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COLOMBIA'S STRATEGIC RESPONSE TO INVESTMENT ARBITRATION: A CONSTITUTIONAL, NORMATIVE, AND DEFENSIVE SHIFT[1]

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ABSTRACT

This article examines Colombia's evolving approach to international investment arbitration through an analysis of its judicial, normative, and defensive strategies. Amid a growing number of arbitration claims, Colombia has responded with a three-pronged effort: constitutional oversight by its Constitutional Court; a phase of international investment agreements review; and the consolidation of state defense mechanisms. The article highlights how Colombia's legal institutions have reasserted sovereignty through conditional treaty approvals, interpretative notes, and stronger procedural safeguards. Ultimately, this shift marks a more symmetrical and legally grounded approach to foreign investment protection, offering a possible model to other states in the region.

Keywords: international investment arbitration; Colombia; constitutional review; treaty review; state defense strategies; balance between foreign investor rights and state sovereignty.

Colombia has experienced a notably fast and complex evolution regarding investment arbitration facing a significant increase in number of cases in recent years, some with adverse outcomes. This article seeks to identify the main responses by Colombian authorities to these international disputes and how the country has sought to manage their impact.

In the 1990s and early 2000s, the Colombian state viewed with concern the trend among its Latin American neighbors to sign a growing number of bilateral investment treaties (BITs), while Colombia concluded only very few.

One of the main reasons that prevented the country from enacting more treaties at that time was the fact that, prior to 1999, the Colombian Constitution had included a

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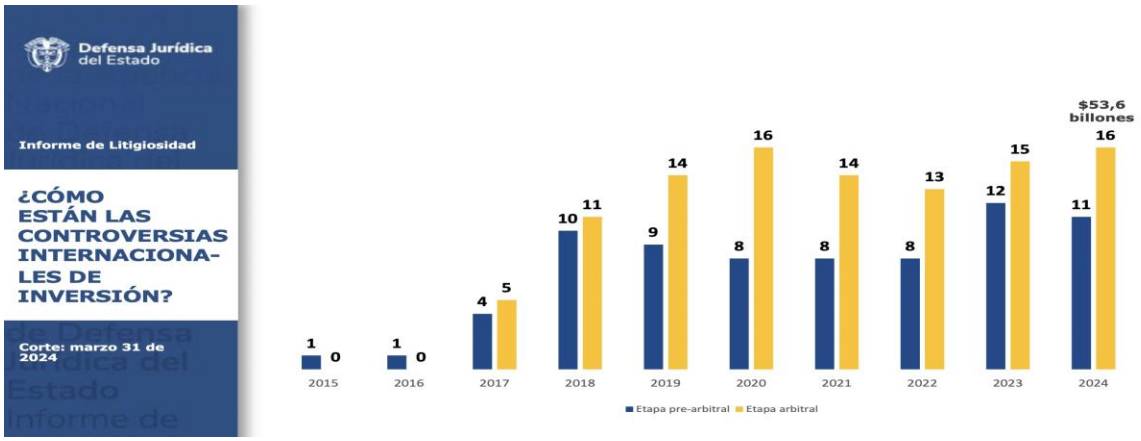
provision, article 58, allowing Congress, for reasons of equity, to determine — by absolute majority — cases in which there would be no compensation when facing state expropriation, and such decisions would not be subject to judicial review. This provision conflicted with the international standard of protection against expropriation and was a major obstacle to Colombia's ability to enter into BITs. However, in 1999, Constitutional Amendment 01 reformed the above-mentioned article, stating that expropriation could only take place through a judicial decision and with prior compensation, provided it was justified by public utility or social interest defined by the legislator.

Because of this, Colombia joined the "club" of Latin American countries entering into BITs relatively late, but by 2019 it had become one of the region's states with the highest number of ongoing claims. This led to an institutional reaction that can be analyzed on three levels: judicial, legislative, and in terms of state defense strategy.



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(I) Judicial Dimension

In the judicial sphere, the Colombian Constitutional Court plays a fundamental role. The Political Constitution establishes a specific process that involves all three branches of public power in the analysis of both BITs and FTAs that include investment chapters.

This process requires the fulfillment of certain stages for Colombia to be able to validly and regularly commit itself internationally:

(1) The President, as the director of international relations, takes the initiative in the negotiation of treaties (Art. 189.10);

(2) Congress approves or rejects the Government's initiative (Art. 150.16);
(3) The Constitutional Court conducts a prior, automatic, and comprehensive review of the treaty and the corresponding ratifying law, which becomes *res judicata* (Art. 241.10).

The constitutionality review, carried out by the Court, in relation to international investment agreements entails a dual analysis: formal and substantive.

The formal review requires the Constitutional Court to verify that the Colombian State was properly represented in the negotiation and subscription of the agreement (Art. 189.2 of the Constitution), and that the legislative process complied with the constitutional stages (Arts. 154, 157, 160, and 241.10). This formal validation ensures that both the Executive and Legislative branches of power follow the procedures set out in domestic law, when approving agreements that may affect the country's economy and sovereignty.

The material review focuses on the agreement's overall compatibility with the Constitution. In other words, this type of review is grounded in the principle of constitutional supremacy. Thus, it does not entail an assessment of the treaty's political or economic desirability but rather seeks to prevent the incorporation into domestic law of provisions that would contradict the Constitution.

This scrutiny may have three possible outcomes:

- The treaty is held constitutional: in this case, the Government may proceed with international ratification, usually through an exchange of notes or another formal mechanism. The treaty can then enter into force without modification.
- The treaty is declared unconstitutional: the Government is prohibited from ratifying it.
- The treaty is declared conditionally constitutional: this occurs when the Court finds that a provision may be interpreted in different ways, one of which would be unconstitutional. In such cases, ratification of the treaty or of a specific clause must be subject to a constitutionally compatible interpretation. In the context of BITs, conditional constitutionality may be ineffective unless Colombia and the counterpart state issue a joint interpretative declaration during the ratification process, thereby ensuring international legal effects.

For many years, the Court maintained a deferential stance toward investment treaties, closely aligned with the Executive and Legislative branches, under the assumption that attracting foreign investment should be prioritized to foster development.

However, in 2019, there was a shift in the Court's previously consistent jurisprudence. In its rulings on the BIT with France[3] and the FTA with Israel[4], the Court broke with this deferential tradition and adopted a reasonableness test, examining each clause of the treaties individually.

For the first time, several international investment arbitral awards were reviewed to understand how arbitral tribunals had interpreted the agreements and what scope they had given them. The rationale for this analysis was that, when investment treaty clauses are overly broad, the authority to determine their scope ends up resting not with the States that negotiated them, but with the arbitral tribunals themselves. Reviewing those awards also enabled the Court to identify which interpretations of the standards might contradict the Colombian Constitution.

Also noteworthy was the Court's decision to open the debate to third parties by allowing the participation of experts and *amicus curiae*—an uncommon move in such cases, which nonetheless enriched and elevated the discussion.

The constitutionality review of both investment agreements, Israel and France's, concluded with conditional constitutional rulings regarding the scope of the investment protection standards. This led to the issuance of joint interpretative declarations with both states. This demonstrates that prior constitutional review should not be viewed as an obstacle to reach such agreements -as both states had accepted to subscribe them-, but rather as a mechanism to ensure their alignment with the constitutional order.

Although the Court's mandate is to assess constitutionality rather than political convenience of treaties, this shift in jurisprudence cannot be understood without reference to the broader context: in 2019, the year in which both rulings were issued, Colombia had emerged as one of the most frequently sued countries in the region in investment arbitration. The Court's decisions were thus fundamental to balancing investment protection with the core principles of the constitutional order.

[3] C-252/19 Constitutional Court Ruling
[4] C-254/19 Constitutional Court Ruling

As a preliminary conclusion, it may be said that the use of strict constitutional review as an *ex ante* filter for problematic investment treaty provisions is a tool that enables a State to promote and integrate foreign investment while simultaneously upholding its domestic legal and constitutional framework.

(II) Normative Dimension

Secondly, from a normative perspective, Colombia has been conducting a highly detailed review of all its current investment treaties for at least the past three years, including some that still reflect the features of first- and second-generation agreements.

Within this framework, the joint interpretative note to the Colombia–United States Free Trade Agreement, adopted in 2025, offers a particularly relevant case for analysis.

Below is a comparative chart illustrating the differences between the original version and the new interpretation jointly approved by both states regarding key protection standards:

	FTA US Colombia	Joint interpretative note
National Treatment and Most-Favored Nation (NT – MFN)	• Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory. • Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition,	The note emphasizes that it is the investor (claimant) who bears the burden of demonstrating that their investment was treated less favorably in comparison to national or third-State investors under similar circumstances. The provision aims to prevent discrimination in alike circumstances, but it does **not prohibit** differentiation per se. Distinctions are permitted when circumstances are not alike, and all relevant factors must be considered, including whether the differentiation is based on legitimate public interest objectives.

	expansion, management, conduct, operation, and sale or other disposition of investments. • Each Party shall accord to investors of the other Party and to covered investments treatment no less favorable than that it accords, in like circumstances, to investors and covered investments of any third party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.	
Fair and Equitable Treatment (FET)	Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security. For greater certainty, paragraph 1 prescribes the minimum standard of treatment to be accorded to investments in accordance with customary international law. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond what is required by that standard and do not create additional substantive rights.	(A) To establish a breach of this standard, the claimant must first demonstrate the existence and applicability of a relevant rule of customary international law, derived from actual and consistent State practice recognized as legally binding. Second, it must be proven that the respondent State has effectively violated such legal practice. The FTA does not grant arbitral tribunals the authority to develop the content of customary international law; such content can only be determined through a thorough assessment of State practice and *opinio juris* before

	"Fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings, in accordance with the principle of due process embodied in the principal legal systems of the world. "Full protection and security" requires each Party to provide the level of police protection required under customary international law. A breach of another provision of this Treaty, or of a separate international agreement, does not establish that a breach of this Article has occurred.	recognizing a rule as part of customary international law. Examples of State practice include relevant decisions by domestic courts or legislation that specifically addresses the issue alleged to form part of customary law, as well as statements made by competent State authorities. International court or arbitral tribunal decisions that refer to the FET standard under customary international law do not, in themselves, constitute proof of State practice unless they contain an analysis that evidences it. (B) The Parties agree that the same level of due process is not required in administrative proceedings as in judicial processes. The concepts of **legitimate expectations**, **transparency**, and **good faith** do not form part of the FET standard. Likewise, **non-discrimination** is not encompassed within FET, except in cases of **discriminatory expropriation** or **discriminatory denial of access to justice** and treatment before domestic courts. (C) Regarding the definition of FET:

		• It does not grant arbitral tribunals the power to review the merits of a domestic court's interpretation of local law. • A State's international responsibility cannot be invoked for judicial acts that are not final, unless available remedies are futile or manifestly ineffective. • A domestic court's ruling that appears incorrect or poorly reasoned does not in itself amount to a denial of justice. • The development of new jurisprudence from existing precedents within the bounds of common law does not constitute a denial of justice. • Failure to comply with domestic legal requirements does not, in itself, amount to a violation of international law. • A denial of justice occurs when a final court decision is manifestly unjust, or when the administration of justice flagrantly disregards basic judicial standards or fails to ensure what is generally deemed indispensable for a functioning judicial system. • Acts of corruption, discrimination, or hostility toward parties, as well as

		interference by the legislative or executive branches that undermines judicial impartiality, may also constitute denial of justice. (D) As to the definition of "full protection and security," the Parties agree that it does not impose on either Party the obligation to prevent economic harm caused by third parties, to guarantee legal certainty or the stability of the legal framework, or to ensure that individuals or their investments are never harmed under any circumstance.
Expropiation	Neither Party may expropriate or nationalize a covered investment, either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except: • for a public purpose; • in a non-discriminatory manner; • upon payment of prompt, adequate, and effective compensation in accordance with paragraphs 2 to 4; and • in accordance with due process of law and Article 10.5. The compensation referred to in paragraph (c) of the preceding section must: • be paid without delay;	The definition is to be understood in accordance with the terms set forth in Article 10.7. In order to succeed in a claim for breach of the expropriation standard, it must be demonstrated that the State totally or virtually destroyed the economic value of the investment. It is necessary to assess whether the State provided the investor with written guarantees and to consider the scope of the relevant governmental regulations.

	• be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation"); • not reflect any change in the value of the investment due to public knowledge of the expropriation; and • be fully realizable and freely transferable. If the fair market value is denominated in a freely usable currency, the compensation shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment. If the fair market value is not denominated in a freely usable currency, the compensation shall be no less than: • the fair market value on the date of expropriation, converted at the prevailing market exchange rate on that date; and • interest at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment.	

	This Article shall not apply to the issuance of compulsory licenses granted in connection with intellectual property rights, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with Chapter Sixteen (Intellectual Property).	

As can be inferred from the chart, one of the most significant changes is the limitation of automatic access to international arbitration, requiring investors to demonstrate actual losses and the effective breach of a specific obligation before initiating a claim in investment arbitration proceedings. This measure seeks to address the strategic or abusive use of arbitration as a potential tool of political or economic pressure against the State.

In addition, a clear distinction is made between direct and indirect losses, thereby preventing claims based on merely derivative or speculative damages. This reinforces the need for a solid causal link between the allegedly unlawful State act and the investor's patrimonial harm.

It is also essential to emphasize the protection of States' sovereign right to regulate matters such as environmental protection, public health, and other public interests, recognizing that not every regulatory measure affecting an investment amounts to a breach of international obligations. This approach breaks away from the notion of an "absolute right" to an immutable investment environment.

Finally, by clarifying the applicable methods of interpretation—focused on customary international law rather than expansive interpretations by arbitral tribunals—the reforms enhance the predictability and legitimacy of the system, preventing tribunals from creating new standards of protection not agreed upon by the contracting States.

The ongoing revisions of international investment agreements signed by Colombia, and particularly the changes introduced in the interpretation of the Colombia–United States Free Trade Agreement, reflect an evolution in the way investment protection is conceived.

The modifications introduced through the clarifying note reflect a conscious evolution toward a more balanced and sustainable investment regime, one that seeks to protect investors' trust without unduly limiting States' ability to legislate, regulate, and safeguard public interests. These developments can be seen as a modern response to the contemporary challenges of investment arbitration and as a commitment to strengthening the legitimacy of the system.

As a preliminary conclusion regarding this legislative trend, it is worth noting that, although the FTA between the U.S. and Colombia was already in force, both countries used this mechanism to clarify its scope and to influence future arbitral interpretations.

This constitutes an explicit exercise in reclaiming the interpretative authority of States, in response to the doctrinal dispersion and expansion promoted by some arbitral tribunals. Colombia and the United States reaffirmed their sovereign will in order to protect foreign investment within a predictable framework, consistent with general international law, and without compromising their domestic regulatory authority.

In this way, the interpretative note not only defines the content of the treaty more precisely—serving as an important *ex post* control mechanism—but may also be regarded as an interpretive precedent for the redesign of investment policy in other countries of the region, marking a turning point in the balance between investor protection and the defense of the public interest.

(III) The State's International Defense Strategy

Another defensive strategy adopted by the Colombian State—preceded by the Argentine experience—was the creation of the National Agency for Legal Defense of the State (*Agencia Nacional de Defensa Jurídica del Estado*, ANDJE), which has traditionally been composed of a team of technical experts and professionals, specialized in the national and international legal defense of the State.

The Agency emerged in response to growing concerns within the Colombian government during the early 2000s, when the surge of multimillion-dollar claims against neighboring countries in investment arbitration proceedings began to be viewed with alarm.

Paradoxically, just a few years earlier, Public Policy Document CONPES 3135 of 2001, entitled "Policy Guidelines for the Negotiation of International Agreements on Foreign

Investment", had criticized the fact that, at the time, Colombia had only signed five international investment agreements, while neighboring states had entered into as many as twenty-nine. However, as the threat of future claims became more tangible, the government issued CONPES 3684 of 2010, titled "Strengthening the State's Strategy for the Prevention and Management of International Investment Disputes." At the time, one of the central concerns identified was the lack of awareness among public officials—across all levels of government—regarding the scope of the commitments Colombia had undertaken through its international investment agreements. The primary objective of the strategy was therefore to enhance the State's capacity to prevent and respond to disputes brought by foreign investors under these treaties.

Since then, ANDJE has become increasingly technical and specialized, adopting progressively more sophisticated strategies informed by accumulated experience.

The ultimate goal is for the Agency to eventually lead the Nation's defense independently, without the assistance of specialized international law firms, and indeed it has already successfully done so in a few cases. In parallel, the Agency's legal defense team, working together with the international law firms that have been contracted, has contributed to securing numerous victories for the Colombian State in investment claims brought in by foreign investors.

Within this context, the case of *Ángel Seda v. Colombia* deserves particular attention. In this proceeding, a tribunal accepted for the first time the invocation of the essential security clause under the U.S.–Colombia FTA and ruled in favor of the State.

Colombia had justified the measures taken against Ángel Seda's real estate project on public order grounds, citing alleged irregularities. The tribunal recognized that States have discretion to protect their institutional stability, even when such measures may adversely affect an investor.

This case is highly significant because it is a landmark as it was the first time a tribunal had addressed the security exception in the particular manner it did, and within a different context. Until then, tribunals had generally assessed emergency measures under the security exception (as in cases arising from Argentina's financial crisis) or decisions linked to military matters (such as *Deutsche Telekom v. India* and *CC/Devas v. India*)[5].

[5] https://arbitrationblog.kluwerarbitration.com/2024/10/07/angel-samuel-seda-and-others-v-colombia-new-pathways-in-the-application-of-security-exceptions/

In contrast to the above-mentioned situations, in the case of *Ángel Seda v. Colombia,* forfeiture and extinction of ownership over land allegedly belonging to a frontman for a drug trafficking organization, were the surrounding situation and the reason for invoking the security exception.

First, the tribunal noted that this argument had been raised only at the rejoinder stage within the framework of jurisdictional objections. However, it found no procedural impediment to its consideration.

Colombia advanced three lines of defense regarding the security clause. First, it argued that the invocation of the clause was not subject to review and that the tribunal should simply decline jurisdiction, relying on the interpretative note to the provision and the support expressed by the United States as a non-disputing party. Second, it contended that if the invocation were accepted, it would automatically deprive the tribunal of jurisdiction. Third, it submitted that even if some degree of review were permitted, it should be extremely limited, given the self-judging nature of the clause.

The tribunal acknowledged that the security clause contained a self-judging element but rejected the argument that this precluded judicial review. Despite the wording of the clause and its accompanying footnote, the tribunal found that mere invocation of the exception was insufficient to shield it from scrutiny. It distinguished this clause from others that explicitly seek to remove disputes from judicial oversight, thereby preventing disproportionate uses that could undermine the legal certainty and predictability of the treaty.

At the same time, the tribunal affirmed that the State enjoys a broad margin of appreciation in defining its security interests, constrained only by the principle of good faith. Applying the plausibility standard developed in recent WTO panel reports, the tribunal held that there must be a plausible link between the challenged measures and the asserted security objective. On this basis, it concluded that the asset forfeiture proceedings were plausibly related to efforts to combat organized crime and, accordingly, applied the security exception and dismissed the claims[6].

In this way, Colombia did not merely defend itself reactively. Together with its legal counsel, it crafted a complex and sophisticated defense strategy, securing not only recognition of the State's sovereign margin to protect essential interests such as the fight against organized crime, but also the successful application of the security

[6] Ibidem

exception, based on principles of good faith and plausibility, thereby limiting Colombia's exposure to speculative or expansive claims.

This case is significant because it reminds us that investment arbitration is not merely a mechanism for the protection of private capital. It can, and must also serve as a forum in which States assert their right to defend public interests, especially when fundamental goods such as security, public order, or the environment are at stake.

Under the leadership of the ANDJE, Colombia has shown that it is possible to build a carefully structured defense that moves beyond simply disputing liability. By skillfully invoking exceptions such as security clauses, anchoring its arguments in good faith and plausibility standards, and adopting a thoughtful management of procedural strategy, Colombia has presented itself not merely as a respondent, but as an active participant, capable of asserting and protecting fundamental sovereign interests in the arena of investment arbitration.

CONCLUSION

In sum, Colombia's recent evolution in investment arbitration reveals a deliberate and structured effort to re-balance the system through multiple institutional channels.

Ex ante, this is achieved through a more rigorous constitutional review of investment treaties, aimed at ensuring their compatibility with domestic principles and preventing the incorporation of norms that may undermine constitutional supremacy.

Ex post, the country has employed bilateral interpretative instruments—such as the 2025 joint note to the U.S.–Colombia FTA—to clarify the scope of protection standards and realign their application with sovereign regulatory space.

Finally, within the arbitration processes themselves, Colombia has adopted increasingly sophisticated defense strategies, invoking exceptional treaty clauses such as the essential security provision where appropriate, and advancing arguments grounded in public interest and institutional legitimacy.

This is not a rejection of investment arbitration, but rather an attempt to foster a more symmetrical and coherent model—one in which the legitimate expectations of investors are balanced against the constitutional mandates and public policy prerogatives of the host State. Colombia's response reflects an assertive, yet legally grounded, reaffirmation of its sovereign role in shaping the interpretation and

application of its international commitments. In doing so, it contributes to a broader regional and global conversation about restoring equilibrium in the investor-State dispute settlement system.

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