Colombia's response to unfavourable investment arbitration: Renegotiate the bilateral investment treaty

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In November 2024, an International Centre for Settlement of Investment Disputes (ICSID) tribunal ordered Colombia to pay Telefónica – a Spanish telecommunications company – US$380 million in damages. This was because the tribunal found that Colombia had violated the fair and equitable treatment requirement in the 2005 Colombia-Spain bilateral investment treaty (BIT).

The following month, Colombia filed an application for annulment of the award, as permitted by ICSID rules. The application will be heard by an ICSID *ad hoc* committee comprising three members. The firm representing Telefónica in the dispute has characterized the filing of the annulment proceedings as a "threatening rhetoric against ICSID arbitration" with "potentially drastic consequences."

Given its size, the award caused a strong political backlash in Colombia. The Colombian government, under populist President Gustavo Petro, announced its intention to renegotiate investor-state dispute settlement (ISDS) provisions of its bilateral investment treaties. Its stated reason: the provisions create legal imbalances by making international arbitration remedies available to foreign investors that are not available otherwise under the normal jurisdiction of local courts.

This article does not advocate for or against renegotiation in Colombia's case but rather seeks to offer a balanced and objective analysis, drawing on how other countries have approached the renegotiation of bilateral investment treaties – or, indeed, the *reinterpretation of substantive obligations* – in the wake of unfavourable arbitral awards.

The *Telefonica* case

Telefónica, S.A. v. Republic of Colombia arose from a series of actions taken by the Colombian government that affected Telefonica's investments in its affiliated company Colombia Telecomunicaciones S.A. E.S.P. (ColTel), in which Telefonica had a majority shareholding. The dispute arose from the state's application of various measures to obtain the reversion of assets related to Telefónica's telecommunications business in Colombia.

In 2013, Colombia's Constitutional Court issued a ruling (the C-555 decision) that the country's telecommunications law from 1994 could be applied retroactively to contracts signed before its enactment. This meant that companies that had invested in Colombia's telecommunications sector under the previous legal framework, like Telefónica, would be subject to new and more onerous conditions. Colombia took action in enforcing this decision, including issuing a resolution that required telecommunications companies to comply with the new law, initiating legal proceedings against companies that refused to comply, and seizing assets of companies that failed to pay the imposed fines.

Telefónica challenged, through international arbitration, the C-555 decision and Colombia's subsequent actions, arguing that they violated the fair and equitable treatment provisions of the 2005 Spain-Colombia BIT (the 2005 Treaty). Under the 2005 Treaty, investors were granted fair and equitable treatment, which protects foreign investors from state measures that are arbitrary, opaque, or otherwise contrary to legitimate expectations.

Once the case got going, Colombia argued that the ICSID tribunal was not the proper forum to address it, and that Telefónica should have exhausted all domestic legal remedies before resorting to international arbitration. Telefónica replied that they were not required to exhaust domestic remedies prior to commencing international arbitration proceedings, as Colombia had directly violated the fair and equitable treatment provisions of the 2005 Treaty.

The tribunal sided with Telefónica and awarded damages against Colombia in the amount of US$380 million.

In particular, the tribunal found that Telefónica's claim was not merely contractual in nature – that is, the underlying issue was not a simple contractual dispute between two commercial partners – but rather arose out of actions of the Colombian government taken in its sovereign capacity that amounted to a breach of the fair and equitable treatment provision found under the 2005 Treaty: the Colombian measures amounted to a denial of justice and arbitrary and discriminatory treatment.

The tribunal considered Colombia's measures under the obligation to provide full protection and security to foreign investments, set out in Article 2(3) of the 2005 Treaty. Ordinarily, this standard relates to physical security and protection; the tribunal found that it also encompassed a guarantee of stability in a secure legal framework. Colombia was found to have failed to uphold this obligation with the C-555 decision, which disrupted the legal and regulatory framework for Telefónica's investments.

Colombia, as we have seen, launched an annulment proceeding under ICSID rules to have the award overturned. It also – to some, controversially – expressed an intention to renegotiate the investor-state dispute settlement provisions of its current bilateral investment treaties.

NAFTA to CUSMA: Rethinking investor-state dispute settlement

Colombia's reaction to the Telefónica award, and especially the impulse to either reinterpret obligations or renegotiate existing bilateral investment treaties, is not unusual. In the Americas, the example of Chapter 11 of the North American Free Trade Agreement (NAFTA) is instructive.

NAFTA came into force in 1994 as a landmark trade agreement between the U.S., Canada and Mexico. It was the first free trade agreement between developed and developing countries. It also – and unusually for a *trade* agreement – included a chapter dedicated to investor and investment protection. Chapter 11 of NAFTA allowed investors broad access to investor-state arbitration without requiring them to first seek remedies in the host state's local courts.

Although originally aimed at Mexico, Chapter 11 was invoked against both Canada and the U.S. soon after its entry into force. Indeed, among NAFTA's three member states, Canada was the primary target of foreign investor claims under Chapter 11. According to a 2021 report by the Canadian Centre for Policy Alternatives, Canada defended at least 44 claims – significantly more than the U.S. (22 claims) or Mexico (33 claims). Of these, Canada lost or settled 10 cases, paying out over $263 million. Additionally, the country had incurred more than $113 million in unrecoverable legal costs as of March 2020.

Ongoing concerns with Chapter 11 outcomes led the three parties to issue an "authoritative interpretation" in 2001. Eventually, the U.S. and Canada decided to eliminate investor-state dispute settlement altogether under the Canada-United States-Mexico Agreement (CUSMA), NAFTA's successor.

Global trends in bilateral investment treaty renegotiation

Bilateral investment treaties are meant to serve the interests of both the investors and the host state. Certain aspects of a BIT, however, may inadvertently favour the rights of investors, while limiting the ability for a state to introduce laws that would affect those investments. Where the balance of a BIT ends up not benefiting the state that entered into it, it would not be surprising to see the state re-evaluate its continuing adherence to the investment treaty as drafted.

Some countries have sought to renegotiate existing BITs to clarify the scope of regulatory autonomy and the limitations of investor rights. For example, Argentina, following multiple arbitration awards against it, attempted to renegotiate its bilateral investment treaty with the U.S. to clarify provisions that had led to adverse rulings, particularly after the annulment decision in *CMS Gas Transmission Co. v. Argentina*.

Argentina argued that the tribunal had misinterpreted its obligations under the BIT, and it wanted to prevent future rulings that could be detrimental to its ability to regulate in the public interest. Argentina's move demonstrated a state's ability to push for clearer investment agreements that better balance investor rights with sovereign prerogatives. However, due to the reluctance of capital-exporting states (such as the U.S.) to renegotiate treaties that benefit their investors, Argentina faced significant challenges in securing these revisions.

India's finance minister, Nirmala Sitharaman, recently said in that the "country needs a new model for bilateral investment treaties… the 2016 template is 'inadequate' for meeting countries' requirements and that investment treaties should be kept separate from future free trade agreements.” She also expressed concern that arbitrators often disregard a host countries’ judicial decisions, inadvertently failing to protect national interests and prioritize investor protections. This comes while Piyush Goyal, India’s minister of commerce, is meeting with representatives from the U.S., the UK and the EU Trade Chief to renegotiate free trade agreements and bilateral trade agreements.

On the other end of the scale, in 2017, Ecuador terminated all its BITs following an audit by the Citizens Commission (CAITISA), which revealed that these agreements failed to attract significant foreign investment and disproportionately benefited investors at the state's expense. The move was largely influenced by Ecuador's experience with investor-state dispute settlement, when a $2.3 billion award against Ecuador was found in favor of Occidental Petroleum. The audit found that BITs undermined Ecuador’s constitutional and national development goals, imposed significant financial liabilities, and constrained the government’s regulatory power. The CAITISA audit also found that arbitrators were biased toward investors, favoring them in most disputes, and recommended the termination of all BITs and the creation of new investment agreements that prioritize national interests, regulate foreign investors, and exclude ISDS mechanisms in favor of domestic legal frameworks. Despite concerns that ending BITs would deter foreign investment, Ecuador, like other countries that have taken similar steps, expects investors to continue operating based on profitability rather than treaty protections.

Conclusion

Bilateral investment treaties are meant to balance the interests of both investors and host states by promoting a stable investment environment while allowing governments to regulate in the public interest. However, as agreements that bind multiple jurisdictions, they are not static instruments; rather, they evolve in response to shifting economic, political, and legal landscapes.

Renegotiating BITs, clarifying their provisions, and refining the role of arbitration mechanisms are legitimate and essential processes that ensure dispute resolution remains fair and balanced. The discussion should move beyond treating BITs as fixed frameworks or viewing their revision as an attack on investment norms. Instead, it should acknowledge that both capital-exporting and host countries must determine the context in which a BIT is mutually beneficial, including fair and equitable treatment provisions, if any. In this light, President Petro’s statements on renegotiating Colombia’s bilateral investment treaty should be understood within their broader policy context, rather than dismissed as a “threatening rhetoric.”

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