

Colombia's Constitutional Court Approves FTA with Israel but Conditions its Ratification

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In June 2019, the Constitutional Court of Colombia (the "Court") issued a [communication](#) summarizing its decision on the [Free Trade Agreement between the Republic of Colombia and the State of Israel](#) (the "FTA") signed on September 30, 2013. The Court adjudged that the FTA is compliant with the Colombian Constitution but warned that if the President decided to ratify the FTA, the State Parties to the FTA must first either issue a joint interpretative declaration or, if necessary, renegotiate the expropriation and most-favored-nation ("MFN") clauses of the FTA.

In the process of approval, the Court held a public hearing and invited the ambassadors of Israel and Palestine, the Ministers of Trade and Foreign Affairs of Colombia, former negotiators of the treaty, and professors Adriana Zapata and Eduardo Zuleta, among others, to present positions on the matter.

This communication on the Court's ruling comes at the same time as the [communication](#) summarizing the decision regarding the BIT between Colombia and France, in which the Court arrived at similar conclusions (discussed [here](#)).

The Court's Decision

A key question resolved by the Court was whether the definition of "territory" in Article 1.5 of the FTA implied Colombia's recognition of Israel's sovereignty over the denominated "Palestinian occupied territories". The Court also evaluated whether the fair and equitable treatment and MFN clauses, among others, were compliant with the Constitution.

The FTA contains two definitions of "territory", one for trade purposes and a different one for investment purposes. Article 1.5 of the FTA contains the general definition of territory for each State Party as regards trade. With respect to Israel, "territory means [,] for the purposes of trade in goods, the territory where its custom laws are applied". For purposes of the investment chapter of the FTA the "territory" of Israel "includes the territorial sea, as well as the continental platform and the exclusive economic zone over which the State of Israel exercises sovereign rights or jurisdiction in accordance with international law and in accordance with the laws of the State of Israel".

Considering that Israel exerts customs control over some of the Israeli-occupied settlements in the West Bank, the Gaza Strip, East Jerusalem or the Golan Heights, [different voices](#) held that by incorporating these definitions in the FTA, Colombia was recognizing Israel's territorial sovereignty

over such territories. According to said voices, the aforementioned recognition breached Colombia's international duties and obligations as regards to human rights and international humanitarian law, as provided for in the Fourth Geneva Convention of 1949 and addressed by the UN Security Council and General Assembly Resolutions.

On this matter, the Court concluded that, in accordance with Article 31 of the Vienna Convention on the Law of Treaties (the "VCLT"), the definitions of territory incorporated in the FTA must be interpreted in light of the FTA's object and purpose, which is to facilitate trade and investment between Colombia and Israel. Therefore, "territory" must be interpreted so as to have effects within the realm of trade and investment law and not as a provision reflecting an agreement on territorial boundaries.

Furthermore, the Court concurred with the decision of the European Court of Justice ("ECJ") in the case Brita GmbH v. Hauptzollamt Hamburg-Hafen regarding the EU-Israel Association Agreement. For the ECJ, to interpret the EC-Israel Association Agreement as meaning that the Israeli customs authorities enjoy competence in respect of products originating in the West Bank would be tantamount to imposing on the Palestinian customs authorities an obligation to refrain from exercising their competence. Such an interpretation would run contrary to the *pacta tertiis nec nocent nec prosunt* principle, according to which "a treaty does not create either obligations or rights for a third State without its consent" (Article 34 VCLT). Thus, the EC-Israel Association Agreement must be interpreted to mean that products originating in the West Bank do not fall within the territorial scope of that agreement. The Court coincided with this ruling and concluded that the FTA is only capable of having effects between Israel and Colombia. None of its provisions can be interpreted in the sense of defining the sovereign territory of Israel or Colombia or creating obligations for Palestine.

As regards the Investment Chapter, the Court declared that certain provisions of the FTA required further interpretation to avoid inconsistencies with constitutional principles such as the obligation to provide equal treatment to foreign and national investors and their investments. In this sense, the Court held that in order for the President to ratify the FTA, the State Parties must first adopt a joint interpretative declaration to clarify the expropriation (Article 10.7) and MFN (Article 10.5) clauses.

Article 10.7 of the FTA defines "expropriation" and adds that the determination of "whether a measure or series of measures of a Party constitutes an effect equivalent to nationalization or expropriation requires a case-by-case, fact-based inquiry, considering, *inter alia*: ... b) the level of interference on the reasonable expectations concerning the investment". For the Court, (a) the expression "reasonable expectations" must be understood to arise from specific and repeated acts carried out by a host state to induce an investor to make or maintain investments in its territory; and (b) these expectations are breached as a result of the investment being affected by abrupt and unexpected changes made by public authorities.

In regard to the MFN clause incorporated in Article 10.5, the Court concluded that the term "treatment" must be interpreted in the context of the FTA, preserving the constitutional competences of the President of Colombia to direct international relations and to conclude treaties. This interpretation purports to prevent the practice of importing provisions from other International Investment Agreements ratified by the host state of the investment.

Preliminary Comments

First, the Court reached a reasonable conclusion regarding the interpretation of the definition of territory provided for in the FTA. In international law there are different meanings of the term

“territory”. Within the framework of international trade law, the concept of “territory” is related to the customs area on which a particular trade regime applies. On the other hand, in the field of public international law, “territory” corresponds to one of the constituent elements of a state, understood as the geographical space where a state exercises its sovereignty.

As a general rule, boundaries are defined by means of border treaties concluded between the respective states or by a competent international court. There is no precedent in international law, and even less in customary international law, supporting the thesis that border delimitation may result from the signing of a free trade agreement or an investment treaty. Likewise, there is no precedent of commercial bilateral treaties –such as FTAs– imposing obligations on third-party states involved in border disputes. Therefore, the Court could not have reached a different conclusion without transgressing basic principles of international law.

Second, the Court does not explain how it arrives to propose, what appears to be its own definition of “reasonable expectations”. There is no reference in the Court’s communication to the interpretation of the FTA in the light of the VCLT –to which both Israel and Colombia are parties– or customary international law. Furthermore, in comparison to its previous decision regarding the BIT between Colombia and France, the Court seems to equate the concepts of “legitimate expectations” and “reasonable expectations” without any clear analysis, reaching the same conclusion in respect of both concepts.

This decision may have similar effects to the ones regarding the Colombia-France BIT:

First, if the Parties wish to pursue the ratification of the BIT, the representatives of Colombia and Israel will have to issue a joint interpretative declaration or renegotiate the FTA.

Second, the judgment of the Court may become evidence of state practice on how Colombia interprets MFN and expropriation clauses. 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 Colombia will not ratify treaties incorporating provisions similar to the ones addressed by the Court in its judgment.

Conclusion

The Court’s official communication presents different outcomes. On the one hand, the interpretation regarding the definition of territory is supported on a clear application of the VCLT and general principles of international law. On the other hand, in the same line of its previous decision regarding the Colombia-France BIT, it suggests that the Court is abrogating the competence to define the text of certain provisions of the FTA invading the competence granted to the President of Colombia by the Constitution.