional injunction, it

243. Sentencia T-354/19, *supra* note 21, at 32; Sentencia No. 00142-2011-PA/TC, *supra* note 21, ¶ 12; Sentencia No. 31-14-EP/19, *supra* note 21, ¶ 49.

244. *See* S.T.C., Feb. 15, 2021, *supra* note 25, at 17–18.

245. Sentencia T-354/19, *supra* note 21, at 39; Sentencia No. 00142-2011-PA/TC, *supra* note 21, ¶ 13; Sentencia No. 31-14-EP/19, *supra* note 21, ¶ 49.

246. S.T.C., Feb. 15, 2021, *supra* note 25, at 18.

247. G.A. Res. 40/72, Model Law on International Commercial Arbitration, *supra* note 14, art. 34.

248. Sentencia T-354/19, *supra* note 21, at 43.

249. *See id.* at 44.

did not explain the reasons why those grounds would not also entail that the award is contrary to Peru's public policy.[250] These obvious shortcomings in the courts' reasoning cast doubt on whether it was really necessary to allow parties to apply for a constitutional injunction against arbitral awards instead of entrusting the courts seized of an application for annulment with the role of ensuring the supremacy of the constitution.

Ecuador merits closer analysis. Unlike Colombia and Peru, Ecuador does not recognize a violation of public policy as a ground for annulling an award.[251] But through its decision, the Court effectively created a new ground for annulling arbitral awards in Ecuador tantamount to the Model Law's provision on public policy.[252] In other words, the Court failed to grant any deference to the legislative choice to not include a violation of public policy as a ground for annulling an arbitral award in Ecuador's Arbitration Law. Furthermore, this decision, like the ones in Peru and Colombia, creates a *sui generis* procedure in which two different courts are tasked with the judicial review of arbitral awards.[253] These reviews may well take place simultaneously or subsequently. Parties are then subjected to two post-award challenges before two different courts.

Beyond the shortcomings in the reasoning of the constitutional courts of Colombia, Peru, and Ecuador, these decisions also affect the possibility of these states becoming attractive seats for international arbitration.[254] There is a tension between the principle of finality of awards and the principle of fairness.[255] Both parties and states have an interest in ensuring the integrity and procedural fairness of any system of adjudication, including arbitration.[256] That, however, does not mean

250. Sentencia No. 00142-2011-PA/TC, *supra* note 21, ¶ 21.

251. Ley de Arbitraje y Mediación, *supra* note 178, art. 31.

252. *See* Sentencia No. 31-14-EP/19, *supra* note 21, ¶ 49.

253. Indeed, these states' constitutional courts are the courts of last resort regarding applications for constitutional injunctions against awards. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] [CONSTITUTION] July 4, 1991, art. 241.9 (Colom.); CONSTITUCIÓN POLÍTICA DEL PERÚ [C.P.] [CONSTITUTION] Dec. 29, 1993, art. 202 (Peru); CONSTITUCIÓN DE LA REPÚBLICA DE ECUADOR [CONSTITUTION] Oct. 20. 2008, cap. 3, art. 94. Ordinary commercial or administrative courts have jurisdiction over applications for setting aside an award. *See* L. 1563/12, *supra* note 107, art. 68; Ley de Arbitraje y Mediación, *supra* note 178, art. 31; Decreto Legislativo que norma el arbitraje, *supra* note 150, art. 64.

254. de Paor & Saghy, *supra* note 213 (noting that rejecting the possibility of filing constitutional injunctions against international awards enhanced Spain's standing as a seat for international arbitrations).

255. Abedian, *supra* note 1, at 554.

256. BERMANN, *supra* note 7.

that arbitral awards should be subject to the same degree of scrutiny as a judicial decision being appealed by the losing party. Parties shy away from seats characterized by undue judicial interference with arbitral awards by national courts.[257] The Model Law strikes a fair balance between these principles. On the one hand, it recognizes that over-judicialization denaturalizes arbitration.[258] It affects the parties' agreement to solve their disputes outside the judicial system of a specific country, and it affects the status of arbitration as a speedy and efficient method for the settlement of disputes. On the other hand, the Model Law recognizes a state's legitimate interest in ensuring that parties' right to due process is respected and that awards are not contrary to the public policy of the state in which they are issued.[259] The balancing of these competing principles has led to a system of judicial review in which the only recourse against an award is a petition for annulment on exhaustive grounds relating to the jurisdiction of the arbitral tribunal, the integrity of the arbitral procedure, and the violation of the public policy of the seat of the arbitration.[260]

Colombia, Peru, and Ecuador completely break away from this system by allowing parties to apply for a constitutional injunction against an arbitral award. As a result of the decisions analyzed in this Article, in these states, there are three post-award remedies: an annulment recourse, an application for a constitutional injunction against an award, and an application for a constitutional injunction against the annulment decision.[261] Moreover, there is a new ground for vacating an award not set forth in the arbitration laws of any of these countries: a violation of constitutional rights.[262] The question then becomes: Is there a way to reconcile the long-held constitutional traditions of these states with an efficient system of judicial review of awards? This Article contends that there is, and the answer lies in the concept of public policy. The courts in the analyzed jurisdictions should reinterpret public policy to include within its bounds the protection of constitutional rights. This way, the courts tasked with solving a petition for annulment

257. Freyer & Gharavi, *supra* note 8.

258. *See* G.A. Res. 40/72, Model Law on International Commercial Arbitration, *supra* note 14, art. 34 (setting forth that an application for setting aside is the exclusive recourse against an arbitral award).

259. *See id.* (setting forth the limited grounds for the setting aside of an award).

260. FERRARI & ROSENFELD, *supra* note 15, at 175–76.

261. Sentencia T-354/19, *supra* note 21, at 49–50; Sentencia No. 00142-2011-PA/TC, *supra* note 21, ¶¶ 17, 21; Sentencia No. 31-14-EP/19, *supra* note 21, ¶ 40.

262. Sentencia T-354/19, *supra* note 21, at 39; Sentencia No. 00142-2011-PA/TC, *supra* note 21, ¶ 21; Sentencia No. 31-14-EP/19, *supra* note 21, ¶ 49.

of an international arbitral award will fulfill the role of ensuring the supremacy of the constitution. There could be a limited right to appeal an annulment decision when the issue is whether the award violates public policy due to a violation of constitutional rights. Through this procedure, constitutional courts would still have the final word on whether an award violated the constitutional rights of one of the parties or not.

VI. Conclusion

Historically, there has been a certain level of distrust by Latin American states towards international dispute settlement.[263] This distrust may partially explain the over-judicialization of international arbitration through applications for constitutional injunctions. In this essay, I argue that the Model Law's system of judicial review is compatible with the analyzed jurisdictions' desire to ensure that courts are able to protect the constitutional rights of parties to international arbitrations seated in those states. The concept of public policy is the key to striking a balance between long-standing constitutional traditions and the continuous development of international arbitration as a method for resolving transnational disputes. The experience of Spain demonstrates that constitutional injunctions are compatible with a pro-arbitration stance. Recognizing that public policy includes the protection of constitutional rights would permit the courts seized of an annulment petition to guarantee the protection of the constitution without doing away with the basic notions that the only recourse against an international arbitral award should be a petition for annulment and that courts should only annul awards under the narrow and exhaustive grounds for annulment listed in the applicable arbitration law. That position would allow Colombia, Peru, and Ecuador to enhance their status as attractive seats for international arbitration without renouncing their legitimate interest in preventing violations of constitutional rights in international arbitrations seated in those states.

263. Conejero Roos, *supra* note 86, at 236.