

International Investment Law and Ethnic Land Restitution in Colombia: Tensions within Transitional Justice Frameworks

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ABSTRACT

Colombia's transitional justice framework incorporates a range of mechanisms designed to address the harms suffered by victims of its prolonged internal armed conflict. Among these mechanisms is a specialised judicial process enabling ethnic communities affected by land dispossession and forced displacement to seek the legal and material restitution of their ancestral lands and territories. While this framework reflects a strong formal commitment to restorative justice, its implementation has increasingly encountered friction arising from competing economic interests, particularly those of foreign-owned mining enterprises operating on contested land. This article examines the interaction between Colombia's ethnic land restitution programme and the international legal protections afforded to foreign investors under international investment agreements. Through an analysis of restitution cases involving overlapping claims by ethnic communities and mining companies, the article demonstrates how state institutions responsible for implementing restitution have exhibited growing sensitivity to investor interests. This sensitivity is reflected in the cautious use of legal remedies that might impose significant burdens on mining operations, even where such remedies could advance the restitution claims of displaced communities. Focusing on a representative case study, the article provides evidence that this institutional caution has been shaped by concerns over potential international investment arbitration proceedings against the Colombian state. The prospect of costly disputes under investment treaties appears to influence domestic decision-making, subtly reshaping the balance between victim-centred restitution and the protection of foreign investment. The article argues that this dynamic exposes structural tensions within transitional justice processes when they intersect with international economic law. It highlights the risk that restitution programmes, particularly those addressing the rights of vulnerable ethnic groups, may be constrained by external legal regimes that prioritise investor protection. The article concludes by calling for greater coherence between transitional justice objectives and international investment law to ensure that restitution mechanisms fulfil their restorative and distributive aims without undue external constraint.

KEYWORDS: land restitution; international investment law; transitional justice; ethnic communities; Colombia; investment arbitration

Introduction

In Colombia, the Law on Victims and Land Restitution 1448 (hereafter LVLR) was enacted in 2011, with the aim of establishing a set of measures to repair victims of the internal armed conflict in a transitional justice framework. This law was accompanied by

the enactment of two decree-laws (Decree-Laws 4633 and 4635) that aimed to cover victims of indigenous and Afro-Colombian communities by recognising their fundamental territorial rights. One of the main purposes of the LVLRL and of the decree-laws is the establishment of a judicial process allowing the victims of forced displacement and land dispossessions linked to the internal armed conflict to request from a judge or tribunal the integral restitution of the land or territory from which they were displaced. According to this normative, the rendered ruling by the restitution judge or tribunal constitutes sufficient title of property, possession, or occupation of the land. The land restitution programme and its judicial enforcement are based on the highest standards of international human rights and international humanitarian law on the rights of internally displaced persons.

The land restitution programme and its judicial enforcement, however, can disrupt the interests of the current owners or stakeholders of the land requested in restitution. This can result in tensions between the land restitution programme and the international investment law (IIL) system, given that property titles or interests in the land or territories held by foreign investors, such as concessions or titles for the exploration and exploitation of natural resources, can be reversed in favour of the victims. In turn, this can lead to investment arbitration claims against the Colombian state based on alleged breaches of one of the 19 investment arbitration agreements (IIAs) ratified by Colombia, which include provisions on protection against expropriation, fair and equitable treatment and non-discrimination among others.

This article aims to assess some of the tensions that could arise between the ethnic-based land restitution programme and the IIL system. In doing so, it analyses the interventions made by the Land Restitution Unit (LRU) in eight ethnic-based land restitution cases that involved mining titles in the period between 2011 and 2018. The analysis pursued shows that since the first ethnic-based land restitution case, the LRU has shifted from requesting the annulment of mining titles, a stronger legal position for the benefit of the communities, to a weaker position either requesting the suspension of such titles or, indeed, avoiding any request regarding their legality. The evidence shows that the LRU is avoiding the request of certain remedies that might be excessively detrimental to foreign and, by extension, national companies. This omission has impacted the decisions rendered by ethnic restitution judges. Our thesis is that the LRU is fulfilling its role of representing the victims' interests only until they come into conflict with the interests of foreign investors. Hence, there is early evidence of a 'chilling effect' of IIL on the land restitution programme in Colombia. This early evidence raises issues related to the suitability of the LRU's role of representing victims in these cases, as well as to the way states may balance conflicting interests stemming from the need to provide reparation to victims of the armed conflict, on the one hand, and international economic law obligations, on the other hand.

The remainder of this article proceeds as follows. The first section provides an overview of the land restitution programme and the initial decisions of the restitution judges in the first two ethnic cases. The second section discusses the remaining ethnic restitution cases that have been concluded at the time of writing that involve ownership of concessions held by mining companies. A clear division can be drawn between the first two cases and the remainder regarding the level of interference in the interests of intervening or opposing companies. The third section discusses the justification provided by the LRU for its

decision to avoid requesting certain remedies in ethnic restitution cases on the basis that the state might be deemed responsible for breaches of IIAs. The fourth section analyses the implications of the LRU's reasoning for both the LRU's role in the ethnic land restitution cases and the existence of a regulatory chill effect arising from IIL. Finally, the article presents its main conclusions.

The ethnic-based land restitution programme in Colombia

The clashes over land control between state agents, economic actors and illegally armed groups have been one of the key features of the internal armed conflict in Colombia. This has led to the displacement of people through systemic and persistent violence and dispossession of abandoned lands. In addition, issues surrounding land, property and tenure have exacerbated land concentration and the high levels of land inequality in the country, which are one of the conflict's main causes. In several cases, both national and international companies were either directly or indirectly involved in acts of displacement and dispossession as a result of economic interests linked to the land. In 2018, the United Nations High Commissioner for Refugees reported that Colombia had an alarming number of internally displaced people, exceeding 7 million.

In this context, the land restitution programme was intended to follow the highest international human rights and international humanitarian law standards on the victims' rights to reparation, truth and justice, which include international treaties, but also soft-law instruments, such as the Pinheiro Principles and the Deng Principles, that deal with the rights of internally displaced people to return and resettlement and to housing and property restitution, respectively. As such, the victims' land restitution right, which has been consistently considered as a fundamental right by the Colombian Constitutional Court, is one of the programme's main components.

While the LVLR is globally aimed at attention, assistance and integral reparation for victims of the internal armed conflict, the Decree-Laws 4633 and 4635 aim at attention, assistance, protection and the restitution of territorial rights for victims belonging to indigenous and Afro-Colombian communities, respectively. The main reason behind this distinction, as stated by the decree-laws, is to provide these groups with a regulation that considers the ethnic and cultural diversity of the country, while complying with their right to prior consultation. Contrary to the LVLR, the drafting of the decree-laws was accompanied by consultation with the indigenous people and the Afro-Colombian communities concerned. The prior consultation right at the centre of the victims' protections provided by the decree-laws is based on the Indigenous and Tribal Peoples Convention of the International Labour Organization (OIT-169), the Colombian Political Constitution (articles 2, 7, 40 and 330) and the constitutional jurisprudence. Under these instruments, prior consultation is a fundamental right, which requires that any act, project, work, activity, or initiative that may directly affect the ethnic communities, or that intends to intervene in their territories, such as the exploration and exploitation of its natural resources, involves consultation between the government and the peoples concerned.

The restitution of territorial rights is the main form of reparation provided by the decree-laws that differentiates them from the LVLR, which aims primarily at the restitution of individual land rights. This focus is explained by 'the historical, economic, political, cultural and spiritual relationship that the ethnic groups have with their territory.' The

decree-laws are based on recognition of the injustices, marginalisation and segregation that both indigenous people and Afro-Colombian communities have suffered throughout history. As such, a guiding principle of both decree-laws is recognition of the fundamental nature of the territorial rights of indigenous people and Afro-Colombian communities.

The procedure set forth for the restitution of collective land rights consists of administrative, judicial and post-ruling phases. In the administrative phase, led by the LRU an entity created by the LVLRL, attached to the Ministry of Agriculture and Rural Development the eligibility of the claimant's application is studied and a report is prepared on the land dispossession and displacement allegedly suffered by the applicants. If this report concludes that the impacts did take place, the claimed land is registered in the National Registry for Dispossessed and Abandoned Lands. The LRU is in charge of filing the claim to the restitution judge who, having assessed the admissibility of the case, is required to allow the submission of formal opposing claims for a 10-day period. If no opposition occurs, the judge retains jurisdiction. Conversely, in cases where opposing claims are submitted and opponents are formally linked to the procedure, responsibility shifts from the restitution judge to a magistrate of the superior district tribunals that specialise in land restitution. After the evidence is studied, the judge or tribunal issues the ruling in which the issues raised by the LRU's claim and the opposing claims, if any, are settled.

Notwithstanding the fact that the restitution judges are members of the ordinary civil law jurisdiction, the land restitution procedure is part of the transitional justice and, accordingly, it has an extraordinary and exceptional nature. At the same time, contrary to the ordinary procedures, its purpose is not the achievement of the formal truth but reparation for the victims, which requires material truth and a more proactive adjudicator. This explains why the decree-laws contain provisions that depart heavily from the traditional civil procedural logic. First, the burden of proof is reversed in favour of the victims, meaning that uncontroverted evidence from the claimants is sufficient to prove territorial affectation. Second, several presumptions in favour of the victims are included such that, when the conditions established by the decree-laws are met, the transactions, administrative acts, or judicial rulings that transfer, grant, or recognise rights in rem over the indigenous reservation area, the collective titled land, or the land where the ethnic groups enjoy their territorial rights, are to be deemed either inexistent or null and void, depending on the applicable presumption.

The Andágueda ruling was the first issued in relation to the application of Decree-Law 4633 (2011), which, alongside Decree-Law 4635, was issued by the Colombian National Government following the special faculties given to it by the LVLRL. On September 23, 2014, the Specialized Civil Chamber of Land Restitution of the Superior Tribunal of the Antioquia department issued its ruling on the request for land restitution submitted by the Embera Katio people of the Alto Andágueda indigenous reservation. The ruling ordered, among other things, the protection and restoration of the land rights of the Embera Katio people and their return to the land as a consequence of the dispossession, abandonment and confinement to which its members were subjected because of the internal armed conflict. Notably, the ruling ordered the National Mining Agency (NMA) to suspend the existing and requested mining titles and concessions on the land that overlapped with the reservation area. The opposing claims presented by the Colombian branches of Continental Gold Limited and AngloGold Ashanti, the Ministry of Mining and

the NMA, were dismissed entirely by the tribunal. In the Andágueda case, the LRU requested the restitution judge to declare either the inexistence of the concession contracts or the annulment of the mining titles that overlapped with the area of the Andágueda indigenous reservation. Specifically, the LRU's request was based on the applicability of the presumption of inexistence of the transactions that transferred or constituted property rights or other rights in rem on the indigenous reservation land.

While the tribunal found that territorial affectations had occurred and that the fundamental prior consultation right of the Embera Katio people had been breached, it did not find the presumption identified by the LRU to be applicable because the concession contracts and the mining titles were not transactions by means of which the land was transferred or property rights on the land were conferred. The tribunal added that they were not administrative acts that recognised or conferred any rights in rem on the land in favour of third parties. Instead, the tribunal decided to suspend the contracts and titles on the basis of article 166(6)(b) of Decree-Law 4633, which permitted it to take this action regarding projects that did not comply with the prior consultation right. However, it omitted any consideration of or reasoning for the inapplicability of article 166(b)(a), which provides for the annulment of the administrative acts that enable these projects, and would have encompassed the mining titles and potentially any act surrounding the subscription of the concession contracts. Although some of the legal arguments chosen by the LRU and some of the legal justifications presented by the tribunal in the Andágueda case have been subject to criticism, both the LRU's claim and the tribunal's ruling are representative of the most ambitious aspects of the land restitution programme.

The Andágueda decision was followed by a second important ruling by the restitution judge of the southwestern municipality of Popayán, issued on July 1, 2015, in application of Decree-Law 4635. The ruling studied the land restitution claim presented by the LRU in representation of the Community Council of Renacer Negro de Timbiquí, which collectively held land awarded by the state in 2001. In this case, the community had been affected by violent events that commenced in 2003 but worsened around 2010, when the disputes between guerrilla and paramilitary groups for the control of the territory led to massive forced displacements of the families of the community. In addition to the presence of illegally armed groups on the territory, aerial sprayings of illicit drug cultivations with glyphosate affected the health of the community's members. Moreover, legal and illegal mining activities had taken place extensively across the territory. At the date of the claim, several mining titles had been granted to limited companies, including Cerro Matoso, a branch of the South32 multinational corporation, and several applications for concession contracts had been presented by companies, including the limited company Anglo American Exploration Colombia.

Among the requests addressed to the judge, the LRU asked for the annulment of the mining titles on the grounds of the applicability of the presumptions of the decree-law, given that the Community Council had not been consulted on their issuance, breaching its fundamental prior consultation right. Thus, the LRU replicated the reasoning that it had adopted before the Andágueda judge, that is, that the breach of the prior consultation right regarding a given project in the case should entail the annulment of its corresponding titles and concessions. Interestingly, the aforementioned companies refrained from presenting formal oppositions during the proceeding, which, as mentioned,

would have automatically given jurisdiction to the hierarchical superior judge, the restitution tribunal.

In the ruling, the judge recognised that the prior consultation right had been breached but stated that the presumptions were not applicable because the titles and concessions were not transactions that constituted rights in rem over the land, nor did they limit or affect the property of the Afro-descendant population, as required by the decree-law. In addition, they were not administrative acts that recognised or granted rights in rem on the collective territory in favour of third parties. The judge considered that the applicable remedy was that provided by article 130(i) of the decree, which allowed it to declare the annulment of the administrative acts that granted individual or collective rights or that modified legal situations that were detrimental to the communities, including mining permits and concessions for the use of natural resources on their territories. However, the judge decided to substitute annulment with suspension, without further justification beyond the fact that the latter was a ‘transitory mechanism’ and that it could be lifted once the prior consultation was carried out.

The common feature of the *Andágueda* and the *Renacer Negro* cases, which were considered emblematic landmark decisions, was a request for annulment by the LRU of the mining titles and concessions granted on land that overlapped with the territory of the indigenous reservation and of the Afro-Colombian communities and the declaration by the judge of their suspension. These rulings, and particularly the annulment claims, reportedly caused discomfort in the national government, as they were in opposition to its extractive policies. This discomfort resulted in the issuance of a circular by the LRU’s General Sub-Directorate, in which it instructed the Ethnic Affairs Directorate that if it observed any effects related to certain economic activities in future restitutions, it would be required to consult with a newly created body of the LRU, referred to as the Team on Environmental, Mining-energy and Infrastructure Issues (AMEI from its acronym in Spanish), on these matters and be required to incorporate its concepts in the eventual claim. As reported by Tamayo-Álvarez, this was interpreted as a government attempt to exert stricter oversight on the restitution claims presented by the LRU in cases that related to mining or hydrocarbon projects financed with foreign capital. This has also been deemed as opposite to the type of policy that land restitution institutions should adopt in order to address certain disincentives behind the perceived unsatisfactory advancement in cases involving business actors. Moreover, it is worth mentioning that the creation of this body with this consultative role did not have any legal basis in the framework governing the LRU.

The increasing timidity of land restitution institutions when confronted with mining interests in ethnic cases

At the time of writing this article, 18 ethnic-based land restitution rulings have been issued, 16 based on application of Decree-Law 4633 and two on the application of Decree-Law 4635. Out of these 18 rulings, at least seven have dealt with the issue of either existing or requested mining titles or concessions on land that overlaps totally or partially with the land claimed for restitution; the *Andágueda* and the *Renacer Negro* rulings being the first two. All of these seven rulings have been decided in favour of the claimant ethnic groups, recognising their condition as victims and ordering the protection and restoration of their land rights. However, between the first two rulings and the subsequent rulings,

there have been key differences in the way that the LRU and the restitution judges and tribunals have addressed third-party rights on the land. As a result, the rulings can be categorised into two groups. The first group includes rulings on which there was a request for annulment by the LRU or a ruling of suspension by the judge or tribunal. The second group includes the rulings on which there was a request for suspension or no request whatsoever by the LRU and a restitution ruling that either dismissed the request for suspension or omitted to rule in this regard. In addition, as occurred in the Renacer Negro case, companies with interests in the outcome of the proceedings refrained from presenting formal oppositions in these cases, with only one exception. By doing so, restitution judges, more prone to be affected by undue external pressures, retained their jurisdiction. The likely explanation for this is the fact that, in the Andágueda case, where oppositions were submitted and the restitution tribunal gained jurisdiction, the outcome for the opposing companies was adverse.

The first ruling that we analyse relates to the Dogibi-Eyáquera case. In this case, a restitution judge declared the suspension of titles and concessions for projects that breached the prior consultation right. The Dogibi-Eyáquera ruling was issued on April 5, 2016 by a restitution judge of Quibdó on application of Decree-Law 4633, following a claim presented by the LRU on behalf of the indigenous community of the Embera-Dobida Dogibi reservation and of the Eyáquera ancestral territory. The indigenous people who inhabited the ancestral territory were subjected to several forced displacements and land dispossessions from 1996, as a result of violent acts inflicted by paramilitary groups and clashes between military forces, guerrilla groups and paramilitary groups. Indigenous leaders had made continued efforts from 1994 to obtain a formal constitution for the Dogibi reservation from the state. This only occurred in 2012, following a ruling of the Constitutional Court.

Several applications for mining concessions were in progress on the land requested in restitution. However, the LRU did not find any grants in force at the time of the claim, which was confirmed by the NMA. This was probably the reason why no request for annulment of mining titles or concession contracts was presented. However, on analysis of the evidence, the judge found that there was an overlap between the applications for concessions and the land requested in restitution for which the prior consultation requirement was not met. The judge considered that while the granting of titles did not conflict with the right to restitution, it did prevent its formalisation and material fulfilment and, when the indigenous people were not consulted, it breached their fundamental rights to traditional property, self-government and social organisation. As a consequence, the judge ordered the NMA to suspend the applications for mining titles and concessions, as well as the titles and concessions in force, if any existed, that overlapped with the territory of the indigenous reservation to guarantee compliance with the prior consultation requirement. No motivation or reasoning was provided for why suspension was deemed to be the applicable remedy rather than annulment.

Contrary to the Dogibi-Eyáquera ruling, the tribunal on the Nuevo Espinal case found that there were no mining titles in force that overlapped with the land claimed in restitution, despite the LRU stating this in its claim presented on behalf of the Wayuu indigenous community and the Nuevo Espinal settlement. In the Nuevo Espinal case, a claim was submitted regarding the forced displacement and the land dispossession to which its members were subjected following violent acts that had taken place from 1993,

with the presence and clashes of illegally armed groups. Notably, the LRU requested a declaration of annulment of a mining title that allegedly overlapped with the claimed land, in an application of the decree's presumptions. As no real overlap existed, the ruling of the restitution tribunal of Cartagena, issued on June 23, 2016, was limited to ordering the government agencies, including the NMA, to ensure that the indigenous rights and the international standards were respected in upcoming applications and granting of mining titles and concessions. The Nuevo Espinal case was the last occasion on which the LRU requested the annulment of mining titles and concession contracts on land that overlapped with the land requested in restitution. In the three cases that followed involving similar or identical situations, the LRU adopted different approaches.

The Mondó-Mondocito case was solved with a ruling issued on November 29, 2017, on application of Decree-Law 1633. In this case, the LRU represented the Emberakati Mondó-Mondocito indigenous territory. Since 1981, the communities of the territory had been affected by the presence of guerrilla groups and their clashes with paramilitary groups and military forces. The violent events, including homicides and threats, led to the forced displacement and dispossession of the indigenous people from their land between 1997 and 2012. In addition, at the time of the award, a mining concession contract on the requested land was in force and several applications for mining titles were being considered, from companies including the Colombian branch of AngloGold Ashanti and Continental Gold Limited. As neither the concession contract nor the mining applications had complied with the right to prior consultation, the LRU asked for their suspension not their annulment for as long as the infringement persisted.

The restitution judge of Quibdó stated that it had not been demonstrated that the granting of the mining concession or the applications for mining titles were coexistent with the violent events that led to the displacement, nor had it been demonstrated that they were linked to them. Furthermore, the judge considered that restitution judges had no jurisdiction to rule on the territorial affectations that were caused by an activity that did not comply with the prior consultation right and that had no relation to the internal armed conflict, which were to be dealt with by ordinary and constitutional judges. As a consequence, the claim that sought the suspension of the concessions and applications was dismissed.

In the Yurumanguí case, the LRU represented the Community Council of the Yurumanguí Cuenca del Río. In this case, the LRU requested the suspension of applications for mining concessions. In 2000, the state had awarded the Community Council a collective territory of 54,776 hectares. Pacific Mines presented a formal opposition to the claim and controverted the existence of this land allocation by the state. In 2011, Pacific Mines had acquired property titles on the land requested for restitution. In 2013, it had presented two applications for mining concessions that did not comply with the prior consultation right. In its ruling of December 18, 2017, the Land Restitution Tribunal of Cali declared the inexistence of the legal transactions that had taken place on the land since 1976. It found that the ownership of the land by the sellers had been terminated by the state in that year on the grounds of its nonexploitation. Regarding any possible affectation of the prior consultation right, the tribunal ordered that the current and future applications for mining concessions were to be subject to the prior consultation procedure, without explicitly addressing the suspension request presented by the LRU.

The Arquía case was the third case that demonstrates how the LRU took a different approach, moving away from the position adopted in the Andaguada case. In this specific case, the LRU represented the interests of the Cuna people of the Arquía Community indigenous reservation, in relation to applications for mining concessions from Capricornio and Nacional de Minerales y Metales, which did not comply with the prior consultation right. However, the LRU did not file any request for annulment or suspension of the mining concession. The judge interpreted this omission as an implicit acceptance by the LRU that the applications were not related to the internal armed conflict. In addition, the judge affirmed that a breach of the prior consultation right could barely be observed from the claim, but that the LRU had not presented any explanation or evidence to prove that this omission was related to the conflict. Accordingly, the judge determined that no decision was to be adopted on the matter. In any case, the judge was not necessarily bound by the claims and evidence brought by the LRU, as the judge rather than the LRU makes the final assessment of the facts.

Finally, the San Lorenzo case was the last case in which there was an overlap between requested land and land upon which a mining title had been granted. In this case, the company Minerales Andinos de Occidente obtained a mining title on the ancestral land of the San Lorenzo indigenous reservation. Contrary to the Arquía case, the LRU did seek the suspension of this title based on a breach of the prior consultation right. The restitution judge agreed that a breach had existed but found that the company had waived its mining rights on the relevant land and that, consequently, there was no need to decide on the claim.

As our analysis indicates, the restitution rulings dealing with mining titles or applications for mining concessions on territories that overlapped with land requested in restitution can be categorised in two groups. The first group includes rulings on which there was a request for annulment by the LRU (Nuevo Espinal) or a ruling of suspension by the judge or tribunal (Dogibi-Eyáquera) or both (Andaguada, Renacer Negro). The second group comprises rulings in which there was a request for suspension or no request whatsoever by the LRU and a restitution ruling that either dismissed the request or omitted to rule in this regard (Mondó-Mondocito, Yurumanguí, Arquía and San Lorenzo). The striking differences were the shift in the LRU's requests from annulment to suspension and the fact that, following this shift, no suspension decision was taken by the judges and tribunals.

Concerns regarding the international investment law and its tension with the land restitution programme

As noted, the LRU shifted its approach regarding the judicial remedy sought for mining projects that had not complied with the prior consultation requirement. This section presents the growing, although nonconclusive, evidence that the shift is influenced by IIL. Specifically, the shift may be influenced by state institutions taking steps to avoid making Colombia responsible for the commission of a wrongful act involving the violation of the international obligations contained in the IIAs ratified by the state.

The IIL system, which comprises 3,360 international investment agreements, including 2,943 bilateral investment treaties and 417 Free Trade Agreements with investment provisions, aims at protecting foreign investors in host states. This system has faced increasing criticism in recent decades for a very different set of reasons. One of the most

recurring causes for concern relates to the investor-state dispute settlement mechanism (ISDS) provided by most of IIAs. The ISDS allows foreign investors to file a claim before an international arbitration tribunal if it considers that an obligation contained IIA has been breached by an action or omission committed by the host state and, thus, it can influence the state's regulatory decisions on matters of public interest. Indeed, the terms 'regulatory chill' and 'chilling effect' have been coined to describe the situation in which the state, in fear of an international arbitration claim, refrains from issuing a certain regulation or adopting a certain measure that could be detrimental to the investors' interests. This also includes cases in which the regulation is issued, or the measure is adopted but in a manner that is unsatisfactory or insufficient, and situations in which a regulation already in force is removed or amended to comply with foreign investors' interests. The existence of a 'chilling effect' is a topic of intense discussion; it is extremely difficult to prove because it requires 'counterfactual evidence about the regulations that would have existed in the absence of the purported chilling.' The absence of evidence has prompted its opponents to refer to it as a 'myth [that] has been blown up to proportions equal only to ancient Greek myths. However, there are a few studies that provide evidence of 'chill' scenarios either in specific countries or regarding specific measures, albeit to limited effect in the latter case.

The risk of a 'chilling effect' is more palpable in sensitive areas for the state, such as the protection of human rights, public health, environmental standards, or labour standards. This may be explained by the fact that foreign investors have challenged the public policies adopted in these areas for reasons that go beyond the alleged breach of the IIA's standards by the state. Examples include, first, the arbitration claims submitted by Philip Morris against Uruguay and Australia regarding the adoption of plain packaging legislation aimed at the protection of public health, and, second, the arbitration claim submitted by Vattenfall against Germany in regard to the state's decision to speed up the policy of eliminating nuclear energy and the associated order to phase-out most of Germany's nuclear plants by 2022.

In the case of the Latin American states and Colombia, the protection of the rights of ethnic groups is an additional area of sensitivity in which tension manifests between the state's right to regulate and the international foreign investment protection provided by IIAs. Several states have faced international arbitration claims that have challenged the measures they adopted to enforce national and international standards of ethnical protection. Some of the challenged measures include judicial rulings against investors for environmental and health damages inflicted to indigenous people and revocation of mining concessions following complaints regarding the breach of indigenous peoples' right to prior consultation, as well as damages to their environment, local heritage and culture. In addition, the risks of a 'regulatory chill' are particularly latent in the context of the land grabbing or global land rush that has unfolded since 2008, a phenomenon that has been defined as 'the capturing of control of relatively vast tracts of land and other natural resources through a variety of mechanisms and forms that involve large-scale capital that often shifts resource use orientation into extractive character. The origins of this phenomenon are linked to the 2007–2008 food crisis, when the risk of being unable to produce enough food domestically led some countries to seek control of land elsewhere. Although this assertion has been challenged, the common feature of land grab contexts is 'the dynamics of global capital reconfiguration and emerging accumulation imperatives

and strategies. Notably, this phenomenon has been achieved through a set of large-scale land deals for agribusiness investments in low and middle-income countries, which perceive economic development opportunities in the attraction of foreign investment.

Global land deals usually involve complex processes and a range of actors, including foreign private companies, foreign governments, finance capital companies and development finance institutions. In addition, the central state plays a key role in promoting land investments by, for example, reclassification, identification, appropriation or relocation and disposition of land in line with the creation of a favourable environment for foreign investors. Such actions could include the ratification of IIAs. In countries such as Colombia, with high levels of inequality and domestic conflicts, these efforts have sometimes been accompanied by an 'ardent support for private capital accumulation' by the central state, as well as by coercion and violence from military and paramilitary forces. The illegitimacy and violence that have characterised this global land rush has raised concerns, particularly because it may dispossess and expel poor and marginalised groups from their lands. This scenario may be explained by the fact that there are uneven power relations in the contesting claims to land and its resources, with farmers and ethnic groups facing state-backed transnational corporations. Furthermore, in the specific case of Colombia, land deals have been accompanied by both armed and institutional violence, which has been a cause of and an opportunity for land grabbing.

IIL provides an investor-friendly environment for foreign investors by providing protection from state measures that may otherwise have had adverse economic effects on the investments and by providing a favourable legal framework for land deals, by conceptualising land as an asset that can be valued in monetary terms. Concerns of a collision between IIL and the land restitution programme in Colombia have been prominent. For instance, the United Kingdom concluded a bilateral investment treaty with Colombia in 2010; before it ratified the treaty in July 2014, nongovernmental organisations (NGOs) voiced their concerns before parliament that the implementation of the LVLIR could be compromised by the treaty because it could allow investors to challenge the land restitution programme. Moreover, Van Ho warned that, due to the threat of investment arbitration claims, the state could alter the Colombian transitional justice processes, by, for example, opting out of applying the LVLIR to foreign corporations. This would undermine the purpose of initiatives such as the land restitution programme 'by disrupting the balance struck and prioritising foreign corporations at the expense of human rights victims.' In the same form, Perrone, Gómez and Prieto-Rios warned that the IIA could have a negative impact on the peace agreement reached between the Colombian Government and the Fuerzas Armadas Revolucionarias de Colombia guerrilla group.

Under the land restitution programme, the declaration of inexistence or annulment of foreign investors' legal titles by a restitution judge could be considered a direct expropriation, given that there would be a formal transfer of property titles over the land by the state. In addition, the suspension of permits, licenses, or concessions could be considered an indirect expropriation, as this would entail a diminution or even a destruction of their value. IIAs prohibit direct and indirect takings by the state that are not conducted for a public purpose or accompanied by adequate compensation and that are based on discriminatory grounds, in breach of due process. While the public policy purpose is unlikely to be contested, if the IIAs are not accompanied by payment of

compensation or if due process and nondiscrimination are not complied with, the IIAs would be considered unlawful. It is worth noting that, under the land restitution programme, the granting of compensation remedies for third parties is conditioned on evidence that the acquisition or occupation of the land claimed in restitution was made in good faith without fault.

The fair and equitable treatment standard is characterised by open-ended wording that grants protection against a broad set of state conducts. Thus, foreign investors could consider that the regulatory framework governing their investments, titles and interests on land suffered sudden amendments in breach of their legitimate expectations or that, in the programme's implementation, the state acted in an unreasonable and arbitrary manner. Moreover, if government officials made written or oral assurances to the investors that their interests and rights on the land were legal, or if the latter were confirmed as such by administrative agencies or domestic courts, these would be considered as protected rights under this standard and would be sheltered from suspensions and annulments.

One situation that may provide (nonconclusive) evidence of the effect of regulatory chill in the ethnic-based land restitution programme is the conflict between the LRU and the Community Council of La Larga Tumaradó (Cocolatu) on the issue of the appropriate remedies to be filed before the restitution judge. This case, pending at the time of writing, relates to the forced displacement of the community, which began in the 1990s because of the escalation of the internal armed conflict, as well as to the land accumulation by third parties and to the launching of productive projects on the territory of the Community.

The governing body of the Community Council complained to the LRU that it had deliberately changed the claims regarding the mining concession granted to the multinational company AngloGold Ashanti, which had not complied with the right to prior consultation. Specifically, the LRU changed the Council's claim from one of annulment to one of suspension. Hence, the Council complained and requested the reasons behind this decision. In response, the LRU justified the shift on various grounds, including, most relevantly, to avoid making Colombia internationally responsible for the breach of obligations contained in IIAs. Specifically, the LRU stated the following:

[T]he analysis of the legality of the contract, in this case, needs to be careful, since requesting a declaration of annulment or inexistence of the mining title through the referred presumptions constitutes a risk of wrongful injury for the Unity and the Colombian state if faced to contractual dispute settlement mechanisms in the framework of free investment treaties or of mining investment protection or direct reparation claims (...). Ultimately, the state resources would be the ones to be compromised.

In the interlocutory order that admitted the LRU claim, the restitution judge of Quibdó referred to the disagreement between the Council and the LRU. The judge established that, while it was unfortunate that the LRU forced its will on the Council, it was part of its powers, as the representing agency, to identify which remedy was appropriate based on the collected evidence. Moreover, the judge affirmed that its decision on whether annulment or suspension was in order was not dependent upon the LRU claim but upon the evidence gathered during the procedure. The mention of IIAs in a legal issue involving a mining title granted to a foreign investor raises questions regarding the extent to which IIL influences the state's decisions and, more importantly, the extent to which this influence is acceptable in the framework of the transitional justice situation of Colombia.

If empirical evidence of regulatory chill scenarios in Colombia are scarce, this is because the state's true awareness that an international arbitration tribunal could declare it internationally responsible for the breach of a ratified IIA is rather recent. This awareness can be traced back to a public policy document adopted by the government through its National Council for Economic and Social Policy in 2010 (CONPES 3684). This document diagnosed that the state was not prepared to prevent and address the international investment disputes that could arise under IIA and recommended the allocation of these functions to state agencies that either already existed or were to be created by subsequent reforms. More importantly, contrary to most of its regional counterparts, which had begun to act as respondents in investment arbitrations from the very beginning of the century, the first arbitration claim against Colombia was only registered in March 2016. However, this claim was followed by 15 other claims at the time of writing this paper. Colombia was among the most frequent respondent states in investor-state disputes in 2018 and 2019. Consequently, while it entered late into the investment arbitration system, it did so 'with a bang.'

An increased awareness by the government and its entities of the risks of an international investment arbitration claim against the state was to be expected and, along with it, manifestations of tension between the land restitution programme and IIL. Indeed, the National Council for Economic Policy in document 3684 stated that there was a need: [T]o train and prepare public officials that could affect the interests of foreign investors on matters of obligations, prevention and attention of investment disputes' with the goal of contributing to the widespread knowledge of IIA, so that the risk of eventual breaches of international commitments is reduced.

Two-fold implications of the Land Restitution Unit's concerns regarding investment arbitration claims

The specific mention of IIAs by the LRU for ethnic-based land restitution raises important issues regarding both the land restitution programme and current discussions on IIL. First, the implications of this mention for the land restitution programme are particularly concerning, given that it is made by the LRU, a public entity created by the LVLIR with the purpose of aiding victims in their struggle for truth, justice and reparation. The LRU has a duty to respect and apply international human rights law and international humanitarian law. It is worth noting that under the Inter-American system for the protection of human rights, reliance by states on IIAs for noncompliance with the convention has not been accepted. In the *Sawhoyamaxa indigenous community v. Paraguay* case, the Paraguayan government had refused to recognise land occupied by the Sawhoyamaxa indigenous community as ancestral land because it had been bought by a German national who opposed the communities' claim. The state justified its refusal on three arguments, one of which was that 'the owner's right "is protected under a bilateral agreement between Paraguay and Germany[,] which... has become part of the law of the land.'" However, the Court denied that there was any incompatibility between the enforcement of the American Convention of Human Rights and the IIA, by considering that 'the enforcement of bilateral commercial treaties negates vindication of noncompliance with state obligations under the American Convention; on the contrary, their enforcement should always be compatible with the American Convention. As a

consequence, the Court declared that the Paraguayan state had violated the conventional rights to a fair trial, judicial protection and to property.

It should be noted that a state commission charged with the oversight and monitoring of the implementation of Decree-Laws 4633 and 4635 has recently warned that the unconstitutional state of affairs regarding the forced displacements persists and is significantly evident in the case of indigenous people and Afro-Colombian communities. The commission has observed that the development of economic activities such as mining continues to threaten the territorial rights of Afro-Colombian communities and has diagnosed that the omission of prior consultation is one of the most recurring violations of their rights. In the same vein, several NGOs have alerted the Inter-American Court of Human Rights that the Colombian state has failed to guarantee the restitution right to ethnic communities as a result of, among other things, an institutional rerouting that favours extractive industries by drafting claims in a way that protects private interests.

It is worth noting that political influence of business actors on restitution proceedings has been identified as one of the obstacles that undermine the implementation of the land restitution programme in cases that involve business actors. In an interview conducted by Wesche, a LRU officer explained how the government exerted pressure through one of its highest officials in a restitution case that involved a large company. Under this scenario, it would seem that the LRU, as a government entity, lacks sufficient autonomy to represent the victims' interests appropriately, affecting their rights to access justice, due process, autonomy and self-government.

Second, regarding IIL, the position of the LRU on IIA confirms the need to analyse the tension between the right to regulate of states and IIA and, more specifically, to discuss the regulatory chill effects of IIL in a manner that considers the state 'as a complex web of actors, not a unitary whole. Given that the international responsibility of states is influenced by acts of state organs in the exercise of executive, legislative and judicial functions, it is only natural that if a regulatory chill exists within states, it can stem from a very wide range of state actors, including judges, government entities and lawmakers. The land restitution cases involving ethnic communities are an example of a situation in which the state, through its different actors, participates as intervener, disputing party and adjudicator. Most importantly, it is essential to acknowledge that the state actors that can interact in a situation leading to a regulatory chill scenario have very different constitutional and legal functions and objectives, which make it very difficult, and sometimes inappropriate, to establish a unique will of a state from an international viewpoint.

Whether the increasing timidity of the LRU in cases involving foreign investors and its impact on the decisions of land restitution judges is evidence of a regulatory chill largely depends on the lens through which the concept is approached. If one considers regulatory chill as the result of the decision by a state not to regulate in fear of, or in response to, an investment arbitration claim, then this might have been true for Australia or Uruguay. However, there is clear evidence that the arbitrations against Australia and Uruguay, while they were pending, resulted in the delay of the adoption of identical or similar regulations in other states, most notably in New Zealand. The impact of IIL in the land restitution programme in Colombia raises similar issues. On the one hand, the existence of IIA signed and ratified by the state has not resulted in a withdrawal of the legal regime that provides a basis for the land restitution cases, including the LVLR and the Decree-

Laws 4633 and 4635 of 2011. On the contrary, the duration of the LVLR and the decree-laws, originally fixed at 10 years, was recently extended for another 10 years until 2031 (Law 2078 of 2021). In the same vein, the victims of the armed conflict and the internally displaced persons are not seeing their access to the administration of justice under the land restitution process hampered, and it is not likely that their internationally and nationally recognised rights will cease to be recognised by restitution judges in the future because of the existence of IIAS.

Another possibility is that the import of IIL considerations by the LRU is being used as a 'political cover' to avoid the enforcement of remedies provided by the decree-laws that might lead to further dissatisfaction with the land restitution programme by strong economic and political sectors in the country. It is worth mentioning that the current governing party has introduced two bills in Congress (both archived) aimed at strengthening the rights of subsequent owners and removing most of the procedural provisions in favour of the victims. Moreover, while it is true that there is a cause-effect relation between the existence of IIAs and the decision not to request the remedy of annulment as explicitly recognised by the LRU in the Cocolatu concept the fact that this is one of the reasons mentioned by the LRU for its decision raises the issue of whether regulatory chill occurs when IIAs are either the exclusive, most prominent, or one of several causes for the chilling effect. This is significant given that it is possible that, the LRU may have adopted the same decision, namely that of not requesting the remedy of annulment, even if Colombia had not signed and ratified any IIAs.

However, the ethnic land restitution cases and the Cocolatu case reveal that the possibility that the Colombian state's international responsibility is engaged under IIA has resulted in the introduction of endogenous considerations by the LRU in the performance of its legal function of representing victims in land restitution cases. These considerations depart from the interests of the victims who are being represented and have direct implications for the ruling that will be delivered by the restitution judge. This adds to changes in the patterns of behaviour of both private and public actors in ethnic land restitution cases, which are evidence of the acknowledgement of contact points between IIL and the land restitution programme. First, mining companies have ceased to submit formal oppositions to the victims' claims, which could be explained by an intent to challenge any adverse decision arising from the restitution ruling only in the international sphere. Second, both the NMA and the Public Ministry have adopted conservative positions in their interventions – by generally arguing that the validity of mining titles held by companies are issues of no relevance to the restitution claims that provide evidence of their awareness of the potential international consequences of the application of land restitution remedies. The fact that the existence of IIAs has prompted a state agency to refrain from requesting a remedy in favour of the victims of the internal armed conflict that is expressly provided for by the Colombian legal framework leads us to affirm that this is early evidence, even if non-conclusive at this stage, of a regulatory chill scenario in Colombia. Whether the evidence becomes conclusive will depend on further theoretical and empirical research into the regulatory chill concept in IIL and further analysis of the future claims and rulings under the ethnic land restitution programme.

Conclusion

This article has evidenced that there is merit in the concerns expressed regarding possible tension between IIL and the land restitution programme that could result in a chilling effect on the institutions in charge of its implementation. More specifically, it has been shown that in restitution cases involving ethnic communities, the LRU has considered the possibility that the Colombian state will be held responsible internationally for breaches of IIA by considering that the annulment of titles or concessions held by foreign investors on the land requested in restitution might be too burdensome and that, as such, requesting their suspension should be preferred. This, at least in one specific case, was against the explicit preference of the represented community.

The consideration by the LRU of aspects that are foreign to the legal framework of the land restitution programme raises questions as to the suitability of the LRU, as an institution attached to the government, to represent victims in these cases, as well as to consider the extent to which the existing IIA signed and ratified by Colombia are having a negative impact in the exercise of the functions of public officials and institutions in the country. More broadly, it evidences how international obligations of states towards economic actors may be instrumentalized to restrain the thorough implementation of measures aimed at ensuring the enjoyment of human rights in the domestic sphere, especially for victims of an armed conflict. Whether the decision of the LRU not to request a certain remedy provided by the land restitution programme because of the mere existence of IIA constitutes evidence of regulatory chill will depend on the angle from which this concept is studied. This article has aimed to further contribute to this debate by presenting a case in which international investment agreements have played a part in the decision of a state agency to fulfil its legal and constitutional functions in an unsatisfactory manner, yet it is not a case in which the land restitution programme has been abandoned or modified as a result.

References:

- Grupo de Memoria Histórica, '¡Basta Ya! Colombia: Memorias de Guerra y Dignidad. Informe General', (Centro Nacional de Memoria Histórica, 2013).
- Rafael Tamayo-Álvarez, 'Colombia's Land Restitution Programme and International Investment Law: Normative Tensions and Possible Convergences Concerning Investor Diligence', *Manchester Journal of International Economic Law* 15, no. 1 (April 2018): 114; Jon D. Unruh, 'Crafting Land Restitution in Colombia: Optimizing a Legal, Social and Institutional Framework', *Land Use Policy* 80 (1 January 2019): 403–5, doi:10.1016/j.landusepol.2018.08.008; Jean-Paul Faguet, Fabio Sánchez and Marta-Juanita Villaveces, 'The Perversion of Public Land Distribution by Landed Elites: Power, Inequality and Development in Colombia', *World Development* 136 (1 December 2020), doi:10.1016/j.worlddev.2020.105036.
- Juan Francisco Soto Hoyos, *Restitución de Tierras y Empresas: Oportunidades y Desafíos* (Bogotá: Comisión Colombiana de Juristas, April 2017).
- UNHCR, *Where We Work: Colombia* (UNHCR: The UN Refugee Agency, 2018), <https://www.unhcr.org/colombia.html>.
- Corte Constitucional de Colombia. M.P. María Victoria Calle Correa, Ruling C-330 (23 June 2016).

- Corte Constitucional de Colombia. M.P. Jorge Iván Palacio Palacio, Ruling C-795 (30 October 2014); Corte Constitucional de Colombia. M.P. Luis Ernesto Vargas Silva, Ruling C-715 (13 September 2012).
- Ministerio del Interior, 'Decree-Law 4633', *Diario Oficial* 48278 (2011) preamble; Ministerio del Interior, 'Decree-Law 4635', *Diario Oficial* No. 48.278 (2011) preamble.
- 'Constitución Política de La República de Colombia', *Gaceta Constitucional* No. 116 § (1991) art. 330; Corte Constitucional de Colombia. M.P. Antonio Barrera Carbonell, Ruling SU-039 (3 February 1997); Corte Constitucional de Colombia. M.P. Carlos Gaviria Díaz, Ruling T-652 (10 November 1998); Corte Constitucional de Colombia. M.P. Marco Gerardo Monroy Cabra, Ruling C-620 (29 July 2003); Corte Constitucional de Colombia. M.P. Alvaro Tafur Galvis, Ruling T-737/05 (14 July 2005); Corte Constitucional de Colombia. M.P. Rodrigo Escobar Gil, Ruling C-208 (12 March 2007); Corte Constitucional de Colombia. M.P. Jorge Iván Palacio Palacio, Ruling T-129 (3 March 2011).
- Unidad de Restitución de Tierras, *Restitución de Derechos Territoriales Étnicos: Decretos-Ley 4633 y 4635 de 2011* (Ministerio de Agricultura y Desarrollo Rural, 2012), 30.
- Comisión Colombiana de Juristas, *Radiografía de La Restitución de Tierras: Informe Presentado Ante La Comisión Interamericana de Derechos Humanos Por Incumplimiento de Reparación a Las Víctimas Despojadas de Tierras En Colombia* (Bogotá: Comisión Colombiana de Juristas, 9 May 2019), 22.
- Ministerio del Interior, Decree-Law 4633 art. 9; Ministerio del Interior, Decree-Law 4635 art. 40.
- Ministerio del Interior, Decree-Law 4633 arts. 147–157; Ministerio del Interior, Decree-Law 4635 art. 113–121.
- Ministerio del Interior, Decree-Law 4633 arts. 147–157; Ministerio del Interior, Decree-Law 4635 art. 113–121.
- Unidad de Restitución de Tierras, *Restitución de Derechos Territoriales Étnicos*.
- Federica Del Llano Toro, *El Desequilibrio Procesal y Probatorio Del Opositor Víctima o Sujeto Vulnerable En El Proceso de Restitución de Tierras* (Bogotá: Editorial Universidad del Rosario, 2016), 54–5.
- Ministerio del Interior, Decree-Law 4633 arts. 162–164; Ministerio del Interior, Decree-Law 4635 arts. 126–128. The presumptions affect exclusively the transactions, administrative acts and judicial rulings that have taken place after January 1, 1990.
- Specialized Civil Chamber of Land Restitution of the Superior Tribunal of Antioquia, Andágueda ruling, No. 27001 31 21 001 2014 00005 00 (15) (23 September 2014).
- First Civil Circuit Judge Specialized on Land Restitution of Popayán, Renacer Negro ruling, No. 071 (1 July 2015).
- Oficina del Alto Comisionado de las Naciones Unidas para los Derechos Humanos. Colombia, 'Benefician a Los Emberá-Katíos Con Primera Sentencia de Restitución Étnica En El País', *HCHR: Compilación de noticias*, 24 September 2014, <https://www.hchr.org.co/index.php/compilacion-de-noticias/60-grupos-etnicos/5336-benefician-a-los-embera-katios-con-primera-sentencia-de-restitucion-etnica-en-el-pais>; Oficina del Alto Comisionado de las Naciones Unidas para los Derechos Humanos. Colombia, 'Con Histórica Sentencia Afros Recuperan Su Territorio En Timbiquí, Cauca', *HCHR: Compilación de noticias*, 6 July 2015,

<https://www.hchr.org.co/index.php/compilacion-de-noticias/93-tierras/6737-con-historica-sentencia-afros-recuperan-su-territorio-en-timbiqui-cauca>.

Comisión Colombiana de Juristas, *Radiografía de La Restitución de Tierras*, 32.

Subdirección General. Unidad de Restitución de Tierras, 'Circular No. 08', 29 May 2015.

Tamayo-Álvarez, 'Colombia's Land Restitution Programme'.

Philipp Wesche, 'Business actors and land restitution in the Colombian transition from armed conflict', *The International Journal of Human Rights* 25, no. 2 (2021): 313, doi:10.1080/13642987.2020.1773441.

All rulings on ethnic land restitution can be accessed at the LRU's website:

<https://www.restituciondetierras.gov.co/sentencias-por-departamento>

First Civil Circuit Judge Specialized on Land Restitution of Quibdó, Dogibi-Eyáquera ruling, No. 27001-31-21-001-2014-00106 (5 June 2016).

Specialized Civil Chamber of Land Restitution of the Superior Tribunal of Cartagena, Nuevo Espinal ruling, No. 2.0001311210012014e+21 (23 June 2016).

First Civil Circuit Judge Specialized on Land Restitution of Quibdó, Mondó-Mondocito ruling, No. 27001-31-21-001-2016-00001-00 (29 November 2017).

Specialized Civil Chamber of Land Restitution of the Superior Tribunal of Cali, Yurumanguí ruling, No. 76-111-31-21-003-2015-00053-01 (18 December 2017).

First Civil Circuit Judge Specialized on Land Restitution of Quibdó, Arquía ruling, No. 27001-31-21-001-2015-00053-00 (19 April 2018).

First Civil Circuit Judge Specialized on Land Restitution of Pereira, San Lorenzo ruling, No. 66-001-31-21-001-2017-0056-00 (19 December 2018).

At the time of writing, 19 IIAs signed by Colombia with other countries are in force. There are eight bilateral investment treaties with Spain (2005), Switzerland (2006), Perú (2007), China (2008), India (2009), the UK (2010), Japan (2011) and France (2014). In addition, there are 11 treaties with investment provisions: Northern Triangle of Central America (2007), EFTA (2008), the European Union-Peru, Ecuador and Colombia FTA (2012), the Additional Protocol to the Pacific Alliance (2014), México (1994), Chile (2006), United States (2006), Canada (2008), Israel (2013), Costa Rica (2013) and South Korea (2013).

UNCTAD, 'World Investment Report 2021: Investing in Sustainable Recovery' (Geneva: United Nations, 2021), 123.

Kyla Tienhaara, 'Regulatory Chill and the Threat of Arbitration: A View from Political Science', in *Evolution in Investment Treaty Law and Arbitration*, ed. Chester Brown and Kate Miles (Cambridge: Cambridge University Press, 2011), 606–28.

Julia G. Brown, 'International Investment Agreements: Regulatory Chill in the Face of Litigious Heat', *Western Journal of Legal Studies* 3 (2013): i–25; Gus Van Harten and Dayna Nadine Scott, 'Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada', *SSRN Scholarly Paper* (Rochester, NY: Social Science Research Network, 7 December 2015); Vera Korzun, 'The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs', *Vanderbilt Journal of Transnational Law* 50, no. 2 (2017): 355–414; Kyla Tienhaara, 'Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement', *Transnational Environmental Law* 7, no. 2 (01 2018): 229–50, <https://ojs.lib.uwo.ca/index.php/uwojls/article/view/5568>.

- Jonathan Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis*, Cambridge Studies in International and Comparative Law (Cambridge: Cambridge University Press, 2014), 14.
- Nikos Lavranos, 'After Philip Morris II: The "Regulatory Chill" Argument Failed Yet Again', *Kluwer Arbitration Blog* (blog), 18 August 2016, <http://arbitrationblog.kluwerarbitration.com/2016/08/18/after-philipp-morris-ii-the-regulatory-chill-argument-failed-yet-again/>.
- Van Harten and Scott, 'Investment Treaties and the Internal Vetting of Regulatory Proposals'.
- Carolina Moehlecke, 'The Chilling Effect of International Investment Disputes: Limited Challenges to State Sovereignty', *International Studies Quarterly* 64, no. 1 (1 March 2020): 1–12, doi:10.1093/isq/sqz077.
- Korzun, 'The Right to Regulate in Investor-State Arbitration', 381.
- Giovanni Zarra, 'Right to Regulate, Margin of Appreciation and Proportionality: Current Status in Investment Arbitration in Light of Philip Morris v. Uruguay', *Brazilian Journal of International Law* 14, no. 2 (2017): 95–121, doi:10.5102/rdi.v14i2.4624.
- Nathalie Bernasconi-Osterwalder and Rhea Tamara Hoffman, 'The German Nuclear Phase-Out Put to the Test in International Investment Arbitration? Background to the New Dispute Vattenfall v. Germany (II)' (IISD, 5 June 2012), https://www.iisd.org/system/files/publications/german_nuclear_phase_out.pdf.
- Enrique Prieto-Rios and Daniel Rivas-Ramírez, 'Neocolonialism and the Tension between International Investment Law and Indigenous Peoples: The Latin American Experience', in *Indigenous Peoples and International Trade: Building Equitable and Inclusive International Trade and Investment Agreements*, ed. John Borrows and Risa Schwartz (Cambridge University Press, 2020), 85–100.
- Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador, No. PCA Case No. 2009–23 (n.d.).
- Burlington Resources Inc. v. Republic of Ecuador (formerly Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)), No. ICSID Case No. ARB/08/5 (n.d.).
- Bear Creek Mining Corporation v. Republic of Peru, Award, No. ICSID Case No. ARB/14/21 (30 November 2017).
- Saturnino M. Borrás Jr et al., 'Land Grabbing in Latin America and the Caribbean', *The Journal of Peasant Studies* 35, no. 3–4 (1 July 2012): 851, doi:10.1080/03066150.2012.679931.
- Lorenzo Cotula, 'Land Grabbing and International Investment Law: Towards a Global Reconfiguration of Property?', in *Yearbook on International Investment Law and Policy 2014-2015*, ed. Andrea K. Bjorklund (Oxford University Press, 2016), 178.
- Saturnino M Borrás Jr. et al., 'Transnational Land Investment Web: Land Grabs, TNCs and the Challenge of Global Governance', *Globalizations* 17, no. 4 (18 May 2020): 606–28, doi:10.1080/14747731.2019.1669384.
- Enrique Prieto-Rios, 'Neoliberal Market Rationality: The Driver of International Investment Law', *Birkbeck Law Review* 3, no. 1 (2015): 55–76.
- Borrás Jr et al., 'Transnational Land Investment Web', 585.

- Ntina Tzouvala, 'A False Promise? Regulating Land-Grabbing and the Post-Colonial State', *Leiden Journal of International Law* 32, no. 2 (June 2019): 235–53, doi:10.1017/S0922156519000128.
- Cotula, 'Land Grabbing', 178.
- Jacobo Grajales, 'The Rifle and the Title: Paramilitary Violence, Land Grab and Land Control in Colombia', *The Journal of Peasant Studies* 38, no. 4 (1 October 2011): 771–92, doi:10.1080/03066150.2011.607701.
- Lorenzo Cotula, 'The New Enclosures? Polany, International Investment Law and the Global Land Rush', *Third World Quarterly* 34, no. 9 (1 October 2013): 1605–29, doi:10.1080/01436597.2013.843847.
- Tara L. Van Ho, 'Is It Already Too Late for Colombia's Land Restitution Process?: The Impact of International Investment Law on Transitional Justice Initiatives', *International Human Rights Law Review* 5, no. 1 (15 July 2016): 60–85, doi:10.1163/22131035-00501003; Marco Alberto Velásquez Ruiz, *The Colliding Vernacullars of Foreign Investment Protection and Transitional Justice in Colombia: A Challenge for the Law in a Global Context* (Toronto, Ontario, Graduate Program in Law York University, Osgoode Hall Law School, 2016) Chapter Six; Tamayo-Álvarez, 'Colombia's Land Restitution Programme'.
- Traidcraft and ABColombia, 'Analysis of the UK-Colombia Bilateral Investment Treaty', 2014.
- Van Ho, 'Is It Already Too Late', 62.
- Enrique Prieto-Rios, Andrei Gomez-Suarez, and Nicolás M. Perrone, 'Foreign Investors and the Colombian Peace Process', *International Community Law Review* 18, no. 3–4 (2016): 223–47.
- Van Ho, 'Is It Already Too Late', 75.
- Tamayo-Álvarez, 'Colombia's Land Restitution Programme'.
- Van Ho, 'Is It Already Too Late', 77.
- Ethnic Affairs Directorate, 'Cocolatu Concept (Bogotá, 27 September 2017), 2–3.
- Comisión Colombiana de Juristas, 'Radiografía de La Restitución de Tierras', 34.
- Ethnic Affairs Directorate, 'Cocolatu Concept', 13–15. The LRU argued that the mining concession contract was neither a transaction by means of which the land was transferred or property rights on the land were conferred, nor an administrative act that recognised or conferred any rights in rem on the land in favour of third parties. The LRU affirmed that the granting of the concession in the specific case of Cocolatu was not linked to the internal armed conflict. Additionally, referring to the omission of the prior consultation, the LRU asserted that 'in the present case, [the omission] cannot configure a territorial affectation on the terms of the Decree-Law... since it does not entail a limitation to the use and enjoyment of territorial rights' (ibid., 18).
- First Civil Circuit Judge Specialized on Land Restitution of Quibdó, Auto interlocutorio No. 035, No. 270013121001–2017–00104–00 (21 March 2018).
- Consejo Nacional de Política Económica y Social, 'Fortalecimiento de La Estrategia Del Estado Para La Prevención y Atención de Controversias Internacionales de Inversión. Documento CONPES 3684', 19 October 2010.
- UNCTAD, 'World Investment Report 2019', *United Nations Publications* (New York: United Nations, 2019); UNCTAD, 'World Investment Report 2020', *United Nations Publications* (New York, 2020).

- Consejo Nacional de Política Económica y Social, 'Estrategia Del Estado', 23, 29. Free translation.
- Congreso de Colombia, 'Law 1448 of 2011', *Diario Oficial* No. 48.096 (2011) art. 178.
- Inter-American Court of Human Rights, *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Judgement on Merits, Reparations and Costs* (29 March 2006).
- Comisión de Seguimiento y Monitoreo a la Implementación del Decreto Ley 4633 de 2011, 'Octavo Informe de Seguimiento y Monitoreo al Decreto Ley 4633 de 2011 Para Las Víctimas Del Conflicto Armado de Los Pueblos Indígenas' (Bogotá D.C., August 2020); Comisión de Seguimiento y Monitoreo a la Implementación del Decreto Ley 4635 de 2011, 'Octavo Informe de Seguimiento y Monitoreo al Decreto Ley 4635 de 2011 Para Los Pueblos y Comunidades Negras, Afrocolombianas, Palenqueras y Raizales Víctimas Del Conflicto Armado' (Bogotá D.C., 2020).
- Comisión Colombiana de Juristas, 'Radiografía de La Restitución de Tierras'.
- Wesche, 'Business actors and land restitution'.
- Anna Sands, 'Unpacking Regulatory Chill: The Case of Mining in the Santurbán Páramo in Colombia', *International Institute for Environment and Development*, 21 December 2020, <https://www.iied.org/unpacking-regulatory-chill-case-mining-santurban-paramo-colombia>.
- Eric Crosbie and George Thomson, 'Regulatory Chills: Tobacco Industry Legal Threats and the Politics of Tobacco Standardised Packaging in New Zealand', *The New Zealand Medical Journal* 131, no. 1473 (13 April 2018): 25–41, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6490166/>; Lukasz Gruszczynski, 'Australian Plain Packaging Law, International Litigations and Regulatory Chilling Effect', *European Journal of Risk Regulation* 5, no. 2 (June 2014): 242–7, doi: 10.1017/S1867299X00003688.
- Tienhaara, 'Regulatory Chill in a Warming World'.
- Maria Fernanda Cabal Molina, 'Proyecto de Ley 020/19 "Por Medio Del Cual Se Modifica La Ley 1448 de 2011 y Se Dictan Otras Disposiciones"' (2019); Maria Fernanda Cabal Molina, 'Proyecto de Ley 131/18 "Por Medio Del Cual Se Modifica La Ley 1448 de 2011 y Se Dictan Otras Disposiciones"' (2018).
- This occurred in the cases Nuevo Espinal, Mondó Mondocito and San Lorenzo, in which mining companies intervened in the procedure without filing formal oppositions.
- Velásquez Ruiz, 'The Colliding Vernacullars', 239–43.