Hitching the amount of deference due to foreign sovereigns to familiar administrative law doctrines provides a useful shortcut, not just for the justices but for practitioners and academics faced with foreign government filings. But doing so also imports existing administrative law debates into a new context. In particular, is *Skidmore* deference, with its promise that courts will *consider* an agency's views, really deference at all?[39] As in the administrative agency context, a requirement of "respectful consideration" leaves plenty of room for courts to disagree with foreign governments.[40] Whether mandatory consideration is understood as a form of deference or not, tying the treatment of foreign sovereigns' views to a familiar (if not entirely clear) standard provides greater clarity than creating a new standard out of whole cloth. Moreover, analogizing to *Skidmore* rather than *Chevron* may ultimately provide more stability (if less deference) given recent suggestions that courts should abandon *Chevron* deference.[41]

Animal Science Products' context-dependent evaluation of foreign government representations is ultimately fitting in a decision that is itself highly context dependent. The Court decided only how judges should approach foreign governments' views when they appear—and only when they appear—to explain the meaning of their own laws. The decision leaves in place existing precedents on, for example, the "considerable weight" due to foreign sovereigns' interpretations of treaties to which they are parties.[42] The unanswered questions in *Animal Science Products*, however, will grow more pressing as foreign sovereigns play an ever-larger role in U.S. litigation.

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Unilateral act, nature, validity—treaties, interpretation, application, non-retroactivity—cultural property, indigenous peoples, restitution, dispute settlement (diplomacy and mediation)

THE "QUIMBAYA TREASURE," Judgment SU-649/17. At http://www.corteconstitucional.gov.co.
Republic of Colombia, Constitutional Court, Plenary Chamber, October 19, 2017.

The Colombian Constitutional Court (Court) ordered the Colombian government to seek the restitution of a set of 122 golden objects of the Quimbaya people in a judgment issued on October 19, 2017 (Judgment).[1] The Judgment addressed significant issues of international law relating to unilateral acts, treaty interpretation, cultural property (particularly that of

[39] Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1251–59 (2007) (discussing debates about whether *Skidmore* is deference or not).

[40] *See* Transcript of Oral Argument, *supra* note 30, at *61–*62 (quoting Chief Justice Roberts noting: "'[W]ith all due respect' usually means the person's about to say you don't know what you're talking about").

[41] For examples of justices questioning *Chevron*, see Pereira v. Sessions, 138 S. Ct. 2105, 2120–21 (2018) (Kennedy, J., concurring); Michigan v. EPA, 135 S. Ct. 2699, 2712–14 (2015) (Thomas, J., concurring); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring).

[42] *See, e.g.*, Air France v. Saks, 470 U.S. 392, 404 (1985).

[1] Case T-3.402.625 (in Spanish).

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indigenous peoples), and the settlement of disputes involving claims for restitution of cultural property through diplomacy and mediation.

The Quimbaya Treasure was part of a set of 433 objects of the Quimbaya people. On August 20, 1891, the Colombian government acquired those objects from private parties. On July 20, 1892, President Holguín Jaramillo informed the Colombian Congress, without seeking its approval, of his intention to donate the subset of golden objects, the Quimbaya Treasure, to Spain. On May 4, 1893, the Quimbaya Treasure was delivered to the Queen Regent of Spain. The Quimbaya Treasure remains in Spain and is exhibited at the Museum of the Americas, in Madrid.

The original proceedings, commenced through an *actio popularis* ("*acción popular*") brought before the Administrative Circuit Courts of Bogotá, requested an order that the Colombian government seek restitution of the Quimbaya Treasure from Spain, specifically, by means of mediation under the auspices of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation (ICPRCP), of the United Nations Educational, Scientific and Cultural Organization (UNESCO). Administrative Circuit Court No. 23 heard the case and ordered the Colombian government to carry out any necessary actions to seek restitution. Furthermore, Administrative Circuit Court No. 23 set up a committee composed of representatives of governmental organs and other relevant entities to report on the implementation of its orders (Implementation Committee).[2] The Colombian government appealed to the High Administrative Court of Cundinamarca, which reversed the first instance decision.[3] A panel within the Contentious Administrative Chamber of the Council of State, which serves as Colombia's apex administrative court, declined to hear an application for review of the appellate decision.[4] Proceedings for constitutional review were then initiated, alleging violations of due process in the appellate and Council of State decisions. Another panel within the Contentious Administrative Chamber of the Council of State, acting as court of constitutional review, upheld the appellate and Council of State decisions.[5] The Colombian Constitutional Court reversed the appellate and Council of State decisions, and largely upheld the first instance decision, including the establishment of the Implementation Committee. The Court's judgment is final in all of the above proceedings.

After analyzing various constitutional law issues, the Court turned to international law. The Court's latter analysis proceeded in three parts.

First, the Court analyzed the nature and validity of unilateral acts under international law, particularly where they are concluded in alleged breach of internal law rules of fundamental importance. The Court observed that unilateral acts are legal acts within international law's system of sources. The Court explained that, even in the absence of an expression of consent by another subject of international law, a declaration or conduct of a representative of a state regarding a specific fact or legal situation may have legal consequences on its own, including the creation of obligations or the loss of rights for that representative's state. The Court noted that, absent a treaty, the delivery of property by one state to another constitutes a unilateral act

[2] Case 2006-0155, Administrative Circuit Court No. 23 (Bogotá Capital District) (Sept. 4, 2009).
[3] High Administrative Court of Cundinamarca, First Chamber, Sub-Section A (Feb. 17, 2011).
[4] Council of State, Contentious Administrative Chamber, First Section (July 7, 2011).
[5] Council of State, Contentious Administrative Chamber, Second Section (Jan. 19, 2012).

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(p. 119).[6] The Court listed various conditions for the validity of a unilateral act of a state: (1) attribution of the act to a state representative; (2) consent to be bound by the act that is not invalidated by coercion, error, fraud, or corruption of a state representative; (3) independence of the act from any preexisting obligation under international law; (4) specificity of the act's object, namely a well-determined fact, situation, right, or claim; and (5) observance of *jus cogens* (pp. 119–20).

The Court then considered the bearing of internal constitutional law on unilateral acts of the Colombian state. The Court observed that the grounds for invalidity and termination of a treaty set out in the Vienna Convention on the Law of Treaties (VCLT),[7] including that regarding a violation of internal law, set forth in VCLT Article 46, may also be invoked in relation to a unilateral act (pp. 121–22). Under VCLT Article 46(1), a violation of internal law may only be invoked to invalidate consent to be bound by a treaty where "that violation was manifest and concerned a rule of its internal law of fundamental importance." Pursuant to Article 46(2), "[a] violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith." The Court added that, like a breach of *jus cogens*, under certain circumstances, a breach of constitutional norms of internal law could affect the validity of a treaty or unilateral act. In support of these propositions, the Court cited a judgment of the Council of State concerning Diplomatic Note GM-542 of November 22, 1957. Note GM-542, addressed to Venezuela, contained a declaration that the Colombian government did not lay any claim to, nor objected to Venezeuela's, sovereignty over the Los Monjes Archipelago.[8] The Court observed that the Council of State annulled Note GM-542 on the ground that it violated constitutional rules concerning frontier delimitation, the competence of the head of state to conduct international relations, and the requirement of Congressional approval. While no frontier delimitation was involved in the present case, the validity of any unilateral act of the Colombian state, the Court concluded, was conditioned on observance of the constitutional rules regarding the president's and Congress's respective competences, in addition to observance of any applicable rules of *jus cogens*.

The Court then found that the delivery of the Quimbaya Treasure, albeit attributable to the president, was invalid in the absence of Congress' approval. Moreover, the absence of that approval meant that the president lacked competence to conclude the unilateral act of delivery. Furthermore, given that the Quimbaya Treasure belonged to the public patrimony of Colombia, a treaty had to be concluded in order to transfer its ownership. The Court stated that the fundamental character of the constitutional rules which were breached stemmed from their bearing on separation of powers and the protection of the public patrimony. Since the president acted in breach of fundamental constitutional rules, the Court concluded that his expression of consent was internationally invalid.

Second, the Court analyzed the protection and restitution of cultural property in international law, particularly that of indigenous peoples. International law, the Court summarized, grants indigenous peoples substantive rights, including the right to their ancestral cultural patrimony. This right implies a two-fold duty upon the state, namely, to abstain from taking

[6] 203 (citing Article 38, Statute of the International Court of Justice, 39 AJIL Supp. 215 (1945)).
[7] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS 332.
[8] Case 325, Council of State, Contentious Administrative Chamber, First Section (Oct. 23, 1992).

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measures which may undermine, and to undertake actions for the preservation and restitution of, ancestral cultural patrimony (pp. 123–27). These duties are laid out in detail in various treaties to which Colombia is a contracting party, and which have been concluded under the auspices of the UNESCO and the International Institute for the Unification of Private Law (UNIDROIT). The Court also discussed the constitutive instrument of the ICPRCP. In particular, the Court discussed the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970 (UNESCO Convention), noting that it is binding upon both Colombia and Spain.

The Court then proceeded to interpret the UNESCO Convention. Invoking VCLT Article 31, the Court noted that restitution of indigenous cultural property is a matter of human rights, and, as such, should be interpreted in accordance with the interpretive guidelines used by the Inter-American Court of Human Rights (IACtHR) and the European Court of Human Rights (ECtHR) (p. 142). For these international courts, the Court observed, the ordinary meaning of the terms of a treaty is the starting point of the interpretation of any international instrument. The Court denominated this aspect of interpretation "exegetic" (*id.*). The ECtHR (p. 143) and the IACtHR (*id.*) also engaged in "systemic" interpretation, reading treaties on human rights as a whole (p. 142) ("intra-systemic" interpretation) and within a broader set of international instruments applicable to the case ("extra-systemic" interpretation). The Court further observed that treaties concerning human rights must be interpreted with regard to their object and purpose (p. 143). Finally, the *effet utile* rule had a particular connotation when applied to human rights treaties: where a provision is susceptible of two constructions, and one of them does not protect the rights of a community, the other, if it accords such protection, is preferable.

Applying these rules, the Court considered the scope of UNESCO Convention Article 11's prohibition on the "transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power." The Court rejected an exegetic interpretation that would preclude the Colombian government from seeking restitution of the Quimbaya Treasure, since its delivery was voluntary and did not result from any occupation of Colombian territory. Such an interpretation would isolate the provision from the body of international instruments on indigenous rights. The Court, instead, opted for a second interpretation, whereby the above-quoted phrase is not the exclusive scenario in which Article 11 may apply. The Court reasoned that Article 11 did not expressly confine an illicit transfer to that scenario, and, in accordance with a systemic interpretation, the concept of unlawfulness in Article 11 must be understood in light of the contemporary international law for the protection of indigenous peoples. Accordingly, Article 11 applies to a unilateral act concluded in violation of the state's fundamental constitutional rules and the human rights of an ethnic minority (p. 203).

The Court further considered the temporal scope of application of the UNESCO Convention, with reference to the principle of non-retroactivity set out in VCLT Article 28. The Court observed that, while the rationale for non-retroactivity is to afford legal security to addressees of international obligations, it is not an absolute principle (p. 145). The Court noted that international courts and tribunals have applied the doctrine of intertemporal law where the same legal phenomenon is governed by various rules over time. Under this doctrine, a right validly acquired under international law in force at a time could be lost later, due to subsequent changes in international law (pp. 145–46, 201–02). The Court observed

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that the intertemporal law doctrine did not involve retroactivity, but retrospectivity (pp. 145–46, 203–04). The Court contrasted the intertemporal law doctrine to the principle of contemporaneity, noting that, under the latter, the validity of a given legal fact must be determined in accordance with the law in force at the time of its execution, as opposed to that in force when an interstate dispute arises (pp. 145–46). The Court, discarding the contemporaneity principle, and instead relying upon the intertemporal law doctrine, decided not to apply the international law in force in 1893 to the delivery of the Quimbaya Treasure, but instead the UNESCO Convention and the other international instruments for the protection of indigenous peoples now in force.

The Court adduced four reasons in support of the above finding (pp. 147–53). First, the non-retroactivity of the aforementioned instruments would be contrary to the *effet utile* rule. Second, the non-retroactivity of the UNESCO Convention would lead to a manifestly unreasonable result, as the majority of international restitution claims of states concern "objects made centuries or even millennia ago," thus depriving the system for restitution of cultural property of any practical effect. Third, under international law's normative hierarchy, *jus cogens* may not be breached by treaty, custom, or unilateral acts. For instance, the Court noted, the principle of self-determination of peoples is accepted today as *jus cogens*. While no relevant *jus cogens* rules existed in 1893, such rules have come into existence over the twentieth century, providing for both a fundamental human right to the protection of cultural patrimony and various rights of indigenous peoples. Fourth, the passage of time does not preclude states from seeking the restitution of cultural property. This is evidenced by the repatriation to Peru of archeological pieces found in Machu Picchu and lent to Yale University in 1912, following a memorandum of understanding concluded in 2010 between Yale University and the Peruvian government. That case also demonstrates the efficacy of international cooperation in the restitution of cultural property.

Lastly, the Court considered various means for the settlement of disputes involving claims for restitution of cultural property. The Court stated that a dispute arises when there is a disagreement on a point of law or fact, and that a dispute between two or more states must be resolved through peaceful means. The Court listed various cases in which disputes involving claims of restitution of cultural property were solved through diplomacy. The Court discussed the ICPRCP, under the auspices of which both Colombia and Spain may initiate mediation proceedings, as a specialized forum for disputes concerning the restitution of cultural property. The Court noted that, under Article 5 of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, Colombia may request the restitution of the Quimbaya Treasure in Spanish domestic courts. The time, mode, and means for seeking the restitution of the Quimbaya Treasure, the Court added, fall within the president's margin of appreciation.

The Implementation Committee established by the first instance court (p. 7), and upheld by the Constitutional Court (p. 208), remains in operation. While the members of the Implementation Committee concluded a confidentiality agreement,[9] a Report of July 17, 2018, has been made available (Report).[10] According to the Report, by Note Verbale of

[9] E-mail of October 18, 2018 from the Academy of History of Quindío (on file with the author).

[10] The Colombian Institute of Anthropology and History (ICANH) Director General made the Report available. E-mail of October 22, 2018 from the ICANH in-house legal counsel (on file with the author).

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March 15, 2018, the Colombian Ministry of Foreign Affairs invited the Spanish government to initiate a dialogue. By Note Verbale of April 30, 2018, the Spanish Ministry of Foreign Affairs stated that: (1) the Quimbaya Treasure was donated to Spain in accordance with customary international law universally accepted in the nineteenth century, and has since belonged to Spain, in good faith; (2) the Quimbaya Treasure is a cultural property protected by the Law of Spanish Historical Patrimony of 1985, and is, thus, "inalienable, non-seizable and imprescriptible"; (3) the Spanish government is willing to establish a dialogue to organize joint exhibitions; and (4) the Spanish government offers to make a replica of the Quimbaya Treasure, and bear the costs of making and sending it to Colombia.[11]

* * * *

The Judgment is the first decision by a Colombian court to address the nature and validity of unilateral acts under international law, and to classify them as legal acts. While the Court's classification finds support in the somewhat scarce literature on legal acts under international law,[12] the Court's characterization of unilateral acts as a source of international law requires clarification. Contrary to the Court's assertion, unilateral acts are not among the sources of law recognized in Article 38 of the International Court of Justice (ICJ) Statute. Ironically, the authority of ICJ Statute Article 38 has been frequently contested for omitting such acts.[13] These contestations, like the Court's assertion, wrongly assume that ICJ Statute Article 38 is concerned with every source of obligation, overlooking that this provision only indicates the sources of the law applicable to disputes submitted to the ICJ.[14] The rest of the Court's analysis of the nature of unilateral acts seems sound, and the various conditions for their validity listed in the Judgment have some support in scholarship.[15]

The Court's analysis of the invalidity of unilateral acts that breach fundamental rules of internal law intersects with the law of treaties and raises interesting questions. Under VCLT Article 4, certain VCLT rules may be applicable to a treaty concluded by states before the VCLT has entered into force with regard to those states, if that treaty is "subject" to those VCLT rules "under international law independently of" the VLCT. Nevertheless, the Court did not establish whether VCLT Article 46 contained a rule to which a treaty, let alone a

[11] Report, at 3–4.

[12] *See, e.g.*, Jean-Paul Jacqué, *Acte et Norme en Droit International Public*, 227 Recueil des Cours 357 (1991); Robert Kolb, Peremptory International Law – *Jus Cogens*: A General Inventory (2015).

[13] Joe Verhoeven, *Considérations sur Ce Qui Est Commun*, 334 Recueil des Cours 9, 125 (2008).

[14] GM Danilenko, Law-making in the International Community 24–25 (1993); Malcolm N. Shaw, International Law 90–91 (8th ed. 2017) ("[u]nilateral acts, while not sources of international law as understood in article 38(1) of the Statute of the ICJ, may constitute sources of obligation").

[15] The International Law Commission (ILC) adopted a set of "Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations" in 2006. While the ILC did not adopt the Special Rapporteur's draft Principle 7, concerning coercion, error, fraud, or corruption of a state representative, the observance of *jus cogens* was included as a condition for validity of unilateral acts. Int'l L. Comm'n, *Unilateral Acts of States*, II(2) Y.B. Int'l L. Comm'n 159 n. 861 (2006) (draft Principle 7 applied VCLT Articles 48–53 by way of analogy). There is a scholarly debate on whether unilateral acts must comply with *jus cogens*. *See, e.g.*, Prosper Weil, *Le Droit International en Quête de Son Identité*, 237 Recueil des Cours 1, 282 (1992) (arguing that *jus cogens* does not concern unilateral acts or conducts of states, but only treaties); Kolb, *supra* note 12, at 62–63 (distinguishing between "material" and "legal" unilateral acts, and arguing that observance of *jus cogens* may condition the latter's validity).

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unilateral act, could be subject independently of the VCLT.[16] While the assumption that the VCLT, including Article 46, applies to the delivery of the Quimbaya Treasure is debatable, the Court's reliance upon separation of powers as a criterion to determine the existence of a "fundamental" rule is significant and seems tenable, given its widespread use in internal legal systems.[17] Nevertheless, the Court did not establish whether that violation was also "manifest," pursuant to VCLT Article 46(2); in fact, it is unclear that the Spanish government could reasonably have been expected to know whether the Colombian government had complied with any relevant internal law procedures, all the more since the act was concluded by the Colombian head of state himself.[18]

Turning to the applicability to the delivery of the UNESCO Convention and the UNIDROIT Convention, the Court further delved into the law of treaties. The Court had already concluded that the delivery was invalid under international law because it breached fundamental rules of internal law. As such, the Court's reliance on the UNESCO Convention to invalidate the delivery is superfluous. Nonetheless, the Court seems to invoke the UNESCO Convention in connection with its observation that unilateral acts are invalid if they violate *jus cogens*. If the Court's position is that the UNESCO Convention has achieved the status of *jus cogens*, such an assumption is unwarranted. In fact, the rules set out in the UNESCO Convention are not of universal application in and of themselves,[19] nor are they reflective of general customary international law,[20] and, therefore, could not be "accepted and recognised" as peremptory by the international community as a whole, pursuant to VCLT Article 53.[21] While the Court's affirmation that the right of self-determination is of *jus cogens* is sound,[22] its assertion that the right of indigenous peoples to their cultural property is likewise of *jus cogens* is not well-established.[23] In any case, the character of those rights as *jus cogens*, if any, would not render every rule for their protection equally of *jus cogens*.[24]

[16] Those rules would, most prominently, take the form of customary rules of the law of treaties. Nevertheless, not every VCLT rule reflects such customary rules, nor is every customary rule codified in the VCLT applicable to unilateral acts. MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 385 (2009); PRZEMYSŁAW SAGANEK, UNILATERAL ACTS OF STATES IN PUBLIC INTERNATIONAL LAW 116–18 (2016).

[17] Lorenzo Cotula, *Freezing the Balancing Act? Project Finance, Legal Tools to Manage Regulatory Risk, and Sustainable Development*, *in* GLOBAL PROJECT FINANCE, HUMAN RIGHTS AND SUSTAINABLE DEVELOPMENT 142, 152 (Sheldon Leader & David Ong eds., 2011); Michael Bothe, *Article 46 Convention of 1969, in* THE VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY, VOL. 1, at 1090, 1097 (Olivier Corten & Pierre Klein eds., 2011).

[18] Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria; Eq. Guinea intervening), Judgment, 2002 ICJ Rep. 303, paras. 265–66 (Oct. 10); ILC, *supra* note 15, at 163 (observing that Note GM-542—one of the only two instances of state practice identified by the ILC as to competence to conclude unilateral acts, albeit set aside internally, was not revoked by the Colombian government internationally); ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 78 (3d ed. 2013).

[19] KAROLINA KUPRECHT, INDIGENOUS PEOPLES' CULTURAL PROPERTY CLAIMS: REPATRIATION AND BEYOND 85 (2013).

[20] CRAIG FORREST, INTERNATIONAL LAW AND THE PROTECTION OF CULTURAL HERITAGE 53 (2016).

[21] IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 220 (2d ed. 1984).

[22] East Timor (Port. v. Austl.), Judgment, 1995 ICJ Rep. 90, para. 29 (June 30).

[23] FORREST, *supra* note 20, at 53; ZUOZHEN LIU, THE CASE FOR REPATRIATING CHINA'S CULTURAL OBJECTS 61 (2016) (arguing that a *jus cogens* peoples' right to restitution of cultural property lacks any basis in international law).

[24] The undue characterization as *jus cogens* of "human rights and humanitarian law" has been criticized as excessive. I Y.B. INT'L L. COMM'N 113, para. 70 (2001) (comments of Alain Pellet).

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The Court's reliance on the intertemporal law principle seems equally inapposite. If the Court were correct in invoking *jus cogens,* the president's unilateral act was void *ab initio* under VCLT Article 53, and did not create any right,[25] the existence of which would require applying the intertemporal law principle. The Court's use of the intertemporal law principle seems intended, instead, to support its retroactive application of the UNESCO Convention. The intertemporal law principle, however, cannot expand the temporal scope of an otherwise inapplicable rule, but merely to determine which rule, among various rules applicable over a period of time, is to be ultimately applied.

The Court's use of the *effet utile* rule as an additional ground to apply the UNESCO Convention retroactively is also debatable. While there is some support for evolutionary interpretation, which has been associated with the intertemporal law principle,[26] and the *effet utile* rule,[27] VCLT Article 31(3)(c) confines what the Court termed "extra-systemic" interpretation to rules which, albeit existing outside the treaty, are "applicable in the relations between the parties," including in terms of their temporal scope. Furthermore, even assuming that the VCLT applied to the unilateral act at issue, VCLT Article 28 does not allow for the retroactive application of a treaty, "[u]nless a different intention appears from the treaty or is otherwise established." The *effet utile* rule does not provide an exception to this general rule of non-retroactivity.[28]

The Court's use of the intertemporal law principle and the *effet utile* rule, in turn, presuppose the subject matter applicability of the UNESCO Convention. However, the Court's use of the *effet utile* rule in relation to the scope of Article 11 of the UNESCO Convention is debatable. The *effet utile* rule cannot justify an interpretation not inferable, much less one evidently departing, from the text of the interpreted rule.

Finally, the Court directed the Colombian government to resort to any suitable dispute settlement method. While the Court referred correctly to the criteria for determining that an interstate dispute exists, it failed to observe that the judicial proceedings before it did not yet involve any interstate dispute. In fact, the Ministry for Foreign Affairs told the Court that the delivery of the Quimbaya Treasure was an accomplished act, binding upon the Colombian state (pp. 28–30).

The Court is well-known for its "judicial activism" in the interpretation and application of Colombian constitutional law. Notwithstanding the Court's proclivity for activism, particularly where the protection of human rights is involved, and its arguable merits, if any,[29] the

[25] SHAW, *supra* note 14, at 94; ILC Special Rapporteur, Third Report on *Jus Cogens*, para. 44, UN Doc A/CN.4/714 (Feb. 12, 2018).

[26] Gabčíkovo-Nagymaros Project, Judgment, 1997 ICJ Rep. 7, para. 140 (Sept. 25); Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention, Final Award, 23 RIAA 59, para. 103 (July 2, 2003).

[27] Arbitration Regarding the Iron Rhine (Belg. v. Neth.), Award, 27 RIAA 41, para. 49 (May 24, 2005); EIRIK BJORGE, THE EVOLUTIONARY INTERPRETATION OF TREATIES 8 (2014).

[28] Where applied, that intention was clearly established. The Mavrommatis Palestine Concessions (Greece v. Britain), 1924 PCIJ (ser. A) No. 2, at 7, 34. Markus Kotzur, *The Temporal Dimension: Non-retroactivity and Its Discontents, in* RESEARCH HANDBOOK ON THE LAW OF TREATIES 153, 172 (Christian J. Tams, Antonios Tzanakopoulos & Andreas Zimmermann eds., 2014) (discussing the existence of such an intention in *Mavrommatis*).

[29] Rodrigo Uprimny Yepes, *Judicialization of Politics in Colombia: Cases, Merits And Risks*, 4(6) REVISTA INTERNACIONAL DE DIREITOS HUMANOS 49, 59 (2007).

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Judgment might ultimately prove ineffective, and not only so as a matter of Colombian internal law.[30] Since several of the Court's findings regarding international law are questionable, and are at odds with the positions consistently defended by the organs of the Colombian government that appeared before the Court, it remains to be seen whether and to what extent the Judgment will be relied upon by the Colombian state in any further courses of action it might undertake on the international plane, particularly in light of Spain's initial opposition to the Judgment.[31]

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[30] Dissenting Opinion, Judge Bernal-Pulido, para. vi (questioning the likelihood of implementing the Judgment on constitutional law grounds.).
[31] Moreover, given its conduct in a similar case previously, *supra* note 18.

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