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COLOMBIA'S 2017 MODEL BIT: BREAKING THE MOULD?
MODELO DE TBI DE COLOMBIA: ¿ROMPIENDO EL MOLDE?*

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COLOMBIA'S 2017 MODEL BIT: BREAKING THE MOULD?

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Abstract

This article aims to highlight Colombia's contribution to the debate on reforming the International Investment Regime (IIR), with its 2017 Model Bilateral Investment Treaty (BIT). It will give some background on Colombia's investment policy and its 2017 Model. It will then explore Colombia's Model through: clarification of the language of BIT provisions, increased State Party rights in Investor State Dispute Settlement Procedures, the State's right to regulate, and investor responsibilities. With Host State regulatory prerogatives and human rights at the core, Colombia puts forward an alternative regional proposal to the IIR reform.

Keywords: 2017 Colombia's Model BIT, BIT, IIR.

Resumen

Este artículo busca resaltar la contribución de Colombia al debate sobre la reforma del RII, con su Modelo de Tratado Bilateral de Inversión de 2017. Brindará algunos antecedentes acerca de la política de inversión de Colombia y su Modelo de 2017. Luego explorará el Modelo de Colombia a partir de: aclaración del lenguaje de las disposiciones del TBI, aumento de los derechos de los Estados Parte en los Procedimientos de Solución de Controversias entre Inversionistas y Estados, la potestad regular, y la responsabilidad de los inversores. Con la potestad regulatoria del Estado receptor y las obligaciones de derechos humanos en el centro, Colombia presenta una propuesta regional alternativa a la reforma del RII.

Palabras clave: Modelo de TBI de Colombia de 2017, TBI, RII.

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INTRODUCTION

The 'legitimacy crisis' of the international investment regime (IIR)[1] rages on, between withdrawals from the system[2] and attempts to reform it.[3] The aim of this article is to highlight Colombia's contribution to the debate on reforming the IIR, with its 2017 Model BIT. This article will initially give some background on Colombia's investment policy and how its 2017 Model BIT came to be (Section 1). It will then explore Colombia's 2017 Model through four themes: clarification of the language of investment protection provisions (Section 2), increased State Party rights in Investor-State Dispute Settlement Procedures (ISDS) (Section 3), the State's right to regulate (Section 4), and investor responsibilities or obligations (Section 5). With Host State regulatory prerogatives and human rights obligations at the core of Colombia's 2017 Model BIT, Colombia puts forward an alternative regional proposal to the IIR reform,[4] that maintains controversial features such as ISDS, but attempts to build clearer expectations of State obligations and Investor behavior.

1. BACKGROUND ON COLOMBIA'S 2017 MODEL BIT

The first Colombian policy document on how to enter into Bilateral Investment Treaties (BITs) or Free Trade Agreements (FTAs) with investment chapters is of 2001, from the National Economic and Social Policy Council (*Conpes*, from its Spanish initials)[5] advising Colombian negotiators not to include labor or environmental issues in BITs.[6] However, when Colombia issued its Model BITs of 2008[7] and 2011[8] it closely followed, in both cases, the 2004 US Model,[9] and not the recommendations of its own *Conpes*, even when the latter reflected what had become a national policy concern on the implications of investment

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[1] FRANCK (2005); and "*Public Statement on the International Investment Regime"* VAN HARTEN, *et al* (2010).

[2] Withdrawals of Ecuador, Venezuela and Bolivia from ICSID, and of South Africa, Italy and Russia from international agreements covering investments. PEINHARDT and WELLHAUSEN (2016).

[3] The work that UNCTAD and UNCITRAL is carrying out in this respect is paradigmatic of the broader concern with the IIR. See "*Working Group III: Investor-State Dispute Settlement Reform".* UNCITRAL. Available at: https://uncitral.un.org/en/working_groups/3/investor-state Accessed: 20 September 2019; and UNCTAD (2018). See also GARCIA *et al.* (2015) and CRAVEN (2005).

[4] Alternative to the Brazilian model. See VIEIRA (2017) on the Brazilian Cooperation and Facilitation Investment Agreements.

[5] "*El Consejo Nacional de Política Económica y Social - CONPES".* DEPARTAMENTO NACIONAL DE PLANEACIÓN. Available at: https://www.dnp.gov.co/CONPES/Paginas/conpes.aspx.

6 DOCUMENTO CONPES 3135 OF 2001.

[7] COLOMBIA MODEL BILATERAL AGREEMENT FOR THE PROMOTION AND PROTECTION OF INVESTMENTS, 2008 (hereafter 2008 Colombia Model BIT).

[8] COLOMBIA MODEL AGREEMENT FOR THE PROMOTION AND PROTECTION OF INVESTMENTS, 2011 (hereafter 2011 Colombia Model BIT).

[9] UNITED STATES MODEL TREATY CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT, 2004 (hereafter 2004 US Model BIT).

arbitration.[10] The two Model BITs of 2008 and 2011 had little impact upon the text of the BITs that were then actually negotiated and signed by Colombia.[11]

2016 was a turning point for Colombia in realizing the risks that could be materialized through BITs. On the one hand, several investment claims were filed against the country,[12] two of them bringing the tension between environmental regulation and investment protection to the fore.[13]Additionally, human rights have gained a prominent position on the country's agenda. On 24 November 2016, Colombia and the FARC guerrilla signed a peace agreement,[14] with important implications for investment policies. It is against this background that Colombia issued its 2017 Model BIT.[15]

2. ATTEMPTS TO CLARIFY THE LANGUAGE OF INVESTMENT PROTECTION STANDARDS

International investment treaties are described as the vaguest treaties in international law,[16] a ground for standing critique of the IIR, which Colombia's 2017 Model BIT addresses not by setting aside traditional provisions, but by re-drafting them.

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[10] CONPES issued DOCUMENT No. 3684, titled 'Strengthening the Strategies of the State for the Prevention and Management of International Investment Disputes' in 2010, which invited the Colombian State to define its investment dispute policy. Accordingly, the National Government issued DECREE 1939 of 2013, on international investment disputes, and the Ministry of Commerce issued RESOLUTION No. 305 of 2014, which established internal procedures to manage investment claims.

[11] While it can be argued that the negotiating power imbalance between developing and developed countries played a role in Colombia's deals with the United States and Canada, it is less so in other BITs Colombia has entered into, with countries such as Peru and Costa Rica, where a power imbalance is less likely, but where Colombia followed the US template rather literally. Moreover, Colombia has negotiated traditional BITs even while having the more progressive US model as a reference. See for example the Colombia-France BIT, of 2014, with broad investment protection provisions and limited public interest regulation. URUEÑA and PRIETO-RÍOS (2017).

[12] In 2016 four cases were filed against Colombia: *AMÉRICA MÓVIL S.A.B. DE C.V. V. REPUBLIC OF COLOMBIA* (ICSID Case No. ARB(AF)/16/5); *COSIGO RESOURCES, LTD., COSIGO RESOURCES SUCURSAL COLOMBIA, TOBIE MINING AND ENERGY, INC. V. REPUBLIC OF COLOMBIA* (UNCITRAL); *Eco Oro Minerals Corp. v. Republic of Colombia* (ICSID Case No. ARB/16/41); and *GLENCORE INTERNATIONAL A.G. AND C.I. PRODECO S.A. V. REPUBLIC OF COLOMBIA* (ICSID Case No. ARB/16/6). *"Investment Dispute Settlement Navigator - Colombia - Cases as respondent State.* UNCTAD. Available at: https://investmentpolicy.unctad.org/investment-dispute-settlement/country/45/colombiahttps://investmentpolicy.unctad.org/investment-dispute-settlement/country/45/colombia.

[13] *ECO ORO MINERALS CORP. V REPUBLIC OF COLOMBIA* (ICSID Case No. ARB/16/41) and *COSIGO RESOURCES, LTD., COSIGO RESOURCES SUCURSAL COLOMBIA, TOBIE MINING AND ENERGY, INC. V REPUBLIC OF COLOMBIA* (UNCITRAL), Notice of Intent to arbitrate and statement of claim of Tobie Mining and Energy Inc. (5 August 2015).

[14] ACUERDO FINAL PARA LA TERMINACIÓN DEL CONFLICTO Y LA CONSTRUCCIÓN DE UNA PAZ ESTABLE Y DURADERA ENTRE EL GOBIERNO NACIONAL DE LA REPÚBLICA DE COLOMBIA Y LAS FUERZAS ARMADAS REVOLUCIONARIAS DE COLOMBIA- EJÉRCITO DEL PUEBLO (FARC-EP), La Habana (24 November 2016).

[15] COLOMBIA MODEL BILATERAL INVESTMENT TREATY 2017 (hereafter 2017 Colombia Model BIT). The methodology followed by the government in drafting 2017 Colombia Model BIT consisted in consulting with a network of national experts in investment law, and analyzing other model BITs from countries such as the United States, Canada, Germany, among others. This resulted in the model presented at the end of 2017. PALAU VAN HISSENHOVEN (former Director, Foreign Investment and Services Division, Ministry of Trade, Industry and Tourism, Republic of Colombia), interview by VÁSQUEZ ARANGO, Carolina, LORENZONI ESCOBAR, Lina and CRISTANCHO ESCOBAR, Felipe. (Medellín, Colombia, 28 January 2019) (hereafter Interview with Mr. Nicolás Palau).

[16] VAN AACKEN and LEHMAN (2013) p. 328.

For the most part, the choices in Colombia's 2017 Model BIT reflect approaches already adopted in other BITs, with some adjustments. For example, Colombia's 2017 Model BIT contains a fair and equitable treatment (FET) provision that includes an exhaustive list of what this standard is deemed to mean.[17] This list textually follows the approach taken in the Comprehensive and Economic Trade Agreement between Canada and the European Union (CETA).[18] However, unlike CETA, which allows for Tribunals to take into account specific representations made to investors that create a legitimate expectation,[19] Colombia's 2017 Model BIT excludes legitimate expectations from the purview of FET. Similarly, Colombia's 2017 Model BIT defines indirect expropriation as that which results from discriminatory or arbitrary measures that have an expropriatory effect, and that need a case-by-case, fact-based inquiry.[20] Exhaustive criteria guide the interpreter in this inquiry: the scope of the measure, its character and its impact.[21] This definition echoes US BIT models but, unlike the US models, and unlike prior Colombian models, the

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[17] '2. The fair and equitable treatment granted to Covered Investors and Investments refers solely to the prohibition against:

a. denial of justice in criminal, civil or administrative proceedings;
b. fundamental breach of due process in judicial or administrative proceedings;
c. manifest arbitrariness;
d. targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; or
e. abusive treatment of investors, such as coercion, duress and harassment

The Council may review the content of this Article, upon request of a Contracting Party'.

[18] See Clause 8.1. of CETA. COMPREHENSIVE AND ECONOMIC TRADE AGREEMENT (CETA) BETWEEN CANADA AND THE EUROPEAN UNION, 2016. The only difference with Clause 8.1. of CETA is that CETA specifies that fundamental breach of due process includes a fundamental breach of transparency. CETA omits the reference to customary international law or to the minimum international standard for the treatment of aliens, a choice that arguably reflects the fact that the minimum standard of treatment under international law is not *per se* clarifying and poses more questions than it solves on how to delimit fair and equitable treatment. KLÄGER (2011) pp. 48, 71. Prior Colombian model BITs and much of its BITs in force include language that echoes NAFTA parties' Interpretive Note of 31 July 2011, which, with a purpose of narrowing interpretation of the standard, famously stated that FET does not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. "*North American Free Trade Agreement Notes of Interpretation of Certain Chapter 11 Provision".* NAFTA FREE TRADE COMMISSION. Available at: http://www.sice.oas.org/tpd/nafta/commission/ch11understanding_e.asp.

[19] CETA paragraph 4, Article 8.1.0.

[20] However, in order to establish if a measure may be considered an expropriation, according to paragraph 2 of Article captioned '[##]-Expropriation:[...]

Such determination shall consider:

a. The scope of the Measure, or series of Measures, in question;
b. The character of the Measure, or series of Measures, in particular whether it is adopted for reasons of public purpose or social interest, made in accordance with due process of law and in a non-discriminatory manner; and
c. Whether the impact of the Measure, or series of Measures, on the Covered Investment is so severe that the effect of the Measure, or series of Measures, has the same practical effect to a direct expropriation of the whole or part of the Covered Investment.'

[21] The Model draft says, 'Such determination shall consider' and then lists the three criteria, unlike the US model that lists the criteria: 'among other factors'. See Annex B paragraph 4 item 'a' of UNITED STATES MODEL BILATERAL INVESTMENT TREATY, 2012 (hereafter 2012 US Model BIT).

2017 Colombian Model excludes 'distinct, reasonable and investment-backed expectations',[22] which have on occasions amounted to breach of the BITs.[23]

US model BITs are also the frame of reference of the efforts in Colombia's 2017 Model BIT to clarify the scope of expropriation and the legitimate regulatory prerogatives of the Host State. Indeed, Colombia's 2017 Model BIT admits expropriation, whether direct or indirect, only when it is 'adopted for reasons of public purpose or social interest',[24] and includes a non-exhaustive list of what could be considered regulatory measures that pursue the protection of public objectives.[25] These measures include not only public health, safety and the environment, as did 2004 US Model BIT and also prior Colombian model BITs, but also consumer protection and competition. These kinds of measures are lawful, therefore not deemed expropriatory, and, for this reason, are not subject to compensation.[26] Colombia's 2007 Model BIT also includes clear provisions, in the preamble, in the body of the agreement and in Annex 6, on the right to regulate, which have a broad scope - as will be discussed in Section 4 - and an impact on arbitral interpretation.[27]

Colombia's 2017 Model BIT contains a compensation clause, independent of the expropriation provision, which seeks to establish criteria to calculate compensation. Under this clause, compensation for expropriation (indirect or direct) will be the result of 'the assessment of an equitable balance between the public interest and the interest of the affected Covered Investor'.[28] This wording is similar to that of the Southern African Development Community (SADC) Model BIT.[29] Despite the theoretical problems of balancing State and investor interests,[30] Colombia identifies criteria to guide the

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[22] Interview with Mr. Nicolás Palau (2019).

[23] See Potestà (2013); Isakoff (2013); and *Técnicas Medioambientales Tecmed S.A. v. Estados Unidos Mexicanos* (ICSID Case No. ARB(AF)/00/3), Final Award (29 May 2006) paragraph 154. Reasonable expectations were included in Colombia's Model BITs of 2008 and 2011.

[24] The other two criteria are that the measure is taken in accordance with due process of law and in a non-discriminatory manner. Additionally, the expression 'social interest' was included in the Colombian BIT Model following the language of Article 58 of the Colombian Constitution (property and expropriation); however, it is a synonym of public purpose. Giest (2017) p. 345.

[25] Paragraph 4 of article captioned '[##]-Expropriation'.

[26] This reflects the 'intent' doctrine, developed in arbitral jurisprudence and according to which general welfare measures that protect legitimate objectives do not constitute an indirect expropriation. Drymer and Fortier (2004) p. 322.

[27] Including references to the right to regulate in the preamble and Annex 6 allows arbitrators to have an interpretative framework in addition to the text of the treaty itself, according to paragraphs 1 and 2 of Article 31 of the Vienna Convention on the Law of Treaties related to the general rule of interpretation of treaties. Vienna Convention On The Law Of Treaties, Vienna (23 May 1969).

[28] Paragraph 1 of article captioned '[##]-Compensation arising from an Expropriation:'

[29] Article 6 Expropriation. '6.2. Option 1: The assessment of fair and adequate compensation shall be based on an equitable balance between the public interest and interest of those affected, ...'. Southern African Development Community (2012).

[30] Giest (2017) p. 350. For example, it is not clear what the exercise of balancing public interest with investor interest would look like, in order to limit arbitrariness by arbitrators.

arbitrators.[31] Hence, compensation is not an all or nothing issue, reflecting instead a balance between the interests of the Host State and investors.[32]

While building on the SADC Model BIT, Colombia's 2017 Model BIT innovates in its compensation clause, when clarifying that compensation for expropriation will not include losses 'which are not actually incurred nor probable or unreal profits'.[33] Moreover, the provision specifies that compensation shall be the 'fair market value' of the covered investment, so it would seem that the tribunals must calculate the amount of compensation according to 'The Market Value Method'.[34] However, while this method traditionally includes prospective profits,[35] these are expressly excluded from calculation of the compensation according to Colombia's Model,[36] seeking to prevent speculation on profits by Claimants.[37] Additionally, Colombia's 2017 Model BIT incorporates a clause on monetary damages in its ISDS section, establishing criteria to help the tribunal determine the amount of compensation in favor of a claimant investor.[38]

Other provisions of Colombia's 2017 Model BIT reflect arbitral interpretations or debates in scholarship. In regard to compensation for losses or damages due to armed conflict, riots or other emergencies, Colombia's 2017 Model BIT lacks a substantive provision,[39] or a 'treatment in case of strife' provision, despite the presence of illegal groups in the country. However, it does include an article on physical protection and security for investors and investments of the other Contracting Party that could be applied to events such as those contained in a standard compensation for losses clause. In this provision, the obligation of the Host Party is restricted to provide physical rather than 'full protection and security', which limits the scope of the obligation[40] excluding the possibility of a wider

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[31] Colombia's 2017 Model BIT takes into consideration the purpose of expropriation, the acquisition history and profitability of the investment, its duration, past use of the property and depreciation, although it does not expressly mention the necessity or proportionality of the measure. See paragraph 1 of article captioned '[##]-Compensation arising from an Expropriation'.

[32] It seems that Colombia follows Kulick's scholarship, in the sense that he argues that the amount of compensation should be the result of a balance between the interests of the investor and the public interest. See KULICK (2012) p 170.

[33] See paragraph 1 of article captioned '[##]-Compensation arising from an Expropriation:'.

[34] NIKIÈMA (2013) pp. 13-14.

[35] Ibid.

[36] Article [##]- Compensation arising from an Expropriation: (...)

'2. The fair market value referred to in paragraph 1 of this Article, shall amount to the one present at the moment immediately before the adoption of the expropriatory Measures, or immediately before the imminent adoption these Measures was of public knowledge, whichever is earlier, (hereinafter, "date of value"). The date of value shall be applied to assess compensations to be paid regardless of whether the criteria set forth in paragraph 1 of Article "[##]-Expropriation". have been met.'

[37] NIKIÈMA (2013) pp. 13-14.

[38] On this, see Section 3.

[39]Under Colombia's 2017 Model BIT, it appears that any compensation or measure adopted by the host State in favour of an investor in the event of a political emergency, is governed by the MFN and NT provisions.

[40] Colombia's 2017 Model BIT follows the arbitral precedent of *CONTINENTAL CASUALTY V. ARGENTINA*. In this dispute the claimant argued that the Argentina had adopted measures that destroyed the legal certainty of its assets and had violated the BIT provision that granted various types of 'legal protection' to its investments. See *CONTINENTAL CASUALTY COMPANY V. THE ARGENTINE REPUBLIC* (ICSID Case No. ARB/03/9), Decision on Jurisdiction (22 February 2006), paragraphs 25, 42 and 67.

interpretation that could even encompass legal protection.[41] However, the 2017 Model BIT keeps a certain level of ambiguity when adding that physical protection and security will be granted 'in accordance with the minimum standard of treatment of customary international law',[42] a reference that is far from offering clarity. Furthermore, the burden of proof of this clause is expressly attributed to the claimant, that must prove 'the contents of customary international law, including its elements of State practice and *opinio iuris*'. Finally, the third paragraph of the provision clarifies that physical protection and security does not imply in any case 'greater policing efforts beyond those granted to the inhabitants of the Host Party'.[43] Accordingly, the investor has a duty of diligence to determine where to invest, attending to factors such as the political risk in the Host State,[44] which in Colombia remains very high.

The provisions of national treatment (NT) and most favored nation (MFN) also reflect on prior arbitral interpretations. Colombia's 2017 Model BIT makes an effort to clarify what 'similar circumstances' mean. Indeed, it establishes that both NT and MFN are intended to protect from nationality-based discriminatory treatment that has a 'concrete effect on the competition relationship that the Covered Investor or Investment has with other investors and Investments…'.[45] Protection is from nationality-based discrimination, which seems to mean that other sources of discrimination are not covered by this provision. Moreover, 'similar circumstances' are to be interpreted by referring to a relationship of competition, a choice which follows a certain pattern of interpretation of similar circumstances in investment arbitration,[46] and concrete effects on that relationship have to be proven.

Furthermore, Colombia's 2017 Model BIT clarifies that MFN does not include: 'definitions, substantive standards of treatment, substantive or procedural obligations, or dispute settlement mechanisms.'[47] It appears then that the treatment encompassed by this standard is actually none, which begs the question on why it was included in the model. One could note however that the reference to 'substantive obligations'- which is distinct from 'substantive standards of treatment' - could actually prevent investors, who do not

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[41] SCHREUER (2010) p. 358; and SCHREUER (2013) p. 4.

[42] Professors Schreuer and Sornarajah argue that the levels of protection and security required from a Host Party will vary depending on its ability to respond to events that threaten the physical security of investments, or the likeliness of facing civil unrest, among other factors. Hence, not all Host States are responsible to the same extent at any given time, although this position could be debated. SCHREUER (2010) p. 369; SCHREUER (2013) p. 9; and SORNARAJAH (2010) p. 135.

[43] As Professor Sornarajah has argued, when referring to the origin of the treatment provisions in the event of armed conflict and other emergencies, the discussion was that an investor cannot demand more favourable treatment than that the host State grants its own nationals. SORNARAJAH (2010) p. 134.

[44] SORNARAJAH (2010) p. 134 citing 'Upton Case (1903), in J. H. Ralston, Law and Procedure of International Tribunals (1926), p. 389.'

[45] 2017 Colombia Model BIT, paragraph 4 of article captioned '[##] General Provision on National Treatment and Most-Favoured Nation Treatment'.

[46] For an interpretation of similar circumstances that is based on competition, see, for example, *SD MYERS, INC. V. GOVERNMENT OF CANADA* (UNCITRAL), Second Partial Award (21 October 2002) paragraph 214; and *SERGEI PAUSHOK, CJSC GOLDEN EAST COMPANY AND CJSC VOSTOKNEFTEGAZ COMPANY V. THE GOVERNMENT OF MONGOLIA* (UNCITRAL), Award on Jurisdiction and liability (28 April 2011) paragraph 315.

[47] 2017 Colombia Model BIT paragraph 4 of article captioned '[##]-Most-Favoured Nation Treatment'.

usually have 'substantive obligations' under traditional BITs, from invoking MFN to avoid the obligations they do have under the 2017 Model.[48]

Overall, Colombia's attempt to finetune language of traditional investment protection provisions is more a restatement of arbitral interpretations, doctrinal discussions and other BITs, with some exceptions. The restatement of these provisions, however, does not exclude a degree of subjectivity when assessing their breach, as a criterion such as 'manifest arbitrariness' in the FET provision easily shows.

3. INCREASED STATE PARTY RIGHTS IN INVESTOR-STATE DISPUTE SETTLEMENT PROCEDURES

Colombia has chosen to maintain ISDS,[49] but to regulate it in detail in section 'DD' of its 2017 BIT Model. Features introduced by said Model seek to maintain ISDS in grip of the Contracting Parties, limiting and regulating the otherwise broad prerogatives of claimant investors and addressing the discretion of arbitral tribunals as well as the content of awards.

Colombia's 2017 Model BIT allows for counterclaims by the Respondent State,[50] introducing a feature that has been argued as pivotal for a rebalancing of the IIR.[51] The scope of the State's counterclaim includes the 'conduct and operation of the Investment or Claimant Investor' or issues related to the 'subject matter' of the dispute.[52] The text is clear in stating that the subject matter of the dispute includes aspects that pertain to the Investor's conduct and that may lead not only to breach of national but also of international law.[53] The text also contains a declaration on the nature of the protection given to Covered Investors and Investments, which stems from their contribution to the Host State's welfare and sustainable development.[54] Therefore, access to ISDS in Colombia's 2017 Model BIT is grounded in the notion of investor responsibility that becomes enforceable to a limited extent as an admissibility requirement. The fact that the BIT foresees investor obligations begs the question as to why Colombia refrained from including a direct cause of action for the Host State. As it stands, the rebalancing effect is defined by the investor's initiative to file a claim, the Host State remaining a defendant through its counterclaim. There are other

[48] See Section 5 below.

[49] 'Two broad alternatives exist: to keep and reform ISDS, as some countries have done or to abandon and/or replace ISDS.' See UNCTAD (2018) p. 47.

[50] See paragraph 2 of the article titled 'Scope of Application of Investor-State Dispute Settlement'.

[51] BJORKLUND (2013) p. 461; CAZALA (2017) p. 319; TIETJE and CROW (2017) pp. 87, 109.

[52] Article captioned '[##]-Scope of Application of Investor-State Dispute Settlement' states the following:
'2. This Section shall also apply to claims raised by the Respondent State related to any issue in connection with numerals (i) through (vii) of Paragraph 1.d. of Article [##]'Denial of Benefits', or those related to the subject matter of the dispute, including the Claimant Investor's breach of applicable international law or the Host Party's law, including in, inter alia, connection with the establishment, conduct and operation of the Investment or Claimant Investor.'

[53] How exactly an investor could breach international law obligations is addressed below.

[54] Paragraph 3 of Article captioned '[##]-Scope of Application of Investor-State Dispute Settlement'. This feature was incorporated in some IIAs concluded in 2017 such as the Burundi-Turkey BIT, Mozambique-Turkey BIT, and Turkey-Ukraine BIT. UNCTAD (2018a) p. 98.

requirements an Investor must fulfil to submit its claim,[55] generally aimed at preventing parallel claims and, in turn, preventing claimant from recovering damages in more than one forum.

Moreover, Colombia's 2017 Model BIT contains features that address the content of arbitral awards and the composition of tribunals. Thus, under this model, the tribunal must take into account a comparison of multiple valuation methods and the monetary values reported by the Claimant Investor in its Economic Declarations, and these compensations must not include losses that are not or will not be actually incurred nor probable or unreal profits. If the estimated damages or losses alleged by the Claimant Investor exceed proven losses by fifty per cent or more, 'the Tribunal shall allocate fifteen per cent (15%) of the resulting difference as costs in favour of the Respondent State'. As a general matter, the Tribunal cannot award moral or punitive damages,[56] only monetary damages and any applicable interests.[57] Moreover, compensation or monetary damages must correspond to the amount the Claimant Investor has received and declared[58] from Third-Party Funding:[59] if the Claimant Investor fails to declare the Third-Party Funding and this has been proven, the Tribunal may not render any award in favor of the Claimant Investor and shall rule on costs and fees in favor of the Respondent State.[60] On this hotly debated topic,[61] Colombia chose not to prohibit third party funding, but to impose the obligation to disclose it.

Additionally, the 2017 Model includes a detailed and differential regulation on what the arbitral tribunal can grant to the claimant for two specific standards. In the event of expropriation, the best possible remedy will be restitution of the property; if not possible, a monetary compensation and/or applicable interest is due.[62] If a violation of MFN is proven, the defendant is given the option to choose between withdrawing or adjusting the measure affecting the competition relationship between the Claimant Investor and its competitors, or paying a monetary compensation for the damages caused. In the event of withdrawal of the measure, the arbitral tribunal must review the Defendant State's compliance with the conditions set out in the award. If these have not been met within a period of six months, the Defendant Party must pay the monetary damages caused by the

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[55] These requirements are incorporated in forms 1(a) or (b) to 4 (a) or (b) of Annex 2. See paragraph 6, items a. to d. of the article captioned 'Submission of a claim before a Court of Law or Arbitral Tribunal'.

[56] Paragraph 4 of article captioned '[##]-The Award'.

[57] Paragraph 3 sub paragraphs b and c of article captioned '[##]-The Award'.

[58] Paragraph 6 item d. of the article captioned 'Submission of a claim before a Court of Law or Arbitral Tribunal'. Third-Party Funding has to be disclosed at any time after the beginning of the arbitral proceedings when a financing agreement is reached.

[59] Paragraph 5 of article captioned '[##]-The Award'.

[60] This as a sanction for breaching one of the requirements contained in the article titled 'Submission of a claim before a Court of Law or Arbitral Tribunal'.

[61] Dautaj and Gustafsson (2017); and Garcia *et al.* (2018) pp. 1-9. Third party funding has been criticized because of its impact on lack or apparent lack of independence and impartiality of arbitrators, cost of ISDS proceedings and security for costs, on the increase in number of frivolous claims or possibility of settling claims. It is argued it has 'introduced a structural imbalance in the ISDS regime as respondent States generally did not have access to it'. United Nations, United Nations Commission on International Trade Law, A/CN.9/WG.III/WP.157 (24 January 2019) pp. 7,8.

[62] According to item c. in paragraph 3: 'Any applicable interest in a manner consistent with Article [##]-Compensation arising from an Expropriation'.

application of the inconsistent Measures and interest under the terms of sub paragraphs b and c.[63]

Furthermore, this Model requires awards to be motivated: arbitrators must make their reasoning explicit, stating 'clear and convincing evidence' of the investor's right to appear as claimant; the existence of any rule of international and/or domestic law invoked; the occurrence of the alleged facts or measures; the existence of injuries for which monetary damages are sought; the causal link between the facts or measures and the monetary damages; and the amount of monetary damages sought.[64]

With regard to the applicable law for arbitral proceedings, the Tribunal shall rule according to the agreement and the applicable rules of domestic[65] and international law. However, the tribunal is prevented from deciding on the legality of the measures taken by the defendant State under its domestic law, and is compelled to follow the interpretation the local courts and authorities of the defendant Party give to its own law.[66] Although this provision seems to mirror the wording in some EU treaties, it reflects an integration into the Colombian legal regime of supranational norms stemming from the Andean Community, which prevail over other domestic norms such as laws enacted by Congress and government decrees. Furthermore, national Courts and Tribunals may request 'prejudicial interpretations' of Andean law to the Andean Court of Justice, to guarantee a uniform application and interpretation of Andean Law.[67]

Finally, there are three requirements governing the appointment of arbitrators that constitute an innovation with regard to arbitral qualifications:[68] 'experience in dispute settlement derived from international investment agreements', which arbitrators must 'preferably' have; compliance with the International Bar Association Guidelines on Conflict of Interest in International Arbitration and, upon appointment, the refraining 'from acting as counsel or as party-appointed expert in any pending or new investment disputes under any international agreement throughout the duration of the arbitration'. The latter addresses criticism against arbitrators who serve simultaneously as counsel.[69]

Other features in the regulation of ISDS reflect deference to domestic institutions. Hence, the requirements to exhaust some degree of domestic remedies must be met before the consultation phase.[70] Indeed, 'non-judicial local administrative remedies' must have

[63] Paragraph 3 of article captioned '[##]-The Award'.

[64] Paragraph 2 of article captioned '[##]-The Award'. According to Mr. Palau, this provision intends to place a limit on the discretion of arbitrators in their awards. Interview with Mr. Nicolás Palau, 2019.

[65] Reference to domestic law was present in paragraph 12 of Article IX of the 2008 Model BIT; but this reference was omitted in the 2011 Model BIT. Mr. Palau explains that its inclusion in the 2017 Model BIT responds to an ongoing discussion regarding the importance that must be given to domestic law in the assessment of a dispute. The rationale behind this provision is to give domestic law the nature of a source of law before the tribunal, and not to be considered merely as a fact. Interview with Mr. Nicolás Palau, 2019.

[66] This clarification seeks to prevent tribunals from ordering states to modify or derogate their domestic law or to adopt measures to bring domestic law in line with international law or a BIT. Ibid.

[67] *"Objetivos y funciones del TJCA".* TRIBUNAL DE JUSTICIA DE LA COMUNIDAD ANDINA. Available at: https://www.tribunalandino.org.ec/index.php/objetivos_funciones/.

[68] See paragraph 3 items 'a.', 'c.' and 'd.' of Article captioned '[##]-Composition of the Arbitral Tribunal'.

[69] This concern has resulted in reform proposals to the ISDS provisions of BITs. MANN (2013) p. 542.

[70] See paragraph 3 of the article captioned 'Conditions in order to submit a Claim to Consultations'. A manifestation of the Calvo Doctrine, as indicated by Shan. SHAN (2007).

been exhausted.[71] Furthermore, the agreement makes reference to the possibility, not obligation, of the Host Party having a 'foreign investment ombudsman', in which case the Investor has the obligation to communicate its grievance to the ombudsman first, so that it can within a 'reasonable time', attempt to solve the investor's case.[72]

A preference for domestic institutions is also reflected in the 'fork in the road' provision, which, however, poses interpretative challenges in Colombia's 2017 Model BIT. The Spanish and English drafts of the model have conflicting versions of paragraph 5 of the article that regulates compensation arising from expropriation. The English version states that '5. Without prejudice to what is established in 'Article [##]-Submission of a claim before a Court of Law or Arbitral Tribunal', compensations for direct expropriation may be challenged before the judicial authorities of the Host Party', whereas the Spanish version states that it is the compensation for indirect expropriation that may be challenged before that forum.[73] In both cases, challenging compensation of (in)direct expropriations before domestic courts, is without prejudice to ISDS: an exception to the 'fork in the road'.[74]

Annex 3 of the Model regulates 'fork in the road' by stating that as a matter of principle, choice of procedure is deemed as final, 'as long as the remedy sought in both the proceedings has the same effect in terms of reparation to the alleged injury suffered by the Claimant Investor in the arbitration'.[75] The wording of the Annex appears to be an open exception to the 'fork in the road': by pursuing different remedies or through the challenging of the 'effects' of the remedy that was sought. This drafting is unclear, certainly a scenario where vagueness of language, an issue IIR reform tries to address, haunts clarifying efforts.

Colombia's 2017 Model BIT addresses the role of the Non-Disputing Contracting Party, to which the Respondent State must to communicate the dispute, a provision that

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[71] Non-Judicial local administrative remedies are defined in Annex 5 of the Model BIT as follows:
'With respect to Colombia: Non-Judicial local administrative remedies are constituted by the "vía administrativa" defined in Articles 74-81 of Law 1437 of 2011 (Administrative Procedure and Contentious Administrative Code), or whichever other provision of Colombian Law that modifies such articles.' Exhaustion of administrative remedies is required in order to submit a claim to consultations, instead of being a requirement to submit a claim to an arbitral tribunal or Court, which is how consultations are regulated in most BITs signed and in force for Colombia. Colombia's Model BIT of 2017 thus anticipates the exhaustion of administrative remedies to the consultation phase. This feature was included in the Belarus-India BIT, Singapore-Sri Lanka FTA and USMCA. UNCTAD (2019) p. 107.

[72] The ombudsman was absent in previous Colombian BIT Models, and is one of the 'institutional' changes to dispute settlement under the 2017 Model, in addition to the creation of the Bilateral Investment Council. Paragraph 1 of the article captioned 'Conditions in order to submit a Claim to Consultations'.

[73] Indirect expropriation is not a cause of action under Colombian law, which makes the Spanish version ambiguous.

[74] This clause is an exception to the 'fork in the road' which favours the investor who would thus, will be able to pursue a remedy before a national court or tribunal while at the same time submitting its claim before other ISDS arbitral choices listed in the Model, as long as the remedies sought in the two fora differ. The 'fork in the road' clause is governed by paragraph 4 of Article captioned '[##]-Submission of a claim before a Court of Law or Arbitral Tribunal'.

[75] Annex 3 of 2017 Colombia Model BIT: 'the choice of procedure shall be deemed as final [...] regardless of the identity of disputing parties [...] or the identity between claims raised in the domestic proceedings and those raised in the arbitration [...] as long as the remedy sought in both proceedings has the same effect in terms of reparation to the alleged injury suffered by the Claimant Investor in the arbitration'.

seeks to promote transparency of the proceedings before the Tribunal. It also seeks to provide a mechanism for input from Non-Disputing Parties with relevant extraterritorial obligations of investors, as discussed further in Section 5 below. Surprisingly, the Respondent State can oppose or restrict the publication or disclosure of the documents requested by Non-Disputing State Party.[76] While this enhances the Respondent State's right to preserve control over the proceedings' information, it diminishes transparency.

Finally, the 2017 Model states that Non-Disputing Parties are to refrain from pursuing matters related to disputes between a Contracting Party and its investors through diplomatic channels.[77] The novelty lies in the sanction that consists in the suspension of the arbitral proceedings and even their termination.[78] However, termination - not suspension - would require a statement or decision by the arbitral tribunal, at the request of the Respondent.

4. PRESERVING THE STATE'S RIGHT TO REGULATE

The preservation of the State's right to regulate is a well-established theme in the debate on the reform of the IIR.[79] While by no means generalized to all recently negotiated BITs,[80] it takes many forms in treaty language: from asserting the right to regulate in the preamble and as an independent provision, to including non-lowering of standards provisions and exceptions. Colombia's 2017 Model BIT stands out because of the emphasis placed on human rights in these provisions.

The right to regulate, included both in the preamble and in the operative text of the agreement, is broad in scope. The preamble reaffirms the right of each Contracting Party to

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[76] Contrary to existing provisions in some BITs and FTAs in force for Colombia seeking for more transparency in the arbitral proceedings in favour of non-Disputing Parties (article 26 of the BIT with Peru; article 32 of the BIT with Japan, article 9.21 of the FTA with Chile; article 826 of the FTA with Canada, and article 12.23 of the agreement with Costa Rica); this provision allows the Respondent State's to decide whether to disclose or restrict access to: 'a. Pleadings, memorials, briefs, requests and other submissions made to the Tribunal by a Disputing Party; b. Minutes or transcripts of hearings before the Tribunal, if available; and c. Orders, awards and decisions of the Tribunal.' See paragraphs 2 and 3 of article captioned 'Communication of the Dispute to the Non-Disputing Party'. BILATERAL INVESTMENT TREATY BETWEEN COLOMBIA AND PERU (2007) (hereafter Colombia – Peru BIT); BILATERAL INVESTMENT AGREEMENT BETWEEN COLOMBIA AND JAPAN (2011) (hereafter Colombia – Japan BIT); FREE TRADE AGREEMENT BETWEEN COLOMBIA AND CHILE, INVESTMENT CHAPTER (2006) (hereafter Colombia – Chile FTA); FREE TRADE AGREEMENT BETWEEN COLOMBIA AND CANADA, INVESTMENT CHAPTER (2008) (hereafter Colombia - Canada FTA); and COLOMBIA - COSTA RICA FREE TRADE AGREEMENT CHAPTER ON INVESTMENT (2013) (hereafter Colombia – Costa Rica FTA).

[77] Paragraph 2 of the article captioned 'Diplomatic Protection'. Although common in BITs, this provision has been described as 'a corollary of the Calvo Doctrine, which came to be incorporated in concession agreements between States and aliens. The Calvo Clause was in essence a waiver of diplomatic protection running from the concessionary company to the conceding State.' JUILLARD (2007), paragraphs 5, 6.

[78] Paragraph 2 of the article captioned 'Diplomatic Protection'.

[79] For a critical analysis on what legal significance and effects such 'right to regulate' clauses may have, see TIETJE and CROW (2017) p. 97; and NOWROT (2014) p. 624.

[80] SCHILL and JACOB (2013). Schill and Jacob's remarks on this are still relevant and Colombia is a good example. With seven BITs in force, they all vary significantly in language and scope. The BIT signed with Turkey in 2014 is a good example. AGREEMENT CONCERNING THE RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENTS BETWEEN COLOMBIA AND TURKEY (2014) (not in force).

regulate to protect legitimate public welfare objectives such as 'human rights, health, public order and safety, labor rights and the environment'.[81] Colombia's previous model BITs limited the right to regulate to environment and labor, so do the BITs it has in force;[82] the reference to human rights is thus notable. The scope of the provision is further expanded in the text of the agreement, where it includes natural resources and sustainable development as part of the legitimate public policy objectives that it protects.[83] In addition, the right to regulate is not subject to conditionalities such as proportionality or compatibility with the agreement.[84] This would allow for broader interpretations of the right to regulate, as consistency with the agreement has normally led to restrictive interpretations.[85]

Similarly, the non-lowering of standards provision[86] -a tool used to prevent a 'race to the bottom' if lower standards are used as a comparative advantage to attract investment-[87] includes human rights, in addition to environmental and labor law.[88] Colombia's previous BIT model from 2011 limited this clause to environmental and labor regulation. Colombia's negotiated BITs and FTAs tend to include environment and/or labour law, together with other standards such as health and safety.[89] The addition of human rights in the 2017 Model BIT broadens the spectrum of standards that cannot be lowered.

The 2017 Model BIT also includes a provision on 'general exceptions', which echoes GATT Article XX.[90] The innovation here lies in two aspects: There is a broader list of measures subject to exception and, arguably, the measures that a party may consider necessary need not always be compatible with the agreement. Colombia here choses to make 'necessity' under this provision, self-judging:[91] the provision refers to measures that a Contracting Party 'deems necessary for'.[92] The fact that necessity is left to the judgement

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[81] Fourth Recital of the Preamble.

[82] Only Colombia's BITs in force with United Kingdom (article VIII) and with Japan (article 21 paragraph 2) include right to regulate clauses that are limited to environmental matters. BILATERAL AGREEMENT FOR THE PROMOTION AND PROTECTION OF INVESTMENTS BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND REPUBLIC OF COLOMBIA, 2010; and Colombia – Japan BIT.

[83] SECTION [CC]-RIGHT TO REGULATE AND INVESTMENT RELATED OBLIGATIONS, Article [##]-Chapeau on Investment and Regulatory Measures.

[84] Colombia's 2017 Model BIT also includes Annex 6, which explicitly includes in the right to regulate, all measures that are not proven to be discriminatory and arbitrary, related to the implementation of the peace agreements between the Colombian Government and Armed Groups, thus not only covering the peace agreement signed with the FARC-EP, but also any future ones.

[85] BEHARRY and KURITZKY (2015) p. 392.

[86] Labelled as 'Non-detraction from environmental, human rights and labour standards'.

[87] JOHNSON and SACHS (2015) p. 39.

[88] SECTION [CC]-RIGHT TO REGULATE AND INVESTMENT RELATED OBLIGATIONS, 'Article [##]-Non-detraction from environmental, human rights and labour standards.'

[89] Colombia – Peru BIT refers to health, safety and the environment, to the exclusion of labour rights. Colombia - Japan BIT refers to health, safety, the environment and labour rights. The investment chapter of Colombia - Canada FTA refers to 'health, safety and the environment', again, labour rights are not mentioned. The investment chapter of Colombia – Costa Rica FTA refers to health, safety, the environment and labour rights.

[90] 'General Exceptions', GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT), Geneva, (30 October 1947).

[91] This feature is present in the Argentina-United Arab Emirates BIT, concluded in 2018. UNCTAD (2019) p. 105.

[92] Colombia's 2011 Model BIT included a general exception clause that made its 'appropriateness', not its necessity, self-judging. However, where Colombia has negotiated general exception clauses it may refer to

of the Host State, reflects the strong stance on regulatory sovereignty of Colombia's 2017 Model BIT. However, it does not free the clause from ambiguity, to the extent that there is no consensus on what it means for a clause to be self-judging.[93] On the other hand, self-judging language raises concerns from an investor-protection perspective.[94] Colombia's 2017 Model BIT raises these concerns given that State measures are not otherwise assessable or compensable under a proportionality standard.[95]

As for the measures listed after the chapeau, Colombia's 2017 Model BIT lists measures aimed at protecting human rights, then followed by measures aimed at protecting the environment, preserving and protecting natural resources, protecting consumer rights, protecting from anticompetitive standards, measures that concern issuance, revocation or limitation of intellectual property rights, measures aimed at preserving public order and measures to ensure compliance with the Host Party's laws and regulations 'that are not incompatible with the provisions of this Agreement'. Thus, compatibility with the agreement is mentioned only once: under item (i), when referring to the need to ensure compliance with the laws and regulations of the Host State. Measures that relate to intellectual property rights, are subject to a consistency requirement, not with the BIT, but with the TRIPs Agreement. In contrast, all the other references would not be subject to a compatibility or consistency test, and thus would prevail in case of conflict with investment protection provisions.

It is not clear whether the matters not expressly subject to compatibility with the agreement actually have to be compatible with the agreement, to the extent they may be regulated by domestic law. Indeed, while there may be international commitments in said matters, they all have domestic regulation. Some international commitments related to human rights and international humanitarian law prevail in Colombia's legal order through the 'constitutionality block'.[96] Accordingly, while the exceptions clause lists more exceptions than usual, it is not clear to what extent the measures that these exceptions allow for must be compatible with the agreement, which frustrates the clarity of language and the very purpose of the exceptions to begin with. As already noted, consistency with the agreement has been one of the reasons for which exception clauses have been interpreted restrictively, thus weakening the application of these policy-implicating clauses.[97]

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necessity, but it is not always self-judging. See for example Colombia's BITs with Peru and Japan for non-self-judging references to necessity.

[93] VANDEVELDE (2009) p. 454. Vandevelde refers to how the United States and Argentina had different understandings of what a self-judging necessity provision means.

[94] BURKE-WHITE and VON STADEN (2008) p. 404.

[95] See Section 2.

[96] Not all human rights treaties though, and not all treaties. Important environmental and economic treaties that pertain to consumer protection, intellectual property, international trade, and so on, do not belong to the constitutionality block and therefore are located at the same hierarchical level of ordinary laws promulgated by Congress, VÁSQUEZ (2016) p. 241. The 'constitutionality block' is 'a set of rules, norms and principles that, without formally appearing in the text of the Constitution, are used as control parameters of the constitutionality of statutes because they have been normatively integrated into the Constitution in various ways by the mandate of the Constitution itself', GÓMEZ (2016) p. 15.

[97] BEHARRY and KURITZKY (2015) p. 392.

5. INVESTOR RESPONSIBILITIES AND OBLIGATIONS

Another approach to balancing the benefits of investment protection, is to assert investor responsibilities or even the obligations that would apply to investors. Colombia's 2017 Model BIT choses to give a subjectivity to the investor that goes beyond being a beneficiary of protection.

The preamble of the BIT states that the parties are convinced that 'the pursuit for sustainable development is a joint responsibility for Governments and Investors', and that both are responsible for its achievement. The subjectivity of the investor stands on the same level of the State with regard to responsibility in attaining sustainable development.[98] The use of the word 'responsibility' is questionable. Either sustainable development is not an obligation for states - which contradicts the notion that, at least to the extent the 2017 Model BIT is applicable, parties are required to 'promote and protect foreign investment that favors prosperity and sustainable development of both parties' – or it is, in which case the use of the term 'obligation' would have been more appropriate for both states and investors, not least because the Sustainable Development Goals call on both actors for action.[99]

Furthermore, the body of the agreement contains a corporate social responsibility (CSR) provision. The first paragraph of the provision contains usual hortatory 'State-centered' language: Contracting Parties 'shall endeavor to ensure' that investors, operating in their territories or incorporated or constituted under their law (thus including a territorial and extraterritorial approach), 'incorporate and practice the OECD Guidelines for Multinational Enterprises on a voluntary basis'. The second paragraph of the provision calls upon 'Claimant Investors' to respect prohibitions included in international human rights and environmental protection instruments, to which any contracting party is party. This obligation to respect applies throughout the life of the investment in the country and it is a condition to be able to submit a claim under ISDS.

Thus, there are two positions in which an investor can be. Either the investor is a Covered Investor, or it is a Claimant Investor, and its responsibilities are quite different in each position. If a Covered Investor, the State will 'endeavor to ensure' that the investor voluntarily incorporates and practices the OECD Guidelines for Multinational Enterprises. If a Claimant Investor, it will be mandated to comply with human rights or environmental obligations a party - any party, so also the Home State – must comply with, both upon making the investment and throughout the investment's operation. This position of the Claimant investor is complemented by a paragraph on the scope of ISDS, included in the

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[98] On the use of the term 'responsibility', both for states and for companies, it is perhaps important to underscore that UN Special Rapporteur Ruggie chose the word 'responsibility' to distinguish what is expected of businesses from the obligations that bind the state. UNITED NATIONS/OHCHR (2012). In this sense, one can speculate that either the Colombian State does not view sustainable development as an obligation, or it believes its commitments to sustainable development are no different from business commitments, views that are both incorrect.

[99] UNITED NATIONS, GENERAL ASSEMBLY, A/RES/70/1 (21 October 2015). The 2030 Agenda consistently highlights the role of the business sector towards achieving sustainable development.

ISDS provision and mentioned above, where parties link investor protection to investor's 'contribution to the sustainable development and welfare of their Host Party.'

The compliance by the Investor with State human rights and environmental obligations under international law raises dogmatic questions on the international subjectivity of investors,[100] which have troubled the arbitral tribunals that have dealt with them. While the Tribunal in *Urbaser v. Argentina* argued that one cannot 'reject by necessity any idea that a foreign investor company could not be a subject to international law obligations',[101] it found difficulties in transferring the State-tailored obligation to ensure the right to water, to a multinational company.[102] Likewise, while in *David Aven et al*. *v. Costa Rica*, the Tribunal implied that international environmental law obligations which apply *erga omnes* also apply to the investor,[103] it was unable to find how the applicable treaty - the CAFTA - imposed these obligations on investors. While these precedents show that arbitral tribunals are beginning to consider the implications of subjectivity for investors under investment treaties, they also show an important difficulty in translating these theoretical considerations into practice.

In the case of Colombia's 2017 Model BIT, the obligation is explicitly spelled out in the treaty, at least when it comes to human rights and environmental obligations attributed to State parties and to the Claimant Investor's contribution to sustainable development. One can only speculate as to the rationale through which a tribunal might assess whether and how an investor has lived up to these obligations, although CSR may be key.[104] Indeed, when discussing investors' international subjectivity, *Urbaser v. Argentina* argued that CSR is an international 'standard' in consideration of which transnational companies are no longer immune from international subjectivity.[105] It is not unlikely that a tribunal would first look into a company's CSR policy to build linkages with traditional State-tailored human rights or environmental obligations. Businesses usually channel their contribution to issues such as environment and human rights through their CSR policies. It appears then that CSR, a 'voluntary' endeavor, has the potential, under Colombia's 2017 Model BIT, to become prescriptive to the extent it relates to human rights, the environment and sustainable development, if an investor wishes to access ISDS. Moreover, in addition to giving teeth to CSR by making it a potential precondition for accessing ISDS, the provision contains an extraterritorial element to the extent home State human rights and environmental commitments are applicable to the investor, together with the Host State's obligations in this regard.

Additionally, the 2017 Model BIT's denial of benefits clause establishes, that the benefits of the agreement may be denied, among other situations,[106] to an investor when

[100] NOWROT (2014) p. 637.

[101] *URBASER S.A. V ARGENTINE REPUBLIC* (ICSID Case No. ARB/07/26) Award (8 December 2016) paragraph 1194. (hereafter Urbaser S.A. v Argentine Republic, Award)

[102] CROW and LORENZONI (2018).

[103] *DAVID AVEN ET AL. V. THE REPUBLIC OF COSTA RICA* (ICSID Case No. UNCT/15/3) Final Award (18 September 2018), paragraph 738.

[104] UNITED NATIONS, HUMAN RIGHTS COUNCIL, A/HRC/17/31 (21 March 2011).

[105] *URBASER S.A. V ARGENTINE REPUBLIC*, Award, paragraph 1195.

[106] Reference is made to situations of control, and thus to the issue of the real beneficiaries of investment. Benefits can be denied under the agreement either if (a) an investor is an enterprise that is owned or

an international court or a judicial or administrative authority of any State with which the Contracting Parties have diplomatic relations, has proven that such investor has directly or indirectly committed or sponsored serious human rights violations, or money laundering, or caused serious environmental damage, seriously violated labor law, committed tax or fiscal fraud, or acts of corruption in the territory and against the laws of the Host Party.[107]

Accordingly, violations of human rights, of international humanitarian law and money laundering can occur anywhere (subparagraphs i., ii. and vii. do not specify that they must have occurred in the territory of the Host State or that they must constitute violations of the law of the Host State) and any tribunal, even an administrative authority, may have proved them. Thus, these violations have extraterritorial implications. On the contrary, environmental damage, fiscal fraud, corruption and violation of labor law, are limited to the normativity of the Host State. But again, these may be found by any tribunal, whether domestic, international, or foreign. Treaty benefits may also be denied when managers of investors have violated the Host State's criminal law.[108] In all cases, the 2017 Model BIT establishes an obligation to notify the Investor of its denial of benefits. It is not clear whether proof of violations must have exhausted all levels of adjudication.

Finally, Colombia's 2017 Model BIT includes, in Annex 6, a specific mention of the role of investments and investors for the successful implementation of the peace agreements the country has entered or may enter into. Covered Investors and Investments 'must collaborate' within their possibilities, to the successful implementation of the Peace Agreements and the achievement of full reparation to victims. The wording sets a binding expectation for Investments and Investors in this regard. Again, Colombia's 2017 BIT Model navigates the categories of subjectivity and voluntariness, opening a scenario where an obligation for the investor or investment is set, within a variable, which consists of the possibilities of each investor or investment.

CONCLUSIONS

controlled by investors of a non-party, with which the denying party has no diplomatic relationships or if the denying party would violate agreements with the non-party by granting the benefits of the agreement to the non-party enterprise; (b) an investor is an enterprise that is owned or controlled by investors of the other contracting party and does not have an authorization of its shareholders to claim; (c) an investor is an enterprise of the other contracting party but does not have substantial business activities in the territory of the Host State.

[107] Article 'Denial of Benefits', paragraph 1 d) and e).

[108] Colombia's 2017 Model BIT contains a restriction on freedom of transfers, very much in line with the special attention that is devoted to the implications of investor behaviour. According to this provision, a party may condition or prevent transfers, so long as this is done in a non-discriminatory and non-arbitrary manner, to enforce compliance with labour, environmental, human rights and tax obligations. This wording is not present in Colombia's previous BIT models from 2008 and 2011. With regard to the BITs Colombia has in force, only the one with the United Kingdom refers to labour and tax matters as justifying restrictions. Other BITs contain 'standard' wording.

Colombia's 2017 Model BIT strongly asserts the regulatory prerogatives of the Host State, both in its substantive clauses and in ISDS, while also establishing expectations for investor behavior.

Vagueness in language is the primary and most common critique of the IIR. Colombia's 2017 Model BIT seeks to do away with several important vagueness critiques by taking up arbitral developments and the wording of other BITs deemed to be clarifying, while also introducing innovative language in its own right. This effort does not necessarily exclude vagueness. To a certain extent, it proves the complexity of taming an attribution of language such as vagueness. The difficulties in interpreting the 'fork in the road' provision, are a case in point.

Imbalance in the ISDS is the second most common critique. Colombia has chosen to keep ISDS in its model but to regulate it through a complex set of provisions. This, together with revised substantive standards, arguably reduces arbitrator discretion. The 2017 BIT Model certainly makes it very challenging for an investor to file a claim and places obligations on arbitrators to motivate awards and on how to calculate damages. Interests that conflict with investor protection standards are strongly asserted, not only through narrowing of scope of traditional protection standards but also through other provisions, such as the obligation of disclosure of third-party funding.

The obligation of the Host State to regulate in the public interest is also made explicit in this model, the inclusion of human rights is noteworthy. However, it is the issue of investor obligations that stands out in this model, a document that did not shy away from making international investor obligations explicit and making compliance with them a condition for accessing ISDS. While this is perhaps the most daring position of the document, it is also the most challenging one from a practical perspective. While following what we believe is an inevitable trend, an arbitral tribunal will need to make an important doctrinal effort to link the investor subjectivity to obligations under international law.

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