

Colombia's Constitutional Court Conditions Ratification of the Colombia-France BIT to the Interpretation of Several Provisions of the Treaty

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In June 2019, Colombia's Constitutional Court (the "Court") issued a communication informing its decision on the constitutionality of the BIT between Colombia and France (the "BIT") signed on July 10, 2014. In an unprecedented decision, the Court adjudged that the BIT is compliant with the Colombian Constitution (the "Constitution") but conditioned its ratification to the state parties' issuance of a joint interpretative note of several provisions, including those regarding fair and equitable treatment ("FET"), national treatment, most favored nation ("MFN"), and expropriation.

In the past, the Court subjected the approval of the FTA between Colombia and South Korea to the issuance of a unilateral interpretative declaration to interpret section A(2) of Annex 8C so as to preserve the powers of the Colombian Central Bank. However, this is the first time that the Court conditions the approval of several clauses of the BIT to the adoption of a joint interpretative declaration, or in absence thereof, to a renegotiation of the BIT.

Three out of nine justices of the Court issued dissenting opinions basically considering that the Court exceeded its constitutional powers.

The Court's decision

The Court considered, generally, that the BIT is compliant with the Constitution. Nonetheless, it concluded that certain interpretations of the text of the BIT may be inconsistent with constitutional principles such as the obligation to provide equal treatment to foreign and national investors and their investments, and not to discriminate the former vis-à-vis the latter. In turn, the Court warned that to ratify the BIT, the state parties had to either adopt a joint interpretative declaration or renegotiate the treaty to comply with the decision of the Court.

Fair and Equitable Treatment

Article 4 of the BIT provides that:

“Each Contracting Party shall accord fair and equitable treatment in accordance with applicable international law to investors of the other Contracting Party and its investments in its territory. For greater certainty the obligation to accord fair and equitable treatment includes, *inter alia*:

a) the obligation not to deny justice in civil, criminal or administrative proceedings in accordance with due process;

b) the obligation to act in a transparent, non-arbitrary and discriminatory manner as regards investors from the other contracting Party and its investments”. This treatment is consistent with the principles of foreseeability and legitimate expectations (...).”

The Court concluded that the language of this clause is vague and undetermined and therefore contradicts constitutional principles of legal certainty and good faith. Hence, this provision must be interpreted by the state parties to clarify whether “international law” refers to customary international law, treaty law, or both, and if it refers to customary international law, to which “instruments” does custom refer to. Moreover, the Court considered that the expression “inter alia” must be interpreted restrictively, in an analogical and not additive sense. Finally, it concluded that the concept of “legitimate expectations” is compliant with the Constitution only to the extent that (a) the expectations arise from specific and repeated acts carried out by the host state to induce an investor to make or maintain investments in its territory; and (b) the expectations are breached as a result of the investment being affected by abrupt and unexpected changes made by public authorities.

National treatment and MFN

Akin to other national treatment and MFN clauses included in multiple International Investment Agreements ratified by Colombia, Article 5 of the BIT provides that each contracting party shall grant to the investments of investors of the other contracting party made in its territory, a treatment not less favorable than that accorded, in like circumstances, to investments of its own investors or to investments of investors of another third state. According to Article 5(3) of the BIT, this obligation does not prevent the contracting parties from adopting justified, necessary and proportional measures to guarantee public order in the event of serious threats to fundamental interests of the states.

For the Court, the terms “similar circumstances” and “necessary and proportional” are vague and uncertain. According to the Court, the former must be interpreted in a way that encompasses all relevant circumstances –including differentiated treatment directed to pursue legitimate public policy objectives– and the latter should be interpreted in a way that respects the autonomy of national authorities to guarantee public order and protect legitimate public policy objectives.

Also, the Court concluded that the practice accepted by some international investment tribunals to import through the MFN clause provisions from other treaties ratified by the host state of the investment, threatens the powers of the President of Colombia to direct international relations and negotiate treaties, as embodied in Article 189.2 of the Political Constitution. Consequently, the Court declared the expression “treatment” to be compliant with the Constitution insofar as it is interpreted to preserve the competences of the President.

Expropriation

Article 6(2) of the BIT provides for the definition of indirect expropriation. Under this provision, a case-by-case analysis must be performed in order to determine whether a measure or series of measures adopted by one of the contracting parties constitute indirect expropriation, considering, among others, the consequences of the measure in the legitimate expectations of the investor. Furthermore, it provides that measures adopted to safeguard legitimate public policy objectives do not constitute an indirect expropriation insofar as such actions are necessary and proportional.

The Court found that the expressions “legitimate expectations” and “necessary and proportional” pose difficulties due to their vagueness and dissimilar application by international investment tribunals. Accordingly, it concluded that these terms must be interpreted under the same conditions required by the Court as regards Article 4 with respect to the concept of “legitimate expectations”, and Article 5 regarding the expression “necessary and proportional”.

Preliminary Comments

Although the full text of the judgment has not been released yet by the Court, the official communication reporting the decision raises several questions and comments. The following is a brief initial reaction to the official summary issued by the Court. But of course, it will be necessary to wait for the full text of the judgment to perform a full evaluation of the Court’s reasoning.

In its analysis of Article 4 of the BIT, the Court emphasized on the need to specify which are the “instruments” comprising customary international law in order to clarify the concept of “international law”. This request is far from clear. The Court seems to assume that customary international law is contained in a set of treaties or international instruments. If this is the case, the task entrusted to the contracting parties by the Court is almost impossible to comply with since there is no set of treaties or instruments that embodies customary international law.

Additionally, the Court does not explain how it comes to what appears to be its own definition of “legitimate expectations”. There is no reference in the Court’s communication to the interpretation of the BIT in the light of the Vienna Convention on the Law of Treaties (VCLT), to which both Colombia and France are parties.

As to the MFN clause contained in article 5 of the BIT, the clarifications requested by the Court seem more as requests for modifications or additions to the BIT than mere interpretative declarations. The Court demands the MFN clause to be interpreted so as to bar the possibility of importing of provisions incorporated in other international investment agreements (IIAs). While, Article 5(4) of the BIT already excludes the application of the MFN clause to import clauses of “definitions” (such as Article 1 of the BIT) or dispute settlement mechanisms incorporated in other IIAs, the BIT does not exclude substantive—or any other—provisions. Thus, the question is whether broadening the scope of limitations to the MFN clause as requested by the Court, would constitute an addition to the BIT rather than an interpretation.

This decision has dramatically changed the Court’s longstanding position regarding IIAs and may have several effects.

First, if the Parties wish to pursue the ratification of the BIT, the representatives of Colombia and France will have to negotiate again either a joint interpretative declaration or the language of the BIT.

The question, of course, is whether France will follow the Court's requests.

Second, the judgment of the Court may become evidence of state practice on how Colombia interprets provisions such as "similar circumstances" or "legitimate expectations". For better or worse, this may have an impact on on-going and future investment arbitrations against Colombia.

Third, the Court drew a red line for Colombia in the negotiation and ratification of IIA. It is most likely that the Court will not approve similar clauses as the ones incorporated in the BIT without further interpretation. The bottom-line question is whether this judgment opens the door for the Court to impose on Colombia's executive branch, and particularly on the President as head of the international relationships of Colombia, the Court's views as to the contents of future IIAs.

Conclusion

The official communication suggests that the Court abrogated the competence to redefine the text of certain provisions of the BIT invading the competence granted to the President of Colombia by the Constitution. Furthermore, it seems that most of the interpretations requested by the Court cannot be addressed through a joint interpretative declaration but require an amendment to the treaty and therefore a new negotiation of its terms. The complete decision may, or may not, shed light on the position of the Court and on whether it exceeded its powers.