

Colombian legal formalism or how to prevent the protection of public interest in public-private arbitration**

El formalismo jurídico colombiano o cómo evitar la protección del interés público en el arbitraje público-privado

ABSTRACT

Arbitration in Colombia is based on an ancient stringent legal formalism that has transplanted, transformed, and mixed, Spanish and Roman laws and legacies with French exegesis. It has also been based on German jurisprudence. This paper describes how Colombian legal formalism has limited the protection of public interests in arbitral proceedings as provided in the 1991 Colombian Constitution. It also shows how it has infused Administrative Law and mainly Procedural Law over time, where formalism is more stringent, and full of useless rhetorical technicalities. As a result, it has privileged the private interest over the public one despite the Constitutional provision to safeguard the public interest over private one. The protection of the public interest is grandiloquently stated in the constitution and in administrative law but with limited practical effect. Consequently, each phase in public-private arbitration is lavishly regulated by an arbitral regime and several sections of the procedure code, the administrative procedure code and the public officials code, but none are effective at protecting the public interest. Instead of protecting the public interest, all the regulations compiled under the influence of the textualist legal culture, constitute barriers to achieving it and thus administrative law leaves it unprotected.

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KEYWORDS

Public-Private Arbitration, Investment Arbitration, Investment Law and Public Interest, Policy Space In Arbitration, Procedural Formalism In Arbitration.

RESUMEN

El arbitraje en Colombia se basa en un antiguo formalismo legal estricto que ha trasplantado, transformado y mezclado, legados legales españoles y romanos con la exégesis francesa, y la jurisprudencia alemana de conceptos en su sistema legal. Este artículo describe cómo el formalismo jurídico colombiano ha limitado la protección del interés público en los procedimientos arbitrales, tal y como se establece en la Constitución colombiana de 1991. También mostrará cómo esto ha infundido el derecho administrativo y principalmente el derecho procesal a través del tiempo, donde el formalismo es más estricto, lleno de tecnicismos retóricos inútiles, lo que resulta en privilegiar el interés privado sobre el público a pesar de la disposición constitucional para salvaguardar el interés público sobre el privado. Afirmo también que la protección del interés público se enuncia grandilocuentemente en la Constitución y en el derecho administrativo, pero con un efecto práctico limitado. En consecuencia, cada fase del arbitraje público-privado está profusamente regulada por un régimen arbitral y varias secciones del código de procedimiento, el código de procedimiento administrativo y el código de funcionarios públicos, pero ninguno es eficaz para dar cuenta de la protección del interés público. En lugar de proteger el interés público, todas esas reglamentaciones, compiladas bajo la influencia de la cultura jurídica textualista, constituyen barreras para su consecución, por lo que el derecho administrativo lo deja desprotegido.

PALABRAS CLAVE

Arbitraje público-privado, arbitraje de inversiones, derecho de inversiones e interés público, espacio político en el arbitraje, formalismo procesal en el arbitraje.

SUMMARY

Introduction. 1. Arbitration as a formal private means to settle disputes. 1.1. Arbitration was designed to settle private disputes. 1.2. A procedural law approach to arbitration. Formalism – textualism. 1.3. The emergence of public-private arbitration. 2. The formal constitutional prevalence of public interests in public-private arbitration. 2.1. Constitutionally tensioned concepts for public-private interest protection. 2.2. Public Law's limited tools to protect the public interest in public-private arbitration. 2.3. The formal limits of public-private arbitration to protect public interests. 3. The naïve Colombian

constitutional approach towards ISDS as governance. 3.1. The government approach to ISDS as governance. 3.2. The constitutional interpretation of ISDS. Conclusion. References.

INTRODUCTION

The importance of public-private arbitration is increasing in Colombian law given the large amounts of capital involved in the exploitation of Colombia's natural resources and in infrastructure projects. This is demonstrated by the many arbitration clauses that are included in a variety of administrative contracts and International Investment Agreements (IIAs) negotiated and signed in the first decade of the 21st century. Arbitration has thus become a recurrent practice in infrastructure projects, and some of the biggest controversies between public and private entities are being removed from the judicial courts and transferred to local or international arbitration. Therefore, the level of justice provided by the State has been regressing to give way to local and international private justice.

This chapter aims to describe what drives public-private arbitration in Colombia and reveals the discrepancies between the constitutional purpose to safeguard the public interest with the prevailing private interest perspective that has infused the practice in public-private arbitration over time. The main thesis herein is that 19th century legal formalism still infuses Colombian arbitration through procedural and administrative law, which are the sources of public-private arbitration. Coupled with its private leaning perspective, such formalism has helped to limit the constitutional guarantee to safeguard the public interest in public-private arbitration. It has excluded the discussion on the arbitral practice, that is to say, that legal formalism has not allowed for the protection, in practice, of the public interest in today's public-private arbitration.

Section II describes how private initiative, party autonomy and free will have driven arbitration since the 19th century in Colombia, and how arbitration was designed exclusively to settle disputes between private entities, embedded in the frame of a formally ruled procedural framework. It examines the continuities of legal textualism-formalism deeply rooted in Colombian procedural law, which impregnated the arbitration reforms in 1989 and 2015. Finally it describes the public-private arbitration emergence process pursued under public law reforms rooted within the afore mentioned continuities. It concludes by noting that the inertia of legal formalism and the private interest approach of arbitration has infused public-private arbitration through time. When preparing contracts with private entities, the State is considered a private actor that can settle contractual disputes with private entities on the same level, without special consideration to its public nature. Subsequently, despite

the constitutional recognition of the prevalence of the public interest over the private interest and the promotion of fundamental rights by constitutional courts, the few formal safeguards included in the arbitral proceedings and in public law have left the public interest unprotected in practice. This is due to the formal design of arbitral proceedings, and administrative law formalism.

Section III explains the concept of public interest in the Colombian Constitution, which, as a general principle, must prevail over the private interest when in conflict. It shows the constitutional tensions between the concepts of public interest, private property and private economic activities, also protected by the constitution. It also explains the administrative law settings designed to protect the public interest in public-private arbitration and the limits of such settings in protecting the public interest in practice. It claims that the Colombian authorities have yet to realize that legal formalism imposes limits to effectively protect the public interest. There is therefore a mismatch between the constitutional duty to protect the public interest and the formal way in which the public interest is accounted for in public-private arbitration proceedings. The constitutional values of democracy and the rule of law do not permeate public-private arbitral proceedings beyond the fundamental right of due process, and do not have a practical impact on the effective protection of the public interest.

This section concludes that despite the constitutional significance of the public interest concept, it has not received the protection required by the Constitutional Court. While the work of the Court has been commendable regarding the protection of human rights, it also adheres to a public law formalism that prevents the protection of the public interest in public-private arbitration.

Section IV gives a brief account of the Colombian public law approach toward Investor-to-State Dispute Settlement (ISDS) governance at the end of the 20th century and the first decade of the 21st century, and how legal textualism still plays an important role for its local institutional legitimation. It then examines the perspective of the government entity in charge of the IIA negotiations regarding the protection of the public interest and ISDS as governance. It also analyzes the interpretation of the Constitutional Court on the compatibility of IIAs with the Colombian Constitution and how it understands the space left by the treaties for the protection of the public interest when implementing public policies. It concludes that the Colombian approach toward ISDS as governance, as seen in the previous sections, is imbued with a stringent Constitutional formalism over international law. In other words, the Court understands that the standards of protection included in the IIAs are compatible with the Constitution and that the governance of such IIAs is interpreted and limited by Colombian constitutional values. This constitutional proposition is naïve because it differs from the opinions that other countries in the region hold regarding the IIAs and from what some ISDS tribunals have decided when settling a case where the public interest is

involved. There may also be serious reliance on what Colombia thinks it had negotiated in the IIAs. It is reasonable to consider that sovereignty spaces to regulate are retained by States when parties leave silences in a treaty. In other words, what is not written in it, give the State sufficient policy space to account for the protection of the public interest, provided that it is not acting arbitrarily.

1. ARBITRATION AS A FORMAL PRIVATE MEANS TO SETTLE DISPUTES

Arbitration in Colombia has been driven by private initiative, free will and procedural formalism. Following the revolutionary war that earned the country's independence from Spain in the early 19th century, Colombia continued with the Spanish legal tradition, which established that arbitration was driven by formalism¹ and free will. Also, that it was intended exclusively as a judicial procedure to settle disputes between private entities. Arbitration was therefore considered a formal procedure to make effective the substantive rights of private persons. Over time, these drivers have remained in Colombian procedural law. They also impregnated the arbitration reforms in 1989 and 2015, when public-private arbitration emerged, where no substantial changes were made to protect the public interest. In 2015, a few formal rules were included in the arbitral rules to protect the public interest but, again, these are of a procedural nature with no real impact on protecting public interests. From the administrative and constitutional law perspective, public-private arbitration was accepted for contractual disputes in the 1970s, and was consolidated in the 1990s, first for local disputes and later for international ones. However, the general principles of protecting public interests, which were recognized in constitutional and in administrative law, did not effectively permeate the arbitral proceedings in public-private arbitration.

As for international arbitration, throughout the 19th century, Latin American republics, such as Argentina, Chile, Mexico, and Peru, came together to agree upon the submission of claims to international commissions. When the commissions failed to resolve the case, there was a subsequent review of these claims by an arbitral tribunal. Colombia followed the same path. An agreement between New Granada (present day Colombia) and the United States, for example, was signed in 1857 to settle disputes between corporations and

1 A legal system is procedurally formalist if a substantive right depends for its existence on procedural rules. See López, D. 'Los conceptos de "formalismo" y "antiformalismo" en la teoría del Derecho' In *Ámbito Jurídico* 19 (2005). A procedural formalist system is also exegetical and full of detailed rules that must be followed textually. Formalism also accepts that an independent dimension of justice or equity does not exist within the rule, that the law is just a rule and not a fact or value. See Mápura, L. M. 'La cultura jurídica en Colombia: un fenómeno que necesita actualizarse.' (LLM thesis, National University of Colombia 2013) 46.

citizens from the United States and those from New Granada, which arose following the Panama riots of 1856.² Arbitration was also invoked to settle border complaints, disputes with foreign citizens and contractual matters³, but it was mostly used to settle private disputes.

1.1. Arbitration was designed to settle private disputes

Arbitration has been well known for the settling of private disputes in Hispanic America since the Spanish colonial era, as the laws that existed applied Spain's arbitral practice in the New World.⁴ Following the independence from Spanish rule, Hispanic American countries continued to use arbitration abundantly at the local level for resolving contractual or inheritance disputes.⁵ Colombia was no different. Following its independence from Spanish rule in 1819, the Spanish laws that provided arbitration continued to be applied and arbitration continued to be recognised as a dispute settlement mechanism in Colombia for private disputes. In 1834, when Colombia's new rulers began to gradually change the judicial institutions inherited from the Spaniards, such as the new procedural codes, a law enacted by Congress continued to recognize arbitration as a means to settle private disputes in civil matters, such as under the Law of May 5 of 1834,⁶ and later by Law 105 of 1890, where arbitration was included within the general procedural code for judi-

2 New Granada (Colombia) – United States. Convention for the arbitration of claims of citizens of the latter against the government of the former. Signed in Washington, September 10, 1857 in William R. Manning (ed), *Arbitration Treaties among the American Nations to the Close of the Year 1919* (OUP 1924) 38.

3 'In the matter of referring national disputes of arbitration, the course of Latin America has been of a remarkably advanced character. Probably the first modern attempt to refer all international disputes to arbitration was between Colombia and Peru by a treaty dated on September 22 of 1822.' (emphasis added) Jackson H. Ralston, *International Arbitration from Athens to Locarno* (SUP 1929) 148.

4 See *Recopilación de leyes de los reynos de las indias*, Ley v of December 1553 (COL). According to J. Eloy Anzola, arbitration in America had appeared previously, in 1532, by the expedition of a decision (pragmática) by Charles I of Spain, at the same time Charles v of the Romanic Germanic Sacrum Imperium. Anzola J. E., *Reseña histórica del Arbitraje Comercial en Venezuela Publicación con Ocasión del Libro Homenaje a los 15 Años de la Promulgación de la Ley de Arbitraje Comercial de Venezuela*, vol 2, Británnica Great Books, 1952 17, (on file with author)

5 See Ramirez Cleves, G. 'El caso de la hacienda 'El Novillero' o 'La Dehesa de Bogotá' of 1834. El tránsito del derecho colonial al derecho republicano' In *Revista de Derecho Privado or RDP*, 2014 73. Also other arbitrations occurred before the independence war in Caracas in 1808, including the contractual case of Bustamante v García, see J. Eloy Anzola (n 5) 31.

6 See Barbosa, F. *Justicia: Rupturas y Continuidades. El Aparato Judicial en el Proceso de Configuración del Estado-Nación en Colombia 1821-1853* (Pontificia Universidad Javeriana - PUJ 2007) 109. Law of May 5 of 1834 Articles 85 to 87 established that adjudicators, *jueces-árbitros*, judges-arbitrators, and their authority were given to act as conciliators (*amigables componedores*) also in civil matters.

cial claims,⁷ all kinds of civil disputes were regulated. This code was then replaced by the 1931 Judicial Code and later by the 1970's Decrees 1400 and 2019 - the Civil Procedure Code⁸ - and Decree 410 of 1971 - the Commercial Code - where arbitral procedures were regulated.

The evolution of Colombia's legal system, including arbitration, has been strongly influenced by the country's inheritance of theoretical, political and social institutions from Europe, mainly from Spanish⁹ and Roman law. These were strongly influenced by the scholastic theology and formalism then taught at Colombian universities.¹⁰ Such influence remained present even after Colombia's independence from Spain in 1819. However, throughout the 19th century Colombia began to turn to France's exegesis method of interpretation, and to copy its laws as a model for some of its private and public law institutions. The most notable example is Colombia's Civil Code, modelled on Napoleon's *Code Civil*, which included institutions and rules from Roman law, such as the formation of obligations. This, alongside with institutions from Spanish law, such as the rights and duties among the catholic family. At the end of the 19th century and the turn of the 20th century, German and Italian legal institutions began to shape Colombia's commercial code and procedural law. However, the arbitral institution as a procedure to resolve private disputes, which were included in the judicial reforms, from 1819-1834, remained in force during that period with no changes. That is to say, it was still considered a formal judicial proceeding as part of the so-called judicial code.

The European legal influence was accompanied by a myriad of theories and textbooks from England, France, Germany and Italy that were taught in Colombian universities.¹¹ Nevertheless, formalism remained at the core

7 In 1890 the statute where the judicial proceedings before a court of law were included was called the Código de Procedimientos Judiciales. In 2012, its name changed to Código de Procedimiento Civil and now it is called Código General del Proceso. Despite all the name changes, formalism is at their core.

8 The Civil Procedure Code's arbitral proceedings were amended in 1989 by Decree 2279 of 1989 and Decree 2651 of 1991 and ultimately Law 1563 of 2012, the so called arbitral statute.

9 In Spain, arbitration was inherited from the Justinianum Code in *El Brevario de Alarico*, and from the *Liber Iudiciorum*, which enforced arbitration and set the arbitral award as *res iudicata*. See Zappala, F. 'Universalismo Histórico del Arbitraje' 2010, 59 (121) Universitas 206. See also, Eloy Anzola J. (n 5) 7-8.

10 Legal education in Colombia, long after independence, was influenced by European theories of civil law, public law and international law and it was mandatory to include these in the curriculums of law faculties, including the theories of Aristotle, Plato, Wolf, Montesquieu, Heineccius, Vattel and others. See Gaitán, J. *Huestes de Estado. La Formación universitaria de los juristas en los comienzos del Estado Colombiano*, 2002, Universidad del Rosario or UR 39-49.

11 For example, Bentham, J., Rousseau, J. J., Baron de Montesquieu, Locke, J. Hans Kelsen, Cesar Beccaria. For a comprehensive view of the reception of European theories see Gaitán, J. (n 11); Castro, S. *La Hybris del Punto Cero. Ciencia, Raza e Ilustración en la Nueva Granada (1750-1816)* (2nd edn, PUJ 2010) and Gutiérrez, D. *Un Nuevo Reino. Geografía Política,*

of Colombian legal education and in judicial practice. According to Diego López, such textbooks are carriers of specific ideas, values and concepts that also contributed to the legal consciousness of future lawyers.¹²

Colombia transplanted, transformed and mixed the French exegesis dogma and the German jurisprudence of concepts within the formalist tradition in both academia and court rooms, to solve the practical problems of the civil code of 1873 by means of the formal procedures enacted by the judicial code.¹³ By the middle of the 20th century, Colombia had added Kelsen's positivist theory to the French exegesis and jurisprudence of concepts, which was adapted by local courts and practitioner-scholars without detaching from formalism. All of these theories, mixed in the Colombian context, transcended to the 21st century. For these reasons, classicism made, and continues to make an impact today in Colombian legal culture,¹⁴ where the exegesis plays an important role, as does the way in which legal analyses have to be conducted. The French theory of legality applied was also extended from the civil code to the administrative codes and to arbitration procedures included in the code of procedure.

Formalism, as a persistent feature of Colombian legal culture since the 19th century, is considered an expression of a formalist legal theory that transplants, transforms, and mixes, in a Colombian context of reception, French exegesis and the German jurisprudence of concepts. This spectrum of streams is subsequently consolidated by Kelsen's positivism and has become a dominant feature of Colombian legal culture.¹⁵ The mixture also transcended easily to the judicial rules of procedure (included in codes) which were designed to settle private disputes where arbitration was included. Procedural law is the legal area in which colonial formalism is best rooted nowadays. These codes affected heavily private arbitration practice and remain in public-private arbitration. Administrative law legal formalism/textualism also left no space for interpretations that could have accounted for the protection of the public interest due to its insistence on adhering to the exact text of the norm.

1.2. A procedural law approach to arbitration. Formalism - textualism.

Since the Spanish colonial era, arbitration in Colombia has been traditionally viewed as a dispute resolution system ruled by procedural law. That is to

Pactismo y Diplomacia durante el Interregno de Nueva Granada (1808-1816), 2010, Universidad Externado de Colombia OR UEC

12 López, D. *Teoría Impura del Derecho*, 2009 Legis. 129.

13 Ibid. 218; Mápura L. (n 2) 46. The common problems that needed to be solved were the ones relating to disputes on land property, inheritance or contracts.

14 López also calls classicism to the formalism, see López, Diego (n 13) 133; Mápura, L. (n. 2) 46. I also use herein both terms in the same fashion

15 Mápura, L. (n. 2) 51.

say, it has been considered a judicial proceeding that takes place in a court of law like civil (private) case proceedings e.g. real estate, wills, contracts, etc. This is why arbitral proceedings, as a means to solve private disputes, have always been part of the legal system's regulations and were included in detailed regulations (codes). In other words, they are contained within the judicial –or civil– rules (codes) of proceedings in the Colombian legal system.

Colombia inherited the *Siete Partidas of Alfonso x El Sabio* from Spain, which were compiled by the *Recopilación de Leyes de los Reynos de las Indias*.¹⁶ These continued to be used by scholars, lawyers and judges for quite some time following the independence from the Spanish rule, during which time local rules were slowly enacted to replace them. Arbitration was regulated in the *Partida* iii, Title iv, from Law xxiii to Law xxxv.¹⁷ Subsequent reforms were made to the *Siete Partidas* judicial system in Colombia and to the procedures to be followed in courts of law in 1834 and 1890 when the *Siete Partidas* were derogated. Other judicial reforms were also made, in 1931, 1970 and 1989, but the regulation of arbitration remained immersed in judicial procedural laws as a chapter of the code of civil procedure and as a means to solve private disputes without regard to the public-private interest. This occurred despite the fact that by the 1970s the State had begun to accept more frequently sending public-private contractual disputes to arbitration. This private interest approach has impregnated over time to public-private arbitration, a transcendence that also occurred because public contracts were a matter subject to private law since it was the only regulation available. As such, the State was seen as a private actor that contracted as a private organization, which was subject to private law, and therefore could settle contractual disputes with private entities, rather than as a provider of public goods that was supposed to look after public interests.

Arbitration was considered a judicial proceeding within the procedural rules (codes). Therefore, the general principles and regulations of procedural law that had to be applied to civil law court proceedings also applied to arbitration. Besides the formalities of arbitral proceedings, the other numerous and detailed legal formalities included in the procedural codes had to be applied by the arbitrator and the parties during the proceedings. For example, the way in which witness depositions were requested to the tribunal, the exact language for questioning the witnesses, the authentication of documents in order for them to be admissible in court, powers of attorney, the paper size to render the decision, etc. Should those formalities not be complied with in the exact language provided for in the rules, different consequences could emerge. These included that the arbitrator must reject the claim for lacking formality, or reject a request for witnesses or the questionnaire itself, etc.

16 See Eloy Anzola (n 5)

17 Eloy Anzola (n 5) 9-10.

In the last fifty years, as part of the Colombian justice reform policy, Colombia has made several reforms to arbitral proceedings, but it has not yet been possible to change the formalist approach of such regulations. Alongside the textualist tradition, another possible explanation could be that the public policy goals that could safeguard the general interest and the public interest were not stated as the core purpose of the reforms, and that these reforms were not pursued and executed by public policy experts during the drafting of the reforms. The task of writing arbitration reforms has traditionally fallen to so-called procedural law experts – proceduralists. They are not experts in public policy issues or economics who could safeguard the general interests when writing a regulation. These proceduralists have been private practitioners: they often teach procedural law; their experience stems mostly from their day-to-day dealings with the judicial system as litigants; and they are also interested in becoming arbitrators. This would explain why most of the literature on arbitration is written by litigant lawyers and professors, *i.e.* proceduralists, and why even today public-private arbitration proceedings are extremely detailed, textualist, formalist and linked to civil codes of procedure. The latter are also written by them, thereby making arbitration an onerous litigation process comprising small steps, forms and technical useless details.

The 2012 arbitration reform enacted by Law 1563 of 2012 managed to distinguish between private-private and public-private, local and international, arbitration.¹⁸ However, those distinctions do not have any practical consequences related to the protection of the public interest. This reform could not be separated entirely from the civil procedure rules and the related formalities to fill the gaps in Law 1563. Thus, local public-private arbitration has continued to be entangled with the formal procedural rules which preserved a single arbitration procedure for public and private disputes. In other words, under this law, written mostly by proceduralist practitioners, general arbitration procedural rules have been compiled into a single regulation separated from the civil codes of procedure. Nevertheless, the separation was only a formality, because in practice this new Arbitral Statute could not be detached from the formalities in Colombia's General Code of Procedure, given that some of the arbitral stages must still be read in conjunction with them. The rules contained in the Administrative Procedure and the Contentious Administrative Code that apply to specific issues involving public-private arbitration must also be applied. They are also full of formalisms, for example, the causes to challenge arbitrators or notifications to the National Agency for Legal Defence for the State (ANDJE).

18 See, Arts. 1, 2. Law 1563 of 2012

1.3. The emergence of public-private arbitration

The arbitrability of issues for public-private arbitration have undergone an evolution, starting from what were restrictive authorisations to the development and passing of more tolerant laws on the matter subject to arbitration. Public-private arbitration in Colombia has been developed hand-in-hand with France's administrative contract theory and during most of the 20th century public law development has had its strongest influence from French administrative law. Colombia was a keen recipient of French developments in this field. The contracts made between a private party and a public entity were known as private contracts of the administration and administrative contracts. In both cases, substantive private rules i.e., civil law and commercial law, were the applicable regulation for the contract.¹⁹ This meant that there was an ample margin for the configuration of the contract's clauses as the parties wished. State contracts were divided into administrative contracts and ordinary contracts of the administration. Despite this division, "Colombian legal tradition has always assumed that state contracts are identical to private contracts, that the State's actions are the same as the individual's actions and so are its legal consequences"²⁰. The definitions from private contracts are therefore adapted to the necessities of the State contract²¹ because administrative law is not independent to act as a substitute for all the rules of private law.²² Colombian courts concluded that, apart from certain clauses, in which the administration reserves privileges that are inherent to the concept of government, the legal aspects of State contracts are ruled by the same principles that govern private contracts, contained in the Civil Code.²³ Finally, public entities are allowed to operate under private law because it creates a more equal relationship between the parties.

This private law tradition has remained for administrative contracts today. Nevertheless, some public contracts, along with private law, are regulated in part by specific rules of administrative law, e.g. natural resources' concession contracts and infrastructure contracts, among others.

From the mid 20th century onward, there has been an inclination toward North American institutions, for example through the creation of entities analogous to independent agencies, such as the Central Bank and the Controllers' Office. Colombia also engaged in international trade and finance

19 See Vidal Perdomo, J., *Derecho Administrativo General* 1966, 2nd edn, Temis. For the evolution of administrative law and administrative contracts in Colombia.

20 Ibid. 424.

21 Vidal Perdomo, J., *Derecho Administrativo General*, 1985, 8th edn, Temis 300

22 Ibid. 312. This same idea remains today as the State Contracts Statute, Law 80 of 1993, provides that as a general rule, the contracts will be ruled by commercial and civil law, except for those that a special rule regulated it.

23 Vidal Perdomo, J. (n. 19) 426

institutions e.g. the IMF, the Latin American Association of Free Trade (ALALC) and the Andean Community. As such, a new trend, in the mid 20th century, in the legal, technocrat and political community evidenced an overlap of common law institutions and administrative French-oriented institutions. Thus, the new public-official technocrat, as they saw themselves, who was responsible for designing public policies, began to influence Colombia's major institutions, including arbitration.²⁴ State-contracting laws, which today allow public-private arbitration, have thereby shifted from French-inspired models, where zero arbitration was permitted, to an UNCITRAL model which in the case of Colombia has also been influenced by the World Bank and the Inter-American Development Bank. Technocrats followed this narrative by means of "modernized judiciaries in order to accommodate these demands and provide a level playing field in the international arena"²⁵. It allowed for the adoption of policies toward the internationalization of public-private mechanisms of dispute settlement, such as international commercial arbitration for state contracts and investor-state disputes.

As for public-private arbitration, legal formalism-textualism has made the process of its recognition and application slow. Arbitration as a means to settle disputes between private parties made no distinction between the kinds of contracts in which the arbitral clause could be used, so, in theory it was possible to agree to public-private arbitration in administrative contracts. Thus, despite the enactment of a regulation in 1938 that provided for the recognition of arbitral clauses in any contract whether public or a private, arbitration clauses were not included in Administrative Contracts. In other words, arbitration for administrative contracts began to be recognized in Colombia under Article 1 of Law 2 of 1938, which recognized arbitration clauses in general, including international arbitration. It recognized the validity of arbitration clauses included in contracts by those parties able to compromise in the event of a dispute. However, as in procedural law, Colombian administrative law relies profoundly on legal textualism tradition, which requires that any and all authority given to a public entity to perform its functions must be clearly specified by law. However, the authorization given was general and it did not specify that administrative contracts were included. No effect was given to that law and it became necessary to clarify it by means of Law 4 of 1964 where public-private arbitration was clearly

24 Democracy had suffered before the appearance of technocrats because important decisions for the whole of the society were not being made by democratic processes but by a small group of people. The axis of power was displaced when the economic institutions shifted and were taken over by technocrats. It is technocrat ideology, not democratic discussion, that ended up legitimizing the Washington Consensus policies. See Álvarez, J. M. *El Interés Nacional en Colombia*, 2003, UEC 136-138.

25 Dakolias, María 'The Judicial sector in Latin America and the Caribbean. Elements of reform' 1996, Technical Paper Number 319, World Bank 4

authorized for construction contracts and their auditing process. Hence, at the national level, public entities, such as the central executive power i.e. the President's office, its ministries or agencies, were empowered to submit to arbitration any differences that arose with contractors, under the terms of Law 2 of 1938.²⁶

As for international arbitration, under Law 2 of 1938 it was allowed. Later Law 150 of 1976, which regulated state-contracts, established that public-private arbitration had to be pursued before local arbitrators and international arbitration was not mentioned. Nevertheless, this new administrative contract regime broadened the scope by which contracts could be subject to arbitration and was authorised for any State contract,²⁷ although it did not include those executed by subnational public entities, e.g. municipalities such as mayors' offices.²⁸

In 1983, a new reform of the State contract regime was carried out through the enactment of Decree-Law 222, which made arbitration available to all public entities, including subnational ones and excluded for arbitration conflicts arising from contractual extraordinary powers of the State –*cláusulas exorbitantes*–²⁹ a particular feature in the Colombian State-contracting regime. Arbitration was only permitted for domestic use in Colombia and with respect to international contractors, a clause was included in their contracts that prohibited them from seeking the diplomatic protection of their home States.³⁰

European modelled institutions in Latin America began to be considered archaic and inefficient by the World Bank at the end of the 1980s, a perception that was confirmed by judicial inefficiency. Procedural laws in which arbitration is included have thus been consistently modified since the 1990s in attempts to “decongest” the judicial system. Judicial congestion continues to persist.³¹ However, this has justified local firms devoted to arbitration to maintain a continued use of domestic public-private arbitration in State contracts and the recent use

26 Articles 1 and 13 of Law 4 of 1964

27 Article 66 of Decree-Law 150 of 1976, When I refer to administrative contract or State contract I am referring to the general category of public contracts executed by a public entity and a private one.

28 The same Decree restricted arbitration for disputes arising from the unilateral termination-*caducidad*-decreed by the State entity in such contracts.

29 Article 76 of Decree-Law 222 of 1983, These are clauses in which the State keeps extraordinary powers and include the possibility of alteration, interpretation and unilateral rescission of the contract.

30 Article 74 of Decree-Law 222 of 1983

31 Colombia's Doing Business Indicators, according to the World Bank Group, state that a judicial procedure takes 1,288 days, and the related costs make up 47.9% of the claim. To put that in perspective, Latin America's average is 734 days and 31% respectively. Colombia ranks 155 out of 189 Countries with regards to “Contractual enforcement”. See <http://www.doingbusiness.org/data/exploretopics/enforcing-contracts>. See also, Strong, S.I. ‘*International Arbitration and the Republic of Colombia: Commercial, Comparative and Constitutional Concerns From a U.S. Perspective*’, 22 In *Duke Journal of Comparative and International Law* 47, 2012, 4.

of international arbitration to resolve contractual and investment disputes. Arbitration has, therefore, gained popularity among Colombian business lawyers and investors as it is believed to be the most efficient and economically viable method of solving public-private disputes³². The Inter-American Development Bank and the World Bank have fuelled this impression by promoting arbitration over litigation as an apparently technical dispute settlement system, because of the confidentiality and flexibility of the arbitration proceedings, the selection of arbitrators, the enforceability of the arbitration awards and the opportunity for parties to choose persons with ‘specialized knowledge’ to judge their dispute. Judges in state courts of law are seeing by arbitrators less likely “to acquire the same degree of expertise in the technical aspects of the transactions that come before them as are the lawyers who represent the parties and who may later serve as arbitrators in similar transactions”³³.

Local and international public-private arbitration in Colombia was propelled by the liberal theories of free initiative, free competition, privatization and efficiency. As a result of economic liberalization, privatizations and new concessions encouraged by the World Bank and the Inter-American Development Bank policies, State contract law was reformed in 1993 by Law 80. Due to this trend of liberalization and privatization, the tendency towards the promotion of arbitration grew and a new provision in Law 80 established that public entities should not prohibit agreements to arbitration in their contracts,³³ which were complemented with a general authorization to arbitrate all kinds of State-Contracts.³⁴ However, legal formalism impeded moving forward because it persisted with its useless requisites for arbitration and in the administrative contracts regimes.

Although the 1993 reform had established that arbitration could be used for resolving local disputes, international arbitration was not permitted because it was not expressly written in such a law. Once again, this demonstrated the consequences of the legal textualism of administrative law that requires the express, complete, and clear description of public entities’ powers to arbitrate their disputes. Thus, three years later international arbitration was enacted by Law 315 of 1996 where its language expressly included public-private international arbitration for State contracts.

32 Minister of the Interior and Justice, ‘Proyecto de Ley 18 de 2011’ (*Senado de la República*, 26 July 2011) <http://www.imprenta.gov.co/gacetap/gaceta.mostrar_documento?p_tipo=05&p_numero=18&p_consec=29607> accessed July 26, 2017

33 See Article 69 of Law 80 of 1993. C. et al. ‘*Alternative Dispute Resolution Guidelines*’ In The World Bank Group Report N. 70763, Working Paper 12. 2011. Available at: <http://documents.worldbank.org/curated/en/108381468170047697/Alternative-dispute-resolution-guidelines> Accessed 11 August 2017” so, according to a good part of the arbitral community, arbitrators are the ones that better can solve complex disputes.

34 Article 70 of Law 80 of 1993 establishes that an arbitration clause can be included in public procurement contracts.

Law 1563 of 2012 (the Arbitration Regime), which regulates overall arbitration in a single regulation, established a general authorization,³⁵ that allows State entities to arbitrate all their arbitrable disputes. That is to say, those disputes that can arise from the interpretation or performance of the contract. This new regime applies for both public-private arbitration and for private-private disputes. Although it finally managed to remove arbitral proceedings from the over formalistic civil code of procedure, i.e. the arbitration chapter will no longer form part of that code, this formal move had no practical effect on a real detachment of arbitral proceedings from both the code and its burdensome formalism. Important provisions in Law 1563 on key issues of the proceedings have secured the dependency of arbitration on the code of procedure, *e.g.* when it provides that the claimant's claim "should fulfil all the [formal] requisites required by the procedural civil code".³⁶ Should those requisites not be fulfilled, the claim will be rejected so claimant will need to comply with those formalisms.³⁷

The arbitration regime applies to both private-private arbitration and public-private arbitration, but most substantive rules applied to the subject matter for public-private arbitration (*e.g.* a contract) are public law in areas such as public works,³⁸ infrastructure,³⁹ public utilities,⁴⁰ mining⁴¹ and oil concessions.⁴² However, public-private arbitration proceedings are conducted like any private-private arbitration. In the case of arbitration, the Council of State and not the Supreme Court of Justice,⁴³ has the authority to annul the award. In the case of international arbitrations, it has the authority to recognize the arbitral awards when the seat

35 Article 1 determines that any arbitration tribunal that is established as a result of an compromissory clause contained in a state procurement contract has to decide in accordance with the law. Law 1563 of 2012 derogated article 70 of Law 80 of 1993.

36 See Article 12 Law 1563 of 2012

37 See Article 90 Process' General Code, Law 1564 of 2012. This procedural code was designed as its predecessors for civil disputes between private parties. See also, S.I. Strong, who points out how the two previous arbitral provisions did not constitute the entirety of the Colombian law on arbitration and references to other statutory provisions were needed to see. Note 37, p. 53

38 See Law 80 of 1993

39 Law 1682 of 2013 Article 14 of Law 1638 authorizes the government to include an arbitration clause in all State procurement contracts regarding transport infrastructure projects and an arbitrator cannot be appointed if he (she) is acting in other three arbitral procedures where state is part of it.

40 Law 142 of 1994

41 Law 685 of 2001 "The Mining Code"

42 See Decree 1056 of 1953, Law 20 of 1969, Decree 2655 of 1988

43 As a result of the influence of French and Spanish Administrative law, under Colombian law, the Court System is divided into four main branches, called jurisdictions: i) a Constitutional jurisdiction headed by the Constitutional Court, in charge of all Constitutional actions; ii) an Administrative jurisdiction headed by the Council of State, in charge of all cases where the State is a party; iii) an Ordinary jurisdiction, headed by the Supreme Court of Justice, in charge of all criminal, civil, commercial, labour, family and agrarian causes and iv) a Special jurisdiction, which contains a special dispute settlement system for indigenous peoples and Peace Judges.

of arbitration is outside Colombia. In either case, the grounds for safeguarding the public interest in public-private arbitration are limited.

Regarding arbitrators' roles, they have the same duty and powers as judges in public-private and private-private arbitrations to reach a legally reasoned and informed decision. However, they have limited authority to protect the public interest because their jurisdiction is granted to decide solely on contractual dispute issues related to the contract's interpretation and its performance, unless a public interest issue is clearly written on the contract. Also, the State Council's control over the arbitral award is limited to specific procedural mishaps⁴⁴ that could have occurred during the arbitral proceedings, which give rise only to the award's annulment.

The grounds for annulment in both public and private arbitration refer exclusively to specific procedural issues.⁴⁵ The public interest is therefore protected in a limited fashion as it may only be protected by annulling the award if a fundamental right was violated or if one of the specific procedural causes for it occurred. If the public interest was affected by the award and a procedural mishap happened during the arbitral proceedings, the award could be set aside by the tribunal but the reason would be the violation of the formal procedural rule, not the infringement of the public interest. Thus, in a local proceeding, the decision of the State Council would not refer to the public interest's substance, but to the procedural breach. For example if: i) the arbitral agreement was inexistent, invalid or non-enforceable; ii) the statute of limitations was exceeded; iii) the tribunal lacked the jurisdiction or competence to decide on a public interest issue that was not provided for in the contract; iv) the tribunal denied or limited the admission of evidence or failed to do so; v) the decision was rendered *ex aequo et bono*, when it should have been law-based, as long as such circumstance is manifest in the award; or vi) the award addressed issues not subject to the tribunal's decision.

Over time, the inertia of Colombian legal formalism-textualism and the private interest approach of arbitration has infused public-private arbitration. It has also strongly influenced administrative contracts to the extent that when contracting with a private entity the State is now considered a private actor that can settle contractual disputes with private entities on the same level. Despite some formal safeguards to protect the public interest included in the arbitral proceedings or in administrative law, due to the formalities of these proceedings and administrative law, the public interest has been left unprotected in practice.

44 The procedural grounds for challenging an award are the same in public and private arbitration, as the Arbitration Statute does not distinguish between the two.

45 See Article 41 of the Arbitration Statute

2. THE FORMAL CONSTITUTIONAL PREVALENCE OF PUBLIC INTERESTS IN PUBLIC-PRIVATE ARBITRATION

Legal formalism in Colombia also operates as a framework that allows for the understanding of the coexistence of different models of State in the Constitution and is a mechanism that validates the syncretic combination of concepts and institutions that coexist.⁴⁶ In this context, public-private arbitration is endowed with contents from all kinds of legal trends both progressive, such as the constitutional protection of the public interest principle, and regressive, such as administrative law textualism that limits the practical application of said principle. The combination of concepts of common good (of a traditionalist Hispanic background), with that of efficiency (of a utilitarian type), and social transformation (typical of positivism)⁴⁷ in the Colombian constitution explains the tension between the public and the private interest in public-private arbitration, whereas formalism explains the ineffectiveness of its protection.

The constitutional settings in Colombia see the protection of the public interest as a fundamental principle that should prevail over the private one,⁴⁸ and the general rules established by the Constitution and administrative law regulation have been developed for its safeguarding. However, the constitutional concept of public interest is in tension when confronted with the textualism of administrative law, limiting the safeguarding of the public interest when the State is part of an arbitral proceeding. In other words, the general principle supposed to protect the public interest does not have the capacity, in practice, to surpass the formalism of administrative law and protect it in public-private arbitration. The 1989 and 2015 arbitration reforms included a few tools that were intended to protect the public interest, but they have proved ineffective because according to the administrative law formalist view, they were incomplete when written.

2.1. Constitutionally tensioned concepts for public-private interest protection

Colombia, like the majority of Latin American countries, legitimated the liberal global market economic system promoted by the Washington Consensus, through constitutional reforms.⁴⁹ This large scale institutional reform shifted the decision making power over economic activity, from democratic

46 Mápura, L. (n. 2) 46-142.

47 Mejía, O. 'Aproximaciones a la Cultura Jurídica en América Latina' in *Several Authors, Libro en Memoria del Prof. Dr. Luis Villar Borda*, UEC 2008 338

48 See articles 1, 58, 333, 336 and 365 of the Colombian Constitution.

49 The constitutional changes coincided in dates and institutional shifts. See Argentina 1994, Bolivia 1994, Brasil 1993, Chile 1991, 1994, 1997, Colombia 1991, Costa Rica 1993,

institutions to technocratic economic institutions⁵⁰ that promoted market efficiency, internationalization of the economy, and the protection of all kinds of private property, thus creating tension with the constitutional general interest principles that safeguarded the general public interest. These reforms also laid the groundwork for accepting international arbitration as a legally legitimate and reliable constitutional dispute settlement system.

Consequently, while the Colombian constitution establishes that the public interest must prevail over the private one, it also promotes individual rights such as free will, personal autonomy, free competition and private property, which must also be protected.⁵¹ These competing values of liberal economic principles incorporated into the Colombian Constitution, along with the classic administrative and constitutional law principle of subordinating the individual interest to the general one, has created domestic tensions among public-private actors. The State tries to resolve these tensions in Colombia through general policies designed by the government and enacted through laws and regulations, and through local courts when making decisions about a public policy case. In these cases, a balanced decision between the public and private interest may be achieved. Both the government and the courts can make use of the constitutional and legal tools available to them to reach legally balanced decisions by applying the constitutional prevalence principle over other regulations or administrative decisions.

Thus, in theory and as a rule, the constitutional principle that establishes that the public interest must prevail over the private one ought to be taken into account in a public-private arbitral award. In this case, that balanced approach cannot be achieved because no clear rule of authority was granted for arbitrators to do, as administrative law textualism requires. Due to this, the constitutional principles and rights that are being recognized by arbitral tribunals during the proceedings or in the award are related to individual rights such as equal treatment,⁵² personal autonomy⁵³ and procedural formalities during the arbitral proceedings (the due process). Hence, constitutional protection is not related to the substance of the rights in dispute or to the public interests. The constitutional principles that are being recognized are those linked with the individual rights of the parties and with the formalities of the arbitral procedures related to the due process of law during arbitration.

The due process of law has the capacity to influence arbitration since it is provided by the constitution as a fundamental right that should be observed

1994, Ecuador 1993, 1996, 1998, México 1988-1994, Paraguay 1992, Perú 1993, 1995, Uruguay 1996 and Venezuela 1989.

50 Important economic decisions are now being made not at the Congress but by independent economic offices that are not politically accountable.

51 See articles 1, 58, 86, 333, 336 and 365 of the Colombian Constitution

52 Art. 13. See also, S.I. Strong, 62

53 Art. 28. See also, S.I. Strong 62

in any judicial and administrative proceeding. It includes public-private arbitration because arbitration in Colombia is considered a judicial proceeding.⁵⁴ Thus, public-private arbitral proceedings may be subject to review by constitutional judges through the use of a *tutela action*,⁵⁵ when one of the parties claims a violation of a fundamental right during the proceedings or by the award, e.g. such as the right to be heard or against unreasonable awards. The Constitutional fundamental rights violated in public-private arbitral proceedings may be protected by a *tutela action*, but the protection of these rights is only granted for the individual rights of the parties involved in the arbitral proceedings. This is not intended for collective or general rights that are beyond the contractual rights under dispute in the proceedings. Therefore, the award's annulment by means of a constitutional *tutela action* might proceed under these very limited grounds.

The Constitutional Court's jurisprudence has limited the conditions under which one may file a *tutela action* against an award for due process violations, to cases when it has been gravely impacted as a consequence of a *de facto* behavior, by a tribunal or after all challenges to the award have been exhausted. In other words, when arbitrators and judges' decisions are grossly unreasonable or arbitrary and the injury for the violation of the party's fundamental right continues to have an effect.⁵⁶ In general, the whole of the award may be subject to review through a *tutela action* for public-private and private-private arbitration.

The reasons for challenging an award by means of a *tutela* are different to the procedural ones established in the Arbitration Regime for the award's annulment. They are focused on the *de facto* behavior of arbitral tribunals which may allow the *tutela* judge to also review the merits of the case. The constitutional court has developed in its jurisprudence four categories of due process errors, *defects* as they are defined, to identify those *de facto* behaviors that appear during arbitral proceedings: when (i) a *substantive defect* appears in the award or when (ii) a *factual defect* appears in the proceedings. Other kinds of *de facto* behavior deficiencies that also give grounds for a *tutela*, occur when (iii) an *organic defect* or (iv) a *procedural defect* appears.⁵⁷

54 Article 29 of the Colombian Constitution: Due process shall be observed in all types of judicial and administrative proceedings. (...) Any evidence obtained with violation of due process is null and void. See also, S.I. Strong, 93, 99.

55 The *tutela* is a constitutional based short judicial proceeding for the protection of fundamental rights, such as due process. See article 86 of Colombian Constitution, Every person shall have a *tutela action* to claim before the judges, at any time and place by means of a preferential and expeditious procedure (...) the protection of their fundamental rights, when these are violated or threatened by action or the omission of any public authority".

56 See Constitutional Court's Decisions SU-174 of 2007 and T-466 of 2011 both on *tutelas* against arbitral awards.

57 See Constitutional Court's Decision T-466 of 2011 on a *tutela* against an arbitral award for this classification and definitions.

A *substantive defect* appears when: i) arbitrators base their decision on a rule that is clearly inapplicable to the concrete case, and consequently a fundamental right is breached; ii) arbitrators are unable to provide any or sufficient legal reasons based on the facts or the tribunal's reasoning is manifestly unreasonable; iii) the tribunal's interpretation or application of a rule goes against *erga omnes* judicial decisions on the application of said rule; iv) the rule is applied without taking into account other applicable rules that are necessary for the systematic application of the law; and v) the concrete applicable rule is not applied.

A *factual defect* appears when arbitrators have: i) failed to appreciate determinative evidence for the case; ii) made an appreciation of evidence that directly affects fundamental rights; or iii) have appreciated evidence in light of a manifestly unreasonable legal interpretation. Such evidentiary appreciation must be determinative for the tribunal's final decision.

An *organic defect* appears when the tribunal is absolutely devoid of competence to address the issues submitted by the parties, either due to a manifest excess of the parties' mandate or because it has decided on non-arbitral issues.

A *procedural defect* occurs when the tribunal has delivered an award without any attention to procedural rules, either legal or contractual, resulting in a breach of due process. The breach of due process must have been determinative for the tribunal to have reached its decision, in a way that without such defect, the decision would have been totally different.

The definitions given by the constitutional court's jurisprudence show that the *tutela* lawsuit has limited scope to protect the public interest in public-private arbitration. It mainly protects the State from gross due process mishaps. This means that should the constitutional rights of the general public interest, such as health and environment, not be included in the contract, they could hardly be protected by this measure. Thus, public matters regulated by administrative law are under constant debate within the private and public sector and conflict with constitutional and administrative principles and norms that may arise during the contract's execution. Nevertheless, such public matters are unlikely to be an issue that can be addressed through arbitration if they are not directly or indirectly included in the contract, because in most cases those public matters are considered to be outside of the contractual debate. If they were to arise in an arbitral proceeding the tools available for protection are limited, not to say non-existent, which leaves the public interest unaccounted for.

2.2. Public Law limited tools to protect the public interest in public-private arbitration

Colombia's current Constitution, promulgated on July 4, 1991 and administrative law regulations have different tools to protect the public interest,

which formally would apply to public-private arbitration. The constitution recognises arbitration as a constitutionally sanctioned dispute settlement mechanism and as one of the ways in which justice may be administered by the State.⁵⁸ Thus, arbitral tribunals are part of the State's adjudicative system because they are understood to be transitorily empowered by the parties according to law. As such, public-private arbitration is formally legitimated by a State's law that provides that its proceedings are recognized as having jurisdictional nature. Subsequently, in Colombia, arbitrators are recognized as being similar to judges with delegated State powers^{59, 60} This has gone as far as the Andean Community region where the Andean court of justice has recognized arbitrators as judges that have as much authority to apply communitarian law as any national court.⁶¹

The Colombian Constitutional Court has also acknowledged the procedural nature of arbitration in Colombia. Therefore, as a formal judicial procedure, arbitrators must strictly follow every step of the arbitral proceedings established in the law.⁶² Failure to abide by these procedural steps can lead to the filing of an annulment or a *tutela* on the part of the claimant or respondent. These formal procedure steps are linked with the "principle of legality" that in the case of administrative law must be applied to public entities and according to which, such public entities and their agents may only act as the law orders or allows them. This principle is based on administrative law and is further enshrined in the Constitution's Article 121.⁶³ However, although an arbitrator is not a public official, they are considered as being one because they have jurisdiction like a judge. Still, even though arbitration is recognized in the

58 Article 116 of the Colombian Constitution: "Individuals may be temporarily invested of administration-of-justice functions, as jurors in criminal cases, settlers or as party-appointed arbitrators to proffer awards in law or equity, in the terms defined by law."

59 Article 16 of the law 1563 of 2012, the Arbitration Statute establishes that arbitrators are subject to the disciplinary regime applied to judges and may even be prosecuted for official misconduct.

60 Arbitrators have judicial authority and the award is recognized as a jurisdictional act. See Constitutional Court's decisions C-431 of 1995 on the constitutionality of the arbitral tribunal to order preliminary measures and C-378 of 2008 on the constitutionality of the regulation to arbitrate decisions taken by boards of partners. Also, at the Communitarian level, the Court of Justice of the Andean Community recognized that arbitrators are "national judges" and as such they are obliged to seek judicial interpretation.

61 See Court of Justice of Andean Community's first recognition of arbitrators as *Communitarian Judges*, case 03-AI-2010, August 26, 2011 where the Andean Court established that it was obligatory for arbitral tribunals to ask for prejudicial interpretation before the Andean Court when communitarian issues were raised during arbitral proceedings. See also cases 161-IP-2013, 181-IP-2013, 255-IP-2013, 14-IP-2014 and 16-IP-2014.

62 See Constitutional Court's decisions C-330 of 2000 on arbitration in labour controversies and C-378 of 2008 on the constitutionality of the regulation to arbitrate decisions taken by boards of partners.

63 Article 121: "No State authority may exercise functions other than those granted by the Constitution and the Law".

Colombian Constitution as a judiciary institution, and like judges, arbitrators have the authority to settle disputes, the public interest is not effectively protected by public law in public-private arbitral proceedings despite the formal rules designed by public law to ensure its protection.

Colombian public law has enacted some formal safeguards to ensure the general public interest defence in public-private arbitration through the public entity's representation, e.g. by ensuring that the State is well represented by experienced counsels in domestic and international public-private arbitrations.⁶⁴ The State's appearance before domestic courts or arbitral panels to ensure the general public's interest may be achieved by using litigant experts,⁶⁵ hired by the State to appear before the arbitral panel. The counsel selection process may take place through a tender.

In addition to the counsel's appointment to represent the public entity, the arbitral tribunal has to notify the claim brought against the public entity to the Inspector General (IG)⁶⁶ and to the National Agency for Judicial State's Defence (ANDJE)⁶⁷ to allow their intervention in the proceedings. These additional interventions are similar to *amicus curiae* interventions and do not have additional powers to those granted to any of the parties in the arbitral proceedings.

The Colombian Constitution and the arbitral regime provide for the intervention of the IG's office in any judicial proceeding to which the State is party with three purposes: "protecting *legal order*, state property and fundamental rights and guarantees" (emphasis added).⁶⁸ The IG's delegate may file its position regarding the case, present evidence during the proceedings and eventually challenge the award. A problem that might arise during arbitral proceedings is the IG's three concurrent functions for its interventions. Therefore, it does not have a clear duty to choose, follow or support the State entity's defence, and as such, the public interest is not necessarily always

64 This includes investment arbitration where the State has organized a detailed process to confront and avoid international disputes by Decree 1939 of 2013 and Resolution 305 of 2014.

65 When appointing legal counsel to represent a State entity, his/her special expertise must be proven in order to justify that the public entity needs an expert in arbitration and that such entity does not already have an expert on the matter subject to arbitration.

66 See Colombian constitution Articles 118 and 227, and Article 49 of the arbitral regime. The General Inspector's Office is an independent body of Government with special surveillance and disciplinary functions over public officers, which has the authority to protect public interests (Art. 118) and intervene in any judicial proceeding to defend social interest and the nation's assets (Art. 227).

67 The ANDJE is a governmental office in charge of providing support to public entities in the most important and relevant cases against the State, it may act as a counsellor or *amicus curiae's* public entity in the proceedings as if it were a third party. Article 199 of the Administrative code (CPACA)... establishes that any claim against a public entity should be notified to ANDJE (National Agency for Judicial State's Defence).

68 See Article 49 which provides for the intervention of the IG's delegate in arbitral proceedings.

protected by it. In fact, the IG delegate may choose instead to protect the private party's rights at issue, as one of the IG's functions is to protect the *legal order*,⁶⁹ which gives the IG wide discretion to choose the *legal order* interpretation which benefits the private entity.⁷⁰

Colombian policy toward the protection of the public interest through multiple representation in domestic arbitration is another legal formalism expression. The rules that provide for the intervention of those two different State entities (or three if the IG agrees with the public entity's defence) are designed simply to add memorials, present evidence before the arbitral tribunal, cross examine witnesses, and submit closing arguments in the case, on equal terms with any party that could hire three different counsels to add arguments to the case. Although it is not possible for private entities to intervene as *amicus curiae* to protect the public interest in public-private arbitration, IG and ANJDE interventions would potentially replace them.

Regarding how transparency in domestic public-private arbitration involves public interest matters, information on arbitral proceedings is publicly available in Colombia because arbitral centers are obliged to make information tools accessible to any person.⁷¹ The appointment process of arbitrators is open to the public when it is delegated to an arbitral center and when the parties do not agree on the appointment of all arbitrators. Thus, the process is conducted via a draw among the arbitral center's arbitrators' list.⁷² Also, as arbitration is considered a judicial proceeding, hearings may be open to any interested person that wants to attend.

As per the information related to domestic public-private arbitral proceedings, there are various regulations that guarantee for any person to access such information. For instance, any person in Colombia may solicit information directly to the state entity, including the arbitration submissions against the public entity.⁷³ There is also a private database for public entities to provide updates on their pending judicial and arbitral proceedings with the Central Government, which is managed by the National Agency for the Legal Defence

69 Legal order is a general and broad concept assimilated to the legality principle which for administrative law functions for public officials implies that every function and authority has to be clearly established in a rule.

70 See e.g. *Empresa de Telecomunicaciones de Bogotá vs. Telmex Telecomunicaciones* (2015) Arbitral Center of Bogotá's Chamber of Commerce, or in cases before State's Council, Section One, case No. 200200273, patent's annulment. In both cases the IG decided to support the private's party position in the case.

71 See article 51.4 of the Law 1563 of 2012, the Arbitration Statute.

72 See article 8 of the Law 1563 of 2012, the Arbitration Statute: However, joining those lists in some arbitral centers is full of formalisms and lack of transparency because one can find in the roster some people that were politicians, former public officials that have no previous experience as litigants or counsels, while some experienced lawyers that applied are not part of such roster.

73 See Law 1712 of 2014 on Transparency and Access to public information

of the State, *ANDJE*.⁷⁴ public-private contracts are also subject to citizenship control and surveillance and as such public entities must freely provide access to the relevant documents and information.⁷⁵

Awards in domestic public-private arbitration have also been made public. Under the current arbitration regime, details of the award are available to any person who requests them from the arbitration center where the arbitral proceedings took place. The arbitration center has the duty to make the awards accessible.⁷⁶

As per the arbitrator's independence and impartiality in public-private arbitration, the arbitrator has the general duty to disclose information regarding their professional-personal relations when informed of their appointment⁷⁷ for their impartiality to be assessed. Thus, arbitrators are subject to a different set of private and public rules of law that seek to guarantee their independence and impartiality. Because an arbitrator is part of the judicial system, the rules on impediments and challenges that apply to judges also apply to them. Likewise because they are deciding on public law cases the same inability, prohibition and conflict of interest regime (Disciplinary Code) applicable to public officials applies to arbitrators.⁷⁸ As a part of the judicial system, the arbitrator has the duty to declare themselves similarly impeded.⁷⁹

If the arbitrator does not declare his or herself impeded, the parties may challenge them in public-private arbitrations as established in the administrative code,⁸⁰ APCAC, because arbitrations are of an administrative law

74 See article 7 para. 4 of Decree 4080 of 2011.

75 See article 66 of Law 80 of 1993.

76 See article 47 of the Law 1563 of 2012, the Arbitration Statute: Cuando el expediente sea digital, se procederá a su registro y conservación en este mismo formato.

77 See article 15 of the Law 1563 of 2012, the Arbitration Statute: The appointed arbitrator shall inform, when accepting its appointment, if it coincides or if it has coincided with either party or its attorneys in other arbitral or judicial proceedings, administrative procedures or any other professional business in which him or any member of its law firm to which he belongs or has belonged, intervenes or has intervened as arbitrator, attorney, consultant, secretary or judicial assistant within the last two (2) years. Likewise, he shall inform any familiar or personal relationship with any of the parties or its attorneys.

78 Article 16 of the Law 1563 of 2012, the Arbitration Statute: Impediments and Challenges. Arbitrators and secretaries are impeded and challengeable under the same circumstances established for judges in the Civil Procedure Code, by the inabilities, prohibitions and conflict of interests established in the Single Disciplinary Code and for the breach of the duty to inform as indicated in the previous Article.

In arbitrations where one of the parties is the State, or one of its entities, along with the conditions set forth in the previous paragraph, the circumstances for impediments and challenged as established in the Administrative Procedure and Contentious-Administrative Code are also applicable (PCAC).

79 See article 130 of the Administrative Code (now APCAC)

80 See APCAC article 130: Causes <for impediments and challenging>. Judges shall declare themselves impeded, or shall be challenged, in the situations regulated by Article 150 of the Civil Procedure Code.

nature. Therefore, the causes for recusal are provided for in the civil code of procedure and⁸¹ in the APCAC.

To reduce the financial impact of the public-private arbitration on the public entity, the public entity must attempt to settle the dispute with the private entity before formal arbitration proceedings begin i.e. following the notification of arbitration, the arbitral tribunal should convene the parties for a settlement hearing.⁸² Any proposals made by the private party to settle, and any commitment that the public entity may undertake, is discussed before the public entity's internal settlement committee, which gives recommendations on whether or not to settle.

Colombian public law has provided additional rules designed to safeguard the public interest in public-private arbitration procedures, in addition to those established for private disputes. However, the formal limits that administrative law imposes on adjudicators make it very difficult, in practice, for them to give special consideration to the public entity's position in the arbitral proceedings.

2.3. The formal limits of public-private arbitration to protect public interests

Colombian public law for public-private disputes is deeply-rooted in legal formalism, *i.e.* on the legal textualism of administrative law and procedural law, in which the adjudicator's interpretative limits and their authority to resolve a case are to be found in precise rules. These rules describe exactly their functions during the arbitral proceedings, and the limits they have for awarding the case, which in fact restricts public interest protection. That is how the rule of law has been understood by administrative law and procedural law in Colombian legal culture.⁸³ In other words, the protection of the public interest is grandiloquently stated in the constitution and in administrative law but with limited practical effect. Consequently, each phase in public-private arbitration is lavishly regulated by an arbitral regime and several sections of the civil code of procedure, the administrative code of procedure and the public official code, but none effectively protect the public interest. Instead of protecting the public interest all those regulations, compiled under the

81 See article 140 of General Procedure Code, which replaced the Civil Procedure Code's Article 150.

82 See article 24 Law 1563 of 2012, the Arbitration Statute.

83 Some contemporary administrative law scholars recognize that in theory, the legality principle cannot be identified with the rule of law principle because the legality, understood as a rule of law element, is not circumscribed to the narrow frame of legal positivism. However, they fail to explain why in practice public officials and judges are remain stuck to textualism. See Santofimio, J. O. *Tratado de Derecho Administrativo. Introducción a los Conceptos de Administración Pública y Derecho Administrativo* Vol I, UEC, 1996, 379

influence of the textualist legal culture, constitute barriers to achieving it and thus administrative law leaves it unprotected.

Textualism is a rooted principle of public law that is further enshrined in Constitutional Articles 121 and 122 paragraph 1, which are the basis of administrative law. Article 121 provides that “No State authority may exercise functions other than those granted by the Constitution and the Law”, and Article 122 establishes that “There will be no public post that does not have detailed functions in the law of regulation...” Such formalism is reflected in different Colombian public law rules, such as those that granted general authority to the IG and the ANDJE to safeguard the public interest. However, in making those laws, it was forgotten that a general authorization to intervene is not enough for administrative law to effectively protect the public interest in judicial or arbitral proceedings. Due to its interpretative textualism any rule that gives the authority to act must be complemented by another rule that allows the public officer to do so. In the case of IG, the general duty to protect the public interest, according to Article 227 of the Constitution, in theory, the Inspector General’s (IG) Office must plea to protect human rights and general interest in public-private arbitration proceedings in Colombia. They the authority to intervene during the arbitral procedure.⁸⁴ However, in practice, as the subject matter of the dispute in public-private arbitration is limited to contractual issues and there is no specific rule that establishes that in this kind of arbitration the public interest should be taken into account by the parties, e.g. the IG’s office, they have no space to plead in favor of the public interest. In the event that the IG decides to plead in favour of the public interest, the authority of the arbitrators to award on such matters is limited because it falls outside the scope of the contract, leaving the general interest unaccounted for.

Another example of formalism comes with the requisite that arbitrators have a minimum standard of knowledge and experience to act in domestic public-private arbitral proceedings. Arbitrators must, at a minimum, fulfill the same requisites required for a Judge in a Superior Court of Judicial Districts i.e. they must have more than eight years of professional experience;⁸⁵ they must be a Colombian national by birth and must be recognized lawyers in

84 Article 277. The Inspector General, by himself or by means of his delegates and agents, shall have the following functions: (...); 2. Protect human rights and ensure their effectivity, with the aid of the Ombudsman; 3. Defend society’s interests; 4. Defend collective interests, particularly environmental interests (...) 7. Participate in procedures, and before judicial or administrative authorities, when necessary to defend the Law, public property, or fundamental rights and guarantees; (...).

85 Article 7 of the Law 1563 of 2012, the Arbitration Statute: Arbitrators. Parties will jointly determine the number of arbitrators, which shall be odd in all cases... In Law-based arbitrations, the arbitrators must, at least, fulfil the same requisites required to be Judge at Superior Tribunal of Judicial Districts, without prejudice to additional qualities required by arbitration centres’ rules or by the parties in the arbitral agreement.

conformity with Colombian law with the ability to legally practice law.⁸⁶ The Parties cannot waver from this rule, even if they agree to do so, but nothing would prevent an arbitrator from sitting on a panel if their eight years of experience were acquired in criminal law. In transport infrastructure projects, for example, additional arbitrator qualities may be established by having them outlined in the conditions of the public tender.⁸⁷

As a consequence of formalism, the constitutional values of democracy and the rule of law enshrined in the Colombian Constitution do not permeate the public-private arbitral proceedings beyond the fundamental right of due process. Also, such values, which could be spread all over public law, do not have the practical impact of effectively protecting the public interest. The rules provided by administrative law, are not sufficient to protect the public interest because of the limited functions granted to adjudicators to do so.

3. THE NAIVE COLOMBIAN CONSTITUTIONAL APPROACH TOWARD ISDS AS GOVERNANCE

Colombian constitutional reform⁸⁸ created tensions among the general interest principles that safeguarded the public and private interests.⁸⁹ These reforms laid the groundwork for accepting international arbitration as a legally legitimate and formal and reliable constitutional dispute settlement system. Because arbitration is established as a legal norm in the Constitution, arbitral tribunals would exercise international public authority within the framework of Colombian constitutional settings. This was not understood or explained by the technocrats, who negotiated the trade and investment treaties between the 1990 and 2015, when ISDS systems were included in those treaties. The constitutional court has also followed that technocratic liberal ideology when undertaking the constitutionality review of IIAs.⁹⁰

The liberal ideology that informed the Colombian approach to ISDS played an important role in the 1990s, leading the country to adopt the Washington Consensus, which promoted economic values such as deregulation, internationalization,⁹¹ efficiency in law making and adjudication, and the reduction of the role of the State across all areas. This same ideology continued to be followed in the 2000s. Hence, the role of the judiciary and arbitration

86 See article 127 of Law 270 of 1996.

87 See article 14 of Law 1682 of 2013.

88 The constitutional changes coincide with dates and institutional shifts. (note 52).

89 See note 53

90 The treaty review that the constitutional court undertakes is mandatory because it is established by the constitutional Article 241.10 and it must be done before the president ratifies any treaty, which ends up giving a constitutional-formal legitimation to ISDS.

91 The Constitutional Court accepted that the 1990s constitutional changes obliged the state to internationalise its economy. See decision C-750 of 2008, 4.3, 158.

to settle disputes between private and public entities was also embedded with such economic ideals and thus justified the acceptance of international ISDS,⁹² but neither the government that promoted ISDS when signing IIAs nor the constitutional court that reviewed IIAs accepted that public-private arbitration had the potential to constitute an alternative means of governance. They were reluctant to recognize its potential despite the advice of some academic and civil society sectors who intervened when the first treaties were being negotiated with developed countries, from 2002 to 2008. On the contrary, the government and the constitutional court overlooked these interventions and understood that Colombia needed an alternative to the sluggish, close-to-collapsing judicial system, where disputes were taking up to nine years to reach a final decision.⁹³ Arbitration was thus promoted as a better alternative that provided swift dispute settlement, along with the belief that arbitrators possessed the best possible knowledge to resolve contractual and investment⁹⁴ disputes.

3.1. *The government approach to ISDS as governance*

With the GATT's Uruguay Round, which began in 1986 and the dissolution of the former USSR shortly afterwards in 1989, the Colombian government rapidly embraced economic reform policies that sought to deregulate trade and investment.⁹⁵ Thus, to ideally protect and thereby encourage private foreign investment, the majority of Latin American countries started to sign IIAs and become members of ICSID.⁹⁶ Colombia was no exception and

92 See note XXX

93 For the history of judicial reforms in Latin America see also, César Rodríguez Garavito 'The Globalization of the Rule of Law: Neoliberalism, Neoconstitutionalism, and the Contest over Judicial Reform in Latin America' in Bryant Garth & Yves Dezalay (eds) *Lawyers and the Transnationalization of the Rule of Law* (Routledge 2011)

94 Regarding the investment dispute settlement mechanism, the Constitutional Court has held that it may be more convenient and peaceful to resolve a dispute by an arbitral institution or by a specialist in the field. See decisions C-358 of 1996, C-379 of 1996, C-442 of 1996, C-008 of 1997, C-309 of 2007 and C-750 of 2008.

95 See Eduardo Lora and Catalina Crane, 'La Apertura y la Recuperación del Crecimiento Económico' in Eduardo Lora (ed), *Apertura y Crecimiento . El Reto de los Noventa* (Tercer Mundo Editores 1991) 112, 156-164; José Antonio Ocampo, 'Determinantes y Perspectivas del Crecimiento Económico en el Mediano Plazo' in Eduardo Lora (ed), *Apertura y Crecimiento. El Reto de los Noventa* (Tercer Mundo Editores 1991) 13-44.

96 The ICSID convention entered into force for the following Latin American countries on the respective dates: Venezuela (1 June 1995), Bolivia (23 July 1995), Ecuador (14 Feb. 1986), Argentina (18 Nov. 1994), Peru (08 Sept. 1993), Chile (24 Oct. 1991), and Colombia (14 Aug. 1997). Worldbank.org, 'List of Contracting States and Other Signatories of the Convention' (18 April 2015) <<https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf>> accessed 26 June 2015.

signed its first IIA in 1994⁹⁷ with the United Kingdom, followed by an IIA with Spain in 1995.⁹⁸ Moreover, in 1994, Colombia signed its first Regional Trade Agreement, which included an investment protection chapter, with Mexico and Venezuela.⁹⁹

Regarding ISDS as governance, public entities responsible for negotiating IIAs and managing disputes arising from investors' claims¹⁰⁰, as well as Constitutional Court judges, consider arbitration simply as a method to settle international disputes. Neither of them recognized that ISDS arbitrators could have the power to exercise public authority, or shape and limit the conduct of state entities when reviewing public policies in a case. As previously mentioned, the Colombian Government, Congress and Constitutional Court disregarded the possibility that arbitrators could exercise public authority despite calls from scholars, the Bogotá Mayor's Office and some NGOs, when Colombia was in the process of negotiating its most important IIAs.¹⁰¹ In effect, those State bodies interpreted that the State could preserve enough policy space to protect public interests, such as health, the environment and human rights.¹⁰² As such, when negotiating the most important IIAs from 2002 onward, the Colombian Government wilfully disregarded the lessons

97 “*Acuerdo entre el gobierno de la República de Colombia y el gobierno del Reino Unido de la Gran Bretaña e Irlanda del Norte, por el cual se promueven y protegen las inversiones*” Signed in London on March 9th 1994, approved by Law 246 of 1995. The BIT's provision regarding expropriation was declared unconstitutional by the Constitutional Court in Decision C-358 of 1996, so the BIT did not come into effect

98 “*Acuerdo para la promoción y protección recíproca de inversiones entre la República de Colombia y el Reino de España*” Signed in Bogota on June 9th of 1995, approved by Law 437 of 1998. The BIT's provision regarding expropriation was declared unconstitutional by the Constitutional Court in Decision C-494 of 1998, so the BIT did not come into effect.

99 “*Tratado de Libre Comercio entre los gobiernos de Estados Unidos Mexicanos, la República de Colombia y la Republica de Venezuela*” signed in Cartagena de Indias on July 13th of 1994, approved by Law 172 de 1994 and declared constitutional by the Constitutional Court in decision C-178 of 1995. The Agreement came into force in January 1995.

100 The Ministry of Foreign Trade, Industry and Tourism (MINCIT in Spanish) negotiates the IIA and coordinates the defence of the State before international tribunals with the Defence State Agency. See article 2.9 of Decree 210 of 2003, and Decree 915 of 2017.

101 After the UK's and Spain's BITs were declared unconstitutional by the Colombian Constitutional Court in 1995 and 1996, respectively, the first IIA with a developed economy was negotiated with the US under a RTA framework between 2004 and 2006. In the public consultations during the negotiations of this IIA in 2003, Bogotá's Mayors Office asked the Colombian government to include public policy safeguards. See, José Manuel Alvarez Z, *Recomendaciones de Bogotá para la Negociación de un Tratado de Libre Comercio con Estados Unidos. Asuntos Constitucionales, Institucionales, Solución de Diferencias, Inversión y Competencia* (Alcaldía Mayor de Bogotá D.C 2004) 57-134.

102 See, Constitutional Court Decision C-750 of 2008. The Central Bank in its intervention before the Court said that its monetary and exchange control authority was not compromised by undertakings in the investment chapter 10, 7. The Ministry of Foreign Trade said that the state preserved all the necessary instruments to achieve economic development, fight against poverty and inequality and generate employment, 10.

that other countries had learned from rulings that limited policy space in some investment cases, such as those against Argentina,¹⁰³ Bolivia,¹⁰⁴ Ecuador,¹⁰⁵ Costa Rica¹⁰⁶ and Mexico.¹⁰⁷

On the other hand, because Colombia's IIA negotiators had no clear policies regarding IIA, other than the idea that signing IIAs encouraged an increase in foreign investment flows, they wholly accepted the blueprints of the country with which they were negotiating on different issues during negotiations. This explains why Colombia has different IIA approaches, for instance, in third party intervention. The agreements with the US, Canada, Chile, Peru, the Central American North Triangle (Guatemala, El Salvador and Honduras), Costa Rica and the Pacific Alliance IIAs,¹⁰⁸ have expressly included provisions accepting non-disputing parties' submissions and *amicus curiae* intervention in arbitral proceedings, Colombia's IIAs with the United Kingdom, Spain, Switzerland, India, Turkey, Israel and China included no such provision.

The transparency of arbitral proceedings and arbitrator selection varies from treaty to treaty too and one example of this is access to documents, which is inconsistent. Some IIAs in force in Colombia provide that all documents (submissions made by the parties in the arbitral proceedings, including awards) can be accessed by non-disputing parties,¹⁰⁹ while others have no such transparency provisions.¹¹⁰ The situation is identical regarding public hearings. The IIAs that Colombia signed with the US, Canada, Chile, Peru

103 *MS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8 (Award) (May 12, 2005), *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12 (Award) (July 14, 2006)

104 *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3

105 *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467 (Final Award) (July 1, 2004).

106 *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1 (Award) (February 17, 2000).

107 *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1 (Award) (August 30, 2000), *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2 (Award) (May 29, 2003).

108 See Articles 10.20.2 and 10.20.3 of the US-Colombia FTA, Article 831 of the Canada-Colombia FTA, Articles 10.20.2 and 10.20.3 of the Pacific Alliance, Article 12.23.4(a) of the Central America's North Triangle, Articles 12.22.2 and Annex D section 1(d) of the Costa Rica-Colombia FTA, Articles 9.20.1 of the Chile-Colombia FTA and 9.20.2 and Article 25.5(d) and Annex G of the Peru BIT.

109 See Article 10.21.1 of the US-Colombia FTA, Article 10.20.1 of the Pacific Alliance, Article 9.21.1 of the Colombia-Chile FTA, Article 12.23.1 of the Colombia-Costa Rica FTA, Article 12.24.1 of the Colombia-Central America North Triangle, Article 830 of the Colombia-Canada FTA and Article 26 of the Colombia-Peru BIT.

110 Colombia-UK BIT, Colombia-India BIT, Colombia-China BIT, Colombia-Spain BIT, Colombia-Switzerland BIT and Colombia-Turkey BIT do not have any reference whatsoever regarding transparency.

and the North Triangle have provisions to ensure public access to hearings, whereas the ones signed with various European countries and China do not.¹¹¹

Similarly, the tools used to ensure transparency, such as publicity, *amicus curiae* and non-disputing party interventions, which are included in some of Colombia's IIAs, may be insufficient to protect the public interest involved. This is for the reason that arbitrators have decided that they have the power as to whether or not to rule in favor of the public interest, depending on the facts of the case and the IIA.

Colombia did not have investment claims before 2016, but in 2023 it had more than seventeen pending claims. Notwithstanding this, the same ideological approach from the government toward IIA continues and so does its acceptance of IIA blueprints from other country for signing,¹¹² despite having its own IIA model, which has never been used.¹¹³

3.2. *The constitutional interpretation of ISDS*

The Colombian constitutional court has become known as one of the most important and creative in the Global South and it is also widely seen as an activist court that has contributed to the transformation of public and private spheres¹¹⁴ in which it has progressively made rulings for the enforcement of social and economic rights,¹¹⁵ recognizing that the rights of protection of cultural minorities is also part of the public interest.¹¹⁶ Despite its activism and its wide interpretations for the protection of fundamental rights, the constitutional court has remained fixed on formalism-textualism when deciding on international law cases, particularly when it has decided on the constitutionality of international treaties by means of ruling that, as established by constitutional Article 4, "The Constitution is the supreme law." And that "In all cases of incompatibility between the Constitution and the law or other

111 Article 10.21.2 of the US-Colombia FTA, Article 10.20.2 of the Pacific Alliance, Article 9.21.2 of the Colombia-Chile FTA, Article 12.23.2 of the Colombia-Costa Rica FTA, Article 12.24.2 of the Colombia-Central America North Triangle FTA, Article 830.2 of the Colombia-Canada FTA and Article 26.5 of the Colombia-Peru BIT.

112 BIT Colombia-France Bilateral Investment Treaty signed on July 10, 2014.

113 http://www.mincit.gov.co/loader.php?lServicio=Documentos&lFuncion=verPdf&id=81586&name=Model_BIT_2017.pdf&prefijo=file

114 See Bonilla, D. (ed), *Constitutionalism of the Global South. The activist tribunals of India, South Africa and Colombia*, CUP, 2013

115 Bilchitz, D. 'Constitutionalism, the Global South, and Economic Justice' in Daniel Bonilla (ed) *Constitutionalism of the Global South. The activist tribunals of India, South Africa and Colombia* (CUP 2013)

116 Bonilla, D. 'Self-Government and Cultural Identity. The Colombian Constitutional Court and the Right of Cultural Minorities to Prior Consultation' in Daniel Bonilla (ed) *Constitutionalism of the Global South. The activist tribunals of India, South Africa and Colombia*, CUP, 2013

legal norm, the constitutional provisions will apply.”¹¹⁷ This has led the Court to claim that the Constitution is above international law despite being able to decide differently based on Article 9 of the Constitution which provides that “The external relations of the State are based on... the recognition of the principles of international law approved by Colombia.” This textualist-formal approach has led the court to claim that the international treaties have to be read wholly with the Colombian Constitution also, which shows that the court has decided to adhere to a formal “constitutional monism”.¹¹⁸ Therefore, in the possible scenario of a conflict between a treaty and a constitutional provision, the latter will prevail. This formalist ruling has been followed by subsequent rulings on IIAs and trade agreements, forcing the constitutional court to give an interpretation that compares treaties with local laws, in which it has said that “a trade agreement is just a law; therefore, it has to be interpreted and applied in conformity with the Constitution”.¹¹⁹ Consequently, in the court’s view, in an investment case “the arbitrator’s decision cannot be contrary to the [Colombian] constitution nor to any public order rule”.¹²⁰

According to the constitutional court, trade agreements and IIAs negotiated by Colombia have been inspired by the same and similar constitutional values of those enshrined in the Colombian constitution, as such: “The political and commercial commitments, the benefits, and the guarantees established [by the FTA] are in accordance with the constitutional order, since they contain provisions that promote economic, social and political integration [as provided in Articles 226 and 227 of the Constitution] in accordance with the respect of national sovereignty, the self-determination of peoples and the principles of international law accepted by Colombia (Article 9 of the Constitution), the effectiveness of the fundamental rights of their workers (Article 53), the protection and conservation of the environment (art. 79), in pursuit of a just political, economic and social order (Preamble of the Constitution), and serve the purposes of the State to serve the community, promote general prosperity and ensure the effectiveness of the principles, rights and duties enshrined in the Constitution, within the framework of the social State of law (articles 1 and 2).”¹²¹

117 See Constitutional Court Decision C-400 of 1998, which decided on the constitutionality of the Vienna Convention of the Law of Treaties between States and International Organizations or between International Organizations of 1986.

118 Vázquez Arango, C.: *Ubicación de las normas internacionales de contenido económico en el ordenamiento jurídico colombiano: análisis doctrinario* In *116 Estudios de Derecho* 2016 227

119 See Constitutional Court’s Decision C-031 of 2009, on the constitutional revision of Free Trade Agreement between Colombia and Chile.

120 See Constitutional Court’s Decision C-750 of 2008, on the constitutional revision of the Free Trade Agreement between the United States and Colombia. p. 337

121 See Constitutional Court’s Decision C-750 of 2008, on the constitutional revision of the Free Trade Agreement between the United States and Colombia, 202.

Regarding the preambles of the IIAs and FTAs, the Constitutional Court ruled similarly to the way in which it ruled on the significance of the Constitution's preamble, as a general rule of interpretation that will affect the entire Constitution, in the case of an IIA the entire agreement. Indeed, it had established that the preamble affects every constitutional norm, thus the constitutional court has understood that when the FTAs and IIAs' preambles establish that the parties in a treaty want to intensify economic relations, their aim is to foster the economic prosperity of both States, or that they are aiming to preserve public welfare. Therefore, as ruled in its C-750 of 2008 Decision the "[P]reamble constitutes a binding and radiating provision of all the regulations that comprise it [the treaty] and, to that extent, each article of the international instrument must be interpreted and applied accordingly to said introductory presuppositions." This understanding has made the Constitutional Court believe that IIAs contain the same public interest safeguards as the Constitution, and that the State's sovereign powers to regulate local matters have not been limited.¹²²

When deciding on the constitutionality of IIAs, the court raised no concerns regarding ISDS governance through the administrative judiciary functions granted to arbitrators to decide on the State's responsibility for measures that would be legitimate according to local law.¹²³ On the contrary, it disregarded any discussion on the powers given to investment arbitrators and concentrated on the formal ideological approach where the Constitutional Court has embraced investment arbitration. It has considered it a convenient method for the peaceful settlement of investment disputes,¹²⁴ and for the establishment of the formal beliefs that the State has lost none of its regulatory powers by signing trade deals and/or IIAs,¹²⁵ and by considering only the text contained in the IIAs.

The Constitutional Court has overlooked the magnitude of international ISDS awards where, in some cases, arbitrators have decided on the limits of private rights and/or public interests with respect to IIAs, by restricting how the State should conduct itself. The court has failed to recognize that arbitrators have become power players in the field of public governance and that they may redefine, through their dispute settlement activity, the relationship between private rights and public interests. This might create the risk that the

122 Constitutional Court's decisions C-621 of 2001 on the constitutionality of extradition over crimes occurred in Colombian territory and C-750 of 2008.

123 Constitutional Court's first decisions on IIA, C-178 of 1995, C-358 of 1996 and C-494 of 1998, did not mention any threat over public policies. On the following decisions, said that there was not any threat to public interest as Colombia had safeguarded its sovereign powers to regulate.

124 See Constitutional Court's decisions reviewing the constitutionality of Colombian IIAs C-358 of 1996 with the U.K., C-379 of 1996 with Cuba, and C-309 of 2007 with Spain. Also, C-442 of 1996 which reviewed the ICSID's constitutionality.

125 See Constitutional Court's Decision C-031 of 2009, on the constitutional revision of Free Trade Agreement between Colombia and Chile which contains an investment chapter.

ISDS will bypass the public policy choices made by democratically elected public authorities.

The Constitutional Court's view regarding the law applicable to ISDS is unusual, because it has stated that investment arbitrators in an investment case, where general interest issues could arise in the dispute, should apply Colombian constitutional and administrative law because the State has kept its regulatory, supervisory and authoritative control over private activities, as if through the exercise of such capacities the general interest would still be protected.¹²⁶ There is a concern that arbitrators in ISDS usually do not apply local law but international law and there is not a clause in Colombian IIAs that obliges arbitrators to apply Colombian law in ISDS cases.

Finally, the Constitutional Court's view regarding IIAs fails to identify the *de facto* multilateralization of investment law caused by the myriad of IIAs and arbitral awards where the public interest or constitutional concerns were not the arbitrators' main concern. The negotiators of Colombian IIAs and the Constitutional Court have overlooked the authority granted to arbitrators to decide on public policy issues and have relied on the transparency of the procedures (despite the fact that European IIAs signed with Colombia do not have transparency rules) and their trust that arbitrators will comply with the public interest according to Colombia's constitutional principles.¹²⁷

CONCLUSION

The legal institution of arbitration in Colombia finalized the legitimization of the 1990s liberal policies process, which sought the uniformity of state contracting,¹²⁸ the deregulation of state activities, and the free flow of investment.¹²⁹ Arbitral tribunals have helped to develop the global legal investment framework, e.g. state contract law and (IIA) protection, in ways that States did not initially consider when it negotiated the IIA or when it drafted the

126 See Constitutional Court's decision 750 of 2008 which adopted the interventions during the proceedings of the Ministry of Foreign Trade in page 10 and the Central Bank in page 7.

127 See Constitutional Court's decision C-750 of 2008, on the constitutional revision of the Free Trade Agreement between Colombia and United States of America, 310-319.

128 Standardization and harmonization of state contracting was addressed at a multilateral level in the Tokyo Declaration of 1973, under the GATT framework. This resulted in the first Code of Government Procurement of Goods in 1979 followed by the WTO's Government Procurement Agreement of 1994. UNCITRAL's (United Nations Commission on International Trade Law) Model Law on Procurement of Goods, Construction and Services of 1988, see General Assembly resolution A/RES/49/54, *Uniformity of laws of procurement* 10th Session in Vienna, October 1988. Doc. A/CN.9/WG.V/WP.22; Uniformity of laws of Procurement. Resolution adopted by the General Assembly of 17 of February of 1995.

129 In contrast to a state's deregulation functions, investment protection was increasingly regulated to complete an international investment legal regime. On the Legalization of International Investment see Jose E. Alvarez, *The Public International Law Regime Governing International Investment* (Hague Academy on Int L 2011) 24-30

State's contract law. International arbitration in general was thus legitimated technically, economically, and legally in Colombia by its laws, the signing of IIAs, the implementation of ICSID, and constitutional recognition through the reviewing proceedings of the treaty before the constitutional court. However, it has not yet departed from the 19th century's legal formalism-textualism nor has it recognized the effects of ISDS on its public law and public interest protection.

Certainly, international arbitration in Colombia has been recognized through formal laws – treaties and State law – as a way to decide on public-private differences that belong to the public law sphere, such as the administrative contracts or public law matters. Hence, arbitral panels, according to Colombian constitutional and administrative views, have been granted limited¹³⁰ authority or power to decide on specific rights recognized by administrative law to the economic private players.

There is a disconnection between Colombian public officials and the constitutional court on what its public law rules establish about international treaties, their interpretation of IIAs, and the current debates in the field. For instance, about the awards' effects on public policies or the powers assumed by arbitrators, as it has been argued that arbitral awards are the next step in completing the standardization of vague investment principles brought about by multilateralization caused by the proliferation of IIAs. In other words,

The power investment tribunals assume as a mechanism to resolve uncertainty in international investment relations is a further source of the multilateralization of international investment law as it enables tribunals to resolve uncertainties that are common to most, if not all, investment treaties, in particular those related to the interpretation and concretization of the vague principles of investment protection, in a uniform manner for various bilateral investment treaty relationships".¹³¹

Nonetheless, in the process of applying IIAs, arbitrators are adding to a body of law that could be categorized as *Lex Mercatoria Publica*, despite the fact these decisions are made outside the State's direct control over the sources of international law, which is also overlooked by Colombia.

That body of awards has strong echoes within the arbitration community, but Colombia overlooked this option to concentrate its position over the IIAs and the ISDS system on the formalities and in an ideological point of view that by signing IIAs the investment flows would increase. One of the problems that was overlooked is that the authority given to the arbitral panels on IIAs

130 Arbitrators have limited time authority, as their mandate only last for the time of the proceedings. They also have limited authority to review the subject matter, contracts and treaty breaches.

131 See Stephan Schill, *The Multilateralization of International Investment Law* (Cambridge INTL Trade & ECON'L, CUP 2009) 263-355

is to interpret and apply the law, not to create new international obligations for the State, or to invent a new source of law, which are solely under the State's competence through a treaty negotiation process.

Colombia has also remained silent about whether the States wanted arbitrators to create law through their awards they would had said so in the IIAs text. It was not aware either that arbitral tribunals may exercise public authority by limiting how States and State entities conduct themselves in relation to private economic actors.¹³² However, those limitations should not go beyond what public law – treaties or administrative law – has established, as domestic and international public-private arbitration are both administrative law institutions that are subject to the rule of law.

Finally, when arbitral panels do not adhere to their limited mandate, fundamental principles of constitutional law, such as the rule of law, may be affected because arbitrators would be acting beyond the authority given to them by law. Also, if arbitrators decide on the definition of private rights and public interests, concerns regarding democracy may arise as such decisions should not be taken by an arbitrator, but by a democratic deliberative process.

Through their awards, arbitral panels may be standardizing vague investment values and, in some cases, they are certainly creating law without the competence to do so, because the power to decide the case and interpret the treaty has not granted them the right to create new obligations for the State. Some investment tribunals also forget that they are not sovereigns, that it is the State that has the capacity to bind and create international obligations and it is their task to resolve a dispute, rather than create new obligations through their interpretation.

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