# Kluwer Arbitration Blog

## When Constitutional Courts Breach International Investment Law: Could the Telefónica v. Colombia ICSID Award Induce Judicial Chill?

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On 12 November 2024, an ICSID tribunal rendered its award in the case of *Telefónica S.A. v. Republic of Colombia*. At its heart, the case concerns the protection of foreign investors' legitimate expectations under a bilateral investment treaty ("BIT"), and, more unusually, the international legal consequences of a decision by a national constitutional court affirming the unconstitutionality of legal provisions in domestic law.

The award warrants attention for the following core reasons: (i) it focuses on the role of constitutional courts as potential breachers of international investment law, beyond denial of justice claims; (ii) it draws attention to how the interpretation of constitutional provisions might run afoul of investor's legitimate expectations; and (iii) more fundamentally, it seems to expand the doctrine of legitimate expectations to cover a matrix of inter-branch inconsistent behaviors (*i.e.*, instances in which the public authority creating the expectation differs from the one frustrating them). Moreover, the reasoning of this award might be of interest to the ongoing arbitration *Próspera Inc. v. Honduras*.

**Factual Background**

The dispute arose from Telefónica's investment in Colombia's telecommunications sector. Telefónica, a Spanish multinational, acquired a controlling stake in Colombia Telecomunicaciones S.A. ("ColTel") in 2004, suceeding in a series of concession contracts originally signed in 1994 for the provision of mobile telephony services. These contracts contained a "reversion clause" ("Cláusula 33"), which stipulated that certain assets would revert to the State at the end of the concession.

In 1998 and 2009, Colombia respectively enacted Laws 422 and 1341, which clarified that, upon termination of telecommunications concessions, only the radio spectrum (a public good) would revert to the State, not the physical assets and infrastructure. This "legal clarification of reversion" (*aclaración legal de la reversión*) was widely understood—by both the public and private sectors—to apply to all existing contracts, including those signed before the acts' enactment [Award, §§413-415].

However, in 2013, the Colombian Comptroller General initiated a constitutional challenge to the application of these laws to pre-existing contracts. In August 2013, the Colombian Constitutional Court issued Ruling C-555/13, holding that the legal clarification could not apply retroactively to contracts signed before the laws came into force. Accordingly, operators such as Telefónica were required to revert not only the spectrum but also all physical assets, or pay a substantial compensation equivalent to their value. This decision triggered a domestic arbitration, which ultimately ordered ColTel to pay over US$500 million to the State. Telefónica, as majority shareholder, was forced to inject nearly US$380 million to cover its share.

Telefónica then brought a claim under the 2005 Colombia-Spain BIT, alleging that Colombia's actions—including the Constitutional Court's decision—breached its legitimate expectations and other treaty protections. Colombia argued that the dispute was purely contractual and had already been resolved by domestic arbitration, and that the Constitutional Court's decision was a legitimate exercise of judicial review, not subject to international scrutiny unless it amounted to a denial of justice.

## Legitimate Expectations Created by the Legislative and Executives Branches … But Breached by the Judiciary

*The Legislative and Executive Branches Created the Legitimate Expectations*

The heart of Telefónica's claim was that Colombia, through its legislative acts and consistent administrative practice over 15 years, had created a legitimate expectation that only the spectrum would revert to the State at the end of the concession. The Tribunal undertook a detailed analysis of the legislative history, the conduct of Colombian authorities, and the economic rationale for the legal clarification.

The Tribunal found that the legislative debates and official statements surrounding Laws 422 and 1341 made it clear that the purpose was to attract investment by limiting reversion to the spectrum. The expectation that this regime would apply to all contracts—including those signed before the entry into force of the laws—was actively fostered by the State. For 15 years, both the government and operators acted on this understanding [Award, §§413-416].

*The Constitutional Court Frustrated the Expectations Created by the Other Branches*

The Constitutional Court's Ruling C-555/13, however, took a different stance. The Court reasoned that limiting the reversion of assets to only the radio spectrum for pre-existing contracts would, in effect, allow private operators to retain assets and infrastructure that, under the original contractual terms, were meant to revert to the State at the end of the concession. This, the Court held, would be contrary to the constitutional mandate to protect the public patrimony and ensure the proper management of public services. The Court also emphasised the importance of preserving the contractual equilibrium and the principle of *pacta sunt servanda* pursuant to what had been negotiated between the private operator and the State at the time of the concession contract [Award, §§106-147].

By holding that the legal clarification could not apply to pre-existing contracts, the Court caused –

in the Tribunal's view – a fundamental alteration of the legal and economic framework upon which Telefónica had relied when making its investment [Award, §441]. Moreover, the Tribunal considered that such a decision discriminated between the older and newer operators [Award, §425].

Thus, the Tribunal concluded that Ruling C-555/13, as part of a series of State measures, amounted to a breach of Telefónica's legitimate expectations, protected under Article 2(3) of the BIT. The tribunal emphasised that the expectation of a stable and predictable legal framework is central to the fair and equitable treatment ("FET") standard, and that States must refrain from "drastic" or arbitrary changes that undermine the basis of an investor's decision [Award, §§409, 443-449].

In particular, the Tribunal noted that the Court's decision was made without adequate consideration of the impact on the legitimate expectations of investors and the economic implications of such a drastic change. The Tribunal further highlighted that the decision led to a situation where Telefónica was unfairly required to revert assets that were not fully amortised, resulting in significant financial harm [Award, §427]. Evincing very little deference, it similarly rejected the argument that the decision was justified by the public interest or the need to preserve the State's assets [Award, §§424, 429, 431], noting that the abrupt change was neither proportionate nor accompanied by adequate compensation [Award, §§452, 454].

Accordingly, the Tribunal found Colombia liable for breaching the BIT and awarded Telefónica US$379.8 million plus interest [Award, §505].

**An Analysis of the Tribunal's Reasoning: Setting the Stage for Judicial Chill?**

There are several aspects of the Tribunal's reasoning that are worth highlighting. Some of them would merit deeper scholarly reflection.

First, this award finds that courts' decisions are apt to fundamentally alter the legal framework of a Host State in a way that contravenes the standards of protection of BITs. At a more theoretical level, this understanding seems to point to lawmaking capabilities of judicial organs, something the Tribunal seems to acknowledge [Award, §146]. It is noteworthy that the Tribunal rejected a defence grounded on the fact that the measure originated from the judiciary. It considered that the State is responsible for all its organs, including the courts, and cannot avoid "international responsibility" by pointing to the independence of its judiciary [Award, §135].

Crucially, the tribunal rejected Colombia's argument that only a denial of justice by a court could breach international law [Award, §§134-147]. While denial of justice is a classic ground for State responsibility for judicial acts, the tribunal found that other forms of judicial conduct—such as a decision that is "clearly incompatible with international law"—can also give rise to international liability [Award, §142]. This potentially expands the ways by which Host States' courts might breach investment agreements.

Second, the finding in favour of a breach of the legitimate expectations of Telefónica appears to raise a novel issue for the application of this doctrine in international investment law. This stems from the fact that the *creation* and *frustration* of legitimate expectations did not arise from the conduct of the same State authority: the expectations were firstly created by the legislative and executive branches, but then breached by the Constitutional Court. This is atypical for two reasons:

(i) the doctrine tends to be applied regarding contradictory or unloyal acts of the same branch (notably, changes in legislation by parliaments or revocation of administrative acts by administrative authorities); and (ii) concerning the judiciary, the doctrine is mostly relied upon as protection against particularly egregious changes in relatively settled caselaw that might frustrate reliance expectations.

Third, the aforementioned raises one obvious question: how to make such an arbitral interpretation of the doctrine of legitimate expectations compatible with the constitutional principle of separation of powers? Ultimately, those empowered to determine the constitutionality of legal provisions were neither the legislative nor the executive branches – but rather the Constitutional Court. Accordingly, those branches were never in a position to assure against an unconstitutionality finding. Moreover, it is somewhat odd to conceive that a Constitutional Court would have to refrain from an autonomous interpretation of the constitution and bow to prior promises of the other branches to avoid future findings of liability against the Host State under a BIT. At its extreme, this would make the role of a constitutional court either redundant or ineffective in terms of actually guaranteeing constitutional provisions.

In sum, one needs to question whether this *inter-branches* doctrine of legitimate expectations could end up inducing a phenomenon of *judicial chill*.

**Conclusion**

The *Telefónica v. Colombia* award is a significant development in international investment law. It confirms that the acts of constitutional courts are not immune from international scrutiny, and that the protection of legitimate expectations is not limited to executive or legislative acts. For States, the case is a reminder that all branches of government must be mindful of international obligations, especially when making decisions that affect foreign investors. For investors, it reaffirms the value of the FET standard as a shield against unpredictable and drastic changes—even those emanating from the highest courts.

As the boundaries between domestic and international law continue to blur, the *Telefónica* award stands as a landmark in the ongoing dialogue between national sovereignty and the rule of law in the global investment regime.

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