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# The Colliding Vernaculars of Foreign Investment Protection and Transitional Justice in Colombia: A Challenge for the Law in a Global Context

Marco Alberto Velasquez  
*Osgoode Hall Law School of York University*

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THE COLLIDING VERNACULARS OF FOREIGN INVESTMENT PROTECTION AND  
TRANSITIONAL JUSTICE IN COLOMBIA: A CHALLENGE FOR THE LAW IN A  
GLOBAL CONTEXT

Marco Alberto Velásquez Ruiz

A Dissertation submitted to the Faculty of Graduate Studies in partial fulfillment of the  
requirements for the Degree of Doctor of Philosophy

Graduate Program in Law  
York University – Osgoode Hall Law School  
Toronto, Ontario  
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## Abstract

This doctoral dissertation explores an argued normative tension between the legal protection of foreign investors via international investment agreements and the implementation of a transitional justice project in Colombia. Considering its nature and extent, this tension is regarded from a global perspective. These legal fields are acknowledged as the opus of transnational legal processes that have been triggered both to diffuse the political vision and to represent the interests of corresponding global epistemic communities. Therefore, their placement at the same political/legal level, and the shared interest they have in regulating access to and use of land and natural resources located within the country's jurisdiction, encompass a conflictual dynamic. That is, the spread of a neoliberal economic model through the domestic internalization of a set of rules and institutions that limit the capacity of the state to intervene in certain areas of public concern, as opposed to the exercise of legal resistance to the detrimental socioeconomic effects produced on the occasion of the country's internal armed conflict, by means of the structural adjustment of social relations. The main contention of this dissertation is that, within the realm of the aforementioned normative tension, the legal protection offered to foreign investors in Colombia by virtue of the systematic conclusion of international investment agreements, has the potential to restrict the country's democratic and sovereign choice to achieve durable peace through the production of profound transformations at the level of social justice. In particular, it is argued that although the international investment agreements concluded by the country are the result of the effective exercise of sovereign prerogatives and place-binding obligations on the state, they cannot be constituted as impregnable commands able to shape indeterminately the country's public policy space with regards to the implementation of the transitional justice project. Moreover, it is also contended that the legal responses to these investor-state controversies must encompass strong political considerations rather than mere technical issues, since they must acknowledge both the contextual particularities of this type of controversies and the transnational nature of the interests at stake.

*To Claudia: my sparkle, my shining star, my constellation.*

## Acknowledgments

As a Colombian national, I am a very fortunate person. I was born in a household full of love and stability. Unlike most of my compatriots, I have never had to live in poverty or suffer the horrible effects of the country's armed conflict. By engaging in a doctoral project on Colombia I wanted not only to achieve personal objectives but also to start giving back a small part of all that I have received in my privileged circumstances. This is an idealistic but deeply honest conviction. I dream for a peaceful and socially just Colombia.

First and foremost, I want to thank my advisor professor Gus Van Harten. It has been an honor to be his doctoral student. I appreciate all his contributions in terms of time and direction, as well as his ethical example. In turn, professors Peer Zumbansen and Shin Imai, the other members of my supervisory committee, provided me with crucial counseling in their areas of expertise and support on the occasion of certain moments of discouragement. Further, the York University and Osgoode Hall Law School community contributed to make this Ph.D. experience productive and stimulating.

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## Introduction

“No debe ser la pretensión del Estado Social de Derecho negar la presencia de los conflictos, ya que éstos son inevitables en la vida en sociedad. Lo que sí puede y debe hacer el estado es proporcionarles cauces institucionales adecuados, ya que la función del régimen constitucional no es suprimir el conflicto -inmanente en la vida en sociedad- sino regularlo, para que sea fuente de riqueza y se desenvuelva de manera pacífica y democrática.”<sup>1</sup>

Colombian Constitutional Court, Decision C-225 of 1995.

### I. Statement and hypothesis

A powerhouse;<sup>2</sup> a regional power;<sup>3</sup> a site for inclusive peace;<sup>4</sup> a tourist heaven;<sup>5</sup> an emerging global player.<sup>6</sup> These recent descriptions were used by the global media to depict the aftermath of a process that Colombia has gone through during the last years, after having been diagnosed as a country with a “nearly failed status”.<sup>7</sup> The latter concept, coined by Gerald Helman and Steven Ratner at the outset of the 1990s,<sup>8</sup> was originally used to explain the alleged emergence of a “disturbing phenomenon”: states incapable of sustaining themselves as members of the

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<sup>1</sup> “The objective of the Social Rule of Law State must not be the denial of the existence of conflicts within society, since they are inherent and inevitable. What the state should do, in turn, is providing adequate institutional channels for their settlement. The objective of the constitutional order is not to abolish but regulate social conflicts, so they can be a source of wealth and can be peacefully and democratically solved.”

<sup>2</sup> CHAN, Ping Szu. “Colombia: from failed state to Latin American powerhouse.” *The Telegraph* (February 28, 2015). Retrieved from <http://www.telegraph.co.uk/finance/globalbusiness/11441732/Colombia-from-failed-state-to-Latin-American-powerhouse.html> (last accessed March 20 2016.)

<sup>3</sup> DE PRIMIS, Roberto. “Colombia: from a failed state to a regional power.” *Eurintelligence* (January 31, 2015). Retrieved from <http://www.eurintelligence.eu/2015/01/colombia-from-failed-state-to-regional.html>

<sup>4</sup> KILLCULLEN, David & MILLS, Greg. “Colombia: from a political economy of war to an inclusive peace.” *Daily Maverick* (December 11, 2014). Retrieved from <http://www.dailymaverick.co.za/article/2014-12-11-colombia-from-a-political-economy-of-war-to-an-inclusive-peace/> (last accessed March 20 2016.)

<sup>5</sup> KAMINSKI, Mathew. “From Failed State to Tourist Haven. If only Iraq, Russia and Libya were more like . . . Colombia.” *The Wall Street Journal* (September 8, 2014). Retrieved from <http://www.wsj.com/articles/from-failed-state-to-tourist-haven-1409872739> (last accessed March 20 2016.)

<sup>6</sup> PADGETT, Tim & OTIS, John. “The Colombian Comeback. From nearly failed state to emerging global player –in less than a decade.” *16 Time International South Pacific Edition Vol, 179* (April 23, 2012). Retrieved from <http://content.time.com/time/covers/europe/0,16641,20120423,00.html> (last accessed March 20 2016.)

<sup>7</sup> RATHBONE, John Paul. “Nation shakes off ‘nearly failed’ status. Report on Colombia.” *Financial Times* (May 7, 2012). Retrieved from <http://ezproxy.library.yorku.ca/login?url=http://search.proquest.com/docview/1013458886?accountid=15182> (last accessed March 20 2016.)

<sup>8</sup> See generally HELMAN, Gerald B. & RATNER, Steven R. “Saving Failed States.” *89 Foreign Policy* (Winter 1992-1993), 3-20.

international community as a result of civil strife, government breakdown, and economic privation.<sup>9</sup>

In the case of Colombia, by the mid-2000s the “failed state” narrative started to be used to tell a story that goes as follows. After almost an entire republican life under a dynamic of violence, political instability and precarious economic conditions that at some point threatened the sustainability of the national project, the country was counting on a “second opportunity on earth”<sup>10</sup> by means of the progressive implementation of crucial transformations at the level of public policy. These reforms were aimed to warrant the accomplishment of the political project embedded in the country’s Constitution (1991), which originally could not be crystallized because of the upsurge of strife, high levels of corruption and a deep economic crisis. Therefore, on the occasion of a change of government in 2010, Colombia adopted decisive actions to become a stable market democracy under the rule of law, respectful of human rights, and an effective member of an international community of states.<sup>11</sup> This narrative, infused with a rather optimistic vision, came to justify the liberal matrix that was chosen to be the model that would drive the destiny of the country.

Thus the government in office decided to rely on governance formulas that had elsewhere been tested to confront problems similar to the ones Colombia was going through. In the name of prosperity,<sup>12</sup> it undertook the systematic conclusion of international investment agreements with capital-exporting countries to create an appropriate legal climate to attract transnational capitals,

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<sup>9</sup> See HELMAN, Gerald B. & RATNER, Steven R. “Saving Failed States.” 89 *Foreign Policy* (Winter 1992-1993), p. 3.

<sup>10</sup> See GARCÍA MÁRQUEZ, Gabriel. *One Hundred Years of Solitude*. New York: Perennial Classics, 1998, p. 458.

<sup>11</sup> See for instance UNITED NATIONS, General Assembly. *Study on common challenges facing States in their efforts to secure democracy and the rule of law from a human rights perspective*. A/HRC/22/29. 2012. Retrieved from <http://www.refworld.org/docid/512b19d72.html> (last accessed March 20 2016.)

<sup>12</sup> See REPÚBLICA DE COLOMBIA, Congreso de la República. *Ley 1450/2011 (Plan Nacional de Desarrollo 2010-2014: Prosperidad para Todos.)*

which were considered necessary to attain economic growth. In turn, the government decided to address the internal violence problem that had historically affected Colombian society and thus assumed the existence of an armed conflict rooted in structural causes, and the consequent responsibility to find durable solutions. In this regard, it adopted a prospective-oriented transitional justice project, that includes a regulatory regime, to address the victim's rights to justice, truth, and reparation, and initiated a peace process with FARC, the oldest and most powerful guerrilla group in the country. Articulated around a supposedly harmonious constitutional order, these policy moves were presented as fundamental components of an supposedly single and coherent strategy to rescue the state from its ignominious fate, and thus confirm its notable role within a global governance system. Thus, insofar as the emergence of positive outcomes revealed that these public initiatives were working out according to the plan, the success of Colombia in overcoming the apparent failure of the project it represented was acknowledged by the international community of states.<sup>13</sup>

However, at some point the “failed state” narrative that had been chosen for Colombia was confronted by other accounts. Something seemed to go wrong with the implementation of the policies adopted by the not-anymore-failed state. Tensions with respect to access to and use of land and natural resources located in the country's rural areas started arising between foreign investors and the people sheltered by the transitional justice project. While the former arrived in the country to conduct diverse economic activities in light of the protection offered by international treaties that Colombia had concluded with their home countries, the latter – particularly the

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<sup>13</sup> For the purposes of this study, the term “international community of states” is used pragmatically. It refers to a social system of continuing interaction and transaction in which nation-states are the principal subjects. It entails the institutional representation of the joint action of nation-states, provided their mutual identification as free and equal sovereignty units and the emergence of shared interests. This concept is used to signify the traditional state-based model of international and domestic governance. See KRITSIOTIS, Dino. “Imagining the International Community.” *4 European Journal of International Law Vol. 13* (2002), 961-992.

country's peasantry and ethnic communities – benefitted from a collective land restitution program with restorative and transformative purposes. In particular, the property rights and economic expectations safeguarded by these international investment agreements were being occasionally challenged by the adoption of distributive-oriented regulatory measures related to the transitional justice project. Thus, it seemed that Colombia's prosperity formula was not much like a single and harmonious language but rather, it resembled a puzzling conversation between colliding vernaculars.

This doctoral dissertation intends to explore this puzzling conversation, which takes place within the realm of the Colombian Constitutional Order (hereinafter CCO) but that, considering its nature and extent, should be considered from a global perspective. This examination aims to demonstrate the existence of a normative tension between two legal phenomena.<sup>14</sup> On the one hand, the consolidation of a regime for the promotion and protection of foreign investment via the systematic conclusion of international investment agreements (hereinafter IIAs); and on the other hand, the implementation of a prospective-oriented transitional justice project (hereinafter TJP) that intends to produce structural transformations in the country. These legal fields are acknowledged as the opus of transnational legal processes that have been triggered both to diffuse the political vision and to represent the interests of corresponding global epistemic communities.<sup>15</sup> Therefore, their placement at the same political/legal level, and the shared interest they have in regulating access to and use of land and natural resources (hereinafter LNR) located within the country's jurisdiction,

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<sup>14</sup> By *normative tension* I mean the stress that occurs between rationales –conceptualizations on the “ought to be”– that are either pointing to the same objective or intend to drive the action of a subject in opposite directions.

<sup>15</sup> Following Gregory Shaffer, this dissertation the term *transnational legal process* is used to characterize the process through which the transnational construction and conveyance of legal norms takes place, involving a great variety of actors with political agendas and a reflection of intensified cross-border interaction characterizing economic and cultural globalization. See SHAFFER, Gregory. “Transnational Legal Process and State Change: Opportunities and Constraints.” *University of Minnesota Law School, Legal Research Paper Series, Research Paper No. 10-28*, 2012, p. 11.

encompass a conflictual dynamic. That is, the spread of a neoliberal economic model through the domestic internalization of a set of rules and institutions that limit the capacity of the state to intervene in certain areas of public concern, as opposed to the exercise of legal resistance to the detrimental socioeconomic effects produced on the occasion of the country's internal armed conflict, by means of the structural adjustment of social relations.

Therefore, the main contention of this dissertation is that, within the realm of the aforementioned normative tension, the legal protection offered to foreign investors in Colombia by virtue of the systematic conclusion of international investment agreements, has the potential to restrict the country's democratic and sovereign choice to achieve durable peace through the production of profound transformations at the level of social justice. In particular, it is argued that although the international investment agreements concluded by the country are the result of the effective exercise of sovereign prerogatives and place-binding obligations on the state, they cannot be constituted as invincible commands that can shape indeterminately the country's public policy space with regards to the implementation of the transitional justice project. Moreover, it is also contended that the legal responses to these investor-state controversies must encompass strong political considerations rather than mere technical issues, since they must acknowledge both the contextual particularities of this type of controversies and the transnational nature of the interests at stake.

## **II. Justification and theoretical approach**

This dissertation starts from a manifest fact. States with abundant lands and natural resources that undergo post-conflict processes are increasingly concluding international investment agreements with capital-exporting countries. They do so in order to attract the financial muscle and expertise



that could supposedly contribute in the consolidation of durable peace.<sup>16</sup> In this regard, there is now interest by both scholars and policy-makers on the repercussions of foreign investment in these particular types of political units. Several questions have been addressed at the forefront of this debate. The first question is whether states undergoing conflict or post-conflict are attractive places for foreign investment.<sup>17</sup> The second area of inquiry reflects on the effects of foreign investment in post-conflict countries. It is investigated whether foreign investment is beneficial or prejudicial for a post-conflict national economy.<sup>18</sup> Particularly, this area focuses on the extent to which foreign investment has a role in boosting the transformative role of transitional justice<sup>19</sup> or if, instead, it could be a source of conflict relapse.<sup>20</sup> Finally, there have been debates around which determinants attract foreign investment into post-conflict economies.<sup>21</sup>

Nevertheless, a current global tendency can also be found in the fact that foreign investors located in post-conflict states have increasingly resorted to the investment agreements – and particularly,

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<sup>16</sup> In particular, while Colombia effectively concluded a treaty of this kind as early as 1993, it only adopted a systematic policy until the outset of the 2000s. Currently, the country has assumed binding legal obligations with most of the big economies of the world in regards of the protection of the latter's foreign investors that have arrived within its territory. In this regard see DE BRABANDERE, Eric. "Jus Post Bellum and Foreign Direct Investment: Mapping the Debate." *4 The Journal of World Investment and Trade Vol. 16* (2015), 590-603; ZRILIĆ, Jure. "International Investment Law in the Context of Jus Post Bellum: Are Investment Treaties Likely to Facilitate or Hinder the Transition to Peace?" *4 The Journal of World Investment and Trade Vol. 16* (2015), 604-632.

<sup>17</sup> See APPEL, Benjamin J. & LOYLE, Cyanne E. "The economic benefits of justice: Post-conflict justice and foreign direct investment." *5 Journal of Peace Research Vol. 49* (2012), 685-699; OLSEN, Tricia, Et Al. "Taking Stock: Transitional Justice and Market Effects." *4 Journal of Human Rights Vol. 10* (2011), 521-543.

<sup>18</sup> See HANNA, Ghassan F. Et Al. "Foreign Direct Investment in Post-Conflict Countries: The Case of Iraq's Oil and Electricity Sectors." *2 International Journal of Energy Economics and Policy Vol. 4* (2014), 137-148.

<sup>19</sup> See YELPAALA, Kojo. "Rethinking the Foreign Direct Investment Process and Incentives in Post-Conflict Transition Countries." *Northwestern Journal of International Law & Business Vol. 30* (2010), 23-99.

<sup>20</sup> See BRAY, John. "Practice note 3: Foreign Direct Investment in conflict-affected contexts." International Alert. Peacebuilding essentials for economic development practitioners, 2009.

<sup>21</sup> See UNITED NATIONS, Conference on Trade and Development. *Best Practices in Investment for Development. How Post-Conflict Countries Can Attract and Benefit from FDI. Lessons from Croatia and Mozambique*. UNCTAD Investment Advisory Series, Series B, Number 3. 2009. Retrieved from [http://unctad.org/en/Docs/diaepcb200915\\_en.pdf](http://unctad.org/en/Docs/diaepcb200915_en.pdf) (last accessed March 20 2016.); MOLOO, Rahim & KHACHATURIAN, Alex. "Foreign Investment in a Post-Conflict Environment." *3 Journal of World Investment and Trade Vol. 10* (2009), 341-358; TURNER, Nicholas, AGINAM, Obijiofor & IGBOKWE, Virtus C. *Foreign direct investment in post conflict countries: opportunities and challenges*. London: Adonis & Abbey Publishers, 2010; TURNER, Nicholas, AGINAM, Obijiofor & POPOVSKI, Vesselin. "Post-Conflict Countries and Foreign Investment." *United Nations University, Policy Brief No. 8*, 2008.

their dispute-settlement arbitral mechanisms – to challenge state regulation issued on the occasion of the efforts made to achieve alternative public objectives, such as overcoming internal violence.<sup>22</sup> In this regard, with one exception<sup>23</sup> academic research has generally not adequately addressed this phenomenon. A number of studies conducted in the context of the alleged fragmentation of public international law have dealt with the interactions between international investment law and other self-contained regimes, such as human rights and international environmental law.<sup>24</sup> Further, some academics sympathetic to the investment law regime have occasionally considered the influence of the political and social conditions of host states in the course of investor-state arbitration.<sup>25</sup> These perspectives recognize the existence of pending issues around the protection of foreign investment in the context of states going through development dilemmas, and with diverse and even contradictory political agendas. However, they do not directly address the public implications of this safeguarding at the domestic governance level, nor the legitimacy questions that this legal

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<sup>22</sup> For instance, see *Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe*. ICSID Case No. ARB/05/6. Award of April 22 2009; *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa*. ICSID Case No. ARB(AF)/07/01. Award of August 4 2010.

<sup>23</sup> Professor Gus Van Harten's piece contains an anticipatory analysis of the effects of the implementation of a hemispherical economic integration process – the FTAA – that involved the development of legal protection to foreign investors on the effective implementation of a set of peace accords recently reached in a Central American country. See VAN HARTEN, Gus. "Guatemala's Peace Accords in a Free Trade Area of the Americas." *1 Yale Human Rights and Development Journal Vol. 3* (2000), 113-158.

<sup>24</sup> See HRISCH, Moshe. "Interactions between Investment and Non-Investment Obligations in International Investment Law." *International Law Forum of the Hebrew University of Jerusalem Law Faculty. Research Paper No. 14-06*, 2006; JANSEN CALAMITA, N. "International Human Rights and the Interpretation of International Investment Treaties: Constitutional Considerations", in BAETENS, Freya (ed.) *Investment Law within International Law. Integrationist Perspectives*. Cambridge: Cambridge University Press, 2013, 330-340.

<sup>25</sup> See GALLUS, Nick. "The Influence of the Host State's Level of Development on International Investment Treaty Standards of Protection." *Journal of World Investment & Trade Vol. 6* (2005), 711-729; KRIEBAUM, Ursula. "Human Rights of the Population of the Host State in International Investment Arbitration." *Journal of World Investment & Trade Vol. 10* (2009), 653-677; KRIEBAUM, Ursula. "The Relevance of Economic and Political Conditions for Protection under Investment Treaties." *The Law and Practice of International Courts and Tribunals Vol. 10* (2011) 383-404; GRITSENKO, Maria. "Relevance of the host state's development status in investment treaty arbitration", in BAETENS, Freya (ed.) *Investment Law within International Law. Integrationist Perspectives*. Cambridge: Cambridge University Press, 2013, 330-340.

field would be facing when defying democratic choices, such as the enactment of regulatory measures to achieve durable peace.

In turn, another part of legal scholarship – led by David Schneiderman, Kyla Tienhaara and Gus Van Harten – is devoted to the study of the public law effects of international investment law and investor-state arbitration from a critical perspective. They have produced important pieces on themes such as the constitutional-like constraints that the legal regime for the promotion and protection of foreign investment places on the democratic regulatory action of states;<sup>26</sup> the detrimental outcomes of investor-state arbitration on the effective implementation of public regulation such as environmental policy;<sup>27</sup> and the legitimacy crisis in which investor-state arbitration is embarked as a consequence of its collision with cherished principles of judicial accountability and independence in democratic societies.<sup>28</sup> The approach adopted in these projects is oriented to address the regulatory challenge that states may face towards the achievement of their public objectives on occasion of the conclusion of international investment agreements. Yet, they entail a general outlook in which the particular case of post-conflict states like Colombia is not considered, nor the specificities of public regulation produced in the context of peacebuilding processes infused with transformative-oriented measures.

Therefore, although the latter critical projects are considered as the theoretical cornerstones of this dissertation due to their contribution to the assessment of international investment law and arbitration from a public law perspective, there is still a gap to be examined further. It is necessary

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<sup>26</sup> See SCHNEIDERMAN, David. *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise*. Cambridge: Cambridge University Press, 2008; *Resisting Economic Globalization. Critical Theory and International Investment Law*. New York: Palgrave Macmillan, 2013.

<sup>27</sup> See TIENHAARA, Kyla. *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy*. Cambridge: Cambridge University Press, 2009.

<sup>28</sup> See VAN HARTEN, Gus. *Investment Treaty Arbitration and Public Law*. Oxford: Oxford University Press, 2007; *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration*. Oxford: Oxford University Press, 2013.

to produce research specifically on whether and to what extent the implementation of a legal regime for the protection of foreign investors via international investment agreements might entail prejudicial effects on the public political/legal processes that post-conflict states embark on to achieve stability and durable peace, including transitional justice. Moreover, there is a lack of case studies able to illustrate the effective existence of these type of normative tensions, and to unearth the specific implications in the particular realm of countries like Colombia. Thus, the intellectual breach encountered on the occasion of the preliminary investigation of the phenomenon, as well as the profound political commitment that the author of this dissertation has to the future of Colombia, have motivated and justified the assumption of the topic from the theoretical and methodological perspective described below.

With regards to the theoretical approach selected, this dissertation has strong foundations in a number of academic projects with a critical orientation that have been contemporarily conducted within sociolegal studies and political economy, as well in the realm of the legal fields covered here: public law, international investment law and transitional justice. This research assumes a transnational legal perspective, according to which law is addressed as a process that takes place beyond the classical sovereign paradigm; whose production, diffusion and implementation involves various actors, norms and procedures; but in which the state performs a crucial role as an agency of political representation. Thus, the works of Paul Schiff Berman,<sup>29</sup> Roger Cotterrell,<sup>30</sup>

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<sup>29</sup> See BERMAN, Paul Schiff. *Global Legal Pluralism. A Jurisprudence of Law beyond Borders*. Cambridge: Cambridge University Press, 2012.

<sup>30</sup> See COTTERRELL, Roger. *The Sociology of Law: An Introduction*. Oxford: Oxford University Press, 2004; *Living Law: Studies in Legal and Social Theory*. Aldershot: Ashgate, 2008; “The Growth of Legal Transnationalism”, in FEBBRAJO, A. & HARSTE, G. (eds.), *Law and Intersystemic Communication: Understanding ‘Structural Coupling’*. Farnham: Ashgate, 2013; “Transnational Networks of Community and International Economic Law”, in PERRY-KESSARIS, A. (ed.), *Socio-legal Approaches to International Economic Law: Text, Context, Subtext*. London: Routledge, 2013, 133-49.

Saskia Sassen,<sup>31</sup> Gregory Schaffer,<sup>32</sup> Gunther Teubner,<sup>33</sup> and Peer Zumbansen,<sup>34</sup> are useful in addressing the normative tension between international investment law and transitional justice in Colombia. In turn, the political characterization of this tension taking place in the realm of the state's Constitutional Order is articulated from the standpoint of a number of theoretical-descriptive concepts: Stephen Gill on *new constitutionalism*,<sup>35</sup> Boaventura de Sousa Santos on *subaltern cosmopolitan legality*,<sup>36</sup> and Karl Polanyi's *embeddedness* of the economy in non-economic institutions such as the law.<sup>37</sup> Further, the Colombian Constitutional Order is presented as an analytical framework and a normative reference point in accordance with the writings of

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<sup>31</sup> See SASSEN, Saskia "The State and Globalization: Denationalized Participation." *Michigan Journal of International Law* Vol. 25 (2004), 1141-1158; *Territory, Authority, Rights: From Medieval to Global Assemblages*. Princeton University Press, 2008 updated 2nd ed. (1st ed. 2006); *A Sociology of Globalization (Contemporary Society Series)*. W.W. Norton, 2016.

<sup>32</sup> See SHAFFER, Gregory. "Transnational Legal Process and State Change," *37 Law and Social Inquiry* Vol. 37 (2012), 229–264; *Transnational Legal Ordering and State Change*. Cambridge: Cambridge University Press, 2013.

<sup>33</sup> See TEUBNER, Gunther. *Law as an Autopoietic System*. London: Blackwells, 1993; *Constitutional Fragments: Societal Constitutionalism in the Globalization*. Oxford: Oxford University Press, 2012. "Colliding Systems: The Vain Search for a Unity of Laws Faced with the Fragmentation of Global Law." *1 Revue Internationale de droit économique* Vol. XXVII (2013), 187-228.

<sup>34</sup> See ZUMBANSEN, Peer. "Transnational Law" *CLPE Research Paper No. 09/2008*, 2008; "Law after the Welfare State: Formalism, Functionalism and the Ironic Turn of Reflexive Law." *3 American Journal of Comparative Law*, Vol. 56 (2008), 769-808; "Neither 'Public' nor 'Private', 'National' nor 'International': Transnational Corporate Governance from a Legal Pluralist Perspective." *Osgoode CLPE Research Paper No. 22/2010*, 2010; "Defining the Space of Transnational Law: Legal Theory, Global Governance & Legal Pluralism." *Osgoode CLPE Research Paper No. 21/2011*, 2011; "Transnational Law, Evolving", in SMITS, Jan (ed.), *Encyclopedia of Comparative Law (2nd Ed.)*. Edward Elgar, 2012, 899-925.

<sup>35</sup> See GILL, Stephen. *Power and Resistance in the New World Order*. London and New York: Macmillan-Palgrave, 2003; GILL, Stephen & CUTLER, Claire (Eds.). *New Constitutionalism and World Order*. Cambridge: Cambridge University Press, 2014.

<sup>36</sup> See SANTOS, Boaventura de Sousa. *Toward a New Legal Common Sense*. London: Lexis Nexis Butterworths, 2002; "The Counter-Hegemonic Use of Law in the Struggle for a Globalization from Below." *Anales de la Cátedra Francisco Suárez* Vol. 39 (2005), 421-474; SANTOS, Boaventura de Sousa & RODRIGUEZ GARAVITO, César. *Law and Globalization from Below*. Cambridge: Cambridge University Press, 2005.

<sup>37</sup> See POLANYI, Karl. *The Great Transformation*. New York: Farrar & Rinehart, 1944.

contemporary domestic constitutional law authors, including César Rodríguez,<sup>38</sup> Rodrigo Uprimny,<sup>39</sup> Juan Carlos Upegui,<sup>40</sup> Luis Eslava,<sup>41</sup> and Daniel Bonilla.<sup>42</sup>

From the standpoint of international investment law, this dissertation fundamentally draws on the abovementioned critical public law approach coined by Schneiderman, Tienhaara and Van Harten, as well as on the work carried out by Santiago Montt with regards to the balancing of global public and private interests in the context of International Investment Law.<sup>43</sup> On the other hand, Transitional Justice is addressed here as a *tool for durable peace*, in line with the literature that gives account of the evolution of the field to assume a more holistic perspective upon its transformative function within post-conflict societies.<sup>44</sup> Therefore, the Colombian project is regarded through the lens of Johan Galtung's work on violence and peace,<sup>45</sup> prospective justice,<sup>46</sup>

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<sup>38</sup> See RODRIGUEZ, César & UPRIMNY, Rodrigo. "Constitución y Modelo Económico en Colombia: Hacia una Discusión Productiva entre Economía y Derecho." *Debates de Coyuntura Económica No. 62* (2005), 23-40.

<sup>39</sup> See UPRIMNY, Rodrigo & GARCIA-VILLEGAS, Mauricio. "The Constitutional Court and Social Emancipation in Colombia", in DE SOUSA SANTOS, Boaventura (Ed.) *Democratizing Democracy: Beyond the Liberal Democratic Canon Reinventing Social Emancipation*. Verso, 2007.

<sup>40</sup> See UPEGUI MEJÍA, Juan Carlos. *Doce Tesis en Torno al Concepto de Estado Social de Derecho. Discurso Jurisprudencial, Elementos, Usos*. Bogotá: Universidad Externado de Colombia, Temas de Derecho Público No. 80, 2009.

<sup>41</sup> See ESLAVA, Luis. "Constitutionalization of rights in Colombia: establishing a ground for meaningful comparisons" *Revista Derecho Del Estado No. 22* (2009), 183-229.

<sup>42</sup> See FORSTER, Sheila R & BONILLA, Daniel. "The social Function of Property: a Comparative Law Perspective." *3 Fordham Law Review Vol. 80* (2011), 101-113; BONILLA, Daniel. "Liberalism and Property in Colombia: Property as a Right and Property as a Social Function." *3 Fordham Law Review Vol. 80* (2011), 1135-1170.

<sup>43</sup> See MONTT, Santiago. *State Liability in Investment Treaty Arbitration. Global Constitutional and Administrative Law in the BIT Generation*. Oxford: Hart Publishing, 2012.

<sup>44</sup> See NAGY, Rosemary. "Transitional Justice as Global Project: critical reflections." *2 Third World Quarterly Vol. 29* (2008), 275 – 289; GREADY, Paul & ROBBINS, Simon. "From Transitional to Transformative Justice: A New Agenda for Practice." *The International Journal of Transitional Justice Vol. 8* (2014), 339–361.

<sup>45</sup> See GALTUNG, Johan. "Violence, Peace, and Peace Research." *3 Journal of Peace Research Vol. 6* (1969), 167–191.

<sup>46</sup> See WILLIAMS, Melissa S., NAGY, Rosemary & ELSTER, Jon. *Transitional Justice. Nomos LV*. New York: New York University Press, 2012.

the link between transitional justice and development,<sup>47</sup> and the economic dimension of peacebuilding.<sup>48</sup>

### III. Structure, methodology and outline of the dissertation

This dissertation can be acknowledged as a sociolegal study. It examines a particular instance – the potential constriction of Colombia’s sovereign choices around its national project and development pattern – from the standpoint of the complex interactions between the law and the social reality where it is recognized as an mechanism of control. Thus it touches upon typical questions in the field, such as the legal regulation of social life, the social construction of legal issues, and the relation between law and social change. In this regard, this approach is localized between two extremes of a methodological spectrum. At one end, the dissertation includes a doctrinal analysis of a great amount of legislation, public policy documents and interventions, as well as judicial decisions. On the other hand, it relies on methods from other disciplines including sociology and political economy in order to analyze and describe the quotidian operation of the legal phenomenon,<sup>49</sup> which is here characterized as a process that involves numerous actors, norms and procedures. These methodological options are articulated to produce an in-depth description of both the paths of diffusion-internalization of the transnational legal fields under study and their corresponding normative rationales. The resulting depictions are in turn instrumental to the further

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<sup>47</sup> See MANI, Rama (Ed.) “Special Edition on Transitional Justice and Development.” 3 *International Journal of Transitional Justice* Vol. 2 (2008), 253-434; DE GREIFF, Pablo & DUTHIE, Roger (Eds.) *Transitional Justice and Development. Making Connections*. New York: Center for Transitional Justice, 2009. BERGSMO, Morten. RODRIGUEZ-GARAVITO, César, KALMANOVITZ, Pablo & SAFFON, María Paula (Eds.). *Distributive Justice in Transitions*. Oslo: Torkel Opsahl Academic EPublisher, 2010.

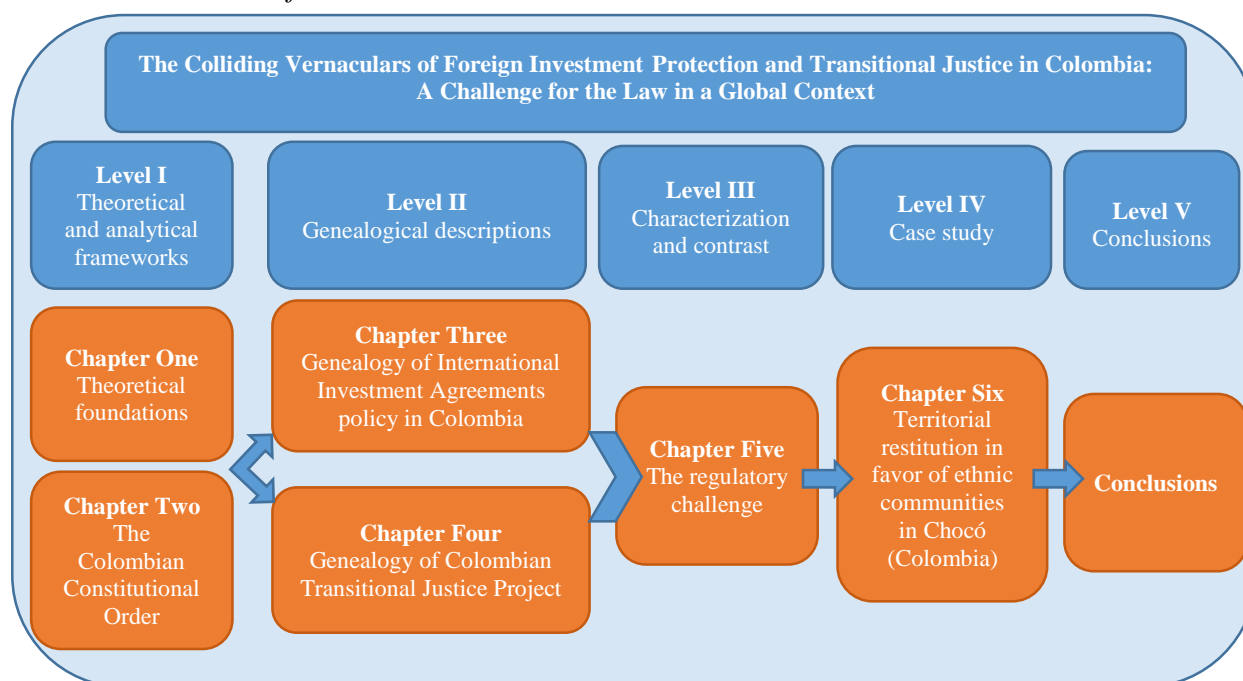
<sup>48</sup> See MANI, Rama. “Rebuilding an Inclusive Political Community after War.” 4 *Security Dialogue* vol. 36 (2005), 511-526; LAPLANTE, Lisa J. “Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework.” *International Journal of Transitional Justice* Vol. 3 (2008), 331-337. SHARP, Dustin (Ed.) *Justice and Economic Violence in Transition*. New York: Springer, 2014.

<sup>49</sup> See BRITISH LIBRARY. “Socio-legal studies: an introduction to collections.” Retrieved from <http://www.bl.uk/reshelp/findhelpsubject/busmanlaw/legalstudies/soclegal/sociolegal.html> (last accessed March 20 2016.)

elaboration of a critical account of the interaction between these legal regimes in a particular normative and social context – that is, Colombia’s Constitutional Order and society. Crucially, this dissertation ultimately flows into the conduct of a case study, which aims to confirm the effective occurrence of the argued normative tension in the context of the Colombian state's public choices, and to explore the extent and specific implications of the regulatory challenge towards the achievement of durable peace in the country.

The following chart depicts the structure of the dissertation:

*Table 1: structure of the doctoral dissertation*



As presented, this research project is built at five argumentative levels that can be considered as the pieces of a puzzle.

The first level delivers the theoretical and analytical frameworks of the dissertation. *Chapter One* introduces the theoretical foundations to situate the problem under study within the context of the changing role of the state in relation to the progressive rise of globalization, and the emergence of



a consequent transnational legality. The state is identified as an agency of political representation, which is in charge of the materialization of diverse global political projects within its jurisdiction by means of their assimilation into its Constitutional Order. Therefore, it is pointed out that the law has a constitutive function in these political processes, which is explained through the introduction of the concepts “new constitutionalism” and “subaltern cosmopolitan legality.” In turn, *Chapter Two* introduces the Colombian Constitutional Order. For the purposes of describing the transnational legal processes under study and their assessment, it is considered as an analytical framework and a normative reference point. In this regard, the Constitutional Order is depicted as a democratic amplification pact that aims to articulate diverse and even contradictory political views coming from a multiplicity of social actors. Thus, the state’s commitment to a social peace function is projected on the establishment of a *social rule of law* formula to shape the activity of public authorities and solve the eventual conflicts produced in the context of the relations between the public and private spheres, especially in the realm of access to and distribution of scarce resources. It is within this normative site that the transnational legal processes are encountered and enter into a complex dialogue.

The next level of argumentation intends to produce comprehensive portraits of the processes that configured the relevant legal fields by the conduct of genealogical analyses.<sup>50</sup> This methodology is used to revise – and eventually restate – commonly understood rationales associated with the emergence of these processes, and is thus expected to help unveil the intellectual foundations that support each of the corresponding normative incorporations into the country’s Constitutional Order. Correspondingly, they provide a detailed account of the actors, norms and procedures

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<sup>50</sup> This descriptive exercise follows the ideas of Michel Foucault on the assimilation of genealogy to an “archaeological method”. See FOUCAULT, Michel. *The Essential Foucault: Selections from Essential works of Foucault, 1954-1984*. New York, NY: The New Press, 2003, p. 306; “What is Critique?” in LOTRINGER, Sylvère (Ed.), *The Politics of Truth*. New York: Semiotexte, 2007, p. 61.

involved in these transnational phenomena and establish connections between the latter's rationales and the constitutional principles and rules that mediated for their reception. In this regard, *Chapter Three* addresses the consolidation of a legal regime for the promotion and protection of foreign investment in Colombia via the conclusion of international investment agreements. Starting from the adoption of an economic liberalization program in the outset of the 1990s – the Apertura Económica program – this policy evolved to support the reforms that lifted the political and legal barriers for the systematic conclusion of international investment agreements with the main capital-exporting countries. On the other hand, *Chapter Four* introduces the Colombian transitional justice project, which is currently being implemented towards the achievement of durable peace after a long-term armed conflict. Therefore, the chapter presents the project's structure, rationale and content under the contention that transitional justice in Colombia evolved to assume a peacebuilding function. This role is related to the addressing of the conflict's structural causes by means of the adjustment of socioeconomic relations in order to produce effective transformations in the country, especially in its rural areas.

The third level of argumentation consists of the collection of previously constructed pieces of the puzzle – the introduction of the Colombian Constitutional Order and the genealogical analyses of the transnational legal processes under consideration – for their articulation within the dissertation's primary contention. This is, that international investment agreements and arbitration may have restricting public law effects on the Colombian state's regulatory capacity, and particularly may limit its sovereign choices regarding the accomplishment of its diverse and emancipatory national project. Consequently, *Chapter Five* provides a critical characterization of these processes that enlightens the nature and extent of the argued normative tension between the transnational legal processes under study. While the protection to transnational capital granted by

the international investment agreements concluded by Colombia is depicted as an instance of *new constitutionalism*, the implementation of a transformative-oriented transitional justice project is diagnosed as a case of subaltern *cosmopolitan legality*. Subsequently, the chapter delivers both political-economy and socio-legal versions of the conflicting dialogue between these transnational legal processes within realm of access to and use of Colombia's lands and natural resources.

After having articulated the transnational legal processes under analysis and identified the subsequent challenges for the Colombian state in the realm of its public regulatory capacities, *Chapter Six* provided an in-depth illustration of this phenomenon through a case study. The instance selected is paradigmatic, as it comprises the first set of territorial restitutions concerning Colombia's transitional justice process in favor of two ethnic communities of the Alto Atrato Region (Chocó Department, Colombia), which created a conflict of interests with certain mining concessions assigned to foreign-owned companies. The purpose of the case study is twofold. It seeks to demonstrate that the intellectual formulations elaborated in the earlier chapters do materialize in real-life situations, and explore the particular implications of this normative collision at the regulatory level. In particular, it will assess the extent to which the regulatory measures enacted in the context of the Colombian transitional justice project could potentially be affected – such as by being rolled back or disputed at an investment arbitration tribunal – as a consequence of the binding behavioral obligations that are embedded in the international investment agreements concluded by the country. Finally, the *Conclusions Chapter* will assemble the main findings of the dissertation and propose further areas of research within the thematic and contextual axes of this project.

## **Chapter One: Theoretical Foundations**

### **I. Introduction**

This chapter provides the theoretical foundations for the development of this study. It sets forth a critical framework to explore a normative tension that is taking place in Colombia between two legal phenomena: the protection offered to foreign investors via international investment agreements, and the implementation of a transitional justice project aimed to produce durable peace. This tension is connected to the regulatory realm of access to and use of lands and natural resources. In this regard, the framework addresses these phenomena from a sociolegal perspective, which depicts the relation between the law and society as mutually constitutive, and recognizes the relevance of considering power relations in the analysis of the nature and extent of law and regulation. Additionally, this chapter adopts a transnational approach that regards the creation, diffusion, and application of the law as a complex process, in which several actors, norms, and procedures are involved. These theoretical foundations are introduced as analytical elements to further illustrate, characterize, and contrast the legal phenomena subject of consideration. Therefore, they will serve to highlight the main contention of the dissertation, according to which the legal protection offered to foreign investors in Colombia via international investment agreements has the potential to restrict the country's sovereign choice to achieve durable peace through transitional justice regulation.

The chapter starts by introducing and explaining the political scenario in which the argued normative tension takes place. This scenario discusses the changing role of the state on the occasion of the rise of globalization. It points out that, although the primacy of the state as the archetypal governance unit has been challenged progressively by the emergence of transnational actors, norms, and processes, it has a fundamental role in global governance. In this regard, it is

depicted as a political representation agency in charge of the materialization of diverse political projects within its jurisdiction. This agency takes place by means of the identification of the rationales of such political projects within the state's Constitutional Order, and their consequent transformation into binding norms or influential dynamics of public action. These instances of normative reproduction and dialogue are identified as "transnational legal processes". They are considered to be the "substance" of global governance, since it is within their realm that global norms are constructed, carried out, and conveyed. Thus, the idea of legal transnationalism highlights the influence exerted on the national legal systems by economic, cultural and political phenomena taking shape beyond their exclusive control.

Subsequently, a series of concepts are introduced: "new constitutionalism" and "subaltern cosmopolitan legality." They will serve to characterize the nature of the legal phenomena under analysis, and to address their problematic interaction from a transnational perspective. In this regard, the articulation of these concepts illustrates the ambivalent role of the state in this conflictual dialogue, and the particular implications for its constitutional order. On the one hand, the introduction of the concept "new constitutionalism" is useful to identify the effects of global economic norms, such as international investment agreements, on the enforcement of domestic public regulation, which represent the sovereign choices made by public authorities in favor of citizens. In turn, "subaltern cosmopolitan legality" is devised to show the instrumental part of the law in a political project, equally transnational, in favor of social justice and, incidentally, to resist the advancement of economic neoliberalism.

## II. The changing role of the state on the occasion of the rise of global governance

For the last five centuries, nation states have progressively emerged and established as the central and foremost units of mankind's polity.<sup>51</sup> In this regard, the depiction of society has been nourished by a sovereignty paradigm<sup>52</sup> that asserts its inherent homogeneity and absolute coincidence with the image of the nation state. Consequently, this conception accounts for the prominence of the latter's authority and supports a consequent monopoly over the legal norms.<sup>53</sup> Social relationships are thus framed within a segmented picture that is defined by distinctive public and private spheres. While the former domain is in charge of accomplishing the state's national project by means of both determining the content and extent of social relationships and administering scarce resources among the different social actors, the latter is constituted by the governed, which are deemed as – ideally – free and equal subjects of rights and duties.

The resulting governance dynamic<sup>54</sup> indicates the existence of an original tension between the abovementioned spheres, which generates a constant negotiation. The state – represented by the public authorities – tends to monopolize the management of social control mechanisms, including the production, adjudication and enforcement of the law. Its *raison d'être* is the exercise of regulatory intervention. On the other hand, whilst there is an expectation from the private parties to be safeguarded by the public sphere in whose jurisdiction they are located, they also tend to

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<sup>51</sup> The foundations of what is considered here as the modern state-based governance system started to be configured in the context of the Peace of Westphalia in 1648.

<sup>52</sup> This is, the existence of a well-defined governing entity that, as a result of a social contract among people, has the prerogative to administer power within a given jurisdiction without any external interference, and which in a supplementary fashion performs as a subject of rights and duties within an international community of free and equal members.

<sup>53</sup> In line with this, Roger Cotterrell has contended that “law constitutes society in so far as it is, itself, an aspect of society, a framework and an expression of understandings that enable society to exist.” See COTTERRELL, Roger. “Why must Legal Ideas Be Interpreted Sociologically?” *Journal of Law & Society* Vol. 25 (1998), p. 176.

<sup>54</sup> *Governance* is here regarded as the control of an activity by some means such that a range of desired outcomes is attached. This function-oriented concept contrasts with the one of *government*, which focuses on the body that performs such task. See HIRST, Paul & THOMPSON, Grahame. *Globalization in Question, 2<sup>nd</sup> Edition*. Cambridge: Polity Press (2000), p. 269.

advocate for high quantities of autonomy and freedom of enterprise. In accordance with the precedent depiction, state-centered governance (a) is a highly centralized function that is performed by a set of specialized and coordinated organs within a harmonic structure; (b) appears to correspond to a unitary political project that aims to synthesize the interests of an supposedly homogeneous national community; and (c) is determined by an equation that involves the balancing of the right of the state to regulate in order to comply with its mandate, with the citizens' expectations upon self-sufficiency and, the maximization of resources through high amounts of freedom.<sup>55</sup>

However, it is currently quite noticeable that the latter configuration has been strikingly impacted by a number of social facts that, supposedly, have come to contend the very position of the state as an exclusive and excluding governance unit. These facts include, for instance, the escalation of different types of interactions across national borders; the emergence of a great variety of actors that come to dispute the state's pre-eminence in the administration of political, social, and economic power; and the rise of norms that have been produced through alternative, non-traditional law-making procedures. Considered as components of a systematic phenomenon, they have been identified around the term "globalization". Although there are as many visions of globalization as people studying the phenomenon, the term is applied here – following Paul Schiff Berman – as the intensification of global interconnectedness in which capital, people, commodities, images, and ideologies move across distance and physical boundaries with increasing speed and frequency.<sup>56</sup>

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<sup>55</sup> Bardie and Birnbaum defined the state's main features as structural differentiation; autonomy; universalism; and institutional solidity. See BADIE, Bertrand & BIRNBAUM, Pierre. *The Sociology of the State*. Chicago: Chicago University Press (1983).

<sup>56</sup> See BERMAN, Paul Schiff. *Global Legal Pluralism. A Jurisprudence of Law beyond Borders*. Cambridge: Cambridge University Press, 2012, p 24.

The extent of the impact of globalization on statehood has been alternatively acknowledged by scholarship. According to those who identify as “hyperglobalists”, we are witnessing a decline in a state-based political regime. Evidence of this can be observed with, for example, the emergence of supranational governance structures that tend to replace traditional state functions, or the proliferation of intents to supplement – or even replace – state-based norms with transnational legal regimes.<sup>57</sup> On the other hand, some would argue that rather than giving up their prerogatives, states are in fact being transformed to assume an instrumental role in the consolidation of an emerging global order. This order is composed of a variety of political projects that tend to be diverse and possibly incongruent, such as the consolidation of a global standardized economic order or the instauration of a universal human rights system. Although these initiatives have been conceived, and are formulated, in a transnational fashion – that is, directed to address social structures and relationships beyond the exclusive normative realm of a national political project – states have become fundamental pieces towards their crystallization.

In examining the extent to which states participate in global governance, Saskia Sassen has adopted a transformationist approach. In that regard, she refers to the “embeddedness of globalization in the national” in order to denote the existence of a substantive association between the two.<sup>58</sup> Thus, she points out that in spite of its undisputable distinctiveness as a scheme that departs from the traditional sovereignty paradigm, global governance – and especially, the political projects settled and diffused under its tutelage – requires the state to successfully reach the domain of social relations within a specific territory. This is the case since first, it confers legitimacy to the projects given their accommodation within a democratic system in which public authorities represent the

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<sup>57</sup> See HELD, David ET. Al. *Global Transformations: Politics, Economics and Culture*. Stanford: Stanford University Press, 1999.

<sup>58</sup> See SASSEN, Saskia. “The State and Globalization: Denationalized Participation.” *Michigan Journal of International Law* Vol. 25 (2004), 1141-1158.



people and there is a supplementary system of checks and balances that guarantee accountability and power equilibrium. Secondly, the state apparatus provides operational effectiveness as it functions with competent institutions, domestic and inter-national law-making prerogatives, and administrative capacities. Therefore, global governance and its associated projects are able to properly comply with their essential political objectives.<sup>59</sup> Furthermore, the particular symbiosis that exists between power, territory, and population in the context of the nation state<sup>60</sup> generated by the afore-mentioned global projects – even those advocating for the restriction of the state intervention as a way to strengthen individual autonomy and the market – require, to some extent, the use of public regulatory mechanisms to effectively incorporate themselves within a certain jurisdiction.<sup>61</sup>

This theoretical construction brings about an important conclusion in terms of the architecture of global governance: on a number of occasions and supplementary to the emergence of truly transnational institutions, norms and processes with an autonomous character, states seem to perform as “agencies of political representation” towards the effective implementation of a variety of global political projects within their jurisdictional contours.<sup>62</sup> In accordance with this instrumental role and upon the acknowledgement of these independent political initiatives, it

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<sup>59</sup> See SASSEN, Saskia. “The Participation of States and Citizens in Global Governance.” *5 Indiana Journal of Global Legal Studies Vol. 10* (2003), 5-28.

<sup>60</sup> “(...) against conceptions of globalization as a process of state demise or erosion, territorial states are conceived here as essential geographical components of the globalization process. (...) Global governance turns to be a multi-scalar process of reterritorialization in which states play crucial roles.” See BRENNER, Neil. “Beyond State-Centrism? Space, Territoriality, and Geographical Scale in Globalization Studies.” *Theory and Society Vol. 28* (1999), p. 44.

<sup>61</sup> According to Sassen, the necessary participation of national states in the formation of global systems is highly explained by the fact that most of territory is encased in a thick and highly formalized national framework marked by the exclusive authority of the national state. See SASSEN, Saskia “The State and Globalization: Denationalized Participation”. *Michigan Journal of International Law Vol. 25* (2004), p. 1148.

<sup>62</sup> Following Hirst & Thompson, the adaptability of state power can be verified in the fact that they have restructured, realigned and internationalized to behave as *primary agents of globalization*. See MORE, Elizabeth. “Is economic globalization leading to the demise of state power?” *1 Journal of International Communication Vol. 12* (2006), p. 19.

appears that the alleged centralized character of governance – that is, the absolute identification between a political project, a structural authority and a legal jurisdiction – tends to be replaced by alternative configurations. Thus, provided that a transnational source of power intends to intervene in certain social structures localized within a given territory, some kind of outer authority is delegated to the involved state and acts through its internal regulatory aptitudes.<sup>63</sup> This way, states are devised as power nodes amidst a constellation that participates in the diffusion and crystallization of global political projects. These tasks are conducted by means of an established network – the international community – and the effective use of the corresponding regulatory capabilities.<sup>64</sup> This elaboration can eventually be verified by means of an in-depth investigation on the inclusion of the political projects into the states' constitutional orders.

### **III. The “substance” of global governance: transnational legal processes**

Having presented a number of introductory considerations as to the variations that the state – and its foundational paradigm – has experienced upon the rise of global governance, the task that follows is to identify whether the legal phenomenon has any role in this scenario. In other words, the question to address is the function that law and regulation perform in the diffusion and implementation of diverse political projects in a particular jurisdiction, provided the role of the state as an agency of political representation. For the purposes of this study, this inquiry must be answered through a structural-functional perspective, which regards law as a semi-autonomous field. This signifies that, as a mechanism of social control, it comprises rule-making capacities and the means to induce or coerce compliance, but is simultaneously set in a larger social matrix that

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<sup>63</sup> According to Hirst and Thompson States are still of central significance because they are key practitioners in the dynamics of governance. They perform as pivots in the distribution of power. See HIRST, Paul & THOMPSON, Grahame. *Globalization in Question*. Cambridge: Polity Press, 1999, p. 271.

<sup>64</sup> See HIRST, Paul & THOMPSON, Grahame. *Globalization in Question*. Cambridge: Polity Press, 1999, p. 271.

infuses it with particular features.<sup>65</sup> Therefore, the legal phenomenon is addressed here as a system that encompasses vigorous processes of norm creation and diffusion whose content and extent are defined by a permanent interplay with society, under a dynamic that Niklas Luhmann has termed “structural coupling”.<sup>66</sup>

In accordance with the sociological perspective of structural-functionalism, society is understood as a complex organism whose various parts interact to achieve certain objectives. In this context, social structures are regarded as relatively stable patterns of social behavior that guide the daily interrelation among individuals or communities, and to which diverse social functions are associated.<sup>67</sup> In this scenario, law would seem to perform predominantly an instrumental role in the effective control of social structures. In particular, social control is assured through the determination of people’s behavioral patterns, either to facilitate the anticipation of social conducts – the generation and protection of expectations, or to produce structural modifications within society in accordance to a given political mandate. If society were a uniform group of actors seeking the achievement of common objectives – as presupposed in a traditional account of the state and its sovereignty paradigm – the legal phenomenon should consequently be acknowledged as a universalist, harmonic and formal system that is oriented to fulfill a modulatory function. Yet, society lacks uniformity. Rather than being a homogenous conglomerate that shares a single system of values and a particular normative view, it is a heterogeneous entity whose contours go beyond a plain identification with the national unit. On the contrary, society is defined by as many

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<sup>65</sup> See MOORE, Sally Falk. “Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study.” *4 Law & Society Review Vol. 7* (1973), p. 719.

<sup>66</sup> See LUHMANN, Niklas. “Operational Closure and Structural Coupling: The Differentiation of the Legal System.” *Cardozo Law Review Vol. 13* (1992), 1419-1441; MATTHEIS, Clemens. “The System Theory of Niklas Luhmann and the Constitutionalization of the World Society.” *2 Goettingen Journal of International Law Vol. 4* (2012), 625-647.

<sup>67</sup> See in this regard the work of Emil Durkheim. DURKHEIM, Emile. *Division of Labor in Society*. New York: Free Press, 1997.

interests and associated normative approaches as social constituents. Thus, since the law is a process that is significantly infused with societal dynamics, it should accordingly be deemed as a complex apparatus. While it is embedded in formal-rational structures, the legal phenomenon also encompasses policy considerations and must therefore deal with dialogues among alternative normative visions of reality. Consequently, the law bears a pluralist nature, which signifies the acknowledgement of multiple legal manifestations interacting with and within the social order.

A pluralistic conception of the normative life thus comports a cosmopolitan society in which there are multiple – local and global, territorial, and epistemic – communities, which communicate at different levels and may overlap in their inherent quest for recognition and expansion.<sup>68</sup> These social units remind us of the abovementioned heterogeneous nature of society. Given their political nature, they are said to be responsible for developing and circulating causal ideas and associated normative beliefs.<sup>69</sup> According to Peter Haas, they can be defined by a number of features that are shared among their members. First, they embrace a set of normative and principled beliefs that provide a value-based rationale for the deployment of social actions. Second, they hold a series of causal beliefs derived from the analysis of the central problems within their discipline, which elucidate particular opinions as to the linkages between policy actions and desired results. Third, they incorporate notions of validity, and criteria for validating and weighting knowledge. Fourth, their members undertake a common political enterprise that draws on the precedent elements.<sup>70</sup> Crucially, although these political subjects may be located within a national context, their very nature is transnational. They have been conceived under a paradigm that is alternative to an

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<sup>68</sup> See BERMAN, Paul Schiff. *Global Legal Pluralism. A Jurisprudence of Law beyond Borders*. Cambridge: Cambridge University Press (2014), p. 11.

<sup>69</sup> See HAAS, Peter. “Epistemic Communities.” In BODANSKY, Daniel Et Al. (Eds.) *The Oxford Handbook of International Environmental Law*. Oxford: Oxford University Press, 2008, p. 792.

<sup>70</sup> See HAAS, Peter M. “Epistemic Communities and International Policy Coordination.” *1 International Organization Vol. 46, Knowledge, Power, and International Policy Coordination* (1992), p. 3.

absolute identification of society with the nation-state, and function with or without the instrumental participation of state authority. Consequently, for these communities to deploy their particular political enterprises, they pursue legal-regulatory projects through the undertaking of processes that involve complex networks of “actors, norms and procedures”.<sup>71</sup> These processes may incidentally include the states and their institutional arrangements, and aim to interact with social structures, regardless of the latter’s identification with a particular nation-state.<sup>72</sup> Thus, in the realm of a transnational society, law and regulation are constantly constructed through the dialogue and contest of these various norm-generating communities, which generate plenty of interactions and legal orders that exist within the social field.<sup>73</sup>

Legal transnationalism, as asserted by Roger Cotterrell, entails the influence exerted on the regulatory policies and practices of nation states by “economic, cultural and political pressures taking shape beyond their [territorial and ideological] borders, and in that extent beyond their [direct] control”.<sup>74</sup> Under this perspective, the content and extent of global governance is defined by the continuum of unstable overlapping of claims that come from different transnational regulatory processes – including those that were diffused and implemented through domestic law – in a given social arena. These processes compete for authority in relation to each other, and negotiate their chances of regulatory effectiveness.<sup>75</sup> As Saskia Sassen has pointed out, although a

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<sup>71</sup> See ZUMBANSEN, Peer. “Transnational Law, Evolving”, in SMITS, Jan (ed.), *Encyclopedia of Comparative Law* (2nd Ed.). Edward Elgar, 2012, 899-925.

<sup>72</sup> See DOBUSCH, Leonhard & QUACK, Sigrid. “Epistemic Communities and Social Movements. Transnational Dynamics in the Case of Creative Commons.” *Max Planck Institute for the Study of Societies*, MPIfG Discussion Paper 8, 2008, p. 8.

<sup>73</sup> See BERMAN, Paul Schiff. *Global Legal Pluralism. A Jurisprudence of Law beyond Borders*. Cambridge: Cambridge University Press (2014), p. 13.

<sup>74</sup> See COTTERRELL, Roger. “The Growth of Legal Transnationalism”, in FEBBRAJO, Alberto & HARSTE, Gorm (Eds.). *Law and Intersystemic Communication. Understanding Structural Coupling*. Farnham: Ashgate Publishing (2013), p. 31.

<sup>75</sup> See COTTERRELL, Roger. “The Growth of Legal Transnationalism”, in FEBBRAJO, Alberto & HARSTE, Gorm (Eds.). *Law and Intersystemic Communication. Understanding Structural Coupling*. Farnham: Ashgate Publishing, 2013, p. 33.

great extent of the political projects linked to globalization are nationally localized and might even have been construed in national terms, they involve “trans-boundary networks and formations connecting or articulating multiple – public and private – processes and actors”.<sup>76</sup>

In sum, in the context of global governance and the eventual rise of a supplementary role for the state as an agency of political representation of transnational epistemic communities, the law is understood as a multifaceted social phenomenon rather than a mere mechanism of social control. Although this dynamic involves the political representation of epistemic communities that defend particular normative visions of reality, the legal phenomenon encompasses specific structural and relational features that confer substantial distinctiveness. Thus, the structural coupling of the law with a given political project, linked to a transnational community, results in the rise of a legal process whose purpose is the effective intervention in social structures. When this depiction is seen from a transnational legal perspective, it is possible to witness, following Gregory Shaffer, “transnational legal processes” through which norms are constructed carried, and conveyed.<sup>77</sup>

#### **IV. The “trace” of transnational legality within the Colombian Constitutional Order and its regulatory implications**

The previous sections introduced ideas on the emerging role of states as agencies of political representation towards the implementation of normative projects that are linked to transnational epistemic communities. Provided the socio-legal scope of this study, it is thus necessary to investigate the effects that the resulting transnational legality – this is, the diffusion and crystallization of transnational legal processes and foremost, their potential encounter and dialogue – may entail on the corresponding domestic constitutional orders and associated regulatory

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<sup>76</sup> See SASSEN, Saskia “The State and Globalization: Denationalized Participation”. *Michigan Journal of International Law* Vol. 25 (2004), p. 1143.

<sup>77</sup> See SHAFFER, Gregory. “Transnational Legal Processes and State Change.” *2 Law & Social Inquiry* Vol. 37 (2012), p. 230.

dynamics. In that regard, the main assertions of this section are the following. First, the implementation of transnational legal processes encompasses an inevitable shaping of the state's constitutional order. This in turn is reflected in the modification of the content and extent of both the national political arrangements and the regulatory ambit of action of public authorities. And second, the fact that a state is often used as an instrument for the consolidation of diverse – and even conflicting – transnational legal processes results in the emergence of normative tensions. These tensions can turn into effective legal collisions with respect to the state's capacity to act consistently towards the definition and accomplishment of its public objectives.

As a result, the introduction of certain theoretical elaborations help unveil both the dynamics and the effects of the institutionalization of transnational legal processes at the macro-political level by means of the legal restructuring of the state and political forms.<sup>78</sup> On the one hand, the phenomenon known as “new constitutionalism” gives an account of the means through which the global propagation of economic neoliberalism and its most representative institutions – free markets and the production of goods and services as unrestricted as possible from state regulation – takes place. Prominently, this phenomenon comports the imposition of binding constraints on the conduct of public policies so as to insulate key aspects of the economy from the influence of politics.<sup>79</sup> On the other hand, the concept “subaltern cosmopolitan legality” seeks to explain the emergence of emancipatory political movements that exert resistance against the globalization of

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<sup>78</sup> See GILL, Stephen. *Power and Resistance in the New World Order*. London and New York: Macmillan-Palgrave, 2003, p. 138.

<sup>79</sup> See GILL, Stephen. *Power and Resistance in the New World Order*. London and New York: Macmillan-Palgrave, 2003, p. 132.

neoliberalism through the deployment of counter-hegemonic legal practices.<sup>80</sup> These two phenomena will be explained and articulated in detail.

#### A. New constitutionalism

The concept *new constitutionalism* – originally articulated by political scientist Stephen Gill<sup>81</sup> – is brought up to explain the nature and extent of global economic governance, and particularly the effects produced on the capacity of the state to act towards the accomplishment of its public objectives.<sup>82</sup> It is accounted as a political project that is engaged with the reconstitution and protection of capital on a world-scale so as to make liberal market democracy the primary model of development.<sup>83</sup> Due to its aim to effectively ensure social control, it has a distinctive legal dimension with the potential to reconstitute both the society and the relations between humanity and the environment. In this regard, new constitutionalism entails a multilevel governance dynamic that operate across jurisdictions, but that ultimately projects on states, which are responsible for their legalization and legitimation.<sup>84</sup>

In order to comply with its political objective, new constitutionalism seeks to internalize a series of rules and values within the national constitutional regimes by means of the interplay between constitutional reforms, judicial interpretation and legislative developments. These norms are designed to protect transnational economic interests that materialize in the right to property and other associated entitlements. This protection is conducted by means of the granting of citizenship

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<sup>80</sup> See generally SANTOS, Boaventura de Sousa. *Toward a New Legal Common Sense*. London: Lexis Nexis Butterworths, 2002.

<sup>81</sup> See GILL, Stephen. “The emerging world order and European change”, in MILIBAND, Ralph and PANITCH, Leo (Eds.). *New World Order? Socialist Register 1992*. London: Merlin Press, 1992, p. 167-172.

<sup>82</sup> See GILL, Stephen. “Globalisation, Market Civilisation, and Disciplinary Neoliberalism.” *3 Millennium: Journal of International Studies Vol. 24* (1995), P. 412.

<sup>83</sup> See SCHNEIDERMAN, David. *Resisting Economic Globalization Critical Theory and International Investment Law*. Palgrave Macmillan, 2013, p. 1.

<sup>84</sup> See GILL, Stephen & CUTLER, Claire (Eds.). *New Constitutionalism and World Order*. Cambridge: Cambridge University Press, 2014, p.4.



and representation rights; the generation of expectations as to the conduct of the public sphere; and the corresponding imposition of obligations and duties on the state.<sup>85</sup> These entitlements are enforceable by the rights holders, as they have general access to autonomous mechanisms of dispute settlement.<sup>86</sup> Likewise, they seek to facilitate the mobility of capital and its holders by providing entry and exit options.<sup>87</sup> The resulting legal devices perform as locking-in mechanisms that place binding constraints on the authority of domestic governments, and particularly on the autonomy of public authorities to regulate the economy or other sectors related to the marketplace.<sup>88</sup> Consequently, they have the potential to freeze or even roll back state measures with the potential to affect the interests of global economic actors operating in the corresponding jurisdiction. This way, it is said that public institutions are “disciplined” to act consistently and in accordance with the commitments self-imposed by the state through a truly precommitment strategy.<sup>89</sup>

The general and most striking effect of new constitutionalism is the insulation of key aspects of the economy and other areas of public concern from political processes. The supporters of disciplinary neoliberalism consider that the effects of this scheme of transnational legality are positive, since the promotion of freedom, nondiscrimination, the rule of law and judicial protection of individual rights across national frontiers may bring stability and efficiency to the economy of

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<sup>85</sup> See GILL, Stephen. “Globalisation, Market Civilisation, and Disciplinary Neoliberalism.” *3 Millennium: Journal of International Studies* Vol. 24 (1995), p. 413.

<sup>86</sup> See SCHNEIDERMAN, David. *Constitutionalizing Economic Globalization. Investment Rules and Democracy’s Promise*. Cambridge: Cambridge University Press (2008), p. 223.

<sup>87</sup> See SCHNEIDERMAN, David. “The Constitutional Strictures of the Multilateral Agreement on Investment.” *3 Law & Social Inquiry* Vol. 25 (2000), p. 758.

<sup>88</sup> GILL, Stephen & CUTLER, Claire (Eds.). *New Constitutionalism and World Order*. Cambridge: Cambridge University Press (2014), p. 7.

<sup>89</sup> See SCHNEIDERMAN, David. “The Constitutional Strictures of the Multilateral Agreement on Investment.” *2 The Good Society* Vol. 9 (1999), p. 90-91.

states.<sup>90</sup> Additionally, the enthusiasts of this analytical perspective sustain that this dynamic of depoliticization serves the purpose of making legal changes within a state more onerous or impossible to take place. The state is thus bound far into the future with respect to its possible intentions to experiment politically or concretely, and undo the neoliberal compact towards a more redistributive dynamic of governance.<sup>91</sup> Thus, in countries affected by structural inequalities and social disparity, the possibility of achieving social justice is evidently limited as democratic choices tend to be removed and citizenship is reduced to a single, uniform conception organized around the value of the market.<sup>92</sup>

#### B. Subaltern cosmopolitan legality

The introduction of new constitutionalism gave an account of the modulatory effects that the spread of a global neo-liberal economic model entails to the constitutional order of a state. Arguably, it offered an unenthusiastic panorama for those who might negatively be affected by the consequent constrain of the regulatory capacity of public authorities in their eventual task of accomplishing alternative public objectives. Nevertheless, although neo-liberal globalization can be identified as hegemonic – this is, the predominant political and normative matrix under which transnational legal processes have been shaped, it is far from being an exclusive phenomenon within the realm of transnational legality. As Boaventura Sousa Santos has explained, throughout the world, local, national and transnational social groups, networks, initiatives, organizations and movements have been active in confronting neoliberal globalization and in proposing alternatives

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<sup>90</sup> See SCHNEIDERMAN, David. “The Constitutional Strictures of the Multilateral Agreement on Investment.” 3 *Law & Social Inquiry* Vol. 25 (2000), p. 763.

<sup>91</sup> See SCHNEIDERMAN, David. “The Constitutional Strictures of the Multilateral Agreement on Investment.” 3 *Law & Social Inquiry* Vol. 25 (2000), p. 763-764.

<sup>92</sup> See GILL, Stephen & CUTLER, Claire (Eds.). *New Constitutionalism and World Order*. Cambridge: Cambridge University Press, 2014, p.9.

to it.<sup>93</sup> Even more, this counter-hegemonic project counts with a legal dimension – acknowledged as subaltern cosmopolitan legality – that is oriented to provide tools to resist the patterns of discrimination and social exclusion associated with the economic model promoted by neoliberalism, and thus produce the necessary social transformations that could ensure the respect of alternative normative legitimacies under the idea of the equality of differences.<sup>94</sup>

The transnational legal processes infused with subaltern cosmopolitan legality are characterized by a series of elements. First, although law is not reduced to state law nor individual rights, they are an active part of cosmopolitan legal practices. Indeed, new notions of rights that go beyond the liberal idea of individual autonomy and incorporate solidaristic understandings of entitlements grounded in alternative forms of legal knowledge are articulated.<sup>95</sup> Second, the construction and use of legal tools depend upon their integration into a political project, which means that the former are politicized before their legalization into the realm of the nation state.<sup>96</sup> Third, the configuration of cosmopolitan legality is a process that takes place “from below”, which denotes both the direct influence of the addressees of the project and the central role played by legal pluralism. Fourth, even if it is accounted as a global initiative, cosmopolitan legality is developed at different scales – local, national and transnational. And fifth, in the context of cosmopolitan legality a restorative

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<sup>93</sup> See SANTOS, Boaventura de Sousa. “The Counter-Hegemonic Use of Law in the Struggle for a Globalization from Below.” *Anales de la Cátedra Francisco Suárez Vol. 39* (2005), p. 435.

<sup>94</sup> See SANTOS, Boaventura de Sousa. *Toward a New Legal Common Sense*. London: Lexis Nexis Butterworths, 2002, p. 466; “The Counter-Hegemonic Use of Law in the Struggle for a Globalization from Below.” *Anales de la Cátedra Francisco Suárez Vol. 39* (2005), p. 442.

<sup>95</sup> See SANTOS, Boaventura de Sousa & RODRIGUEZ GARAVITO, César. “Law, Politics and the Subaltern in Counter-Hegemonic Globalization”, in *Law and Globalization from Below*. Cambridge: Cambridge University Press, 2005, p. 15.

<sup>96</sup> See SANTOS, Boaventura de Sousa & RODRIGUEZ GARAVITO, César. “Law, Politics and the Subaltern in Counter-Hegemonic Globalization”, in *Law and Globalization from Below*. Cambridge: Cambridge University Press, 2005, p. 16.

vision of justice is replaced by a transformative one, which entails a project of social justice that addresses the systematic harm that have affected the ones relegated by society.<sup>97</sup>

Subaltern cosmopolitanism sends a powerful message. Hegemonic economic globalization has an undeniable preponderance that can be verified in the preferential way in which its associated legal processes are localized in the governance landscape. Yet, nation-states, subaltern communities, and other social actors may still organize in defense of perceived common interests. They can use their capabilities for transnational interaction, created on the occasion of the intensification of social interactions across borders, to their benefit.<sup>98</sup> In this context, a state's constitutional/legal system may perform an emancipatory role towards the contention of the negative effects of neoliberalism on the most disadvantaged members of its national society.

The greatest consequence of analyzing transnational legal issues through the lens of subaltern cosmopolitan legality appears to be the acknowledgement of the heterogeneous character of state regulation. Because of the particular intensity, selectivity and pace of transnational interactions, different political logics of regulation or different styles of law are identified in different areas of state intervention.<sup>99</sup> Thus, the latter dynamic experience drastic changes as various and potentially competitive semi-autonomous regulatory paths emerge from an apparently single and coherent constitutional order. They therefore converge in the domestic legal system, which is deemed a contact zone where rival normative ideas and agencies meet under unequal conditions and subvert each other. The outcome, according to Santos, is the coexistence of partial legal fields constituted

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<sup>97</sup> See SANTOS, Boaventura de Sousa. *Toward a New Legal Common Sense*. London: Lexis Nexis Butterworths, 2002, p. 466-471.

<sup>98</sup> See SANTOS, Boaventura de Sousa. *Toward a New Legal Common Sense*. London: Lexis Nexis Butterworths, 2002, p. 180.

<sup>99</sup> See SANTOS, Boaventura de Sousa. *Toward a New Legal Common Sense*. London: Lexis Nexis Butterworths, 2002, p. 199-200.

by relatively unrelated and highly discrepant logics of regulation. This certainly entails undisputable challenges for the state, as it tends to lose coherence as a unified agent of social regulation. In sum, the very definition of general interest is disputed.<sup>100</sup>

### C. The emergence of normative tensions

This section questioned the particular effects of transnational legality on a state's Constitutional Order and the associated regulatory dynamics. In that regard, new constitutionalism and subaltern cosmopolitan legality were introduced as useful concepts to the analysis aimed to recreate a sociopolitical scenario that environs the encounter and dialogue between particular transnational legal processes. Therefore, the objective of ensuring the consolidation of liberal democratic capitalism as a truly global political project is contrasted with the resistance exercised by counter-hegemonic forces whose purpose is to bring alternative models to contend the patterns of discrimination and social exclusion associated with neoliberalism. Here, the role of the law appears to be fundamental in the articulation of these political initiatives, as they are oriented towards the effective intervention in social relationships and structures. A great variety of legal artefacts are deployed to set binding constraints to the potential production of policy changes that could contravene the interests of the global economic project within the state's jurisdiction. In turn, the emancipatory nature of subaltern cosmopolitanism is supplemented by legal tools that are designed to address violence and structural inequalities from a transformative perspective. All in all, states and their constitutional/legal orders perform a central role in this power dialectic.

The latter account reaffirms the idea that in the realm of global governance, the state has become a distinctive political agency that is in charge of representing and crystallizing diverse and even

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<sup>100</sup> See SANTOS, Boaventura de Sousa. *Toward a New Legal Common Sense*. London: Lexis Nexis Butterworths, 2002, p. 199-200.

conflicting transnational political projects. Consequently, the emergence of normative conflicts within its constitutional/legal order is not only a spontaneous outcome of the struggle between initiatives with conflictual visions of society, but an unavoidable phenomenon that brings both structural and substantial challenges for the state. Crucially, the apparent existence of a single national political project and an unambiguous and coherent legal system is put into question, and instead an invitation to think about a fragmented constitutional order is upon the table. This is inevitably reflected in the regulatory patterns of public authorities, and particularly in their capacity to act consistently on the occasion of the definition and accomplishment of their mandate.

## Chapter Two: The Colombian Constitutional Order

### I. Introduction

After having presented the dissertation's theoretical foundations, this chapter introduces the Colombian Constitutional Order (CCO). For the purpose of this study, the CCO is used as an analytical framework that will help to illustrate a normative tension between two transnational legal processes with strong regulatory implications: (1) the construction of a legal regime for the promotion and protection of foreign investment through the systematic conclusion of international investment agreements; and (2) the implementation of a transitional justice project whose main objective is the effective achievement of durable peace in the country through structural transformations in society. In that regard, the chapter elaborates on the CCO's social peace function, economic foundations, and global projection. Additionally, the depiction of the CCO will facilitate the further visualization of the regulatory challenge that the state – the natural implementing agency and guarantor of these legal processes – would be facing as a consequence of the aforementioned normative stress.

A constitutional order reflects the normative image of a state – and its society – its *raison d'être*. Its foundation entails the formulation of a set of principles, values, norms and institutions whose purpose is to materialize and articulate the aspirations of a political community.<sup>101</sup> Consequently, it is considered as a reference point intended to radiate legal force, normative charge and coherence on the state's legal system.<sup>102</sup> Therefore, it sets the contours of the exercise of public authority through the formulation of a bill of rights and duties which modulate the relationship between the public and private spheres;<sup>103</sup> the assignment of specific competences to public authorities;<sup>104</sup> and

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<sup>101</sup> See REPÚBLICA DE COLOMBIA. *Constitución Política*, 1991, preamble and art. 1-10.

<sup>102</sup> Constitutional supremacy, the principle of legality and legal coherence.

<sup>103</sup> See REPÚBLICA DE COLOMBIA. *Constitución Política*, 1991, art. 11-112.

<sup>104</sup> See REPÚBLICA DE COLOMBIA. *Constitución Política*, 1991, art. 113-284.

the delimitation of the state's regulatory activity – the capacity to intervene or the duty to abstain – in accordance with the constitutional objectives.<sup>105</sup>

In this context, the Colombian Constitutional Order is assumed to be the normative site within which the transnational legal processes under analysis and their respective rationales can be better comprehended, both individually and as part of a conflictual dynamic. This is so for a very pragmatic reason: it was in the realm of the CCO that the transnational legal processes were effectively incorporated into the country's legal system. Consequently, they acquired entity as part of said normative structure.<sup>106</sup> In turn, this incorporation provides transnational legal processes with distinctive features. First, they are provided with legitimacy by means of their framing within the state's political project. Second, they become infused with normative support due to their identification with pre-established constitutional principles and values. And third, their inclusion within the state's policy agenda turns them into subjects of regulation. Therefore, it is possible to assert that these incorporation processes are determiners of the alleged tension, since they situate both rationales in the same normative level and induce a dialogue among them.

From a methodological standpoint, the depiction of the CCO is based on the account and contextualization of the relevant constitutional norms and the jurisprudence of the country's Constitutional Court, which is in charge of its development. By using the CCO as a decoder, one can decipher the normative rationales embedded in both the establishment of a legal regime for the promotion and protection of foreign investors via international investment agreements (Chapter Two), and the implementation of a transitional justice project that is articulated through

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<sup>105</sup> See REPÚBLICA DE COLOMBIA. *Constitución Política*, 1991, art. 332-373.

<sup>106</sup> Here it is very important to establish a distinction between the moment when the norms are formally created by either the national legislator or through an international law-making process, and the moment when such norms become part of a domestic legal system by means of their assimilation by either the country's Constitutional Order.



transformative regulatory measures (Chapter Three). Furthermore, the CCO will frame the tension between these transnational legal processes from the standpoint of the state's regulatory activity (Chapter Four). In sum, although the CCO is not directly assumed as an object of analysis, it is an useful analytical instrument whose operation should lead to the elucidation of the central role of the state in the normative articulation of both transnational legal processes in Colombia. Particularly, it is instrumental for unearthing and particularizing the dilemma that the country will have to confront when the time comes to decide how to act and whose interests to uphold.

This chapter is divided in four sections. The first part introduces the Colombian Constitutional Order from the perspective of its social peace function. The second part depicts the CCO in relation to the interactions between the public and private spheres, and particularly among the authorities and the economic agents. The third part visualizes the influence of globalization on the CCO as related to the internationalization of economic relations and the reception of international human rights and social standards. Finally, the fourth part of the chapter provides preliminary conclusions as to the relevance of the CCO given its task as the dissertation's analytical framework.

## **II. The 1991 Constitution and the role of public authorities in achieving social peace: The Social Rule of Law State**

This section introduces the current Colombian Constitutional Order from the standpoint of its social peace function. It describes how the emergence of the 1991 Constitution represented a milestone in the country's nation-building process in that it articulated an alternative model of the state, with the aim of bringing about a more accountable relationship between public authorities and society after a long period of violence and social inequalities. The emergence of the Social Rule of Law State – a political project with normative force that was adopted in the new

constitution – sealed a compromise on the transformation of the country into a democratic, inclusive, and more equitable state.

A. A new constitution is here to bring social peace

In 1991, a new Constitution was greeted with jubilation in Colombia, and is still regarded as a historical milestone in the ongoing nation-building process today. By the outset of the 1990s, the country was immersed in a chaotic situation of extreme violence, political patronage, social inequality and economic crisis. It had apparently reached a point of no return with respect to the aspiration of becoming a stable and prosperous nation, and somehow evoked the recently formulated and likewise controversial idea of the failed state.<sup>107</sup> The previous Constitution, enacted in 1886 under the shadow of the many civil wars that lashed the country during the XIX century and aligned to a conservative political plan called *la regeneración*, had proven to be ineffective in consolidating a national project. Seemingly, the state's capacity to act did not acquire the structural potential required to influence certain sectors and social groups, which had traditionally been abandoned to their destiny except for accidental, negative, and sometimes repressive ways.<sup>108</sup> In this context, the new political charter symbolized an opportunity to break with the state's historical inability to forge a sustainable national project within a naturally diverse society. It adopted an aspirational attitude that infused the constitution with a forward-looking perspective, and

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<sup>107</sup> For a clarification on the concept “failed state”, see the Introduction of this dissertation.

<sup>108</sup> See LEAL BUITRAGO, Francisco. “Structural crisis and the current situation in Colombia” *28 Canadian Journal of Latin American and Caribbean Studies Vol. 14* (1989), p. 34; LEGRAND, Catherine. “The Colombian crisis in historical perspective.” *55/56 Canadian Journal of Latin American and Caribbean Studies Vol. 28* (2003), pp. 165-209.

consolidated the normative idea of progress.<sup>109</sup> Likewise, it recognized its associates and the consequent representation of their varied interests.<sup>110</sup>

Previous attempts were unsuccessful to reflect the existence of plural social concerns into the law.<sup>111</sup> On this occasion, certain sectors of society that had previously been excluded had the chance to participate in the debates on the configuration of the nation's political project. As a result, the Constitution acted as a democratic amplification pact.<sup>112</sup> Unlike the historical power tandem between the Liberal and Conservative parties that contributed to the spread of violence in the country and especially in the rural areas, the 1991 process gathered a representative group of social actors. Besides the traditional parties, it included the guerrilla groups under demobilization, social sectors from a variety of ideological streams, and ethnic communities. The 1991 Constitution was designed to perform a "social peace function", one which aimed to create appropriate conditions for the settlement of the complex conflicts – armed, social, and economic – that had jeopardized the very continuity of the state.<sup>113</sup> Likewise, it has been depicted as an expression of faith, a belief in the law's capacity to provide substantial answers to the social,

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<sup>109</sup> See GARCÍA VILLEGAS, Mauricio. "Constitucionalismo Aspiracional" *Araucaria Revista Iberoamericana de Filosofía, Política y Humanidades* No. 29 (2013), p. 77.

<sup>110</sup> See Browitt, Jeff. "Capital Punishment: The Fragmentation of Colombia and the Crisis of the Nation-State." 6 *Third World Quarterly* Vol. 22, *The Post-Cold War Predicament* (2001), p. 1064.

<sup>111</sup> For instance, the 1936 Constitutional reform that tried to produce the effective redistribution of lands in the rural areas.

<sup>112</sup> See UPRIMNY, Rodrigo & GARCIA-VILLEGAS, Mauricio. "The Constitutional Court and Social Emancipation in Colombia", in DE SOUSA SANTOS, Boaventura (Ed.). *Democratizing Democracy: Beyond the Liberal Democratic Canon Reinventing Social Emancipation*. 2007, p. 66.

<sup>113</sup> In words of the former Constitutional Justice Manuel José Cepeda, its adoption should be appreciated as a nonviolent revolution towards peace, equality, and participation for all, held within institutional channels and against arbitrariness, exclusion, and abuses of power. See CEPEDA-ESPINOSA, Manuel José. "Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court" 4 *Washington University Global Studies Law Review* Vol. 3 (2004), p. 534, 546.

political and economic ills that faced Colombia.<sup>114</sup> It reminds the idea of the law as an instrument of social change.<sup>115</sup>

In order to comply with the social peace function – that is, the solution of complex conflicts through the effective adjustment of social relations – the 1991 Constitution was embedded with two distinctive features. In the first place, the charter has normative force, according to which it is a binding and directly applicable norm. This feature is crystallized in the existence of concrete mechanisms to guarantee the constitution’s supremacy, and particularly to review the conformity of both the legal rules and the behaviour of public authorities in relation to the CCO.<sup>116</sup> In this regard, the Constitution was functionally arranged to intervene effectively in the settlement of conflicts between colliding rationales gravitating around the Colombian legal system.<sup>117</sup> In the second place, the Constitution possesses an evaluative character since its content is structured around a value system – a normative program – that must be promoted and observed by the public authorities.<sup>118</sup> This is reflected in the inclusion of a set of orienting principles and values that guide the application of the Charter’s bill of rights through a comprehensive institutional structure.

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<sup>114</sup> See ESLAVA, Luis. “Constitutionalization of rights in Colombia: establishing a ground for meaningful comparisons” *Revista Derecho del Estado* No. 22 (2009), p. 201.

<sup>115</sup> See FALK MOORE, Sally. “Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study” 4 *Law & Society Review* Vol. 7 (1973), 719-746.

<sup>116</sup> A specialized jurisdiction in head of a Constitutional Court was created to conduct judicial review on occasional constitutional amendments, the legislation passed by the congress and the international agreements concluded by the government so as to establish their conformity with the Charter. However, the constitutional prerogative is also invested on all the judiciary by means of the creation of an exceptional judicial writ (*acción de tutela*), which is designed to provide judicial protection to any person when their fundamental rights are jeopardized or threatened on the occasion of the action or omission of a public authority. See RODRÍGUEZ, César & UPRIMNY, Rodrigo. “Constitución y modelo económico en Colombia: hacia una discusión productiva entre economía y derecho” *Debates de Coyuntura Económica* No. 62 (2005), p.25.

<sup>117</sup> See ESLAVA, Luis. “Constitutionalization of rights in Colombia: establishing a ground for meaningful comparisons” *Revista Derecho del Estado* No. 22 (2009), p. 186.

<sup>118</sup> See generally RODRÍGUEZ, César & UPRIMNY, Rodrigo. “Constitución y modelo económico en Colombia: hacia una discusión productiva entre economía y derecho” *Debates de Coyuntura Económica* No. 62 (2005), 23-40.

## B. The Social Rule of Law State

The ambition in which a constitution like Colombia's was formulated brings many challenges for the state, which is in charge of its effective observation and harmonic implementation. First, there is a large gap between the aspirational image captured by the charter's political program and the reality that needs to be addressed in order to achieve social peace. Second, as the constitutional process recognized diverse and divergent social actors as valid interlocutors, a great variety of competing interests are at stake. Third, there are limited means and resources to materialize a great-scale political program, which not only includes objectives based on the passive action of the state but goals whose compliance require the active involvement of public authorities. Fourth, the institutional governance apparatus called to implement the constitutional mandates is complex a set of entities whose dissimilar approaches towards the management of public affairs might generate collisions. In sum, in the pursuance of its constitutional mandate, the state faces the need to find a formula to balance juxtaposing normative forces, make a sustainable use of the limited means and coordinate a miscellaneous collection of public authorities.

The social rule of law state formula (hereinafter SRLS) is embedded in the 1991 Constitution,<sup>119</sup> and has been appointed to perform such a balancing task.<sup>120</sup> It has been developed progressively by the Colombian Constitutional Court through its case law, and performs as a core concept for the maintenance of a sustainable social order in the country. In a social reality characterized by a

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<sup>119</sup> "Colombia is *a social state under the rule of law*, organized in the form of a unitary republic, decentralized, with autonomy of its territorial units, democratic, participatory, and pluralistic, based on the respect of human dignity, the work and solidarity of the individuals who belong to it, and the prevalence of the general interest.

<sup>120</sup>As Luis Eslava points out, the Constitutionalization of a social rule of law state, based on a generous bill of rights, was modeled on the 1948 German Constitution and the 1978 Spanish Constitution. Properly speaking, the SRLS started to configure in Colombia as early as 1936 with a constitutional reform inspired in Leon Duguit's ideas on solidarism, so the concepts of state intervention, social duties and social function of property were introduced to the national legal system. See ESLAVA, Luis. "Constitutionalization of rights in Colombia: establishing a ground for meaningful comparisons" *Revista Derecho del Estado* No. 22 (2009), p. 202.

complex delimitation between the public and private spheres, the SRLS translates the constitutional premises into concrete criteria to address the challenges associated with the exercise of power. This formula performs as a compass to drive the action of public authorities toward the accomplishment of the constitutional objectives, in accordance with their respective mandates. The SRLS accompanies the democratic character of the process that led to the formulation of the 1991 Constitution, which incorporated institutions with alternative ideological matrixes and recognized the rights of historically marginalized people so as to find equilibrium and surpass conflict<sup>121</sup>. Since the state adopted the general responsibility to ensure well-being and equality conditions to all the people within its jurisdiction – in consonance with the Constitution’s aspirational character<sup>122</sup> – its purposes and goals significantly extended beyond the classic aims of protecting persons and property. Correspondingly, its degree of regulatory intervention expanded both in private and public spheres of social life.<sup>123</sup>

The practical influence of the SRLS on the conduct of public authorities in order to orient their action towards the achievement of the country’s socioeconomic objectives is reflected in the jurisprudential development produced by the Colombian Constitutional Court. These developments can be grouped in a number of ideas.<sup>124</sup> First of all, the incorporation of the SRLS into the CCO implies a shift in the Colombian state’s paradigm. It comprises a transition from a

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<sup>121</sup> See UPEGUI MEJÍA, Juan Carlos. *Doce Tesis en Torno al Concepto de Estado Social de Derecho. Discurso Jurisprudencial, Elementos, Usos*. Bogotá: Universidad Externado de Colombia, Temas de Derecho Público No. 80, 2009, p. ii.

<sup>122</sup> See ESLAVA, Luis. “Constitutionalization of rights in Colombia: establishing a ground for meaningful comparisons” *Revista Derecho del Estado* No. 22 (2009), p. 202.

<sup>123</sup> CEPEDA-ESPINOSA, Manuel José. “Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court” *4 Washington University Global Studies Law Review* Vol. 3 (2004), p. 617.

<sup>124</sup> According to the methodology proposed by Colombian researcher Juan Carlos Upegui. See UPEGUI MEJÍA, Juan Carlos. *Doce Tesis en Torno al Concepto de Estado Social de Derecho. Discurso Jurisprudencial, Elementos, Usos*. Bogotá: Universidad Externado de Colombia, Temas de Derecho Público No. 80, 2009.

liberal gendarme state to a social-oriented state.<sup>125</sup> Thus, it is recognized that public intervention in social relations is necessary to procure equality, freedom and effective individual autonomy, since society is not anymore visualized as an entity composed by free and equal subjects *in abstracto*. Rather, it is visualized as a conglomerate of people under conditions of material inequalities.<sup>126</sup> Second of all, as a consequence of the placement of human dignity at the core of the CCO, the concept of equality is now associated to the state's recognition of material differences and the identification of scarcities so as to materialize its primary aim: the promotion of decent conditions of life for the whole of the population, and especially in favor of the people immersed under conditions of manifest vulnerability.<sup>127</sup> Further, in the context of the SRLS public authorities do not have unlimited powers and, on the contrary, their competences become obligations subject to judicial review.<sup>128</sup> Likewise, by virtue of the SRLS formula the Constitutional Court has recognized the existence of an "economic constitution" within the charter, which conjugates different normative rationales in order to satisfy public objectives.<sup>129</sup> Finally, the Court has pointed out that under the principle of solidarity social public policies must be

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<sup>125</sup> Likewise, the Court characterizes this transition by de-identifying the CCO from fixed models of governance such as the welfare state or the assistance-oriented state. See REPUBLICA DE COLOMBIA, Corte Constitucional. *Sentencia C-1064/2001*. M.P. Manuel José Cepeda Espinosa.

<sup>126</sup> See REPUBLICA DE COLOMBIA, Corte Constitucional. *Sentencia C-587/1992*. M.P. Ciro Angarita Barón.; *Sentencia C-776/2003*. M.P. Manuel José Cepeda Espinosa.

<sup>127</sup> See REPUBLICA DE COLOMBIA, Corte Constitucional. *Sentencia C-776/2003*; *Sentencia C-932/2007*. M.P. Marco Gerardo Monroy Cabra.

<sup>128</sup> See REPUBLICA DE COLOMBIA, Corte Constitucional. *Sentencia SU-022/1998* M.P. Carlos Gaviria Díaz; *Sentencia C-617/2002*. M.P. Alfredo Beltrán Sierra, Jaime Córdoba Triviño. These decisions address the enactment of laws on the promotion and protection of economic, social and cultural rights. Likewise, in decision T-025/04 the Court issued specific orders to the executive on the implementation of public policies in favor of internally displaced persons. See REPUBLICA DE COLOMBIA, Corte Constitucional. *Sentencia T-025/2004*. M.P. Manuel José Cepeda Espinosa.

<sup>129</sup> This conjugation can be verified, for instance, in the CCO's formulation of the protection of private property in the context of its social and ecological aims, or the recognition of the free enterprise principle as shaped by the idea of social responsibility. See REPUBLICA DE COLOMBIA, Corte Constitucional. *Sentencia T-533/1992*. M.P. Eduardo Cifuentes Muñoz.

progressive,<sup>130</sup> and private parties do have authentic legal duties that are relative to the satisfaction of public interests.<sup>131</sup>

In conclusion, in the context of the Colombian Constitutional Order's normative dimension, the SRLS performs two functions. First, it acts as a driving force, as long as it channels the activity of public authorities towards the achievement of public goals. Second, it is a rational referent that provides patterns on how to solve normative conflicts that occur in the context of the exercise of public power. As illustrated in the following section, these functions acquire great relevance in the configuration of the relations between the public and private spheres or, seen from a political-economy perspective, on the establishment of the country's economic model. Apparently, this nexus comprises a conflict between the protection of individual rights and freedoms, and the mandate to redirect social structures towards the achievement of Colombia's political program.

### **III. Constitutional Order and socioeconomic model in Colombia: between economic freedom and state intervention**

After having introduced the foundations of Colombia's Constitutional Order and its social peace function, this section intends to present the SRLS in relation to the setting up and functioning of the country's socioeconomic model. Particularly, this formula is regarded from the standpoint of the content and scope of the property rights regime.<sup>132</sup> The discussion addresses the concept of *social market economy*, which is portrayed as a normative archetype that frames the relationship between the state and the private sphere, specifically with regards to access and use of scarce

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<sup>130</sup> See REPUBLICA DE COLOMBIA, Corte Constitucional. *Sentencia C-671/2002*. M.P. Eduardo Montealegre Lynett; *Sentencia C-251/1997*. M.P. Alejandro Martínez Caballero.; *Sentencia C-038/1994*. M.P. José Gregorio Hernández Galindo.

<sup>131</sup> See REPUBLICA DE COLOMBIA, Corte Constitucional. *Sentencia T-801/1998*. M.P. Eduardo Cifuentes Muñoz; *Sentencia T-520/2003*. M.P. Rodrigo Escobar Gil.

<sup>132</sup> Here it is assumed that the way in which the property rights regime is structured and applied reflects the economic model that a state has chosen by means of its constitutional design.



resources. Consequently, it defines the regulatory dynamics of public authorities – that is, their capacity to intervene in the realm of the private sphere, and to occasionally restrict or shape the corresponding individual economic entitlements, in accordance with the country’s political project.<sup>133</sup>

#### A. Colombia’s economic model: a social market economy

The choosing of an economic model for Colombia caused tensions throughout the process leading to the formulation of the 1991 Constitution. The adoption of a liberal matrix<sup>134</sup> was somehow agreed upon since the beginning of the discussions that took place inside the Constitutional Assembly. Yet, there were discrepancies among the representatives of different sectors of society as to the absolute character of individual economic-related rights and liberties in relation to the state’s intervention prerogatives towards the achievement of social public goals.<sup>135</sup> On the one hand, some believed the economy should be entirely market-driven and that the state should only impact the assignment of scarce resources by correcting eventual structural failures and protecting

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<sup>133</sup> See CHAÍN LIZCANO, Guillermo. “La Cuestión Económica en el Constitucionalismo Colombiano. Propiedad – Planeación – Intervención”. In *Constitución Política y Reorganización del Estado*. Bogotá: Universidad Nacional de Colombia (1994), p. 87.

<sup>134</sup> According to Daniel Bonilla, although it is clear that the ideological spectrum of liberalism is ample and somehow blurry, it is possible to identify a liberal matrix that is defined by a series of principles upon which any liberal, in spite of his normative position, would feel identified with: a. Human beings are autonomous and rational individuals, with the capacity to develop a life project; b. social reality is structured around two *spaces*: the private, which is the sphere where individuals manage their life projects, and the public, which is the ambit of justice-making and where the distribution of scarce resources occurs; c. human beings are entitled with individual rights, which are powerful safeguards from the interference of the state or other individuals on behalf of their autonomy; d. a liberal state must be structured by three political precepts: separation of public powers, democracy and the rule of law; f. the state must equally consider and treat all the members of society; g. the market is the most suitable mechanism to order the economy of the state. See BONILLA, Daniel Et al. *Derecho, Democracia y Economía de Mercado*. Bogotá: Ediciones Uniandes & Editorial Temis (2010), p. 2-5.

<sup>135</sup> See the different positions on Colombia’s economic model and property rights regime discussed within Constitutional Assembly’s Vth Commission (economic affairs) in: MARULANDA GÓMEZ, Iván et al. *Informe de Ponencia*. Gaceta Constitucional No. 46 de abril 15 de 1991, MARULANDA GÓMEZ, Iván et al. *Ponencia para Primer Debate en Plenaria del Articulado sobre “Libertad de Empresa, Competencia Económica, Monopolios e Intervención del Estado”*. Gaceta Constitucional No. 80 de mayo 23 de 1991; MARULANDA GÓMEZ, Iván & ARIAS LÓPEZ, Jaime. *Informe-ponencia para debate en Plenaria*. Gaceta Constitucional No. 82 de mayo 25 de 1991; REYES, Cornelio. *El Derecho de Propiedad, una Disposición Anacrónica y Contradictoria*. Gaceta Constitucional No. 107 de junio 24 de 1991.

individual entitlements from external interferences. On the other hand, there were claims supporting the crystallization of a social-oriented vision of the economy, which had been permeating the Colombian normative order since 1936 and advocated for the state's direction of the economy by means of the allocation of eventual interventionist prerogatives, thus entailing the relative nature of individual rights.

The formula that was embedded in the Constitution for addressing this normative divergence entailed the incorporation of two seemingly differing principles: economic freedom and state intervention. Each represents the normative visions which exist between the state and the private sphere on the grounds of the allocation of scarce resources. Further, they modulate each other's scope of action. As a result, while the Charter is not ideologically neutral with regards to the way in which economic assets are used to comply with its political program, it did not adopt a stationary or definitive position on how these aims can be accomplished; that is, which type of economic policies should be implemented to meet the country's goals. Rather, the Constitution advocates for a case-by-case consideration.<sup>136</sup>

Economic freedom is included in the Constitution as the foundation of the country's economic system. The enterprise is placed as the basic unit of economic development, and free economic private initiative and free competition are established as its associated entitlements. Yet, these safeguards are put into the perspective of the satisfaction of the public good and the protection of social interests by including exceptional limitations for their full exercise, or requesting public

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<sup>136</sup> See generally RODRIGUEZ, César & UPRIMNY, Rodrigo. "Constitución y Modelo Económico en Colombia: Hacia una Discusión Productiva entre Economía y Derecho." *Debates de Coyuntura Económica* (2005), 23-40 (proposing that the Colombian Constitution has an open character as it does not constitutionalize an specific economic model but admits the implementation of diverse economic policies, though within certain normative and appreciatory limits). This vision is confirmed by Decision C-287/2009. See REPUBLICA DE COLOMBIA, Corte Constitucional. *Sentencia C-287/2009*. M.P. Luis Ernesto Vargas Silva, p. 29.

authorities to control the activity of private economic agents within the market.<sup>137</sup> In turn, as the overall responsibility of managing the economy is assigned to the state, the principle of state intervention becomes a normative maxim in the context of the Colombian Constitutional Order. Thus, public authorities are called to use their prerogatives in certain fields – resource extraction, land use, production, distribution, use and consumption of goods, and provision of public utilities – so as to rationalize the economy and eventually perform a redistribution role within the economic cycle. Therefore, observing the principle of legality, they could act to safeguard certain public interests and ascertain that all individuals have access to basic goods and services.<sup>138</sup>

Considered together, the CCO sent an aspirational message: by following economic liberal postulates, it is possible to achieve the objective of a less-unequal society in which there is a fair income distribution for all citizens. In that regard, the country's Constitutional Court has, through its case law, proactively developed the content and scope of economic freedom and state intervention. As a result, it has progressively constructed a normative archetype which, by means of the balance of said principles, aims to orient the activity of public authorities intervening in the

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<sup>137</sup> “Article 333. Economic activity and private initiative must not be impeded within the limits of the public good. For their exercise, no one may demand prior permission or licenses without authorization of the law. Free economic competition is a right of everyone, entailing responsibilities. The enterprise, as a basis of development, has a social function that implies obligations. The state will strengthen the joint organizations and stimulate enterprise development. The State, mandated by the law, will check the impediments to or restrictions of economic freedom and will avoid or control any abuse that individuals or enterprises may create thanks to their dominant position in the national marketplace. The law will delimit the scope of economic freedom when the social interest, the environment, and the cultural patrimony of the nation demand it.”

<sup>138</sup> “Article 334. The general management of the economy is the responsibility of the State. By mandate of the law, the State will intervene in the exploitation of natural resources, land use, the production, distribution, use, and consumption of goods, and in the public and private services in order to rationalize the economy with the purpose of achieving an improved quality of life of its inhabitants, the equitable distribution of opportunities, and the benefits of development and conservation of a healthy environment. In a special manner, the State will intervene for the sake of the full employment of the human resources and to ascertain that all individuals, especially those of low income, may have effective access to basic goods and services. And also, to promote productivity and competitiveness and the harmonious development of the regions.

private sphere and to bring certainty to the expectations of private economic agents: the social market economy.<sup>139</sup>

The Colombian Constitutional Court has addressed the tensions between economic freedom and state intervention as a problem to be solved within the realm of the SRLS.<sup>140</sup> In developing the nature of economic freedom, it asserted that the content and extent of this entitlement was the result of a historical process around the increasing role of the state in the satisfaction of social needs.<sup>141</sup> Also it clarified that, whereas this type of freedom is a fundamental element of the economic system due to its connection with the right of personal autonomy, its recognition depends on the realization of superior values such as justice, equity, solidarity and the common good.<sup>142</sup> Likewise, the Court elucidated that the exercise of an economic activity is not absolute and in any case, must conform to the public interests at stake.<sup>143</sup> In turn, the Court depicted state intervention as a prerogative, distributed among different branches of public power and authorities acting as an exception to the observance to economic freedom.<sup>144</sup> It observed that, although there can be tensions between economic freedom and the prevalence of general interests within economic activities, state intervention seeks to reconcile private initiative with public interest.<sup>145</sup> Yet, it

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<sup>139</sup> The origin of the term can actually be traced back to the work of German economist Alfred Müller-Armack's. See *Wirtschaftslenkung und Marktwirtschaft* (The Control of the Economy and the Market Economy), 1947.

<sup>140</sup> "The SRLS, the principles of human dignity and social solidarity, the essential aim to promote prosperity and ensure the effectiveness of rights, obligations and constitutional principles, and the fundamental right to equality, all considered as a whole, orient the interpretation of the economic constitution and irradiate over all its ambits, including regulation, private property, free enterprise, resource extraction, the tax regime, national budget and public expenditure." See REPUBLICA DE COLOMBIA, Corte Constitutional. *Sentencia T-505/1992*. M.P. Eduardo Cifuentes Muñoz, p.531.

<sup>141</sup> See REPUBLICA DE COLOMBIA, Corte Constitutional. *Sentencia T-425/1992*. M.P. Ciro Angarita Barón, p.13.

<sup>142</sup> See REPUBLICA DE COLOMBIA, Corte Constitutional. *Sentencia C-1045/2000*. M.P. Álvaro Tafur Galvis, p. 17.

<sup>143</sup> See REPUBLICA DE COLOMBIA, Corte Constitutional. *Sentencia C-645/2002*. M.P. Marco Gerardo Monroy Cabra, p. 17.

<sup>144</sup> See REPUBLICA DE COLOMBIA, Corte Constitutional. *Sentencia C-176/1996*. M.P. Alejandro Martínez Caballero, p. 16.

<sup>145</sup> See REPUBLICA DE COLOMBIA, Corte Constitutional. *Sentencia C-615/2002*. M.P. Marco Gerardo Monroy Cabra, p. 16.

explained that the consequent limitations to individual rights should meet certain conditions, as they must be founded on reasonable and proportionate motives, linked to the consecution of constitutional goals,<sup>146</sup> carried out according to the law, and not affecting the entitlement's core content.<sup>147</sup> Thus, the construction of each principle is directly influenced by the other's scope, as the promotion of a balanced resolution of eventual normative tensions was highly desired.

Overall, the Constitutional Court justified the choosing of the social market economy model by remarking the state's duty to promote the efficient use of resources while ensuring that people have effective access to basic goods and services, in order to ensure a life with dignity.<sup>148</sup> Therefore, the tribunal recognized that the role of the market as resource-allocator should be reconciled with the social, political and economic role of the state as resource-redistributor.<sup>149</sup> Consequently, it pointed out that the state's public authorities have specific behavioral duties in two concrete areas. In accordance with their competences, they are called to protect and safeguard a free and competitive market, which is depicted as the site where private economic agents may equitably enter and offer goods and services. In turn, they must correct market imperfections, either the ones related to free competition or those which threaten the validity of the rights that are necessarily tied to the market.<sup>150</sup> The social market economy must be seen as a normative model that sets up the relations between the public and private spheres with respect to the administration of scarce resources. In the realm of the CCO's socioeconomic model, a well defined dynamic becomes

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<sup>146</sup> This means that State intervention goes beyond purely economic reasons, and it is also justified from both organizational and axiological standpoints. See Decision REPUBLICA DE COLOMBIA, Corte Constitutional. *Sentencia C-618/2012*. M.P. Gabriel Eduardo Mendoza Martelo, p. 26.

<sup>147</sup> See REPUBLICA DE COLOMBIA, Corte Constitutional. *Sentencia C-837/2013*. M.P. Luis Ernesto Vargas Silva, p. 50.

<sup>148</sup> See REPUBLICA DE COLOMBIA, Corte Constitutional. *Sentencia C-856/2004*. p. 54.

<sup>149</sup> See REPUBLICA DE COLOMBIA, Corte Constitutional. *Sentencia C-265/1994*. M.P. Alejandro Martínez Caballero, p. 17-18.

<sup>150</sup> See REPUBLICA DE COLOMBIA, Corte Constitutional. *Sentencia C-837/2013*. M.P. Luis Ernesto Vargas Silva, p. 48.

visible. Although economic freedom is defined as a fundamental value and private initiative is acknowledged as a primary development engine, public authorities have the faculty and the obligation to intervene in the private sphere by means of their regulatory prerogatives. They do so to correct market failures and assure the accomplishment of public goals and the protection of social entitlements.

#### B. Economic model and property rights regime: the social function of property

One of the pillars on which any economic model with a liberal matrix is built is the recognition and protection of private property. This legal institution sets up a given scheme of identities and social interactions that is based on the commodification of land and natural resources<sup>151</sup> and the consequent allocation of exclusionary entitlements that can eventually be interchanged. On this basis, the market consolidates as a paramount mechanism of social control. In the case of Colombia, the Civil legislation established a property rights regime that regulates ownership in line with an absolute vision of individual autonomy and private initiative.<sup>152</sup> Yet, the 1991 Constitution advanced on the adoption of an alternative view that situates property in the context of the country's constitutional compromise with social justice.<sup>153</sup> Following the reasoning path assumed through the SRLS formula and the social market economy model, property is regarded not only as a right but as a social function whose exercise entails internal and external restraints.<sup>154</sup>

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<sup>151</sup> Here, the concept *commodification* is used to represent the process through which land and natural resources are assigned an economic value and a function.

<sup>152</sup> See REPÚBLICA DE COLOMBIA. *Ley 84 de 1873 – Código Civil*, art. 653-1007.

<sup>153</sup> Originally formulated on the occasion of the 1936 constitutional reform. See generally BONILLA, Daniel. "Liberalism and Property in Colombia: Property as a Right and Property as a Social Function." *3 Fordham Law Review* Vol. 80 (2011), 1135-1170.

<sup>154</sup> As accurately pointed out by Forster and Bonilla, the concept social function of property was originally articulated by French jurist Leon Duguit in a set of lectures given in 1911. From this conception, it comes that property is no a right but rather a social function, according to which it has both external and internal limits. Therefore, the owner has obligations with respect to his things as they should be put at the service of the community, and the state should protect such property rights only when they fulfill their social function; it has the positive obligation to encourage the owner to exercise his rights in accordance with the social function. See FORSTER, Sheila R & BONILLA, Daniel. "The social Function of Property: a Comparative Law Perspective." *3 Fordham Law Review* Vol. 80 (2011), p. 105.

As such, the Constitution introduces and develops a private property regime within the CCO by means of three well-defined components. First, ownership is generally identified as a right in accordance with civil legislation and, in principle, it is protected from the eventual retroactive effect of subsequent laws. Second, property is depicted as a social function that entails duties for the owner and other right-holders, comprises an ecological dimension, and should favour the public in case of the emergence of a conflict of interest around regulation. Third, along with the latter characteristic, property can eventually be expropriated under public utility or social interest reasons, in accordance with the law, subject to a judicial decision or an administrative procedure, and mediating prior compensation.<sup>155</sup> Therefore, whereas the crystallization of private property came to confirm the CCO's predilection for a social order with liberal foundations, the insertion of a supplementary social function that builds on a right-duties dynamic gave public authorities a key interventionist tool to comply with their objectives in terms of distributive justice.<sup>156</sup>

In the same way that the definition of the country's economic model counted with the crucial contribution of the Colombian Constitutional Court, the property rights regime was an object of consideration and clarification. In particular, the Tribunal highlighted three aspects of the theme. It has depicted and explained the change of paradigm that the right to property has experimented within the CCO. Also, it has addressed the implications of the social function of property on the

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<sup>155</sup> "Article 58. Private property and the other rights acquired in accordance with civil laws are guaranteed and may neither be disregarded nor infringed by subsequent laws. When in the application of a law enacted for reasons of public utility or social interest a conflict between the rights of individuals and the interests recognized by the law arises, the private interest shall yield to the public or social interest. Property has a social dimension which implies obligations. As such, an ecological dimension is inherent to it. The State will protect and promote associative and joint forms of property. Expropriation may be carried out for reasons of public utility or social interest defined by the legislature, subject to a judicial decision and prior compensation. The compensation will be determined by taking into account the interests of the community and of the individual concerned. In the cases determined by the legislator, the expropriation may take place by administrative action, subject to subsequent litigation before the administrative law courts, including with regard to the price."

<sup>156</sup> See BONILLA, Daniel. "Liberalism and Property in Colombia: Property as a Right and Property as a Social Function." *3 Fordham Law Review Vol. 80* (2011), p. 1162.

structure and exercise of rights, especially with regards to the raise of eventual restrictions. Additionally, it has provided normative orientation concerning the projection of the social vision of property on specific issues associated with the context of the country. The emergence of the 1991 Constitution encompassed, in the opinion of the Constitutional Court, the crystallization of a new paradigm to rationalize property.<sup>157</sup> Particularly, the new Charter closed a normative gap between a clearly individualistic notion of this institution – associated with the classical liberal state and embedded in article 669 of the Civil Code – and the emerging CCO, which embraced a functionalist perspective. In that regard, as property relinquished to the exigencies of social justice and sustainable economic development, its nature varied. From being considered absolute, it was transformed into a relative entitlement, susceptible to limitations or restrictions for the sake of the effective realization of public and social interests.<sup>158</sup> In this context, the CCO property rights decidedly moved away from an exclusive regard to subjective prerogatives, towards a more balanced rights-duty perspective.<sup>159</sup> Thus, their exercise is only legitimated when they seek the promotion of social welfare.<sup>160</sup>

This shift in the conceptualization of property brought a consequent spread of case law devoted to develop the conditions around the exercise of this institution.<sup>161</sup> The social function of property

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<sup>157</sup> See REPUBLICA DE COLOMBIA, Corte Constitucional. *Sentencia C-595/2010*. M.P. Jorge Iván Palacio Palacio, p. 9.

<sup>158</sup> “Nevertheless, with the instauration of the interventionist state, these purely liberal and individualistic perspective entered into crisis, so ownership passed from being a strict relation between the owner and a thing to embed the rights of all the members of society. This is the idea of a social function of property, which entails an important reconceptualization of this private-law category, as it allows that the legal order imposes wider restrictions and charges to property rights, as – following Duguit – property lies on social utility.” See REPUBLICA DE COLOMBIA, Corte Constitucional. *Sentencia C-189/2006*. M.P. Rodrigo Escobar Gil, p. 20.

<sup>159</sup> Crucially, in accordance with the Constitution, “The exercise of the rights and liberties recognized in this Constitution implies responsibilities.” See REPÚBLICA DE COLOMBIA. *Constitución Política*, 1991, art. 95.

<sup>160</sup> See Decision REPUBLICA DE COLOMBIA, Corte Constitucional. *Sentencia C-491/2002*. M.P. Marco Gerardo Monroy Cabra, p. 9.

<sup>161</sup> See Decision REPUBLICA DE COLOMBIA, Corte Constitucional. *Sentencia C-006/1993*. M.P. Eduardo Cifuentes Muñoz, p. 17.



was projected into the internal dimension of the right, so it performs as a driver to materialize the objectives of the SRLS while serving the interests of the individual.<sup>162</sup> Accordingly, the right to property is acknowledged as an economic entitlement that primarily points to guarantee the participation of the owner in the organization and development of a socioeconomic system.<sup>163</sup> Likewise, the Court explained that the social function of property performs as the main determinant for the external allocation of limitations to ownership toward the achievement of social benefits.<sup>164</sup> Yet, the core of the right, which relates to the minimum degree of enjoyment of an object that enables its holder to obtain economic benefits, must be respected.<sup>165</sup> Therefore, it was concluded that the rights' core content is disregarded when a restriction does not correspond to proportionate and reasonable ends, or is not related to the supremacy of general interest or the principle of solidarity.<sup>166</sup>

As a result, with the shift in the rationalization of the entitlement, the Constitutional Court expanded the scope of the social function of property on specific issues associated with the context of the country. With regards to rural property it has commented that land exploitation must benefit the community and not only the owner.<sup>167</sup> Additionally, the Court has affirmed that in the case of vacant rural lands, the social function of property is concretized in a number of obligations for the right-holder: economic exploitation; exclusive usage for agricultural activities; and the avoidance

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<sup>162</sup> See REPUBLICA DE COLOMBIA, Corte Constitutional. *Sentencia C-589/1995*. M.P. Fabio Morón Díaz, p. 14; *Sentencia C-740/2003*. M.P. Jaime Córdoba Triviño, p. 17.

<sup>163</sup> See REPUBLICA DE COLOMBIA, Corte Constitutional. *Sentencia C-189/2006*. M.P. Rodrigo Escobar Gil, p. 15.

<sup>164</sup> See REPUBLICA DE COLOMBIA, Corte Constitutional. *Sentencia C-589/1995*. M.P. Fabio Morón Díaz, p. 12.

<sup>165</sup> “The legal configuration of property can point to the suppression of certain powers of the owner, to its conditional exercise, or in some cases to the forced fulfilment of certain obligations.” See REPUBLICA DE COLOMBIA, Corte Constitutional. *Sentencia T-427/1998* M.P. Alejandro Martínez Caballero, p. 16.

<sup>166</sup> See Decision REPUBLICA DE COLOMBIA, Corte Constitutional. *Sentencia C-278/2014*. M.P. Mauricio González Cuervo, p. 28.

<sup>167</sup> See REPUBLICA DE COLOMBIA, Corte Constitutional. *Sentencia C-223/1994*. M.P. José Gregorio Hernández Galindo, p.6.

of exploitation if the terrain is expected to serve environmental conservation purposes.<sup>168</sup> Likewise, the Court has recognized collective property as a fundamental right for the indigenous and Afro-Colombian peoples.<sup>169</sup> In that regard, collective ownership has been depicted as crucial for the protection of those peoples' identity, autonomy, and existence, due to the special link they have with territory.<sup>170</sup> In this sense, the tribunal has opined that collective property entails a correlating duty of protection from public authorities and the private sphere, which stems from certain international agreements concluded by Colombia, especially the ILO Convention 169.<sup>171</sup> Moreover, the Court established a number of sub-rules regarding the right to collective property. The first is that there is a right to constitute reserves on behalf of ethnic groups. The second is that the state has the obligation to protect collective property from the acts of third parties, including the duty to promote land restitution in case of forced dispossession or abandonment as a consequence of the conflict and the supplementary implementation of land tenure security by means of the clarification of property rights and registration towards their effective enjoyment. The third rule is that in the context of the eventual impact of collective property by economic processes, prior consultation is a means to ensure the integrity of ethnic communities.<sup>172</sup>

#### **IV. A national Constitutional Order with a global projection**

This section argues that the Colombian Constitutional Order is a normative system with a global projection. As a result of the progressive influence of globalization on the Colombian

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<sup>168</sup> See REPUBLICA DE COLOMBIA, Corte Constitucional. *Sentencia C-595/1995*. M.P. Carlos Gaviria Díaz, p. 12.

<sup>169</sup> See REPUBLICA DE COLOMBIA, Corte Constitucional. *Sentencia T-188/1993*. M.P. Eduardo Cifuentes Muñoz, p. 16.

<sup>170</sup> See REPUBLICA DE COLOMBIA, Corte Constitucional. *Sentencia T-013/2009*. M.P. Rodrigo Escobar Gil, p. 51.

<sup>171</sup> See REPUBLICA DE COLOMBIA, Corte Constitucional. *Sentencia T-091/2013*. M.P. Luis Guillermo Guerrero Pérez, p. 11.

<sup>172</sup> See REPUBLICA DE COLOMBIA, Corte Constitucional. *Sentencia T-387/2013*. M.P. María Victoria Calle Correa, p. 26-37.

constitutional setting,<sup>173</sup> state sovereignty has been shaped as it passed from being an absolute prerogative to acquire a relative character. As evidenced by both the constitutional text and the jurisprudential developments of the Constitutional Court, the structure of the state and its dynamics of public action have been transformed in order to be compatible with phenomena such as free trade, capital and human mobility, and the promotion and protection of human rights. Although the Colombian state indisputably remains the primary governance unit in accordance with the principles and goals constitutive of its national project, it occasionally performs an alternative role. From a functional standpoint, the state has been arranged to act as an agency towards the crystallization of global political projects within its jurisdiction.

The CCO's global vocation can be seen particularly in two areas of legal development. On the one hand, the aim of the state to place itself as a relevant actor within the international community of states provided the existence of shared interests that it is called to endorse. On the other hand, the state has progressively acquired a commitment to protecting and promoting human rights and other social-oriented concerns by means of their recognition as superlative components of the legal order.

#### A. Internationalization and integration

The first indication of the CCO's global projection can be found in the constitutional purpose of ensuring Colombia a relevant position and an active role in the international community of states, as evidenced by the inclusion of the principles of internationalization and integration in the 1991 Constitution. Whilst the political charter clearly recognized state sovereignty and self-

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<sup>173</sup> Here globalization is acknowledged as the intensification of transnational relations at different levels and the progressive emergence of actors disputing the exclusive exercise of political, economic and social power to the state.

determination as the foundations of the country's foreign relations,<sup>174</sup> it also established a series of supplementary directives on how and in which direction the state should exercise these attributes in the context of the international realm. The first directive is the internationalization of political, economic, social, and ecological relations.<sup>175</sup> Additionally, the Constitution commands the consolidation of economic, social and political integration processes with other nations by means of the conclusion of treaties and the constitution of supranational organizations.<sup>176</sup> While these policy instructions are part of the regular governance dynamic of states, they had not been expressly included in the country's previous Constitution.

Therefore, in line with the aim of placing Colombia as a primary global actor, the Constitutional Court has elaborated a relatively coherent doctrine on the content and extent of the internationalization and integration principles in a number of areas: the lifting of restrictions to the transnational mobility of people and capital;<sup>177</sup> the study of the legality and convenience of adherence of the country to integration processes and the transferring of public competences to supranational institutions;<sup>178</sup> and the recognition of transnational private actors' relative capacity to produce regulations for certain areas of interaction with the public that are subject to their

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<sup>174</sup> "The foreign relations of the State are based on national sovereignty, on respect for the self-determination of the people, and on the recognition of the principles of international law approved by Colombia." See REPÚBLICA DE COLOMBIA. *Constitución Política*, 1991, art. 9.

<sup>175</sup> "The State will promote the internationalization of political, economic, social, and ecological relations on the basis of fairness, reciprocity, and the national interest." See REPÚBLICA DE COLOMBIA. *Constitución Política*, 1991, art. 226.

<sup>176</sup> "In the same manner, the foreign policy of Colombia will be oriented toward the integration of Latin America and the Caribbean. Article 227. The State will promote economic, social, and political integration with other nations and especially with the countries of Latin America and the Caribbean by means of treaties which, on the basis of fairness, equality, and reciprocity, create supranational organizations even to the point of constituting a Latin American community of nations." See REPÚBLICA DE COLOMBIA. *Constitución Política*, 1991, art. 9.

<sup>177</sup> These cases will be introduced and extensively reviewed in chapter 3, with occasion of the conclusion of free trade agreements and bilateral investment agreements by Colombia.

<sup>178</sup> For instance, Decision C-137/1995, regarding the nature and implications of Colombia's entering into the World Trade Organization. See REPUBLICA DE COLOMBIA, Corte Constitucional. *Sentencia C-137/1995*. M.P. Jorge Arango Mejía.

influence.<sup>179</sup> Further, the Court became aware that the abovementioned configuration – restricted state sovereignty to satisfy the internationalization and integration objectives – could conflict with the effective observance of domestic regulation. Therefore, it acknowledged the consequent challenges that this governance dynamic could pose on the activity of public authorities as to the pursuance of certain constitutional objectives, in relation to the compliance with international obligations acquired by the Colombian state. On the occasion of the assessment of the normative value of international treaties within the internal legal order, the tribunal pointed out that the foundation of the international order to which Colombia recognized legitimacy rested in the concept of consensus (*pacta sunt servanda*).<sup>180</sup> As a result, the Court pointed out that public authorities were deemed to apply domestic law in a way that the international compromises assumed by the state could be honoured as much as possible.<sup>181</sup> Furthermore, the Court considered that the breach of an international obligation might entail the impact of Colombian citizens' rights before other states.<sup>182</sup> However, it also noted that in case of tensions between international obligations and domestic law, there should be efforts to harmonize the undisputable supremacy of the constitutional project with the obligatory nature of the compromises assumed by the state as a subject of international law.<sup>183</sup> A vision of absolute state sovereignty was displaced to introduce a governance perspective that looked beyond the state.

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<sup>179</sup> In Decision T-247/2010, the Constitutional Court identified the existence of a global normative process in the expansion of corporate social responsibility in Colombia, and referred to the consequent implications for the CCO. In that regard, it gave an account of the concept, presented the evolution of certain international legal initiatives proposed around the need to regulate the behaviour of private economic actors – prominently the United Nation's Global Compact –, and denoted that in spite of its non-binding nature, corporate social responsibility could be directly identified with a number of principles and values constitutive of the CCO, including solidarity and the SRLS formula. See REPUBLICA DE COLOMBIA, Corte Constitucional. *Sentencia T-247/2010*. M.P. Humberto Antonio Sierra Porto.

<sup>180</sup> See REPUBLICA DE COLOMBIA, Corte Constitucional. *Sentencia C-319/1994*. M.P. Hernando Herrera Vergara.

<sup>181</sup> See REPUBLICA DE COLOMBIA, Corte Constitucional. *Sentencia C-400/1998* M.P. Alejandro Martínez Caballero; *Sentencia C-155/2007*. M.P. Álvaro Tafur Galvis.

<sup>182</sup> See REPUBLICA DE COLOMBIA, Corte Constitucional. *Sentencia C-492/1998* M.P. Fabio Morón Díaz.

<sup>183</sup> See REPUBLICA DE COLOMBIA, Corte Constitucional. *Sentencia C-269/2014*. M.P. Mauricio González Cuervo.

## B. Human rights and other social-oriented issues

The aim to place Colombia on a strategic position within the international community had particular effects on the content and scope of the country's sovereignty paradigm and its associated prerogatives. In the same way, the recognition of the prevalence of human rights law and international humanitarian law within the domestic legal order has progressively shaped the configuration and structure of the CCO. In fact, the Constitution provides for the domestic priority of international agreements that include provisions in these areas,<sup>184</sup> such as the *sui generis* provision according to which the catalogue of rights and liberties acknowledged by the state on behalf of its citizens transcended the constitutional and international conventional texts.<sup>185</sup> As a result, the Colombian Constitutional Order was designed as a structure oriented to promote and protect both the individual and the collective dimensions of the person. In this regard, as the relation between public authorities and the people subject to their jurisdiction is regulated, the exercise of public power is oriented in accordance with the particular needs of Colombian society.

The Constitutional Court elaborated a line of precedent on the nature and extent of the abovementioned prevalence of international human rights treaties in the context of the CCO. Particularly, it interpreted the domestic priority of these legal instruments as an indication of the existence of a "constitutionality block". This legal concept, imported from the French legal system, was developed by the French *Conseil d'Etat* to preserve the applicability and legal force of certain constitutional texts originally included in outdated constitutions. In the case of Colombia, the

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<sup>184</sup> "International treaties and agreements ratified by Congress that recognize human rights and prohibit their limitation in states of emergency have domestic priority. The rights and duties mentioned in this Charter will be interpreted in accordance with international treaties on human rights ratified by Colombia." See REPÚBLICA DE COLOMBIA. *Constitución Política*, 1991, art. 93

<sup>185</sup> "The enunciation of the rights and guarantees contained in the Constitution and in international agreements in effect should not be understood as a negation of others which, being inherent to the human being, are not expressly mentioned in them." REPÚBLICA DE COLOMBIA. *Constitución Política*, 1991, art. 94.

Constitutional Court has used the constitutionality block for two purposes. On the one hand, to integrate a constellation of principles and norms which, although not formally inserted within the Constitution, own a distinct status within the legal order's hierarchy because of their connection with the most essential individual and collective human entitlements and should therefore be considered for the purposes of judicial review.<sup>186</sup> On the other hand, to open the CCO to receive the direct influence of supranational normative elements associated with the same purpose that in principle would not be deemed as valid sources of law. In that regard, the Constitutional Court has in many occasions interpreted the constitutional charter from the standpoint of the case law produced by the Inter-American Human Rights System, whose rationale was adopted to solve cases of collision between public and private interests.<sup>187</sup> Likewise, it directly applied legal instruments whose "soft-law" nature would in principle prevent their suitability to support a decision on the matter.<sup>188</sup>

Finally, the transformation of state sovereignty in favor of the protection of human rights is plausible in the context of the country's indigenous peoples<sup>189</sup> and Afro-Colombian

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<sup>186</sup> See REPUBLICA DE COLOMBIA, Corte Constitucional. *Sentencia C-033/1993*. M.P. Alejandro Martínez Caballero; *Sentencia C-225/1995*. M.P. Alejandro Martínez Caballero

<sup>187</sup> For instance, see *Sentencia C-540/2012* (using the jurisprudence of Inter American Court of Human Rights concerning intelligence and counter-intelligence activities in the context of the constitutional right to privacy); *Sentencia C-620/2011* (interpreting the role of the state in the initiation of criminal proceeding in cases of forced disappearance as established by the Inter-American Human System); *Sentencia T-653/2012* (affirming the binding character of the decisions uttered by international human rights tribunals, Thus pointing out that the domestic authorities in charge of their effective implementation can not pose internal law arguments to justify a delay in their task).

<sup>188</sup> For instance, see *Sentencia T-327/2001* (the Court declared that the United Nations' Guiding Principles on Internal Displacement belonged to the constitutionality block and consequently used them to define the duties of public authorities on the matter); *Sentencia C-540/2007* (stating that although the Universal Declaration of Human Rights is not a treaty, it is part of the constitutionality block due to its historical relevance and substantive content); *Sentencia C-1490/2000* (recognizing that a Community Decision passed by the Andean Community of Nations had constitutional status as it regulated the protection of authors' moral and patrimonial rights).

<sup>189</sup> "The authorities of the indigenous [Indian] peoples may exercise their jurisdictional functions within their territorial jurisdiction in accordance with their own laws and procedures as long as these are not contrary to the Constitution and the laws of the Republic. The law will establish the forms of coordination of this special jurisdiction with the national judicial system." See REPÚBLICA DE COLOMBIA. *Constitución Política*, 1991, Article 246. "Departments, districts, municipalities, and indigenous reservations are territorial entities." See REPÚBLICA DE COLOMBIA.

communities<sup>190</sup>. In a number of political, economic and social issues, the Constitution provided a certain level of governance autonomy to the ethnic groups located within the country. This prerogative has been interpreted by the Constitutional Court through the enforcement of particular collective rights to these communities, and by means of the recognition of their right to participate actively in the decisions that could affect their self-determination, territory, and existence as a diverse cultural enclave.

## V. Conclusions

The purpose of this chapter was to introduce the Colombian Constitutional Order. By illustrating the CCO's content and scope, it provided a normative reference point for the elaboration of the genealogic accounts of the transnational legal processes that, according to this dissertation's main contention, are under tension (see Chapter Three and Chapter Four). Further, the CCO will be used as an analytical framework for the characterization and analysis of the normative collision that is supposedly taking place between the legal protection of foreign investment through the systematic conclusion of international investment agreements, and the implementation of transitional justice transformative regulatory measures (Chapter Five).

The illustration of the Colombian Constitutional Order brought up a number of conclusions. The CCO's social peace function encompasses the recognition of the diverse and inherently conflictual

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*Constitución Política*. 1991, art. 286. "In accordance with the Constitution and the laws, the indigenous territories will be governed by the councils formed and regulated according to the uses and customs of their communities. The exploitation of the natural resources in the indigenous territories will be done without impairing the cultural, social, and economic integrity of the indigenous communities. In the decisions adopted with respect to this exploitation, the Government will encourage the participation of the representatives of the respective communities." REPÚBLICA DE COLOMBIA. *Constitución Política*. 1991, art. 330.

<sup>190</sup> "Within the two (2) years following the entry into force of the present Constitution, Congress will issue, following a study by a special commission created by the government for that purpose, a law which will recognize the black communities which have come to occupy uncultivated lands in the rural zones adjoining the rivers of the Pacific Basin, in accordance with their traditional cultivation practices and the right to collective property over the areas which the same law must also demarcate." See REPÚBLICA DE COLOMBIA. *Constitución Política*, 1991, Transitory Article 55. This transitory article gave birth to Law 70 of 1993, which developed an autonomy regime on behalf of these communities.



nature of Colombian society. As a democratic amplification pact, it was designed to embrace a multiplicity of normative rationales and find a way to articulate them around a national project. In this way, the Constitutional Order aims to create the conditions to settle the complex conflicts that have jeopardized the very continuity of the Colombian state under the framework of "equality of differences" principle. While at first sight it might look like an internally fragmented order, the various interests comprised by the country's legal regime are balanced by a formula that was specifically included to orient the relations between the public and private spheres: the social rule of law. In this context, the Colombian Constitutional Court has performed a fundamental role in adapting such formula to the particularities of the country's socioeconomic order. The result is the inclusion and development of the "social market economy" and "social function of property" concepts within the constitutional debates over the dialogue between economic freedom and state intervention. In that regard, the aspirational message that is sent by the CCO is that in the context of a liberal matrix and a market economy, it is possible to achieve a less unequal society in which power and resources are fairly distributed.

Equally relevant, it was found that the CCO was provided with a global scope. Globalization entails the intensification of transnational relations and the emergence of a variety of actors that permanently interact with the state in the realm of governance and regulation. Therefore, the Constitution contains specific tools to assimilate these novelties and incorporate these global forces into its normative order. Thus, an absolute account of state sovereignty is transformed into a relative and functional attribute, which not only serves the purposes of a global market economy but also aims to incorporate human rights and other socially-inspired standards into the country's legal order and social relations.

## Chapter Three: The Genealogy of the Protection of Foreign Investment through International Investment Agreements in Colombia

### I. Introduction

This chapter provides a genealogical analysis to elucidate how and to what extent the adoption of a legal regime for the promotion and protection of foreign investment by means of the systematic negotiation of international investment agreements (IIAs) became a primary policy for the achievement of Colombia's socioeconomic objectives. This exercise is conducted in accordance with the country's Constitutional Order, which for the purpose of this dissertation is envisaged as both an analytical framework and a normative reference point.<sup>191</sup> Thus, the primary objective of this chapter is to provide an in-depth illustration of the process through which this instance of transnational legality was incorporated into the country's legal order. Further, this genealogical exercise will help to unveil the normative rationales embedded in the public policy. These outcomes will contribute to the articulation of the dissertation's main contention: that the safeguards offered to foreign investors may constrain Colombia's sovereign choices as to the implementation of a transitional justice project through public regulation.

In order to identify the normative rationales which are part of this transnational legal process, the chapter presents its progressive assimilation in Colombia in three stages. Each of these phases represent a political-legal step taken by the state towards the effective internalization of the IIAs negotiation as a primary policy to attain socioeconomic development. In the first stage, the attraction of foreign investment was acknowledged as a relevant component for the accomplishment of a profound economic liberalization program, denominated *apertura económica*. In the second stage, the negotiation of international investment agreements emerged

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<sup>191</sup> See Chapter One: The Colombian Constitutional Order.

as primary tools for the country to attract foreign capital, and a number of institutional adjustments had to be adopted for their effective implementation. Further, in the third phase, this policy consolidated in the context of the stress between the tendency to limit the state's regulatory capacity as a means of protecting foreign investors, and the advent of concerns as to the system's social and environmental sustainability. Given this framework, the pertinent normative rationales will be decoded through a detailed examination of the legal and policy pieces – international agreements, public policies, domestic laws, and judicial decisions – that were produced on the occasion of each of these landmark phases. Finally, special attention will be placed on their incorporation into the Colombian Constitutional Order.

This chapter has been divided into four sections. Section I provides the legal antecedents and the intellectual history on the visualization of foreign investment attraction as essential for achieving Colombia's socioeconomic development. Subsequently, Section II relates to how the negotiation of IIAs became the primary mechanism to attract transnational capital in the country. Particularly, it presents a number of institutional adjustments that were carried out to facilitate the implementation of the agreements. Next, Section III focuses on the evolution of the IIAs negotiation policy from the standpoint of the effective protection of foreign investors from the activity of public authorities. In this regard, it emphasises the challenges that the state's regulatory capacity assumed on the occasion of the internalization of foreign investment protection as a public interest, and the subsequent effects that this assumption generated on the domestic legal order and the country's governance dynamics. To conclude, Section IV summarizes the normative rationales apprehended throughout the chapter and formulates a number of initial conclusions concerning the way in which this transnational legal process has shaped the structure and role of the Colombian state as a regulatory authority.

## II. Foreign investment attraction as a primary economic policy in Colombia

### A. Antecedents and ideological context

The consolidation of a policy on the negotiation of International Investment Agreements in Colombia took place in the context of a normative shift in the country's Constitutional Order. As related in Chapter Two, the 1991 Constitution embedded in an economic model that moved from a closed orientation to one with a marked neoliberal character. In this regard, foreign investment acquired political recognition as an economic dynamic whose adoption was inexorable for the accomplishment of the country's developmental aims. This Section intends to illustrate the process through which this political acknowledgement occurred. In order to do so, it emphasises its greatest outcome: a domestic legal environment that was set up to encourage the arrival of foreign capital, which created the initial conditions for the ulterior conclusion of IIAs. This exercise entails the apprehension of the ideological antecedents surrounding the adoption of the policy, and the identification of the various – domestic, international, public and private – elements whose complex interaction promoted Colombia's commitment with the systematic negotiation of IIAs.

In 1990, a constituent assembly was deliberating a new political charter in Colombia. In parallel, a government with strong neoliberal beliefs came into power with the intent of producing drastic modifications to the country's economic model, through the adoption of a comprehensive package of structural reforms. These are referred to as *apertura económica*. This policy aimed to replace the close vision of the economy that the country had maintained for more than 50 years. Between 1930 and the end of the 1980s, Colombia maintained a relatively closed economy through an import-substitution policy, a direct control of the payments balance and the proliferation of additional tariff and non-tariff barriers to free trade and investment. In this regard, it was argued that the effective change of economic paradigm depended on the reduction of the state's

involvement in the governance of domestic economic affairs; on the expanding of the role of private actors and market forces; and on access to the global economic system. While the 1991 Constitution provided public authorities with interventionist prerogatives to comply with the country's social goals, it adopted an open economic model. Accordingly, the government can adopt any economic archetype to comply with the country's public goals as long as such a model is framed within the constitutional normativity, so there were no major problems with implementing *apertura económica*.<sup>192</sup>

Until the emergence of *apertura económica* the internationalization of economic relations was generally implemented in an erratic way by the Colombian governments. In particular, the idea that the attraction of foreign investment was a convenient policy for the interests of Colombia was subject to variable consideration by public authorities. In the context of diplomatic inter-state relations and the constitutional protection of the rights of non-nationals, capital mobility was depicted as a practice implicitly accepted, due to its intrinsic relation with human mobility and the observation of the principle of reciprocity.<sup>193</sup> Eventually, foreign investment was considered as a regional interest in the realm of the *Andean Community* (CAN),<sup>194</sup> and was addressed by domestic

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<sup>192</sup> The economic analyst and academic José Antonio Ocampo support the view that, although the Constitution and *apertura* share some elements, the national development plan introducing such policy refers to principles and values embedded in the Constitution as normative justifications for the shift of the country's economic model –, a careful analysis indicates that they have radically different conceptions on the direction that state reform should have taken. See OCAMPO, José Antonio. “Reforma del estado y desarrollo económico y social en Colombia.” *Análisis político Vol. 17* (1992), p. 11-12.

<sup>193</sup> Although the implementation of incentives to immigration was not as prolific as in the case of other Latin American countries, the conclusion of friendship, commerce and navigation treaties among Colombia and the most industrialized countries (the European Nations, United States and Canada, between 1820-1940) facilitated the arrival of foreigners and their capital to the country, mainly dedicated to conduct economic activities around commerce, the building of infrastructure and the extractions of natural resources. Such agreements provided for reciprocal protection of non-national's personhood and property, including the assumption of certain behavioral duties by the state parties and the possibility to settle disputes through arbitral procedures, thus reminding the current content of international investment agreements. Likewise, Colombian constitutions generally maintained the provision for an equal treatment of nationals and aliens by public authorities and according to domestic laws. As inter-state relations became a matter of more technical regulation, such instruments became obsolete.

<sup>194</sup> Established in 1969, the Andean group (later on denominated Andean Community or CAN) envisaged the entry of foreign investment to the region as a shared interest, as annotated in art. 24 of CAN's constitutive agreement, which

laws dealing with technical aspects related to the management of foreign exchange and trade.<sup>195</sup>

In any case, it is clear that the flows of foreign investment never represented a substantial economic dynamic for Colombia until the 1990s.<sup>196</sup>

The illustration of *apertura económica*'s main ideas provide key elements for understanding why and under which terms the attraction of foreign investment acquired normative relevance in Colombia. The conceptual foundation of the policy is embedded in the Colombian national development plan 1990-1994, according to which the deep socioeconomic gaps affecting the country were not structural issues but the consequence of a closed and inefficient economic model that had been applied since the 1930s.<sup>197</sup> Therefore, it was claimed that the Colombian institutional

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refers to the creation of a common system for the treatment of foreign capital. In 1970, the enactment of community decision 24 installed a restrictive regime that reflected an arguable unfriendly attitude toward USA companies assumed by various Latin American governments. In 1987, the community abandoned such orientation through community decision 220, which brought more flexibility to the reception of foreign investment. Finally, in 1991 community decision 291 advocated for the liberalization of foreign investment in the region through policies such as the elimination of any distinction between domestic and foreign investment and removal of limits to profit remittances. See SHERMAN, Gail. "Colombian Political Bases of the Andean Pact Statute on Foreign Capital." *Journal of Interamerican Studies and World Affairs* Vol. 15 (1973), 111-120; DAVINOBIĆ, Tomislavo. "Foreign Investment Politics and International Law." *Lawyer of the Americas* Vol. 3 (1973), 10-15.

<sup>195</sup> The issue was firstly addressed in 1951 by decree 165 –the country's statute on foreign exchange and trade–, that granted relative openness to the entry and establishment of foreign investment and was partially inspired in the "Guidelines on Laws and Administrative Procedures of Host Countries", document issued at the Third International Bar Association Conference that took place in London, 1950. Later on, as a way to confront the 1967 crisis on the payments balance, a new foreign exchange statute was issued (decree 444) and the scope on the hosting of foreign capital changed through the establishment of strong controls, including the requirement of authorization by the National Planning Department. The government's protectionist attitude reached its highest point on 1975, when a norm (law 75) forbidding the entry of foreign investment for the financial sector was passed by the Congress. See LITTEL, Norman. "Improvements in Legal Climate Investments Abroad." *Virginia Law Review* Vol. 38 (1952), 729-745; SOLAUN, Mauricio & CEPEDA, Fernando. "Political and Legal Challenges to Foreign Direct Private Investment in Colombia." *Journal of Interamerican Studies and World Affairs* Vol. 15 (1973), 77-101.

<sup>196</sup> Foreigners occasionally performed an important role in the development of certain sectors of the economy such as transportation – fluvial navigation and air carriage, infrastructure – a number of key civil engineering projects, and the beer industry.

<sup>197</sup> The previous economic model was localized in the context of a number of ideas that were considered as fallacies by the National Development Plan: the conflictual relation between capital accumulation and capital distribution; the perception of the state as an efficient governance unit; and the likeliness of a state-oriented economic model as a democratic dynamic. In contrast, it was proposed a new ideological core based on the work of a number of academics. Michal Kalecki (no specific bibliographical reference provided in the plan), one of the most distinguished economists of the 20<sup>th</sup> century; Bela Balassa (*Exports and Economic Growth: Further Evidence*, 1978) did extensive consulting work for the World Bank; Jagdish Bhagwati (*Exports, Policy Choices and Economic Growth in Developing Countries*, 1991) is recognized as an advocator of international trade; Hollis Chenery (*Industrialization and Growth*, 1987) was a permanent advisor to the United States Agency for International Development and the World Bank; Jeffrey Sachs

economic apparatus should be “turned upside-down” through the implementation of an alternative economic paradigm which would suppose an opening to the global realm, and an opportunity for private actors to assume a central role in the country’s modernization and growth. This, in turn, would require the modification of the role of the state in the governance of economic affairs and its regulatory capacity.<sup>198</sup> Therefore, it was pointed out that one of the actions required in implementing this new economic approach was to develop suitable conditions for stable flows of international trade and investment.

#### B. First policy outcomes associated with the attraction of foreign investment

The particular policy outcomes of *apertura económica* took no time to emerge. Following the mandate of the national development plan, several public policy documents were issued. *Conpes* documents 2490 and 2572 sketched a favorable domestic legal regime for the promotion and treatment of foreign investment.<sup>199</sup> Accordingly, capital mobility was depicted as a fundamental element within the country’s constitutional internationalization and integration aspirations, which were part of the Country’s Constitutional Order and promoted economic growth.<sup>200</sup> In this regard,

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(*External Debt and Macroeconomic Performance in Latin America and East Asia*, 1985) is known as one of the main advisors of Eastern European and developing country governments during the transition from communism to a market system or during periods of economic crisis; and Stephen Jen (*Outward Orientation and Economic Performance in Developing Countries*, 1991), former IMF advisor.

<sup>198</sup> The ideological core of the national development plan lies in the formulation of a “new theory of development”, which was contrasted in the Plan with the prior model, identified as the “Latin American dependency school.” It is based on the work of a number of academics, such as Michal Kalecki (no specific bibliographical reference provided in the plan), one of the most distinguished economists of the XX century; Bela Balassa (*Exports and Economic Growth: Further Evidence*, 1978) did extensive consulting work for the World Bank; Jagdish Bhagwati (*Exports, Policy Choices and Economic Growth in Developing Countries*, 1991) is recognized as an advocator of international trade; Hollis Chenery (*Industrialization and Growth*, 1987) was a permanent advisor to the United States Agency for International Development and the World Bank; Jeffrey Sachs (*External Debt and Macroeconomic Performance in Latin America and East Asia*, 1985) is known as one of the main advisors of Eastern European and developing country governments during the transition from communism to a market system or during periods of economic crisis; and Stephen Jen (*Outward Orientation and Economic Performance in Developing Countries*, 1991), former IMF advisor.

<sup>199</sup> These public policy documents are issued by the National Council on Social and Economic Policy (CONPES), a public consultative body at the socioeconomic level. It has to be noted that these public policy documents performed the fundamental role of building an argumentative bridge between *apertura económica* and the Constitution.

<sup>200</sup> Document 2490 illustrated the macroeconomic benefits that foreign investment attraction would bring about to the country. Firstly, it complements internal savings. Secondly, it allows the diversification and modernization of the

it was asserted that since the attainment of alternative financial resources and technology could increase the internal levels of international trade and employment, the domestic market had to become a competitive player at the global level to attract significant foreign investment. Thus, this level of competitiveness depended on the implementation of policy and regulatory adjustments to liberalize the rules concerning access, treatment, and protection of foreign investors, and especially their property rights.<sup>201</sup> Consequently, two types of norms were proposed: rules governing the entry of transnational capital into the country,<sup>202</sup> and rules directed at consolidating the equal treatment of foreign investors with respect to the national industry.<sup>203</sup>

The change of the state's economic paradigm carried out by the government in 1990 was mainly the result of the impulse given by domestic public policies. Yet, their issuance was connected to the adoption of a structural adjustment program by the late 1980s, mainly promoted by the World Bank and the IMF.<sup>204</sup> Under widespread conditions of a capitalist production crisis and an associated fiscal crisis in the region, the program sought to promote the conduct of profound

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country's productive capacity. Thirdly, it is an alternative to external indebtedness. Fourthly, foreign investors establish long-term commitments at the host country and assume the risks proper of the entrepreneurial activity.

<sup>201</sup> For that purpose, three criteria – regarding the conduct of public authorities with respect to foreign investors – were established as guidelines for the ulterior design of the new regulation: *national treatment*, *automaticity*, and *universality*. While the *automaticity* criterion advocates for the reduction of the requirements for access of foreign investors, *universality* focuses on the idea that no discrimination should be conducted as regards to the economic sector in which the foreign investor develops its economic activity. See REPUBLICA DE COLOMBIA, Consejo Nacional de Política Económica y Social. *Documento Conpes 2490. Nuevo Régimen de Inversión Extranjera*. Octubre 8 de 1990, p.6.

<sup>202</sup> Eradicate the idea of economic sectors reserved to national enterprises; the removal of previous authorization requirements, including investment funds; modify the requirement of previous public offer to nationals when selling public shares of enterprises; work towards the establishment of a migratory regime based on the idea of free entry of foreigners to Colombian territory. See REPUBLICA DE COLOMBIA, Consejo Nacional de Política Económica y Social. *Documento Conpes 2490. Nuevo Régimen de Inversión Extranjera*. Octubre 8 de 1990, p.6-10.

<sup>203</sup> Focused on revenues, credits, taxes and capital transfer. See REPUBLICA DE COLOMBIA, Consejo Nacional de Política Económica y Social. *Documento Conpes 2490. Nuevo Régimen de Inversión Extranjera*. Octubre 8 de 1990, p.10-14.

<sup>204</sup> This program, designed by the World Bank and the IMF under the mandate of enabling the consecution of stable and open economic relations around the world, visualized Latin America as one of its main targets. On the global governance role of the Bretton Woods institutions, see generally STONE, Diane and WRIGHT, Christopher (Eds.) *The World Bank and Governance: A Decade of Reform and Reaction*. London; New York: Routledge, 2007; GIGLI, Juan Manuel. “Neoliberalismo y Ajuste Estructural en América Latina”. *Revista del Centro de Estudios Internacionales para el Desarrollo Vol. 1* (1999), 1-27.



regulatory reforms at the domestic level as a *condicio sine qua non* for the provision of loans, urgently required to deal with economic turmoil.<sup>205</sup> In this context, in 1990, Colombia concluded an agreement with the IMF to formalize the granting of loans under the condition of implementing a number of legal reforms including the reduction of tariffs, the relaxation of labor conditions, and the liberalization of the capital market.<sup>206</sup> Likewise, the agreement included a commitment to enabling private agents to play a greater role in the economy and therefore enhance overall efficiency and productivity.<sup>207</sup> While it is perhaps difficult to affirm that this initiative solely and directly conducted the attraction of foreign investment as an inexorable economic policy, it certainly influenced the regulatory changes that were subsequently produced. Most importantly, the agreement contributed to the creation of a proper atmosphere for the arrival and establishment of foreign capital.

As a result of these public policy processes, the Colombian Congress passed a new foreign exchange statute that established the foundations for the production of a drastic shift from the erratic attitude of prior governments with respect to the entry of foreign capital in the country.<sup>208</sup> In particular, the norm modified restrictive practices on foreign exchange through the simplification of the procedures governing access of foreign capital to the country and their regulation once in operation. Moreover, the new statute delegated to the executive branch the issuance of an autonomous statute on foreign investment, which was enacted in late 1991,<sup>209</sup> according to which a favorable scope on the mobility of capital was adopted.

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<sup>205</sup> See BAJPAI, Nirupam. "World Bank's Structural Adjustment Lending: Conflicting Objectives" 15 *Economic and Political Weekly* Vol. 25 (1990), 791-794.

<sup>206</sup> See GARAY, Luis Jorge. "Colombia: estructura industrial e internacionalización 1967-1996". Bogotá: Departamento Nacional de Planeación, 1998, p. 344.

<sup>207</sup> See AGARWAL, Manmohan & SENGUPTA, Dipankar. "Structural Adjustment in Latin America: Policies and Performance" 44 *Economic and Political Weekly* Vol. 34 (1999), p. 3130.

<sup>208</sup> See REPÚBLICA DE COLOMBIA, Congreso de la República. *Ley 9/1991*.

<sup>209</sup> See REPUBLICA DE COLOMBIA, Consejo Nacional de Política Económica y Social. *Resolución 51 de 1991*.

At this point, the association of a policy objective with a number of constitutional postulates – internationalization, regional integration, and economic growth – was key in the creation of a conviction to the identification of foreign investment as a crucial economic dynamic in Colombia. In the context of *apertura económica*, this process crystallized in a domestic legal regime designed to offer favorable conditions to foreign investors by means of granting them advantages and operational incentives. In this regard, the state acquired particular compromises in relation to the fostering of such benefits to foreign investors by lifting excessive controls over both the influx of capital and the conduct of foreign exchange operations. Further, it produced regulatory actions to guarantee equal conditions of operation to foreign investors. Yet, as will be explained in the following section, the emergence of a domestic legal regime favorable to foreign investors should be regarded as simply the starting point for further development of a public policy on the systematic conclusion of IIAs.

### **III. The rise of International investment agreements as a primary mechanism to attract foreign investment.**

#### **A. The emergence of international investment agreements**

At the outset of the 1990s, Colombia was one of many countries that was considering the arrival of transnational businesses and the extraction of their resources as a feasible alternative to invigorate its fragile economy. In fact, many states with comparable features shared this view and similarly advanced in the modification of their domestic legal frameworks to attract foreign investment. In this regard, the public policy documents enacted on the occasion of *apertura económica* suggested that the domestic reforms that derived into the enactment of a foreign

investment statute should be supplemented by an international diplomatic initiative to incentivise the entry of foreign capital.<sup>210</sup>

In response, Colombia started negotiating international investment agreements in 1992 at both the regional and international levels.<sup>211</sup> Although the country had negotiated an IIA with Germany as early as 1965, this agreement was never incorporated into the country's internal legal order. Colombia had been attentive to join early multilateral initiatives to regulate the protection of foreign investment, such as the one sponsored by the Organization for Economic Cooperation and Development (OECD)<sup>212</sup>, and the Free Trade Area of the Americas (FTAA).<sup>213</sup> However, the negotiations that led to the conclusion of the first group of IIAs ultimately started in the 1990s, and were mainly conducted in the context of a regional integration process with Venezuela and Mexico.<sup>214</sup> On the other hand, a block of bilateral treaties were also concluded with the United Kingdom,<sup>215</sup> Peru,<sup>216</sup> Cuba,<sup>217</sup> and Spain.<sup>218</sup> At the regional level, what was initially considered an

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<sup>210</sup> See REPUBLICA DE COLOMBIA, Consejo Nacional de Política Económica y Social. *Documento Conpes 2490. Nuevo Régimen de Inversión Extranjera*. Octubre 8 de 1990, p.6.

<sup>211</sup> As Sornarajah stresses out, although they started to be negotiated as early as 1959, there was a massive proliferation of bilateral investment treaties in the 1990s. See SORNARAJAH, M. *The International Law on Foreign Investment, Third edition*. Cambridge: Cambridge University Press (2010), p. 172.

<sup>212</sup> According with OECD's Committee on International Investment and Multinational Enterprises, the agreement was needed to respond to the dramatic growth and transformation of foreign direct investment that had been spurred by widespread liberalisation and increasing competition for investment capital. Therefore, governments and the business community and labour were urging new multilateral rules which set high standards and a balanced and equitable framework for dealing with investment issues. See OECD Report presented at the Council meeting at Ministerial level which took place in May 1995 (DAFFE/CMIT/CIME(95)13/FINAL, 5 May 1995). Retrieved from <http://www.oecd.org/daf/mai/htm/cmitcime95.htm> (last accessed 18 March 2016); GEIGER, Rainer. "Towards a Multilateral Agreement on Investment", *Cornell International Law Journal Vol. 31* (1998), 467-475. As suggested in the Conpes document 2969 of 1997, Colombia was interested in joining this initiative, as well as the ones similarly occurring in the context of FTAA (free trade area of the Americas) and the WTO. When the draft of the multilateral agreement was published in 1997, it got widespread criticism from civil society and its was finally withdrew in 1998.

<sup>213</sup> See First Summit of the Americas: Free Trade Area of the Americas. Retrieved from [http://www.summit-americas.org/Miami%20Summit/FTAA-English\(rev\).htm](http://www.summit-americas.org/Miami%20Summit/FTAA-English(rev).htm) (last accessed March 7 2016.)

<sup>214</sup> Treaty concluded in June 13, 1994, and embodied by *Ley 172/1994*. The treaty was subsequently denounced by Venezuela on May 31, 2006. Therefore, the treaty is currently known as the G-2 and is only applicable to the remaining parties.

<sup>215</sup> Treaty concluded in March 9 1994, and embodied by *Ley 246/1995*.

<sup>216</sup> Treaty concluded in April 26 1994, and embodied by *Ley 279/1994*.

<sup>217</sup> Treaty concluded in July 1, 1994, and embodied by *Ley 245/ 1995*.

<sup>218</sup> Treaty concluded in June 9 1995, and embodied by *Ley 437/ 1998*.

integration process exclusively oriented at creating a free trade zone, was transformed into a more complex economic initiative. Due to its experience with the NAFTA agreement, Mexico proposed to enlarge the scope of this initiative by including provisions relative to the management of foreign investment.<sup>219</sup> In turn, the negotiations towards the conclusion of bilateral investment treaties were justified by factors like, for example, the desire to advance on the process of integration with neighbouring countries, Peru and Cuba, the existence of strong historical and cultural ties with Spain, and the undisputable potential of bringing British capital to the country.

This policy approach was principally grounded in the perception that the massive influx of foreign capital would increase the country's level of economic growth. Therefore, in order to facilitate such inflow, the country should become a competitive global economic player through the adoption of a more aggressive internationalization strategy, that attended to the constitutional principle of internationalization of economic relations, and was founded in the systematic negotiation of IIAs.<sup>220</sup> From a political economy perspective, this approach resembles the idea of a market of scarce resources that are to be distributed among many prospective recipients, which recognize each other as competitors in the race for assuring the optimal arrival of investment flows. As a consequence, countries like Colombia develop competitive advantages to encourage foreign investors to establish in their jurisdiction, and in so doing gain preferential access to capital. In this context, the generation of effective competitive advantages depends on two elements. Firstly, the

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<sup>219</sup> See ECHAVARRÍA, Juan José. "El G3 en el Camino de la Integración Continental", in *NAFTA y MERCOSUR: un Diálogo Canadiense-Latinoamericano*. Santiago: Dolmen Ed., 1996, p.144.

<sup>220</sup> During the deliberations that gave rise to the 1991 Constitution at the Constituent Assembly, the internationalization of economic relations and the process of regional integration were carefully examined. In that regard, their inclusion in the political charter was justified by acceptance of the limitations proper of the national state, as well as the appreciation of the global economic reality, characterized by the formation of economic blocks. In conclusion, that the internationalization of economic relations "is an imperative of contemporary world, whose inattention or inadequate interpretation would translate in the waste of significant opportunities of progress and wellbeing". See REPUBLICA DE COLOMBIA, Asamblea Nacional Constituyente. *Ponencia sobre la internacionalización de las relaciones económicas*. Gaceta Constitucional No. 53 de abril 18 de 1991., p. 47-48.

nature of the decision-makers: foreign investors. They are transnational private entities that are incorporated in a certain “home country”, and whose social object is the conduct of a lucrative economic activity in a “host country”. Secondly, transnational capital mobility is framed within the political context of international relations, which from a legal point of view refers to international investment law. In turn, IIAs entail the compromise that foreign investors will be protected from the potential risks that might affect their interests, including those that might be caused by the acts of the state. This commitment leads to the generation of expectations toward foreign investors as to the conduct of public authorities, which should not interfere with the economic enterprise of foreign investors. In other words, the competitive advantages that countries like Colombia seek to acquire from the conclusion of IIAs are materialized in a stable and predictable environment of operation, that allows foreign investors to foresee the rules and conditions under which they conduct an economic activity. This environment is built on the imposition of behavioral standards on the state, and is articulated and legitimized on the basis of inter-state reciprocity.

#### B. Institutional adjustments to assure the effective implementation of IIAs

During the first IIA negotiations, the Colombian state faced a number of structural issues that had to be addressed in order to allow the effective articulation of the policy. For example, the country had conducted important regulatory reforms at the domestic level with the purpose of facilitating the entry of foreign capital to the country. Yet, the transnational nature of the phenomenon covered by the agreements required the implementation of further legal adjustments to enable the effectiveness of the compromises made by Colombia, insofar as the obligations included in the IIAs could be enforceable. On the one hand, the country had not joined the Multilateral Investment

Guarantee Agency (hereinafter MIGA<sup>221</sup>) and the International Centre for Settlement of Investment Disputes (hereinafter ICSID<sup>222</sup>) conventions. These are legal initiatives sponsored by the World Bank Group that set up a supranational institutional framework for the management of a number of aspects gravitating around the relations between host states and foreign investors. Additionally, the CCO was not in line with the legal protection of foreign investment offered by the IIAs. A number of constitutional provisions appeared to be in conflict with certain international standards included in the agreements negotiated. Particularly, there were inconsistencies in the context of the protection of foreign investors' property rights from expropriation. Thus, the effective articulation of the compromises assumed at the inter-state level required the state closing up to the global legal pattern of establishing supranational institutions and rules as a way to gain legal uniformity.

With regards to the first type of legal adjustments, both international legal instruments included elements to support the arrival of foreign investors to Colombia, and the protection of their interests upon the occurrence of negative impacts on their rights. While MIGA provides insurance to foreign

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<sup>221</sup> The Multilateral Investment Guarantee Agency (MIGA), created in 1985, is an international financial institution with the mandate of encouraging the flow of investment to and among developing countries. It does so by issuing guarantees against non-commercial risk and carrying out a wide range of promotional activities to support economic growth, reduce poverty, and improve people's lives. See generally SHIHATA, Ibrahim. "The Multilateral Investment Guarantee Agency". 2 *The International Lawyer Vol. 20* (1986), 485-497; SHIHATA, Ibrahim. *MIGA and Foreign Investment*. The Netherlands: Martinus Nijhoff Publishers, 1988.

<sup>222</sup> the International Centre for Settlement of Investment Disputes (ICSID), established under a convention similarly sponsored by the World Bank in 1965, is a multilateral specialized institution that facilitates the settlement of legal disputes arising directly out of an investment through conciliation and arbitration proceedings. These are regarded as alternatives for foreign investors to avoid resorting to domestic tribunals or diplomatic protection mechanisms. See Convention on the Settlement of Investment Disputes between States and Nationals of Other States, signed in Washington, March 18, 1965. When the first draft of the convention was approved at the World Bank's meeting in 1964 at Tokyo, Colombia along with most of Latin American countries (Argentina, Bolivia, Brazil, Chile, Costa Rica, Ecuador, El Salvador, Guatemala, Haiti, Honduras, México, Nicaragua, Panamá, Dominican Republic, Paraguay, Peru, Uruguay and Venezuela) voted against the instauration of ICSID. See FACH GOMEZ, Katia. "Latin America and ICSID: David versus Goliath?" Retrieved from [https://www.academia.edu/830229/Latin\\_America\\_and\\_ICSID\\_David\\_versus\\_Goliath](https://www.academia.edu/830229/Latin_America_and_ICSID_David_versus_Goliath) (last accessed March 20 2016.)

capital operating in a member country from non-commercial risks,<sup>223</sup> the ICSID convention establishes a dispute-settlement mechanism to solve prospective disputes which occur within the orbit of influence of the IIAs.<sup>224</sup> As a country with a variable economic performance immersed in a long-term armed conflict, Colombia considered the subscription to MIGA as an opportunity to expand positive expectations on prospective investors. Therefore, the country adhered to the convention in October 1992 and concluded the ICSID convention in May 1993 because it increasingly assumed a central role in the enforcement of the behavioural standards embedded in the IIAs.

In the subsequent review of the laws that incorporated these treaties into the domestic legal order, the Constitutional Court addressed a number of issues that speak about the challenges that the protection to foreign investment via IIAs poses to the nature of the state and its performance as a sovereign authority. In both cases, the Court manifested that the laws that incorporated the treaties were in accordance with the CCO because of the exceptional constitutional authorization to transfer public attributions to supranational entities, under the basis of equity, reciprocity, and national convenience.<sup>225</sup> However, with regards to the ICSID convention, the Court had to address the question of the treaty's potential to affect the sovereignty of the state by displacing the domestic judiciary in the settlement of disputes taking place within the country's jurisdiction. Thus, the Court depicted arbitration as an alternative mechanism to settle social conflicts, that was linked

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<sup>223</sup> In particular, the agency recognizes as coverable the risks resulting from; a. government restrictions on currency conversion and transfer; b. legislative actions or administrative actions or omissions of the host government which have the effect of depriving the foreign investor of his ownership or control of, or substantial benefits from, his investment; c. repudiation or breach of government contracts in the cases where the investor has no access to a competent judicial or arbitral forum; and d. armed conflict and civil disturbance. See Convention establishing the Multilateral Investment Guarantee Agency, signed at Seoul, October 11 1985, art. 11-14.

<sup>224</sup> See generally SCHREUER, Christoph H. *The ICSID Convention: A Commentary*. Cambridge: Cambridge University Press, 2001.

<sup>225</sup> See REPUBLICA DE COLOMBIA, Corte Constitucional. *Sentencia C-203/1995*. M.P. José Gregorio Hernández Galindo, p. 12-13; *Sentencia C-442/1996*. M.P. Eduardo Cifuentes Muñoz.

with the CCO through its identification with the aim of peaceful coexistence. It located the convenience of adopting this mechanism in its efficiency and dynamic nature. In that regard, the Court said that arbitration provides more equitable and reasonable decisions than the domestic judiciary, due to the technical complexity attributed to the conflicts stemming from the relation between the state and foreign investors.<sup>226</sup> Yet, the Court felt compelled to develop an argumentative position over the ambivalent implications of investor-state arbitration on the country's sovereignty. It considered foreign investors to be subjects of international law, with legal capacity to appear before an international tribunal,<sup>227</sup> and justified the need to promote a convenient depoliticization of the investor-state legal relations by means of their dissociation from inter-state diplomatic relations.<sup>228</sup> These decisions cleared the path for the continuation of IIA negotiations from 1997 onwards.

All in all, the institutional adjustments produced during the first phase of the negotiation of IIAs by Colombia went to the heart of the Constitution. It was the result of a structural tension generated by an incompatibility between the content of the agreements and certain portions of the CCO, as to the social function of property.<sup>229</sup> This stress derived from the protection of the property rights of foreign investors from the public action of the state, in the context of direct expropriation.<sup>230</sup> On the occasion of the examination of the first set of IIAs entered into by the country between 1995 and 1998, and prior to their implementation in the domestic legal order, the Colombian

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<sup>226</sup> See REPUBLICA DE COLOMBIA, Corte Constitucional. *Sentencia C-442/1996*. M.P. Eduardo Cifuentes Muñoz, p. 36. A similar argumentative line had been previously adopted by the Court in Decision C-358/1996 when reviewing the United Kingdom-Colombia Bilateral Investment Treaty. See REPUBLICA DE COLOMBIA, Corte Constitucional. *Sentencia C-358/1996*. M.P. Carlos Gaviria Díaz, José Gregorio Hernández Galindo.

<sup>227</sup> See REPUBLICA DE COLOMBIA, Corte Constitucional. *Sentencia C-442/1996*. M.P. Eduardo Cifuentes Muñoz, p. 42.

<sup>228</sup> See REPUBLICA DE COLOMBIA, Corte Constitucional. *Sentencia C-442/1996*. M.P. Eduardo Cifuentes Muñoz, p. 43.

<sup>229</sup> See Chapter One.

<sup>230</sup> This topic is considered as one of the cornerstones of modern International Investment Law.



Constitutional Court noted that a number of provisions included in the treaties were contrary to the Constitution's property clause.<sup>231</sup> In particular, the Tribunal acknowledged that the IIAs strictly prohibited the parties to implement a type of regulatory action that was otherwise authorized by the Colombian Charter: the expropriation for reasons of equity, not subject to judicial review or the payment of any compensation.<sup>232</sup> In that respect, the Court argued that to be admitted the treaty's expropriation provision as a valid exception to the rule embedded in the Constitution, a preferential treatment would be endorsed to the investors from the state with which Colombia had concluded the treaty. As a consequence, this provision was found to be discriminatory for investors from both Colombia and other countries.<sup>233</sup> Therefore, the tribunal ruled that the IIAs were partially unconstitutional since the provisions on expropriation overlooked the constitutional authorization of expropriation without compensation.<sup>234</sup> As a result, the definitive application of the IIAs was left in a legal vacuum.<sup>235</sup> According to David Schneiderman, the Colombian

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<sup>231</sup> See REPUBLICA DE COLOMBIA, Corte Constitucional. *Sentencia C-358/1996*. M.P. Carlos Gaviria Díaz, José Gregorio Hernández Galindo (regarding the United Kingdom - Colombia BIT); *Sentencia C-379/1996*. M.P. Carlos Gaviria Díaz. (regarding the Cuba-Colombia BIT); *Sentencia C-008/1997*. M.P. Alejandro Martínez Caballero (regarding the Peru-Colombia BIT); *Sentencia C-494/1998* M.P. Hernando Herrera Vergara (regarding the Spain-Colombia BIT).

<sup>232</sup> "Private property and the other rights acquired in accordance with civil laws are guaranteed and may neither be disregarded nor infringed by subsequent laws. When in the application of a law enacted for reasons of public utility or social interest a conflict between the rights of individuals and the interests recognized by the law arises, the private interest shall yield to the public or social interest. Property has a social dimension which implies obligations. As such, an ecological dimension is inherent to it. The State will protect and promote associative and joint forms of property. Expropriation may be carried out for reasons of public utility or social interest defined by the legislature, subject to a judicial decision and prior compensation. The compensation will be determined by taking into account the interests of the community and of the individual concerned. In the cases determined by the legislator, the expropriation may take place by administrative action, subject to subsequent litigation before the administrative law courts, including with regard to the price. *However, the legislator, for reasons of equity, shall determine the cases in which there is no place for the payment of compensation, by the affirmative vote of an absolute majority of members of both chambers.*" See REPÚBLICA DE COLOMBIA, *Constitución Política*, 1991, art. 58.

<sup>233</sup> See REPUBLICA DE COLOMBIA, Corte Constitucional. *Sentencia C-358/1996*. M.P. Carlos Gaviria Díaz, José Gregorio Hernández Galindo, p. 34.

<sup>234</sup> See OTERO, Hernando & GÓMEZ-PINZÓN, Enrique. "Colombia", in HAMILTON, Jonathan C. Et Al (Eds.) *Latin American Investment Protections. Comparative Perspectives on Laws Treaties, and Disputes for Investors, States, and Counsels*. Boston: Martinus Nijhoff Publishers, 2012, p. 188.

<sup>235</sup> Exceptionally, the G2 FTA with Mexico entered into force due to an express reservation made by the Colombian government when the instrument was concluded, with respect to the interpretation of the treaty's expropriation clause, which should be conducted in accordance with the country's constitution.

Constitutional Court undertook a decisive initiative to counter the disruptive effects of the global economic strategy procured by the government.<sup>236</sup>

Yet, the executive branch reacted strongly to the decision issued by the Constitutional Court, since it was the authority in charge of the IIAs negotiation policy. In November 1997, *Conpes* issued a public policy document with the purpose of reiterating the strategic role of foreign investment for the country's economic growth. In this regard, it suggested that the constitution had to be amended in order to eliminate the state's prerogative to conduct non-compensated expropriations for reasons of equity. It was argued that maintaining the regulatory warrant would prevent the country from concluding IIAs and thus attracting transnational capital, because it would lose competitiveness in relation to other states that had adapted their domestic legal frameworks to the international standard, or *Hull formula*.<sup>237</sup> Therefore, in 1999, the executive branch introduced an amendment petition before the Congress, which eventually resulted in the modification of the property clause and the removal of the regulatory prerogative from the CCO.<sup>238</sup> With the constitutional question solved, the IIA negotiation policy could now be consolidated.

These legal adjustments occurred on the occasion of the first set of IIAs negotiations in which Colombia took part. They reveal the contentious nature of the process that led to the incorporation of this policy into the CCO. Given the particular nature of the phenomenon under regulation, the need to secure the efficient operation of the IIAs that had been negotiated required the affiliation of the state to supranational institutions. This entailed the transfer of certain sovereign prerogatives

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<sup>236</sup> See SCHNEIDERMAN, David. *Constitutionalizing Economic Globalization. Investment Rules and Democracy's Promise*. Cambridge: Cambridge University Press, 2008, p. 177.

<sup>237</sup> According to the *Hull Formula*, an expropriation must be accompanied by compensation in a strict manner that is prompt, adequate and effective. For an illustration of the content and scope of the Hull formula on expropriation, see generally DOLZER, Rudolf. "New Foundations of the Law of Expropriation of Alien Property." *3 The American Journal of International Law Vol. 75* (1981), 553-589.

<sup>238</sup> See REPÚBLICA DE COLOMBIA. *Acto Legislativo 01*, 1999.

and the modification of its constitutional setting. These measures were adopted to avoid prospective normative tensions with respect to the protection of the interests of foreign investors, and in relation to the regulatory activity of public authorities. In this process, the Constitutional Court performed a decisive yet ambivalent role. On the one hand, it legitimized the new supranational memberships by means of their identification with certain constitutional norms. In contrast, the Court performed as a gendarme to deal with the irruption of international standards that could preclude the state's sovereign prerogatives and the validity of its social regulatory function. In the latter case, while the Court tried to oppose resistance to the advancement of the economic globalization project due to its apparent incompatibility with the CCO, the political response from the executive branch was emphatic. With the acquiescence of the legislative authorities, the Constitution was amended.

From the analysis of this stage of the process that consolidated the negotiation of IIAs as a primary socioeconomic policy in Colombia, an important insight associated with the normative rationale embedded in these legal instruments is unveiled. In a country that has adopted foreign investment as a relevant factor for the success of its economic model, sovereignty can only be fully defended through a political economy that reconciles the national needs and interests with the inexorable tendency toward the internationalization of the economy.<sup>239</sup> This rationale entails, in consequence, a depiction of the state's limited governance role. In order to consolidate a legal climate which attracts the arrival of foreign investment, the state seems to be compelled to accept the progressive standardization of its sovereign prerogatives for the sake of legal uniformity, predictability, and stability.

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<sup>239</sup> See SCHNEIDERMAN, David. *Constitutionalizing Economic Globalization. Investment Rules and Democracy's Promise*. Cambridge: Cambridge University Press, 2008, p. 179 (quoting the dissenting Opinion of Magistrates Barrera Carbonell, Cifuentes Muñoz and Ortiz Gutierrez at Decision C-358/1996, p. 68).

#### IV. Consolidation the IIA negotiation policy

##### A. IIA negotiations, trends and policy guidelines

As a consequence of the institutional adjustments produced in the aftermath of the first IIA negotiations entered into by Colombia, by the year 2000, this policy had been released from a number of limitations that problematized the effective implementation of the agreement into the country's Constitutional Order. The conclusion of more treaties of this kind became common practice within the context of the country's international economic policy. Both the transference of public prerogatives to supranational structures, and the amendment of the 1991 Constitution in regards of the adjustment of direct expropriation to the international standards, were effective in facilitating the operation of the system. Particularly, they promoted the routinization of the policy practice.<sup>240</sup>

By December 2015, Colombia had entered into 22 international investment agreements; 12 bilateral investment treaties and 10 free trade agreements that include investment chapters. The advancement of the IIAs negotiation policy reveal the country's disposition to be identified as a capital-importer, in the context of three negotiation pattern. The first corresponds to the aim of attracting capital from countries such as the United States, Canada, the European Union, United Kingdom, Switzerland, Japan, Spain, and France, which have traditionally been Colombia's main commercial partners. The second pattern is oriented to promote the arrival of investors from emerging economies such as China, India, Singapore, Korea, Turkey, and Israel, which have the potential to become great sources of capital in the short term. Finally, the third pattern lies at the

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<sup>240</sup> Very telling of this routinization is, for instance, UNCTAD's 2004 assessment on Colombia's position with regards to the promotion and protection of foreign investment: whereas the country has only one bilateral investment treaty in effect, now that the constitutional norm on expropriation has been amended the negotiation and ratification of new treaties should proceed. See United Nations Conference on Economic Development UNCTAD. *Investment Policy Review: Colombia*. Geneva: United Nations, 2006, p. 28.

regional level, where Colombia has successfully negotiated treaties with states sharing political views and a compromise with economic globalization. This has taken place in the context of the *Pacific Alliance* – formed by Mexico, Chile, Peru, Panama and Costa Rica – and the *North Triangle* economic integration area – formed by El Salvador, Honduras and Guatemala.

As José Antonio Rivas, former director of the Foreign Investment Division at the Ministry of Commerce, has noted, Colombia adopted a singular position with respect to the negotiation of IIAs compared to the regional trend. As an emergent economy, it was one of the few states negotiating IIAs between 2006 and 2010. This contrasts with the fact that Latin America was the region with the highest number of investor-state arbitration cases before the ICSID in that period.<sup>241</sup> In contrast, countries like Venezuela, Ecuador, and Bolivia rejected these types of agreements by withdrawing their membership from ICSID, or by manifesting disagreement with the scope of the agreement after significant defeats in arbitration (for example, Argentina). For its part, Colombia significantly increased its confidence in foreign capital as a vehicle for economic prosperity and, consequently, on foreign investment protection via IIAs as a means to secure such resources.<sup>242</sup>

From a substantive perspective, the regularization of IIA negotiations encompassed an evolution in the content and scope of the protection granted to foreign investors in Colombia. New public policies on the matter promoted the advent of supplementary elements that focused on the optimization of this safeguarding by means of the limitation of the state's regulatory capacity. On the other hand, concerns about social and environmental sustainability of the emerging legal regime were progressively addressed in the context of the IIAs negotiation. In particular, three

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<sup>241</sup> See RIVAS, José Antonio. "Colombia", in BROWN, Chester (Ed.) *Commentaries on Selected Model Investment Treaties*. Oxford: Oxford University Press, 2013, p. 183.

<sup>242</sup> See MORTIMORE, Michael. *Arbitraje internacional basado en cláusulas de solución de controversias entre los inversionistas y el Estado en acuerdos internacionales de inversión: desafíos para América Latina y el Caribe*. Serie Desarrollo Productivo 188. Santiago de Chile: CEPAL, 2009, p.8.

legal milestones should be presented. Firstly, the introduction of safeguards from regulatory acts of the state tantamount to expropriation. Secondly, the appearance of references, norms and mechanisms regarding both corporate social responsibility and environmental, labor, and human rights issues. Thirdly, the foundation of a public policy aimed at addressing prospective international investment controversies.

#### B. Indirect expropriation

In the context of the first set of IIAs concluded by Colombia during the 1990s, the protection offered to foreign investment was localized in the realm of a series of behavioral standards provided by international law. These standards refer to either the treatment of foreign investors, which must be fair, equitable, and competitive with respect to nationals and non-nationals from other countries, or to their safeguard from direct expropriation, which, if produced, should be accompanied by a prompt, adequate and effective compensation. These components were built around the deliverance of a stable environment of operation, which is considered a site where foreign investors can conduct their economic activity with certainty concerning both their behavior and that of public authorities. Yet, while these standards were devoted to imposing obligations on public authorities in order to orient their particular relation with foreign investors, they were not strictly designed to step into the general realm of the activity of the state as a sovereign regulatory entity. This last situation is relevant since, in fact, foreign investors may be occasionally affected by regulatory measures. Although these measures are not directly intended to interfere with their entitlements and expectations, they could indirectly harm their private interests while acting in the pursuance of public goals. In response, the Colombian state followed the tendency observed globally and started including provisions on indirect expropriation in its IIAs negotiation agenda. These provisions address the safeguarding of foreign investors from the detrimental effects of

public regulatory actions. Traditionally, expropriation had been visualized within IIAs as sovereign actions comprising a formal transfer of title or outright seizure. Starting with a bilateral investment treaty that Colombia and Chile concluded in 2000, the majority of international investment agreements concluded by the country comprised provisions on the protection of foreign investors from state measures that could indirectly affect their investments.<sup>243</sup>

In 2008, on the occasion of the constitutional review of the 2006 United States-Colombia free trade agreement,<sup>244</sup> the protection from indirect expropriation acquired connotation within the constitutional debates around the complex interactions between the state and private economic actors, provided that in the context of the CCO the accomplishment of the country's political program demanded a dynamic regulatory scheme from public authorities.<sup>245</sup> Unlike the broad way in which the indirect expropriation standard was formulated in the 2000 Chile-Colombia bilateral investment treaty (hereinafter BIT), the agreement concluded with the USA comprised a more elaborated safeguard. Besides the inclusion of the standard, the IIA contained guidelines on the identification of indirect expropriation cases<sup>246</sup> and criteria for their further analysis,<sup>247</sup> including references to which regulatory actions of the state should not be considered as indirect takings.<sup>248</sup> Since this agreement was formulated in a more comprehensive way, the Colombian Constitutional

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<sup>243</sup> See 2000 Chile-Colombia Bilateral Investment Treaty.

<sup>244</sup> See REPUBLICA DE COLOMBIA, Corte Constitucional. *Sentencia C-750/2008*. M.P. Clara Inés Vargas Hernández.

<sup>245</sup> When the 2000 Chile-Colombia Bilateral Investment Treaty was reviewed, the Colombian Constitutional Court limited to declare that the treaty's safeguard concerning expropriation, which happened to covered both direct and indirect takings, was adjusted to the constitutional property clause embedded in article 58 of the charter, without providing further explanation. See REPUBLICA DE COLOMBIA, Corte Constitucional. *Sentencia C-294/2002*. M.P. Jaime Araujo Rentería, p. 26.

<sup>246</sup> The determination of whether a measure or series of measures of a party constitute an indirect expropriation requires a case-by-case, fact-based inquiry.

<sup>247</sup> These criteria are the following: the economic impact of the measure; the extent to which the acts interfere with distinct, reasonable expectations; the character of the measure or series of measures.

<sup>248</sup> Non-discriminatory measures, designed and applied to protect legitimate public welfare objectives, for instance health, safety and the protection of the environment, were deemed as not constituting indirect expropriation.

Court found itself obliged to provide a justification concerning the validity of these type of measures. In particular, it had to justify why a provision that could restrict the regulatory manoeuvre of the state, in a way that could eventually collide with the achievement of certain public objectives, should still be considered constitutional.<sup>249</sup> The Constitutional Court based its favorable examination of indirect expropriation in its localization within the framework of constitutional property clause, so as to assign normative support. In that sense, it pointed out that the provisions on indirect expropriation should be seen as the crystallization of the private ownership safeguard, which should be indistinctly applicable to both nationals and foreigners.<sup>250</sup>

Nevertheless, the precedent line was soon revised by the Constitutional Court. In 2009, on the occasion of the examination of a new free trade agreement concluded between Chile and Colombia,<sup>251</sup> the Tribunal introduced the “legitimate expectations doctrine” to rationalize the regulatory restrictions that public authorities might experiment by the inclusion of standards on indirect expropriation within IIAs. Not only did the incursion of this doctrine in the constitutional debate implied the replacement of the argumentation line that the Court had adopted in terms of the justification of the indirect expropriation clause via the protection of property rights. It also encompassed the crucial inclusion of the normative idea of economic freedom as a limited policy space. The Court localized the debate around the validity of indirect expropriation in the realm of

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<sup>249</sup> Several interventions of different political and civil society actors, including the ones of Jorge Enrique Robledo – a member of the Congress representing the left-oriented political party *Polo Democrático* – and the think tank *Dejusticia*, led to the Court’s direct pronouncement on the matter, as captured by Decision C-750/08. Interestingly, congressman Robledo was clear in signalling the disproportionate advantages that foreign investors would gain by means of the treaty’s content and scope, particularly in case an official decision would affect their economic interests, regardless of its public nature and purpose. Moreover, *Dejusticia* expressly claimed that regulatory chill might be produced, thus undermining Colombia’s regulatory capacity and public policies on delicate issues such as access to health service, the protection of the environment or the provision of public utilities. See REPUBLICA DE COLOMBIA, Corte Constitucional. *Sentencia C-750/2008*. M.P. Clara Inés Vargas Hernández, p. 53-65.

<sup>250</sup> Once again, the principles of integration and internationalization of economic relations. See REPUBLICA DE COLOMBIA, Corte Constitucional. *Sentencia C-750/2008*. M.P. Clara Inés Vargas Hernández, p. 324.

<sup>251</sup> See REPUBLICA DE COLOMBIA, Corte Constitucional. *Sentencia C-031/2009*. M.P. Humberto Antonio Sierra Porto.



international economic law.<sup>252</sup> Particularly, it posed the inquiry in the context of the political struggles between capital-importing countries adopting regulatory measures to nationalize property owned by foreigners, and capital-exporting countries deciding to protect their citizens from such actions by means of the development of multilateral legal initiatives.<sup>253</sup> Additionally, with the purpose of providing an authoritative opinion on the matter, the Court made a deferential reference to certain famous investor-state arbitration cases to provide an illustration of certain state regulatory measures that had been identified as indirect expropriations by these bodies.<sup>254</sup>

Having established an international economic analytical framework, the Court pointed out that any scrutiny of indirect expropriation should transcend considerations of the protection of private property and the primacy of general interest, as was the case with the rationale on direct expropriation. In this case, the Court sustained that the examination had to include reflections on the exercise of sovereign regulatory prerogatives, and the protection of legitimate interests. Consequently, the Tribunal asserted that indirect expropriation had its constitutional foundation in

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<sup>252</sup> Making a rather erratic reference to Andrew Newcombe's 1999 doctoral dissertation "When Is Government Regulation Expropriatory and When Should Compensation Be Paid", as well as his 2005 article "The Boundaries of Regulatory Expropriation in International Law" (ICSID Review (2005) 20 (1): 1-57).

<sup>253</sup> In that regard, the Court specifically cites the "1961 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens" and the 1967 OECD Convention on the Protection of Foreign Investment as direct legal antecedents of the incorporation of indirect expropriation clauses within IIAs. See REPUBLICA DE COLOMBIA, Corte Constitucional. *Sentencia C-031/2009*. M.P. Humberto Antonio Sierra Porto, p. 90-91.

<sup>254</sup> "Arbitral tribunals have qualified as indirect expropriation the following type of governmental acts; a. the constitution of a protected environmental zone with the consequent decision of cancelling a construction permit. (*Metalclad Corp. v. México*. ICSID Case No. ARB(AF)/97.1. Award of August 30 2001); b. the interference of a public authority in order to cancel a contract with a foreign investor (*CME v. Czech Republic*. UNCITRAL Tribunal Arbitral. Partial Award of September 13 2001.); the cancellation of a toxic waste deposit licence (*Técnicas Medioambientales Tecmed S.A. v. México*. ICSID Case No. ARB(AF)/00/2. Award of May 29 2003); the imposition of excessive or arbitrary taxes carrying the impact of an investment's economic sustainability (*Revere Copper and Brass Inc. v. Overseas Private Investment Corporation*. Award of August 24 1978); the annulment of a free trade zone, generating negative spillover on importing practices (*Antoine Goetz & Others and S.A. Affinage des Metaux v. Republic of Burundi*. ICSID Case No. ARB/01/2. Award of June 21 2012); the imposition of managers by the host state (*Starrett Housing Corporation, Starrett Systems, Inc., Starrett Housing International, Inc., v. The Government of the Islamic Republic of Iran, Bank Omran, Bank Mellat*. Iran-US Claims Tribunal Case No. 24. Award of August 14 1987). See REPUBLICA DE COLOMBIA, Corte Constitucional. *Sentencia C-031/2009*. M.P. Humberto Antonio Sierra Porto, p. 91-92.

the principle of legitimate expectations, which should be assimilated to a corollary of the *bona fide* principle.<sup>255</sup> The Court explained that from these principles it is derived that citizens must evolve within a stable and predictable legal environment in which they can trust. Thus, it concluded that the protection against indirect expropriation found its justification in the fact that public authorities should preserve a coherent behavior in relation to their previous actions, except for the emergence of public motivations that would encourage it to behave otherwise. In particular, it pointed out that private economic agents should be protected from abrupt and unexpected changes produced by regulatory actions, bearing in mind the certain and reasonable expectations they have on the profitability of their enterprises.<sup>256</sup>

For these reasons, the Constitutional Court found that the standard of protection against indirect expropriation included in the Chile-Colombia Free Trade Agreement did not limit in a disproportionate way the state's regulatory prerogatives. Yet, it warned that the eventual application of the standard should be the result of a strict verification of its premises, due to the fact that it could be subject to exceptions based on the protection of public interests.<sup>257</sup> The same position was assumed by the Court in the analysis of similar provisions that were embedded in the IIAs that Colombia entered into with Switzerland, the North Triangle (Honduras, Guatemala and El Salvador), Canada, China, and United Kingdom.<sup>258</sup>

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<sup>255</sup> See REPÚBLICA DE COLOMBIA. *Constitución Política*. 1991, art. 83.

<sup>256</sup> See REPUBLICA DE COLOMBIA, Corte Constitucional. *Sentencia C-031/2009*. M.P. Humberto Antonio Sierra Porto, p. 93.

<sup>257</sup> See REPUBLICA DE COLOMBIA, Corte Constitucional. *Sentencia C-031/2009*. M.P. Humberto Antonio Sierra Porto, p. 94.

<sup>258</sup> See respectively, REPUBLICA DE COLOMBIA, Corte Constitucional. *Sentencia C-150/2009*. M.P. Mauricio González Cuervo; *Sentencia C-446/2009*. M.P. Mauricio González Cuervo; *Sentencia C-608/2010*. M.P. Humberto Antonio Sierra Porto; *Sentencia C-199/2012*. M.P. Gabriel Eduardo Mendoza Martelo; *Sentencia C-169/2012*. M.P. María Victoria Calle Correa.

### C. The emergence of social and environmental concerns

In the context of the Colombian IIA negotiation policy, the protection to foreign investment was reinforced importantly through the inclusion of indirect expropriation standards. In parallel, the agreements concluded by Colombia began to embed references, clauses and supplementary accords that addressed a number of social and environmental concerns related to the type of practices that foreign investors implemented in the development of their economic enterprise at the signatory countries.

As explained, the logic inherent to the IIAs concluded by Colombia builds on the possibility to establish an inter-state legal regime to provide stable and predictable conditions of operation to foreign investors, considering the benefits that transnational capital might bring to the country's economy. Therefore, from the terms of the IIAs the relationship between investors and the host state is depicted as a unilateral dynamic. While the sovereign has a number of obligations to the foreign economic actors located within its jurisdiction, these private actors have apparently no correlative behavioral responsibilities, beyond a generic duty to respect domestic laws. Yet, this depiction disregards the fact that in the context of the economic activity that motivated foreign investors to arrive in the country, adverse social and environmental impacts might be caused on the people located within their sphere of influence and the environment itself. Under this perspective, IIAs would seem to be unbalanced equations. While foreign investors are entitled to occupy a privileged position in society to obtain economic profits from the execution of a productive activity, no correlative behavioral duties are observed in relation to the social, political and cultural surroundings.

These sort of concerns permeated the ambit of IIA negotiations worldwide. At some point, a number of international governance fora – such as the OECD and the World Economic Forum –

began issuing studies, policy guidelines and recommendations suggesting that states negotiating IIAs should incorporate mechanisms to either mitigate or dissuade the occurrence of these kinds of negative impacts within the orbit of the investor-state relationship.<sup>259</sup> In the particular case of Colombia, the risk around the occurrence of this kind of prospective spillovers was evident. The country's political instability, and the weakening of social structures that the internal armed conflict had produced, were elements to consider as facilitators or triggers of occasional power abuses by foreign investors. Moreover, there is evidence according to which certain foreign investors (multinational corporations) have fomented or taken advantage of direct violence and social inequalities to obtain territorial domination and operational privileges that materialized in massive and systematic human rights violations.<sup>260</sup>

In this regard, in 2001 a public policy document advised the Colombian authorities involved in the negotiation of IIAs to include labor and environmental issues in their negotiation agendas.<sup>261</sup> As a consequence, three of the most prominent agreements concluded by the country – the ones having United States, Canada, and the European Union as counterparts – encompassed particular regulatory schemes to impinge the content and scope of these international investment agreements with this type of normative elements.

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<sup>259</sup> See ORTINO, Federico. "The Social Dimension of International Investment Agreements: Drafting a New BIT/MIT Model?" OECD, VII Global Forum on International Investment, 27-28 March 2008. Retrieved from <http://www.oecd.org/investment/globalforum/40311350.pdf> (last accessed March 18 2015.)

<sup>260</sup> See ROY-GRÉGOIRE, Étienne. *Land and Conflict. Resource Extraction, Human Rights, and Corporate Social Responsibility: Canadian Companies in Colombia*. Report prepared by Mining Watch Canada & CENSAT-Agua Viva for Inter Pares. Ottawa, 2009.

<sup>261</sup> See REPUBLICA DE COLOMBIA, Consejo Nacional de Política Económica y Social. Documento Conpes 3135. *Lineamientos de Política Para las Negociaciones Internacionales de Acuerdos de Inversión Extranjera*. Octubre 9 de 2001.

*Table 2: inclusion of social and environmental elements into international investment agreements concluded by Colombia*

International Legal Instrument	Preamble	Institutional Performance Duties	CSR Clause	Additional mechanisms
<b>Colombia – USA Free Trade Agreement (2007)</b>	General reference to labor and environmental issues	<b>Art. 17.6:</b> Cooperation activities for promoting CSR	-----	Supplementary agreements on labor and environmental issues could be negotiated
<b>Colombia – Canada Free Trade agreement (2008)</b>	Encourage enterprises to respect CSR	<b>Art. 817:</b> Committee on Investment has to promote CSR issues.	<b>Art 816:</b> -States should “encourage” enterprises -Voluntary adoption of internationally recognized standards -On internal policies and practices -Specific topics	-Side Agreements on labor and environmental issues -Human Rights Impact Assessment Mechanism
<b>Colombia-European Union Free Trade Agreement (2012)</b>	General reference to sustainable development	<b>Art. 286:</b> Cooperation activities for implementing sustainable development, including CSR	<b>Art. 271(3) (4):</b> States should “promote” CSR through flexible mechanisms	-Chapter on Sustainable Development as integrator of social elements within the FTA -Environmental and labor clauses

Source: Direct consultation to legal instruments

In accordance with Table 2, the inclusion of social and environmental elements into the IIAs concluded by Colombia was not uniform. Rather, it depended on the content and extent of the measures subject to consideration, thus reflecting the contentious nature of the issue.

From the point of view of their nature, the inclusion of references in the preambles of the IIAs suggests the intention to impinge a general influence on the interpretation and application of the legal instruments. This can be understood as an effort to set up a tone for the interpretation of the obligations included in the agreement. Yet, it is also clear that the effective impact of these

references in the interpretation and application of the behavioral standards included in the IIAs would be vague, due to the lack of specific prescriptions of the parties involved. In turn, the agreements also encompass certain duties directed explicitly to the signatory states on two grounds. Firstly, they request the implementation of domestic policies regarding the promotion and protection of labor rights and the environment. Second, they command governments to “encourage” private businesses, both national and foreign, to enact corporate social responsibility and sustainable development practices. Whereas these actions were supposedly intended to influence the behavior of foreign investors as to the conduct of their economic activities within the signatory countries, the associated duties do not directly address their behavior. Therefore, it is unclear whether they could have the capacity to influence the equation that defines the relationships between the state and foreign investors. Not only because they are neither particular binding commands nor directly enforceable by any kind of procedure, but also because the power relations between the state and foreign investors seems to be unbalanced.

Prominently, in the orbit of the free trade agreement concluded between Colombia and Canada in 2008, a series of supplementary legal instruments were developed to supervise and mitigate the potential impact of the treaty on the respective populations of the signatory countries. In this regard, the implementation of the main international agreement was accompanied by two side agreements on labor conditions and the protection of the environment. Likewise, an annual human rights report mechanism was established. They reflect the continuous concerns that the implementation of this IIA generated on both the Canadian and the Colombian social movements, and the consequent pressure exercised on the legislative organs of the countries, with respect to the implications of incorporating the treaty into their domestic legal orders. In the end, the eventual inclusion of these side agreements into the realm of the Canada-Colombia FTA was the only way

to capture the consent of the legislative bodies, responsible for its incorporation, on the occasion of the accord's ratification.<sup>262</sup>

#### D. The emergence of a system to address international investment controversies

The building of a favorable environment for the arrival of foreign investment in Colombia via the systematic conclusion of IIAs was, at some point, acknowledged as a potential source of challenges for Colombia at the level of its international responsibility. As explained, IIAs are structured to guarantee investors that their entitlements and expectations will remain stable as a consequence of the predictable behavior from the other societal actors, including public authorities. As a result, the greatest source of enforceability of these legal instruments resides in the fact that they include specific provisions on investor-state dispute settlement. This mechanism entitles foreign investors to submit a case before an international arbitral tribunal when a dispute with the host country arises. Therefore, the realization of this risk motivated the Colombian state to provide a public policy response on the matter. Concretely, it developed a mechanism oriented towards preventing and managing the international investment controversies which the country would incur as a consequence of the breach of standards included in the IIAs, as to the protection of foreign investors.

In 2010, a public policy document recognized the lack of institutional capacity to prevent and manage the advent of international investment controversies.<sup>263</sup> In such context, the cases associated with the Argentinian fiscal crisis were cited as a dramatic example of what could happen

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<sup>262</sup> See generally, VAN HARTEN, Gus. "The Canada-Colombia Free Trade Agreement: Imbalance of the Legal Rights and Responsibilities of Canadian Investors in Colombia", in ROCHLIN, James (Ed.) *Profits, Security and Human Rights in Developing Countries. Global Lessons from Canada's Extractive Sector in Colombia*. New York: Routledge (2015), 152-177.

<sup>263</sup> See REPUBLICA DE COLOMBIA, Consejo Nacional de Política Económica y Social. Documento Conpes 3684. Fortalecimiento de la Estrategia del Estado Para la Prevención y Atención de Controversias Internacionales de Inversión. Octubre 19 de 2010.

to Colombia from the standpoint of its financial stability and credibility within the international community if immersed in these type of legal controversies.<sup>264</sup> Consequently, it proposed a series of policy guidelines to advance in the creation of an institutional mechanism to provide efficient responses to address the legal defense of the state for these type of cases, in head of the Ministry of Commerce. In 2011, a number of regulations on the matter established that the recently created National Agency for the Legal Defense of the State should support the Ministry of Commerce in the management of international investment controversies, according to the conditions included in the international investment agreements signed by Colombia.<sup>265</sup> However, it was not until 2012 that the issue was properly regulated. Decrees 189/2012 and 1939/2013 provided for the objectives, principles, instances and institutional duties associated with the management of international investment disputes. In addition, Resolution 0305/2014<sup>266</sup> regulated the specific procedure to be conducted by public authorities on the occasion of the emergence of controversies of this type. As of December 2015, Colombia has never been through an investor-state arbitral procedure. Yet, the risk of being subject to an international investment controversy is latent.

## V. Conclusions

Assuming a transnational legal approach, this chapter illustrated the process through which the IIAs negotiation policy was adopted as a relevant mechanism for achieving socioeconomic development in Colombia. In particular, it explored how the protection of foreign investment, as provided by the IIAs concluded by the country, was assimilated by and incorporated into the

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<sup>264</sup> See REPUBLICA DE COLOMBIA, Consejo Nacional de Política Económica y Social. Documento Conpes 3684. *Fortalecimiento de la Estrategia del Estado Para la Prevención y Atención de Controversias Internacionales de Inversión*. Octubre 19 de 2010, p. 13-15.

<sup>265</sup> See REPÚBLICA DE COLOMBIA. *Decreto 4085 de 2011* (by which the objectives and structure of the National Agency for the State Legal Defense are established.)

<sup>266</sup> “By which a procedure for the management of international investment disputes is set forth”, administrative regulation issued by the Ministry of Commerce on the 27<sup>th</sup> of January 2014.



Colombian Constitutional Order. In this regard, the chapter aimed to unveil the normative rationales embedded in the emerging legal order, which is founded on the provision of conditions of stability and predictability to foreign investors in order to promote their arrival in the country.

It was found that this legal phenomenon is in fact the consequence of complex interactions among several actors, norms and procedures. The conjunction of particular historical, political, economic and social elements at the domestic level, including the normative impulse of a constitutional process, allowed a shift in the country's economic model so as to consider foreign capital as essential for achieving development. This led to the progressive overriding of political and economic barriers to the arrival of foreign capital under beneficial conditions of operation. Further, the pressure exercised by diverse transnational governance structures, compromised by the spread of a global market economy, contributed to the depiction of foreign investors as significant agents of economic prosperity.

This context led to the further adoption of a IIAs negotiation policy by Colombia, and the corresponding adjustment that facilitated their effective incorporation into the CCO. Therefore, the IIAs were presented in a way that an occasional reduction of the state's policy space, as a consequence of their enforcement, was assumed as a natural consequence of the application of the constitutional principles of internationalization and integration. Moreover, the CCO was amended in order to adapt its property clause to the nature and extent of the protection offered to foreign investors. The resulting legal regime aims to provide a stable and predictable environment through the protection of the rights and expectations of foreign investors from the potential harm that the regulatory action of public authorities might cause. This includes the possibility that Colombia could be brought before an international arbitral tribunal in order to respond to public regulatory actions that could be amounted to direct or indirect expropriation. The eventual emergence of

public policies oriented to address the negative effects of this transnational legal process, such as the inclusion of references to social and environmental standards in the IIAs and the development of a protocol for the management of investment disputes, indicate the contentious nature of this legal phenomenon and the fragmented nature of the CCO.

## **Chapter Four: The Genealogy of the Colombian Transitional Justice Project**

### **I. Introduction**

The previous chapter introduced the nature and extent of the legal protection offered to foreign investors in Colombia by means of the systematic conclusion of international investment agreements, and illustrated the corresponding normative rationale. In order to continue developing the pieces necessary for the dissertation's analysis of the existence of a normative tension on the grounds of access to and use of land and natural resources in the country, this chapter introduces the transitional justice project (hereinafter TJP) that is currently being implemented in the country. In this regard, the TJP is depicted as a transnational legal process that entails a distinctive scheme of state regulatory activity, which is intended to achieve durable peace through the production of profound changes within Colombian society's socioeconomic structures, especially at the country's rural areas. Therefore, this chapter will first present the legal antecedents of the Colombian transitional justice project. They indicate the progressive incorporation of a peacebuilding function into the field, or put differently, the adoption of a preponderant role in the creation of conditions for durable peace in a society dealing with a long-term structural conflict. Thus, it is illustrated how this initiative acquired its distinctive features through the assimilation of two transnational phenomena: the consolidation of an institutional human rights discourse and the progressive embodiment of a transitional justice rationality that is in line with the state's normative aspirations and dynamics of intervention in relation to the resolution of the internal armed conflict. Subsequently, the project is properly introduced through a thorough explanation of its structure, rationale and content. The structure reflects the interaction of a series of catalyzing forces (political background) that triggered the state's response to the question of durable peace (legal framework). This response includes both the proper transitional justice regulation – the conditions required for the victims' access to the rights to justice, truth and reparation – and the

norms that reinforce the compromises reached by the parties in the peace process. It follows the path of international standards in the field, but at the same time adapts to local particularities. Next, the project's rationale builds on the idea that both putting an end to the armed conflict and addressing the rights of the victims, are the primary steps for a further process of reconstruction, transformation and reconciliation, termed "post-conflict". Finally, the content of the project echoes the way in which the state performs as a regulatory authority to produce structural changes in society, and a number of concluding remarks are provided.

The foremost objective of this chapter is to characterize the Colombian TJP as a prominent instance of transnational legality that has been set up to achieve a number of objectives associated with the country's Constitutional Order. Importantly, this process has given birth to a distinctive scheme of public regulatory activity that seeks to facilitate the effective intervention in social structures so as to advance in the consecution of an effective transition towards a more just and stable society, especially at the rural areas and with respect to the most vulnerable peoples.

## **II. Legal antecedents of the Transitional Justice Project in Colombia**

The transitional justice project that is currently being implemented in Colombia reflects the evolution of the field with regard to the assumption of a more holistic understanding of conflict dynamics. Consequently, it has distinctive characteristics compared to prior similar processes – such as the ones in Central America, Eastern Europe and South Africa – with respect to the way in which past human rights violations are addressed while looking forward to promote sustainable peace.<sup>267</sup> However, its configuration and consolidation is neither a fortuitous outcome nor an

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<sup>267</sup> For a legal genealogy and a conceptual history of transitional justice see TEITEL, Ruti. "Transitional Justice Genealogy" *16 Harvard Human Rights Journal Vol. 16* (2003), 69-94; ARTHUR, Paige. "How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice." *2 Human Rights Quarterly Vol. 31* (2009), 321-367.

isolated event. The content and extent of the project has been fashioned by the spread of an institutional discourse around the promotion, protection and respect of human rights, as well as by the embodiment of a transitional justice rationale within the public action of state authorities. These antecedents emerged and crystallized through the development of a specialized legal framework.

The antecedents of the Colombian transitional justice project are thus centered along two paths. The first is the internalization and operationalization of a human rights discourse within certain institutions with political and adjudicatory functions within the country's governance spectre. These actors included the victims of the conflict within their mandate and scope of intervention, so they assumed specific roles in the promotion and protection of their rights. As such, these institutions indirectly influenced the building of the transitional justice project. The second path corresponds to a number of preliminary attempts to enact a legal framework to articulate a proper transitional justice regime. In the context of the peace negotiations between the Colombian government and a number of insurgent armed groups, these initiatives evolved from the incorporation of disarmament, demobilization and reincorporation mechanisms, to the development of legal devices that addressed the victim's right to justice, truth and reparation.

A. Indirect antecedents: the influence of the human rights discourse on the recognition of the victims and their specificities

Although it is not possible to infer a specific causal relation between human rights and transitional justice, the consolidation of the former at the institutional discourse and practices of Colombia's public authorities is connected to the development of the latter. The progressive recognition of human rights issues by several domestic and supranational fora, part of the country's governance spectre, contributed to making the situation of the victims of the conflict more visible and sent a normative message to the authorities in charge of safeguarding their entitlements. In this regard,

two processes, in particular, should be considered; the role of the Colombian Constitutional Court in interpreting and developing the 1991 Constitution, and the activity of the Inter-American Human Rights System in relation to the occurrence of human rights violations in the context of the country's armed conflict.

*1. The work of the Constitutional Court towards the enforcement of the 1991 Constitution*

In 1991, a new Constitution with an aspirational character was enacted in Colombia and one of its greatest achievements was the creation of a Constitutional Court. Under a context of political instability and exacerbated violence, the Court undertook the task of protecting the integrity of the new political charter and its ambitious aims. In particular, it assumed the supervision of the SRLS formula, a programmatic principle that establishes the type of political community that Colombia wishes to be as a nation: a social and democratic state subject to the rule of law.<sup>268</sup>

In order to make that supervision operative, since its creation in 1991 the Court embarked in a phase of judicial activism. It systematically assumed cases stemming from the massive use of the *acción de tutela*, a constitutional judicial action specifically established for the protection of people's human rights in Colombia.<sup>269</sup> Further, this process made possible the production of a solid jurisprudential block that enlightened the content and scope of the bill of rights that the 1991 Constitution had adopted. This way, the situation of the country is connected and contrasted with the normative principles and entitlements included within the political charter.

The Court's judicial activity concerning the situation of people internally displaced on the occasion of the conflict has been, perhaps, the most remarkable example of the abovementioned judicial

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<sup>268</sup> See Chapter I on the Colombian Constitutional Order.

<sup>269</sup> See CEPEDA, Manuel Jose. "The Constitutional Protection of IDPs in Colombia" in ARANGO, Rodolfo (Ed.) *Judicial Protection of Internally Displaced Persons: The Colombian Experience*. Washington: The Brookings Institution – University of Bern Project on Internal Displacement (2009), p. 1.

activism. The massive exodus of people from the rural areas to the urban settlements, produced by the violence generated within the confrontation and motivated by a handful of strategic incentives, led to a humanitarian emergency and a massive and systematic violation of human rights. Particularly, a great amount of land and productive means were dispossessed.<sup>270</sup> Although in 1997 the Congress had passed Law 387 to address the precarious situation of the victims of forced displacement in Colombia, by 2004 this social phenomenon spun out of control, to a large extent because of the lack of effective response from authorities. Evidencing the structural nature of the problem, the Constitutional Court aggregated 1150 constitutional complaints and issued its most ambitious ruling in its two decades of existence: Judgment T-025.<sup>271</sup> This decision, and its subsequent follow-up, should be considered a fundamental source of inspiration for the development of the Colombian transitional justice project.

Two reasons support the previous assessment. First, Judgment T-025 contributed to making the situation of internally displaced people visible and the relevance of the land question in rural areas. It depicted them as victims of an armed conflict whose most basic entitlements had been affected. In that regard, through this decision the tribunal implemented the transitional justice discourse to characterize the situation of those affected by forced displacement.<sup>272</sup> But more importantly, it argued in favor of an instrumental relation between violence, displacement and land dispossession. It claimed that forced displacement should be not be acknowledged as a consequence of massive

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<sup>270</sup> See REPUBLICA DE COLOMBIA, Corte Constitucional. *Sentencia T-025/2004*. M.P. Manuel José Cepeda Espinosa.

<sup>271</sup> See RODRÍGUEZ, César. "Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America" 7 *Texas Law Review* Vol. 89 (2011), p. 1671.

<sup>272</sup> The Court depicted internally displaced people as victims and consequently, it attributed specific entitlements associated with such condition. For instance, the Court validated that internally displaced women were facing the special risk to be deprived from their lands and wealth by armed actors provided their historical position before property, especially at the rural areas. Likewise, it accounted the intertwining between local socioeconomic processes connected and the armed conflict that have affected the traditional lands and cultural standards of indigenous peoples and Afro-Colombian communities.

and systematic human rights violations on the occasion of the conflict, but as an instrument for the accumulation of lands and resources. Thus, the Court suggested the existence of economic motives behind the massive exodus of people. In addition to the labor of elucidation, Judgment T-025 introduced an innovative scheme of public intervention to address the situation of internally displaced people in Colombia. The tribunal declared the existence of an “unconstitutional state of affairs”, whereby internal displacement was assessed as a massive and systematic violation of human rights that required structural interventions by the authorities in charge in order to be remedied. Consequently, the Court took on policy-making functions, which in a conventional model of separation of powers would pertain to the legislative branch, and proceeded to allocate resources to make effective the economic and social rights of internally displaced people.<sup>273</sup> This scheme of intervention has been framed by scholarship as a case of structural injunctive remedies.<sup>274</sup> Given the systemic failures verified in the action of state authorities, the Constitutional Court not only laid down a series of orders intended to produce tangible changes in the conduct of public authorities, but formulated policies aimed at producing particular regulatory responses.<sup>275</sup>

## 2. *The contribution of the Inter-American Human Rights System*

In the regional context, the Inter-American Human Rights System has conducted a similar task to the one of the Constitutional Court as to the characterization of the victims of the conflict and the implementation of structural legal remedies to address their situation. The system is a

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<sup>273</sup> See ARIZA, Libardo J. “The Economic and Social Rights of Prisoners Constitutional Court Intervention in the Penitentiary System in Colombia”, in BONILLA, Daniel (Ed.), *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa and Colombia*. Cambridge: Cambridge University Press, 2013, p.129.

<sup>274</sup> According to César Rodríguez, Judgment T-025 contains enforcement orders whereby the Courts instructed various government agencies to take coordinated actions to protect the entire affected population and not just the specific complainants in the case. See RODRÍGUEZ, César. “Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America” *7 Texas Law Review Vol. 89* (2011), p. 1671.

<sup>275</sup> On the nature of injunctive remedies see EASTON, Robert E. “The Dual Role of Structural Injunction”. *8 The Yale Journal Vol. 99* (1990), p.1983.



supranational mechanism that was established within the framework of the Organization of American States.<sup>276</sup> It is intended to supervise the promotion and protection of human rights in the region. Although the system is subsidiary to the results provided by the domestic jurisdictions, it is well established as a relevant judicial platform in the region. Particularly, the reports of the Inter-American Human Rights Commission and the jurisprudence of the Inter-American Court of Human Rights have contributed to shape the Colombian transitional justice project. As supranational governance structures in the field of human rights, they have introduced valuable insights with regard to the role of the state in guaranteeing due redress to the people whose entitlements have been affected in the context of the conflict.

The Inter-American Commission on Human Rights is a political and diplomatic-oriented body in charge of monitoring the state's performance in the promotion and protection of human rights in the region. Several reports have addressed the situation of the victims in Colombia and pointed out the country's obligation to implement transformative responses to attend such circumstances. For instance, in its 1999 report on the country, the Commission acknowledged the efforts of the national government to address the complex and challenging reality of the internal armed conflict by commencing a peace process with the guerrilla groups. Moreover, in reference to the peace initiative it pointed out that its effectiveness was linked to investigating, judging, and making reparations for human rights violations. Consequently, the Commission requested particular legal developments to respond to violations of fundamental rights occurred in the context of the armed conflict.<sup>277</sup> Likewise, in its 2011 report the Commission made reference to the adoption of the

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<sup>276</sup> The American Declaration of the Rights and Duties of Man was approved at the Ninth International Conference of American States, held in Bogota in 1948. Later on, the Inter-American Commission on Human Rights was created as an institutional support of such instrument. In turn, the Inter-American Court of Human Rights came to exist in 1969 by means of the enactment of the Convention.

<sup>277</sup> See ORGANIZATION OF AMERICAN STATES, Inter-American Commission on Human Rights. *1999 Country Report on the Human Rights situation in Colombia*. OEA/Ser.L/V/II.102, Doc. 9 rev. 1, 26 February 1999.

current transitional justice initiative in Colombia. In particular, it identified the state's recognition of the existence of an armed conflict as the starting point of an effective process of victims' reparation, especially towards the restitution of the lands forcibly dispossessed by the insurgent actors. Correspondingly, it assumed the task of monitoring the implementation of both the legal measures stemming from the TJP and the outcomes of the peace process with FARC.<sup>278</sup>

The Inter-American Court of Human Rights is the system's adjudicatory organ. Therefore, it is in charge of reviewing the conduct of the states in relation to the 1969 American Convention on Human Rights and other regional legal instruments.<sup>279</sup> By 2014, the Court's jurisprudence on Colombia had addressed 14 cases, all of them in connection with the armed conflict, in which the state failed to protect the human rights of the people within its jurisdiction. In this regard, not only has the regional tribunal taken the opportunity to trace important connections between the dynamics of the conflict and human rights infringements in the country, but it has also reviewed the transitional justice project's accordance with its own precedent line in the grounds of victim's integral reparation. In a number of cases associated with massacres committed by paramilitary forces with the acquiescence of the Government, the Court identified a causal relation between the armed conflict and internal displacement in Colombia.<sup>280</sup> It pointed out that the latter phenomenon

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<sup>278</sup> See ORGANIZATION OF AMERICAN STATES, Inter-American Commission on Human Rights. *2011 Annual Report*. OEA/Ser.L/V/II., Doc. 69, 30 December 2011.

<sup>279</sup> In that sense, it acknowledges individual petitions against state parties and determines whether the latter are internationally responsible for the breaching of the conventional obligations. The Court's decisions have a binding character on all those States which recognize the Court contentious jurisdiction as obligatory. See CANÇADO TRINIDADE, Antonio Augusto. "Current State and Perspectives of the Inter-American System of Human Rights Protection at the Dawn of the New Century". *Tulane Journal of International and Comparative Law* 8 (2000), p.20.

<sup>280</sup> See ORGANIZATION OF AMERICAN STATES, Inter-American Court of Human Rights. *Case of the "Mapiripán Massacre" v. Colombia*, Judgment of September 15 2005, Series C No. 134; *Case of the Ituango Massacres v. Colombia*, Judgment of July 1 2006, Series C No. 148; *Case of the Pueblo Bello Massacre v. Colombia*, Judgment of January 31 2006, Series C No. 140. Although the Court recognized the occurrence of forced displacements as a consequence of primary human rights violations, it did not examine the eventual violation of conventional obligations connected with the latter phenomenon since the claimants did not include arguments in that respect.

was a source of massive and systematic infringements often associated with the economic and social condition of the population, including their property.<sup>281</sup> Similarly, in a 2013 case, the Court established that Colombia's domestic policies on reparation could be articulated as effective substitutes to the measures that it was supposed to order as a consequence of the declaration of state responsibility and in regards to the redress of victims.<sup>282</sup> Further, certain collective measures taken in the context of the transitional justice project were presented as a valid way for the state to comply with the reparatory obligations towards the victims of the case.<sup>283</sup>

As illustrated above, the Colombian Constitutional Court and the Inter-American System of Human Rights play an important role in the articulation of the structural causes of the country's internal conflict and the elucidation of the situation of the victims. Their decisions confirm the notable influence that these institutions had in the shaping of the Colombian transitional justice project. They contributed to the consolidation of a human rights discourse in the country's domestic and regional governance spheres. Furthermore, they led to the internalization of the structural need to implement sustainable remedies which produce conditions for durable peace. They represent a tendency related to the establishment of connections between different legal fields and processes when a particular context requires the production of effective and innovative answers from public authorities.

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<sup>281</sup> "Based on the above, this Court considers that the theft of the livestock and the destruction of the homes by the paramilitary group, perpetrated with the direct collaboration of State agents, constitute a grave deprivation of the use and enjoyment of property." See Inter-American Court of Human Rights, *Case of the Ituango Massacres v. Colombia*, Judgment of July 1 2006, Series C No. 148, par. 183.

<sup>282</sup> See ORGANIZATION OF AMERICAN STATES, Inter-American Court of Human Rights, *Case of Comunidades Afrodescendientes Desplazadas de la Cuenca del Río Cacarica (Operación Génesis) v. Colombia*, Judgment of November 20 2013, Series C No. 270, par. 461.

<sup>283</sup> See ORGANIZATION OF AMERICAN STATES, Inter-American Court of Human Rights, *Case of Comunidades Afrodescendientes Desplazadas de la Cuenca del Río Cacarica (Operación Génesis) v. Colombia*, Judgment of November 20 2013, Series C No. 270, Par. 470.

## B. Direct antecedents: towards the articulation of a transitional justice scheme

The previous section illustrates how the consolidation of the human rights discourse in the country was fundamental in raising a greater institutional awareness around the situation of the victims of the armed conflict and their particular needs. Equally relevant for the configuration of the Colombian transitional justice project was the proliferation of legal devices, aimed to facilitate peace negotiations between the government and the insurgent actors of the conflict. They promoted the development of normative and structural elements to recognize and enforce the victim's rights to justice, truth and reparation, which were subsequently incorporated by the current project. Although in principle these legal frameworks focused on offering incentives for the re-incorporation of the insurgent actors to civil life, they progressively appropriated the discourse and the objectives of transitional justice so as to articulate the rights of the victims. These legal devices can be grouped in two milestones. The first is identified around the early attempts to introduce the discourse associated with the protection and assistance of the people affected by the conflict, and especially Law 418 of 1997. The second device is the enactment of Law 975 of 2005, commonly identified as the Justice and Peace Law (hereinafter JPL), which is considered the first conscious attempt at producing a transitional justice instrument in Colombia.

### *1. Early attempts to introduce the transitional justice discourse: from general amnesties to Law 418 of 1997*

By the 1980s, the armed conflict in Colombia transformed, from being considered an isolated matter of public order in the rural areas, to becoming a serious concern for national authorities. While guerrilla groups were gaining presence across the national territory, the nascent paramilitary forces consolidated as major actors of the conflict due to the malicious amalgam of territorial pretensions and drug trafficking. In this context, the achievement of peace became a central aim for the government and an attractive launching platform for politicians.

As a consequence, from 1982 to 1997 a series of governmental initiatives aimed to end the hostilities between the parties of the conflict, while encouraging the demobilization of insurgents, and establishing peace dialogues.<sup>284</sup> These had variable results. A number of norms were enacted between 1981 and 1985 to confer amnesties for political crimes (sedition, rebellion and riot) to the members of the insurgency who decided to lay down arms.<sup>285</sup> However, the fact that the granting of amnesties did not require the disarmament of guerrillas led to the failure of prospective peace processes, even though they initially appeared to hold enormous potential.<sup>286</sup> On the other hand, in 1990 the government and the M-19 guerrilla signed a comprehensive peace accord known as the Political Pact for Peace and Democracy. The guerrilla group committed to disarmament and reintegration into society.<sup>287</sup> This event served as a catalyst for the promulgation of other legal instruments that allowed the demobilization of smaller rebel groups in the following years.<sup>288</sup> Although these primary attempts to regulate the surroundings of peace negotiations in Colombia were conceived to respond to the need to end the conflict and provide stability, they did not directly include components of justice, truth and reparation, proper of transitional justice. Moreover, as proposed by Laplante and Theidon, they entailed similarities with the Disarmament, Demobilization and Reinsertion programs (DDR<sup>289</sup>) developed by the United Nations in the

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<sup>284</sup> See extensively BOUDON, Lawrence. "Guerrillas and the State: The Role of the State in the Colombian Peace Process" 2 *Journal of Latin American Studies* Vol. 28 (1996), 279-297.

<sup>285</sup> See REPÚBLICA DE COLOMBIA, Congreso de la República. *Ley 37/1981*.; *Decreto Legislativo 474/1982*; *Ley 35/1982*; *Ley 49/1985*.

<sup>286</sup> See BOUDON, Lawrence. "Guerrillas and the State: The Role of the State in the Colombian Peace Process" 2 *Journal of Latin American Studies* Vol. 28 (1996), p.282.

<sup>287</sup> See REPÚBLICA DE COLOMBIA, Congreso de la República, *Ley 77/1989*; *Decreto 206/1990*.

<sup>288</sup> See REPÚBLICA DE COLOMBIA, Congreso de la República, *Decreto 213/1991* (in the case of EPL, PRT, and Quintin Lame Armed Movement); *Decreto 1943/1991* (regarding the Ernesto Rojas Movement); *Ley 104/1993* (Milicias urbanas de Medellín, Frente Francisco Garnica de la Coordinadora Guerrillera Simón Bolívar); *Ley 241/1995* (extension of the benefits to non-demobilized members of the latter armed groups).

<sup>289</sup> Since the late 1980s, the United Nations has increasingly been called upon to support the implementation of disarmament, demobilization and reintegration (DDR) programmes in countries emerging from conflict. They are conceived as processes for executing successful peacekeeping operations whose objective is to grant security and stability in post-conflict environments so that recovery and development can begin. See UNITED NATIONS, Secretary General. *Note to the General Assembly*. A/C.5/59/31. May 2005. Retrieved from <http://www.undp.org/con>

context of peacekeeping operations.<sup>290</sup> In that sense, the main goal of the government was to address the concerns associated with the maintenance of public order within the country, and not to directly secure lasting peace after the finalization of the conflict, or to address the situation of the victims of the armed conflict.

As a result of the variable outcomes produced by these legal instruments, the considerable expansion of the armed conflict by the mid-nineties, and the increasing presence of the human rights discourse at several institutional scenarios, the legal initiatives to achieve peace and stability in the country experienced a shift in their design and scope. Evidence of this was the enactment of Law 418 in 1997. Although this norm continued addressing the armed conflict as a strict matter of public order, it introduced an alternative perspective with regards to the normative meaning of peace for Colombian society. In other words, law 418 established that its regulatory aim was the provision of valuable tools to ensure the validity of the SRLS, as well as the effective observation of the rights and fundamental freedoms recognized by the Constitution and the international treaties approved by Colombia. It authorized the government to conduct dialogues and conclude peace accords with insurgent groups in order to obtain definitive solutions to the armed conflict, ensure the effective implementation of international humanitarian law and human rights, and encourage a ceasefire and a subsequent demobilization.<sup>291</sup> In addition, the norm was designed to grant amnesties from all criminal investigations, prosecutions, and convictions of political crimes to the members of the insurgent groups who chose to participate in individual or collective

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<sup>290</sup> LAPLANTE, Lisa & THEIDON, Kimberly. "Transitional justice in times of conflict: Colombia's ley de Justicia y Paz" *28 Michigan Journal of International Law* (2006), p. 51.

<sup>291</sup> See REPÚBLICA DE COLOMBIA, Congreso de la República. *Ley 418/97*, art. 8.

demobilizations.<sup>292</sup> In this regard, it shared the scope of the norms previously enacted to develop alternative criminal-oriented mechanisms to facilitate the end of conflict.<sup>293</sup> Yet, Law 418 recognized the situation of the victims as one of the key factors to address in order to achieve peace and stability in the country. Unlike the legal instruments that were previously enacted to address the termination of the armed conflict, this norm went beyond the setting of DDR-oriented measures. It sent specific instructions to several national authorities as to their duties on the assistance of people affected by the violence occurred with the occasion of hostilities between the actors of the internal confrontation.

In order to determine the addressees of public assistance, Law 418 included a definition of victim that accounts for the civilian population whose life, personal integrity and property were affected as a consequence of actions which occurred in the context of the armed conflict.<sup>294</sup> Further, the law indicated that the state was obliged to provide humanitarian assistance, education, and healthcare to the victims; create housing programs directed to meet their specific requirements; and provide financial assistance for the replacement of belongings affected by violent actions.<sup>295</sup> In this regard, while Law 418 mostly created incentives to induce the end of the conflict, the incorporation of the victims' assistance component indicated the rise of a concern for the need to balance the criminal attribution component with the requirements of justice in its retributive, restorative, and distributive versions.

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<sup>292</sup> See THE CENTER FOR JUSTICE AND ACCOUNTABILITY. *Colombia: The Justice and Peace Law*. Retrieved from <http://cja.org/article.php?id=863> (last accessed March 20, 2016.)

<sup>293</sup> KERR, Katie. "Making Peace with Criminals: An Economic Approach to Assessing Punishment Options in the Colombian Peace Process" *37 University of Miami Inter-American Law Review* (2005), p. 66; BURBIDGE, Peter. "Justice and Peace? – The Role of Law in Resolving Colombia's Civil Conflict" *International Criminal Law Review* 8 (2008), p. 563; AHMAD, Javaria. "The Colombian Law of Justice and Peace: One Step Further from Peace and One Step Closer to Impunity?" *16 Transnational Law & Contemporary Problems* (2007) 333-372.

<sup>294</sup> See REPÚBLICA DE COLOMBIA, Congreso de la República. *Ley 418/97*, art. 15.

<sup>295</sup> See REPÚBLICA DE COLOMBIA, Congreso de la República. *Ley 418/97*, art 16-42.

Given their content and extent, the institutional obligations introduced by Law 418 were supported by the application of the principle of social solidarity.<sup>296</sup> In that regard, the Colombian Constitutional Court has pointed out that when a person is under a situation of manifest vulnerability and can not provide for himself, an exceptional obligation is grounded in head of the state.<sup>297</sup> Therefore, the role in the state in the assistance of the victims of the conflict by means of Law 418 was not a formal recognition of the victims' rights to justice, truth, and reparation, proper of transitional justice. Nor did it imply the recognition of any sort of responsibility by the state, but the plain application of the principle of social solidarity. However, it introduced the idea that any institutional scheme to achieve durable peace should consider the situation of the victims of the conflict, and thus altered previous considerations around the role of the state in guaranteeing order and stability within its territory. While this norm did not include express references to transitional justice, it certainly incorporated a number of discursive elements that resemble the field's normative foundations.<sup>298</sup>

## 2. *The Justice and Peace Law: recognition of transitional justice in Colombia*

Law 418 was recognized for having incorporated the victims' rights discourse within the Colombian legal framework on conflict resolution and peace. Yet, it is fair to acknowledge that Law 975 of 2005 (JPL) introduced the rationality and structure proper of transitional justice, including its transformative potential. The rise and development of the JPL is directly related to the negotiation and dismantling of paramilitary groups that occurred under the Uribe Velez administration, between 2002 and 2008. During the corresponding demobilization process, it

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<sup>296</sup> See REPÚBLICA DE COLOMBIA, Congreso de la República. *Ley 418/97*, art. 16.

<sup>297</sup> Se REPÚBLICA DE COLOMBIA, Corte Constitucional de Colombia, *Sentencia T-533/92*. M.P. Eduardo Cifuentes Muñoz, p. 7-9.

<sup>298</sup> For instance, it was designed as an interim regulation whose currency was was modified and successively extended by *Ley 548/99*, *Ley 782/02*; *Ley 1106/06*, and *Ley 1421/10*, especially under the requirements of the negotiations with paramilitary groups during the Uribe administration (2002-2008).



became clear to the authorities that the nature and magnitude of the crimes committed by the paramilitary groups exceeded the possibilities of Law 418, which was devoted to grant amnesty for political crimes. In August 2003, The Uribe administration submitted to Congress a first draft law,<sup>299</sup> which received strong critiques as to the legal instrument's systematic unawareness of the rights of the victims.<sup>300</sup> In response, the government introduced a new proposal in which these rights were included as part of the strategy to finalize the conflict and achieve peace, so the JPL was approved by the Colombian Congress in July 2005.<sup>301</sup>

The JPL's aim to incorporate a transitional justice scheme in Colombia was produced under a major challenge; the continuation of hostilities in the country was accompanied by a systematic denial by the government as to the existence of an armed conflict.<sup>302</sup> In this context, the legal instrument embodied, as its predecessor, a tension between the state's political need to promote DDR and the obligation to respect the rights of those who were harmed on the occasion of the

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<sup>299</sup> See KERR, Katie. "Making Peace with Criminals: An Economic Approach to Assessing Punishment Options in the Colombian Peace Process" 37 *University of Miami Inter-American Law Review* (2005), p. 67-68; POSNANSKI, Timothy "Colombia Weeps but doesn't Surrender: The Battle for Peace in Colombia's Civil War and the Problematic Solutions of President Alvaro Uribe" 4 *Washington University Global Studies Law Review* (2005), p. 727.

<sup>300</sup> "The proposed legislation coincided with the Coordination and International Cooperation Roundtable for Colombia, held in London in July 2003 and Cartagena in February 2005 and involving the Colombian government and potential donors, such as the G24 countries, the Inter-American Development Bank, and the United Nations. While the purpose of the international meetings was to discuss recommendations issued by the UN High Commissioner for Human Rights Office in Colombia, they inevitably involved discussion of the DDR process. These meetings may have been a turning point in the negotiations in that they communicated clearly to the Colombian government that it would have to bring DDR into compliance with international standards on truth, justice, and reparation. Moreover, they ignited the lobbying efforts of local and international human rights groups." See LAPLANTE, Lisa & THEIDON, Kimberly. "Transitional justice in times of conflict: Colombia's ley de Justicia y Paz" 28 *Michigan Journal of International Law* (2006), p. 78.

<sup>301</sup> KERR, Katie. "Making Peace with Criminals: An Economic Approach to Assessing Punishment Options in the Colombian Peace Process" 37 *University of Miami Inter-American Law Review* (2005), p. 67-68; ARVELO, José. "International Law and Conflict Resolution in Colombia: Balancing Peace and Justice in the Paramilitary Demobilization Process" 37 *Georgetown Journal of International Law* (2005), p. 436; GONZÁLEZ, Alexander. "Justicia transicional y reparación a las víctimas en Colombia" 4 *Revista Mexicana de Sociología* Vol. 72 (2010), p.634; EASTERDAY, Jennifer. "Deciding the Fate of Complementarity: A Colombian Case Study" 26 *Arizona Journal of International & Comparative Law* (2009), p. 71.

<sup>302</sup> Although the process was compared with other peace and reconciliation projects in "transitional societies" such as South Africa, Guatemala and Northern Ireland, Colombia was short of being a transitional society as the guerrillas were still at war. See BURBIDGE, Peter. "Justice and Peace? – The Role of Law in Resolving Colombia's Civil Conflict" *International Criminal Law Review* 8 (2008), p. 558.

armed conflict.<sup>303</sup> The JPL sought to compensate the granting of generous exceptions for punishment to those who committed atrocious crimes with the recognition of the rights of the victims.<sup>304</sup> However, compared with Law 418, the JPL brings about important new ideas regarding the role of the state in the achievement of durable peace, and particularly on the assumption of its obligations regarding the situation of the people affected by the conflict.

The incorporation of an extended definition of victim reflected a more comprehensive account of the context and dynamics of the conflict. It expanded the constellation of assistance, and enlarged particular obligations of public authorities.<sup>305</sup> Consequently, the formal recognition of the victims' rights to justice, truth, and reparation entailed the inclusion of a rationality of transitional justice within the realm of institutional action.<sup>306</sup> In this respect, the expansion of the role occurred not only in terms of the number of people to be attended to, but also the nature of the measures to be implemented. Notably, the JPL established a formula to conduct reparations; when it was not possible to undertake actions oriented at returning to the situation prior to the victim's injury (restitution), authorities were responsible for providing monetary compensation for the damages caused to the victim. In parallel, actions towards the re-establishment of the victim's dignity had to be conducted and guarantees of non-repetition should be provided.<sup>307</sup> These components were supplemented by collective reparation programs, oriented at recovering the institutional stability

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<sup>303</sup> LAPLANTE, Lisa & THEIDON, Kimberly. "Transitional justice in times of conflict: Colombia's ley de Justicia y Paz" 28 *Michigan Journal of International Law* (2006), p. 79.

<sup>304</sup> See UPRIMNY, Rodrigo & SAFFON, María Paula. "¿Al fin, ley de justicia y paz? La ley 975 de 2006 tras el fallo de la Corte Constitucional", in UPRIMNY, Rodrigo et. al. *¿Justicia transicional sin transición? Verdad, justicia y reparación para Colombia*. Bogotá: Ediciones Antropos, 2006. P.203; POSNANSKI, Timothy "Colombia Weeps but doesn't Surrender: The Battle for Peace in Colombia's Civil War and the Problematic Solutions of President Alvaro Uribe" 4 *Washington University Global Studies Law Review* (2005), p. 727.

<sup>305</sup> The definition contains a more comprehensive account of the causes associated with the damages recognized as repairable; the condition of victim is extended to the relatives of the people directly affected by violence; and assistance to victims does not depend on the identification of the victimizer. See Law 975/2005, article 5.

<sup>306</sup> See REPÚBLICA DE COLOMBIA, Congreso de la República. *Ley 975/2005*, art. 6-8.

<sup>307</sup> See REPÚBLICA DE COLOMBIA, Congreso de la República. *Ley 975/2005*, art.8.

of the SRLS in the areas of the country that had suffered the greatest injuries and where most of the vulnerable communities were originally located.<sup>308</sup>

However, the JPL fell short in achieving its aspiration of providing integral reparation, and achieving restitution. In spite of the inclusion of a sophisticated rationality that determined the role the state in ensuring the rights of the victims, the mechanisms designed to crystallize the normative pretensions of transitional justice were either incomplete or inoperative.<sup>309</sup> A generous formulation of the reparatory principle contrasted with a precarious institutional design that had severe logistical and procedural problems.<sup>310</sup> Although the victims' right to reparation was thoroughly recognized, the JPL restricted its scope to the obligation that the insurgent actors had on redressing the victims.<sup>311</sup> Therefore, reparation was projected as a procedural incident in the context of the alternative criminal procedure rather than an independent transitional justice component, for which many persons were prevented from receiving redress.<sup>312</sup> Moreover, reparation – including the restitution of lands – rested on the surrendering of goods proceeding from illicit activities conducted by the armed actors, and was exceptionally placed on the public budget.<sup>313</sup> This ignored

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<sup>308</sup> See REPÚBLICA DE COLOMBIA, Congreso de la República. *Ley 975/2005*, art.49.

<sup>309</sup> As indicated by the NGO International Office for Human Rights Action on Colombia (OIDHACO) in a 2013 report, “After more than seven years, Law 975 (...) has not obtained the expected results. By January 2013, only 14 sentences had been passed. And although in the process important progress was made with regards to the right to the truth - according to figures from the Attorney General’s Office, paramilitaries have confessed to 39,546 crimes involving 51,906 victims, including 25,757 murders and 1,046 massacres, this legal framework actually led to a de facto amnesty for almost all of those who demobilized. And for the few who were convicted, sentences do not meet the criteria of proportionality in relation to the serious nature of the crimes committed.” See OIDHACO, “Amendment to the ‘justice and peace law’. Consolidation and expansion of a de facto amnesty”. April 2013. Retrieved from <http://www.oidhaco.org/uploaded/content/article/1595801969.pdf> (last accessed March 20 2016.)

<sup>310</sup> EASTERDAY, Jennifer. “Deciding the Fate of Complementarity: a Colombian Case Study” *26 Arizona Journal of International & Comparative Law* (2009), p. 78-79; UPRIMNY, Rodrigo & SAFFON, María Paula *La ley de “justicia y paz”: ¿una garantía de justicia y paz y de no repetición de las atrocidades?*, in UPRIMNY, Rodrigo et. al. “¿Justicia transicional sin transición? Verdad, justicia y reparación para Colombia” Bogotá: Ediciones Antropos, 2006., p.180.

<sup>311</sup> See REPÚBLICA DE COLOMBIA, Congreso de la República. *Ley 975/2005*, art. 42.

<sup>312</sup> EASTERDAY, Jennifer. “Deciding the Fate of Complementarity: A Colombian Case Study” *26 Arizona Journal of International & Comparative Law* (2009), p. 78-79.

<sup>313</sup> See REPÚBLICA DE COLOMBIA, Congreso de la República. *Ley 975/2005*, art. 54.

the dynamics of appropriation used by the insurgent groups, which included legal manoeuvres to cleanse the illicit origin of the goods.<sup>314</sup> In addition, the government's denial of the existence of an armed conflict comprised the inherent minimization of its own responsibility in addressing the harm produced in this context.<sup>315</sup>

In the following years the gaps left by the precedent legal instruments were subject to concern by the Colombian state. In particular, the Congress addressed the critics of the transitional justice initiatives that had been elevated by different societal actors. In 2007, a number of congressmen from different political movements registered a draft that intended to formulate a truly public policy to enforce the rights of the victims.<sup>316</sup> This proposal was not only aimed at compiling the dispersed domestic legal instruments on the protection of victims, but included new dispositions concerning the effective reparation of the people affected by the conflict.<sup>317</sup> The projected bill followed the ideological path introduced by the JPL with respect to the rights of the victims, and intended to recognize the complexities of the Colombian conflict. Consequently, it planned to extend protection to people affected by any of the actors of the confrontation, including the state. Likewise, the proposal introduced mechanisms identified with the principle of patrimonial reintegration, which aimed to guarantee the material restitution of goods whose dispossession was a consequence of the conflict.<sup>318</sup> Yet, in spite of the great support that the proposal had among different sectors of Colombian society and other international actors, in July 2009, the draft was

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<sup>314</sup> See DIAZ, Ana María & MARIN, Carlos Alberto (Eds.) "Colombia: El espejismo de la justicia y la paz Balance sobre la aplicación de la ley 975 de 2005" Bogota: Comision Colombiana de Juristas, 2007, p.89-94.

<sup>315</sup> See LAPLANTE, Lisa & THEIDON, Kimberly. "Transitional justice in times of conflict: Colombia's ley de Justicia y Paz" 28 *Michigan Journal of International Law* (2006), p. 97.

<sup>316</sup> See REPÚBLICA DE COLOMBIA, Cámara de Representantes. *Proyecto de Ley 157/2007*; Senado de la República. *Proyecto de Ley 044/2008*.

<sup>317</sup> See RETTBERG, Angelika "Reparación en Colombia ¿Qué quieren las víctimas?" Bogotá: GTZ, 2008, p.34.

<sup>318</sup> According to this principle, reparation should be driven by the need to reconstitute victim's economic worth, understood as the set of rights and obligations that can be to be economically estimated or the universe of assets and liabilities attributed to an individual.

taken down due to both budgetary constraints manifested by the economic authorities, and the reluctance of the Uribe administration to accept the potential attribution of state responsibility on the grounds of transitional justice.<sup>319</sup>

The account of the early attempts to develop legal responses to the problem of violence in Colombia revealed how the country's national project – the establishment of a social rule of law state – became progressively intertwined with the specific objectives of transitional justice. Under the clear influence of the human rights discourse, transitional justice evolved from the plain implementation of DDR strategies to the recognition of the rights of the victims as fundamental preconditions for the achievement of durable peace. The participation of a variety of actors, including different sectors of civil society, the international community, and other transnational governance bodies, was transcendental to the materialization of this shift. They had a decisive influence on the inclusion of a proper transitional justice rationality whereby the victim's rights to justice, truth, and reparation progressively acquired tools to become effective entitlements. Restitution was progressively identified as the most desirable way to redress the victims, which is explained by the fact that in the context of the Colombian conflict land and natural resources have strategic value. Yet, the very ambitious objectives incorporated within these early legal instruments lacked effective mechanisms to fill such expectations. The Colombian background was not integrally depicted, to the extent that the government denied the existence of an armed conflict for many years. Additionally, these laws lacked the ability to turn actions leading to the enforcement of victim's entitlements into operative measures. Thus, transitional justice still

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<sup>319</sup> See GONZÁLEZ, Alexander. "Justicia transicional y reparación a las víctimas en Colombia" 4 *Revista Mexicana de Sociología* Vol. 72 (2010), p. 646.

required the refinement of certain components and the inclusion of others to obtain a distinctive transformative nature.

### **III. The Colombian Transitional Justice Project: structure, rationale and content.**

As mentioned above, in 2009 a legislative initiative that sought the enactment of domestic regulation on the rights of the victims of the armed conflict was defeated at the Colombian Congress. Although this outcome was attributed to budgetary restraints, the reluctance of the government to accept the existence of an armed conflict was decisive in the voting of the initiative. Although by that time the paramilitary groups had apparently demobilized and the guerrillas weakened by means of strategic military actions, the conflict was far from being resolved and the situation of the victims remained largely unattended, in spite of the application of the JPL.

After the 2010 presidential elections, Juan Manuel Santos inherited the task of finding a solution to the armed conflict and set the foundations for durable peace. Whilst Santos was expected to follow Uribe's radical postulates as to the non-existence of an armed conflict and the reluctance to find a negotiated solution, the governmental policies in that respect experienced a substantial shift. A peace process with the guerrilla group FARC was initiated in Cuba, and a new transitional justice law draft was presented by the government before the Congress. Unlike the past transitional justice initiatives that either relegated the rights of the victims to the periphery or were unable to provide effective enforcement mechanisms, this new attempt gravitated around the idea of finalizing conflict through a negotiation so as to start a phase of reconstruction, transformation, and reconciliation. In other words, while the enforcement of the victim's rights to justice, truth, and reparation was depicted as a precondition for the conduct of a legitimate peace process, the success of the negotiations would in turn guarantee an effective transition towards a more just and stable society.

The significant departure from the ideological convictions and the strategic actions fiercely defended by the Uribe government is grounded in a particular political backdrop, which triggered the production of a legal framework. This legal ensemble turned into a comprehensive project that brought new approaches to the strategy chosen by the government to achieve peace. The new Colombian transitional justice initiative was oriented to emphasize the content and extent of the rights of the victims in order to produce structural transformations in society. In doing so, the state acquired a preponderant role in the issuance of regulatory measures to effectively enforce these entitlements, and eventually adjust social relations with respect to the distribution of scarce resources. The following sections will map out the Colombian transitional justice project's structure, corresponding rationale, and content. In order to illustrate the distinctive character of the project, the current enterprise is depicted as a mechanism that genuinely places the victims at the center of institutional concern through the regulatory action of the state.

#### A. Structure of the project

##### *1. Political background*

From a political standpoint, the Colombian TJP is founded on a number of events: the arrival of Juan Manuel Santos to the presidency in 2010; the acceptance of the existence of an armed conflict in Colombia by the government; and the initiation of a peace process with the guerrilla group FARC. These elements occurred progressively and are intrinsically related. They should be regarded as the catalyzing forces that triggered a legal response to the question of durable peace. The election of Santos resulted in an unexpected ideological turn that promoted an alternative acknowledgement of the country's problems and their possible solutions. The acknowledgement of an intrinsic relation between the conflict and socioeconomic marginalization in the country's national development plan sent a message that reinvigorated the role of the state in the procurement

of the aspirational demands embedded in the country's Constitutional Order.<sup>320</sup> In turn, the public recognition of the existence of an armed conflict allowed the enlargement of the transitional justice spectrum and the legitimization of the forthcoming peace process.<sup>321</sup> The internalization of the structural complexities behind the conflict's root causes led to the design of a system which was sensitive to certain elements that were previously peripheral, such as economic violence. Also, it exposed rural areas as the principal spaces of transitional intervention, where most of the injury to victims took place and social imbalances were configured. Finally, the commencement of a peace process with FARC in September 2012 led to the conclusion of a series of accords that contain structural reform proposals, which are directly associated with the overcoming of the conflict's structural causes. These accords are primarily intended to produce transformations in certain social structures to facilitate the resolution of the historical confrontation in Colombia, and assure the circumstances necessary for durable peace. Yet, they also have an undisputable impact on the situation of the victims. In particular, the Agrarian Accord enacted in May 2013 contains a set of normative objectives that are expected to create the conditions for an effective reparation process.

## 2. *Legal framework*

The legal framework of the Colombian TJP can be framed in two categories. The first corresponds to the proper regulation of transitional justice, and is particularly concerned with the design and implementation of the victims' rights to justice, truth, and reparation. The second aims to provide

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<sup>320</sup> See REPÚBLICA DE COLOMBIA, Congreso de la República. *Ley 1450/2011 (Plan Nacional de Desarrollo 2010-2014: Prosperidad para Todos)*. Retrieved from <https://www.dnp.gov.co/Plan-Nacional-de-Desarrollo/PND-2010-2014/Paginas/Plan-Nacional-De-2010-2014.aspx> (last accessed March 8 2016).

<sup>321</sup> See EL ESPECTADOR. "Santos reconoce conflicto armado y Uribe lo controvierte." *El Espectador*, May 4 2011. Retrieved from <http://www.elespectador.com/noticias/politica/articulo-267421-santos-reconoce-conflicto-armado-y-uribe-controvierte>; SEMANA. "¿Qué significa el reconocimiento del conflicto armado por parte del Gobierno?" *Semana*, May 5 2011. Retrieved from <http://www.semana.com/nacion/articulo/que-significa-reconocimiento-del-conflicto-armado-parte-del-gobierno/239313-3>; THE ECONOMIST. "A concession to Reality." *The Economist*, May 26 2011. Retrieved from [http://www.economist.com/blogs/americasview/2011/05/armed\\_conflict\\_colombia](http://www.economist.com/blogs/americasview/2011/05/armed_conflict_colombia) (last accessed March 8 2016).



the peace process with a normative basis to reinforce the compromises reached by all parties, and in particular the ones associated with the implementation of structural reforms to remedy the conflict's root causes. As will be illustrated, these legal components are permanently interrelated due to the particularities of the Colombian transition, so they facilitate each other's legitimization and instrumentalization.

i. Transitional justice regulation

In September 2010 the government introduced a new transitional justice initiative before the Colombian Congress, which incorporated some features of the bill that was defeated in 2009. The proposal considered both the establishment of a general framework to address the rights of the victims of the conflict, and the creation of an exceptional land restitution regime to conduct reparations. In June 2011, Law 1448 – commonly known as the Victims Law – was passed by the Congress. This legal instrument was designed as a general framework that recognizes victims as subjects of special protection, and consequently provides for their right to be appropriately redressed. Land restitution was placed as the primary component for the reparation provision, given the specificities of the harm suffered by those affected and the particular territorial dynamics of the conflict.<sup>322</sup> In turn, the general character of the Victims Law encompassed the need to produce a number of supplementary norms to provide supporting regulation to comply with its mandate, and develop the conditions for its coherent articulation within the CCO.

The first group of supporting norms is formed by a number of decrees that supplement Law 1448. They provide operative mechanisms, new institutions and differential criteria to meet the objectives of the transitional justice project. In particular, the victims' right to reparation was regulated comprehensively, as these norms address the processes required to conduct land

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<sup>322</sup> See REPÚBLICA DE COLOMBIA, Congreso de la República. *Ley 1448/2011*, art. 3 (on the definition of victim).

restitution, and to protect the property rights of the victims over abandoned and looted lands.<sup>323</sup> In addition, a number of institutions were created to facilitate these processes. These are the Administrative Unit for Victim Reparation, which performs as the coordinator of the reparation component, and the Administrative Unit for Land Restitution, which is in charge of the material accomplishment of this task.<sup>324</sup> Finally, attending a differential approach coming from the consolidation of the human rights discourse within the CCO, specific reparation measures were provided for ethnic groups, including indigenous peoples and Afro-Colombian communities mostly located in rural areas.<sup>325</sup> On the other hand, the second group of supporting norms formulate the public policies that are required to assure the fiscal and operational effectiveness of the TJP. In particular, these policies set the guidelines, processes and standards required for the viability of the project's regulatory actions, which involve the coordinated articulation of different public authorities and the execution of a significant amount of resources.<sup>326</sup>

ii. The Peace process regulation

Alongside the aim to recognize and make effective the victims' rights to justice, truth, and reparation, the Santos administration had in sight the intention to find a negotiated exit to the armed conflict and thus, lead the country to a post-conflict peace-building phase. Therefore, the government started a preliminary rapprochement with FARC that was facilitated by Cuba, Norway and Venezuela, representing the international community. The exploratory process concluded with

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<sup>323</sup> See REPÚBLICA DE COLOMBIA, Congreso de la República. *Decreto 4800/2011; Decreto 4829/2011.*

<sup>324</sup> See REPÚBLICA DE COLOMBIA, Congreso de la República. *Decreto 4802/2011; Decreto 4801/2011; Decreto 4803/2011.*

<sup>325</sup> See REPÚBLICA DE COLOMBIA, Congreso de la República. *Decreto-Ley 4633/2011; Decreto-Ley 4634/2011; Decreto-Ley 4635/2011.*

<sup>326</sup> Particularly, *Decreto 175/2012* compiles a number of public policy documents that, taken as a whole, constitute the National Development Plan on Victims.

the signature of a preliminary framework accord in August 2012 – the Havana Accord.<sup>327</sup> In general terms, this document is a programmatic instrument that imposes a best-efforts-to-negotiate obligation on all of the parties. As expected, it endorses the ideological line assumed by the Victims Law to address the conflict’s root causes in order to account for the conditions of social reconciliation and durable peace. Therefore, it includes a number of guiding principles to conduct the process: the respect for human rights should permeate the negotiations; the territorial dimension of the conflict must permeate what is accorded by the parties; the structural aspects of negotiation must rely on the idea of economic development with social justice and respect for the environment; peace and stability will bring to the country a leading role in the regional and global landscapes.<sup>328</sup> Within this normative context, the international community was invited to endorse the process and understand its particular conditions.<sup>329</sup>

In addition, to express the intention to start formal negotiations – which effectively occurred in October 2012 – and set the rules of the game, the accord proposed a 6-points discussion agenda. Not surprisingly, the first point in concerned with the implementation of a new scheme of rural development that supports local integration and the achievement of more equitable socioeconomic conditions.<sup>330</sup> In May 2013, the parties announced the conclusion of an accord establishing

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<sup>327</sup> See REPÚBLICA DE COLOMBIA & FARC-EP. “Acuerdo general para la terminación del conflicto y la construcción de una paz estable y duradera.” August 26 2012. Retrieved from <https://www.mesadeconversaciones.com.co/sites/default/files/AcuerdoGeneralTerminacionConflicto.pdf> (last accessed January 13, 2015.)

<sup>328</sup> See REPÚBLICA DE COLOMBIA, Congreso de la República. *Ley 1448/2011*, art. 2.

<sup>329</sup> In April 2013, around 80 state representatives gathered at the United Nation’s Human Rights Council expressed their support to the peace process in Colombia. See PROGRAMA PRESIDENCIAL DE DERECHO HUMANOS COLOMBIA. “Consejo de Derechos Humanos de Naciones Unidas destaca avances en derechos humanos en Colombia durante Examen Periódico Universal.” *Centro de Prensa Internacional*, April 23 2013. Retrieved from [http://wsp.presidencia.gov.co/cepri/noticias/2013/abril/Paginas/20130425\\_04.aspx](http://wsp.presidencia.gov.co/cepri/noticias/2013/abril/Paginas/20130425_04.aspx) (last accessed March 20 2016).

<sup>330</sup> The particular issues that integrate the content of such point are the following: Access and use of land; management of unproductive lands, formalization of land ownership, setting of the agricultural border and constitution of peasant reserve zones; The inclusion of a territorial scope at the development programs; Infrastructure and lands adaptation; Social development, including health, housing, education and poverty eradication; Productive aspects of agriculture and microfinances; Food safety systems.

programmatic elements towards the implementation of a prospective agrarian reform.<sup>331</sup> According to the parties, the accord was the first step in a structural transformation of the country's rural and agrarian background. This was the case because it focused on the interests of small-scale farmers, access to and redistribution of lands, the fight against poverty, the encouragement of agriculture in the country, and the reactivation of the rural economy.<sup>332</sup> Likewise, it was considered that the accord aimed to reverse the effects of the conflict by adopting restitutive actions in favor of the victims of land dispossession and forced displacement. Finally, it was pointed out that the country's Constitutional Order – including respect for accrued private property rights – would not be altered as a consequence of the accords concluded between the government and FARC.

In sum, the peace process regulation reveals a structural orientation. Provided the causes underlying the Colombian conflict, both the principles that serve as drivers of the negotiation and the content being discussed, legitimize the eventual state intervention in social structures and relations as a mechanism to achieve durable peace. In particular, land ownership and rural development appear to be the primary subjects of concern. In this regard, the initial findings extracted from the content of the Agrarian Accord point to the eventual enactment of state regulation entailing either structural reforms to existent structures or novel developments with a distributive character. There is evidence of a great complementarity between the peace process and the regulation on the promotion and protection of the victims' rights to justice, truth and reparation. Thus, the latter is considered to be not only a precondition for the peace process, but a fundamental instrument of the post-conflict peace-building agenda.

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<sup>331</sup> See REPÚBLICA DE COLOMBIA & FARC-EP. “Hacia un Nuevo Campo: Reforma Rural Integral”. May 26 2013. Retrieved from <https://www.mesadeconversaciones.com.co/sites/default/files/Comunicado%20Conjunto%20%20La%20Habana%20%2026%20d%20emayo%20de%202013%20%20Versi%C3%B3n%20Espa%C3%B1ol%20-%20PDF.pdf> (last accessed March 20 1016.)

<sup>332</sup> Ibid., p.1.

## B. Rationale of the project

As a project, the current Colombian transitional justice initiative has a distinctive rationale: it has a set of founding arguments that justify its content and scope, which evidence a coordinated structure, and which in turn function to achieve a specific goal. In order to illustrate this rationale, this section will analyze the content and scope of three different types of documents that collect the principles and premises that inspired the design and articulation of the corresponding legal framework. First, the explanatory statements of the legal instruments produced on the occasion of the Victims Law.<sup>333</sup> Second, the project's financial and action plans, which intended to make it operative and sustainable over time.<sup>334</sup> And third, a series of public keynotes and reports that contain relevant ideological statements for the transitional justice project: the statement by the President of Colombia, Juan Manuel Santos, before the United Nations General Assembly in its 68<sup>th</sup> session;<sup>335</sup> the speeches given by the Colombian High Commissioner for Peace, Sergio Jaramillo, at different universities;<sup>336</sup> and the First Joint Report of the peace process.<sup>337</sup> Therefore,

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<sup>333</sup> See REPÚBLICA DE COLOMBIA. "Exposición de Motivos al Proyecto de Ley por la cual se establecen normas transicionales para la restitución de tierras." September 27 2010. Retrieved from [http://wsp.presidencia.gov.co/Prensa/2010/Septiembre/Documents/20100907\\_MotivosTierras.pdf](http://wsp.presidencia.gov.co/Prensa/2010/Septiembre/Documents/20100907_MotivosTierras.pdf); "Exposición de Motivos al Proyecto de Ley por la cual se dictan medidas de atención y reparación integral a las víctimas de violaciones a los derechos humanos e infracciones al derecho internacional humanitario." September 27 2010. Retrieved from <http://static.elespectador.com/especiales/2010/09/e05bfb29d4d932369f6f7008779fd07f/index.html> (last accessed March 20 2016.)

<sup>334</sup> See REPÚBLICA DE COLOMBIA. Consejo Nacional de Política Económica y Social. *Documento Conpes 3712. Plan de Financiación Para La Sostenibilidad de la Ley 1448 De 2011*. Diciembre 1 de 2011; *Documento Conpes 3726. Lineamientos, Plan de Ejecución de Metas, Presupuesto y Mecanismo de Seguimiento para el Plan Nacional de Atención y Reparación Integral a Víctimas*. Mayo 30 de 2012.

<sup>335</sup> UNITED NATIONS GENERAL ASSEMBLY. *Statement by The President of the Republic of Colombia, Juan Manuel Santos, before the General Assembly of the United Nations in its 68th Session*. (New York, 24 September 2013). Retrieved from [http://gadebate.un.org/sites/default/files/gastatements/68/CO\\_en\\_0.pdf](http://gadebate.un.org/sites/default/files/gastatements/68/CO_en_0.pdf) (last accessed March 20 2016.)

<sup>336</sup> See JARAMILLO, Sergio. "La Transición en Colombia." Conference given at Externado de Colombia University. May 9 2013. Retrieved from <http://www.altocomisionadoparalapaz.gov.co/Documents/La%20transici%C3%B3n%20en%20Colombia.pdf>; "The Transition in Colombia and the Process to Build a Territorial Peace." Conference given at Harvard Kennedy School – Carr Center for Human Right Policy. March 13 2014. Retrieved from <http://www.hks.harvard.edu/centers/carr/news-events/carr-center-events/event-details/2014/sergio-jaramillo-caro> (last accessed March 20 2016.)

<sup>337</sup> Havana, June 21 2013. See <https://www.mesadeconversaciones.com.co/comunicados/primer-informe-conjunto-de-la-mesa-de-conversaciones-la-habana-21-de-junio-de-2013> (last accessed March 20 2016.)

the illustration of the project's rationale is done through the formulation of three inquiries. First, what is the meaning and the implications of Colombian transition. Second, which are the types of justice operating in Colombian transition. And third, what is the relation between Colombian transition and the international community.

### *1. The meaning and implications of transition*

The current transitional justice initiative in Colombia is considered a political event with considerable socio-legal effects, which represents a “once-in-a-generation opportunity”.<sup>338</sup> In that regard, the decision to change the political direction with respect to the strategy to finalize the armed conflict was not an easy choice and implied a risk.<sup>339</sup> Moreover, the strategy chosen to address the effects of 50 years of conflict involves a number of significant complexities. Not only is ordinary justice considered ill-equipped to address a phenomenon of this magnitude,<sup>340</sup> but traditional peace-building schemes such as DDR are insufficient in achieving durable peace in Colombia.<sup>341</sup> Thus, there appears to be a consensus as to the reasons for which the previous attempts at introducing a transitional justice initiative in Colombia were not effective.<sup>342</sup>

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<sup>338</sup> See JARAMILLO, Sergio. “The Transition in Colombia and the Process to Build a Territorial Peace.” Conference given at Harvard Kennedy School – Carr Center for Human Right Policy. March 13 2014. Retrieved from <http://www.hks.harvard.edu/centers/carr/news-events/carr-center-events/event-details/2014/sergio-jaramillo-aro> (last accessed March 20 2016.)

<sup>339</sup> “Although it would have been easier to move forward on the path the previous government was following, it would have not been responsible”. See JARAMILLO, Sergio. “The Transition in Colombia and the Process to Build a Territorial Peace.” Conference given at Harvard Kennedy School – Carr Center for Human Right Policy. March 13 2014. Retrieved from <http://www.hks.harvard.edu/centers/carr/news-events/> (last accessed March 20 2016.)

<sup>340</sup> “As the conflict has dragged on in time, the transitional justice tools must deal with a huge amount of human rights violations product of decades of violence.” See REPÚBLICA DE COLOMBIA, Congreso de la República. *Exposición de Motivos Marco Jurídico para la Paz*. Retrieved from <http://repositorio.urosario.edu.co/bitstream/handle/10336/1326/Anexo%208.pdf?sequence=9> (last accessed March 20 2016.)

<sup>341</sup> “A historical error has been thinking that the achievement of peace is only a matter of demobilization of the armed groups, without thinking about the need of radical transformations at the rural areas”. See JARAMILLO, Sergio. “La Transición en Colombia.” Conference given at Externado de Colombia University. May 9 2013. Retrieved from <http://www.altocomisionadoparalapaz.gov.co/Documents/La%20transici%C3%B3n%20en%20Colombia.pdf> (last accessed March 20 2016.)

<sup>342</sup> “The previous attempts to meet such aims failed due to impediments associated with the juxtaposition of unarticulated institutional processes, or their lack of consistency to ensure the rights of the victims.” See REPÚBLICA DE COLOMBIA, Congreso de la República. “Exposición de Motivos al Proyecto de Ley por la cual se dictan medidas

Bearing this in mind, it is clear that the Colombian project does not fit within the classic transitional justice model, which focuses on moves from authoritarian regimes to liberal democracies. In this case, there is a transition from an internal conflict grounded in structural issues to peace. As such, this phenomenon entails additional considerations to the traditional understandings of the field. In that respect, the explanatory statement of the Victims Law pointed out that a first “transitional moment” took place in 1991 with the enactment of a new Constitution. In the same direction, the Constitutional Court had depicted the political charter as a symbol of a real transit to democracy and as a true peace agreement. Thus, it is considered that the current transition intends to create the instruments necessary to address the obstacles that had impeded the full realization of the constitutional aspirations.<sup>343</sup> Following the Colombian High Commissioner of Peace, the country’s transition does not imply a shift in the constitutional model of the state, but its redirection in order to comply with the primary objectives and aspirations.<sup>344</sup>

This transitional justice project is a complex structure involving various political and legal elements which, put together under a determined configuration, seek to serve the ultimate objective of durable peace in the country. In that regard, the logic behind this arrangement suggests that the design of transition involved a series of steps that supposed *a process*: the acceptance of the

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de atención y reparación integral a las víctimas de violaciones a los derechos humanos e infracciones al derecho internacional humanitario.” September 27 2010, p. 3. Retrieved from <http://static.elespectador.com/especiales/2010/09/e05bfb29d4d932369f6f7008779fd07f/index.html> (last accessed March 20 2016.)

<sup>343</sup> “Transition in Colombia supposes a broader understanding of the goals of transitional justice; a balance between the need to address the legacy of human rights violations and the state’s obligation to crystalize the aspirations of the 1991 Constitution. In this context, transitional justice has a prospective dimension” See REPÚBLICA DE COLOMBIA, Congreso de la República. *Exposición de Motivos Marco Jurídico para la Paz*. Retrieved from <http://repository.urosario.edu.co/bitstream/handle/10336/1326/Anexo%208.pdf?sequence=9> (last accessed March 20 2016.)

<sup>344</sup> “Although we need to think about new types of community organization in order to boost transition, the state’s political and administrative model is not a subject of discussion whatsoever.” See JARAMILLO, Sergio. “The Transition in Colombia and the Process to Build a Territorial Peace.” Conference given at Harvard Kennedy School – Carr Center for Human Right Policy. March 13 2014. Retrieved from <http://www.hks.harvard.edu/centers/carr/news-events/carr-center-events/event-details/2014/sergio-jaramillo-caro> (last accessed March 20 2016.)

existence of an armed conflict; the enactment of the Victims Law; the creation of a favorable international environment for the completion of post-conflict peace-building actions; and the design of a methodical process to start peace dialogues with the insurgency.<sup>345</sup>

The norms for regulating the protection and enforcement of the victim's rights to justice, truth, and reparation were designed to start operating before the materialization of a peace process with FARC, and they will continue acting regardless of the final result of the dialogues. However, these norms are intricately connected with the success of the peace initiative. They perform as an ethical base to legitimize the negotiations, and they contribute to creating the material conditions for the long-term implementation of the prospective agreements. In other words, due to its instrumental nature, transitional justice is depicted as a peace-building mechanism.<sup>346</sup> Thus, the whole process gravitates around the idea of putting an end to the conflict in order to properly commence transition, which is assumed as a peace-building policy space.<sup>347</sup> This is the way in which the "transitional justice without transition" paradox is justified in the Colombian case<sup>348</sup>, since the

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<sup>345</sup> See JARAMILLO, Sergio. "La Transición en Colombia." Conference given at Externado de Colombia University. May 9 2013. Retrieved from <http://www.altocomisionadoparalapaz.gov.co/Documents/La%20transici%C3%B3n%20en%20Colombia.pdf> (last accessed March 20 2016.)

<sup>346</sup> "Once the final peace agreement is signed everything will change, since we will enter into a phase of peacebuilding without the pressure and coercion exercised by direct violence. We properly enter into the transitional phase." See JARAMILLO, Sergio. "La Transición en Colombia." Conference given at Externado de Colombia University. May 9 2013, p. 1. Retrieved from <http://www.altocomisionadoparalapaz.gov.co/Documents/La%20transici%C3%B3n%20en%20Colombia.pdf> (last accessed March 20 2016.)

<sup>347</sup> "One could say that the post-conflict scenario is the real starting point of the peace process, not its final point." See JARAMILLO, Sergio. "La Transición en Colombia." Conference given at Externado de Colombia University. May 9 2013, p. 1. Retrieved from <http://www.altocomisionadoparalapaz.gov.co/Documents/La%20transici%C3%B3n%20en%20Colombia.pdf> (last accessed March 20 2016.)

<sup>348</sup> "The foundations of transition will be the accords reached at Havana. There are five substantive points that have to do with the termination of conflict, which constitute the hard core issues that are to be solved in order to achieve peace, independently of anyone's political affiliation or ideology." See JARAMILLO, Sergio. "La Transición en Colombia." Conference given at Externado de Colombia University. May 9 2013, p. 1. Retrieved from <http://www.altocomisionadoparalapaz.gov.co/Documents/La%20transici%C3%B3n%20en%20Colombia.pdf> (last accessed March 20 2016.)



effective protection of the rights of the victims is both an end and a means to achieve the ultimate objective of peace.<sup>349</sup>

In the context of Colombian transition, peacebuilding has been identified with three instrumental actions that have a structural character: reconstruction, transformation, and reconciliation.<sup>350</sup>

Moreover, it is assumed that the country's rural areas has to be rebuilt, provided that it was the zone where the armed conflict had the greatest impact.<sup>351</sup> Thus, since the Colombian state has encompassed an institutional failure to deliver and enforce goods and services at the territorial level, it is necessary to set up particular institutions to guarantee the production and deliverance of these elements in the form of rights. In doing so, it is expected to stabilize the country's social life through the corresponding deployment of regulatory actions.<sup>352</sup> In that regard, it is suggested that the transformation of rural areas requires not only a pragmatic recognition of what has to be done and how it should be implemented, but a symbolic action associated with the enforcement of the rights of the people that had traditionally lived in the periphery of institutional concern.<sup>353</sup> Finally, while the *raison d'être* of the Victims Law is the institutionalization of a public policy on the

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<sup>349</sup> "The materialization of the rights of the victims is an intermediate goal itself and a yardstick to measure the affectivity of the ultimate goal, which is national reconciliation and the consolidation of democracy" REPÚBLICA DE COLOMBIA, Congreso de la República. *Exposición de Motivos Marco Jurídico para la Paz*, p. 2. Retrieved from <http://repository.urosario.edu.co/bitstream/handle/10336/1326/Anexo%208.pdf?sequence=9> (last accessed March 20 2016.)

<sup>350</sup> See JARAMILLO, Sergio. "La Transición en Colombia." Conference given at Externado de Colombia University. May 9 2013, p. 1. Retrieved from <http://www.altocomisionadoparalapaz.gov.co/Documents/La%20transici%C3%B3n%20en%20Colombia.pdf> (last accessed March 20 2016.)

<sup>351</sup> See JARAMILLO, Sergio. "La Transición en Colombia." Conference given at Externado de Colombia University. May 9 2013. Retrieved from <http://www.altocomisionadoparalapaz.gov.co/Documents/La%20transici%C3%B3n%20en%20Colombia.pdf> (last accessed March 20 2016.)

<sup>352</sup> See JARAMILLO, Sergio. "The Transition in Colombia and the Process to Build a Territorial Peace." Conference given at Harvard Kennedy School – Carr Center for Human Right Policy. March 13 2014. Retrieved from <http://www.hks.harvard.edu/centers/carr/news-events/carr-center-events/event-details/2014/sergio-jamillocaro>(last accessed March 20 2016).

<sup>353</sup> See JARAMILLO, Sergio. "The Transition in Colombia and the Process to Build a Territorial Peace." Conference given at Harvard Kennedy School – Carr Center for Human Right Policy. March 13 2014. Retrieved from <http://www.hks.harvard.edu/centers/carr/news-events/carr-center-events/event-details/2014/sergio-jamillocaro>(last accessed March 20 2016).

promotion and protection of the rights of the victims, its ultimate objective is national reconciliation.<sup>354</sup> The latter is depicted as a social setting where the rules of the game are accepted by everyone, and everyone is working towards the consolidation of peace and stability.<sup>355</sup>

Alongside the latter characteristics, the Colombian transition is shaped by a series of operational elements that determine the way in which the project's normative devices and institutional mechanisms must be articulated in order to serve the objective of durable peace. These elements include temporality, exceptionality, territoriality and participation. They have been set up to indicate how the authorities should implement the transitional justice project in order to comply with the reconstructive and transformative aspirations. The first element, temporality, represents the need to impose a specific time frame to achieve the transitional objective, so as to consider, with reasonable expectation, when the tasks will be completed.<sup>356</sup> In turn, the exceptional character of transition relies on the fact that the application of regular legal instruments would be ineffective to reconstruct and transform Colombian society.<sup>357</sup> In this regard, it has been said that the state has to conceive and put forward all the possible resources to comply with the objectives of transition,

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<sup>354</sup> "This project aims to institutionalize a truly state policy on the assistance, attention, protection and reparation of victims. It is the result of a consensus between the government and different sectors of society. Only the realization of this aim will enable the materialization of Colombian transitional justice's ultimate objective: national reconciliation." See REPÚBLICA DE COLOMBIA, Congreso de la República. *Exposición de Motivos Marco Jurídico para la Paz*. Retrieved from <http://repository.urosario.edu.co/bitstream/handle/10336/1326/Anexo%208.pdf?sequence=9> (last accessed March 20 2016).

<sup>355</sup> See JARAMILLO, Sergio. "La Transición en Colombia." Conference given at Externado de Colombia University. May 9 2013. Retrieved from <http://www.altocomisionadoparalapaz.gov.co/Documents/La%20transici%C3%B3n%20en%20Colombia.pdf> (last accessed March 20 2016.)

<sup>356</sup> "We have to set a time limit—for instance, ten years—to materialize everything that is being discussed and accorded" See JARAMILLO, Sergio. "La Transición en Colombia." Conference given at Externado de Colombia University. May 9 2013. Retrieved from <http://www.altocomisionadoparalapaz.gov.co/Documents/La%20transici%C3%B3n%20en%20Colombia.pdf> (last accessed March 20 2016.)

<sup>357</sup> "The purpose of a transitional framework as the one here envisaged is, precisely, to create exceptional mechanisms to repair and assist victims, and not replace the regular ordinary tools the state has to protect people within its jurisdiction." See JARAMILLO, Sergio. "La Transición en Colombia." Conference given at Externado de Colombia University. May 9 2013. Retrieved from <http://www.altocomisionadoparalapaz.gov.co/Documents/La%20transici%C3%B3n%20en%20Colombia.pdf> (last accessed March 20 2016.)

including temporary legal measures, extraordinary resources, and new local institutions.<sup>358</sup> Territoriality makes reference to the fundamental character of the local dimension of peace.<sup>359</sup> Since most of the conflict's impact took place at the local level and had a structural character, a great challenge for the project is to build institutions to effectively intervene peripheral social structures that own distinctive features and have traditionally been relegated.<sup>360</sup> Finally, participation implies that the design of the measures implementing the content of the peace agreements should count with the active involvement of the addressees. This is, that transformation must be produced "from bellow", based on the power and organizational capacities of local communities.<sup>361</sup> As a result, individuals and communities become self-aware of their role as agents of change, and the regulatory measures enacted in the context of the project have a high participatory nature.<sup>362</sup>

## 2. *The dimensions of justice involved in the Colombian transition*

As has been illustrated, the Colombian transitional justice project has a normative dimension. Its aim to produce transformations within the political organization originates from an allegation of

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<sup>358</sup> See JARAMILLO, Sergio. "La Transición en Colombia." Conference given at Externado de Colombia University. May 9 2013. Retrieved from <http://www.altocomisionadoparalapaz.gov.co/Documents/La%20transici%C3%B3n%20en%20Colombia.pdf> (last accessed March 20 2016.)

<sup>359</sup> "In Colombia, so far there has been no real peace process as such. Although there were successful processes with the former guerrillas, no peace process at the local side has taken place. This is why the conflict has not been properly finalized". See JARAMILLO, Sergio. "La Transición en Colombia." Conference given at Externado de Colombia University. May 9 2013. Retrieved from <http://www.altocomisionadoparalapaz.gov.co/Documents/La%20transici%C3%B3n%20en%20Colombia.pdf> (last accessed March 20 2016.)

<sup>360</sup> See JARAMILLO, Sergio. "La Transición en Colombia." Conference given at Externado de Colombia University. May 9 2013. Retrieved from <http://www.altocomisionadoparalapaz.gov.co/Documents/La%20transici%C3%B3n%20en%20Colombia.pdf> (last accessed March 20 2016.)

<sup>361</sup> See JARAMILLO, Sergio. "La Transición en Colombia." Conference given at Externado de Colombia University. May 9 2013. Retrieved from <http://www.altocomisionadoparalapaz.gov.co/Documents/La%20transici%C3%B3n%20en%20Colombia.pdf> (last accessed March 20 2016.)

<sup>362</sup> "In order to put an end to conflict we need a veritable social mobilization at the local background, and a collective act of imagination regarding how would transition look like." See JARAMILLO, Sergio. "La Transición en Colombia." Conference given at Externado de Colombia University. May 9 2013. Retrieved from <http://www.altocomisionadoparalapaz.gov.co/Documents/La%20transici%C3%B3n%20en%20Colombia.pdf> (last accessed March 20 2016.)

discontent with respect to certain elements in the social setting, and it encompasses the use of law and regulation to produce the corresponding changes. Thus, the diffusion of justice through regulatory actions is fundamental for the accomplishment of the purposes of reconstruction, transformation and reconciliation, since the state might be required to intervene in societal structures and relations in an effective way to produce the expected changes.

As a political event with a distinct normative character, the Colombian transitional justice project incorporates a vision of justice. With respect to the relation between the demands of justice and the project's scope of intervention, the scope of the victims' rights enforcement is ample. Although the Colombian transition is principally committed to address the situation of those who were affected by the conflict, it is also configured as a mechanism to prevent the resurgence of personal and structural violence. Thus, the transitional justice project incorporates both backward-looking and forward-looking perspectives of justice, which results in a broader configuration of victims.<sup>363</sup> Thus, from an implementation perspective, the project assumes three particular dimensions of justice that have been coined to respond to the particularities of the conflict/post-conflict scenario. These dimensions are territorial justice, distributive justice and the proper satisfaction of the rights of the victims. The Colombian High Commissioner of Peace has defined each dimension in the following way:

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<sup>363</sup> "Our commitment goes beyond serving the victims of the past; our commitment is eliminating the possibility of having new victims as a result of this conflict." See UNITED NATIONS, General Assembly. *Statement by The President of the Republic of Colombia, Juan Manuel Santos, before the General Assembly of the United Nations in its 68<sup>th</sup> Session*. New York, September 24 2013. Retrieved from [http://gadebate.un.org/sites/default/files/gastatements/68/CO\\_en\\_0.pdf](http://gadebate.un.org/sites/default/files/gastatements/68/CO_en_0.pdf) (last accessed March 20 2016).

- Territorial justice. It entails the implementation of actions at the local level. They are intended both to return the material possession of lands and to protect the property rights of the people affected by the conflict.<sup>364</sup>
- Distributive justice. This dimension subscribes to the idea that peace must be inclusive and must transcend the needs of victims impacted directly by the conflict to a vision much broader in scope, which attends to the needs of all. As a consequence, the state undertakes this transitional process as an opportunity to generate structural transformations.<sup>365</sup>
- Satisfaction of the rights of the victims. This corresponds to the promotion and protection of the victims' rights to justice, truth and reparation, which are formally recognized through the enactment of the Victims Law. Although their implementation takes place prior to the proper transitional phase, it is believed that once a peace agreement is signed, the effects of such an anticipatory justice exercise will be amplified through post-conflict peace-building actions.<sup>366</sup>

These dimensions of justice reflect the state's intention to introduce a pioneer scheme towards the achievement of durable peace, which has been nourished from both the past experiences in other

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<sup>364</sup> "Along with corruption, the conflict was used as an instrument to make possible the acquisition of the country's most productive lands with money coming from illegal activities. Thus, the effects of the conflict on the territory and land ownership must be reversed through the implementation of exceptional, effective and time-framed mechanisms." See JARAMILLO, Sergio. "La Transición en Colombia." Conference given at Externado de Colombia University. May 9 2013. Retrieved from <http://www.altocomisionadoparalapaz.gov.co/Documents/La%20transici%C3%B3n%20en%20Colombia.pdf> (last accessed March 20 2016.)

<sup>365</sup> "After 50 years of conflict, not only direct victims should be attended, but also the ones who were affected by the conflict; although they did not displace, they got impoverished. We have to conduct distributive-oriented actions, and mostly distribute lands along with the assets and capacities required to make proper use of them." See JARAMILLO, Sergio. "La Transición en Colombia." Conference given at Externado de Colombia University. May 9 2013. Retrieved from <http://www.altocomisionadoparalapaz.gov.co/Documents/La%20transici%C3%B3n%20en%20Colombia.pdf> (last accessed March 20 2016.)

<sup>366</sup> "Even if the government already started to implement this justice component through the enactment of the victims and land restitution law, something different could be achieved if peace is signed. It would be an opportunity to carry out an integral strategy, a truly transition." See UNITED NATIONS, General Assembly. *Statement by The President of the Republic of Colombia, Juan Manuel Santos, before the General Assembly of the United Nations in its 68th Session*. New York, September 24 2013. Retrieved from [http://gadebate.un.org/sites/default/files/gastatements/68/CO\\_en\\_0.pdf](http://gadebate.un.org/sites/default/files/gastatements/68/CO_en_0.pdf) (last accessed March 20 2016.)

countries and the country's own early attempts.<sup>367</sup> The integration of a comprehensive view of the conflict's causes and dynamics into the legal elements of the project goes along with the political decision to conduct a transition, transformative in character, rather than a restrictive understanding of the superficial effects of violence. Therefore, from the official documents analyzed it is possible to infer the Colombian authorities' self-awareness of the crucial role they have in the execution of different tasks associated with the transition, as well as the implications of these actions on the future configuration of social relations, especially with regards to the distribution of public goods in rural areas.

### *3. The relation between the Transitional Justice Project and the International Community*

As highlighted by the Colombian High Commissioner for Peace, one of the fundamental steps to build a transitional justice project was the creation of a favorable international environment for peace. In that regard, the government developed a strategy to engage the international community with the current Colombian enterprise. This approach considers not only the strategic importance of including the support of states, international institutions and other non-state entities, but the need to assure a consistent attitude from these actors with respect to their expectations around the results of the process. Notable for the elucidation of this strategy is a statement given by President Santos before the United Nations General Assembly during its 68<sup>th</sup> period of sessions in September 2013.

The first element of the strategy is the provision of a global perspective on the conflict. Traditionally, states that deal with an internal confrontation have claimed that by virtue of their

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<sup>367</sup> "We have pioneered the implementation of transitional justice measures amidst the conflict, prioritizing the satisfaction of the victim's rights." See UNITED NATIONS, General Assembly. *Statement by The President of the Republic of Colombia, Juan Manuel Santos, before the General Assembly of the United Nations in its 68th Session*. New York, September 24 2013. Retrieved from [http://gadebate.un.org/sites/default/files/gastatements/68/CO\\_en\\_0.pdf](http://gadebate.un.org/sites/default/files/gastatements/68/CO_en_0.pdf) (last accessed March 20 2016.)

sovereignty, the settlement of this confrontation is as an internal affair, thereby preventing any external intervention. This attitude, however, has become less common in light of the increasing interdependence within the international community and the consolidation of a “shared-interests” doctrine within international relations. In that regard, President Santos affirmed before the General Assembly that Colombia was not the only state affected by its internal conflict, and thus it had an intrinsic responsibility to find effective durable solutions due to its particular compromises with international peace and security. Therefore, he called upon the international community to remain attentive to different situations taking place during the course of the transitional justice project. Following this line of reasoning, the Colombian government acknowledged the fundamental role of international governance structures in the configuration and legitimization of the transitional justice project.<sup>368</sup> Since the early stages of the process, the country has encouraged the presence of international authorities to transmit a message of general commitment to the path assumed to achieve durable peace.<sup>369</sup> Further influence of the international community on the process includes not only the accompaniment to the peace negotiations in Havana,<sup>370</sup> but the adoption of international standards by the regulation produced in the realm of the protection on the rights of

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<sup>368</sup> “Today, before the Assembly, we Colombians want to thank the international community for the support we have received in the endeavour of achieving the end of our conflict through the dialogue.” See UNITED NATIONS, General Assembly. *Statement by The President of the Republic of Colombia, Juan Manuel Santos, before the General Assembly of the United Nations in its 68th Session*. New York, September 24 2013. Retrieved from [http://gadebate.un.org/sites/default/files/gastatements/68/CO\\_en\\_0.pdf](http://gadebate.un.org/sites/default/files/gastatements/68/CO_en_0.pdf) (last accessed March 20 2016.)

<sup>369</sup> “My government promoted an ambitious bill to recognize and repair victims amidst a conflict, a bill I had the honour to enact in the presence of the honorable Secretary-General of the Organization.” See UNITED NATIONS, General Assembly. *Statement by The President of the Republic of Colombia, Juan Manuel Santos, before the General Assembly of the United Nations in its 68th Session*. New York, September 24 2013. Retrieved from [http://gadebate.un.org/sites/default/files/gastatements/68/CO\\_en\\_0.pdf](http://gadebate.un.org/sites/default/files/gastatements/68/CO_en_0.pdf) (last accessed March 20 2016.)

<sup>370</sup> Since the exploratory phase of the peace process, countries like Norway, Venezuela and Cuba have performed as guarantors of the process.

the victims.<sup>371</sup> There is evidence of deference to an “international consensus on the justice, truth and reparation criteria”.<sup>372</sup>

However, this deference to the international community of state’s political will and standards is shaped by the vindication of the country’s right to achieve peace in accordance with the specific conditions and variables of its context.<sup>373</sup> As a consequence, the President requested the international community to respect Colombia’s right to pursue peace in the way it considers best.<sup>374</sup>

While the reference to the duty of respect might be seen as a request to non-intervention, it also assumes a specific position towards the further effects of the implementation process, which reminds a self-determination discourse. Thus, the discussion engages with a recognized entitlement, such as peace. Moreover, the use of a normative-oriented discourse indicates an intention to anticipate occasional responsibility issues at the international level.<sup>375</sup>

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<sup>371</sup> “The standards on the protection of victims that have been considered by the government and the Congress throughout this legislative process are the ones included in several international hard law and soft law instruments.” See REPÚBLICA DE COLOMBIA. “Exposición de Motivos al Proyecto de Ley por la cual se dictan medidas de atención y reparación integral a las víctimas de violaciones a los derechos humanos e infracciones al derecho internacional humanitario”, p. 8. September 27 2010. Retrieved from <http://static.elespectador.com/especiales/2010/09/e05bfb29d4d932369f6f7008779fd07f/index.html> (last accessed March 2016.)

<sup>372</sup> “According to contemporary international law, the right to reparation has both individual and collective dimensions. The first encompasses the impairment of the victim’s rights and requires the adoption of individual measures such as restitution. Whenever possible, restitution actions intend to place the victims into the original situation it was before the injury was produced.” See REPÚBLICA DE COLOMBIA. “Exposición de Motivos al Proyecto de Ley por la cual se dictan medidas de atención y reparación integral a las víctimas de violaciones a los derechos humanos e infracciones al derecho internacional humanitario”, p. 14. September 27 2010. Retrieved from <http://static.elespectador.com/especiales/2010/09/e05bfb29d4d932369f6f7008779fd07f/index.html> (last accessed March 2016.)

<sup>373</sup> “And with the world as our witness, we would like to vindicate our right to achieving the peace.”

<sup>374</sup> “What we are asking from the UN and the international community is to respect Colombia’s right, and the right of every nation, to pursuing peace.” See UNITED NATIONS, General Assembly. *Statement by The President of the Republic of Colombia, Juan Manuel Santos, before the General Assembly of the United Nations in its 68th Session*. New York, September 24 2013. Retrieved from [http://gadebate.un.org/sites/default/files/gastatements/68/CO\\_en\\_0.pdf](http://gadebate.un.org/sites/default/files/gastatements/68/CO_en_0.pdf) (last accessed March 20 2016.)

<sup>375</sup> “We ask you to keep accompanying us in this effort, respecting our choices, the way in which we act, and trusting that our decisions have never been against the international community’s needs.” UNITED NATIONS, General Assembly. *Statement by The President of the Republic of Colombia, Juan Manuel Santos, before the General Assembly of the United Nations in its 68th Session*. New York, September 24 2013. Retrieved from [http://gadebate.un.org/sites/default/files/gastatements/68/CO\\_en\\_0.pdf](http://gadebate.un.org/sites/default/files/gastatements/68/CO_en_0.pdf) (last accessed March 20 2016.)



In addition, the recognition and subsequent incorporation of a series of international standards – such as democracy and the rule of law – within the transitional justice project is also evidence of a particular connection between this process and the compromises made in the realm of the international community.<sup>376</sup> In sum, it is possible to affirm that Colombia adopted a transitional justice project with a strong international orientation, which is informed by a series of elements and standards produced at the international sphere.<sup>377</sup> Due to this framing of the conflict as a global problem, the government has insisted on the need for feedback from a great variety of actors in order to arrive at global solutions.<sup>378</sup>

### C. Content of the transitional justice project

The content of the transitional justice project is elucidated through an analysis of the reasons and dynamics behind both the scheme of victims' reparation – particularly land restitution – and the prospective rural development reform proposed in the context of the peace negotiations between the government and FARC, which intends to bring structural transformations at the territorial level.

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<sup>376</sup> “We will stop this conflict now, to ensure our democratic tradition, the Rule of Law, and attending our duties with the international community.” UNITED NATIONS, General Assembly. *Statement by The President of the Republic of Colombia, Juan Manuel Santos, before the General Assembly of the United Nations in its 68th Session*. New York, September 24 2013. Retrieved from [http://gadebate.un.org/sites/default/files/gastatements/68/CO\\_en\\_0.pdf](http://gadebate.un.org/sites/default/files/gastatements/68/CO_en_0.pdf) (last accessed March 20 2016.)

<sup>377</sup> “Indeed, we have adopted an international strategy for transitional justice. The strategy addresses the principles of truth, justice and reparation, which we hope will enable us to make transition towards peace.” UNITED NATIONS, General Assembly. *Statement by The President of the Republic of Colombia, Juan Manuel Santos, before the General Assembly of the United Nations in its 68th Session*. New York, September 24 2013. Retrieved from [http://gadebate.un.org/sites/default/files/gastatements/68/CO\\_en\\_0.pdf](http://gadebate.un.org/sites/default/files/gastatements/68/CO_en_0.pdf) (last accessed March 20 2016.)

<sup>378</sup> “The different governments are evaluating them (the points of negotiation) and they should serve as inputs for discussions at all universities and think tanks, and in different scenarios, not just from America but from the whole world, because this is a global problem and requires a global solution.” UNITED NATIONS, General Assembly. *Statement by The President of the Republic of Colombia, Juan Manuel Santos, before the General Assembly of the United Nations in its 68th Session*. New York, September 24 2013. Retrieved from [http://gadebate.un.org/sites/default/files/gastatements/68/CO\\_en\\_0.pdf](http://gadebate.un.org/sites/default/files/gastatements/68/CO_en_0.pdf) (last accessed March 20 2016.)

### 1. *The transformative character of reparations*

The enactment and implementation of the Victims Law in 2011, including its supplementary regulation, was crucial for launching the Colombian transitional justice project. Nevertheless, it is also expected to have a transcendental role in the post-conflict scenario, once peace has been reached with the insurgent armed actors, due to its transformative character. As a result, restorative justice was conceived as a transitional-justice-oriented component which, by addressing the complex causality around the conflict, goes beyond merely addressing past human rights violations. It also performs a supportive role in the reconfiguration of the country's future. Thus, independently of – and in parallel to – the resolution of the confrontation with the belligerent actors, the state is compelled to intervene in certain social relations to establish the conditions for stability and development. This way, the norms and regulations embedded in the transitional justice project provide reflexive answers to social needs.<sup>379</sup>

For that reason, the regulation addressing the rights of the victims was designed to produce tangible changes in society, including the possibility to distribute – or redistribute – economic entitlements and affect expectations. Particularly, the victims's right to reparation is expected to be achieved through a massive and systematic land restitution program.<sup>380</sup> Furthermore, this restorative justice initiative is expected to work in tandem with the outcomes of the peace process, since the agrarian and rural issues are fundamental points in the negotiation agenda.<sup>381</sup> Thus, an individual measure

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<sup>379</sup> See MOORE, Sally Falk. "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study" 4 *Law & Society Review* Vol. 7 (1973), 719-746.

<sup>380</sup> Continuing with the aspirations of *Ley 975/05*, land restitution is designated as the preferred alternative to restore the rights of the victims. According to Conpes 3135, it is seen as a way to rebuild people's "life project" and dignity, whether individual or collective, depending on their specific ethnic and social characteristics and affiliations. See REPUBLICA DE COLOMBIA, Consejo Nacional de Política Económica y Social. Documento Conpes 3135. *Lineamientos de Política Para las Negociaciones Internacionales de Acuerdos de Inversión Extranjera*. Octubre 9 de 2001.

<sup>381</sup> "The purpose of reparation is to restore victims with their rights and in consequence, allow them reintegrate to society as citizens. Reparations own a transformative potential on the victim's life conditions, which in most of the cases have been marginalized. Not only they are useful means to deal with the harm directly suffered as a consequence

enacted in this context has different dimensions: not only does it constitute an act of individual reparation intended to reconstitute the situation of the victim but it is also a peacebuilding measure.<sup>382</sup> As a result, the implementation of transformative reparations encompasses the exercise of structural regulatory actions by the state, and particularly by its legislative, executive and judicial authorities.<sup>383</sup>

Finally, it is important to bear in mind two specific issues around the operative possibilities of victims' reparation. First, although social welfare measures are based on the state's general obligation to provide for its citizens and do not intend to substitute reparations, in the case of the victims of the armed conflict these measures are imbued with an intrinsic reparatory effect and should be recognized as such.<sup>384</sup> And second, the authorities must perform in a way that the implementation of the transitional justice scheme will not compromise the country's fiscal

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of violence, but they transcend to reset citizenship by means of the provision of essential welfare components they did not have before being victimized." See REPÚBLICA DE COLOMBIA. "Exposición de Motivos al Proyecto de Ley por la cual se dictan medidas de atención y reparación integral a las víctimas de violaciones a los derechos humanos e infracciones al derecho internacional humanitario", September 27 2010, p. 28. Retrieved from <http://static.elespectador.com/especiales/2010/09/e05bfb29d4d932369f6f7008779fd07f/index.html> (last accessed March 20 2016.)

<sup>382</sup> "The approach to peace is a rights-based approach; although victims should be redressed, the peace process is also intended to extend its capacity to protect the rights of all Colombians." See JARAMILLO, Sergio. "La Transición en Colombia." Conference given at Externado de Colombia University. May 9 2013. Retrieved from <http://www.altocomisionadoparalapaz.gov.co/Documents/La%20transici%C3%B3n%20en%20Colombia.pdf> (last accessed March 20 2016.)

<sup>383</sup> "Given the magnitude and complexity that the State faces with the implementation of this law, it is necessary to provide an effective institutional design, consistent with the proposed measures. it is necessary to adopt a sound institutional design to ensure that public authorities can count with exceptional administrative and adjudicatory models. This, to complement the existing ones under the framework of transitional rules and to address the challenge of fiscal sustainability. To meet such purpose, certain conditions must be generated for all the branches of government to commit with a coordinated and harmonious performance while implementing this law." See REPUBLICA DE COLOMBIA, Consejo Nacional de Política Económica y Social. Documento Conpes 3726. *Lineamientos, Plan de Ejecución de Metas, Presupuesto y Mecanismo de Seguimiento para el Plan Nacional de Atención y Reparación Integral a Víctimas*. Mayo 30 de 2012, p.7.

<sup>384</sup> See REPÚBLICA DE COLOMBIA. "Exposición de Motivos al Proyecto de Ley por la cual se dictan medidas de atención y reparación integral a las víctimas de violaciones a los derechos humanos e infracciones al derecho internacional humanitario", September 27 2010, p. 27. Retrieved from <http://static.elespectador.com/especiales/2010/09/e05bfb29d4d932369f6f7008779fd07f/index.html> (last accessed March 20 2016.)

sustainability, since the further aim of development could be compromised due to the reality of a country with limited resources.<sup>385</sup>

## 2. *Land restitution and structural transformations at the territorial level*

According to the Victims Law's explanatory statement, in the past two decades 750,000 peasant households were forcibly displaced from their lands, of which 460,000 abandoned around three million hectares. In some cases, the abandoned land remains so, while in others, it is cared for by relatives or neighbors. It may have been repopulated by farmers to which both guerrilla and paramilitary armed chiefs awarded the plundered lands, and the rest was transferred *de facto* or through ordinary legal procedures to third parties, usually people with no apparent connection to the offenders.<sup>386</sup> From this explicit depiction of the current distribution of the land that was abandoned or dispossessed, it becomes clear why the reconstruction and transformation of the rural area is considered a primary concern for the country's transitional justice project. Behind this concern is the conviction that a profound transformation of the rural sector is necessary to guarantee durable peace. In this regard, such transformation can only be achieved by breaking the vicious cycle of violence and poverty, which is responsible for the historical social marginalization of a great part of the Colombian population.<sup>387</sup> Thus, rural transformation requires the conjunction of two types of state intervention actions; the massive and systematic restoration of land ownership to those who were directly affected by forced displacement or deliberate dispossession on the

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<sup>385</sup> See See REPUBLICA DE COLOMBIA, Consejo Nacional de Política Económica y Social. Documento Conpes 3726. *Lineamientos, Plan de Ejecución de Metas, Presupuesto y Mecanismo de Seguimiento para el Plan Nacional de Atención y Reparación Integral a Víctimas*. Mayo 30 de 2012, p.8.

<sup>386</sup> See REPÚBLICA DE COLOMBIA. "Exposición de Motivos al Proyecto de Ley por la cual se establecen normas transicionales para la restitución de tierras." September 2010, p.1. Retrieved from [http://wsp.presidencia.gov.co/Prensa/2010/Septiembre/Documents/20100907\\_MotivosTierras.pdf](http://wsp.presidencia.gov.co/Prensa/2010/Septiembre/Documents/20100907_MotivosTierras.pdf) (last accessed March 20 2016.)

<sup>387</sup> See JARAMILLO, Sergio. "La Transición en Colombia." Conference given at Externado de Colombia University. May 9 2013. Retrieved from <http://www.altocomisionadoparalapaz.gov.co/Documents/La%20transici%C3%B3n%20en%20Colombia.pdf> (last accessed March 20 2016.)

occasion of the conflict, and the formulation of land and agrarian development policies to generate profound structural changes in the rural areas is essential.

The land restitution program included in the Victims Law is a fundamental part of the transitional justice initiative, since it intends to expeditiously realize and secure the victims' right to reparation by means of the restitution of the lands that were denuded by widespread acts of illegal violence on occasion of the conflict.<sup>388</sup> Not only is it a restorative measure, but an effective structural driver under the prospective scenario of post-conflict peace-building. Thus, the challenge for the state is to redress the extensive damage suffered by more than half a million farm households, most of which are mired in poverty. Under the irregular and massive circumstances of land dispossession, the success of restitution depends on the design of a system capable of restoring the usurped rights in a fast and effective way.<sup>389</sup> To achieve this, the system requires the incorporation of exceptional standards, appropriate in addressing the particularities of plundering. In this regard, the situation is not acknowledged as a regular civil law disputes between private individuals, in which the ownership of property rights is to be determined in accordance with ordinary legislation. Rather, the land restitution procedures address the impact of the armed conflict according to the territorial stability of the peasantry, for which a law incorporating restorative justice is required.<sup>390</sup> This type of intervention is supported by the establishment of special land dispossession areas, within which a system of registration of stripped land is created so as to establish the tenancy, possession and ownership conditions over looted goods.<sup>391</sup> Finally, since violence is a social process that radiates

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<sup>388</sup> See REPÚBLICA DE COLOMBIA. "Exposición de Motivos al Proyecto de Ley por la cual se establecen normas transicionales para la restitución de tierras." September 2010, p.7. Retrieved from [http://wsp.presidencia.gov.co/Prensa/2010/Septiembre/Documents/20100907\\_MotivosTierras.pdf](http://wsp.presidencia.gov.co/Prensa/2010/Septiembre/Documents/20100907_MotivosTierras.pdf) (last accessed March 20 2016.)

<sup>389</sup> See REPÚBLICA DE COLOMBIA. "Exposición de Motivos al Proyecto de Ley por la cual se establecen normas transicionales para la restitución de tierras." September 2010, p.2. Retrieved from [http://wsp.presidencia.gov.co/Prensa/2010/Septiembre/Documents/20100907\\_MotivosTierras.pdf](http://wsp.presidencia.gov.co/Prensa/2010/Septiembre/Documents/20100907_MotivosTierras.pdf) (last accessed March 20 2016.)

<sup>390</sup> See *Ibid.*, p. 3.

<sup>391</sup> See *Ibid.*, p. 7.

its effects beyond direct victims to collaterally affect other persons, collective reparations are also considered.<sup>392</sup>

In turn, the Agrarian Accord signed in Havana between the government and FARC in May 2013 contains the basis of a comprehensive rural reform.<sup>393</sup> In this regard, the Colombian High Commissioner of Peace has added that this initiative intends to supplement the land restitution program introduced by the Victims Law in order carry out a truly structural transformation of the rural scenario.<sup>394</sup> The Agrarian Accord has certain particularities around its nature, including its endorsement pending a final agreement on all the points of the negotiation agenda. Likewise, due to its general character further regulation – new laws, legal reforms, acts of the administration and judicial decisions – is required towards its effective implementation. While this suggests a certain degree of uncertainty regarding the final outcome of the peace process, both the favorable political atmosphere around the process and the expected achievement of basic socioeconomic conditions for its execution via the adoption of the Victims Law invite to think that it will become an effective policy.

As a process centered on the improvement of the situation of historically marginalized people, the envisioned rural reform aims to create the environment and the material conditions to guarantee the welfare and wellbeing of the people in the country's rural areas. Therefore, it is believed that allowing regional integration, the reactivation of the rural economy – particularly the peasant,

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<sup>392</sup> See *Ibid.*, p. 3.

<sup>393</sup> “The Comprehensive Rural Reform (CRR or RRI for its Spanish acronym) should be the start-up of structural transformations in Colombia's rural and agrarian reality with equity and democracy, thus contributing to avoid repeating the conflict and to the construction of a stable and long-lasting peace.” See “First joint report of the dialogue table between the government of the republic of Colombia and the Revolutionary Armed Forces of Colombia – people's army, FARC – EP”. Havana, June 21 2013, p. 7.

<sup>394</sup> See JARAMILLO, Sergio. "La Transición en Colombia." Conference given at Externado de Colombia University. May 9 2013. Retrieved from <http://www.altocomisionadoparalapaz.gov.co/Documents/La%20transici%C3%B3n%20en%20Colombia.pdf> (last accessed March 20 2016.)

family and community economies—, and the eradication of poverty through the promotion of equality measures, will result in the protection and enjoyment of people’s rights.<sup>395</sup> Unlike previous agrarian reforms that were unsuccessfully carried out in Colombia during the twentieth century, the formulation of the Agrarian Accord indicates the aim of going beyond a scheme of land distribution by introducing a number of supplementary elements. The first element is the creation of a land trust fund whose operation will be complemented by additional mechanisms such as the provision of subsidies for land purchasing and special lines of credit. The second element is the implementation of an integral access strategy, according to which land access has to be accompanied by the building of means and capacities to make good use of them and the provision of public goods and services to set an environment conducive to productivity. The third aspect is the enactment of measures instrumental in formalizing rural property titles, which seek to regularize land ownership and bring predictability in economic transactions. The fourth element is the enactment of new regulations on the use of land, the delimitation of the agricultural border, and the participation of communities in the configuration of the rural development strategies. Finally, the fifth component corresponds to the expansion of infrastructure in the countryside.

Although the government has been emphatic in dismissing the idea that the implementation of the latter policies might change the country’s economic model, it is impossible to ignore that the Agrarian Accord presupposes the formulation of a supplementary vision of development. In this regard, it is expected that the social structures in rural areas will be reconstructed or reformulated in order to achieve real transformations. In that respect, the agreements acknowledge and focus on the fundamental role of the peasant, family and community economies in the development of the

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<sup>395</sup> See “First joint report of the dialogue table between the government of the republic of Colombia and the Revolutionary Armed Forces of Colombia – people’s army, FARC – EP”. Havana, June 21 2013, p. 7.

countryside; on the promotion of different forms of association and cooperation; on income and employment generation; on the advancement and formalization of work; on the production of food supplies; and on the preservation of the environment.<sup>396</sup> However, further examination of the Accord indicates that the latter should be considered along with its necessary articulation with the conventional forms of agricultural and livestock production. Moreover, rural reform should be carried out within a context of globalization and the insertion policies that the state has agreed to incorporate within its legal order.<sup>397</sup>

#### **IV. Conclusions**

This chapter aimed to introduce the transitional justice project that is currently being implemented in Colombia. The illustration of its antecedents, content and rationale led to its characterization as a distinctive scheme of regulation with a transnational nature. It represents an evolution from the traditional transitional justice paradigm since it adopts a more holistic approach to the resolution of the conflict. Therefore, a practical outcome of the Colombian state's commitment to materialize its aspirational constitutional mandate is the attainment of sustainable social peace and stability in the country. In this regard, the transitional justice project is assimilated as a peace-building mechanism as long as it has the capacity to address the conflict's root causes and thus to produce profound changes within Colombian society's socioeconomic structures, especially in the country's rural areas.

An account of the antecedents of the Colombian TJP showed that in the context of a long-term armed conflict, the adoption of a human rights discourse and the field's particular rationale by the

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<sup>396</sup> See "First joint report of the dialogue table between the government of the republic of Colombia and the Revolutionary Armed Forces of Colombia – people's army, FARC – EP". Havana, June 21 2013, p. 7.

<sup>397</sup> See "First joint report of the dialogue table between the government of the republic of Colombia and the Revolutionary Armed Forces of Colombia – people's army, FARC – EP". Havana, June 21 2013, p. 7.



country's Constitutional Order contributed to the progressive enactment of legal instruments to find durable solutions to this phenomenon. These legal responses to the problem of internal violence went from simple strategies of disarmament, demobilization and reincorporation to the production of a comprehensive transitional scheme of public action that is focused on the satisfaction of the victims' rights to justice, truth and reparation, as reflected in the project's structure. Subsequently, the introduction of TJP's rationale revealed a highly politicized and globalized field, which has entrusted public authorities the production of profound transformations within Colombian society in order both to correct past dynamics of violence and social exclusion and to promote prospective actions towards a more democratic and inclusive society.

These objectives are confirmed through the presentation of the project's content, which focuses on the undertaking of regulatory interventions to adjust the relations between the public and private spheres at the country's rural areas by means of the implementation of initiatives such as a land restitution program. In this context, the international community has a significant role; while it actively supports the project, and encompasses global public interests, it is called to respect the implementation and specific outcomes of Colombian transition. This includes not only the non-intervention in certain aspects of political negotiation and adoption of the TJP, but also the exceptional consideration of the effects of certain regulatory actions oriented to the latter's implementation that might generate the impact of external interests or even the breaching of international enforceable obligations.

## **Chapter Five: The regulatory challenge**

### **I. Introduction**

In order to highlight the main argument of the dissertation, this chapter articulates the theoretical, analytical, and substantive elements introduced to date in this dissertation, with the purpose of enlighten its main argument. This argument addresses the existence of a normative tension between two transnational legal processes within the specific regulatory realm of access to and use of land and natural resources in Colombia. In particular, it is argued that the legal protection of foreign investment offered by international investment agreements has the potential to affect the implementation of a transitional justice project that is driven by transformative considerations. Although these processes are both seemingly in line with the country's Constitutional Order, it is argued that they present contentious visions of the direction the Colombian state should take in order to attain its national project. In that regard, this chapter intends to characterize and contrast these transnational legal processes, in order to illustrate the regulatory challenges that this tension poses on the state's ability to exercise democratic choices and to comply with its public objectives in a coherent fashion.

The previous chapters served to place the theoretical, analytical and substantive pieces of this puzzle. Chapter one provided the theoretical foundations for articulating the content and extent of the interaction among the transnational legal processes under consideration. Chapter two introduced the Colombian Constitutional Order, which is acknowledged as an analytical tool and a normative reference point since it is the particular scenario where the transnational legal processes under consideration encounter and enter into tension. Subsequently, chapters three and four provided in-depth genealogical accounts of each of these transnational projects, and focusing, in particular, on the way in which they were incorporated into the country's Constitutional Order,

in order to unveil their respective intellectual histories and normative rationales. Thus, the following step entails two tasks: 1) to characterize the transnational legal processes under study in light of the corresponding roles within the context of the normative tension, and 2) to carry on a proper analysis by means of a set of analytical criteria and the formulation of the eventual regulatory outcomes that this tension would provide.

This chapter is divided in two sections. The first section outlines the tension between the two transnational legal processes. The legal protection of foreign investment through international investment agreements is portrayed as a particular regime of judicial review and liability, which has the potential to restrict the legitimate activity of public authorities in order to safeguard the interests and expectations of global economic actors. On the other hand, the Colombian transitional justice project is depicted as an instance of social resistance and emancipation that encompasses a distinctive scheme of regulatory activity with a prospective orientation and a transformative function. Section two articulates these characterizations and contrasts the transnational legal processes under study, in order to provide explanations for the regulatory implications arising from this tension, from the standpoint of political economy and socio-legal studies. Finally, a number of concluding remarks are provided.

Overall, this section illustrates the crucial role of the state in the legalization and legitimation of a transnational legality, which is characterized by the conflictual dynamics between diverse political/legal processes in order to retain power over the distribution of scarce resources. Thus, the main contention of this chapter is that from a public regulatory perspective, the protection of foreign investors via international investment agreements has a real potential to constrain the effective implementation of prospective-transformative transitional justice regulation in Colombia. Particularly, the articulation of both the behavioral standards and the dispute-settlement

mechanism embedded in international investment agreements might freeze or roll back the regulatory measures that are oriented at generating structural changes within society around issues of access to and use of land and natural resources.

## **II. Characterization of the transnational legal processes under analysis**

Considering the theoretical and analytical frameworks formulated in chapters one and two, this section characterizes the transnational legal processes that were introduced in chapters three and four. These processes include the legal protection offered to foreign investment via international investment agreements, and the implementation of a transformative transitional justice project.

### **A. The legal protection offered to foreign investment via international investment agreements (IIAs) and new constitutionalism**

The process through which Colombia has been implementing a legal regime for the protection of foreign investment upon the negotiation of international investment agreements will be considered as a case of new constitutionalism. In this regard, it is argued that this transnational legal process is a constitutive element of a global political project that aims to introduce neoliberal market democracy as the predominant socioeconomic model. The Colombian state has gone through profound transformations in its domestic institutional structure and legal order, which are intended to internalize a number of rules and values to insulate the interests of foreign investors from public control or public-induced changes. As a result, the country's policy choices are diminished due to the potential that this process has to restrict the regulatory capacity of national public authorities. In practice, the alleged constraint may take place in two scenarios. In the first scenario, the IIAs concluded by the country may result in the slowing down of political/legal projects at the domestic level as a result of the fear of public authorities on the consequences their actions can bring to the country on the grounds of responsibility – a phenomenon known as “regulatory chill”. The second

scenario is that these agreements might generate an effective challenge to the legality and sustainability of particular regulatory measures in the realm of investor-state arbitration.

Although the first international investment agreement (in its modern form) was concluded between Germany and Pakistan as early as 1959, the general consolidation of a transnational legal regime for the protection of foreign investment only came to be at the outset of the 1980s. At that time, the United States, Canada, and European countries started to enter into these types of treaties, which eventually acquired sufficient substantial uniformity to be considered global governance devices.<sup>398</sup> Progressively, a network of treaties composed of investment and free trade agreements, bilateral or regional, have reached global coverage. Nowadays, there are more than 2500 IIAs in force, as well as negotiations around the creation of great multilateral blocks that embrace this sort of legal mechanism (e.g. the Transatlantic Trade and Investment Partnership and the Transpacific Partnership). In line with this tendency, and with the great exception of Brazil, Latin American countries initially expressed general acceptance of the possibility of concluding IIAs with the major capital-exporting countries and with each other. The great penetration of neoliberal ideology into national governments and their technocratic elites allowed a friendly reception for this international policy scheme, which came to propose alternatives to a rather exhausted protectionist socioeconomic model. However, as soon as Latin America started to deal with deep economic crises, such as the one in Argentina in the early 2000s, the IIAs proved to be blunt artifacts that foreign investors could effectively use to defer the risks associated with the measures that states had implemented for facing the public predicaments. This prejudicial outcome, combined with a political shift by means of the emergence of socialist-oriented governments in countries like

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<sup>398</sup> See generally VANDEVELDE, Kenneth. "A Brief History of International Investment Agreements." *University of California-Davis Journal of International Law & Policy* Vol. 12 (2005), 157-194.

Bolivia, Ecuador, and Venezuela, led to a distinctive wave of rejection of international investment law. This attitude materialized in the denunciation of some treaties, as well as in the non-compliance of a number of awards issued in the context of investor-state arbitration.

The case of Colombia is rather exceptional. As explained in chapter three, in comparison with its neighbours – which had started negotiating agreements of this kind by the late-1980s – the country experienced a late reception of this policy. It was not until 1994 that it concluded the first IIAs in the context of a regional integration initiative with Mexico, which in turn was connected to the latter's participation in NAFTA. Following a global trend, this type of reception took place through a pronounced ideological turn in the country's development strategy. This turn derived from the pressure exercised by the international economic institutions on the adoption of the *apertura económica* policy: the enactment of a new constitution that included “freedom of enterprise” and “internationalization” as paramount principles for the definition of the corresponding economic model, and the implementation of a structural adjustment program. The rejection of the precedent model – depicted as protectionist and associated with poverty, inefficiency and authoritarianism – contributed to the generation of a “common sense” concerning the inherent benefits and inevitability of the new scheme. This led to the systematic adoption of profound legal and institutional reforms that aimed to lift the existing barriers for the liberalization of Colombian economy, and particularly to create a favorable environment for the entry and operation of foreign investors in the country. Further, the prominent role of the state in creating the structures of economic globalization is notorious, since the spread of the market and its institutions – such as the ones allowing unrestricted capital mobility – was not a spontaneous dynamic but required

deliberate planning and intervention.<sup>399</sup> In that regard, the role of the law and regulation was fundamental in effectively internalizing the rules and values which legitimized the idea that the attraction of foreign investment is conducive to economic growth and prosperity. In this context, the legal phenomenon appears to be not merely an external mechanism of control but a constituent way in which social relations are lived and experienced.<sup>400</sup>

The resulting atmosphere cleared the path for the commencement of negotiations at both regional and international levels, but also unveiled the existence of a number of obstacles for IIAs to effectively function within the country's jurisdiction. The first obstacle was the lack of membership in supranational institutions such as the MIGA and ICSID which were key for the operation of the treaties' substantive and procedural safeguards. The second obstacle was the existence of important contradictions between the content of the treaties and the Colombian constitution with respect to public-utility expropriation. Once again, this transnational legal process showed its great transformative capacity so the impediments were duly addressed by the state through the exercise of its sovereign prerogatives. Thus, the country adhered to the abovementioned international governance structures and deployed multi-level regulatory actions that resulted in the amendment of the constitution. Yet, the role of the country's Constitutional Court was somehow ambivalent. In the first case, it performed as an agent of the global economic project through the favorable judicial review of the MIGA and ICSID treaties, which brought with it the ultimate legitimization of the associated transnational legality. This signifies their effective insertion into the Colombian Constitutional Order through a politically-oriented interpretative

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<sup>399</sup> See SCHNEIDERMAN, David. "Power and production in global legal pluralism. An international political economy approach." PERRY-KESSARIS, Amanda. *Socio-Legal Approaches to International Economic Law*. Text, Context, Subtext. New York: Routledge, 2013, p. 110.

<sup>400</sup> See GILL, Stephen. "Market civilization, new constitutionalism and world order." GILL, Stephen & CUTLER, A. Claire (Eds.) *New Constitutionalism and World Order*. Cambridge: Cambridge University Press, 2014, p. 36.

exercise. Importantly, the arguments raised by the judicial body relied on the constitutional principles of internationalization, integration and – curiously – peaceful coexistence, to justify both the convenience of trading-off sovereign prerogatives and the depoliticization of investor-state dispute settlement for the sake of the achieving of technically-oriented decisions. On the other hand, the Court was responsible of the elucidation of the collision between the provisions embedded in the IIAs and the national Constitutional Order. In this regard, it declared the partial invalidity of the treaties with respect to the requirement of compensation for any expropriation conducted by public authorities. In any case, the Colombian executive and legislative organs were quick to amend the constitution, so the resistance interposed by the judicial organ was finally neutralized by the pressures generated by the regime of transnational rules for the protection of foreign investment. Following Schneiderman, this instance shows that economic globalization's structures are articulated not only outside of states, but are also being internalized, with different branches of the state responding differently to these exigencies.<sup>401</sup>

The outcome produced by the systematization of the Colombian IIAs negotiation policy and internal adjustments that were carried out to facilitate the operation of rules included in the treaties a legal regime with a unique configuration. In the first place, the fact that it is embodied in binding inter-national agreements secures its formal legitimacy and enforceability under the basis of state consent, equality and reciprocity. Further, its structure resembles a private/commercial law instrument in which the parties assume a sort of contractual relationship founded in the allocation of rights and obligations, including a mechanism to award damages arising from the interpretation and application of the pre-committed rules. Finally, the legal regime has undeniable public law

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<sup>401</sup> See SCHNEIDERMAN, David. *Constitutionalizing Economic Globalization. Investment Rules and Democracy's Promise*. Cambridge: Cambridge University Press (2008), p. 177.



effects. The inclusion of both behavioral standards and a dispute-settlement mechanism within the agreements entails the potential to conduct judicial review over the regulatory conduct of public authorities. In sum, this extraordinary legal amalgam provides foreign investors with exorbitant safeguard for their property rights and other economic interests as compared with the general protection granted by the state to any individual within its jurisdiction. Moreover, it establishes a series of expectations with respect to the degree of consistency that state agents must observe while exercising their functions, which inevitably generates binding constraints on the autonomous exercise of public authority.<sup>402</sup>

From an international legal perspective, these agreements could be regarded at first glance as not contravening any of the paradigmatic foundations of the field. However, an analysis of the political and social consequences of the juridical commitments therein reveal important challenges for the capacity of the Colombian state to comply with its public objectives, especially in the context of a diverse and unequal society under a profound multifaceted conflict. In this regard, the constitutional debates that emerged on the occasion of the review of the treaties concluded with United States and Canada, with regards to the inclusion of legal standards on indirect expropriation, provide clear insights on the potential of this legal regime to insulate Colombia's public choices. At an early stage of judicial review, the Court justified these behavioral rules on the constitutional protection of the right to property. Yet, it soon had to introduce alternative arguments as to the apparent existence of a "legitimate expectations" principle with a constitutional pedigree, according to which the regulatory state intervention should generally depend on the maintenance of a stable and predictable environment in favor of foreign investors and the

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<sup>402</sup> See generally VAN HARTEN, Gus. *Investment Arbitration and Public Law*. Oxford: Oxford University Press, 2007, p. 1-9.

profitability of their enterprises. Since the Court made no distinction nor identified the type of regulatory conduct that could be scrutinized through the indirect expropriation standard, it somehow validated the chance that any act of the state affecting the interests of a foreign investor could potentially be reviewed by an arbitral tribunal, as long as it fit within the wide description provided by the source treaty. Moreover, the further implementation of a supplementary legal-stability-contracts regime contributed to enlarging the possibility of cloistering transnational capital from political power – represented in major legal changes – especially in the realm of socioeconomic policies.<sup>403</sup>

In addition, the inclusion of social and environmental elements into the orbit of the IIAs concluded by Colombia – notably, the side agreements and the human rights report system enacted on the occasion of the Canada-Colombia Free Trade Agreement – helped to strengthen the substantial legitimacy of the resulting legal regime. Originally, this inclusion was the result of massive pressures exercised by different sectors of civil society – including trade unions, human rights coalitions and organizations representing the interests of ethnic groups from both countries – as to the negative effects that these agreements would convey to the people located within the respective jurisdictions. Yet, the policy move ended up serving the very interests of the transnational legal project. Though they were intended to provide answers to the problems raised by the opponents, they turned out to be deceptive since they hardly addressed the core questions regarding the social and environmental risks that accompanied the liberalization of foreign investment. Instead, they promoted a set of broad and voluntary standards whose achievement would merely be subject to ineffective encouragement by state parties on the foreign investors. They were simply used to

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<sup>403</sup> See VAN HARTEN, Gus. “Investment Rules and the Denial of Change.” *4 CLPE Research Paper No. 14/2010 Vol. 6* (2010), p. 4.

dissuade the critics in order to accelerate the domestic legal incorporation processes.<sup>404</sup> The result is an unbalanced equation in which the host states have a wide range of obligations with foreign investors, while the latter owe no other duty than to comply with domestic law, which in any case has been adapted to their nature and primary objective: the maximization of scarce resources.

Considering the previous depiction, the constraints on the regulatory capacity of the Colombian state that may be produced by the crystallization of a legal regime for the promotion and protection of foreign investment could be found in two well-defined scenarios. The first is the possibility that the content and scope of IIAs could influence the conduct of public authorities so that particular regulatory measures oriented to generate structural changes are frozen or rolled back – phenomenon known as regulatory chill. In turn, the second situation is the actual challenge to particular regulatory measures in the context of investor-state arbitration.

In the context of the debates around the legitimacy of international investment agreements, and particularly on the fairness and sustainability of investor-state arbitration, it has been suggested that international investment law – as an institution – may influence the course of public policy development. In that regard, a hypothesis concerning the regulatory effects of this legal institution has been outlined: in some circumstances, public authorities will respond to a high (perceived) threat of investment arbitration by failing to enact or enforce bona fide regulatory measures, or by modifying measures to such an extent that their original intent is undermined or their effectiveness is severely diminished.<sup>405</sup> The latter formulation is identified as regulatory chill. The very idea of the potential occurrence of regulatory chill in the context of international investment agreements

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<sup>404</sup> For instance, the Canadian Parliament unblocked and approved the abovementioned agreement as soon as the supplementary agreements were concluded by the parties.

<sup>405</sup> See notably TIENHAARA, Kyla. “Regulatory chill and the threat of arbitration: A view from political science”, in BROWN, Chester & MILES, Kate (Eds.). *Evolution in Investment Treaty Law and Arbitration*. Cambridge: Cambridge University Press (2011), p. 610.

comes from interdisciplinary literature that seeks to transcend a purely legal comprehension of the relation between law and transnational capital mobility, and builds on the internalization of the state's prerogatives as a sovereign entity. It is not only considered to have the right to regulate so as to comply with its public aims, but also to be given the duty to enact regulations in order to protect certain interests as demanded by its constitutional order.<sup>406</sup> Thus, as the resulting policy space is eventually confronted by restrictions coming from the obligations imposed by international investment agreements, public authorities might react to a perceived threat of investor-state arbitration by modifying their behavior from what is reasonably expected from them, as provided by their jurisdiction and mandate. In other words, it is possible to infer that the set of rules contained in the IIAs have the potential to tip the balance of negotiating power away from domestic governments and towards foreign investors, resulting in a contraction in the power of states to regulate.<sup>407</sup>

In 2001, as a great number of concerns on the conclusion of the NAFTA agreement between Canada, Mexico and United States spread, particularly chapter 11 on investment, the regulatory chill hypothesis started to be used to indicate the legitimacy setbacks that the integration treaty would entail on the signing countries' sovereign prerogatives. Howard Mann commented that one of the most notable outcomes of this agreement was the potential negative impact of its investment provisions on governmental decision-making in relation to the public interest. Concretely, as a result of the obligations and the dispute-settlement mechanism included in the agreement, many regulatory agencies in the government would become increasingly reluctant to act, because of the

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<sup>406</sup> See SPEARS, Suzanne A. "The Quest for Policy Space in a New Generation of International Investment Agreements." *4 Journal of International Economic Law Vol. 13*, (2004), p. 1038.

<sup>407</sup> See ZARSKY, Lyuba. "From regulatory chill to deepfreeze?" *4 International Environmental Agreements: Politics, Law and Economics Vol. 6* (2006), p. 396.

risks associated with the legal uncertainties in the interpretation of these treaties and the corresponding potential claims for compensation.<sup>408</sup>

In that regard, as many indirect expropriation and fair and equitable treatment claims grow out of investor expectations that are supposedly affected by changes in the host country's regulatory environment, just the threat of such liability would lead countries to forego needed public-purpose regulation that might negatively affect the value of foreign investment, rather than risk potential liability.<sup>409</sup> Moreover, concerns about regulatory chill might arise not just from the outcome of investment cases, but also from the acknowledgement of the inconsistent legal conclusions and reasoning found in arbitral awards.<sup>410</sup>

Investment treaties could undermine the sovereign right of states to regulate activities within their jurisdiction, but also their duty to do so<sup>411</sup>. For instance, in the context of human rights protection from business interference John Ruggie has commented on the specific conflict between the respect of investment obligations and the implementation of human rights policies. Thus, some investment treaty guarantees and contract provisions might unduly constrain the host Government's ability to achieve its legitimate policy objectives, including its international human rights obligations, because under threat of binding international arbitration, a foreign investor may be able to insulate its business venture from new laws and regulations, or seek compensation from

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<sup>408</sup> See MANN, Howard. "Private Rights, Public Problems. A Guide to NAFTA's Controversial Chapter on Investor Rights." Manitoba: International Institute for Sustainable Development (2001), p. 33-34.

<sup>409</sup> See U.N. CONFERENCE ON TRADE & DEV. (UNCTAD). *Taking of Property*. Geneva: UNCTAD Series on issues in international investment agreements, UNCTAD/ITE/IIT/15, 2000, p. 23. Retrieved from <http://unctad.org/e/docs/psiteiitd15.en.pdf> (last accessed March 20 2016); GROSS, Stuart G. "Inordinate Chill: Bits, Non-Nafta Mits, and Host-State Regulatory Freedom –an Indonesian Case Study". *Michigan Journal of International Law Vol. 24* (2003), p.899.

<sup>410</sup> See SPEARS, Suzanne A. "The Quest for Policy Space in a New Generation of International Investment Agreements." *4 Journal of International Economic Law Vol. 13* (2004), p. 1040.

<sup>411</sup> See COTULA, Lorenzo. "Do Investment Treaties Unduly Constrain Regulatory Space?" *Questions of International Law Vol. 9* (2014), p.20.

the Government for the cost of compliance.<sup>412</sup> Moreover, it has been suggested that in the realm of the extractive industry arbitration might be used as an offensive weapon to harass or intimidate.<sup>413</sup>

The second scenario in which the autonomy of Colombia's democratic policy choices might be challenged is the challenge to particular regulatory measures in the context of investor-state arbitration. Although so far Colombia has not been publicly called to appear before an arbitral tribunal to respond for potential breaches of investment treaty provisions, the chance that the country could be sued by a foreign investor is possible due to the very existence of a great number of IIAs in force. In this regard, certain recent political decisions on a number of issues – such as the delimitation of natural reserves that had been previously adjudicated for mining exploitation<sup>414</sup> or the issuance of measures on the price control of essential medications<sup>415</sup> – have affected the economic interests of certain multinational corporations. As such, foreign investors occasionally manifested their disagreement with the decisions made by public authorities and have been reminded of the compromises assumed by the country as to the protection of foreign investment. It is not for nothing that Colombia's Ministry of Commerce has been implementing a

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<sup>412</sup> See, RUGGIE, John. *Business and Human Rights: Towards Operationalizing the 'Protect, Respect and Remedy' Framework*. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/11/13, 2009 par. 30. Retrieved from <http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.pdf> (last accessed March 20 2016); WAYNCIMER, Jeff. "Balancing Property Rights and Human Rights in Expropriation", in DUPUY Pierre-Marie Dupuy et. Al. (Eds.). *Human Rights in International Investment Law and Arbitration*. Oxford: Oxford University Press (2009), p. 306.

<sup>413</sup> See OTTO, James & CORDES, John. "The Regulation of Mineral Enterprises: A Global Perspective on Economics, Law and Policy." Rocky Mountain Mineral Law Foundation, Institute for Global Resources Policy and Management Colorado School of Mines, 2002, cited in TIENHAARA, Kyla. *The Expropriation of Environmental Governance. Protecting Foreign Investors at the Expense of Public Policy*. Cambridge: Cambridge University Press, 2009, p. 217.

<sup>414</sup> See EL TIEMPO. "Minambiente delimita 98.954 hectáreas, el 76 % del páramo de Santurbán." *El Tiempo*, December 19 2014. Retrieved from <http://www.eltiempo.com/colombia/otras-ciudades/delimitacion-del-paramo-de-santurban/14996735> (last accessed January 18 2015.)

<sup>415</sup> See DUZAN, María Jimena. "Un solo competidor bajaría el precio en un 30 o 40 por ciento." *SEMANA*, August 30 2014. Retrieved from <http://www.semana.com/nacion/articulo/alejandra-gaviria-un-solo-competidor-bajaria-el-precio-en-un-30-40-por-ciento/400918-3> (last accessed February 28 2016.)

comprehensive policy on the prevention and management of international investment controversies since 2010. The awareness of the prospective consequences of the systematic negotiation of IIAs and particularly, of the risks that the latter entail at the level of international responsibility, particularly from the experience of neighbour states, led the country to develop a system to address the advancement of these types of disputes.

B. The Colombian transitional justice project as an instance of subaltern cosmopolitan legality

In turn, it is argued that the Colombian Transitional Justice Project (TJP) should be characterized as a particular instance of subaltern cosmopolitan legality that entails a distinctive scheme of regulatory action. This enterprise has an undeniable political nature, and is part of a transnational initiative that aims to diffuse a liberal peacebuilding model during the conduct of transitions in postconflict and post-authoritarian societies.<sup>416</sup> However, it also has a number of particular features that evidence a shift in the field's traditional paradigm. Consequently, this move points towards the assumption of a more holistic approach towards both the understanding of the causes of the conflict and in addressing of the corresponding solutions. Thus, this normative move has the purpose of resisting the negative effects of certain socioeconomic setbacks that are connected with the internal conflict itself.

As Dustin Sharp explains, since it first took the global stage in the 1980s and 1990s, transitional justice has mainly acted as a vehicle for delivering liberal goods such as democracy, the rule of law, the respect for human rights, and economic freedom, through a market-oriented economy.<sup>417</sup> Moreover, it has become progressively aligned to a parallel initiative around the maintenance of international peace and security, whose aim has been acknowledged as a shared interest within the

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<sup>416</sup> Peace is here equated with a particular set of norms and beliefs that are part of the liberal project.

<sup>417</sup> See SHARP, Dustin. "Emancipating Transitional Justice from the Bonds of the Paradigmatic Transition." *International Journal of Transitional Justice* (2014), p. 1.

international community.<sup>418</sup> In that regard, the field acquired its main features through the development of principles, norms, institutions and processes that have been diffused through international legal and non-legal instruments – notably in the fields of human rights and good governance,<sup>419</sup> as well as upon the incipient consolidation of an epistemic community around the subject.<sup>420</sup> Ultimately, this transnational legal process encompasses a shaping of the state's structure and patterns of governance, which has influenced the activity of public authorities. As such, the antecedents of the current Colombian enterprise revealed that the global discourse and rationale on transitional justice were progressively received and internalized at the domestic level by means of preliminary attempts to develop legal responses to the problems arising from the country's armed conflict. Specifically, these responses went from a broad DDL framework to the specific adoption of a set of rights – justice, truth, and reparation – in favor of the victims, though always inserted within the liberal matrix.

However, the Colombian formula for peace must be regarded as a distinctive project. It represents an evolution from the preliminary attempts that were deployed to bring sustainable solutions to the problems arising from the country's violent and unstable background. Additionally, it entails an obvious move from the global transitional justice paradigm. This is because it adopted a more holistic understanding of the conflict's nature and dynamics and assumed a prospective-transformative approach in the formulation and implementation of the policies conducive to

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<sup>418</sup> The international community is becoming contingent upon the domestic arrangements of a state meeting certain internationally prescribed legal standards in relation to the protection of certain individual rights and the maintenance of international peace and security. See TURNER, Catherine. "Delivering Lasting Peace, Democracy and Human Rights in Times of Transition: The Role of International Law." *The International Journal of Transitional Justice* Vol. 2 (2008), p. 127.

<sup>419</sup> See TURNER, Catherine. "Delivering Lasting Peace, Democracy and Human Rights in Times of Transition: The Role of International Law." *The International Journal of Transitional Justice* Vol. 2 (2008), p. 126-127.

<sup>420</sup> See in that regard DEZALAY, Ives & GARTH, Bryan. *International Commercial Arbitration and the Construction of a Transnational Legal Order*. Chicago: The University of Chicago Press, 1996.



guaranteeing durable peace. Politically speaking, crucial to this shift was the diametrically opposed perspective, adopted by the Colombian government since 2011, towards the understanding of the country's struggle. From being narrowly considered as an instance of terrorism, drug trafficking and organized crime, it came to be acknowledged as an armed conflict grounded in structural causes. Therefore, the state was compelled to develop legal responses to adequately deal with the particular needs of the victims on the grounds of responsibility and not as a matter of mere solidarity or good-will, as was previously considered.

The Colombian TJP should be considered as a “second constitutional moment” in relation to the country's Constitution. As previously explained, the latter assumed a social peace function whereby various and even contradictory normative visions of society were articulated around a single national project, founded upon aspirational (a normative idea of progress in which diversity is embraced and gross social injustices are remedied) and transformative (breaking with the past and looking to an alternative future) considerations. However, for different reasons – attached to the very dynamics of the conflict – these aims could not be originally crystallized. Therefore, the TJP was consciously configured to supplement the Colombian Constitutional Order with the task of ensuring durable peace and stability –one of its paramount mandates. The project is thus an enterprise that intends to induce large-scale social changes by means of the proper addressing of the structural problems that are considered to be both the root causes of the country's long-term internal conflict and the main obstacles for the full realization of the Constitution. As a consequence, the TJP pursues the effective adjustment of the social relationships and structures that have traditionally been shaped by patterns of inequality and discrimination, especially in rural areas, where they have produced the greatest spillovers. All in all, as its eventual outcome is the redirection of the country's constitutional framework, the Colombian project encompasses a

conscious re-politicization of transitional justice, a field whose recent progression had been characterized by the opposite. That is, becoming more of a bureaucratized site and a highly technical enterprise rather than a political/legal process.

The abovementioned holistic approach comprises a turn from the narrow and reductionist viewpoint according to which transitional justice's objective was limited to the deliverance of liberal public goods – free markets and western-style democracy – as a means of stabilizing a society affected by authoritarianism or unrest. Rather, the Colombian model is a tool of peacebuilding.<sup>421</sup> In this regard, and following the theoretical underpinnings developed by Johan Galtung, while an instrument to achieve positive peace, transitional justice should be concerned with addressing proper responses to personal and structural violence.<sup>422</sup> Whereas the former refers to individualized actions that occur on the occasion of a conflict, the latter is related to its root causes and the negative spillover effects that cannot be directly attributed to a subject or a collectivity. Thus, whilst the Colombian transitional justice project is mainly designed to promote and protect the rights of the victims to justice, truth and reparation, it also aims to introduce a more egalitarian distribution of power and resources in society by means of the effective adjustment of social relations.

In this context, both the land restitution component included in the Victims Law and the agrarian reform proposed in the realm of the negotiations between the Colombian government and FARC are notable instances of the regulatory activity of the state for the procurement of positive peace

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<sup>421</sup> “Peace invokes a more holistic sets of objectives than the narrower goals associated with facilitating liberal political transitions, the turn to peacebuilding represents a broadening and a loosening of earlier paradigms and moorings, making this a significant moment on the evolution of the field.” See SHARP, Dustin. “Emancipating Transitional Justice from the Bonds of the Paradigmatic Transition.” *International Journal of Transitional Justice* (2014), p. 14.

<sup>422</sup> See generally GALTUNG, Johan. “Violence, Peace, and Peace Research.” *3 Journal of Peace Research Vol. 6* (1969), 167-191.

in the country. They represent the articulation of the dimensions of justice that support the TJP: territorial justice by means of the preferential implementation of actions in rural areas; distributive justice projected in the intervention of social structures to deal with the conflict's root causes; and the actual satisfaction of the rights of the victims through the enactment of regulatory measures and the activation of particular-exceptional executive and adjudicatory procedures. In fact, they denote the implementation of a distinctive scheme of regulation with prospective and transformative implications.

With regards to the prospective implications of the TJP, its regulatory measures have adopted a forward-looking vision of justice that confronts the past. This confrontation does not primarily intend to correct a transaction – a particularized action that affected a person or a collectivity – but rather to adjust the parties' relations so that their onward interactions take place on a sound foundation. Accordingly, the respective remedies are not necessarily determined by an exact amount of loss but rather by the balance of social relations that have historically been unequal. Thus, it is possible that these measures could impact actors that were not directly involved in the production of harm, but that due to the elapse of time and possibly a certain degree of negligence, ended up occupying a position in relation to the interests to be intervened.<sup>423</sup> On the other hand, these measures have transformative implications in that they should produce effective and tangible changes in society, under the foundational assumption of the inadequacy – and perhaps illegality – of the social setting that intends to be altered. In this regard, the tools of transformation must rely on the historical context of the conflict to be resolved, be driven by the particular and diverse understandings within Colombian society, and comprise a range of policies and approaches that

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<sup>423</sup> See WEBBER, Jeremy. "Forms of Transitional Justice", in WILLIAMS, NAGY, ELSTER. *Transitional Justice* (2012), p. 104-115.

can successfully impact on the social, political and economic status of a large range of stakeholders.<sup>424</sup> In sum, the desired transformation entails a distributional function,<sup>425</sup> emphasizes local agency and resources, and challenges unequal and intersecting power relationships and structures of exclusion at both the local and the global level.

The latter analysis allows the Colombian transitional justice project to be characterized as an instance of subaltern cosmopolitan legality. Although it was essentially founded on international standards and configured within a liberal matrix that tends to deliver a homogeneous version of society, this enterprise is also directly informed by an alternative normative model. This alternative model seeks to confront the patterns of discrimination and social exclusion associated with the country's conflict, including economic violence. Prior to addressing the question "What kind of society do we want after transition?", the Colombian project refers to one in which the equality of differences is accepted as an ethical and political maxim. Therefore, the TJP adopted a "bottom-up" orientation where there is reliance on local visions of reconstruction, transformation and reconciliation on the design and implementation of transitional justice measures. On the occasion of the implementation of the corresponding measures, this includes both the respect for cultural and social diversity, and the active participation of the members of the affected communities – peasants, ethnic groups, women, children and the poor in general – in the definition of the problematic issues associated with the distributional effects of the regulatory activity of public authorities.<sup>426</sup>

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<sup>424</sup> See GREADY, Paul and ROBINS, Simon. "From Transitional to Transformative Justice: a New Agenda for Practice." *The International Journal of Transitional Justice* Vol. 8 (2014), p. 340-344.

<sup>425</sup> See UPRIMNY, Rodrigo. "Transformative Reparations of Massive Gross Human Rights Violations: between Corrective and Distributive Justice." *4 Netherlands Quarterly of Human Rights* Vol. 27 (2009), p. 637.

<sup>426</sup> See TURNER, Catherine. "Delivering Lasting Peace, Democracy and Human Rights in Times of Transition: the Role of International Law." *The International Journal of Transitional Justice* Vol. 2 (2008), p. 140.

Finally, the Colombian transitional enterprise recognizes the realities of power but aspires to cosmopolitan aspirations and positive peace. There is an undisputable interest by the international community to resolve the Colombian conflict because of the shared concern with the associated transnational criminal activities, the evident trans-boundary effects produced by its particular dynamics, as well as the expectation by global economic actors to conduct profitable activities in the country without any setbacks. Yet, it is very telling that in his dialogue with the international community of states, president Santos had celebrated the external support given by facilitator states and international governance bodies but also requested *respect* for the country's particular way of conducting the transition. Not only does this signify that international standards can not be considered as a "strait jacket upon independent thought" towards the design and implementation of the project, but that potential collisions between the Colombian TJP and other international obligations should be treated exceptionally. For instance, the tensions with the interests and expectations of private parties protected by international economic regulation.

### **III. Contrasting the transnational legal processes**

To conclude this chapter, this section intends to articulate the argued normative tension between the transnational legal processes under scrutiny from two different perspectives. The first perspective is a political economy account of the battle around the commodification of land and natural resources. The second is a socio-legal view of the regulatory implications of the protection of foreign investors via international investment agreements on the effective implementation of the Colombian transitional justice project. And particularly on the latter point, the probable constraint of the state's public choices to achieve durable peace in the country.

A. The political economy version: the battle around the commodification of lands and natural resources

From a political economy perspective, the tension between the legal protection of foreign investment in Colombia and the country's transitional justice project is explained by the existence of conflictual approaches as to the identity and consequent destination of the country's lands and natural resources (LNR) within their respective normative frameworks. International investment agreements regard LNR as tradeable commodities whose attached property rights – in head of a foreign investor – should be protected in the context of a stable and predictable market. On the other hand, while transitional justice also identifies LNR as commodities, it enlightens a pattern of economic violence – accumulation by dispossession – that has partly determined their current configuration and allocation, and which must consequently be corrected so as to adjust the affected social relations and thus achieve durable peace. Thus, this tension is reproduced in the mutual contestation among their respective supporting legal regimes.

The historical trajectory of violence in Colombia can be seen through the lens of social relations entrenched in the struggles over the dispossession of lands and resources, which are embedded in the multiple players at local, regional, national and global scales.<sup>427</sup> Accordingly, after a period of systematic denial, the Colombian internal conflict was not only acknowledged by the government but characterized as a phenomenon rooted in socioeconomic causes. In this regard, it is nowadays accepted that various dynamics of direct violence – such as forced displacement, massacres and

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<sup>427</sup> “In the aftermath of independence, the Colombian political economy of agriculture was shaped by the nation-building efforts of the Colombian government through the dispossession of vacant lands and their distribution, as well as the colonization of the internal frontier. In the XX Century land dispossession played a key role in legitimizing the authority of central government and structuring class relations. Land concentration and the accumulation strategies of elites fueled social unrest and contestation.” See PATEL-CAMPILLO, Anouk & CASTRO BERNARDINI, María del Rosario. “The Political Economy of Agriculture in Colombia: An Unfinished Business”, in BONANNO, Alessandro & BUSCH, Lawrence. *Handbook of the International Political Economy of Agriculture and Food*. Cheltenham: Elgar Press (2015), p. 97-100.

forced disappearances – that occurred in the context of the conflict were more than a detrimental consequence of the strife between the involved armed actors. In fact, they were also an instrumental part of a conscious strategy to acquire unrestricted access to lands and natural resources located at the rural areas – which is where the confrontations have historically had the greatest impact – by means of the uprooting of population and the misallocation of property rights<sup>428</sup>. By applying David Harvey’s analysis of “accumulation by dispossession”,<sup>429</sup> it is evident that in the case of Colombia the indiscriminate use of force was used as a means of incorporating land and peoples into capitalist structures rooted in the concepts of private property and profit generation.<sup>430</sup> In other words, capital accumulation was greatly achieved by violently depriving rural populations from their commonly held lands – and consequently, their capability of determining the conditions for access to and use of natural resources – towards the further enclosing of that land for the benefit of certain economic agents.<sup>431</sup> Additionally, these dynamics of direct violence allowed for the commodification of natural entities and processes that were previously absent from logic of the market economy, such as land and natural resources that traditionally belonged to the country’s ethnic groups – particularly, indigenous peoples and Afro-Colombian communities.

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<sup>428</sup> See GUTIERREZ SANÍN, Francisco. “Land and Property Rights in Colombia – Change and Continuity.” 2 *Nordic Journal of Human Rights* Vol. 28 (2010), 230–261.

<sup>429</sup> “By this I mean the continuation and proliferation of accumulation practices that Marx had treated as 'primitive' or 'original' during the rise of capitalism. These include the commodification and privatization of land and the forceful expulsion of peasant populations as in Mexico and India in recent times; conversion of various forms of property rights (e.g. common, collective, state) into exclusive private property rights; suppression of rights to the commons; and the suppression of alternative forms of consumption and productions, such as the ones of indigenous peoples. The state, with its monopoly of violence and definitions of legality, plays a crucial role both in backing and promoting these processes, and in many instances has resorted to violence.” See HARVEY, David. *The New Imperialism*. Oxford: Oxford University Press, 2003, p. 143-173; HARVEY, David. “Neo-Liberalism as Creative Destruction.” 2 *Geografiska Annaler. Series B, Human Geography, Vol. 88, Geography and Power, the Power of Geography* (2006), 145-158.

<sup>430</sup> See GIBBS, Terry. “Violent Enclosure: The Political Economy of Forced Displacement in Colombia”, in BRICKNER, Rachel K. (Ed.) *Migration, globalization, and the state*. Houndmills: Palgrave MacMillan (2013), 61-78.

<sup>431</sup> See OSLENDER, Ulrich “Colombia: Old and New Patterns of Violence.” *Socialist Register* Vol. 45 (2009), 181-198.

The violent process of accumulation was followed by the commodification of the dispossessed LNR. That is, they were transformed into tradeable objects in the market by means of their privatization – the assignment of legal title that gives exclusive rights to a person over a thing – and individuation – the placing of legal and material boundaries around things so they can be bought, sold and used. Not only were these preconditions for their exchange, but they also contributed to “cleanse” the obscure origin of the LNR in question.<sup>432</sup> As a result, the allocation of property rights in rural areas acquired a particular arrangement: high concentrations of land in the hands of a few. In this regard, a development model was established according to which both resource extraction licenses and infrastructure concessions were systematically granted to a handful of companies, often associated with foreign capital. Therefore, the very configuration of social relations was shaped. It is not necessarily that the whole socioeconomic pattern of Colombia’s rural areas is the product of the conveyance of dynamics of accumulation by dispossession, but to a great extent it was moulded by the distributional outcomes of violence.<sup>433</sup> It is in this context that foreign investors have arrived in Colombia, so although they have generally not contributed to the spreading of war in the country, they somehow encountered beneficial conditions for their establishment and operation as economic enterprises, including the possibility of accessing LNR that had previously been subject of dispossession.

The decision to implement a policy of systematic negotiation of international investment agreements aimed to incentivize the massive influx of transnational capital, under the rationale that they would bring economic growth to the country. In this regard, the agreements were designed to perform as determinants in the investors’ choice by means of the provision of a

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<sup>432</sup> See CASTREE, Noel. “Commodifying What Nature?” *3 Progress in Human Geography Vol. 27* (2003) p. 279-283.

<sup>433</sup> GUTIERREZ SANÍN, Francisco. “Land and Property Rights in Colombia – Change and Continuity.” *2 Nordic Journal of Human Rights Vol. 28* (2010), p.259.



competitive “business climate” in the country. This environment would offer stable conditions of operation founded on an equal and efficient protection of property rights, as well as on the possibility to cover the expectations of foreign investors with respect to the regulatory conduct of state authorities that could obstruct their economic maximization interests. Thus, in order to ensure this type of predictability, the agreements included binding behavioral obligations on the states that would be accompanied by a very effective dispute settlement mechanism for foreign investors to claim compensation from the host state in case of eventual negative impacts. Although it was not the only relevant factor, this institution of extensive legal protection was crucial to allow access of transnational capital to a great variety of commodities (for example, land and natural resources in rural areas) necessary for their economic enterprise and the ultimate reason for which they arrived in Colombia. In sum, IIAs offer a very powerful promise: they guarantee the immutability and stability of social configuration, and consequently the allocation of rights and other economic interests, on territories in which foreign investors are primary actors due to their enterprise. In fact, it can be argued that the resulting legal regime which supplements the process of commodification of LNR that have been taking place in Colombia which, as explained beforehand, was informed by actions of accumulation by dispossession that took place on the occasion of the country’s internal conflict.<sup>434</sup>

In turn, while the Colombian transitional justice project also conceives LNR as commodities, this depiction is produced in the context of the prospective correction of socioeconomic injustices to achieve durable peace. As previously mentioned, the project has been designed to produce structural transformations in the country’s society by implementing a dynamic scheme of

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<sup>434</sup> See generally COTULA, Lorenzo. “The New Enclosures? Polanyi, international investment law and the global land rush.” *9 Third World Quarterly Vol. 34* (2013), 1605–1629.

regulatory intervention that principally focuses on addressing the conflict's root causes and their prejudicial outcomes. Therefore, based on the recognition of a set of individual and collective entitlements to the people affected by the spread of – personal and structural – violence, the project includes particular mechanisms to adjust the social relations that were either altered or arose on the occasion of the conflict. Particularly, the land restitution program aims to ensure the material and juridical restoration of the lands that were coercively dispossessed to individuals and communities and their temporal extraction from the market, even if these regulatory actions affect consolidated private interests, such as the property rights and economic expectations of foreign investors at the rural areas. Moreover, in the case of collective restitution in favor of ethnic communities, the project contemplates the possibility of conducting a judicial review of the public acts that granted concessions, licenses or titles to conduct extractive activities within the territories affected by the dynamics of the conflict.

In sum, whereas the IIAs are intended to reinforce the commodification of LNR by means of the provision of stronger protection to the property rights and expectations in head of foreign investors, the TJP's regulatory measures have the potential to promote their – at least partial – decommodification, with the latter understood as the process through which commodities are depicted as entitlements, so their dependence on the market is rendered.<sup>435</sup> It is in this context that IIAs may restrict the effective implementation of the Colombian transitional justice project.<sup>436</sup>

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<sup>435</sup> See ESPING-ANDERSEN, Gosta. *The Three Worlds of Welfare Capitalism*. Princeton, NJ: Princeton University Press (1990), p. 21-22.

<sup>436</sup> See generally POLANYI, Karl. *The Great Transformation*. New York: Farrar & Rinehart, 1944.

B. The socio-legal version: pushing the state – and its regulatory capacity – towards opposite directions within the same Constitutional Order

Having presented the political economy analysis of the tension that is arguably taking place in Colombia between the protection of foreign investment via IIAs and the implementation of a transformative-oriented transitional justice project, this section illustrates the content and scope of this normative stress from a socio-legal perspective. Consequently, it draws on the Colombian Constitutional Order to explain how these manifestations of transnational legality encountered and entered into an intense dialogue in the realm of the state, which is the natural agency of incorporation and guarantor of these processes. Thus, in the context of this particular encounter, the IIAs concluded by the country have the potential to place severe constraints to the operation of the Colombian Constitutional Order, which due to its social peace function is founded on a “Social Rule of Law” principle that seeks to harmonize diverse and often contingent social interests. Moreover, the particular incorporation of the transitional justice project in the country and the tension consequently generated with the protection of foreign investment made visible the process of depoliticization of the LNR regulatory field that the latter legal framework aspires to materialize. In this regard, the TJP constitutes itself a source of resistance to the indiscriminate advancement of economic globalization in the realm of the Colombian Constitutional Order, resulted in the legal conflict. Therefore, the state faces a great challenge towards the accomplishment of its public choices.

As it was advanced in chapter one, the CCO reflects the normative image of the state. It was configured as a democratic amplification pact to accomplish social peace that is translated in the objective of materializing the varied political aspirations of the diverse social actors that conform the country’s social base. As such, it encompasses a formula – the Social Rule of Law – that aims

to work as a compass, orienting the exercise of public power towards both the achievement of the constitutional socioeconomic objectives and the settlement of the daily disputes that could often arise between multiple and competing interests. In other words, it finds a balance between juxtaposing normative forces, making a sustainable use of limited means, and accordingly coordinating the activity of public authorities. Therefore, the relations between public and private spheres have been shaped by means of the inclusion of two symbiotic dynamics: economic freedom and state intervention. While the former advocates for the consolidation of a free market economy that is based on the encouragement of free enterprise and the protection of property rights, the latter seeks to promote social justice by means of the regulatory activity of public authorities in order to eventually adjust inequality and discrimination around social relations. Thus, the resulting scheme of identities and social interactions envisages private property as an economic entitlement that has a social function; this entails the individual enjoyment of economic benefits and the satisfaction of particular needs in the context of social solidarity. It was within this normative landscape that these transnational legal processes were assimilated in Colombia.

The global projection of the country's Constitutional Order was crucial for the effective incorporation of the IIAs negotiated by the country. Particularly, the way in which the country's Constitutional Court interpreted the constitutional principles of internationalization and integration as legitimate avenues to limit state sovereignty served the purposes of both opening the domestic market to foreign investors and the establishment of a legal regime for the safeguarding of their rights and expectations from the potential interference of public regulation. In this regard, the placement of binding constraints on the authority of domestic public authorities – the new constitutionalism dynamic – extracted the economic interests and expectations of foreign investors from the rationalization typical of the SRL formula. Thus, any social function – including the

solidarity-based duties and restrictions – is uprooted from the property rights of foreign investors and rather, they are deemed as absolute and somehow unassailable. In practical terms, the protection offered by IIAs is founded in binding and enforceable behavioral standards that condition the regulatory action of the state to the non-alteration of economic profits obtained through these entitlements, regardless of the reasons or purposes sought through public conduct. They are thus decontextualized and depoliticised for the sake of guaranteeing a stable and predictable investment climate.

The emergence of the transitional justice project – an instance of subaltern cosmopolitan legality – came to make visible the constraints that the IIAs concluded with capital-exporting countries had placed on Colombia's democratic choices, including the aim to achieve durable peace. As the TJP assumed the role of being a “second constitutional moment” towards the crystallization of certain aspirations included in the 1991 Constitution, a strong scheme of regulatory action intended to produce significant transformations in the country was included in the project. In particular, the implementation of a rights-based land restitution program and an agrarian reform grounded in a “bottom-up” perspective is intended to produce the adjustment of social relations in the country's rural areas. Thus, these distributive-oriented policies will eventually intersect with private interests and expectations, such as those of foreign investors. The latter, provided with extensive protection by virtue of their special status, could accordingly pose a threat or effectively resort to investor-state arbitration in order to neutralize the impact of their property rights and claim compensation for the harms produced. From a public standpoint, this signifies that the prerogative to identify controversies between the state and foreign investors is extracted from the sphere of the domestic judiciary to be assigned to a transnational body – an ad hoc arbitral tribunal – which will actually be reviewing the acts of domestic public authorities in accordance with the broad and imprecise

standards embedded in the investment treaties. In principle, this seems to be contrary to public law principles, such as democracy, accountability and the rule of law.

#### **IV. Conclusions**

This chapter aimed to articulate the analytical framework, genealogical descriptions and theoretical elements included in this research so far to demonstrate the existence of an essential normative tension around two transnational legal processes that present alternative visions on the attainment of Colombia's socioeconomic objectives. Likewise, it intended to project the regulatory implications of the encounter of these colliding vernaculars in the realm of the Colombian Constitutional Order. In this regard, the chapter highlighted that the legal protection of foreign investors via international investment agreements has the potential to constrain the effective implementation of the transitional justice project in Colombia. This is so because it has the potential to freeze or roll back the regulatory measures oriented at generating structural changes in the realm of access to and use of land and natural resources. Moreover, it could even challenge these measures before an investment arbitration tribunal. Therefore, the capacity of the state to enforce certain legitimate public objectives – such as the attainment of durable peace after a long-term armed conflict grounded in social inequalities – might be restrained in case they collide with certain private interests and expectations, such as those of foreign investors.

This political and legal phenomenon poses a tremendous challenge to the Colombian state, which is consciously – and legally – committed to the implementation of a neoliberal market democracy within its jurisdiction, including the observation of very demanding standards as to the protection of the economic interests and expectations of foreign investors. However, the polity has the paramount duty of materializing the social peace aspirations that support its Constitutional Order, including the correction of historical inequalities and the prospective and equitable distribution of

opportunities among the population. Thus, it is possible to identify a conflictual dialogue between a hegemonic political project and an emancipatory alternative that has chosen to follow the realm of the law to go by. What remains to be seen is whether this set of arguments and connections can be verified in real life, for which conducting a case study is necessary.

## **Chapter Six: Case Study. Collective Territorial Restitution to Ethnic Communities Located within the Sphere of Influence of Mining Projects Operated by Foreign Investors (Chocó, Colombia)**

### **I. Introduction**

The previous chapters aimed to introduce and characterize a normative tension between the legal protection offered to foreign investment through international investment agreements and the implementation of a transitional justice project in Colombia. The result of this exercise was the identification of the challenges that the country would face, as a consequence of this normative tension, from the standpoint of its capacity to perform as a governance authority towards the attainment of public goals. This chapter aims to provide an in-depth illustration of this phenomenon through a case study. Its purpose is twofold: first, to demonstrate that the intellectual formulations elaborated in the previous chapters materialize in real-life situations; and second, to explore the particular implications of this normative collision on the regulatory capacity of public authorities in Colombia.

The case selected is paradigmatic as it comprises the first collective restitutions that took place on the occasion of the Colombian transitional justice project, which were conducted in favor of two ethnic communities of the Alto Atrato Region (Chocó Department, Colombia). This zone is a rural enclave that was progressively abandoned by these populations as a consequence of the country's internal conflict. It is also part of the sphere of influence for a number of mining concessions that had been assigned to foreign-owned companies when the restitution process commenced. Therefore, a conflict of interests was created between the economic interests of the mining companies and the right to restitution in head of the ethnic groups. In particular, this case study focuses on the situation of two communities: The *Emberá Katío* indigenous people of the *Alto*



*Andágueda* reservation, and an Afro-Colombian community denominated *Consejo Comunitario Mayor de la Organización Campesina y Popular del Alto Atrato - Cocomopoca*.

The question here is whether and to what extent the protection of foreign investors granted by certain international investment agreements concluded between Colombia and capital-exporting countries has the potential to constrain the effective implementation of transitional justice. Particularly, whether it can affect or shape the regulatory measures that are oriented to redress victims and produce structural transformations in the country, such as land restitution. Therefore, the analysis concentrates on the content and outcomes of the territorial restitution procedures that were activated in favor of the Emberá Katío and Cocomopoca communities. Specifically, this case is examined from the standpoint of a legal phenomenon: the judicial suspension of a number of concession contracts that have been concluded between the state and particular multinational mining corporations, in order to ensure the effective consolidation of these ethnic peoples' collective rights over the lands which are overlapping the corresponding mining projects. These processes have been assumed by the Colombian authorities in accordance with the formula provided by the Victims Law and its supplementary norms on the redress of ethnic groups.<sup>437</sup>

Since the case study principally deals with judicial procedures, the principal source of information is the record corresponding to the territorial restitution processes in favor of the Emberá Katío and Cocomopoca communities.<sup>438</sup> Supplementary to this documentation, the factual and contextual part of the case builds on selected press articles and secondary literature, which were in part provided by a number of organizations involved in the litigation of the territorial restitution

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<sup>437</sup> See Chapter Three.

<sup>438</sup> Clarifying that by March 2016, a final decision on the latter case had not been issued by the entrusted tribunal. Nevertheless, the information collected by that time was sufficient to reconstruct the case and trace the conduct of public authorities with reference to the Emberá Katío case.

procedures. The multinational companies responded poorly to an information request, so information from them is limited. The study aims to contrast the way in which public authorities performed in each of the instances so as to detect particularities and eventual variations in their conduct. In this regard, these situations share most factual and contextual elements and are being addressed by the same decision-makers, the only difference being the moment when the territorial restitution was requested.

This chapter is organized in three sections. Section I introduces the case's background. This includes an account of the social, economic and geopolitical context of the region; the characterization of the actors – public and private, domestic and international – involved in the controversy; and the description of the legal foundations of the controversy from the standpoint of both the legal protection of the mining industry's foreign investors and the regulation in favor of ethnic communities. Section II focuses on corresponding territorial restitution processes. It emphasises the illustration and analysis of the conflicts emerging from the effective recognition of the ethnic communities' restitution rights in relation to the interests and expectations of the mining companies. In this regard, the study seeks to unearth the rationales and argumentative schemes embedded in the position of the relevant actors throughout the legal processes, as well as establish possible interconnections between the outcomes of the Emberá Katío case and the conduct of the Cocomopoca case. Finally, Section III collects the results of the previous observation and reflects on the likelihood of the alleged normative collision between the legal protection of foreign investors via international investment agreements and the implementation of the Colombian transitional justice project. In this regard, it addresses the eventual consequences of the strain on the conduct of public authorities.

## II. Background

Following the aim of producing a case study that exemplifies the tension between the legal protection offered to foreign investment via IIAs and the implementation of a transitional justice project in Colombia, this section introduces the particular elements that will be considered to articulate the claimed normative conflict, and produce the corresponding analysis concerning the regulatory implications of this type of stress. This background highlights the economic, social, cultural, and ecological conditions that contextualize the facts of the case; the characterization of the relevant actors involved in the controversy; and, the legal foundations that support the crystallization of the encounter between these colliding vernaculars.

### A. Context

The Alto Atrato region is located in the Chocó department, in the North-West of Colombia, and includes the Atrato, Bagadó, Cértegui, and Lloró municipalities. Historically, the zone's governability has been conditioned by the lack of effective presence of state authorities. This is evidenced by the fact that it is one of the poorest and least developed enclaves of the country. This might be explained by its isolation from the main urban centers, as well as by the structural discriminatory practices that have characterized Colombian society. In this regard, most of its population have an ethnic origin – indigenous peoples, Afro-Colombian communities and peasants.

The region has a privileged geostrategic location, since it adjoins with Panama and has access to the Atlantic and Pacific oceans. This condition has led the zone to be one of the main scenarios of the country's internal armed conflict. The major armed actors (guerrillas, paramilitary groups, criminal bands, etc.) have permanently disputed the chance to use the region to conduct illegal/profitable activities, especially the ones associated with drug trafficking, smuggling,

kidnapping and extortion. In this context, the high intensity of the warfare between the country's armed forces and the illegal armed actors has deeply impacted civilian population. On the other hand, the zone is recognized by its biodiversity, fertile lands and great amount of valuable mineral resources that lie unexploited. Therefore, not only has it become subject to economic interest by the state for its development objectives, but the abovementioned actors of the conflict have sought their appropriation as a means of financing the belligerent actions.

## B. Relevant actors

The characterization of the – public, private, national, and international – actors involved in the case study's controversy constituted a preliminary step for the further account of the alleged normative tension between the adoption of the Colombian transitional justice project and the interests of certain foreign investors. This explanation is not only instrumental to the understanding of the particularities of the territorial restitution processes under consideration. It also contributes to the unveiling of certain features that are relevant for the account of occasional variations in the conduct of public authorities, which motivated the introduction of a hypothesis concerning the obstructive potential of IIAs on the country's sovereign choices as to the implementation of transitional justice.

### 1. *Victims - ethnic communities and accompanying organizations*

#### i. The Emberá Katío People

The *Emberá Katío* people have inhabited North-west Colombia – particularly the Chocó Department and the Darién region, which borders with Panama – since immemorial times. As a consequence of the contact with European conquerors, and later with contemporary westernized Colombians, they had to adapt to the territorial demands of the country's national project. They

are grouped around *resguardos* (reservations)<sup>439</sup> to gain recognition and protection from the Colombian state and preserve a relative degree of self-determination. In accordance with their ancestral traditions and culture, the Emberá Katío people have developed a unique relationship with territory and nature that builds on interdependence and survival, and surpasses the common occidental understandings around private ownership and economic exploitation.

In particular, the Emberá Katío people's Alto Andágueda reservation, mostly located within the Bagadó municipality at the Chocó Department, was recognized and constituted in 1979 by means of a resolution issued by the country's agrarian authority (Instituto Colombiano de Reforma Agraria – INCORA), which was then the institution in charge of these matters.<sup>440</sup> By 2012 the resguardo was formed by 31 communities, 1454 families and around 7.000 individuals, living on 50.000 hectares of land. Due to its location and particular features, the area where the resguardo is located has been one of the most affected by Colombia's internal armed conflict. Since the year 2000 a great number of indigenous leaders have been assassinated and the community's property has been affected by the belligerent actions. This has produced massive waves of forced displacement that have deeply touched the very physical and cultural survival of the Emberá Katío people's Alto Andágueda reservation.

#### ii. Cocomopoca Afro-Colombian community

Like the indigenous peoples, Afro-Colombians have inhabited this area for hundreds of years. Upon their arrival in America in the context of slavery, some were able to escape from the urban

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<sup>439</sup> These are indigenous reservations, established by Colombian law so as to delimit the zones where indigenous peoples live and develop themselves as social groups with certain level of autonomy, based on their right to self-determination. According to the 1991 Constitution, reservations are territorial entities, and the authorities of the indigenous peoples may exercise their jurisdictional functions within such territorial jurisdiction in accordance with their own laws and procedures as long as these are not contrary to the Constitution and the laws of the Republic. See REPÚBLICA DE COLOMBIA. *Constitución Política*, 1991, art. 246 and 286.

<sup>440</sup> Nowadays the public entity in charge of Colombia's rural development public policies is Incoder, which inherited Incora's mandate regarding the constitution of reservations.

centers and settled along the Pacific coast, including the Alto Atrato Region. Cocomopoca is an association composed of 43 communities, which group 3200 families that have traditionally occupied around 172.000 hectares by the basin of the Andágueda, Capá, and Tumutunendo Rivers. In this context, they conduct ancestral survival practices with regards to agriculture, fishing, and hunting. They act as natural care-givers of the tropical forest which they inhabit.

Cocomopoca has as antecedent the Afro-Colombian National Cimarron Movement that was formed during the 1970s, and formalized as an independent organization in 1982. In the context of the enactment of the 1991 constitution, the protection of the collective rights of Afro-Colombians increased, and consolidated with the enactment of law 70 of 1993. After 11 years of negotiations with the government, in September 2011 the Cocomopoca community was officially recognized by the national agrarian authority. They received a collective title of 73.000 hectares within the Atrato, Bagadó, Lloró and Cértegui municipalities, in the Department of Chocó.

## *2. Foreign investors – mining companies*

In accordance with the facts of the case, three multinational mining companies acquired particular economic interests around the “Dojurá Project” over time: AngloGold Ashanti, Continental Gold Ltd, and Glencore. By virtue of their transnational nature and the nationality of their shareholders, they are accounted as foreign investors in light of the safeguards offered by the IIAs concluded by Colombia with a number of capital-exporting states (Canada, UK, Switzerland, and Peru). Particularly, they enjoy the protection granted by these agreements, including the possibility to claim damages against Colombia, before an investor-state arbitration tribunal. As will be illustrated, they perform a contentious role on the occasion of the Colombian transitional justice project’s territorial restitution procedures.

iii. AngloGold Ashanti (South Africa and United Kingdom)

AngloGold Ashanti (hereinafter AGA) is one of the world's largest mining companies and concentrates most of its activity in the extraction of gold. It was formed in 2004 by the merger of two chief businesses: AngloGold, a company majority-owned by the British Anglo American plc; and the Ghana-based Ashanti Goldfields Corporation, founded by the British citizen Edwin Cade during colonial occupation.<sup>441</sup> The consolidated AGA now forms the second largest gold producer in the globe with prospective interests in 7 countries – one of which is Colombia – and 20 effective projects in 10 countries.<sup>442</sup> The company mainly belongs to investors from the United States, Canada and South Africa, and while it was legally incorporated in the latter, it is also listed in the New York, Euronext, and Australian stock exchanges.<sup>443</sup> AGA has been accused of being involved in environmental damage and human rights abuses. For instance, in 2011, the company was accused by several NGOs of irresponsible behavior that ended in the contamination of land and poisoning of people in Ghana.<sup>444</sup>

AGA showed initial interest in Colombia in 1999, when its predecessor AngloGold acquired 50% of Corona Goldfields through an exploration agreement with its parent, Conquistador Mines Ltd., a Canadian Corporation dedicated to the extraction of gold in the Antioquia and South Bolivar regions.<sup>445</sup> However, after it was established that Conquistador Mines had apparently been

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<sup>441</sup> See DUMETT, Raymond E. “Edwin Cade and Frederick Gordon: British Imperialism and the Foundation of the Ashanti Goldfields Corporation, West Africa”, in DUMETT, Raymond E. (Ed.), *Mining Tycoons in the Age of Empire 1870-1945*. Farnham: Ashgate Publishing, 2009, p. 64.

<sup>442</sup> See ANGLOGOLD ASHANTI, “Lo que usted debe saber sobre AngloGold Ashanti 2014,” p. 48. Retrieved from <http://www.anglogoldashanticolombia.com/todo-lo-debes-saber-sobre-anglogold-ashanti/> (last accessed March 20 2016).

<sup>443</sup> See ANGLOGOLD ASHANTI. “Delisting and cancellation of securities from the London Stock Exchange.” Retrieved from [http://www.anglogoldashanti.com/en/Media/news/Pages/20140926\\_Delisting.aspx](http://www.anglogoldashanti.com/en/Media/news/Pages/20140926_Delisting.aspx) (last accessed March 20 2016).

<sup>444</sup> See GREEN PEACE. “South African Company 'Wins' Public Eye Award.” January 31 2011. Retrieved from <http://www.greenpeace.org/africa/en/News/news/South-African-Corp-Wins-Public-Eye-Award/> (last accessed March 20 2016).

<sup>445</sup> See ANGLOGOLD ASHANTI. “Conquistador Mines Ltd. and AngloGold South America Limited enter into Colombian Exploration Agreement.” November 19 1999. Retrieved from <http://www.infomine.com/index/pr/Pa033>

involved in human rights abuses associated with the presence of paramilitary groups at the Simití municipality, AngloGold decided not to continue with the agreement.<sup>446</sup> At a later date, in February 2003, the companies Kedahda Ltd. and Kedahda Segunda Ltd were created in Virgin British Islands with AGA capital,<sup>447</sup> in order to prepare their arrival in Colombia by the end of that year.<sup>448</sup> In effect, AGA initially entered in the country as Sociedad Kedahda Ltd.,<sup>449</sup> created in September 2003 and whose object was performing exploration, exploitation, and commercialization activities, in areas subject to concession contracts concluded with the Colombian government.

While the new subsidiary started submitting proposals beginning in 2004, it was only in 2006 that it celebrated its first concession contracts with Colombia's mining authorities. By 2007, it acquired exploration rights and initiated prospecting activities over a zone known as "La Colosa" in the Tolima department. Along with the "Gramalote" project, "La Colosa" is AGA's main interest in Colombia.<sup>450</sup> In 2008, the company changed its name to AngloGold Ashanti in order to consolidate the global commercial brand in their businesses in Colombia.<sup>451</sup> By July 2015, AGA had invested around 350 million dollars in Colombia. It has acquired 504 mining titles and expects the resolution

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[051.PDF](#). REVISTA DINERO "Minería Colombiana, Diamante en Bruto." *Revista Dinero*, March 14 2008. Retrieved from <http://www.dinero.com/edicion-impresa/negocios/articulo/mineria-colombiana-diamante-bruto> (last accessed March 20 2016.)

<sup>446</sup> See COUMANS, Catherine. "A sample of Canadian mining companies operating in developing countries accused of human rights and environmental abuses". *Mining Watch Canada*, June 7 2007, p. 3. Retrieved from [http://www.miningwatch.ca/sites/www.miningwatch.ca/files/Problematic\\_Canadian\\_Mining\\_Cases\\_0.pdf](http://www.miningwatch.ca/sites/www.miningwatch.ca/files/Problematic_Canadian_Mining_Cases_0.pdf) (last accessed March 20 2016)

<sup>447</sup> By means of this territory's "International Business Companies Act", which allows the incorporation of such type of businesses, in exchange of favorable fiscal conditions with regards to tax and other duties exemptions.

<sup>448</sup> See MOLANO, Jorge. "AngloGold Ashanti: la Voracidad de las Multinacionales de la Muerte, el Saqueo y la Destrucción." Tribunal Permanente de los Pueblos (TPP) Capítulo Colombia, 2006. Retrieved from [http://www.omal.info/IMG/doc/documento\\_final\\_tpp.doc](http://www.omal.info/IMG/doc/documento_final_tpp.doc) (last accessed March 20 2016.)

<sup>449</sup> See PULIDO, Alejo. "Las preguntas detrás de AngloGold Ashanti." *La Silla Vacía*, June 30 2011. Retrieved from <http://lasillavacia.com/historia/las-preguntas-detras-de-anglogold-ashanti-25503> (last accessed March 20 2016.)

<sup>450</sup> See ANGLOGOLD ASHANTI, "Lo que usted debe saber sobre AngloGold Ashanti 2014", p. 48. Retrieved from <http://www.anglogoldashanticolombia.com/todo-lo-debes-saber-sobre-anglogold-ashanti/> (last accessed March 20 2016.)

<sup>451</sup> See ANGLOGOLD ASHANTI, "Lo que usted debe saber sobre AngloGold Ashanti 2014", p. 9. Retrieved from <http://www.anglogoldashanticolombia.com/todo-lo-debes-saber-sobre-anglogold-ashanti/> (last accessed March 20 2016.)



of 3074 pending requests, which are distributed in 21 departments of the country, including Chocó.<sup>452</sup>

AGA's *modus operandi* goes through the constitution of commercial societies for each of its projects – such as Exploration's Chocó Colombia S.A.S. in the case under study – and joint venture contracts with other mining companies, so as to diversify the associated risks. Yet, these private entities belong to the multinational corporation.<sup>453</sup> AGA claims to have a strong corporate social responsibility scheme. In that regard, it recalls its affiliation to social and environmental standard-setting initiatives, such as IFC's Environmental and Social Performance Standards, Global Pact's Voluntary Principles, the Extractive Industry Transparency Initiative, and the UN Principles on Business and Human Rights.<sup>454</sup>

After Antioquia and Tolima, Chocó is the department with the most hectares which have been entitled in favor of AGA, notwithstanding the numerous solicitudes that are still under study.<sup>455</sup> According to the latest available data and not including the concession contracts previously concluded with the Colombian government, while in 2012 the company was granted 3 mining titles in the region, by 2013 it acquired 5 more.<sup>456</sup>

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<sup>452</sup> See EBUS. Bram. “Los lunares de AngloGold Ashanti”. *Las Dos Orillas*, October 23 2014, <http://www.las2orillas.co/los-lunares-de-anglogold-ashanti/> (last accessed March 20 2016.)

<sup>453</sup> See GONZÁLEZ, Ximena & ROCHA, Johana. “El Verdadero Rostro de la Locomotora Minera y sus Particularidades en el Departamento del Chocó. El Caso del Proyecto Dojurá”. *Centro de Estudios para la Justicia Social Tierra Digna*, June 2012, p. 9. Retrieved from <http://www.tierradigna.org/attachments/article/7/El%20verdadero%20rostro%20de%20la%20Locomotora%20Minera.pdf> (last accessed March 20 2016.)

<sup>454</sup> See ANGLOGOLD ASHANTI, “Lo que usted debe saber sobre AngloGold Ashanti 2014”, p. 5. Retrieved from <http://www.anglogoldashanticolombia.com/todo-lo-debes-saber-sobre-anglogold-ashanti/> (last accessed March 20 2016.)

<sup>455</sup> See GONZÁLEZ, Ximena & ROCHA, Johana. “El Verdadero Rostro de la Locomotora Minera y sus Particularidades en el Departamento del Chocó. El Caso del Proyecto Dojurá”. *Centro de Estudios para la Justicia Social Tierra Digna*, June 2012, p. 10. Retrieved from <http://www.tierradigna.org/attachments/article/7/El%20verdadero%20rostro%20de%20la%20Locomotora%20Minera.pdf> (last accessed March 20 2016.)

<sup>456</sup> See AGENCIA NACIONAL DE MINERIA, *Títulos Mineros otorgados por la Agencia Nacional de Minería*. Retrieved from [http://www.anm.gov.co/?q=Titulos\\_otorgados\\_ANM](http://www.anm.gov.co/?q=Titulos_otorgados_ANM) (last accessed March 20 2016).

In the context of the case under analysis, AGA submitted a concession bid with regards to the territory under dispute as early as 2005. Since 2008, Colombian mining authorities granted mining titles as follows:

*Table 3: Mining titles owned by AGA which overlap with the Alto Andágueda indigenous reservation*

Year	Concession Contract	Mining Title	Title-holder	Municipalities included	Extension within indigenous reservation (Hct.)	Ratio of title within indigenous reservation (%)	Period	State
2008	L 685	-	AngloGold Ashanti Colombia S.A.	Pueblo Rico / Bagadó	122,4	34,4	-	Under study
		GEQ-09Q		Bagadó	2.272	96,3	2038	Granted
GEB-09F		Bagadó		9,8	2,36	2039	Granted	
GEB-09G		Bagadó		5,7	1,5	2039	Granted	
2009		GEB-09B		Pueblo Rico / Bagadó / Tadó	3.143	40,7	2039	Granted
		HJN-15231		Bagadó	800,2	67,3	2039	Granted
		HJN-15251		Bagadó	612,9	54,7	2039	Granted
		2011		GEQ-105	Bagadó	2.516	59,7	2041
<b>Total of (requested and granted) titles' hectares within the indigenous reservation</b>					<b>9.482</b>			

Source: Legal File, AGA Submission answering the complaint in the Alto Andágueda Case, p. 3.

Table 4: Mining titles owned by AGA overlapping with the Cocomopoca collective territory

Year	Concession Contract	Mining Title	Title-holder	Municipalities included	Extension within indigenous reservation (Hct.)	Ratio of title within indigenous reservation (%)	Period	State
2009	L 685	GEB-09A	AngloGold Ashanti Colombia S.A.		76,6	100	2039	Granted
		GEB-09B		Bagadó	2.891	37,5	2039	Granted
		GEB-09F		Bagadó	418,26	100	2039	Granted
		GEB-09G		Pueblo Rico / Bagadó / Tadó	365,8	96	2039	Granted
		IDA-16081			921,2	100	2039	Granted
		HJN-15231		Bagadó	1.187	99,9	2039	Granted
		HJN-15251		Bagadó	1.119,7	100	2039	Granted
2010		IDA-16121			1.520,3	90,8	2040	Granted
		GEB-09H			1.621,4	99	2040	Granted
2011		GEQ-105		Bagadó	1.711,5	40,7	2041	Granted
<b>Total of (requested and granted) titles' hectares within the Afro-Colombian territory</b>					<b>10.832,76</b>			

Source: Legal File, AGA Submission answering the complaint in the Alto Andágueda Case, p. 3.

In the context of Concession contract L685, between 2008 and 2011 AngloGold Ashanti received 11 mining titles, which overlap the region's ethnic territories by around 20.000 hectares. With regards to the lands collectively owned by the Emberá Katío community, 6 mining titles overlap 9.842 hectares of the area of the Alto Andágueda indigenous reservation, with additional title requests which are still pending. In turn, 10 mining titles overlap 10.832,76 hectares of the territories of the Cocomopoca Afro-Colombian community.

iv. Continental Gold Ltd (Canada)

Continental Gold Limited (herein CGL) is an advanced-stage exploration and development company focused on becoming the leading gold producer in Colombia.<sup>457</sup> It was incorporated in Bermuda in April 2007 under the Companies Act 1981,<sup>458</sup> and carries out its operations through a corporate office in Toronto (Canada) and a foreign company branch office in Medellín (Colombia). In March 2010, it amalgamated with the Canadian company Cronus Resources Ltd. through a venture exchange and is currently listed in the Toronto stock exchange.<sup>459</sup> The company was founded by Robert W. Allen, a citizen of the United States that arrived in Colombia during the 1980s looking for investment opportunities in the extractive sector. Allen initiated a world-wide business in the industry with a domestic company named “The Bullet Group” in 1994, after discovering gold mines in Antioquia department.<sup>460</sup>

According to the company’s 2015 annual information report, its corporate social responsibility model is aligned with international performance standards. The company aims to protect the environment, deliver effective and sustainable community development, and improve the quality of life for its employees and contractors, their families, and the immediate community.<sup>461</sup> The company’s signature project, named “Buriticá” and located in the Antioquia department, is its only operative property interest so far, and has been told to be one of Colombia’s greatest extractive

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<sup>457</sup> See THE GOLD REPORT “Continental Gold Inc.” Retrieved from <http://www.theaureport.com/pub/co/cnl-tsx> (last accessed March 20 2016.)

<sup>458</sup> See SEDAR. “Continental Gold Inc.” Retrieved from [www.sedar.com/DisplayProfile.do?lang=EN&issuerType=03&issuerNo=00004532](http://www.sedar.com/DisplayProfile.do?lang=EN&issuerType=03&issuerNo=00004532). (last accessed March 20 2016.)

<sup>459</sup> See CONTINENTAL GOLD LTD. “Annual Information Form for the Year ended December 31, 2014”, March 6 2015, p.3. Retrieved from [www.conti/files/doc\\_financials/2014/Q4/CNL-\\_-YE-2014AIF\\_Final\[1\]\\_v001\\_11tc91.pdf](http://www.conti/files/doc_financials/2014/Q4/CNL-_-YE-2014AIF_Final[1]_v001_11tc91.pdf) (last accessed March 20 2016.)

<sup>460</sup> See JIMÉNEZ MORALES, Germán. “Un paisa sentó a Mr. Allen en una montaña de oro”. *El Colombiano*, September 11 2010. Retrieved from [http://www.elcolombiano.com/un\\_paisa\\_sento\\_a\\_mr\\_allen\\_en\\_un\\_a\\_montana\\_de\\_oro-LEEC\\_103989](http://www.elcolombiano.com/un_paisa_sento_a_mr_allen_en_un_a_montana_de_oro-LEEC_103989) (last accessed March 20 2016.)

<sup>461</sup> CONTINENTAL GOLD LTD. “Annual Information Form for the Year ended December 31, 2014”, March 6 2015, p. 10. Retrieved from [www.continentalgold.com/files/doc\\_financials/2014/Q4/CNL-\\_-YE-2014AIF\\_Final\[1\]\\_v001\\_](http://www.continentalgold.com/files/doc_financials/2014/Q4/CNL-_-YE-2014AIF_Final[1]_v001_) (last accessed March 20 2016.)

prospects, because of a rare combination of factors: size, grade, growth-potential, and excellent metallurgy.<sup>462</sup> On the other hand, its portfolio includes three early-stage projects for which it has received mining titles: *Berlin*, *Dominical*, and *Dojura*.<sup>463</sup> The latter is the one subject of consideration in this study.

In the context of the case under examination, in 2011, the company created a subsidiary in Bermuda (CGL Dojura Holdings Limited), which in turn constituted a commercial society in Colombia (CGL Dojura S.A.S.) to comply with that country's domestic mining legislation for the eventual conclusion of concession contracts.<sup>464</sup> In October 2006, CGL entered into an assignment agreement with AngloGold Ashanti in respect of the Dojura property, with the purpose of transferring 51% of the former company's interests in the project in exchange for the latter's assuming exploration expenditures and other payments from the date it began exploration. While CGL received payments from AGA in 2011 and 2012, these payments stopped in 2013, due to the emergence of apparent uncertainty as to whether the project would stay on track, given the increase of armed conflict in the zone. In 2014, AGA announced that it no longer wished to pursue a joint venture,<sup>465</sup> so Continental Gold Ltd maintained economic interests over the Dojura project.

In the context of the case under analysis, Continental Gold entered into a concession contract with the Colombian mining authorities in 2010, obtaining one mining title as follows:

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<sup>462</sup> See CONTINENTAL GOLD LTD. "Buriticá Project." Retrieved from <http://www.continentalgold.com/en/projects-2/projects/> (last accessed March 20 2016).

<sup>463</sup> See CONTINENTAL GOLD LTD, "Annual Information Form for the Year ended December 31, 2014", March 6 2015, p.6. Retrieved from [www.continentalgold.com/files/doc\\_financials/2014/Q4/CNL](http://www.continentalgold.com/files/doc_financials/2014/Q4/CNL) (last accessed March 20 2016).

<sup>464</sup> See CONTINENTAL GOLD LTD, "Annual Information Form for the Year ended December 31, 2014", March 6 2015, p.3. Retrieved from [www.continentalgold.com/files/doc\\_financials/2014/Q4/CNL](http://www.continentalgold.com/files/doc_financials/2014/Q4/CNL) (last accessed March 20 2016.)

<sup>465</sup> See CONTINENTAL GOLD LTD, "Annual Information Form for the Year ended December 31, 2013", p.23. Retrieved from [www.continentalgold.com/files/doc\\_financials/2013/CNL\\_2013%20Annual%20Financial%20State%20ments\\_Final\\_v001\\_i05b6c.pdf](http://www.continentalgold.com/files/doc_financials/2013/CNL_2013%20Annual%20Financial%20State%20ments_Final_v001_i05b6c.pdf) (last accessed March 20 2016.)

*Table 5: Mining titles owned by Continental Gold overlapping the Alto Andágueda indigenous reservation*

Year	Concession Contract	Mining Title	Title-holder	Municipalities included	Extension within indigenous reservation (Hct.)	Ratio of title within indigenous reservation (%)	Period	State
2010	L 685	FHK-148	Continental Gold Ltd. (Capricornio SOM) <sup>466</sup>	Bagadó / Lloró	2.322,1	30%	2040	Granted
<b>Total of (requested and granted) titles' hectares within the indigenous reservation</b>					<b>2.322,1</b>			

Source: Legal File, AGA Submission answering the complaint in the Alto Andágueda Case, p. 3.

*Table 6: Mining titles owned by Continental Gold overlapping the Cocomopoca collective territory*

Year	Concession Contract	Mining Title	Title-holder	Municipalities included	Extension within indigenous reservation (Hct.)	Ratio of title within indigenous reservation (%)	Period	State
2010	L 685	FHK-148	Continental Gold Ltd. (Capricornio SOM)	Bagadó / Lloró	2.189	28,3%	2040	Granted
<b>Total of (requested and granted) titles' hectares within the Afro-Colombian territory</b>					<b>2.189</b>			

Source: Legal File, AGA Submission answering the complaint in the Alto Andágueda Case, p. 3.

In the context of Concession contract L685, in the year 2010, Continental Gold Ltd. received 2 mining titles, which are overlapping the region's ethnic territories by around 2,500 hectares. With regards to the lands collectively owned by the Emberá Katío community, 1 mining title superimposes 2.322,1 hectares of the area of the Alto Andágueda indigenous reservation. In turn,

<sup>466</sup> According to Continental Gold's submission in the Alto Andágueda case (p. 12), although Capricornio SOM appears as the concessionary in contract FHK-148, the corresponding mining titles were ceded to the former company.

1 mining title overlaps 2.189 hectares of the territories of the Cocomopoca Afro-Colombian community.

v. Glencore (Switzerland and Peru)

Glencore Plc is an Anglo-Swiss mining company, created through a merger between Glencore and Xstrata in 2003, two companies involved in the extractive and energy sectors.<sup>467</sup> Currently, the company is considered a leading producer and marketer of commodities operating worldwide. It has operations around the world spanning a network of more than 90 offices located in over 50 countries.<sup>468</sup> It arrived in Colombia in 1995 as it acquired CI Prodeco, a business dedicated to operating several open-pit coal mines in the country (*Calenturitas* and *La Jagua*).<sup>469</sup> In this context, the company was accused of paying the associates of paramilitary killers to incite the forced displacement of people, in order to occupy their lands near the project.<sup>470</sup> In 2000, Glencore acquired 33% of the state-owned coal mine “El Cerrejón”, which is considered one of the largest mines of its kind in the world.<sup>471</sup>

Glencore’s interests over the Dojura project developed in a different way. Empresa Minera los Quenuales (EMQ), a Peruvian subsidiary of Glencore International (Glencore Finance, incorporated in Bermuda), was created in 2006 as the result of the amalgamation of two mining

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<sup>467</sup> See BLAS, Javier. "Glencore finishes takeover of Xstrata". *Financial Times*, 2 May 2013. Retrieved from [www.ft.com/intl/cms/s/0/9d355d82-b31a-11e2-95b3-00144feabdc0.html#axzz3fFgxqOVS](http://www.ft.com/intl/cms/s/0/9d355d82-b31a-11e2-95b3-00144feabdc0.html#axzz3fFgxqOVS) (last accessed March 20 2016).

<sup>468</sup> See GLENCORE, “Annual Report 2014”, p. 3-8, Retrieved from [www.glencore.com/assets/investors/doc/reports\\_and\\_results/2014/GLEN-2014-AnnualReport.pdf](http://www.glencore.com/assets/investors/doc/reports_and_results/2014/GLEN-2014-AnnualReport.pdf) (last accessed March 20 2016.)

<sup>469</sup> See PRODECO. “Our History”. Retrieved from <http://www.prodeco.com.co/index.php/en/company/our-history/> (last accessed March 20 2016.)

<sup>470</sup> See SWEENEY, John. “Panorama questions over Glencore mines.” *BBC*, 16 April 2012. Retrieved from <http://www.bbc.com/news/17702487> (last accessed March 20 2016.)

<sup>471</sup> See CERREJON. “Nuestra Empresa”. Retrieved from <http://www.cerrejon.com/site/nuestraempresa/historia/nuestra-historia-2000.aspx> (last accessed March 20 2016.)

companies that had exploited old deposits of different minerals in this country.<sup>472</sup> One of EMQ's subsidiaries, Dowea S.A.S.,<sup>473</sup> constituted in turn a subsidiary in Colombia in 2010.<sup>474</sup> In 2013, Dowea S.A.S. acquired 51% of the Colombian company Exploraciones Chocó Colombia S.A.S.<sup>475</sup> While the latter was originally created by AngloGold Ashanti Colombia,<sup>476</sup> a joint venture agreement entailing the transfer of the operation's direct management was accorded with "another Company",<sup>477</sup> which turned out to be Dowea. A report issued by the Colombian Superintendence of Industry and Commerce established that an economic integration process was conducted between AngloGold Ashanti and Dowea according to which the latter acquired indirect control of Exploraciones Chocó Colombia, property of the former South African company, by means of the acquisition of 51% of the corresponding shares.<sup>478</sup>

In the context of the case under analysis, Exploraciones Chocó Colombia (Glencore) formulated a concession bid with regards to the disputed territory in 2008. Thus, Colombian mining authorities granted mining titles as follows:

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<sup>472</sup> See GLENCORE. "Operaciones en Perú". Retrieved from [www.glencoreperu.pe/ES/QuienesSomos/Paginas/Divisi%C3%B3nSurdelPer%C3%BA.aspx](http://www.glencoreperu.pe/ES/QuienesSomos/Paginas/Divisi%C3%B3nSurdelPer%C3%BA.aspx); BNAMERICAS. "Empresa Minera los Quenuales." Retrieved from <http://www.bnamericas.com/company-profile/en/empresa-minera-los-quenuales-sa-minera-los-quenuales> (last accessed 20 2016.)

<sup>473</sup> See BLOOMBERG BUSINESS. "Company Overview of Dowea SAS", Retrieved from [www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=236768417](http://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=236768417) (last accessed March 20 2016.)

<sup>474</sup> See GRUPOGIA. "Dowea SAS." Retrieved from <http://www.grupogia.com/en/nit/900387269> (last accessed March 20 2016.)

<sup>475</sup> See PORTAFOLIO. "Las movidas del 2013 que 'menos ruido' hicieron." *Portafolio*, January 2 2014. Retrieved from <http://www.portafolio.co/negocios/movidas-empresariales-del-2013> (last accessed March 20 2016.)

<sup>476</sup> See UNIDAD INVESTIGATIVA EL TIEMPO. "Los dueños de las minas". *El Tiempo*, November 30 2012. Retrieved from [www.eltiempo.com](http://www.eltiempo.com) (last accessed March 20 2016.)

<sup>477</sup> See ANGLOGOLD ASHANTI, "Lo que usted debe saber sobre AngloGold Ashanti 2014", p. 10. Retrieved from <http://www.anglogoldashanticolombia.com/todo-lo-debes-saber-sobre-anglogold-ashanti/> (last accessed March 20 2016.)

<sup>478</sup> See SUPERINTENDENCIA DE INDUSTRIA Y COMERCIO. March 11 2013. Retrieved from [http://www.sic.gov.co/recursos\\_user/documentos/Competencia/Integraciones/Resoluciones/Integraciones/2013/Marzo/13-035223-3.pdf](http://www.sic.gov.co/recursos_user/documentos/Competencia/Integraciones/Resoluciones/Integraciones/2013/Marzo/13-035223-3.pdf) (last accessed March 20 2016.)



Table 7: Mining titles owned by Glencore overlapping the Alto Andágueda indigenous reservation

Year	Concession Contract	Mining Title	Title-holder	Municipalities included	Extension within indigenous reservation (Hct.)	Ratio of title within indigenous reservation (%)	Period	State
2008	L 685	GEQ – 09C	Exploraciones Chocó Colombia SAS	Bagadó / Lloró	199,9	4	2038	Granted
		GEQ – 09D		Bagadó / Lloró	1.208,8	59,7	2038	Granted
		GEQ – 09K		Bagadó – El Camren	0,6	0,1	2038	Granted
<b>Total of (requested and granted) titles' hectares within the indigenous reservation</b>					<b>1.409,3</b>			

Source: Legal File, AGA Submission answering the complaint in the Alto Andágueda Case, p. 3.

Table 8: Mining titles owned by Glencore overlapping the Cocomopoca collective territory

Year	Concession Contract	Mining Title	Title-holder	Municipalities included	Extension within indigenous reservation (Hct.)	Ratio of title within indigenous reservation (%)	Period	State
2008	L 685	GEB – 09I	Exploraciones Chocó Colombia SAS	Bagadó	17,26	100		Granted
		GEQ – 09C		Bagadó / Lloró	1.095,3	21,9	2038	Granted
		GEQ – 09D		Bagadó – Lloró	90,06	4,5	2038	Granted
<b>Total of (requested and granted) titles' hectares within the indigenous reservation</b>					<b>1.202,62</b>			

Source: Legal File, AGA Submission answering the complaint in the Alto Andágueda Case, p. 3.

In the context of Concession contract L685, in the year 2008 Exploraciones Chocó Colombia SAS (Glencore) received 4 mining titles, which are overlapping the region's ethnic territories in around 2.600 hectares. With regards to the lands collectively owned by the Emberá Katío community, 3 mining titles overlap 1.409,3 hectares of the area of the Alto Andágueda indigenous reservation. In turn, 1 mining title overlaps 1.202,62 hectares of the territories of the Cocomopoca Afro-Colombian community.

### 3. *Public authorities involved in the conflict and its solution*

The third group of relevant actors is perhaps the most representative for the purpose of identifying eventual regulatory setbacks in the effective implementation of transitional justice's land restitution measures within the spectrum of foreign investment protection. Public authorities are in charge of implementing the state's Constitutional Order. As a result, they have taken an active part in several public actions related to the case: the conclusion of international investment agreements; the attraction of the multinational mining companies involved in the extractive enterprise that overlaps the lands of the ethnic groups beneficiaries of transitional justice; and, the carrying out of the territorial restitution processes that entered into conflict with the economic interests arising from the conclusion of concession contracts around the multinational mining companies.

#### vi. *Public authorities associated with the promotion of foreign investment and the regulation of the extractive sector*

As provided by the country's Constitution, the ministries are the heads of public administration on their respective issues, which correspond to diverse public policy areas. Under the direction of the president of the republic, it is their responsibility to formulate policies pertaining to their portfolio, direct the administrative operations, and execute the law.<sup>479</sup>

#### - *Ministry of Mining and adjunct mining authorities*

The Ministry of Mining is the executive head of the mining-energy sector. It is in charge of the articulation of the related public policies, including the adoption of general plans on the economic aspects of mining, the designation of special mining areas, and the regulation of concrete aspects of the exploration and extraction of natural resources.<sup>480</sup> The Ministry has a series of adjunct public

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<sup>479</sup> See REPÚBLICA DE COLOMBIA. *Constitución Política*, 1991, art. 208.

<sup>480</sup> See REPÚBLICA DE COLOMBIA. *Decreto 381/2012*, art. 1-2.

entities that perform specialized functions in accordance with the requirements of the field.<sup>481</sup> Principally, the National Mining Agency was created to administer the mining resources owned by the state, promote their optimal and sustainable use, and follow-up on private titles in case they have been granted to private parties.<sup>482</sup> In this regard, the Agency is entrusted to enter into concession agreements for the purpose of exploration and extraction activities upon the granting of mining titles.<sup>483</sup>

- *Ministry of Commerce, Industry and Tourism and adjunct investment-promotion entities*

The Ministry of Commerce, Industry and Tourism came into being after the fusion of the Ministry of Economic Development and the Ministry of International Trade in 2002.<sup>484</sup> As an executive authority, the Ministry is in charge of formulating, adopting and coordinating the policies on economic development related to competitiveness, integration and the expansion of productive sectors, including the promotion of international trade and investment.<sup>485</sup> As a result, the Ministry's Foreign Investment Division represents the country in the conclusion of international trade and investment agreements. The Division must design the corresponding negotiation strategy and eventually assume the defense of the nation in the settlement of disputes with foreign investors.<sup>486</sup>

vii. Public authorities associated with the implementation of Colombian transitional justice  
The implementation of the reparation component of the Colombian transitional justice project principally lies in a number of entities created by the Victims Law and its supplementary regulation – the Land Restitution Unit and the Land Restitution judiciary. Likewise, this task is partly

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<sup>481</sup> See REPÚBLICA DE COLOMBIA. *Decreto 381/2012*, art. 3.

<sup>482</sup> See REPÚBLICA DE COLOMBIA. *Decreto 4134/2011*, art. 3.

<sup>483</sup> See REPÚBLICA DE COLOMBIA. *Decreto 4134/2011*, art. 4.

<sup>484</sup> See REPÚBLICA DE COLOMBIA, Congreso de la República. *Ley 790/2002*, art. 4.

<sup>485</sup> See REPÚBLICA DE COLOMBIA. *Decreto 210/2003*, art. 1.

<sup>486</sup> See REPÚBLICA DE COLOMBIA. *Decreto 210/2003*, art. 14 and 17.

entrusted to the entities that form the Public Ministry, which in turn are in charge of effectively overseeing the inspection, vigilance and control of public authorities, as well as the promotion and protection of human rights.<sup>487</sup>

- *Land Restitution Unit*

Along with the Victims Unit, the Land Restitution Unit is one of the main institutions that was created on the occasion of the releasing of the Colombian transitional justice project. It is subscribed to the Ministry of Agriculture and serves as the executive authority, materializing the land restitution component in the context of the victims' right to reparation.<sup>488</sup> The Unit, on behalf of the victims, is in charge of activating the individual and collective land restitution procedures, which include both administrative and judicial stages.<sup>489</sup>

- *Land Restitution Judiciary*

In order to conduct the judicial portion of the individual and collective land restitution processes, the Victims Law provided for the creation of an interim land restitution judiciary. It is composed of First-instance Judges (*Jueces Civiles del Circuito especializados en restitución de tierras*) and Second-instance Tribunals (*Tribunales Superiores especializados en restitución de tierras*). They are mandated to study precautionary measure requests linked to a potential land restitution process, and to make a final decision regarding these redress claims.<sup>490</sup>

- *Public Ministry (Office of the Ombudsman, Human Rights Bureau)*

The Public Ministry is an autonomous group of authorities whose responsibility is the defense and promotion of human rights, the protection the public interest and overseeing the country's fiscal

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<sup>487</sup> See REPÚBLICA DE COLOMBIA. *Constitución Política*, 1991, art. 275-284.

<sup>488</sup> See REPÚBLICA DE COLOMBIA, Congreso de la República. *Ley 1448/2011*, art. 103-104.

<sup>489</sup> See REPÚBLICA DE COLOMBIA, Congreso de la República. *Ley 1448/2011*, art. 82.

<sup>490</sup> See REPÚBLICA DE COLOMBIA, Congreso de la República. *Ley 1448/2011*, art. 119.

management and the official conduct of those who perform public interests, in accordance with the constitutional mandate.<sup>491</sup> It is composed by three organs: The Human Rights Bureau (*Procuraduría General*), the People's Ombudsman (*Defensoría del Pueblo*), and the Comptroller General (*Contraloría General*). In the particular context of the judiciary, as the representative of the interests of society, the agents of the Public Ministry take on an active role in the conduct of the judicial processes as they are in charge of verifying the observance of due process and the respect of judicial guarantees.<sup>492</sup> The Victims Law contemplates that a representative of the Human Rights Bureau must follow-up every land restitution process, and must eventually intervene so as to safeguard the respect of public interests.<sup>493</sup>

### **III. Legal foundations of the controversy**

As explained in the preceding chapters, the tension that is here analyzed takes place within the Colombian Constitutional Order (CCO). The CCO is envisaged as a normative site where the transnational legal processes – the protection offered to foreign investment via international investment agreements, and the implementation of a transitional justice project – encounter one another. As a result, these instances of transnational legality push the state, the regulatory authority, to act in two opposite directions: preservation vs. transformation. Therefore, since this case study occurs within a particular normative context, it is necessary to properly introduce the legal foundations involved in the controversy. On the one side of the spectrum one finds the norms produced to encourage the arrival of and secure protection to the multinational mining companies whose interests were apparently affected. On the other side, there is the public regulation that has supposedly infringed the rights and expectations of foreign investors. These legal references are

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<sup>491</sup> See REPÚBLICA DE COLOMBIA. *Constitución Política*, 1991, art. 118.

<sup>492</sup> See REPÚBLICA DE COLOMBIA. *Constitución Política*, 1991, art. 275-284.

<sup>493</sup> See REPÚBLICA DE COLOMBIA, Congreso de la República. *Ley 1448/2011*, art. 119.

valuable in understanding the following sections, which address the illustration and the socio-legal analysis of this normative collision, in search of specific patterns.

#### A. Promotion and legal protection of foreign investment and mining regulation

The legal basis for the promotion and protection of multinational mining companies that take part in this case is composed of two elements. The first element is comprised of the international investment agreements by which Colombia – and particularly the state’s public authorities – acquired particular behavioral obligations with regards to the entitlements and expectations of the aforementioned foreign investors, whose legal constitution took place in Canada, Peru, Switzerland and the UK. Further, the second element corresponds to the mining regulation according to which the involved companies concluded concession contracts with the country and thus acquired a number of mining titles and an associated prospect of profit. Jointly considered, these norms are the source of the interests that were supposedly affected by the territorial restitution processes in favor of the Emberá Katío and Cocomopoca communities.

##### *1. International Investment Agreements concluded between Colombia and Canada, USA, Switzerland and Peru*

As explained in chapter three, the international investment agreements (IIAs) concluded between Colombia and capital-exporting countries were designed to confer abundant protection to the foreign investors of a country establishing in the other’s jurisdiction. This safeguard includes the inclusion of two complementary elements: a series of behavioral standards that host governments must observe in their relations with foreign investors, and a dispute-settlement mechanism that the latter can use to request damages and other redressing measures upon the breach of the obligations included in the IIAs. In turn, it was contended that based on these safeguards, multinational companies – such as the ones involved in the case under analysis – may have decided to arrive in

Colombia upon the promise of a stable and predictable operational environment. Therefore, it is necessary to introduce the international investment agreements that purportedly contributed to attracting the mining corporations whose titles are superimposed on the collective territories of the ethnic communities of the case. These IIAs offer an alternative to review the governmental regulatory actions that affected their interests.

Provided the nature, structure and background of the multinational mining companies involved in the case (AngloGold Ashanti, Continental Gold Ltd and Glencore), the following chart introduces the IIAs that are alleged to be the source of obligations for Colombian authorities and correlative protection in favor of foreign investors:

*Table 9: international investment agreements with relevance in the case*

<b>Country</b>	<b>Type of treaty</b>	<b>Signature</b>	<b>Legal incorporation</b>	<b>Constitutional revision</b>	<b>Foreign investor covered</b>
<b>Canada</b>	Free Trade Agreement (investment chapter)	November 2008	Law 1363 of 2009	Decision C-608 of 2010	Continental Gold Ltd
<b>Peru</b>	Bilateral Investment Treaty	December 2007	Law 1342 of 2009	Decision C-377 of 2010	EMQ – Dowea (ExploChoco)
<b>Switzerland</b>	Bilateral Investment Treaty	May 2006	Law 1198 of 2008	Decision C-150 of 2009	Glencore – EMQ – Dowea (ExploChoco)
<b>United Kingdom</b>	Bilateral Investment Treaty	March 2010	Law 1464 of 2011	Decision C-169 of 2012	AngloGold Ashanti

Source: direct consultation to the legal instruments.

These agreements include similar provisions with regards to the extent of protection to foreign investors: fair and equitable treatment; protection against direct and indirect expropriations without compensation; and a mechanism to settle disputes between investors and host states through international arbitration.

With regards to the extent of protection, the treaties provide very similar definitions of *investor* and *investment*. In general terms, investors are deemed as natural persons, nationals of a party, and legal entities incorporated in or organized under the law of a party that have seat, and substantial economic activities within the jurisdiction of this country, which seem to make, are making, or have made an investment.<sup>494</sup> In turn, investment is defined as the economic assets that are property of the investor. The latter include contracts, and particularly concession agreements granted by administrative acts on the search, extraction and exploitation of natural resources.<sup>495</sup> Concerning the IIAs' scope of application, the agreements are effective on investments made prior to or after their entry into force. However, they do not bind a party in relation to acts or facts, source of claims or disputes, that took place prior to the treaties' entry into force.<sup>496</sup>

The fair and equitable treatment standard, included in all the agreements, provides for the obligation not to impair by unreasonable and discriminatory measures the management, maintenance, use, enjoyment, extension, sale, and liquidation of investments. While the agreements entered into with Switzerland and the UK exclusively refer to this safeguard, the accords signed with Peru and Canada include additional references to full protection and security,

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<sup>494</sup> See Agreement between the Republic of Colombia and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments (2006), art. 1; Bilateral Agreement for the Promotion and Protection of Investments between the Government of the United Kingdom of Great Britain and Northern Ireland and Republic of Colombia (2010), art. I; Canada – Colombia Free Trade Agreement (2008), art. 838; Acuerdo entre el Gobierno de la República Del Perú y el Gobierno de la República de Colombia sobre Promoción y Protección Recíproca de Inversiones (2007), art. 42.

<sup>495</sup> See Agreement between the Republic of Colombia and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments (2006), art. 1 (e); Bilateral Agreement for the Promotion and Protection of Investments between the Government of the United Kingdom of Great Britain and Northern Ireland and Republic of Colombia (2010), art. I (v); Canada – Colombia Free Trade Agreement (2008), art. 838 (j); Acuerdo entre el Gobierno de la República Del Perú y el Gobierno de la República de Colombia sobre Promoción y Protección Recíproca de Inversiones (2007), art. 42 (e).

<sup>496</sup> See Agreement between the Republic of Colombia and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments (2006), art. 2; Bilateral Agreement for the Promotion and Protection of Investments between the Government of the United Kingdom of Great Britain and Northern Ireland and Republic of Colombia (2010), art. XIII; Canada – Colombia Free Trade Agreement (2008), art. 801; Acuerdo entre el Gobierno de la República Del Perú y el Gobierno de la República de Colombia sobre Promoción y Protección Recíproca de Inversiones (2007), art. 1 (3).

<sup>496</sup> See Agreement between the Republic of Colombia and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments (2006), art. 1 (2) (c).



and minimum treatment. Importantly, the agreements clarify that this standard entails the obligation not to deny justice in administrative proceedings, in accordance with the principle of due process.<sup>497</sup>

In turn, the non-expropriation without compensation standard was included in all the agreements, and provides for protection against both the direct taking of the investors' property and the indirect impact on their economic interests through measures which have the same effect. In the latter case, measures taken for reasons of public interest, in a non-discriminatory manner, in accordance with due process of law, and accompanied by prompt, effective, and adequate compensation are permitted.<sup>498</sup> In addition, all the treaties except for the one with Switzerland include a detailed explanation of the content and extent of indirect expropriation (measures which have an equivalent effect as direct expropriation without entailing the formal transfer of a title or seizure). In that regard, the determination of indirect expropriation requires a case-by-case fact-based inquiry, which should consider the economic impact of the measure, the degree of interference with distinct and reasonable expectations, as well as its character. Thus, non-discriminatory measures, taken for reasons of public interest (including public health, safety, and the protection of the environment),

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<sup>497</sup> See Agreement between the Republic of Colombia and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments (2006), art. 4 (1) and (2); Bilateral Agreement for the Promotion and Protection of Investments between the Government of the United Kingdom of Great Britain and Northern Ireland and Republic of Colombia (2010), art. II (2) and (3); Canada – Colombia Free Trade Agreement (2008), art. 805; Acuerdo entre el Gobierno de la República Del Perú y el Gobierno de la República de Colombia sobre Promoción y Protección Recíproca de Inversiones (2007), art. 4.

<sup>498</sup> See Agreement between the Republic of Colombia and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments (2006), art. 6; Bilateral Agreement for the Promotion and Protection of Investments between the Government of the United Kingdom of Great Britain and Northern Ireland and Republic of Colombia (2010), art. VI; Canada – Colombia Free Trade Agreement (2008), art. 811; Acuerdo entre el Gobierno de la República Del Perú y el Gobierno de la República de Colombia sobre Promoción y Protección Recíproca de Inversiones (2007), art. 11.

proportionate, not arbitrary, and taken with good faith, are not considered tantamount to indirect expropriation.<sup>499</sup>

Further, all the IIAs include similar provisions regarding the settlement of disputes between states and foreign investors through international arbitration. When a dispute arises between a party and an investor of the other party, in connection with the interpretation or application of the agreement, the matter can be differed to either the country's administrative courts or to international arbitration. While the law governing the arbitration procedure is considered international law, the tribunal may take into consideration the law of the disputing party. Yet, it has no jurisdiction to determine the legality of the measure alleged to be in breach of the agreement under the domestic law of the disputing party. Additionally, in the case when the acts of public authorities are involved, local remedies must be exhausted. The dispute settlement choice is final, as is the award in the case of international arbitration, which binds the parties and should be immediately executed.<sup>500</sup>

## *2. Mining regulation: Law 685 of 2001*

The current mining code – Law 685 of 2001 – was passed in the context of the expansion of economic liberalization in Colombia, and around the time the country started concluding the majority of IIAs with capital-exporting countries.<sup>501</sup> The emerging norm compiled the principal

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<sup>499</sup> See Bilateral Agreement for the Promotion and Protection of Investments between the Government of the United Kingdom of Great Britain and Northern Ireland and Republic of Colombia (2010), art. VI; Canada – Colombia Free Trade Agreement (2008), annex 811; Acuerdo entre el Gobierno de la República Del Perú y el Gobierno de la República de Colombia sobre Promoción y Protección Recíproca de Inversiones (2007), annex C.

<sup>500</sup> See Agreement between the Republic of Colombia and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments (2006), art. 11 and Protocol, ad. art.11; See Bilateral Agreement for the Promotion and Protection of Investments between the Government of the United Kingdom of Great Britain and Northern Ireland and Republic of Colombia (2010), art. IX; See Canada – Colombia Free Trade Agreement (2008), art. 818-838; Acuerdo entre el Gobierno de la República Del Perú y el Gobierno de la República de Colombia sobre Promoción y Protección Recíproca de Inversiones (2007), art. 18-33.

<sup>501</sup> Law 685 was enacted after a failed attempt to introduce a similar norm in 1996. It is a revised version of the previous mining code – Decree 2655 of 1988, which was a tangible outcome of the implementation in the country of

regulation around the legal relations between the state and the private parties in the context of the mining industry,<sup>502</sup> which was defined as a public-utility activity subject to social interest considerations.<sup>503</sup> The mining code is founded on the aim of promoting the exploration and exploitation of the country's mining resources so as to satisfy the internal and external demand within a framework of sustainability.<sup>504</sup> It reiterates a constitutional provision according to which the minerals found in the soil and the subsoil of the national territory are exclusive property of the state, regardless of the ownership conditions of the overlapped area.<sup>505</sup> In this regard, the right to prospect and exploit natural resources can only be granted by the state, by means of the subscription of concession contracts that entail the constitution of a mining title in favor of a private party.<sup>506</sup>

Law 685 states that, foreign private parties intending to take part in the mineral exploration and exploitation process, have the same rights and obligations as Colombian nationals for the purpose of conducting these economic activities on national territory. Yet, it is stipulated that in order to submit a concession bid, they must constitute a commercial society domiciled in Colombia that would act as a subsidiary of the matrix company.<sup>507</sup> The resulting concession contract would have a maximum term of 30 years and could be renewed for an identical period.<sup>508</sup> On the other hand, the mining code establishes that extractive activities performed on the territory of ethnic communities must be in agreement with the principle of cultural integrity. Accordingly, every

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IMF's structural adjustment programs that commanded a transition into an extractivist economy. See SILVA, Shameel. "El Código de Minas: una de las rodillas temblorosas del Establecimiento. El caso de Guamocóe", *Prensa Rural*, March 27 2009. Retrieved from <http://www.prensarural.org/spip/spip.php?article2080> (last accessed March 20 2016.)

<sup>502</sup> REPÚBLICA DE COLOMBIA, Congreso de la República. *Ley 685/2001*, art. 2.

<sup>503</sup> See REPÚBLICA DE COLOMBIA, Congreso de la República. *Ley 685/2001*, art. 13.

<sup>504</sup> See REPÚBLICA DE COLOMBIA, Congreso de la República. *Ley 685/2001*, art. 1.

<sup>505</sup> See REPÚBLICA DE COLOMBIA, Congreso de la República. *Ley 685/2001*, art. 5.

<sup>506</sup> See REPÚBLICA DE COLOMBIA, Congreso de la República. *Ley 685/2001*, art. 6 and 14.

<sup>507</sup> See REPÚBLICA DE COLOMBIA, Congreso de la República. *Ley 685/2001*, art. 18-20.

<sup>508</sup> See REPÚBLICA DE COLOMBIA, Congreso de la República. *Ley 685/2001*, art. 70.

actor involved in the extractive industry is obliged to develop its economic enterprise in a way that the cultural, social, and economic values of ethnic communities, who are the traditional occupants of the area subject to concession, are not affected.<sup>509</sup> On that point, the law provides for the constitution of indigenous and Afro-Colombian mining zones,<sup>510</sup> which confer a “preference right” in favor of the benefitted communities to exclusively conduct extractive activities within aid zone.<sup>511</sup> However, third parties may be contracted by the ethnic groups to conduct activities (whether partial or in their entirety) related to the concession.<sup>512</sup>

#### B. Constitutional and transitional justice regulation on the redress of ethnic groups through territorial restitution

The previous section delivered the legal base that supports the promotion and protection of the multinational mining companies considered by the case study. In turn, this section introduces the norms and jurisprudence relevant to the processes of territorial restitution in favor of the Emberá Katío and Cocomopoca communities. They are the ethnic groups which, in the context of the case, were displaced from their traditional lands on the occasion of the conflict. Therefore, the particular nature of the victims to be redressed demands the consideration of the constitutional and legal protection of ethnic groups in Colombia. Subsequently, the section provides an in-depth illustration of the transitional justice measures through which the territorial restitution in favor of the ethnic groups is conducted. In the context of this case study, the public decision authorizing the territorial restitution is thought to be the regulatory conduct that unchained the collision

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<sup>509</sup> REPÚBLICA DE COLOMBIA, Congreso de la República. *Ley 685/2001*, art. 121.

<sup>510</sup> See REPÚBLICA DE COLOMBIA, Congreso de la República. *Ley 685/2001*, arts. 122-123 and 130-132.

<sup>511</sup> See REPÚBLICA DE COLOMBIA, Congreso de la República. *Ley 685/2001*, arts. 124 and 133.

<sup>512</sup> See REPÚBLICA DE COLOMBIA, Congreso de la República. *Ley 685/2001*, arts. 126 and 134.

between the interests of foreign investors, and the state's aim to produce substantial transformations in the country to achieve durable peace.

### *1. Constitutional and legal protection of ethnic groups in Colombia*

As previously mentioned, one of the most prominent features of the Colombian Constitutional Order is its social peace function, which was determined through the constitutional process in 1991. The recognition of the multicultural nature of Colombian society, and the existence of diverse and overlapped interests to be integrally addressed, led to the consideration of ethnic communities as subjects of special protection. Not only did this acknowledgment generate the country's commitment to the protection of indigenous and tribal peoples in accordance with international legal standards,<sup>513</sup> it also encompassed the inclusion of special safeguarding norms and mechanisms in the country's legal order.

The 1991 Constitution importantly establishes the recognition of the ethnic and cultural diversity of the Colombian nation, thus generating a correlative duty of public authorities and the private sphere in protecting the country's ethnic groups.<sup>514</sup> In this regard, it was recognized that their physical survival is ensured through the endorsement of their right to representation, the validation of their internal norms and governance schemes, and the consequent protection of their particular relationship with the land. While the Constitution included specific norms in favor of indigenous peoples,<sup>515</sup> the special protection of Afro-Colombian communities was only recognized in 1993

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<sup>513</sup> Colombia ratified the 1989 ILO Convention No. 169 on Indigenous and Tribal Peoples in August 1991. Likewise, and after initial abstention, the country decided to fully support the 2007 United Nations Declaration on the Rights of Indigenous Peoples in 2009. See *ILO Convention No. 169 on Indigenous and Tribal Peoples*. June 27, 1989. Retrieved from [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C169](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169) ; *United Nations Declaration on the Rights of Indigenous Peoples*. 13 September 2007. Retrieved from [http://www.un.org/esa/socdev/unpfi/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf)

<sup>514</sup> See REPÚBLICA DE COLOMBIA. *Constitución Política*, 1991, art. 7-8.

<sup>515</sup> See REPÚBLICA DE COLOMBIA. *Constitución Política*, 1991, art. 63 (communal lands of ethnic groups are inalienable, imprescriptible and not subject to seizure); art. 246 (right to representation and internal governance); art. 286 (indigenous reservations are considered territorial entities); art. 329 (provisions on the configuration of indigenous

through the enactment of Law 70.<sup>516</sup> Therefore, regardless of the individual protection given to their members, the CCO provides for the recognition of ethnic communities as truly right-holders.<sup>517</sup> As such, the creation of special territorial entities such as indigenous reservations and Afro-Colombian territories represent the materialization of their self-determination. Correspondingly, they constitute the object through which ethnic groups exercise their political autonomy and have collective ownership, which is inalienable, imprescriptible, and not subject to seizure.<sup>518</sup> As a result, it is stipulated that in the decisions adopted with respect to the governance of these territories, including the management of land and natural resources, public authorities should consult preliminarily the communities.<sup>519</sup>

The Colombian Constitutional Court has put its attention on the situation of ethnic communities as part of the judicial protection that the Court has conferred to internally displaced people, in the context of judgement T-025 of 2004. This interest is derived from the constitutional protection to ethnic communities, and proceeded upon the verification of the failure of public authorities in addressing the massive and systematic human rights violations in the context of internally forced

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territorial entities); art. 330 (participation of indigenous peoples in the decisions related to the exploitations of natural resources in their territories).

<sup>516</sup> In accordance to transitory article 55 of the 1991 Constitution, “Within the two (2) years following the entry into force of the present Constitution, Congress will issue, following a study by a special commission created by the government for that purpose, a law which will recognize the black communities which have come to occupy uncultivated lands in the rural zones adjoining the rivers of the Pacific Basin, in accordance with their traditional cultivation practices and the right to collective property over the areas which the same law must also demarcate. In the special commission referred to in the previous clause, representatives elected by the communities involved will participate in each case. The property thus recognized will only be transferable within the limits stipulated by the law. The same law will establish mechanisms for the protection of the cultural identity and the rights of these communities and for the progress of their economic and social development.”

<sup>517</sup> Particularly the provisions included in both the Constitution and the Law 70, notwithstanding certain regulation on the protection of ethnic communities that is inserted in the country’s mining code.

<sup>518</sup> See REPÚBLICA DE COLOMBIA. *Constitución Política*, 1991, art. 63 and 330; Congreso de la República. *Ley 21/1991* (which regulates the creation and management of indigenous reservations); Congreso de la República. *Ley 70/1993*, art. 4-18 (which is focused in the territories of Afro-Colombia communities.)

<sup>519</sup> See REPÚBLICA DE COLOMBIA. *Constitución Política*, 1991, art. 330; Congreso de la República. *Ley 70/1993*, art. 19-25.

displacement.<sup>520</sup> In monitoring the enforcement of judgement T-025,<sup>521</sup> the Court has acknowledged that ethnic communities are the most affected by forced displacement, and decided to establish a series of objective factual deductions to be considered in future cases to ensure the protection of their individual and collective rights. In this regard, the tribunal emphasized a number of descriptive propositions – branded as “underlying and connected factors” – that unearth dynamics which, although not directly related to belligerent actions, have been produced within the spectrum of the conflict so as to negatively affect ethnic groups and/or benefit private actors.

In the case of indigenous peoples, the Court has referred to “territorial and socioeconomic processes connected to the armed conflict that affect ethnic communities’ culture and territory” to depict the existence of underlying and interconnected factors that had influenced their situation. In this regard, it highlighted that at the local level, certain licit economic activities – including the exploitation of natural resources – became intertwined with warlike processes through multiple and complex patterns. The result of this connection was the massive and systematic violation of individual and collective human rights, especially in the realm of the community’s ethnic integrity.<sup>522</sup> Likewise, the struggles over access to and use of land were identified as a common underlying factor of the conflict. This is specifically associated with the impact on indigenous people’s rights, due to both the special bonds these groups have with their territory and the accentuated vulnerability they experience in relation to contact with western civilization.<sup>523</sup> In turn, the Court identified certain mining and agricultural processes that, in the case of Afro-Colombian

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<sup>520</sup> See Chapter Four, on the indirect antecedents of the Colombian transitional justice project.

<sup>521</sup> The Constitutional Court enacted two monitoring writs in that respect; Auto 004, in relation to indigenous peoples, and Auto 005, with regards of Afro-Colombian communities.

<sup>522</sup> See REPUBLICA DE COLOMBIA, Corte Constitucional. *Sentencia T-025/2004 (Auto 004/2009)*, M.P. Manuel José Cepeda Espinosa, p. 9.

<sup>523</sup> See REPUBLICA DE COLOMBIA, Corte Constitucional. *Sentencia T-025/2004 (Auto 004/2009)*, M.P. Manuel José Cepeda Espinosa, p. 11-12.

communities, have imposed strong tensions on these peoples' ancestral territories and have facilitated dispossession as a transversal path.<sup>524</sup> In that regard, it was said that Afro-Colombians' collective right to territory is affected due to an association between armed actions and legal and illegal pressures to impose a model of economic development based on productivity, which overlooks the communities' traditional uses and customs on self-provision and ecological sustainability.<sup>525</sup>

In conclusion, the Constitutional Court sent a clear message: forced internal displacement entails the impossibility for ethnic communities to develop their common life on their land. Thus, as social and political structures are weakened, these groups can not properly exercise their right to prior consultation on the occasion of the arrival of economic processes involving the extraction of natural resources in the region.

## *2. The Victims Law and supplementary regulation on the collective restitution of lands*

As introduced in chapter four, the implementation of the Colombian transitional justice project took place by means of the enactment of domestic legislation that recognizes the victim's rights to justice, truth, and reparation, and sets up mechanisms towards their effectiveness. In the context of the right to reparation, the Victims Law includes a restitution component that concentrates the reduction of the detriments caused by the conflict on the legal position of the victims, with regards to their patrimony and particularly, upon the territories they used to inhabit.<sup>526</sup> Considering the specific context and circumstances around the country's internal armed conflict, the law provides for administrative and judicial procedures through which the victims can achieve the effective

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<sup>524</sup> See REPUBLICA DE COLOMBIA, Corte Constitucional. *Sentencia T-025/2004 (Auto 005/2009)*, M.P. Manuel José Cepeda Espinosa, p. 24.

<sup>525</sup> See REPUBLICA DE COLOMBIA, Corte Constitucional. *Sentencia T-025/2004 (Auto 005/2009)*, M.P. Manuel José Cepeda Espinosa, p. 27.

<sup>526</sup> See REPÚBLICA DE COLOMBIA, Congreso de la República. *Ley 1448/2011*, art. 25.



restitution of their lands, in case they were abandoned or dispossessed on the occasion of either direct conflict actions, or associated underlying and connected factors.<sup>527</sup>

In that regard, the recognition of Colombia's multicultural demographic composition by the CCO led to the inclusion of the principle of cultural and ethnic diversity within the Victims Law.<sup>528</sup> As a consequence, particular land restitution procedures for ethnic communities were adopted. They supplement the Victims Law through the provision of a particular procedure for the satisfaction of the collective rights of these peoples.<sup>529</sup> While Decree 4633 deals with the assistance, attention, integral redress, and territorial restitution of indigenous peoples, Decree 4635 provides the same type of measures for Afro-Colombian communities. These norms are essentially identical, except for certain aspects related to the particular features of each ethnic group's self-identification and vision of what constitutes redress.<sup>530</sup> They build on the constitutional protection of ethnic groups that derived from the establishment of administrative entities with a differentiated collective property legal regime. Consequently, they include a series of mechanisms designed to promote the effective enjoyment of these entitlements, which is translated in the material restitution of the affected lands and their legal endorsement.

The passing of those decrees counted towards the endorsement of the bulk of Colombian ethnic groups, through prior consultation with the representatives of the majority of the country's indigenous peoples and Afro-Colombian communities. As a result, the Decrees adopted a legal pluralistic perspective, since they rely on the recognition of their autochthonous normative orders

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<sup>527</sup> Explanation of this concept and reference to Constitutional Court's Auto 004, in which their meaning is clarified.

<sup>528</sup> "The State recognizes and protects the ethnic and cultural diversity of the Colombian Nation." See REPÚBLICA DE COLOMBIA. *Constitución Política*, 1991, art. 7.

<sup>529</sup> See REPÚBLICA DE COLOMBIA, Congreso de la República. *Ley 1448/2011*, art. 205.

<sup>530</sup> While the indigenous peoples adopt a discourse associated with their spiritual experiences and their special link with Mother Nature (a metaphysical entity), Afro-Colombian communities identify themselves as protectors of the environment and bearers of a dynamic of interaction with the ecosystem based on sustainability and viability.

and their articulation of the country's Constitutional Order.<sup>531</sup> Following the development of the international protection of indigenous and tribal peoples, the foundation of these norms lies in three principles: self-determination and autonomy;<sup>532</sup> real and affective participation;<sup>533</sup> and, the collective dimension of protection mechanisms which function to eliminate the risks to their physical and cultural survival.<sup>534</sup> Correspondingly, two entitlements are given to the collective subjects, so as to support the further adoption of specialized procedures: the right to territory and the right to prior consultation.

Accordingly, the territorial restitution component acquires its particular scope from the determination of the types of damages that can be redressed through the mechanisms embedded in the norms. Since the ethnic communities are seen as subjects of rights, collective damage is regarded as the specific injury of their entitlements and possessions.<sup>535</sup> In turn, territorial damage is related to either the infringement of ecosystems and the sustainability of the lands in the case of Afro-Colombian communities,<sup>536</sup> or the transgression of territory's capacity to provide sustenance, health, and food sovereignty to indigenous peoples.<sup>537</sup> These descriptions engage with an rationalization of lands as living entities. As a result, they are considered autonomous victims, even if their legal representation is undertaken by the community.<sup>538</sup> Likewise, territorial restitution is informed by the normative idea that redress must be integral<sup>539</sup> and transformative.<sup>540</sup> This implies that compensation for material damages results in the elimination of structural

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<sup>531</sup> See REPÚBLICA DE COLOMBIA. *Decreto 4633/2011*, art. 7; *Decreto 4635/2011*, art. 20.

<sup>532</sup> See REPÚBLICA DE COLOMBIA. *Decreto 4633/2011*, art. 29; *Decreto 4635/2011*, art. 25.

<sup>533</sup> See REPÚBLICA DE COLOMBIA. *Decreto 4633/2011*, art. 26; *Decreto 4635/2011*, art. 41.

<sup>534</sup> See REPÚBLICA DE COLOMBIA. *Decreto 4633/2011*, art. 14; *Decreto 4635/2011*, art. 79.

<sup>535</sup> See REPÚBLICA DE COLOMBIA. *Decreto 4633/2011*, art. 42; *Decreto 4635/2011*, art. 6.

<sup>536</sup> See REPÚBLICA DE COLOMBIA. *Decreto 4635/2011*, art. 9.

<sup>537</sup> See REPÚBLICA DE COLOMBIA. *Decreto 4633/2011*, art. 45.

<sup>538</sup> See REPÚBLICA DE COLOMBIA. *Decreto 4633/2011*, art. 3.

<sup>539</sup> See REPÚBLICA DE COLOMBIA. *Decreto 4633/2011*, art. 8; *Decreto 4635/2011*, art. 16.

<sup>540</sup> See REPÚBLICA DE COLOMBIA. *Decreto 4633/2011*, art. 28.

discrimination and marginalization that might have been caused by the conflict. All things considered, it can be argued that this territorial restitution procedure intends to break with the continuity of the country's civil and administrative laws in order to impose an exceptional regime which, due to its reach and relevance, provides transitional justice administrators with quasi-constitutional attributes.

In accordance with the procedures embedded in decrees 4633 and 4635, the extent of territorial restitution exceeds the mere physical and quantifiable restoration. It essentially intends to recuperate the effective enjoyment of all the prerogatives and faculties associated with the collective right to territory. The corresponding legal action can be exercised by the involved community<sup>541</sup> upon the occurrence of territorial injuries within the period 1991-2021, and may operate on a variety of lands: those with a special administrative regime for ethnic communities; those which are in process of acquiring this special condition; and, vacant lands that are expected to be assigned to these peoples, regardless of any occupation by a third party or the conduct of an economic activity.<sup>542</sup> In this context, territorial injury is defined as the detriment produced on the relation between a community and its territory. It is caused by actions directly linked to the armed conflict or indirectly associated with underlying and connected factors, which have generated abandonment<sup>541</sup>, dispossession, or any other type of interference to the effective enjoyment of the implied prerogatives of the social group with regards to their ancestral lands. In turn, abandonment is regarded as the loss of the chance to have proper access to the spaces of collective enjoyment and interaction. Further, dispossession refers to the illegal actions leading to the appropriation of

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<sup>541</sup> According to art. 143 of Decree 4633 and art. 109 of Decree 4635, the territorial restitution solicitudes can be directly filed by the communities' traditional authorities, an organization of victims, a member of the community, or the public authorities in charge of this component (Land Restitution Unit and People's Ombudsman). See REPÚBLICA DE COLOMBIA. *Decreto 4633/2011*, art. 143; *Decreto 4635/2011*, art. 109.

<sup>542</sup> See REPÚBLICA DE COLOMBIA. *Decreto 4633/2011*, art. 141; *Decreto 4635/2011*, art. 107.

the territory and natural resources by third parties to the detriment of the community. This encompasses private and public legal acts concluded or dictated within the conflict's sphere of influence.<sup>543</sup>

Practically speaking, the territorial restitution procedure is composed of three well-defined stages: precautionary measures, a characterization, and a judicial procedure. After a preliminary restitution solicitude has been filed before the Land Restitution Unit, this institution may decide to request, under circumstances of gravity and urgency, the issuing of precautionary measures while a final decision is made in the realm of the judicial procedure. These measures maintain a preventive character, and seek to prevent imminent damages to the territorial rights of the community or the termination of the ones taking place. Consequently, they can address the interruption of administrative or judicial procedures that deal with the territories subject to restitution, the inscription of the restitution procedure on the corresponding cadastral certificate, or any other procedure that the judge considers necessary to comply with the preventive purpose, including the suspension of any ongoing economic activities in the zone.<sup>544</sup>

The Land Restitution Unit must elaborate the characterization of the territorial injury. This document shall be considered the factual base of the formal collective restitution claim to be filed before the competent tribunal, notwithstanding the effects produced by the precautionary measures.<sup>545</sup> The resulting report principally includes a detailed account of the context and particularities of the territory intended to be restituted; a description of the antecedents and circumstances around the presumed territorial injuries; the illustration of third parties eventually interested in opposing the restitution and the particular interests on the territory that could be

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<sup>543</sup> See REPÚBLICA DE COLOMBIA. *Decreto 4633/2011*, art. 144; *Decreto 4635/2011*, art. 1110.

<sup>544</sup> See REPÚBLICA DE COLOMBIA. *Decreto 4633/2011*, art. 151; *Decreto 4635/2011*, art. 116.

<sup>545</sup> See REPÚBLICA DE COLOMBIA. *Decreto 4633/2011*, art. 153-155; *Decreto 4635/2011*, art. 118-120.

alleged as the base of their opposition, including economic activities, extractive projects or any other relevant activity; a reference to the legal obstacles that could challenge a decision on favor of the restitution; and the individualization and in-depth description of the community and its members.<sup>546</sup> Finally, the Land Restitution Unit must suggest specific actions that, with the aim of ensuring the effective enjoyment of the community's collective right to territory, the transitional justice judge could order in the context of the judicial procedure.

Once a formal claim has been filed, the competent tribunal proceeds to study the case from the standpoint of the characterization report, and from the arguments and evidence included in the writs brought by both the claimants – which could be represented by the Land Restitution Unit, the People's Ombudsman or a non-governmental organization – and the opponents. Unlike ordinary civil and administrative domestic procedures, the opponents must assume the burden of proof to discredit the occurrence of abandonment or dispossession, due to the victim's accentuated vulnerability and consequent difficulty to present evidence of the alleged injuries.<sup>547</sup> The tribunal then analyzes the facts and arguments by applying a series of judicial presumptions which were specifically provided by the exceptional norms. They assign legal consequences – either inexistence or nullity, concepts coined by Colombian civil and administrative legislation – to a number of public (administrative) and private acts that could eventually be linked to the territorial injury under discussion. Thus, the application of these presumptions is intended to guarantee the effective enjoyment of collective right to territory beyond the mere material possession of land.<sup>548</sup>

The judicial decision may not only order the material and legal restitution of the territory to the community. The tribunal may also request specific actions from public authorities to accompany

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<sup>546</sup> See REPÚBLICA DE COLOMBIA. *Decreto 4633/2011*, art. 154; *Decreto 4635/2011*, art. 119.

<sup>547</sup> See REPÚBLICA DE COLOMBIA. *Decreto 4633/2011*, art. 162; *Decreto 4635/2011*, art. 1126.

<sup>548</sup> See REPÚBLICA DE COLOMBIA. *Decreto 4633/2011*, art. 163-164; *Decreto 4635/2011*, art. 127-128.

the return process. Moreover, it can suspend concession contracts or annul exploration and exploitation titles in the context of extractive activities in order to secure the crystallization of these orders.<sup>549</sup>

#### **IV. The legal conflict between territorial restitution and the protection of foreign investment**

Having introduced the structural elements of the case study, this section addresses the territorial restitution processes where there is an apparent normative tension between the legal protection of foreign investment and the implementation of the Colombian transitional justice project. In this regard, after introducing certain preliminary aspects related to the configuration of the territories under dispute, the collective restitution procedures to be contrasted – the cases of the Emberá Katío people of the Alto Andágueda Reservation and the Cocomopoca Afro-Colombian community – are thoroughly illustrated. This descriptive exercise is relevant for the further analysis of the regulatory implications of the alleged normative tension.

##### **A. Preliminary aspects regarding the territorial configuration of the cases**

While the Emberá Katío community's reservation obtained official recognition in 1979, the Cocomopoca territory was acknowledged as an Afro-Colombian collective property in 2011. This particular territorial configuration, along with the negative impacts suffered on the occasion of the country's armed conflict, constitute the source of the collective restitution claims filed by the ethnic groups. Yet, there are other situations which must be illustrated on account of the administrative and judicial processes, which gave birth to this normative clash between the safeguarding of the interests of a number of multinational corporations and the implementation of certain territorial restitution measures.

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<sup>549</sup> See REPÚBLICA DE COLOMBIA. *Decreto 4633/2011*, art. 166; *Decreto 4635/2011*, art. 130.

Following the provisions included in the mining regulation on the protection of the interests of ethnic communities, the Emberá Katío community had requested an indigenous mining zone within the reservation. It did so in order to take advantage of a corresponding preference right,<sup>550</sup> and on the occasion of obtaining the mining titles constitute an economic enterprise to extract mining resources. In June 2001, the country's mining authority granted the Emberá Katío community a mining title for the extraction of gold until 2012.<sup>551</sup> In September 2011, a mining operation contract was concluded between the Alto Andágueda reservation and Sociedad Minera Santacruz S.A.S.,<sup>552</sup> and, in September 2013, the mining concession was extended for ten more years.<sup>553</sup> Although the indigenous mining zone does not overlap with the mining titles granted to the multinational mining companies, they are both located within the same reservation.

An additional territorial configuration process to consider is the constitution of strategic mining areas in a great area of the country's territory, including a portion of the zones inhabited by the ethnic communities. This process took place in accordance with the provisions included in the domestic mining regulation,<sup>554</sup> and in accordance with National Development Plan 2010-2014.<sup>555</sup> Following the command of this public policy, in January 2012, the government issued an administrative act by means of which the extraction of gold was identified as a strategic interest for the country's economic development. Next, in February 2012, a public document proposed a

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<sup>550</sup> See REPÚBLICA DE COLOMBIA, Congreso de la República. *Ley 685/2001*, art. 124.

<sup>551</sup> See AGENCIA NACIONAL DE MINERIA. Resolution 81704 of 29 July 1996 and Concession Contract BAE-112 concluded in 26 June 2001; these documents are cited in the territorial restitution decision uttered by the High Court of Antioquia on the Alto Andágueda reservation in September 2014, p. 43

<sup>552</sup> See AGENCIA NACIONAL DE MINERIA, Resolution GTRM-940 of 23 September 2011. Retrieved from [http://www.anm.gov.co/sites/default/files/ anotaciones\\_rmn/anotaciones-rmn-17-de-enero-de-2012.pdf](http://www.anm.gov.co/sites/default/files/ anotaciones_rmn/anotaciones-rmn-17-de-enero-de-2012.pdf) (last accessed March 20 2016.)

<sup>553</sup> See AGENCIA NACIONAL DE MINERIA. Resolution VCT-2770 of 11 September 2013, cited in the territorial restitution decision uttered by the High Court of Antioquia on the Alto Andágueda reservation in September 2014, p. 43.

<sup>554</sup> See REPÚBLICA DE COLOMBIA, Congreso de la República. *Ley 685/2001*, art. 124.

<sup>555</sup> See REPÚBLICA DE COLOMBIA, Congreso de la República. *Ley 1450/2011*, art. 108.

number of areas that should be considered as potential strategic mining areas. As a result, the Ministry of Mining determined that 3 million hectares should be deemed strategic for the development of Colombia's mining industry, and consequently 313 mining blocks were created.

Regarding the case under study, six of the abovementioned mining blocks overlap with the ancestral territories of the ethnic communities located in the Alto Atrato Region.<sup>556</sup> In response to this regulatory activity, in September 2013, the non-governmental organization Tierra Digna – representing the interests of the Cocomopoca community – introduced a constitutional writ (*acción de tutela*) with the purpose of protecting the collective rights of the ethnic groups to the territory and prior consultation. The organization alleged that these entitlements had been affected by the strategic mining areas without considering their implications on the communities nor counting their opinion. The tribunal that studied the case decided to rule in favor of the claimant and suspended the constitution of 16 mining blocks until the administrative authorities of the state pronounced the legality of the corresponding resolutions.<sup>557</sup> The Ministry of Mining appealed the decision and the nation's State Council revoked the suspension in December 2013. In that regard, the tribunal argued that the resolution did not breach the ethnic people's rights, since the administrative acts that delimited the strategic mining zones had a general character. Therefore, it should not be subject to consultation. It pointed out that in any case, the communities should be consulted upon the conclusion of concession contracts that would generate mining titles in favor of private parties.<sup>558</sup>

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<sup>556</sup> Blocks 152 (Tadó); 156 (Bagadó and Tadó); 158 (Cértegui); 168 (Lloró); 181 (Bagadó, Lloró; Cármen); 224 (Bagadó).

<sup>557</sup> See REPÚBLICA DE COLOMBIA, Tribunal Administrativo de Cundinamarca, Sección III. *Sentencia No. 25000-23-36-000-2013-01607-01*. 16 de octubre de 2013.

<sup>558</sup> See REPÚBLICA DE COLOMBIA, Consejo de Estado, Sala Administrativa, Sección IV. *Sentencia No. 25000-23-36-000-2013-01607-01*. 16 de diciembre de 2013.



## B. Territorial restitution of the Emberá Katío People of the Alto Andágueda Resguardo

In accordance with the Victims Law and its supplementary norms, in December 2012 the regional branch of the Land Restitution Unit initiated a territorial restitution procedure, in representation of the Emberá Katío communities of the Alto Andágueda reservation, before a first instance court in Quibdó, the capital of the Department of Chocó.

### 1. *Precautionary measures*

As provided by the special procedure embedded in the transitional justice regulation, the Land Restitution Unit went before a first-instance land restitution court in January 2013 and requested the issuance of precautionary measures to preserve the collective rights of the indigenous people, pending a final decision regarding the return of their territory was taken. The Unit requested the suspension of the mining titles located within the indigenous reservation, and the deferral of the study of new concession requests by the competent public authority. In turn, the representative of the Public Ministry intervened as guarantor of the judicial process. It suggested that the injunction should not be granted on the grounds of the impropriety of the land restitution procedure to discuss the validity of mining titles. These titles derived from the concession contracts concluded between the mining authority and the companies, so the administrative jurisdiction had exclusive jurisdiction to decide upon these type of affairs.<sup>559</sup>

In February 2013 the court decided to grant the injunction. It indicated that as a consequence of the land dispossession that occurred on the occasion of the conflict, the indigenous community had lost the opportunity to use, manage, and enjoy their collective entitlements over the territory and natural resources.<sup>560</sup> Therefore, the granting of mining titles to the multinational companies

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<sup>559</sup> See REPÚBLICA DE COLOMBIA. Primer Tribunal Civil Especializado en Restitución de Tierras de Quibdó. *Sentencia sobre medidas cautelares – Auto 006*. 4 de febrero de 2013.

<sup>560</sup> See REPÚBLICA DE COLOMBIA. Primer Tribunal Civil Especializado en Restitución de Tierras de Quibdó. *Sentencia sobre medidas cautelares – Auto 006*. 4 de febrero de 2013, p. 11.

resulted from the application of incomplete procedures as no prior consultation was carried out with the communities of the Alto Andágueda reservation, which affected their fundamental right to self-determination.<sup>561</sup> According to the Tribunal, this meant that the lack of prior consultation affected the Emberá Katío in a number of ways. Firstly, it fixed their development priorities over the use, management, and enjoyment of the ancestral lands and natural resources. Secondly, it prevented the community from intervening in the discussions over the collateral damages that the mineral extraction could cause on their territory and personhood. Thirdly, the ethnic group could not take part in the negotiation of the eventual indemnifications of these injuries. Importantly, the Quibdó Court highlighted that, notwithstanding the legality of the concession contracts object of controversy, it was grave that foreign investors were receiving 30-year-valid mining titles while the indigenous community had only received authorization to extract mining resources for 10 years. Thus, the Tribunal verified the excessive enjoyment of the territory by persons external to the community, which was exclusively motivated by economic interests.<sup>562</sup> In August 2013, the first instance Court maintained the suspension of the mining titles until a final decision on the territorial restitution would be taken.

Interestingly, the precautionary measures issued by the Quibdó Court were not initially challenged by the foreign investors that had received the mining titles under suspension, those directly affected, but rather by the National Mining Agency, which is a public institution inserted into the state apparatus. In October 2013, eight months after the injunction was granted, the National Mining Agency brought a constitutional writ before a higher court – the High Tribunal of Medellín – against the judicial act that suspended the titles. The Agency affirmed that because the public

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<sup>561</sup> See REPÚBLICA DE COLOMBIA. Primer Tribunal Civil Especializado en Restitución de Tierras de Quibdó. *Sentencia sobre medidas cautelares – Auto 006*. 4 de febrero de 2013, p. 14-15.

<sup>562</sup> See REPÚBLICA DE COLOMBIA. Primer Tribunal Civil Especializado en Restitución de Tierras de Quibdó. *Sentencia sobre medidas cautelares – Auto 006*. 4 de febrero de 2013, p. 12-14.

authority had granted the mining titles that were under suspension, its rights to access to justice and due process had been infringed upon by the transitional justice court's decision. It argued that the latter court had exceeded its jurisdiction, which should be circumscribed to address situations directly related to the armed conflict. It further pointed out that there were ordinary procedures that should have been exclusively used to claim compensation for the injuries that the development of mining projects normally entails on the surface. Therefore, the National Mining Agency requested the reestablishment of the companies' economic entitlements derived from the concession contracts, and lifting the restriction on the study of new concession requests.<sup>563</sup>

The High Tribunal decided to deny the constitutional protection sought by the National Mining Agency. It based its reasoning on the impossibility to verify an irreparable prejudice on the claimant – the National Mining Agency,<sup>564</sup> and the fact that the Agency disregarded certain fundamental particularities of the case when granting the concessions to the mining companies. It overlooked the situation of accentuated vulnerability that the Emberá Katío communities faced as a consequence of the armed conflict and other underlying factors, such as the conduct of certain economic activities. Likewise, the Agency did not consider the distinctive relation that indigenous peoples have with their ancestral territories, and the special constitutional protection granted to such relations.<sup>565</sup> Therefore, the High Court pointed out that these territories could not be subject to the same treatment given to common private property, so every effort to secure indigenous people's land tenure, including the occasional suspension of mining titles, was justified.<sup>566</sup>

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<sup>563</sup> See REPÚBLICA DE COLOMBIA. Tribunal Superior de Antioquia, Sala de Restitución de Tierras. *Acción de Tutela 05000 22 21 000 2013 00091 00*. Noviembre 13 de 20013, p. 22.

<sup>564</sup> See REPÚBLICA DE COLOMBIA. Tribunal Superior de Antioquia, Sala de Restitución de Tierras. *Acción de Tutela 05000 22 21 000 2013 00091 00*. Noviembre 13 de 20013, p. 36.

<sup>565</sup> See REPÚBLICA DE COLOMBIA. Tribunal Superior de Antioquia, Sala de Restitución de Tierras. *Acción de Tutela 05000 22 21 000 2013 00091 00*. Noviembre 13 de 20013, p. 38.

<sup>566</sup> See REPÚBLICA DE COLOMBIA. Tribunal Superior de Antioquia, Sala de Restitución de Tierras. *Acción de Tutela 05000 22 21 000 2013 00091 00*. Noviembre 13 de 20013, p. 39.

## 2. *Final decision on territorial restitution*

In accordance with the territorial restitution procedure, after the precautionary measures stage was concluded, the Land Restitution Chamber of the Antioquia High Tribunal assumed the task of uttering a final decision regarding the territorial restitution of the Alto Andágueda reservation. In addition to the material restitution of the territory in favor of the Emberá Katío, the Land Restitution Unit requested that the tribunal address a number of actions connected to the redress. Firstly, it petitioned the clarification of the boundaries of the reservation, in order to update the cadastral registry. Second, it asked the Tribunal to annul the concession contracts concluded between the state and the mining companies and the corresponding mining titles. Third, it requested the banning of the consideration of additional mining concession proposals in the area subject to discussion. Fourth, it claimed the creation of an indigenous mining zone in favor of the Emberá Katío communities, so as to allow the extraction of the mineral resources located at the Alto Andágueda resguardo.<sup>567</sup> Once the Tribunal assessed and verified the harm suffered by the Emberá Katío communities as a consequence of the armed conflict and its underlying factors, it turned to study the arguments of the opponents – the mining companies. These arguments will be illustrated in depth.

Continental Gold Ltd. was represented by the Colombian legal firm Lloreda Camacho & Co.<sup>568</sup> The opposition was directed to dismiss the claimant's annulment request and based its arguments on three grounds: the lack of causal nexus between the victimization of the indigenous community

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<sup>567</sup> See REPÚBLICA DE COLOMBIA. Tribunal Superior de Antioquia, Sala de Restitución de Tierras. *Decisión de Restitución de tierras en favor la comunidad Emberá Katío del resguardo del Alto Andágueda 27001 31 21 001 2014 00005 00*. Septiembre 23 de 2014, p. 4-7.

<sup>568</sup> *Lloreda Camacho & Co.* is a Colombian law firm with more than 70 years providing legal services to national and multinational companies. The firm serves clients worldwide by means of its affiliation with global legal groups such as Lawyers Associated Worldwide, Association of Corporate Counsel, America Bar Association, Transatlantic Law International, the Rocky Mountain Mining Foundation, the International Bar Association and the Institute for Energy Law, among others. See <http://lloedacamacho.com/the-firm/about-the-firm/alliances-and-memberships/> (last accessed March 20 2016.)

and its territory; the existence of a valid concession agreement between the mining authorities and the company; and, the lack of jurisdiction for the transitional justice judge to decide upon the validity of the corresponding mining titles. The opposition alleged that it was not possible to establish a connection between the territorial dispossession suffered by the indigenous communities and the company's decision to conduct an economic activity in the region upon the conclusion of a concession agreement. Thus, it suggested that the claimants were trying to take advantage of the transitional justice procedure to revive the opportunity to contest the validity of its mining titles, an action that in any case would have had to take place by the time they were granted and through the administrative procedure at disposition.<sup>569</sup> In this regard, the claimant pointed out that whereas the land restitution judges had been invested with the power to satisfy the victims' right to reparation, this capacity was restricted to facts explicitly considered by the law. Therefore, it argued that an administrative act produced by the state's regulatory activity – a mining title – could not be considered as a factor underlying or connected to the armed conflict.<sup>570</sup>

In turn, AngloGold Ashanti and Exploraciones Chocó Colombia (Glencore) brought in identical oppositions to the claimant's pretensions, provided the existence of a joint venture agreement between these companies as to the administration of the mining titles located within the Alto Andágueda reservation. The companies were represented by the arbitration-specialized Colombian law firm Botero Salazar & Tobón Asociados,<sup>571</sup> and founded their opposition on five arguments directed at the definitive cancellation of the mining titles and the suspension of the study of new

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<sup>569</sup> See Continental Gold Ltd. Opposition to the territorial restitution claim in favor of the Emberá Katío Community of the Alto Andágueda Resguardo, 3 April 2014, p. 12-16.

<sup>570</sup> See Continental Gold Ltd. Opposition to the territorial restitution claim in favor of the Emberá Katío Community of the Alto Andágueda Resguardo, 3 April 2014, p. 16-17.

<sup>571</sup> Importantly, the firm has a strategic alliance with Kennedys, an international law firm founded in 1899 with specialist expertise in litigation and dispute resolution – including international arbitration –, and which is globally established. See <http://www.bstlegal.com/la-firma/> (last accessed 20 March 2016.)

concession proposals. The first argument was that the challenged concession contract was neither linked to the armed conflict nor caused the dispossession of the indigenous communities. Therefore, the territorial restitution procedure could not be used to affect clear and well-established entitlements that had been legitimately obtained by the mining companies.<sup>572</sup> The second argument was that while the CCO provided that the subsoil and natural resources belong to the state regardless of the owner of the surface territory, the land restitution procedure could not be used to violate pre-established norms and procedures on the granting of mining titles. In particular, the opposition sustained that the indigenous community could not request the creation of an indigenous mining zone and the granting of a corresponding concession in lieu of the administrative acts that were being contested, since the companies were legitimate right holders.<sup>573</sup> The third argument was that Colombian law did not forbid the granting of mining titles that overlapped with the territories of ethnic communities.<sup>574</sup> The fourth argument was that the tribunal could not apply the legal presumption included in the transitional justice norms<sup>575</sup> on the inexistence of certain legal acts that caused territorial impairment on the ethnic community's lands, and as such spillover could not be proved from the facts of the case.<sup>576</sup> The last argument was that

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<sup>572</sup> See AngloGold Ashanti. Opposition to the territorial restitution claim in favor of the Emberá Katío Community of the Alto Andágueda Resguardo, 4 April 2014, p. 10-15; Exploraciones Chocó Colombia SAS. Opposition to the territorial restitution claim in favor of the Emberá Katío Community of the Alto Andágueda Resguardo, 23 April 2014, p. 6-12.

<sup>573</sup> See AngloGold Ashanti. Opposition to the territorial restitution claim in favor of the Emberá Katío Community of the Alto Andágueda Resguardo, 4 April 2014, p. 15-19; Exploraciones Chocó Colombia SAS. Opposition to the territorial restitution claim in favor of the Emberá Katío Community of the Alto Andágueda Resguardo, 23 April 2014, p. 12-16.

<sup>574</sup> See AngloGold Ashanti. Opposition to the territorial restitution claim in favor of the Emberá Katío Community of the Alto Andágueda Resguardo, 4 April 2014, p. 20-22; Exploraciones Chocó Colombia SAS. Opposition to the territorial restitution claim in favor of the Emberá Katío Community of the Alto Andágueda Resguardo, 23 April 2014, p. 16-20.

<sup>575</sup> See REPÚBLICA DE COLOMBIA. *Decreto* 4633/2011, art. 163.

<sup>576</sup> See AngloGold Ashanti. Opposition to the territorial restitution claim in favor of the Emberá Katío Community of the Alto Andágueda Resguardo, 4 April 2014, p. 22-25; Exploraciones Chocó Colombia SAS. Opposition to the territorial restitution claim in favor of the Emberá Katío Community of the Alto Andágueda Resguardo, 23 April 2014, p. 20-23.

declaring the annulment of the mining titles under study would imply the transgression of the mining companies' legitimate expectations. With regards to this last argument, it is relevant to reproduce the opposition party's elaboration:

“The companies obtained a number of mining titles under the conditions established by the domestic mining legislation. A decision disregarding these entitlements, which are product of the conclusion of a contract with the state, would constitute a transgression of the legitimate expectations principle. The latter principle has been developed by jurisprudence derived from the interpretation of article 83 of the constitution, which provides for good faith as a constitutional maxim.<sup>577</sup> In this regard, the Constitutional Court has stated that the juridical relations between public administration and the society must be fixed in accordance with the former's duty to proceed with loyalty, as there is a correlative right to expect that the other party acts in conformity to what has been originally arranged. This is especially relevant in the behavior of public authorities provided their natural prerogatives, so their regulatory activity must be coherent with their precedent behavior. Thus, private parties do not find themselves surprised by conduct contrary to their original expectations on the rules governing the relations between the state and the ones being governed.<sup>578</sup> In addition, the State Council – the highest judicial authority on administrative matters – has pointed out that the principle of legitimate expectations represents the materialization of good faith, legal certainty and equity in the domestic legal order. Its purpose is to bring stability and foreseeability to individuals from the activity of public authorities, so no additional charges than the ones required to satisfy public purposes are imposed. Though

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<sup>577</sup> “Article 83. The activities of individuals and of public authorities will have to be performed in good faith, which will be presumed in all the measures that the former promote as opposed to the latter.”

<sup>578</sup> See REPÚBLICA DE COLOMBIA, Corte Constitucional. *Sentencia T-097/2011*.

legitimate expectations can not be foreseen as acquired entitlements, they impose the duty on public authorities not to enforce unanticipated changes in the pre-established rules or its regulatory activity.<sup>579</sup> In conclusion, if the land restitution judge decides to question the validity of the company's mining titles, it would be responsible of infringing the principle of legitimate expectations".<sup>580</sup>

The representative of the Public Ministry was consequent with her prior position, when she opposed to the granting of preliminary measures in favor of the Emberá Katío community. Therefore, she opined that the pretensions related to the territorial restitution should be attended by the tribunal, except for the annulment of the mining titles previously granted by the National Mining Agency to the multinational mining companies.<sup>581</sup>

In order to set the foundations of its decision, the tribunal started by raising a number of preliminary points. With regards to the nature and scope of the judicial process being carried out, the tribunal asserted that it was entirely permeated by a transitional justice paradigm. Accordingly, its creation responded to the aim of breaking with the continuum of the ordinary domestic – administrative, civil, and agrarian – norms to remedy past harms associated with the conflict, and thus produce tangible transformations in society. Therefore, transitional justice judges were invested with special prerogatives to intervene by calling the action of a great number of public

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<sup>579</sup> See REPÚBLICA DE COLOMBIA, Consejo de Estado. *Sentencia de 29 de julio de 2013*.

<sup>580</sup> See AngloGold Ashanti. Opposition to the territorial restitution claim in favor of the Emberá Katío Community of the Alto Andágueda Resguardo, 4 April 2004, p. 25-28; Exploraciones Chocó Colombia SAS. Opposition to the territorial restitution claim in favor of the Emberá Katío Community of the Alto Andágueda Resguardo, 23 April 2004, p. 23-25.

<sup>581</sup> See REPÚBLICA DE COLOMBIA. Tribunal Superior de Antioquia, Sala de Restitución de Tierras. *Decisión de Restitución de tierras en favor la comunidad Emberá Katío del resguardo del Alto Andágueda 27001 31 21 001 2014 00005 00*. Septiembre 23 de 2014, p. 12.



authorities at different levels.<sup>582</sup> Next, the tribunal brought in a comprehensive legal base to decide upon the territorial restitution claim. Not only did it include international legal documents, such as ILO's Covenant No. 169 and the UN Declaration on the rights of indigenous peoples, but recognized indigenous peoples' own norms – *ley de origen*, *ley natural*, *derecho mayor* or *derecho propio* – as part of the legal base relevant to determine the conditions under which their territorial rights had to be restituted.<sup>583</sup> Finally, the tribunal depicted the Alto Andágueda reservation – the administrative entity recognized by the state – as a subject of special protection and a rights-holder<sup>584</sup>. Thus, it manifested that the reservation was entitled with a right to collective territory or collective ownership, which was built on the constitutional property clause and had to be extensively depicted provided the special circumstances of the case.<sup>585</sup> Consequently, because the ordinary legal and economic dimensions of private ownership were influenced by the concept of indigenous territory, lands should be understood not as a mere commodity but as a geographical, social, cultural, and religious site, essential for the community's self-determination.<sup>586</sup>

Considering the particular elements of the case, and the conditions imposed by the transitional justice norms as to the determination of a territorial injury, the tribunal characterized the legal exploitation of natural resources as an underlying factor in the armed conflict that affected the

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<sup>582</sup> See REPÚBLICA DE COLOMBIA. Tribunal Superior de Antioquia, Sala de Restitución de Tierras. *Decisión de Restitución de tierras en favor la comunidad Emberá Katío del resguardo del Alto Andágueda 27001 31 21 001 2014 00005 00*. Septiembre 23 de 2014, p. 43-44.

<sup>583</sup> See REPÚBLICA DE COLOMBIA. Tribunal Superior de Antioquia, Sala de Restitución de Tierras. *Decisión de Restitución de tierras en favor la comunidad Emberá Katío del resguardo del Alto Andágueda 27001 31 21 001 2014 00005 00*. Septiembre 23 de 2014, p. 12-15.

<sup>584</sup> See REPÚBLICA DE COLOMBIA. Tribunal Superior de Antioquia, Sala de Restitución de Tierras. *Decisión de Restitución de tierras en favor la comunidad Emberá Katío del resguardo del Alto Andágueda 27001 31 21 001 2014 00005 00*. Septiembre 23 de 2014, p. 15-17.

<sup>585</sup> Article 58 of Colombian constitution recognizes communal property for indigenous peoples and Afro-Colombian communities, and recalls the social function of private ownership as a limitation to the exercise of such entitlement.

<sup>586</sup> See REPÚBLICA DE COLOMBIA. Tribunal Superior de Antioquia, Sala de Restitución de Tierras. *Decisión de Restitución de tierras en favor la comunidad Emberá Katío del resguardo del Alto Andágueda 27001 31 21 001 2014 00005 00*. Septiembre 23 de 2014, p. 14.

territorial and cultural integrity of the Alto Andágueda reservation.<sup>587</sup> In this regard, it argued that the ancestral territory possessed by the Emberá Katío communities were put at risk, as the mining projects associated with the concession contract covered 62% of the reservation, and had a prolonged duration – around 40 years.<sup>588</sup> In this regard, the tribunal made reference to an essential tension between economic development and the protection of the country's ethnical diversity, dynamics supported by public interest arguments. It pointed out that this tension concretized the existence of contentious discourses on how nature was comprehended. An utilitarian vision, according to which land and natural resources should be commoditized, was contrasted with an alternative depiction that understood nature as a constitutive part of the identity of ethnic peoples.<sup>589</sup> In accordance with the tribunal, this tension – and the fact that the mining titles and the concession bids omitted the realization of prior consultation with the indigenous communities – encompassed a potential to increase the territorial damages and social changes already produced by the armed conflict. Thus, it sustained that prior consultation was the mechanism for harmonizing the abovementioned opposing views of nature. A similar belief is held by a normative rule coined by the Colombian Constitutional Court, which states that every act, project, activity, or initiative with proclivity to intervene in the territories of ethnic communities, regardless of the scale of injury, should be subject to prior consultation since its beginning.<sup>590</sup>

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<sup>587</sup> See REPÚBLICA DE COLOMBIA. Tribunal Superior de Antioquia, Sala de Restitución de Tierras. *Decisión de Restitución de tierras en favor la comunidad Emberá Katío del resguardo del Alto Andágueda 27001 31 21 001 2014 00005 00*. Septiembre 23 de 2014, p. 28.

<sup>588</sup> See REPÚBLICA DE COLOMBIA. Tribunal Superior de Antioquia, Sala de Restitución de Tierras. *Decisión de Restitución de tierras en favor la comunidad Emberá Katío del resguardo del Alto Andágueda 27001 31 21 001 2014 00005 00*. Septiembre 23 de 2014, p. 27.

<sup>589</sup> See REPÚBLICA DE COLOMBIA. Tribunal Superior de Antioquia, Sala de Restitución de Tierras. *Decisión de Restitución de tierras en favor la comunidad Emberá Katío del resguardo del Alto Andágueda 27001 31 21 001 2014 00005 00*. Septiembre 23 de 2014, p. 28-31.

<sup>590</sup> See REPÚBLICA DE COLOMBIA. Tribunal Superior de Antioquia, Sala de Restitución de Tierras. *Decisión de Restitución de tierras en favor la comunidad Emberá Katío del resguardo del Alto Andágueda 27001 31 21 001 2014 00005 00*. Septiembre 23 de 2014, p. 32-37.

Having established a link between the advancement of the mining project and the situation of the affected indigenous communities, the tribunal went to determine the conditions under which territorial restitution had to be conducted, and the further effects of this process on the mining titles. In order to prove the dispossession of the Emberá Katío communities' territory, the tribunal had to establish whether the legal presumption, regarding the nullity of certain administrative acts that recognize or grant non-possessory rights over the affected territory, should be applied in the case as provided by the transitional justice regulation.<sup>591</sup> From a restrictive interpretation of the norm, the Antioquia court decided that the case did not fit within the legal presumption. In this regard, it established a formal difference between an administrative act and an administrative contract, and decided that the conclusion of a concession contract to exploit resources overlapping the indigenous territory should not be considered as a territorial injury.<sup>592</sup> However, it considered that the suspension of the concession contract and the corresponding mining titles, ordered by the Quibdó Court in 2013 upon the imposition of precautionary measures, should remain until a prior consultation procedure with the communities of the Alto Andágueda resguardo could be carried out.<sup>593</sup> Finally, with regards to the constitution of an indigenous mining zone, the tribunal considered that such injunction would exceed its jurisdiction. Yet, it urged the Agencia Nacional de Minería to consider that option, as the authority in charge of these regulatory procedures.<sup>594</sup>

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<sup>591</sup> As previously mentioned, this presumption is coined by Decree 4633 in order to secure the effective enjoyment of territorial rights by the victims beyond material restitution.

<sup>592</sup> See REPÚBLICA DE COLOMBIA. Tribunal Superior de Antioquia, Sala de Restitución de Tierras. *Decisión de Restitución de tierras en favor la comunidad Emberá Katío del resguardo del Alto Andágueda 27001 31 21 001 2014 00005 00*. Septiembre 23 de 2014, p. 38-41.

<sup>593</sup> As previously mentioned, this presumption is coined by Decree 4633 in order to secure the effective enjoyment of territorial rights by the victims beyond material restitution.

<sup>593</sup> See REPÚBLICA DE COLOMBIA. Tribunal Superior de Antioquia, Sala de Restitución de Tierras. *Decisión de Restitución de tierras en favor la comunidad Emberá Katío del resguardo del Alto Andágueda 27001 31 21 001 2014 00005 00*. Septiembre 23 de 2014, p. 41.

<sup>594</sup> As previously mentioned, this presumption is coined by Decree 4633 in order to secure the effective enjoyment of territorial rights by the victims beyond material restitution.

### C. Territorial restitution of Cocomopoca

The previous section illustrated the territorial restitution procedure that supported the collective rights of the Emberá Katío people of the Alto Andágueda reservation. This section in turn presents an initiative that has been carried out with the same purpose by the Cocomopoca Afro-Colombian communities. It is worth mentioning that, since this ethnic group's territory is adjacent to the lands of the indigenous peoples, the land restitution process counted with the same opponents, and its outcome was arguably influenced by the conduct of the same public authorities.

#### 1. *Precautionary measures*

Similar to the territorial restitution process carried out in favor of the indigenous community, in May 2014, the NGO Tierra Digna requested precautionary measures to protect the collective rights of the Cocomopoca Afro-Colombian communities. Importantly, this legal action was filed before the same first-instance land restitution court that resolved the petition in favor of the Emberá Katío people. The claim focused on three aspects: the suspension of the mining titles that overlapped with the ethnic territory; the deferral of the study of the bids that aim to obtain a concession on the same zone; and, the cancellation of a strategic mining area that overlapped with the community's territory.<sup>595</sup> In this case, the representative of the Public Ministry manifested neither support nor opposition to the injunction.

The Quibdó court acknowledged that the abandonment of lands as a consequence of forced displacement, and the granting of numerous mining titles to multinational mining companies during the period of greatest violence in the zone, were indeed factual circumstances that produced

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<sup>594</sup> See REPÚBLICA DE COLOMBIA. Tribunal Superior de Antioquia, Sala de Restitución de Tierras. *Decisión de Restitución de tierras en favor la comunidad Emberá Katío del resguardo del Alto Andágueda 27001 31 21 001 2014 00005 00*. Septiembre 23 de 2014, p. 42-43.

<sup>595</sup> See REPÚBLICA DE COLOMBIA. Tribunal Superior de Antioquia, Sala de Restitución de Tierras. *Decisión de Restitución de tierras en favor la comunidad Emberá Katío del resguardo del Alto Andágueda 27001 31 21 001 2014 00005 00*. Septiembre 23 de 2014, p. 1-2.

the systematic violation of Cocomopoca's collective rights.<sup>596</sup> Next, it added that the companies had concluded contracts with Colombia's Ministry of Defense in order to obtain security-provision services from the country's military forces within their projects.<sup>597</sup> After confirming its competence to study the precautionary measures request, the Court recognized that the coincidence of forced displacement practices with the development of mining projects could be considered a factor transversal to the armed conflict. In this regard, it depicted such a coincidence as a risk for the collective rights of Afro-Colombian communities.<sup>598</sup> However, it emphasized that not every action against the territory should entail the protection of the state through transitional justice, since the latter legal framework was limited to safeguard situations only directly connected with the subsistence of the ethnic community, as well as those that had caused the conflict or certain underlying factors.<sup>599</sup>

The Court indicated that the request for the cancellation of the resolution that created a strategic mining area that overlapped the collective territory was not within its jurisdiction. Such an administrative act, they argued, had a general character and was neither related to the armed conflict nor incentivized by the dispossession of Cocomopoca's territory.<sup>600</sup> Concerning the suspension of the mining titles granted to the multinational companies and the deferral of the study

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<sup>596</sup> See REPÚBLICA DE COLOMBIA. Tribunal Superior de Antioquia, Sala de Restitución de Tierras. *Decisión de Restitución de tierras en favor la comunidad Emberá Katío del resguardo del Alto Andágueda 27001 31 21 001 2014 00005 00*. Septiembre 23 de 2014, p. 2-5.

<sup>597</sup> Agreement No. 11-056 of 2011, concluded between AngloGold Ashanti and the Ministry of Defense of Colombia. REPÚBLICA DE COLOMBIA. Tribunal Superior de Antioquia, Sala de Restitución de Tierras. *Decisión de Restitución de tierras en favor la comunidad Emberá Katío del resguardo del Alto Andágueda 27001 31 21 001 2014 00005 00*. Septiembre 23 de 2014, p. 5.

<sup>598</sup> See REPÚBLICA DE COLOMBIA. Tribunal Superior de Antioquia, Sala de Restitución de Tierras. *Decisión de Restitución de tierras en favor la comunidad Emberá Katío del resguardo del Alto Andágueda 27001 31 21 001 2014 00005 00*. Septiembre 23 de 2014, p. 11-13.

<sup>599</sup> REPÚBLICA DE COLOMBIA. Tribunal Superior de Antioquia, Sala de Restitución de Tierras. *Decisión de Restitución de tierras en favor la comunidad Emberá Katío del resguardo del Alto Andágueda 27001 31 21 001 2014 00005 00*. Septiembre 23 de 2014, p. 15.

<sup>600</sup> See REPÚBLICA DE COLOMBIA. Tribunal Superior de Antioquia, Sala de Restitución de Tierras. *Decisión de Restitución de tierras en favor la comunidad Emberá Katío del resguardo del Alto Andágueda 27001 31 21 001 2014 00005 00*. Septiembre 23 de 2014, p. 17.

of new concession bids, the Quibdó judge acknowledged that some of the latter had already been suspended by the decision in favor of the Emberá Katío people. Therefore, it was considered unnecessary to pronounce upon such titles.<sup>601</sup> Nevertheless, it decided to deny the injunction over the titles and bids that had not been subject to previous scrutiny. It pointed out that the mining companies were not operating on the territory where they had titles due to *force majeure* circumstances. Further, no evidence indicated that the titles were related to the violence patterns in the zone. Although there was an apparent administrative failure concerning the granting of mining titles without conducting prior consultation with the affected ethnic community, this inconsistency was not linked to the armed conflict so it should not be addressed by the transitional justice jurisdiction. In any case, the duty to conduct prior consultation with ethnic communities was not obligatory upon the conclusion of a concession contract but during the effective realization of prospective and extractive activities, as provided by “the law governing these type of agreements”.<sup>602</sup> In sum, the Court supported the rejection of the precautionary measures claim on the impossibility to verify a direct benefit for the mining companies from the factual circumstances that affected the Cocomopoca community, as well as on the apparent non-obligatory character of prior consultation during the pre-contractual phase.<sup>603</sup> Finally, although the organization representing Cocomopoca appealed the decision of the Quibdó Court, the Land Restitution High

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<sup>601</sup> See REPÚBLICA DE COLOMBIA. Tribunal Superior de Antioquia, Sala de Restitución de Tierras. *Decisión de Restitución de tierras en favor la comunidad Emberá Katío del resguardo del Alto Andágueda 27001 31 21 001 2014 00005 00*. Septiembre 23 de 2014, p. 20.

<sup>602</sup> See REPÚBLICA DE COLOMBIA. Tribunal Superior de Antioquia, Sala de Restitución de Tierras. *Decisión de Restitución de tierras en favor la comunidad Emberá Katío del resguardo del Alto Andágueda 27001 31 21 001 2014 00005 00*. Septiembre 23 de 2014, p. 21.

<sup>603</sup> See REPÚBLICA DE COLOMBIA. Tribunal Superior de Antioquia, Sala de Restitución de Tierras. *Decisión de Restitución de tierras en favor la comunidad Emberá Katío del resguardo del Alto Andágueda 27001 31 21 001 2014 00005 00*. Septiembre 23 de 2014, p. 22.

Tribunal confirmed both the rejection of the precautionary measures related to the suspension of the company's mining titles and the preclusion of the consideration of new concession bids.

*2. Final decision on territorial restitution*

In December 2014, after the injunction request was rejected by the first-instance land restitution court, the Land Restitution Unit – in close collaboration with the NGO Tierra Digna – introduced a formal territorial restitution petition in favor of Cocomopoca. In February 2015, the Land Restitution Chamber of the Antioquia High Court acknowledged the claim brought by the representatives of the victims concerning the restoration of ethnic communities' ancestral territory. As in the case of the Alto Andágueda reservation, and in addition to the material restitution of the territory, the representatives of the victims requested the Antioquia Court to declare the inexistence of the concession contracts concluded between the state and the mining companies, the consequent annulment of the equivalent mining titles, and the deferral of any concession proposal on the area subject of discussion.<sup>604</sup> The Land Restitution Unit founded these claims on the territorial injuries that the Afro-Colombian community suffered as a consequence of its victimization in the context of the country's armed conflict. In particular, the Unit argued that the conclusion of concession contracts concerning the development of mining projects within Cocomopoca's ancestral lands occurred during a period when the zone was experiencing high levels of violence and forced displacement. Therefore, it contended that the community could not participate in the decisions affecting its territory, including the granting of mining titles for the extraction of natural resources located within their lands.<sup>605</sup> Consequently, the Unit pointed out that these administrative acts – the concession contracts – should be declared inexistent by the Tribunal, supplementary to material

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<sup>604</sup> See Land Restitution Unit, Land Restitution Claim in Representation of Cocomopoca, 19 December 2014, p. 133.

<sup>605</sup> See Land Restitution Unit, Land Restitution Claim in Representation of Cocomopoca, 19 December 2014, p. 53-54.

restitution, as the transitional justice regulation provided for a number of legal presumptions in that sense.<sup>606</sup>

In turn, the companies AngloGold Ashanti and Exploraciones Chocó Colombia (Glencore) constituted as opponents in the process. As in the case of the Alto Andágueda reservation, they were represented by the law firm Botero Salazar & Tobón Asociados through identical writs. As in the previous case, the opposition to the title cancellation claim was founded on the discredit of the land restitution procedure as a mechanism to address mining issues, and particularly, to decide upon eventual irregularities in the conclusion of concession contracts between the state and private parties. In this regard, it was claimed that there was no relation whatsoever between the companies or their mining titles and the internal armed conflict. Thus, they argued that the tribunal could not disregard nor violate the entitlements that the opponents had legally obtained from the Colombian state under the development of the latter's economic policy.<sup>607</sup> In that sense, the opposition strongly relied on the same arguments alleged on the occasion of the claim brought in favour of the Emberá Katío people: the mining companies' disconnection to the actions that caused the victimization of Cocomopoca; the impossibility to verify any act of dispossession against the afro-Colombian communities provided the exclusive and excluding property rights that the state over the subsoil and its natural resources; the inexistence of any prohibition for the Colombian state to grant mining titles that overlap with ethnic territories; and the risk to affect the companies' legitimate expectations.<sup>608</sup>

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<sup>606</sup> See REPÚBLICA DE COLOMBIA. *Decreto 6635/2011*, art. 127-128. Land Restitution Unit, Land Restitution Claim in Representation of Cocomopoca, 19 December 2014, p. 107-108.

<sup>607</sup> See AngloGold Ashanti and Exploraciones Chocó Colombia. Opposition to the territorial restitution claim in favor of the Cocomopoca Afro-Colombia Community, 27 February 2015.

<sup>608</sup> See AngloGold Ashanti and Exploraciones Chocó Colombia. Opposition to the territorial restitution claim in favor of the Cocomopoca Afro-Colombia Community, 27 February 2015.



However, a new element was introduced for the consideration of the Land Restitution Chamber. According to the opposition, and contrary to what the Antioquia Court argued in the Alta Andágueda reservation decision, the country's legal order could not be interpreted as inferring that prior consultation should be considered obligatory for the granting of mining titles. It should instead be deemed mandatory only for the conduct of exploration and extraction activities. In consequence, the representative of the mining companies considered that since they had not infringed the communities' rights in that regard, the concession contracts could not be cancelled.<sup>609</sup> Finally, the opposition enforced this argument by making reference to both the decision of the First Specialized Civil Court on Land Restitution that rejected the solicitude concerning the suspension of the mining titles due to the lack of prior consultation, and the position of the Public Ministry in the Alto Andágueda case that called for not infringing on the interests of mining companies.<sup>610</sup>

By February 2016 the Land Restitution Chamber of the Antioquia High Court had not issued a final decision on the claim brought by the Land Restitution Unit and Tierra Digna, in representation of the Cocomopoca Afro-Colombian communities. Arguably, the Antioquia Land Restitution Court has taken substantially more time to issue a decision than in the case of the Emberá Katío people for unclear reasons.

## **V. Analysis**

The previous sections introduced the case study's background and the particular legal conflict arising from the development of territorial restitution procedures in zones under the influence of mining concessions, in the Choco Department, Alto Atrato Region. Given this particular context,

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<sup>609</sup> AngloGold Ashanti and Exploraciones Chocó Colombia. Opposition to the territorial restitution claim in favor of the Cocomopoca Afro-Colombia Community, 27 February 2015.

<sup>610</sup> AngloGold Ashanti and Exploraciones Chocó Colombia. Opposition to the territorial restitution claim in favor of the Cocomopoca Afro-Colombia Community, 27 February 2015.

the following section will discuss the likelihood of a normative clash between the legal protection offered to foreign investment via international investment agreements and the implementation of a transitional justice project. This section explores the regulatory implications of such a collision.

#### A. Analysis on the likelihood of the normative collision

The case under analysis can be regarded from the standpoint of one of the main issues addressed by the Colombian Constitutional Order: the relation between the state and the private sphere under its jurisdiction. As explained in a precedent chapter, this dynamic is modulated by the interaction between the consecration of economic freedom and private property as founding principles of the country's socioeconomic regime in relation to the capacity of public authorities to intervene in the private sphere so as to ensure the achievement of public goals.<sup>611</sup> In that respect, the relation between the state – represented by the National Mining Agency – and the multinational mining companies – which constituted subsidiaries in Colombia in order to obtain mining titles as provided by the domestic mining regulation – arose from the conclusion of concession contracts. Thereafter, this relation derived from the establishment and operation of these companies within the country's territory, particularly where ethnic communities live. Thus, under the country's public law regime, the effective formalization of these agreements created rights and obligations between the parties. The companies are entitled to conduct exploration and exploitation activities in accordance with technical and environmental standards and for a fixed period of time (30 years). In exchange, they must pay a periodical royalty and, in case of a fruitful extraction of minerals, transfer royalties to the country. In turn, the state must ensure that the licensees can effectively conduct their activities in the zone of the project and that the terms of the contract are respected by the public authorities and third parties.

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<sup>611</sup> See Chapter One on the characterization of the Colombian Constitutional Order.

In this case, the law has a constitutive role in the establishment of these multinational mining companies in Colombia so as to conduct an economic activity – the extraction of gold in the Alto Atrato Region – by means of the establishment of contractual relations that are framed in the country’s public law regime. Yet, it also performed a regulatory role: to address the way in which these private entities project their legal personhood. That is, to define how the mining companies exert their rights and obligations in accordance with their social object and under the specific context of the country’s Constitutional Order. This includes the determination of the use, enjoyment and disposal of the mining titles acquired by means of the concession agreements entered into with the state. In the present case, both the country’s conflictual background and the constitutional consecration of special protection to ethnic groups were brought up to challenge the legitimacy of the concession agreements. In particular, the validity of the corresponding mining entitlements is disputed under the grounds of the transgression of the ethnic group’s collective rights to territory and prior consultation. Thus, as a consequence of the lack of due diligence of the contractual parties in the identification of particular circumstances that demanded the conduct of additional actions to crystallize the concession agreements, the Emberá Katio and Cocomopoca communities were deprived of the possibility of deciding upon access to and management of their ancestral lands and attached natural resources.

Up to this point, the alleged normative tension arising from this case emerges at the intersection of competing interests in the realm of access to and use of land and natural resources. Both sides find undisputable support in the country’s Constitutional Order, which is said to be rational and coherent, and are therefore provided with a collection of legal norms. Yet, when confronted, they seem to hold contradictory views as to how scarce resources as an object of regulation should be managed by public authorities. The mining regulation regards land and natural resources as

separate elements, claiming that the latter's ownership is an exclusive prerogative of the state, and advocating for the protection and preservation of the mining company's acquired rights. On the other hand, the regulation in favor of the safeguard of ethnic groups encompasses an alternative conception as to the separate character of lands and natural resources, supports the free disposal of natural resources by the state to respect the special relation between the ethnic groups and the territory, and speaks in favor of the production of structural changes in society so as to ensure their survival, even if private interests are affected.

In principle, the latter formulation is essentially correct and consequently, it could be argued that this case counts with a potential solution within the realm of the country's Constitutional Order by means of an interpretative exercise. However, the introduction of some additional elements to the equation turns such an assessment into a more complex endeavour. Based on the facts of the case, it becomes visible that each body of substantive regulation – respectively aligned with a particular interest and offering protection to a specific group of people – is supported by supplementary normative rationales. Thus, the protection of the interests and expectations of the multinational mining companies finds support in their condition of foreign investors from countries with which Colombia has entered into international investment agreements. On the other hand, the ethnic communities are recognized as victims of the armed conflict, which have been especially affected by the dispossession of their lands as a consequence, have been forcibly displaced, and whose rights must be effectively redressed within the realm of transitional justice.

Both transitional justice and international investment law are herein considered as transnational legal processes that progressively entered into contact with the Colombian Constitutional Order, insofar that the particular – political, social and economic – circumstances of the country promote the reception of these normative rationales. Although they do not directly encompass the regulation

of substantive areas, their purpose is to stimulate the conduct of the state towards a consistent attitude with the paired substantive regulation. On the one hand, the conclusion of international investment agreements is aimed to guarantee a stable environment of operation to foreign investors by means of the imposition of behavioral standards that may eventually restrict the regulatory activity of public authorities that could affect their interests and expectations. This is supplemented by the provision of a transnational dispute-settlement mechanism. On the other hand, with the primary objective of achieving durable peace, transitional justice breaks with the continuum of a country's legal order, and pushes the state to assume a pattern of exceptional regulatory activism towards the realization of structural transformations in the country, including the satisfaction of the victims' right to reparation by means of redistributive measures.

In this case, these transnational legal processes come to support interests and legal frameworks that are in direct contention: the interests of mining companies and the mining regulation as opposed to the interests of ethnic groups, human rights, and social regulation. Thus, they end up pushing the action of the state in opposite directions over the same object of regulation: access to and use of land and natural resources. That is, whether to abstain from intervening so as to preserve acquired rights, or to regulate in order to support structural changes. All in all, these normative rationales are powerful since they count with the support of the country's Constitutional Order, which makes them legitimate in the eyes of the citizens, the international community of states and other relevant transnational actors. However, as argued, they problematize the eventual solution of these types of situations.

In the case under analysis, the activation of transitional justice's territorial restitution procedures in favor of the Emberá Katío and Cocomopoca communities has been acknowledged as the only way in which these ethnic groups could obtain the effective recognition of their territorial rights,

after several incomplete or unsuccessful attempts made through the ordinary legal means offered by the domestic legal order. Incidentally, the transitional justice judge argued that, provided the specific circumstances of these collective restitution claims, the effective enjoyment of territorial rights by the ethnic groups required going beyond the material restoration of the land. It encompassed the revision of any political or economic public decision conducted over the zone under dispute, even if the rights and expectations of third parties could be affected. In contrast, the fact that the mining companies directly involved in the Dojura project belong to multinational entrepreneurial conglomerates coming from countries with which Colombia has concluded international investment agreements – AngloGold Ashanti from the United Kingdom; Empresa Minera los Quenuales from Peru, which in turn is owned by Glencore from Switzerland; and Continental Gold Ltd. from Canada – opens the door to whether they might consider using these treaties, directly or indirectly, to contest the negative impact of their economic interest and expectations derived from the conclusion of concession contracts with the state.

#### B. The regulatory implications of the normative collision

So far, this chapter has provided the illustration of a real-life situation to verify the existence of an actual normative tension between the legal protection of foreign investment via international investment agreements and the implementation of a transitional justice project in Colombia –the territorial restitution of ethnic communities in Colombia’s Alto Atrato Region. Next, this section intends to explore the particular regulatory implications of this particular instance. In this regard, the core inquiry that will be addressed is whether and to which extent the safeguards given to the multinational mining companies involved in the Dojura Project have the potential to, or have actually affected, the effective implementation of the territorial restitution processes in favor of the ethnic communities inhabiting the zone. That is, whether the legal protection resulting from

the conjunction of the international investment agreements concluded by the country and the domestic mining regulation might occasionally constrain the adoption of the regulatory measures related to the eventual suspension or the definitive annulment of the mining titles that overlap with the lands of the latter communities.

Considering the case addresses distinct administrative-judicial procedures with its focus on diverse ethnic communities, this analysis intends to evaluate two key elements. First, the identification of direct or indirect references to either the existence of international investment agreements that could eventually be used to discipline the conduct of public authorities, or to the nature and extent of the protection that the multinational mining companies enjoy as foreign investors. And second, the verification of particular variations in the conduct of the relevant actors from one case to the other. This includes shifts not only in the actions taken by the public authorities or the opponents, but modifications in the argumentation of the positions actually assumed by each actor.

The argumentative core of the territorial restitution processes under analysis was the protection of the collective territorial rights of the ethnic communities. However, this process changed to encompass a further discussion: the extent to which clear and well-established economic entitlements, derived from the conclusion of a legal agreement between the state and foreign private parties, could legitimately be affected by subsequent and exceptional transitional justice regulatory measures. In that regard, the response to this hypothesis comes from the validation of a number of variables.

1. *Existence of a conflict between the pursuance of a public interest (durable peace) and the protection of private interests of foreign investors, produced by the regulatory action of the transitional justice authorities*

In accordance with Colombia's development policies, the mining industry has been designated as a critical economic sector that has to be boosted through the attraction of foreign investors, which contribute to the sector with capital, particular expertise and specialized technology. Therefore, the country has concluded concession agreements with several mining companies to allow the massive extraction of minerals. In parallel, Colombia has been implementing a transitional justice project that is intended to create the conditions for the achievement of durable peace after an extended internal armed conflict. One of the project's prominent components is the protection of the victims' right to reparation through the conduct of territorial restitution procedures. From the facts of the case, it is proved that the private interests of three mining companies – subsidiaries of multinational corporations – are being challenged by a number of judicial decisions that decided to grant territorial restitution in favor of ethnic groups. In this regard, they provide for the suspension of their mining titles due to both their overlapping with the lands to be restored and the fact that no prior consultation with the affected communities was conducted on the occasion of the concession granting. This represents an economic detriment for the companies, as well as an alteration of their expectations of the project's further development.

2. *Feasibility of resorting to investment arbitration to challenge the transitional justice regulatory measures that affected the interests of foreign investors*

Colombia has adopted a policy of systematic conclusion of international investment agreements with capital-exporting countries. These agreements include standards by virtue of which behavioral obligations are imposed on the state parties and particularly, on their public authorities. In addition, the agreements provide for investor-state arbitration as a mechanism that foreign



investors may resort to claim compensation from the eventual breach of treaty obligations by the state party where they are settled. From the facts of the case, it can be affirmed that the mining companies whose mining titles have been affected by the regulatory measures on territorial restitution are owned by multinational corporations. These companies were either constituted or enlisted in countries with which Colombia has international investment agreements – United Kingdom, Canada, Switzerland and Peru. Therefore, the opportunity for the mining companies to activate the investor-state arbitration mechanism to request damages from the regulatory action of Colombian public authorities is real, as the mechanism is current and directly available.

*3. Verification of an “investment arbitration threat” and its eventual perception by the transitional justice public authorities*

So far, the existence of a conflict between the economic entitlements and expectations of a number of multinational mining companies and the implementation of transitional justice regulatory measures has been discussed. Likewise, it is certain that these private parties could activate, under their condition of foreign investors, the investment arbitration mechanism to claim damages from the state on the other. It is now necessary to determine whether these companies have stated, directly or indirectly, their intention to undertake investment arbitration against Colombia in retaliation for the suspension of their mining titles or conditionally upon their definitive cancellation of the corresponding concessions in further procedures. Also, it has to be established whether this aim was effectively perceived by the threatened public authorities.

In line with the difficulties to corroborate the subjective component of these types of situations (a possible case of regulatory chill), it was not possible to find any direct statement by foreign investors in the present case, nor a particular declaration of the transitional justice public authorities from which any type of threat could have been perceived. However, there are other

elements, listed below, that reveal certain patterns in the conduct of public authorities and foreign investors that should also be considered. These patterns help to establish a causal nexus between the impact of the economic interests of foreign investors – a product of the enforcement of the land restitution regulatory measures – and the production of subsequent variations in the behavior of the transitional justice public authorities from one case – the Emberá Katío People of the Alto Andágueda Reservation – to the other – the Cocomopoca Afro-Colombian people.

- It is reasonable to presume that Colombian public authorities were generally aware of the impact of international investment agreements on public interest regulation.
  - o During the examination of the constitutionality of the international investment agreements concluded between Colombia and the main capital-exporting countries, such as the United States and Canada, concerns on the potential adverse effects of these treaties on the state's regulatory capacity were raised publicly by civil society and academics. This is consigned in the corresponding judicial decisions that declared the agreements' accordance with the country's Constitutional Order.
  - o A great number of contemporaneous investment arbitration decisions affecting countries of the region – including Argentina, Bolivia, Chile, Ecuador and Venezuela – were made publicly available, including the important adverse effects on their political stability and fiscal sustainability.
  - o In 2013 the Ministry of Commerce's Foreign Investment Division started implementing a legal defense strategy to address the eventual emergence of international investment controversies derived from the breach of the international investment agreements in force. Moreover, well in advance the Ministry had been implementing an aggressive information program that sought to instruct public

authorities on the risks their regulatory activity might include to the country's international responsibility in the realm of investment arbitration.

- It is reasonable to infer that being aware of the risks of investment arbitration, some public authorities assumed a favorable attitude towards foreign investors on the occasion of the occurrence of situations affecting their economic interests and expectations.
  - o During the territorial restitution procedure in favour of the Emberá Katío people, the representative of the Public Ministry assumed a firm position against the eventual impact on the mining companies' entitlements. By virtue of its constitutional mandate the Public Ministry is in charge of safeguarding the respect of human rights, the judicial guarantees and the interests of the victims – such as the ethnic groups – in the course of judicial procedures. Yet, the support given to the mining companies is consistent with a series of guidelines that this institution's central level set forth on the occasion of the enactment of the transitional justice regulation. Particularly, the idea that private interests should not be affected as a consequence of the implementation of the Victims Law.
  - o On the occasion of the territorial restitution procedure in favour of the Emberá Katío people, the public authorities of the mining sector – especially the National Mining Agency – assumed the representation of the interests of the multinational mining companies affected by the suspension of mining titles. Not only did this institution oppose the suspension of the mining titles that had been granted to the companies through precautionary measures, but it interposed a constitutional writ against this injunction.

- There is evidence of permanent meetings between the national mining authorities – the Ministry of Mining and the National Mining Agency – and the Land Restitution Unit, the institution in charge of representing the ethnic groups in territorial restitution procedures. This might indicate discussions on the prejudicial effects that certain elements of the land restitution processes might encompass the country's development strategy, as they could collide with the economic interests of the multinational mining companies operating in the country.
- In the Alto Andágueda case the first instance judge that decided on the granting of precautionary measures suspended the mining companies' titles. Nevertheless, the land restitution tribunal that produced the final decision on the territorial restitution affirmed the mining contracts. Instead, it decided to maintain the suspension of the titles until prior consultation with the indigenous people could be conducted. This conservative attitude in the application of the transitional justice regulation could indicate an awareness of further consequences that this decision might have implied for the state's international responsibility.
- It is reasonable to infer that the multinational mining companies affected by the transitional justice regulatory measures were informed in advance of both the non-financial risks associated with investing in the zone subject to concession, and the exorbitant protection they enjoyed from the international investment agreements concluded between Colombia and their home countries. Particularly, the possibility of resorting to arbitration in order to settle eventual controversies with the host state.
  - The multinational mining companies increased their investments in Colombia after the corresponding IIAs with their home countries were concluded. This can be

- explained by the fact that they became aware of the additional protection provided by these treaties, and so the level of political risk they were exposed to went down.
- In their opposition to the territorial restitution claims brought about by the Land Restitution Unit in representation of the ethnic groups, the mining companies made specific reference to a number of elements that are sympathetic to the normative rationale of the protection of foreign investors through international investment agreements. In particular, their argument that builds on the legitimate expectations doctrine, points to the safeguarding of private interests from unexpected changes in the regulatory activity of public authorities, an idea that is familiar to past investment arbitration cases. The latter could indicate mindfulness towards their capacity to use investment arbitration in order to claim damages from the state. Thus, they incorporated this type of argumentation in their opposition to the land restitution claim.
  - As early as February 2011, by the time the transitional justice regulation was issued, some companies requested a certificate on the presence of ethnic communities on the region. This is arguably another indication of their awareness of what could potentially happen with the mining titles. In spite of that, no prior consultation was conducted, perhaps because the companies trusted in the power of mining regulation and the IIAs to dissuade the initiation of territorial restitution procedures. Or even more, because knowing the risk of suspension or cancellation, they undertook direct actions to dissuade public authorities from initiating LRP or to suggest no restrictions on their economic interests.

- The reports of at least one of the mining companies – the Canadian Continental Gold Ltd. – contain references to the regulatory risks that it must deal with in Colombia, including the ones derived from land claims.<sup>612</sup> Likewise, the reports reveal that the Dojura project is important for their operation in the country as they are explicitly considering the commencement of prior consultation procedures with the ethnic communities so as to offset the titles' suspension.<sup>613</sup>

4. *Regulatory outcomes of the perception of an “investment arbitration threat” by transitional justice public authorities*

By January 2016, the Antioquia High Court had not issued a final decision on the territorial restitution claim interposed by the Land Restitution Unit in representation of the Cocomopoca Afro-Colombian community. As a result, it is not yet possible to establish whether there were particular variations in the conduct of this tribunal, with respect to the eventual impact of the entitlements and expectations of the opponents, and as a consequence of a perceived threat of investment arbitration. However, there was a clear inconsistency in the granting of precautionary

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<sup>612</sup> “Any changes in regulations or shifts in political attitudes in this jurisdiction, or other jurisdictions in which the Company may acquire projects from time to time, are beyond the control of the Company and may adversely affect its business. Future development and operations may be affected in varying degrees by such factors, among others, as government regulations (or changes thereto) with respect to the restrictions on production, export controls, income taxes, expropriation of property, repatriation of profits, environmental legislation, land use, water use, land claims of local people, mine safety and receipt of necessary permits. The effect of these factors cannot be accurately predicted. See “Risks of the Business” See CONTINENTAL GOLD LTD, “Annual Information Form for the Year ended December 31, 2014”, p. 7. Retrieved from [www.continentalgold.com/files/doc\\_financials/2014/Q4/CNL-\\_-YE-2014AIF\\_Final\[1\]\\_v001\\_11tc91.pdf](http://www.continentalgold.com/files/doc_financials/2014/Q4/CNL-_-YE-2014AIF_Final[1]_v001_11tc91.pdf) (last accessed March 20 2016.)

<sup>613</sup> “During 2012, the Company received a summary of the results of an airborne geophysical survey performed by AngloGold over a portion of the property. The results are consistent with the long-standing recommendation that the property has potential for large-scale copper-gold porphyry style mineralization. (...) On September 23, 2014, the Superior Court of the District of Antioquia rejected a claim to cancel exploration and mining concessions that encompass traditional indigenous land due to indigenous groups being displaced as a result of security conditions. However, the court did temporarily suspend exploration and mining activities on indigenous land until formal consultation with indigenous communities occur. Approximately 7,726 hectares in the Dojura project are affected by this court ruling. The Company plans to begin the process of consulting the indigenous communities in the affected areas.” See CONTINENTAL GOLD LTD. “Annual Information Form for the Year ended December 31, 2014”, p. 50. Retrieved from [www.continentalgold.com/files/doc\\_financials/2014/Q4/CNL- 2014AIF\\_Final\[1\]\\_v001\\_11tc91.pdf](http://www.continentalgold.com/files/doc_financials/2014/Q4/CNL- 2014AIF_Final[1]_v001_11tc91.pdf) (last accessed March 20 2016.)

measures by the first instance judge of Quibdó. They substantially varied from one case to the other.

In deciding the request for precautionary measures made by the Land Restitution Unit in favor of the Alto Andágueda Reservation, the first-instance court developed an extensive argumentation based on the particular relation between the ethnic community and its ancestral lands. In this regard, it introduced an inclusive concept of territorial rights that encompassed the possibility to grant injunctions with respect to public acts related to the management of natural resources. In particular, they importantly provided for the provisional suspension of the mining titles already conceded, as well as the preclusion of consideration of further concession bids until a final decision on the territorial restitution claim would be issued by the upper Court.

Surprisingly, from the facts of the case, it is evidenced that the same first-instance judicial authority – the First Specialized Civil Court on Land Restitution of Quibdó – substantially changed its position regarding the eventual suspension of mining titles to protect the rights of an ethnic group with the advent of a new precautionary measures claim. In fact, the petition brought up by the representatives of Cocomopoca came only six months after the injunction in favor of the Embera Katio people had been decided. Importantly, it has to be pointed out that this happened around cases that shared most of the same factual elements: the zone, the evidence of territorial injuries, the fact that the victims are recognized ethnic groups, the identity of the mining companies, and even some of the mining titles.

The judge acknowledged the grave situation of the Cocomopoca Afro-Colombian community, the considerable vulnerability of their territorial rights, and the negative impact that certain socioeconomic phenomena – including the development of legitimate mining projects such as the ones carried out by the multinational mining companies of the case – could have on them.

However, it finally decided not to suspend any mining title or further concession bid. In order to support such preclusion, it assumed a legal rationale that was drastically different from the one utilized in the precedent case. It argued that as a transitional justice judge, it had no jurisdiction to decide upon administrative matters; alleged an apparent impossibility to verify a direct benefit on behalf of the mining companies from the facts of violence affecting the Cocomopoca community; and disputed the obligatory character of prior consultation during the pre-contractual phase.

It is not possible to provide direct evidence that the Quibdó judge was affected by any type of coercion or perceived a threat related to the possibility that his decision could eventually affect the economic interests of the multinational mining companies and thus compromise the country's international responsibility – as a consequence of investment arbitration. Yet, it is at least noticeable that this type of shift in the argumentation of the Court was produced in a sudden and obscure way, and invites reflection on the possibility that it might have taken place as the result of some type of external influence.



### **Concluding Remarks**

Assuming a public-law perspective, this dissertation aimed to approach a puzzling conversation that is currently taking place in Colombia between two politically-infused transnational legal processes, which have been identified as paramount for the accomplishment of the country's national project. As a result, this project contends that the legal protection of foreign investment through the conclusion of international investment agreements has entered into tension with the adoption of a transitional justice project oriented to produce significant transformations in the country's society. The principal objective of this exploration was to verify the existence of an essential normative tension that is supposedly produced by the confrontation of the legal orders that correspondingly emerged from the incorporation of these transnational legal processes into the country's Constitutional Order. This in turn led to a discussion of the content and extent of this tension, in order to identify the regulatory implications of the safeguarding of the rights and expectations of foreign investors on the country's sovereign choices associated with the effective achievement of durable peace. Thus, a case study was used to demonstrate that the collision between the abovementioned transnational legal processes materialized in concrete situations and encompassed particular consequences with respect to the exercise of the country's public sovereign choices.

#### **I. What was found**

The introduction of the Colombian Constitutional Order provided an understanding of the country's complex and diverse social background and the aspirational character of the national project, which is aimed to achieve durable peace among the various and competing social interests. In turn, the thorough illustration of the transnational processes under consideration revealed that although they share a liberal matrix, their respectively embedded normative rationales provide

opposite views as to the nature and configuration of the socioeconomic model that the country must adopt in order to achieve its political objectives. Particularly, they provide conflicting prescriptions with respect to the conceptualization and management of land and natural resources located in the country's rural areas. Whereas both processes recognize an economic dimension to these elements (for example, their condition of exchangeable commodities) their social function is openly disputed. Under the perspective of the promotion and protection of foreign investment, lands and natural resources are deemed to be "development locomotives". In this regard, the provision of a stable environment of operation to foreign investors is considered a means of achieving economic growth as long as transnational capital and expertise are considered necessary to take effective advantage of these assets. On the other hand, the transitional justice project considers LNR as both the primary supplies for the correction of the socioeconomic injustices associated with the country's armed conflict, and the ambit within which its transformative action must produce the greatest impact. Thus, the regulatory intervention of public authorities in the prospective adjustment of social relations is recognized as a fundamental mechanism to attain durable peace.

Correspondingly, it was found that the legal regimes that were developed within the realm of these transnational processes entered into direct tension on the occasion of the contrasting of their differing normative perspectives. Although they are deemed to be legal orders that have been coherently articulated around the Colombian Constitutional Order, the emergence of legal disputes around the vindication of the rights and expectations associated with access to and use of LNR is becoming a recurrent pattern. Importantly, while the international investment agreements concluded by Colombia are intended to provide extensive protection to foreign investors' accrued entitlements by placing behavioral duties on the state that can be claimed before an arbitral

tribunal, the transitional justice project includes effective tools to occasionally intervene in the private sphere in order to comply with its reparatory and transformative functions.

Therefore, when this dialogue is studied from a public-law perspective, the argued normative tension is found to entail a large-scale regulatory challenge. As a fundamental structure of global governance, the Colombian state is in charge of performing as an agency of political representation in the context of the effective incorporation of the transnational legal processes under consideration within its jurisdiction. In this context, it was found that the international investment agreements concluded by the country have the potential to place great restrictions on the regulatory activity of public authorities that is oriented towards the adjustment of the social relations in which foreign investor are directly or indirectly involved. In particular, these international legal instruments are provided with a set of standards that can be broadly interpreted when delimiting the behavioral duties of the state and a powerful dispute-settlement mechanism by virtue of which public actions can be reviewed and what pronounced monetary indemnifications may be imposed. As a result, they might restrict or penalize the implementation of the regulatory actions part of the Colombian peacebuilding strategy –including TJP’s land restitution program, insofar as they safeguard the rights and expectations of foreign investors.

## **II. What is at stake**

It is not surprising that Colombia’s rural areas, where the spill-over produced by the internal armed conflict caused the greatest impact, have the highest levels of poverty and social inequalities. Yet, it is shocking that most of the country’s economic potential – a high ratio of land and natural resources – lies therein. In this context, there is an evident historical debt in terms of the recognition of this region’s relegated social structures as a constitutive part of the national project. As a result, the Colombian transitional justice initiative has been designed to overcome a classical paradigm

that is centered on the application of corrective justice to situations that emerged on the occasion of authoritarianism or violent strife. In turn, it has been alternatively configured as a peacebuilding mechanism that aims to bring up a real alternative to break with the vicious cycle of violence and poverty that has marked the country's history. The implementation of both a holistic understanding of the conflict's root causes and a transformative approach centered on addressing structural issues, is expressly intended to crystallize the multicultural and inclusive national project embedded in the 1991 Constitution. Therefore, the resulting regulatory scheme that implements the TJP is infused with the power to eventually adjust social relations by means of the effective intervention in the private sphere's interests, if required. This includes the possibility to affect the property rights and expectations of the economic enterprises located in the rural areas, such as the ones of foreign investors.

The importance of the Colombian Transitional Justice Project transcends the general purpose of bringing about justice and the rule of law to a concrete situation. This is so since the application of its different components and dimensions is crucial for the very fate of the state, the materialization of a still-forming national identity and consequently, the sustainability of its diverse society. Above the finalization of armed hostilities with the insurgent groups, the traditional marginalization of persons and communities that has served as an instrument of capital accumulation must be properly addressed. This should be done by providing effective redress to identifiable injuries on peoples' socioeconomic rights, as well as through the prospective elimination of the discriminatory patterns that have legitimized the prevalent social structures. This, in turn, entails the possibility of setting up alternative schemes through which the political inclusion of the ones historically excluded becomes effective. Herein, the role of law and regulation is paramount. Although the generation of substantial social transformations finds its

source in a political milestone, this process cannot be accomplished if the adequate instruments are not put in place to serve the associated normative aspirations. Unlike other mechanisms of social control – and particularly because of its embeddedness within the social, the legal phenomenon has the capacity to transmit normative rationales, legitimize their incorporation within society, and provide specific institutions, commands and procedures for their effective materialization. It is under these terms that the Colombian transitional justice project should be acknowledged as a second constitutional moment and as an instance of subaltern cosmopolitan legality. It represents an opportunity to set off the country towards the attainment of a more stable national project, coherent with its social base. Therefore, it cannot be merely acknowledged as a simple scheme of public regulatory activity but as a distinctive phenomenon that demands special consideration by those interested in its content and extent, including anyone intending to exert adjudicative review over it.

Following this line of reasoning, an eventual failure in the implementation of Colombia's current peacebuilding strategy as a consequence of the operation of IIAs' disciplinary powers would be devastating. It would cause permanent and insurmountable repercussions on the country's attempt to overcome poverty and violence. At a superficial level, the country would face strong fiscal constraints associated with the impossibility of achieving socioeconomic stability. The defective implementation of transitional justice components, such as the land restitution program, would restrict the chance to adopt an alternative model of rural development that is much needed to reinvigorate economic dynamism in rural areas. The maintenance of both the fragile social situation of the peasantry and the lack of democratic access and use of land and natural resources, would collide with the agrarian accord that was concluded with FARC in the realm of the corresponding peace process. This agreement is the result of a conscious effort by the parties to

address some of the conflict's root causes while projecting into the future to attempt solving the country's socioeconomic issues. Therefore, if the provision of the agrarian accord's performance preconditions – the restitution of usurped lands and the clarification of old disputes around property rights – is blocked by the latent threats posed by the legal protection to foreign investors, the proposed development alternative would not have the chance to succeed in the long term. The bigger picture indicates that the socio-demographic impact of this disappointment would entail two severe repercussions. First, a great portion of the internally displaced people who are confined in the country's urban centers will not have a place to return or be relocated to, so cities will become the primary settlements of conflict and social marginalization (re-victimization). And second, the ethnic communities – the indigenous peoples and Afro-Colombian communities that have ancestrally inhabited the Colombian territory – will tend to disappear, due to the irremediable fracture produced by a separation from ancestral territories. The resultant uprooting and the consequent deprivation of their capacity to intervene in the decisions affecting their territory would lead to the exhaustion of the conditions necessary for their survival as ethnic groups. In the meantime, the countryside will be preserved for large-scale agricultural and extractive activities and the land will maintain its concentration ratio, one of the highest in the world.<sup>614</sup> A final peace accord will eventually be concluded with FARC and the other insurgent groups, thus encompassing a natural decrease in the levels of direct violence. Nevertheless, if there is not a parallel implementation of the retributive and distributive justice actions oriented at adjusting the socioeconomic dynamics that originated and fuelled the conflict, poverty and discrimination will not be reduced and strife will eventually reappear under new slogans or actors. Thus, not even the

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<sup>614</sup> See EFE, “Colombia, uno de los más desiguales por alta concentración de tierras.” *ABC Color*, September 25 2011. Retrieved from <http://www.abc.com.py/internacionales/colombia-uno-de-los-mas-desiguales-por-alta-concentracion-de-tierras-312106.html> (last accessed March 20 2016.)

greatest legal safeguards would persuade transnational capital to arrive in a country sunken under perennial belligerence and instability.

Moreover, the non-implementation of the transitional justice project (in its entirety or in part) by cause of the regulatory constraints exercised by the IIAs would entail serious consequences for Colombia at the international level. Not only the country has acquired political compromises with the international community as to the achievement of durable peace, but owns particular obligations in the realm of the promotion and protection of Human Rights, International Humanitarian Law and International Labor Law that are linked with the victims' rights to justice, truth and reparation. These binding duties could be ultimately breached in case the TJP is not properly implemented through the adoption of the necessary regulatory measures. Thus, Colombia might face the possibility of being found accountable for its inactivity at well-established international governance bodies such as the Inter-American Human Rights System, The International Labor Organization and the United Nations' human rights monitoring mechanisms. For instance, in a recent decision the Inter-American Court of Human Rights found Paraguay responsible for the violation of the collective rights of an indigenous community, which had been displaced on the occasion of the advancement of an economic project carried out by a multinational corporation on its territory. In this case, the Court rejected the state's defense as to the existence of duties derived from an international investment agreement with the foreign investor's home country. In particular, it pointed out that "the enforcement of bilateral commercial treaties negates vindication of non-compliance with state obligations under the American Convention; on the contrary, their enforcement should always be compatible with the American Convention, which is a multilateral treaty on human rights that stands in a class of its own and that generates rights for

individual human beings and does not depend entirely on reciprocity among States”.<sup>615</sup> Moreover, since the Inter-American Human Rights System has identified the Colombian transitional justice project as a priority case, it is reasonable to expect close scrutiny on its implementation.<sup>616</sup>

A third scenario to consider is the possible activation of the dispute-settlement mechanism included in the IIAs concluded by Colombia, a consequence of the effective implementation of measures stemming from the transitional justice project. Foreign investors, whose economic interests were arguably affected on the occasion of the regulatory activity of the state, would go before arbitral tribunals to claim liability. Whether this is the case, it is inferable that the quantity and ratio of the monetary indemnifications that the country would be obliged to pay as compensation could produce grave setbacks on its already fragile economy. This assertion is built on the consideration of previous awards that decided upon similar situations that occurred in the region. For instance, in the context of a bilateral investment treaty concluded between Ecuador and the United States, in 2012, an ICSID arbitral tribunal decided upon an investment dispute about the passing of a domestic regulation that cancelled a 30-year concession granted to a US oil company that operated several wells in the former country. As a result, Ecuador was ordered to pay around US 1 billion dollars for the breach of fair and equitable treatment and indirect expropriation provisions included in the IIA.<sup>617</sup> This sum amounted to approximately 5% of Ecuador’s general budget for 2012, which speaks clearly about the fiscal implications of these

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<sup>615</sup> See INTER-AMERICAN COURT OF HUMAN RIGHTS. *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of March 29, 2006.* Series C No. 146, par. 140.

<sup>616</sup> See INTER-AMERICAN COMMISSION ON HUMAN RIGHTS. *Truth, Justice and Reparation: Fourth Report on Human Rights Situation in Colombia.* OEA/Ser.L/V/II.Doc. 49/13, 31 December 2013.

<sup>617</sup> Originally, Ecuador was ordered to pay US 1.8 billion, but this amount was reduced after an annulment proceeding. See INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES – ICSID. *Occidental Petroleum Corporation Occidental Exploration and Production Company (Claimants) Vs. The Republic of Ecuador (Respondent)*. ICSID Case No. ARB/06/11, Award of October 15 2012, par. 876; Decision on Annulment of the Award of November 2 2015, par. 586.



kinds of procedures on developing countries.<sup>618</sup> Considering the similarities encountered in the type of activities that foreign investors conduct in these countries and their respective levels of development, it is likely that Colombia could face comparable predicaments. Particularly, with respect to the awarding of large sums, on the occasion of the exercise of sovereign prerogatives, they have the potential to thoroughly strike down Colombia's economic sustainability. In this regard, Colombia is a small-scale economy that has historically incurred massive loans to support the funding of its budgetary needs, and is currently facing a severe recession that is partly linked to the global oil and financial crises. Thus, scarce resources that were initially allocated to serve socioeconomic goals would have to be used to cover the repercussions of these arbitral awards. The general discontent produced by these arbitral decisions would unchain political instability and consequent impulsive responses from the government, which would aggravate the already severe situation.

The account of these challenging scenarios speak about what is at stake with the encounter of these colliding vernaculars. That is, what are the implications of the normative tension produced by the – either pre-emptive or actual – constricting influence of international investment agreements on the effective implementation of the Colombian transitional justice project. Prominently, it comports an assessment of the function and purpose of sovereignty within a modern global society that governs itself through complex dynamics that combine domestic and international structures with transnational dynamics. In turn, a normative dilemma is intrinsically attached to the political question. It involves accepting the existence of conflictual approaches as to the nature of Colombian society and the way in which social problems should be therein addressed. There is a

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<sup>618</sup> See MINISTERIO DE FINANZAS DEL ECUADOR. “Presupuesto 2012-2015.” Retrieved from <http://www.finanzas.gob.ec/wp-content/uploads/downloads/2012/08/A%C3%B1o-2012.pdf> (last accessed March 20 2016.)

pretention about achieving an homogeneous social setting, formed by free individuals that seek to maximize their preferences in the realm of the market and the rule of law. Yet, this version is confronted by the portrait of a diverse and unequal society that requires both the active intervention of the polity to adjust unjustified and disproportionate disparities, and the solidarity of the private sphere on the occasion of these adjustments. These considerations leads to inquiring about the role of the law in Colombian society. Particularly, whether the law predominantly serves as a mechanism of social control to regulate variant expectations or if it can also be deemed an effective instrument to produce structural transformations.

At a first glance, the problem emerging between the protection of foreign investment via IIAs and the implementation of transitional justice in Colombia may be related to the way in which the law has been arranged to address competing social interests. From this perspective, the solution to the issue lies in the awareness that the satisfaction of the rival concerns should be conducted with limited means and upon the recognition of private accrued rights. Due to the latter's relative inviolability, the action of public authorities is shaped. This approach does not consider the context in which these potential disputes are produced nor the implications of a given allocation on the allocator's mandate – in this case, on the country's Constitutional Order. Therefore, the ensuing response would be based on both the respect of the pre-established rules of the game and the maximization of the available resources to be distributed, regardless of any normative orientation distinct to respecting the rule of law and achieving the greatest utility. Most likely, it could be argued that Colombia has willingly consented to the restriction of its sovereign prerogatives, so the eventual regulatory discipline occurs in accordance with the law and is legitimated by the aim of safeguarding the rights and expectations of profitable businesses. Thus, the responsibility in which the country might have to incur the legal changes produced by the transitional justice project

would be founded on both the expectations generated by the sovereign on the private sphere and the quantifiable effects of the public conduct that produced the breaching of these legal concessions.

However, this normative tension can be viewed from an alternative perspective. Unlike the previous account, this distinct regard is founded on the recognition of the paramount relevance of both the surrounding context and the social and political implications of these types of conflicts on the evaluation of the alleged normative tension, which takes place in the realm of the country's Constitutional Order. These elements introduce exceptional considerations that should be taken into account when assessing the regulatory actions that the state has taken on the occasion of the abovementioned dilemma. This includes any decision as to the eventual imposition of either compensatory sanctions or restrictions on the sovereign choices of the governance actor. Starting with the most salient point, the nature and extent of sovereignty should be revisited. Through the framework of a legal conflict, its eventual allegation should be made in light of both the progressive change of the state paradigm and the evidence of an emerging transnational and diverse society, which can only be governed through the lens of inclusion and cosmopolitanism. It is neither a matter of claiming deference to public actions under the grounds of broad and obscure references to national independence or peoples' self-determination, nor demanding inexcusable coherence with respect to the preliminary assumption of similarly ample and vague behavioral obligations by the polity. Nowadays, sovereignty should be acknowledged as a prerogative defined by functional contours, whose claim must be carefully conducted with reference to particular normative explanations rather than as a simplistic spell.

Further, it is argued that the international investment agreements concluded by Colombia might not be interpreted and applied in such a way that the operation of public regulatory schemes, like

the one implementing the country's transitional justice project, is limited. In case of the emergence of tensions, the protection offered to foreign investors' rights and expectations – whichever are the nature of the aims appealed or the pedigree of the means adopted – can not be deemed to be a compelling reason to disregard the crucial opportunity for the country to advance in the crystallization of the lasting-social-peace aspiration. Not only does this goal lie at the very heart of the national project, it represents the interests of the majority of the Colombian population and encompasses the possibility to address the rights of those who have been historically marginalized. The IIAs under discussion are in effect the result of the exercise of sovereign prerogatives and place-binding obligations on the state. Their formal validity is not herein discussed. Yet, they cannot be amounted to impregnable commands able to shape indeterminately the country's public policy space. In this regard, they might not be advertised in a way that public authorities end up preventing from acting in accordance with their mandate, nor be interpreted as authorizations to deliberately review Colombia's public conduct. Be it as it may, the legal phenomenon cannot be properly comprehended outside of the social framework within which it is given meaning and functions as a mechanism of control. Therefore, any effort to find a solution to this normative tension must acknowledge both the transnational nature of the interests at stake and the marked political character of the corresponding epistemic communities. Contrary to what has been argued by certain champions of International Investment Law, the legal responses to investor-state controversies must encompass strong political considerations rather than mere technical disquisitions. This is not to suggest that the law has a modest role in the settlement of these type of disputes. Quite the contrary, the legal phenomenon should be realized as a mechanism that can lead to the production of social transformations as long as they are identified with the attainment of the Colombian Constitutional Order. In turn, the neutrality mask that is usually worn by both

international investment agreements and investor-state arbitration should be removed in order to proceed with a more honest dialogue among the different positions under *mêlée*.

All things considered, it is not improbable that particular investment-related legal disputes – such as the one suggested by the dissertation’s case study – end up emerging on the occasion of the implementation of the regulatory measures stemming from the Colombian TJP. Thus, it is expected that prospective investor-state arbitrations will address the occasional breaching of IIAs’ obligations at the expense of foreign investors. In such an eventuality, under the assessment of state responsibility, the adjudicators should go beyond a simple evaluation of the negative impact that these measures have caused on the claimants’ rights and expectations. They might also want to consider the particular factors and conditions surrounding the conduct of the state that is pointed as the alleged source of the harm produced on foreign investors. These include Colombia’s socioeconomic background, the political considerations that determined the decision to implement the transitional justice project and the distinctive character of the associated regulatory scheme. Likewise, with the purpose of maintaining a coherent international legal system, arbitrators could not discard from their assessments certain international human rights obligations upon which Colombia proceeded to design its peacebuilding strategy. In the same way that the IIAs concluded by Colombia generated expectations on foreign investors, these commandments have produced valid prospects on the Colombian population, which must be honored by the public authorities. In sum, those deciding upon the responsibility of Colombia must balance the undeniably legal interests of transnational capital with the expectations of a whole country on the achievement of durable peace.

### **III. What to expect**

It is expected that further investment-related conflicts around the adoption of the Colombian transitional justice project, prone to affect the country's sovereign choices, will increase in the short term. In the first place, the implementation of TJP's regulatory scheme is a legal mandate that comes from the very heart of the country's Constitutional Order. Although the process may find detractors and significant hurdles, transformative justice components such as the land restitution program will continue advancing. In parallel, the endorsement of a peace accord with FARC and other insurgent actors, which contemplates a serious adjustment of social relations in the rural areas through the eventual intervention in the private sphere's economic interests, has reached a point of no return. Thus, there is a high probability of encountering new investor-state disputes around access to and use of lands and natural resources in the country's rural areas, like the one that involved the protection of territorial rights of ethnic communities in the Choco Department at the expense of the mining titles granted to a number of multinational mining companies. It is not clear, however, whether the significance of this situation has been acknowledged by the Colombian government, due to its apparent reluctance to accept the regulatory implications of the legal protection to foreign investors via IIAs on its own governance capacities. Yet, the very existence of a mechanism to address occasional international investment disputes represents a note of optimism towards the defense of the peacebuilding process, and, particularly, the safeguarding of the victims' interests. Not only does this category include those directly affected by the armed conflict, but also the entire Colombian population that live under conditions of poverty and social exclusion.

Moreover, new tensions of this kind are currently emerging in a variety of regulatory areas such as the protection of the environment or the health industry. For instance, in August 2014, a

controversy around the regulation of the production of biotechnological medicaments emerged between the Colombian government and a number of foreign pharmaceutical companies operating in the country. The Ministry of Health had considered passing an executive decree to modify the domestic norms on the matter, and in doing so would facilitate the generic production of this type of medicine. In particular, it was intended to adjust the traditional route to obtain the corresponding patents for the sake of avoiding the consolidation of a monopoly leading the multinational corporations, and thus increase the chances for poor people to access this medicine. Consequently, a provision of this kind would immediately open the door to internal competition and a subsequent reduction in the price of certain products that were part of the companies' patent stock. As soon as the government's regulatory initiative was noticed by the potentially affected foreign investors, diplomatic support was sought from the home countries' diplomatic missions in Colombia. In this regard, both the United States and the Swiss embassies sent letters to the Minister of Health, Alejandro Gaviria, expressing great discontent related to the plan to issue the executive decree.<sup>619</sup> Furthermore, the anger of these multinational corporations reached the Colombian ambassador in Washington, who in turn sent a letter to the Ministry of Health, informing them of the situation and warning them about the possible negative outcomes that the planned regulation would have on Colombia, in accordance with the Free Trade Agreements that these countries had concluded in 2007.<sup>620</sup> The response of the public authority was nothing but a "we are ready to battle", so the decree was finally approved.<sup>621</sup> Hopefully, the occurrence of these kinds of incidents persuade the

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<sup>619</sup> See DUZAN, María Jimena. "'Un solo competidor bajaría el precio en un 30 o 40 por ciento.'" *Semana*, August 30 2014. Retrieved from <http://www.semana.com/nacion/articulo/alejandra-gaviria-un-solo-competidor-bajaria-el-precio-en-un-30-40-por-ciento/400918-3> (Last retrieved December 30 2015).

<sup>620</sup> See EL ESPECTADOR. "Crece escándalo por apoyo de Luis Carlos Villegas a farmacéuticas." *El Espectador*, August 19 2014. Retrieved from <http://www.elespectador.com/noticias/politica/crece-escandalo-apoyo-de-luis-carlos-villegas-farmaceut-articulo-511352> (Last retrieved December 30 2015).

<sup>621</sup> See EL ESPECTADOR. "Presidente firma decreto sobre medicamentos biotecnológicos." *El Espectador*, September 18 2014. Retrieved from <http://www.elespectador.com/noticias/salud/presidente-firma-decreto-sobre-medicamentos-biotecnolog-articulo-517464> (Last retrieved December 30 2015).

Colombian government to either revise the existent investment treaties or at least reconsider the negotiation of new international compromises of this kind.

Considering both the content and extent of the international investment agreements endorsed by Colombia and the particularities of the above-mentioned transitional phase that the country is going through, the eventual emergence of investment arbitration cases involving the Colombian state can be reasonably anticipated. This fact, along with the essential purpose of expanding the critical comprehension of the issue beyond its mere assumption, invites further research devoted to addressing the following issues. The first is the identification and characterization of further scenarios of tension between the issuance of social-oriented public regulation and the legal protection of foreign investment via international investment agreements. The second is the systematic production of case studies to explore the implications of these tensions, including the conditions under which situations of regulatory chill might take place. The third is the elaboration of anticipatory analyses as to the content and extent of the investor-state legal controversies that countries like Colombia would have to face on the occasion of the emergence of these kind of disputes. Finally, the fourth issue is the exploration of reliable and sustainable alternatives in the regulation of the relations between host states and foreign investors, which include the imposition of correlative duties on the latter in order to balance social interests and expectations.



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