COLOMBIA

Country Report on Commercial and Investment Arbitration

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I. COMMERCIAL ARBITRATION

1. What domestic law(s) regulate(s) commercial arbitration in your country?

a. Is this legislation applicable to both domestic and international arbitration? Are these rules based on the UNCITRAL Model Law? If yes, what are the meaningful differences?

b. Are there any legislative initiatives ongoing to amend the domestic law? If yes, on what aspect of the arbitration law(s) and for which reasons?

c. By your expertise, is the legislative framework efficient and effective?

The legal framework for arbitration in Colombia starts with the constitution, which considers arbitrators as private individuals temporarily vested with the public function of administering justice.[1] Furthermore, the Constitutional Court has characterised 'arbitration' as voluntary, temporal, exceptional and as a procedural mechanism.[2] Against this background, the Law 1563 of 2012 (*Ley 1563 de 2012*) was conceived, which comprehensively governs arbitration in Colombia. Whilst the First Section thereof (Articles 1—58) contemplates the provisions for domestic arbitration, the Third Section (Articles 62—116) regulates international arbitration. The Law 1563 of 2012 was enacted on 12 July 2012[3] and entered into force on 12 October 2012.[4] This Law

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1 Constitution of 1991, Art 116 and Art 228. Arbitration as administration of justice has been further reiterated by the legislator through, e.g. Law 270 of 1996, Art 13(3); Law 446 of 1998, Art 111; Law 1285 of 2009, Art 6.

2 Constitutional Court, C-060/01, MP. Carlos Gaviria Díaz.

3 Official Gazette No 48.489 of 12 July 2012, containing the Law 1563 of 2012 (hereinafter Law 1563 of 2012).

4 Law 1563 of 2012, Art 119.

sought to unify the regime on arbitration, which was previously spread across the Colombian legal system.[5]

Although the section on international arbitration is largely based on the UNICTRAL Model Law on International Commercial Arbitration with the amendments of 2006 (UNCITRAL Model Law), the section on domestic arbitration contains local particularities of Colombian procedural law.[6] For instance, in domestic arbitration the tribunal is obliged to conduct a conciliation hearing[7] and it may grant 'poverty relief' (*'amparo de pobreza'*) to an impecunious party,[8] bringing the arbitration procedure closer to the Colombian civil procedure.[9]

International arbitration envisaged in Law 1563 of 2012 aimed to establish Colombia as an appealing seat for international arbitration proceedings, and consequently, it included certain deviations from the UNCITRAL Model Law.[10] Certainly, there are more detailed provisions on the proceedings for setting aside (Article 109); grounds to deny enforcement of interim measures (Article 89); *kompetenz-kompetenz* and separability (Article 79) challenge procedure (Article 76); appointment of arbitrators (Article 73). However, some of the noteworthy deviations from the UNCITRAL Model Law are the following:

First, concerning the scope of application, particularly, when an arbitration is considered 'international'. Whereas Article 1(3) UNCITRAL Model Law contemplates objective criteria as well as the parties' choice to determine whether an arbitration is international, Article 62(3) Law 1563 of 2012 only foresees objective criteria. Accordingly, it is not sufficient to agree on a seat of arbitration outside of parties' place of business in order to consider the arbitration 'international', as long as none of the parties is domiciled outside the country, the performance of the substantial obligations takes place at the parties' domicile, and the dispute does not affect international trade.

Second, unlike the UNCITRAL Model Law, Article 62 Law 1563 of 2012 provides that no State, state-owned or state-controlled enterprise may invoke its own law to disprove capacity to conclude arbitration agreements or the arbitrability of the dispute.

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5 Marcela Rodriguez Mejía, 'Una Aproximación al regimen del arbitraje nacional del Nuevo estatuto del arbitraje en Colombia, Ley 1563 de 2012' (2012) 23 Revista de Derecho Privado 379, 380-381.

6 Fernando Mantiall-Serrano, 'Colombia Enacts a New International Arbitration Law' (2013) 30(4) Journal of International Arbitration 431, 432; Eduardo Zuleta, 'National Report for Colombia' in Lise Bosman (ed), *ICCA International Handbook on Commercial Arbitration* (Kluwer law International 2020, Supplement No 112) 2.

7 Law 1563 of 2012, Art 24.

8 Law 1563 of 2012, Art 13.

9 For a detailed discussion *see* Marcela Rodriguez Mejía, 'Una Aproximación al regimen del arbitraje nacional del Nuevo estatuto del arbitraje en Colombia, Ley 1563 de 2012' (2012) 23 Revista de Derecho Privado 379—417.

10 Fernando Mantiall-Serrano, 'Colombia Enacts a New International Arbitration Law' (2013) 30(4) Journal of International Arbitration 431, 433.

Third, Article 8.1 UNCITRAL Model Law foresees that a court must direct the disputing parties to arbitration if there is an arbitration agreement and a party so requests. Article 70 Law 1563 of 2012 replicates the same provision. However, pursuant to Article 8.1 UNCITRAL Model Law, should the arbitration agreement be null and void, inoperative or incapable of being perform, the court may refrain from referring the parties to arbitration. This caveat does not exist on Article 70 Law 1563 of 2012.

Fourth, Article 74 Law 1563 of 2012 governs the appointment of arbitrators in multiparty proceedings, which is absent in the UNCITRAL Model Law. According to Article 74 Law 1563 of 2012, multiple claimants and respondents will act jointly, as claimants on one side or respondent on the other side, to appoint an arbitrator unless otherwise agreed. If it is not possible to constitute the tribunal according to the abovementioned rule, any party may have recourse to a judge for the appointment.

Finally, although Article 108 Law 1563 of 2012 replicates the grounds for setting aside of Article 34 UNCITRAL Model Law, there is an important distinction in the Colombian regime. Pursuant to Article 107 Law of 2012, if none of the parties is domiciled or resides in Colombia, they may agree in writing to exclude entirely the setting aside of the award, or to limit the grounds of Article 108 Law 1563 of 2012.

In July 2019, the Ministry of Justice submitted the Draft Law 006/19 to the Senate to modify certain aspects of Law 1563 of 2012.[11] With regards to international arbitration, two aspects of this Draft Law 006/19 are worth to mention. First, it seeks to clarify the third ground to consider that an arbitration is international, namely, when the dispute affects international trade.[12] Accordingly, Article 27 Draft Law 006/19 adds that this ground refers 'to a contractual relationship or to an economic operation that involves the transfer of goods, services or funds across an international border' (*'a una relación contractual o a una operación económica que implique transferencia de bienes, servicios o fondos a través de una frontera internacional'*). Second, it designates the Permanent Court of Arbitration in The Hague as the appointing authority. Until the date of writing, the Parliamentary debates on Draft Law 006/19 are still ongoing.

2. Is there an arbitration institution in your country? If yes, how is it structured and are these structures sufficient? Did this institution create its own procedural rules?

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11 *See* Draft Law 006/19 <https://legislapp.mininterior.gov.co/media/archivos_proyectos/PL_006-19S._ESTATUTO_DE_ARBITRAJE.pdf> accessed 04 January 2020.

12 Law 1563 of 2012, Art 62(3).

There are hundreds of arbitral institutions in Colombia dealing with domestic arbitration, nevertheless, there are few equipped to administer international arbitration. The most prominent institutions are the Centre of Arbitration and Conciliation of the Chamber of Commerce of Bogotá (CCB Centre), the Centre of Conciliation, Arbitration and Amicable Composition of the Chamber of Commerce of Medellín (CCM Centre), and the Centre of Conciliation, Arbitration and Amicable Composition of the Chamber of Commerce of Cali (CCC Centre).

The CCB Centre was created in 1983 with the aim of promoting alternative dispute resolution methods including arbitration, conciliation, and insolvency among others. The CCB Centre has offices in five different locations in Bogotá, Colombia. Furthermore, the CCB Centre administers international arbitration in Spanish, English and Portuguese and either under its own rules of arbitration or under the UNCITRAL Arbitration Rules.[13] The most prominent case administered by the CCB Centre is the recently decided *Concesionaria Ruta del Sol v Agencia Nacional de Infraestructura (ANI)* case,[14] whereby the arbitral tribunal declared the underlying concession contract 'null and void' due to the corruption scheme orchestrated by the infamous Odebrecht.

The CCM Centre was established in 1993 with the objective of promoting the settlement of disputes efficiently, quickly and legally effective. The CCM Centre is located in Medellín, Colombia, and provides services on arbitration (both national and international), conciliation, amicable composition, real estate guarantees and insolvency. The CCC Centre was created in 1993 with the aim of providing leading services in alternative dispute resolution. The CCC Centre has an office in Cali, Colombia. Contrary to the CCB Centre, the parties are free to decide the language of the proceedings in arbitration.[15]

3. How is the commercial arbitration practice in your country?

a. How many commercial arbitration cases are there annually in your country?

b. Which are the main subject-matters the cases deal with?

c. Are there any subject matters considered non-arbitrable in domestic laws?

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13 *See* <https://www.centroarbitrajeconciliacion.com/Servicios/Arbitraje-Nacional/Arbitraje-Internacional> accessed 04 January 2020.

14 *Concesionaria Ruta del Sol SAS v Agencia Nacional de Infraestructura – ANI*, Centro de Arbitraje y Conciliación de la Cámara de Comercio de Bogotá, Ref. 4190 y 4209, Laudo Arbitral del 6 de agosto de 2019.

15 *See* Artide 6.20, Book VI Rules for International Commercial Arbitration of the CCC ('*Libro VI Reglamento de Arbitraje Comercial Internacional del Centro de Conciliación, Arbitraje y Amigable Composición de la Cámara de Comercio de Cali*') <https://www.ccc.org.co/inc/uploads/2020/08/Reglamento-CCYA-Actualizado-2020.pdf> accessed 06 January 2020.

According to a study of 2017 commissioned by the Ministry of Justice and elaborated by the CCB, there are around 490 arbitrations per year throughout the country.[16] The CCB Centre is the leading arbitral institution in Colombia to administer both domestic and international arbitration followed by the CCM Centre in the second place, and the CCC Centre in the third place. However, there is a notorious disparity since the CCB Centre administers over 300 cases per year, which constitutes over 50% of all arbitration cases in Colombia (*see* Figure 1 below).

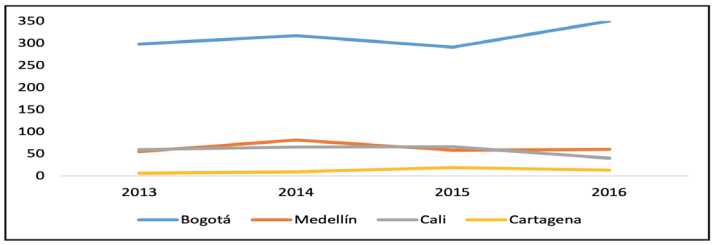

Figure 1: Arbitral Proceedings in Bogotá, Medellín, Cali and Cartagena[17]

Although most of the cases settled through arbitration arise from commercial disputes (app. 54%), there is a considerable amount of disputes with public entities which are resolved through arbitration (app. 22%).[18] On the one hand, disputes arising out of administrative contracts (private—public entity) can be submitted to arbitration according to the Law 80 of 1993. On the other hand, legality of administrative acts cannot be decided by arbitration,[19] however, the economic effects of an administrative act issued in the exercise of the exorbitant powers of the administration with regards to administrative contracts can be submitted to arbitration.[20] Most of the subject-matters submitted to arbitration involve involve oil, gas, telecommunications and software related disputes.[21]

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16 CCB, 'Final Report of Arbitration in the National Territory' ('*Informe Final del Diagnóstico del Arbitraje en el Territorio Nacional*') December 2017 <http://info.minjusticia.gov.co:8083/Portals/0/MASC/Documentos/INFORME%20FINAL%20DIAGNOSTICO%20DE%20%20ARBITRAJE%20EN%20COLOMBIA%20VERSION%20FINAL.pdf> accessed 07 January 2021.

17 CCB, 'Final Report of Arbitration in the National Territory' ('*Informe Final del Diagnóstico del Arbitraje en el Territorio Nacional*') December 2017, page 88 <http://info.minjusticia.gov.co:8083/Portals/0/MASC/Documentos/INFORME%20FINAL%20DIAGNOSTICO%20DE%20%20ARBITRAJE%20EN%20COLOMBIA%20VERSION%20FINAL.pdf> accessed 07 January 2021.

18 CCB, 'Final Report of Arbitration in the National Territory' ('*Informe Final del Diagnóstico del Arbitraje en el Territorio Nacional*') December 2017, page 97 <http://info.minjusticia.gov.co:8083/Portals/0/MASC/Documentos/INFORME%20FINAL%20DIAGNOSTICO%20DE%20%20ARBITRAJE%20EN%20COLOMBIA%20VERSION%20FINAL.pdf> accessed 07 January 2021.

19 Constitutional Court, C-1436/00, MP. Alfredo Beltrán Sierra.

20 Constitutional Court SU-174/07, MP. Manuel José Cepeda Espinosa.

21 Eduardo Zuleta, 'National Report for Colombia' in Lise Bosman (ed), *ICCA International Handbook on Commercial Arbitration* (Kluwer law International 2020, Supplement No 112) 4.

With respect the arbitrability/non-arbitrability of certain disputes, it is considered that all disputes over rights that are 'transferable' ('*transigibles*') may be settled through arbitration, as well as those matters that the law explictily authorises as capable of settlement through arbitration.[22] Examples of non-arbitrable matters relate to civil status of individuals; rights of people under incapacity; minimum rights of employees; public order and sovereignty; class actions.[23]

4. What are the grounds for refusal of recognition and enforcement of arbitration awards in your country? Is your country party to the New York Convention (with reservations)? How strict are your national courts when enforcing awards (e.g. in relation to public policy)?

Colombia ratified the New York Convention on 25 September 1979, entering into force on 24 December 1979.[24] The Colombian Congress approved the New York Convention through the Law 37 of 1979, which was declared unconstitutional by the Supreme Court on 6 October 1988. However, instead of denouncing the New York Convention, the Colombian Congress approved it once again by means of the Law 39 of 1990, which ratified the Convention's validity in the interregnum between the two laws.[25] No reservations were made.

The grounds for refusal of recognition and enforcement of foreign awards are those established under Article V New York Convention. In spite of this, the Supreme Court consistently required that foreign awards ought to fulfil the requirements of Article 694 of the former Civil Procedure Code regulating the exequatur of foreign judgments, otherwise enforcement could be denied.[26] The Supreme Court changed this position after the enactment of Law 1563 of 2012 and the new Civil Procedure Code ('*Código General del Proceso*').[27] Thus, nowadays the refusal of enforcement of a foreign arbitral award can only be based on the grounds listed in Article V New York Convention.

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22 Juan Carlos Naizir Sistac, 'Objective Arbitrability: What Can Be and What Cannot be Submitted to Domestic Arbitration According to the Colombian Sources of Law?' (2019) Vniversitas No 139, 4-5.

23 Juan Carlos Naizir Sistac, 'Objective Arbitrability: What Can Be and What Cannot be Submitted to Domestic Arbitration According to the Colombian Sources of Law?' (2019) Vniversitas No 139, 6ff.

24 See 'Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) <https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2> accessed 06 January 2020.

25 Supreme Court of Justice, Civil Cassation Chamber, MP. Héctor Marin Naranjo, 20 November 1992, Judicial Gazette No. 2458 of 1992 (*Sunward Overseas SA v Serivicios Maritimos Limitada Semar*).

26 Supreme Court of Justice, Civil Cassation Chamber, MP. Héctor Marin Naranjo, 20 November 1992, Judicial Gazette No. 2458 of 1992 (*Sunward Overseas SA v Serivicios Maritimos Limitada Semar*).

27 For a thorough discussion on this topic, *see* Rafael Bernal and Hernando Otero, 'Chapter 5: Colombia' in Omar E García-Bolivar and Hernando Otero (eds), *Recognition and Enforcement of International Commercial Arbitral Awards in Latin America* (Brill/Nijhoff) 82-94.

The concept of public policy as a ground to deny enforcement of foreign arbitral awards in Colombia has been narrowly interpreted. Indeed, Article 112(b)(ii) Law 1563 of 2012 states that recognition and enforcement of an award may be denied if it is contrary to 'Colombian international public policy'. This concept is deemed to encompass the basic and most fundamental principles of the Colombian legal system.[28]

The foregoing analysis may demonstrate an arbitration-friendly position of the Colombian courts, nevertheless, there is a constitutional action ('*Tutela*') which might become an additional review mechanism of arbitral awards. The '*Tutela*' is a Colombian constitutional action designed for the protection of fundamental rights.[29] By means of this action, one may challenge judicial decisions or even arbitral awards if those decisions affect fundamental rights.[30] The Constitutional Court has further recognised that international awards rendered in Colombia can equally be challenged through the '*Tutela*'.[31] Consequently, an extra layer of control exists in the Colombian legal system, whereby awards may be challenged for reasons beyond the limited grounds for setting aside under the Law 1563 of 2012. This is highly criticised and contravenes the Law 1563 of 2012, whose purpose was the promotion of Colombia as seat of international arbitration.[32]

5. Is commercial arbitration in your country perceived as a viable alternative to taking cases in front of national courts?

Although there is a slightly upward trend in the use of arbitration as dispute settlement mechanism in Colombia, most of individuals and enterprises either ignore the existence and functioning of arbitration, or consider it as highly expensive.[33] Certainly, most of the arbitration proceedings carried out in Colombia involve domestic arbitration, whereas the number of international arbitrations is not significantly high.[34]

II. INVESTMENT ARBITRATION

28 Supreme Court of Justice, Civil Cassation Chamber, MP. Luis Alonso Rico Puerta, 18 Abril 2017, SC5207-2017, Ref No 11001-0203-000-2016-01312-00, para 3.4.

29 Constitution of 1991, Art 86.

30 Constitutional Court, T-244/07, MP. Humberto Antonio Sierra Porto.

31 Constitutional Court, SU-500/15, MP. Luis Guillermo Guerrero Pérez; Constitutional Court, T-354/19, MP. Antonio José Lizarazo Ocampo.

32 For a thorough discussion on this topic, *see* Daniela Corchuelo Uribe, 'Tutela in International Arbitration in Colombia' (2017) 30 Spain Arbitration Review 49-79.

33 CCB, 'Final Report of Arbitration in the National Territory' ('*Informe Final del Diagnóstico del Arbitraje en el Territorio Nacional*') December 2017, page 97 <http://info.minjusticia.gov.co:8083/Portals/0/MASC/Documentos/INFORME%20FINAL%20DIAGNOSTICO%20DE%20%20ARBITRAJE%20EN%20COLOMBIA%20VERSION%20FINAL.pdf> accessed 07 January 2021.

34 Eduardo Zuleta, 'National Report for Colombia' in Lise Bosman (ed), *ICCA International Handbook on Commercial Arbitration* (Kluwer law International 2020, Supplement No 112) 4.

6. How is the international legal framework for investment arbitration constituted?

a. Do(es) your country's arbitration law(s) also apply to investment arbitration?

b. Has your country signed and ratified the ICSID Convention?

c. Which arbitration rules are the most often used?

d. Is your country party to many BITs and/or regional investment treaties (such as the Energy Charter Treaty)?

e. Does your country have a Model BIT, or otherwise use model language in its BITs?

Foreign investment (including portfolio investment) in Colombia is regulated by the Decree 2080/00. This Decree regulates both the substantive standards of protection and dispute settlement except for specific provisions of international treaties in force in Colombia.[35] On 18 May 1993 Colombia signed the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention), which entered into force on 14 August 1997.[36]

In 1994 Colombia signed its first bilateral investment treaties (BITs) with the United Kingdom, Peru and Cuba. Only the Colombia—Peru BIT entered into force in 2004, however it was replaced by a new treaty in 2010. Each of the 1994 BITs signed by Colombia foresaw investor-state arbitration for the settlement of investment disputes.[37] Until date, Colombia has signed nineteen BITs, nevertheless, three have been terminated and only seven have entered into force.[38] Additionally, Colombia has concluded seven Free Trade Agreements (FTAs), which provide for investor-state arbitration.[39] One of the possible factors for the moderate number of investment agreements entered by Colombia might be that every treaty must be scrutinised by the Constitutional Court prior its ratification.[40] Should the treaty fail the constitutional review, it cannot be ratified by the parliament.[41] Another factor might be that, originally, Article 58 of the Colombian Constitution expressly allowed expropriation without compensation, which conflicted

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35 Decree 2080/00, Art 1 and Art 14.

36 ICSID, 'List of Contracting States and other Signatories of the Convention (as of 9 June 2020)' (2020) <https://icsid.worldbank.org/sites/default/files/ICSID-3.pdf> accessed 09 January 2021.

37 Colombia-UK BIT of 1994, Art 9; Colombia-Peru BIT of 1994, Art 12; Colombia-Cuba BIT of 1994, Art 13.

38 See the information available at UNCTAD, Investment Policy Hub <https://investmentpolicy.unctad.org/international-investment-agreements/countries/45/colombia> accessed 09 January 2021.

39 Colombia-US FTA of 2006; Colombia-Chile FTA of 2006; Colombia-Guatemala-El Salvador-Honduras FTA of 2007; Colombia-Canada FTA of 2008; Colombia-Mexico FTA of 2010, Colombia-South Korea FTA of 2013, Colombia-Costa Rica FTA of 2013.

40 José Antonio Rivas, '5. Colombia' in Chester Brown (ed), *Commentaries on Selected Model Investment Treaties* (OUP 2013) 194.

41 José Antonio Rivas, '5. Colombia' in Chester Brown (ed), *Commentaries on Selected Model Investment Treaties* (OUP 2013) 194.

with international investment agreements.[42] However, the Legislative Act 01 of 1999 modified former Article 58 of the Constitution establishing compensation as a necessary requirement for expropriations.[43]

The latest Colombian Model BIT was adopted in 2017[44] and it seems to incorporate precise provisions to tackle certain of the recurrent disputed issues developed by arbitral tribunals. The 2017 Colombian Model BIT provides for a denial of benefits clause, which allows the host state to deny treaty protection to the investor when the latter does not have substantial business activities in the home state, committed grave violations of host state's domestic law, or committed serious actions such as 'serious human rights violations' even in the territory of third states. This constitutes an expansion to the traditional denial benefits clauses that might prevent looming arbitral proceedings unless the home state objects.[45]

With regards to expropriation, the 2017 Colombian Model BIT distinguishes the criteria for lawfulness between direct and indirect expropriation. For direct expropriation to be lawful, it must pursue a public purpose, in accordance with due process, adopted in a non-discriminatory manner and accompanied by compensation. However, for an indirect expropriation to be lawful, the same requirements must be fulfilled except for the payment of compensation. This distinction clarifies that non-discriminatory measures, undertaken for a public purpose, in accordance with due process, even if affecting the economic interests of an investment, do not necessarily require compensation.[46]

The fair and equitable treatment standard (FET) envisaged by the 2017 Colombian Model BIT refers to an exhaustive list of elements that constitute a violation of FET such as denial of justice, fundamental breach of due process, manifest arbitrariness, targeted discrimination, and abusive treatment. This seems to follow a trend in investment treaty drafting, whereby states are willing to introduce a higher degree of specificity on FET provisions such as the 2012 US Model BIT, the United States-Mexico-Canada Agreement (USMCA), Comprehensive and Progressive

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42 Kabir AN Duggal, Daniel F García Claivjo, Samuel Trujillo and María C Rincon, 'Colombia's 2017 Model IIA: Something Old, Something New, Something Borrowed' (2019) 34(1) ICSID Review 224, 225.

43 Constitution of 1991, Art 58: 'For reasons of public policy or social interests defined by the legislator, there might be expropriation through a court ruling and prior compensation.' ('*Por motivos de utilidad pública o interés social definidos por el legislador, podrá haber expropiación mediante sentencia judicial e indemnización previa*').

44 *See* Colombian Model BIT of 2017 <https://www.mincit.gov.co/temas-interes/documentos/model-bit-2017.aspx> accessed 11 January 2021.

45 Kabir AN Duggal, Daniel F García Claivjo, Samuel Trujillo and María C Rincon, 'Colombia's 2017 Model IIA: Something Old, Something New, Something Borrowed' (2019) 34(1) ICSID Review 224, 230.

46 Kabir AN Duggal, Daniel F García Claivjo, Samuel Trujillo and María C Rincon, 'Colombia's 2017 Model IIA: Something Old, Something New, Something Borrowed' (2019) 34(1) ICSID Review 224, 231; Eduardo Zuleta, 'National Report for Colombia' in Lise Bosman (ed), *ICCA International Handbook on Commercial Arbitration* (Kluwer law International 2020, Supplement No 112) 85.

Agreement for Transpacific Partnership (CPTPP), Comprehensive Economic and Trade Agreement (CETA) among others.[47]

An interesting expansion on the tribunal's jurisdiction is evinced by explicitly allowing the respondent state to raise counterclaims against the investor based on the breach of international law or breach of host state's domestic law. The possibility of counterclaims seems of particular importance for Colombia, considering that counterclaims were explicitly included in Colombian latest signed BIT with the United Arab Emirates in 2017,[48] albeit not being based on the 2017 Colombian Model BIT.

Moreover, the 2017 Colombian Model BIT contains certain caveats that aim to safeguard the 2016 Peace Agreement between Colombia and the largest Colombian guerrilla movement.[49] The most notorious one consists of Annex 6 of the Model BIT, which states that any measure for the implementation of peace agreements between Colombia and any armed group are not a violation of the treaty, as long as such measure is neither discriminatory nor arbitrary.[50]

7. How is the investment arbitration practice in your country?

a. How many investment arbitration cases are there annually against your country?

b. How many investment arbitration cases are there annually initiated by investors from your home country?

Until date, seventeen cases have been brough against Colombia in investment arbitration.[51] This corresponds to a recent wave of investment claims against the country that started in 2016. In fact, in 2018 Colombia was the most frequent respondent state in investment arbitration.[52] On 27 August 2019, the first award was rendered in *Glencore v Colombia* ordering Colombia to pay over USD 20 million to the claimants,[53] whereas the other sixteen cases are still pending. Although

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47 Patrick Dumberry, 'Artide 8.10' in Marc Bungenberg and August Reinisch (eds), *CETA Investment Law: Article-by-Article Commentary* (Beck/Nomos/Hart, forthcoming 2021).

48 Colombia-United Arab Emirates BIT of 2017, Art 13(3): ('In order to submit a daim to arbitration under this Section, the Investor must present Forms 1(a) or 1(b) of Annex II, as applicable, with the Investor's acceptance of the possibility of facing daims by the Respondent against them').

49 Kabir AN Duggal, Daniel F García Claivjo, Samuel Trujillo and María C Rincon, 'Colombia's 2017 Model IIA: Something Old, Something New, Something Borrowed' (2019) 34(1) ICSID Review 224, 230.

50 Colombian Model BIT of 2017, Annex 6: ('The Contracting Parties hereby recognise and acknowledge that any Measure adopted, maintained or modified in order to implement the Peace Agreements between the Colombian Government and any Armed Group cannot be considered to be a violation to this Agreement, unless such Measures are proven to constitute a discriminatory and arbitrary Measure').

51 See the information available at UNCTAD, Investment Policy Hub <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/45/colombia/respondent> accessed 11 January 2021.

52 UNCTAD, 'World Investment Report 2019: Special Economic Zones' (12 June 2019) UNCTAD/WIR/2019, 103.

53 *Glencore International AG and CI Prodeco SA v Republic of Colombia*, ICSID Case No ARB/16/6, Award of 27 August 2019.

most of the cases relate to mining concessions, there are some cases involving telecommunication services,[54] banking,[55] real estate development[56] and port concessions.[57] The latest known investment claim submitted against Colombia is *AFC Investment Solutions SL v Colombia*,[58] which relates to financing services.

Conversely, there is only one publicly known investment arbitration case, where the claimants are Colombian nationals. This is *Rios v Chile* case[59] regarding concession contracts for the operation of Transantiogo, the public transportation system in Santiago, Chile. On 23 December 2020, the tribunal declared the proceedings closed and the disputing parties await the final decision.

III. CATCH-ALL QUESTION

8. Are there any further noteworthy trends or current discussions in your country that are worth mentioning?

The most recent development in Colombia regarding international investment agreements consists of the review process undertaken by the Constitutional Court over international investment agreements and their implementing laws. By its decisions C-252/19 and C-254/19, the Constitutional Court declared the 'conditional constitutionality' of the Colombia-France BIT[60] and the Colombia-Israel FTA.[61] Particularly, despite considering the treaties and corresponding laws in accordance with the constitution, the Constitutional Court expressly subjected certain treaty provisions to a restrictive interpretation and urged the contracting parties to clarify concepts such as 'legitimate expectations'.[62]

Nevertheless, the Colombian Constitutional Court's analysis may be subjected to certain criticisms. First, the Court used arbitral awards to define and analyse the content of the different provisions in the Colombia-France BIT and the Colombia-Israel FTA. This seems inappropriate considering that under public international law judicial decisions are only auxiliary means of

54 E.g. *Telefónica SA v Republic of Colombia*, ICSID Case No ARB/18/3.
55 E.g. *Astrida Benita Carrizosa v Republic of Colombia*, ICSID Case No ARB/18/5.
56 E.g. *Angel Samuel Seda and others v Republic of Colombia*, ICSID Case No ARB/19/6.
57 E.g. *Glencore International AG, CI Prodeco, and Sociedad Portuaria Puerto Nuevo SA v Republic of Colombia*, ICSID Case No ARB/19/22.
58 AFC Investment Solutions SL v Republic of Colombia, ICSID Case No ARB/20/16.
59 Carlos Rios and Francisco Javier Rios v Republic of Chile, ICSID Case No ARB/17/16.
60 The Colombia-France BIT was signed on 10 July 2014 and approved by the Colombian Parliament through the Law 1840 of 2017.
61 The Colombia-Israel FTA was signed on 30 September 2013 and approved by the Colombian Parliament through the Law 1841 of 2017.
62 Constitutional Court, C-252/19, MP. Carlos Bernal Pulido; Constitutional Court, C-254/19, MP. José Fernando Reyes Cuartas.

interpretation.[63] Second, the constitutional analysis may constitute an 'excessive' intrusion to executive branch powers, which is in charge of the management and direction of international relations.[64]

The EU has previously experienced a similar process of review of CETA, which culminated with the Opinion 1/17 (CETA Opinion) of the Court of Justice of the European Union. Contrary to the Colombian Constitutional Court's decisions, the CETA Opinion has a broader reach since it marks the conditions for the future of ISDS from the EU perspective.[65] However, both courts, by means of their 'constitutional review', have sparked the discussion on possible consequences of such pro-active courts for international investment law.[66]

63 Catharine Titi, 'Control constitucional y derecho internacional de inversiones a través de cuatro sentencias constitucionales en Colombia, Ecuador, y la Unión Europea' (forthcoming 2021) Revista Latinoamericana de Derecho Internacional 19.

64 Catharine Titi, 'Control constitucional y derecho internacional de inversiones a través de cuatro sentencias constitucionales en Colombia, Ecuador, y la Unión Europea' (forthcoming 2021) Revista Latinoamericana de Derecho Internacional 20.

65 Marc Bungenberg and Catharine Titi, 'CETA Opinion – Setting Conditions for the Furture of ISDS' (5 June 2019) EJIL:Talk! Blog post <https://www.ejiltalk.org/ceta-opinion-setting-conditions-for-the-future-of-isds/> accessed 11 January 2021.

66 For an analysis on this issue, *see* Catharine Titi, 'Control constitucional y derecho internacional de inversiones a través de cuatro sentencias constitucionales en Colombia, Ecuador, y la Unión Europea' (forthcoming 2021) Revista Latinoamericana de Derecho Internacional.