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The Constitutional Shield: How Colombia's Judiciary Shapes Investment Treaties Through Joint Interpretation

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ABSTRACT

This policy brief examines an innovative judicial approach by the Colombian Constitutional Court in response to an increase in investor-state dispute settlement (ISDS) claims. The Court introduced a doctrine called 'conditional constitutionality' (*exequibilidad condicionada*), which mandates the executive to negotiate binding joint interpretative declarations prior to ratifying an International Investment Agreement (IIA). This process aims to clarify ambiguous language and ensure that IIA provisions align with constitutional principles, particularly concerning the sovereign right to regulate and the protection of human and environmental rights.

The analysis examines the "constitutional shield" doctrine established by this domestic mechanism, emphasising its legal basis in Article 31.3(a) of the Vienna Convention on the Law of Treaties. However, it highlights a significant discrepancy: the uncertain acknowledgement of these subsequent agreements within the international investment arbitration framework. The brief notes that arbitral tribunals, which often function as autonomous legal systems, may not consistently respect such domestic constitutional provisions. This creates ongoing tension between national sovereignty and arbitral independence. The policy brief concludes by addressing the limitations of relying solely on domestic solutions and calls for systemic reforms at the international level, such as within the United Nations Commission on International Trade Law (UNCITRAL) Working Group III.

KEYWORDS: Joint Interpretation, Colombia, Investor-State Dispute Settlement (ISDS) System, International Investment Agreements (IIAs), Vienna Convention on the Law of Treaties, United Nations Commission on International Trade Law (UNCITRAL) Working Group III, International Investment Arbitration, International Investment Regime

Ce rapport sur les politiques examine une approche judiciaire innovante adoptée par la Cour constitutionnelle de Colombie en réponse à la multiplication des différends investisseur-État (ISDS). La Cour a introduit une doctrine appelée "constitutionnalité conditionnelle" (exequibilidad condicionada), qui impose à le pouvoir exécutif de négocier des déclarations interprétatives conjointes contraignantes avant de ratifier un Accord international d'investissement (AII). Ce processus vise à clarifier les formulations ambiguës et à garantir que les dispositions des AII soient

KEY MESSAGES

- "Article 31.3(a) of the Vienna Convention on the Law of Treaties allows States to interpret their international investment agreements (IIAs) through joint statements, commentaries or declarations, to clarify core provisions of IIAs, and guide the relationship of IIAs with other State obligations under international law, including climate change and human rights. These interpretations also allow the exercise of States' sovereignty in shaping the understanding and implementation of their treaty obligations, making States the 'Masters of their Treaties'."
- "Prompted by a significant rise in investor-state dispute settlement (ISDS) claims, the Constitutional Court of Colombia forged the doctrine of conditional constitutionality (*exequibilidad condicionada*), which conditions the ratification of IIAs on the negotiation of binding joint interpretative declarations aimed at resolving textual ambiguities. This judicial innovation effectively creates a domestic 'constitutional shield,' compelling the executive to align treaty provisions with national constitutional principles before ratification."
- "Under this framework, the international investment regime is only legitimate if it fosters genuine equality and actively protects the spectrum of human and environmental rights. This responsibility extends beyond government action to include the private sector, with a special focus on safeguarding the most vulnerable."

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conformes aux principes constitutionnels, en particulier en ce qui concerne le droit souverain de réglementer et la protection des droits humains et de l'environnement.

L'analyse examine la doctrine du "bouclier constitutionnel" établie par ce mécanisme national, en soulignant sa base juridique dans l'article 31.3(a) de la Convention de Vienne sur le droit des traités. Cependant, elle met en évidence une divergence importante : la reconnaissance incertaine de ces accords ultérieurs dans le cadre de l'arbitrage international en matière d'investissement. En effet, les tribunaux arbitraux, qui fonctionnent souvent comme des systèmes juridiques autonomes, peuvent ne pas respecter de manière cohérente ces dispositions constitutionnelles nationales. Cela crée une tension permanente entre la souveraineté nationale et l'indépendance arbitrale. Le rapport conclut en abordant les limites du recours exclusif à des solutions nationales et appelle à des réformes systémiques au niveau international, par exemple au sein du Groupe de travail III de la Commission des Nations unies pour le droit commercial international (CNUDCI).

MOTS-CLÉS: *Interprétation conjointe, Colombie, système de règlement des différends entre investisseurs et États (RDIE), accords internationaux d'investissement (AII), Convention de Vienne sur le droit des traités, Groupe de travail III de la Commission des Nations Unies pour le droit commercial international (CNUDCI), arbitrage international en matière d'investissement, régime international d'investissement*

Este informe sobre políticas examina un enfoque judicial innovador de la Corte Constitucional de Colombia en respuesta a un aumento de las demandas de solución de controversias inversor-Estado (ISDS por sus siglas en inglés). La Corte introdujo una doctrina denominada 'exequibilidad condicionada', que obliga al ejecutivo a negociar declaraciones interpretativas conjuntas y vinculantes antes de ratificar un Acuerdo Internacional de Inversión (AII). Este proceso tiene como objetivo aclarar el lenguaje ambiguo y asegurar que las disposiciones del AII se alineen con los principios constitucionales, particularmente en lo relativo al derecho soberano a regular y a la protección de los derechos humanos y ambientales.

El análisis examina la doctrina del "escudo constitucional" establecida por este mecanismo interno, enfatizando su base legal en el artículo 31.3(a) de la Convención de Viena sobre el Derecho de los Tratados. Sin embargo, resalta una discrepancia significativa: el incierto reconocimiento de estos acuerdos subsecuentes en el marco del arbitraje internacional de inversiones. El informe señala que los tribunales arbitrales, que a menudo funcionan como sistemas jurídicos autónomos, pueden no respetar de manera consistente dichas disposiciones constitucionales internas. Esto genera una tensión constante entre la soberanía nacional y la independencia arbitral. Este informe sobre políticas concluye abordando las limitaciones de depender únicamente de soluciones internas y hace un llamado a reformas sistémicas a nivel internacional, como por ejemplo dentro del Grupo de Trabajo III de la CNUDMI.

PALABRAS CLAVES: *Interpretación conjunta, Colombia, Sistema de solución de controversias entre inversores y Estados (ISDS), Acuerdos internacionales de inversión (AII), Convención de Viena sobre el Derecho de los Tratados, Grupo de Trabajo III de la Comisión de las Naciones Unidas para el Derecho Mercantil Internacional (CNUDMI), Arbitraje internacional en materia de inversiones, Régimen internacional de inversiones*

Introduction

States have increasingly turned to joint interpretations to exercise their authority as 'Masters of their Treaties,' ensuring international investment agreements (IIAs) align with the sovereign right to regulate. This practice has found a uniquely proactive and institutionalised form in Colombia, where the Constitutional Court has transformed it into a constitutional mandate.

Prompted by a significant rise in investor-state dispute settlement (ISDS) claims, the Court forged the doctrine of conditional constitutionality (*exequibilidad condicionada*), which conditions the ratification of IIAs on the negotiation of binding joint interpretative declarations aimed at resolving textual ambiguities. This judicial innovation effectively creates a domestic "constitutional shield," compelling the executive to align treaty provisions with national constitutional principles *before* ratification. Nonetheless, this domestic legal solution confronts a critical challenge on the international plane, depending on the deference of arbitral tribunals, as the binding nature of such subsequent agreements remains an unsettled question in international law. This analysis, therefore, scrutinises the resulting disjuncture between a potent domestic constitutional remedy and its uncertain reception within the global investment arbitration regime.

Joint Interpretations in International Investment Agreements

Joint interpretations in IIAs are emerging as a critical tool for States to shape the understanding and application of these complex agreements. States have increasingly considered the use of joint interpretations to balance investor protection with their right to regulate in the public interest.[1] Joint interpretations provide a mechanism for States to clarify ambiguous provisions, adapt treaty interpretation to changing circumstances, and potentially curb expansive interpretations adopted by some tribunals. Aiming at providing a unified and authoritative understanding of treaty provisions, joint interpretations can enhance the legitimacy and predictability of the ISDS system.

The contrasting outcomes in *Metalclad* and *Methanex* exemplify how joint interpretations can enhance the legitimacy and predictability of the ISDS system. The *Metalclad* award created significant uncertainty by broadly interpreting treaty obligations beyond what the State parties intended, thus challenging the system's legitimacy by threatening domestic regulatory authority.[2] In direct response, the North American Free Trade Agreement (NAFTA) parties issued a binding joint interpretation to clarify the standard of treatment. The subsequent *Methanex* tribunal's deference to this interpretation showcased a crucial corrective mechanism in action.[3] The Tribunal accepted the joint interpretation as binding and reinforced a predictable legal

1 Swiss Institute of Comparative Law, "Legal opinion on right to regulate on investment treaties" (2023). Available from https://www.isdc.ch/media/2375/23-016-e-avis.pdf.
2 *Metalclad Corporation v The United Mexican States* (ICSID Case No ARB(AF)/97/1) Award, 30 August 2000.
3 *Methanex Corporation v United States of America*, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005.

standard, affirming the principle that the States remain the ultimate masters of the treaty, and demonstrated that binding joint interpretations could be a tool to prevent unchecked arbitral discretion.

In line with this view, joint interpretations or joint interpretative statements could be understood as subsequent agreements between States party to an international treaty to clarify the meaning and application of specific provisions within an IIA. Article 31.3(a) of the Vienna Convention on the Law of the Treaties (VCLT) recognises the importance of subsequent agreements between parties in treaty interpretation.[4]

> Article 31 General rule of interpretation (...)
> 3. There shall be taken into account, together with the context:
> (a) **any subsequent agreement** between the parties **regarding the interpretation** of the treaty or the application of its provisions (...);

Article 31.3(a) of the VCLT allows States to interpret their IIAs through joint statements, commentaries or declarations, to clarify core provisions of IIAs, and guide the relationship of IIAs with other State obligations under international law, including climate change and human rights.[5] These interpretations also allow the exercise of States' sovereignty in shaping the understanding and implementation of their treaty obligations, making States the 'Masters of their Treaties'.

Nonetheless, there is no conclusive position regarding the 'bindingness' of interpretative agreements in international law, as primary legal sources, but the authority attributed to these agreements is derived from the foundational principle of State consent that underpins the classic law of treaties.[6] This principle suggests that because the treaty parties are the creators of the law, they are also the ultimate masters of its meaning, thus granting their shared interpretation a decisive weight.

The United Nations Commission on International Trade Law (UNCITRAL) Working Group III on Investor-State Dispute Settlement Reform has also drawn attention to this issue.[7] It has recognised that States are increasingly seeking means for making their joint interpretations legally binding on ISDS tribunals, and that new IIAs have included institutions like joint committees or commissions to monitor implementation and interpretative statements.[8]

Given that there is no conclusive understanding yet on the binding nature of joint interpretations, the evolving and subsequent practice of individual States has shaped new means for strengthening the role of the States as 'owners' of their treaties. The case of the Colombian Constitutional Court illustrates this evolution, through its decisions on conditional ratification of IIAs considering the need for them to include joint interpretative provisions, which serve as a model for how domestic constitutional review can mandate international interpretive action.

The Colombian Constitutional Court and the Innovation of Conditional Ratification of IIAs via Joint Interpretative Declarations

The Colombian Constitution of 1991 provides the Constitutional Court with the competence to conduct judicial review over all international agreements. Article 241(10) of the Colombian Constitution[9] recognises that, once a treaty is approved by Congress but before presidential ratification, it must undergo an automatic and comprehensive constitutional control by the Court.

According to the Constitution, the judicial review conducted by the Court should be twofold: (1) a formal analysis verifying that the correct legislative and executive procedures were followed, and (2) a substantive material review assessing the compatibility of the treaty's provisions with the principles and rights enshrined in the Constitution.[10] The Court's decision is final and carries the force of *res judicata*, meaning a ruling of unconstitutionality for the treaty prevents the agreement from being ratified and entering into force. The one caveat is that if one or more provisions are declared unconstitutional by the Constitutional Court, the President of the Republic may ratify the agreement, but must submit reservations on such provisions. This process establishes the Court's approval as a *sine qua non* condition for treaty ratification, positioning it as the gatekeeper in the country's assumption of international obligations.

Commonly, the Constitutional Court had adopted a deferential standard of review for IIAs, prioritising the executive branch's authority in foreign economic relations and promoting and attracting foreign investment. However, Colombia has experienced a significant increase in ISDS cases, facing 21 arbitration claims between 2016 and March 2023, and was the most sued nation globally in 2018.[11] This scenario led Colombia to review its existing IIAs, to rectify 'legal imbalances' in past treaties, and rebalance the relationship between the State and foreign investors to ensure a more equitable framework.[12]

The Constitutional Court also decided to be part of this process. In 2019, the Constitutional Court adopted judgment C-252,

4 Vienna Convention on the Law of Treaties, art. 31(3)(a), May 23, 1969, 1155 U.N.T.S. 331.
5 See: United Nations Commission on International Trade Law (UNCITRAL) Secretariat, Possible reform of investor-State dispute settlement (ISDS): Interpretation of investment treaties by treaty Parties (A/CN.9/WG.III/WP.191, 17 January 1 2020), paras. 26 and 55.
6 F. Zarbiyev, "Are joint interpretive agreements conclusive? The International Law Commission and the black box of authentic treaty interpretation", *European Society of International Law (ESIL) Reflections*, Vol. 13, Issue 3 (2024). Available from https://esil-sedi.eu/esil-reflection-are-joint-interpretive-agreements-conclusive-the-international-law-commission-and-the-black-box-of-authentic-treaty-interpretation/.
7 UNCITRAL, Possible reform of investor-State dispute settlement (ISDS): Interpretation of investment treaties by treaty Parties (Note by the Secretariat; U.N. Doc. A/CN.9/WG.III/WP.191, 17 January 2020). Available from https://undocs.org/en/A/CN.9/WG.III/WP.191.
8 *Ibid.*, paras. 36 – 40.
9 Asamblea Nacional Constituyente, Constitución Política de Colombia de 1991, Gaceta Constitucional 116 del 20 de julio de 1991. Available from http://www.secretariasenado.gov.co/senado/basedoc/constitucion_politica_1991.html.
10 Corte Constitucional de Colombia, Sentencia C-252 de 2019. Available from https://www.corteconstitucional.gov.co/relatoria/2019/c-252-19.htm.
11 L. Ghiotto & B. Müller, *ISDS en números COLOMBIA: un boom de demandas de inversores extranjeros* (Transnational Institute; Colectivo de Abogados José Alvear Restrepo, 2023). Available from https://www.tni.org/files/2023-05/ISDS_Colombia_MAY23.pdf.
12 Ministerio de Comercio, Industria y Turismo, "Colombia revisa acuerdos de promoción de inversiones", 23 May 2024. Available from https://www.mincit.gov.co/prensa/noticias/comercio/colombia-revisa-acuerdos-de-promocion-inversiones.

examining the Colombia-France IIA. The Court chose a "stricter standard of review", taking a rigorous approach that assesses both the legitimacy of a treaty's goals and whether its measures are suitable and proportional to achieve them. The Court reaffirmed that domestic legal, judicial, and administrative mechanisms are empowered to oversee the "technical and implementation aspects" of IIAs to ensure the supremacy of the national Constitution and the protection of fundamental rights.[13] The Court also recognised that in some instances, these domestic measures, when enacted after a treaty's ratification, have given rise to ISDS claims against the State.[14]

The Court found that the risk of finding the State liable under international law, because of the lawful domestic exercise of regulatory and judicial controls threatens constitutional principles like sovereignty, sustainability of public finances and the protection of human rights.[15] The Court also considered that the use of reservations to specific provisions in the agreement is pragmatically a "request to renegotiate", which makes them impractical.[16] Instead, the Court adopted, as mentioned, a conditional ruling of constitutionality (*exequibilidad condicionada*) as the appropriate judicial tool. This involved upholding the constitutionality of the treaty on the condition that the executive branch secures a binding joint interpretative declaration with the other signatory State to clarify or limit the scope of a specific clause.[17] The Court affirmed that joint interpretations are a suitable mechanism and effective remedy, grounded in international law and State practice, to align treaty obligations with constitutional mandates.

The Constitutional Court decision C-254 of 2019[18] consolidated this position, establishing the "stricter standard of review" as a binding judicial doctrine. This ruling reviewed the Free Trade Agreement (FTA) between Colombia and the State of Israel. Applying this framework as developed in its previous judgment, the Court confirmed that its new, rigorous standard of review was not an exception, but the new rule for all future IIAs.[19] The Court also considered that the economic interests of the State are bound by the limits of constitutional law and international duties to uphold human rights.[20] Under this framework, the international investment regime is only legitimate if it fosters genuine equality and actively protects the spectrum of human and environmental rights. This responsibility extends beyond government action to include the private sector, with a special focus on safeguarding the most vulnerable. This view operates within the context of a "non-fragmented" international legal system, meaning that one cannot view a trade issue in isolation but must always determine how all relevant laws, especially those concerning human rights, interact and apply.[21]

13 See: Corte Constitucional de Colombia de Colombia, Sentencia C-252/19 de 2019 (M.P. Cristina Pardo Schlesinger), para. 61. Available from https://www.corteconstitucional.gov.co/relatoria/2019/c-252-19.htm.
14 *Ibid.*, para. 62.
15 *Ibid.*, para. 63.
16 *Ibid.*, para. 67.
17 *Ibid.*, paras. 68 – 69.
18 Corte Constitucional de Colombia, Sentencia C-254/19 de 2019. Available from https://www.corteconstitucional.gov.co/relatoria/2019/c-254-19.htm.
19 *Ibid.*, para. 123.
20 *Ibid.*, para. 35.
21 *Ibid.*, para. 36.

The Joint Interpretative Declaration: A Negotiated Constitutional Shield

The examined decisions adopted by the Constitutional Court of Colombia were aimed at clarifying ambiguous terms and interpreting them to ensure compatibility with the Constitution. These precedents have fundamentally altered the treaty-making landscape in Colombia, shifting significant power from the executive to the judiciary and forcing government negotiators to prioritise legal precision and constitutional compatibility from the very beginning of any treaty negotiation.

As demonstrated in the case of the FTA between Colombia and Israel,[22] the joint interpretative declarations are employed to insert specific, binding interpretations for contentious clauses thereby allowing the treaty to pass constitutional muster. In its review of the Colombia-Israel FTA, the Colombian Constitutional Court raised significant concerns about the investment chapter, fearing that ambiguous language could be interpreted expansively by arbitral tribunals.[23] The Court worried this would unconstitutionally limit the State's regulatory power and give foreign investors superior rights. Specifically, it flagged the Most-Favored-Nation (MFN) clause for potentially allowing investors to "import" more favorable terms from other treaties. The Court also expressed apprehension about the Fair and Equitable Treatment (FET) standard, particularly the protection of "reasonable expectations," which could lead to "regulatory chill" by penalizing legitimate public interest regulations. Lastly, it was concerned that the provisions on indirect expropriation might be used to challenge non-discriminatory regulatory actions that diminish an investment's value.

At the domestic level, these interpretations might function as a successful constitutional remedy, allowing the agreement to be explicit and constitutional. Nonetheless, they might not be sufficient to constrain ISDS tribunals,[24] highlighting the fundamental limitation of joint interpretations which ultimately represent diplomatic comprises. This creates a critical gap between the Court's constitutional aspiration and the pragmatic approach in front of international tribunals.

For instance, the *Achmea* case exposes a fundamental clash between the European Union (EU)'s legal framework and the international investment arbitration system. The EU's Court of Justice (CJEU) decided that arbitration clauses in treaties between Member States were incompatible with EU law, arguing that since these foreign tribunals operate outside the EU's judicial system, they cannot refer questions to the CJEU, thereby threatening the uniform interpretation and autonomy of EU law. In response to this "constitutional command", Member States sought to terminate these treaties. However, international arbitral tribunals have consistently rejected this stance, arguing that their authority originates from public international law and cannot be unilaterally unapplied by a regional legal system.[25]

22 Free Trade Agreement between the Republic of Colombia and the State of Israel (signed 30 September 2013, entered into force 11 August 2020).
23 See: https://www.corteconstitucional.gov.co/comunicados/no.%2019%20comunicado%2005%20y%2006%20de%20junio%20de%202019.pdf.
24 F. Zarbiyev, "Are joint interpretive agreements conclusive?".
25 Fanou Maria, "Intra-EU Claims as an Objection to Jurisdiction", Jus Mundi, 9 September 2025. Available from https://jusmundi.com/en/document/publication/

Although the role of the 'constitutional control' of IIAs and joint interpretations can serve as mechanisms at the national level to strengthen the role of States as owners of their treaties, the *Achmea* case is a stark reminder that the international investment arbitration system operates as a self-contained legal order. International tribunals, deriving their authority from public international law, do not automatically defer to the constitutional interpretations of domestic or regional courts. This creates a persistent gap where a State's domestic legal responses remain limited by interpretations by foreign tribunals. Therefore, while such declarations are essential for meeting national constitutional requirements, it is necessary to achieve a structural and holistic reform of the international investment regime.

Conclusion and Recommendations

The Colombian Constitutional Court's innovative use of conditional ratification recognises that joint interpretations have emerged as a vital instrument for States seeking to reassert their authority as 'Masters of their Treaties' within the international investment law framework. The Court has recognised that these mechanisms, grounded in the Vienna Convention on the Law of the Treaties, allow State parties to clarify ambiguities and seek that investment agreements align with their public interest obligations, including human rights and environmental protection. The Court mandated joint interpretative declarations as a prerequisite for the constitutionality of IIAs. It forged a "constitutional shield" at the domestic level, compelling the executive branch to negotiate interpretations that safeguard national sovereignty and constitutional mandates proactively.

However, the joint interpretative declarations still have to face the uncertain bindingness of these declarations on international arbitral tribunals. A critical gap persists between an interpretation's efficacy as a domestic constitutional remedy and its legal force in an ISDS proceeding. Therefore, while the Colombian model represents a significant step in empowering States to shape their treaty obligations, the uncertainty about its ultimate effectiveness highlights the ongoing tension between State sovereignty and arbitral discretion, underscoring the broader debate on the need for systemic reform in investor-state dispute settlement.

States should consider shifting from a reactive approach to interpreting vague standards in IIAs after ratification to a proactive strategy of designing robust treaties from the outset. A more effective safeguard is to embed clear provisions directly into the treaty text, thereby avoiding vague protection standards, such as the FET and MFN provisions. Additionally, formal mechanisms such as a Joint Committee of the Parties that can issue binding clarifications for arbitral tribunals at any moment of the process may be incorporated.

For the vast majority of existing treaties, joint declarations should be strategically drafted to maximise their legal authority by explicitly grounding them on Article 31(3)(a) of the Vienna Convention on the Law of Treaties. This will confirm that they reflect the parties' original and continuing intent and clarify their application to all pending and future disputes.

Given that this is a systemic challenge, countries like Colombia should use their national experience to drive reforms at key international forums, especially the UNCITRAL Working Group III. This would support efforts to establish a clearer standard for the binding effect of subsequent interpretations. Ultimately, bridging this gap demands mutual understanding and coordination of the domestic and international legal systems.

en-intra-eu-claims-as-an-objection-to-jurisdiction (accessed 16 September 2025).

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