

## SYMPOSIUM ON THE COLOMBIAN PEACE TALKS AND INTERNATIONAL LAW

### THE COLOMBIAN PEACE NEGOTIATION AND FOREIGN INVESTMENT LAW

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The stunning vote against the Colombian Peace Agreement opens an opportunity to include in the negotiations issues that were not included in the first deal—despite the fact that their omission had the potential to undermine the goal of a sustainable peace. One such issue is foreign investment law. Since the beginning of the talks, the Colombian government was keen on emphasizing that the country’s “economic model” was not subject to negotiation. The shadow of Venezuela loomed large in that position. Whatever came out of the talks was to be integrated in a framework of a free market economy, where private property and, above all, foreign investments would be respected.<sup>1</sup>

The reality, however, is that the Peace Accord made promises that put it on a collision course with Colombia’s obligations to its foreign investors, as protected by a complex of bilateral investment treaties (BITs) and free-trade agreements (FTAs). The rejected deal will serve as the basis for the continuing negotiation; however, it is important that foreign investment law be considered in a new deal. This essay shows how the rejected deal would have created conflicts, particularly in connection with foreign investments in mining and agroindustry, and makes recommendations for the way peace negotiators and investment arbitrators might approach them moving forward: negotiators should strive to include language to the effect that the agreement is necessary to protect Colombia’s essential security; and arbitrators should adopt a deferential approach that acknowledges the humanitarian dimension of their responsibility as adjudicators.

#### *Investment Agreements in the Colombian Peace Talks*

Peace negotiations in Colombia did not put pressure on the government to change the strategy for integrating to global markets pursued since the 1990’s. That strategy meant focusing on foreign investment as the key for economic development, using trade deals for signaling legal stability to foreign investors, and favoring extractive industries and large agroindustry as key sectors for development.

Even as the government was negotiating with the FARC, President Santos signed four new BITs and six new FTAs that include investment protection provisions. Colombia currently has thirteen investment agreements in force, including deals with the United States, the European Union, Canada, China, and the United Kingdom.

The FARC mostly played along. The Marxist guerrilla group has always opposed foreign investment protection and, at one point during the negotiation, did put forward a proposal to denounce trade agreements

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<sup>1</sup> El País, *“Aquí no venimos a negociar el modelo de desarrollo del país”*: *Humberto de la Calle*, EL PAÍS (COLOMBIA) (Oct. 18, 2012).

and require domestic adjudication of disputes related to foreign investment.<sup>2</sup> Ultimately, though, the Peace Agreement made no reference to foreign investment protection, and the government made no promise to denounce or renegotiate existing trade treaties. This will most likely continue to be the case in the negotiation, as trade deals were not an issue of contention for the rejection of the deal.

### *A Contradictory Land Policy*

The choice of keeping peace and investment protection on separate tracks means that a peace deal will be implemented in a regulatory space where foreign investment is strongly protected, a state of affairs that is particularly relevant with regards to land tenure. Historically, land has been at the center of the Colombian armed conflict. Violence and internal displacement has been connected to land tenure, with 79 percent of all displaced people reporting leaving behind some kind of land title.<sup>3</sup> In total, almost 5.5 million hectares were abandoned or forcibly taken as a consequence of the armed conflict—an area twice the size of Massachusetts.<sup>4</sup> Colombia is still characterized by highly concentrated land ownership: almost 78 percent of rural land in Colombia is property of 13.7 percent of owners, and the Gini coefficient for land is 0.88, one of the worst in the world.<sup>5</sup>

With figures such as these, no peace is viable in Colombia without some kind of deal on land reform and restitution. The Peace Agreement thus strived to create an “integral land reform” to reverse land concentration and favor small and midsize agriculture. Central to this effort was the creation of a three million hectares “land fund.” The fund would be composed of recovered vacant lands that belong to the state; lands whose property titles are administratively extinguished because they “failed to comply with the social and ecological function of property” (an old formula in Colombian property law, common to several Latin-American constitutions, according to which property should not remain idle); and, finally, of lands formally expropriated for public purposes, with “the corresponding compensation,” among other sources. Moreover, the Peace Agreement locked-in ongoing efforts of land restitution to victims of the armed conflict, an ambitious program that will continue, regardless of the status of the peace deal.<sup>6</sup>

The negotiations could lead to some changes in the details of these programs, but the overall landscape will most likely remain the same. If a peace deal strives to deal with inequality in land tenure as a root cause of the conflict, it will do so mostly by redistributing land, just as the rejected agreement tried to do. But this transitional mechanism will enter a policy space that is already thickly regulated. Just as the Colombian government felt no real pressure to renegotiate its international investment obligations, it will also be negotiating land reform while carrying on with a rural developmental policy focused on incentivizing extractive industries and capital-intensive agroindustry. For the last decades, Colombia has given generous tax breaks to mining companies, and has facilitated the acquisition of extractive licenses. Further, since 2007, the Colombian government has pushed forward a series of laws to facilitate the establishment of large areas of rural land

<sup>2</sup> FUERZAS ARMADAS REVOLUCIONARIAS DE COLOMBIA, EJÉRCITO DEL PUEBLO (FARC-EP), DESARROLLO RURAL Y AGRARIO PARA LA DEMOCRATIZACIÓN Y LA PAZ CON JUSTICIA SOCIAL EN COLOMBIA: 100 PROPUESTAS MÍNIMAS 71-74 (2014).

<sup>3</sup> PROCURADURÍA GENERAL DE LA NACIÓN, CONTROL PREVENTIVO Y SEGUIMIENTO A LAS POLÍTICAS PÚBLICAS EN MATERIA DE REINSERCIÓN Y DESMOVILIZACIÓN 185 (2006).

<sup>4</sup> LUIS JORGE GARAY & FERNANDO BARBERI, DECIMO PRIMER INFORME. CUANTIFICACIÓN Y VALORACIÓN DE LAS TIERRAS Y LOS BIENES ABANDONADOS O DESPOJADOS A LA POBLACIÓN DESPLAZADA EN COLOMBIA: BASES PARA EL DESARROLLO DE PROCESOS DE REPARACIÓN 10 (2009).

<sup>5</sup> Ana María Ibáñez Londoño, *La persistencia de la concentración de la tierra en Colombia: ¿Qué pasó entre 2000 y 2010?*, in DISTRIBUTIVE JUSTICE IN TRANSITIONS 279 (Morten Bergsmo et al. eds., 2010).

<sup>6</sup> FARC-EP & GOBIERNO DE COLOMBIA, ACUERDO FINAL PARA LA TERMINACIÓN DEL CONFLICTO Y LA CONSTRUCCIÓN DE UNA PAZ ESTABLE Y DURADERA 163-164 (2016).

dedicated to capital-intensive agroindustry, most recently through the creation of the *Zonas de Interés de Desarrollo Rural, Económico y Social*.<sup>7</sup> This parallel framework of rural development is in conflict with the kind of land reform that is still on the negotiating table in Colombia. Where the peace negotiators speak of democratizing access to land, supporting small peasants and restituting land to victims, these agroindustry development programs require land concentration and capital to be successful.

### *Investment Protection Versus the Peace Agreements*

This situation could put provisions of a peace accord on a collision course with foreign investors, particularly if land reform measures trigger an arbitration. Indeed, there is already evidence of such disputes. For example, since 2008, Anglo Gold Ashanti, the third largest gold producer in the world, and other smaller companies, were given concessions for gold mining in the reservation of the Emberá, an indigenous community in the Colombian Pacific. The area had been the center of intense combats between FARC and the Colombian Army, and the latter bombarded part of the reservation, forcing thousands of Emberá to flee. A couple of years later, the community sought to have their land restituted under the transitional justice mechanism created to that effect, but Anglo Gold opposed the restitution. It argued that the mining concession given by the government complied with Colombian law. The judge decided against Anglo Gold, and restituted the land to the Emberá, on the basis that the community had not been consulted when the concessions were granted.<sup>8</sup>

The Emberá case provides a glimpse of the kind of investment cases that a Colombian peace deal may trigger. Anglo Gold, or any investor in its situation, could try to seek compensation under a relevant investment treaty, arguing that the Colombian judge's restitution order is a measure tantamount to expropriation, or that it violates the fair and equitable treatment standard. And more ambitious domestic orders of restitution could lead to more ambitious international claims.

Similarly, investment cases could also emerge from the establishment of a "land fund," or any equivalent policy, particularly from the recovery of vacant plots that are possessed by foreign investors. For example, according to Oxfam, Cargill (the largest agricultural commodity trader in the world) may have evaded Colombia's restriction on acquiring previously state-owned land destined for family farming, buying up fifty thousand hectares of previously vacant plots.<sup>9</sup> If this accusation proves to be true, and the Colombian government decides to reverse the acquisitions and include these plots in the "land fund," Cargill could seek compensation under the Colombia–U.S. FTA. Would it prevail? It is of course impossible to know. Cargill has always said that it followed Colombian law scrupulously.<sup>10</sup> However, the risk of compensation will surely weigh on the Colombian decision to include certain vacant plots in the land fund.

To be sure, foreign investment is not, in itself, antithetical to a peace agreement. On the contrary, foreign funds will be needed to implement it. Nonetheless, while there is in theory enough land in Colombia to both foment agroindustry and implement peace initiatives, the reality of a lack of transport infrastructure is so

<sup>7</sup> First came Law 1152 of 2007 (arts. 90-91) (declared unconstitutional in decision C-175 of 2009); then came Law 1450 of 2011 (arts. 61-62) (declared unconstitutional in decision C-644 of 2012); then a 2013 bill to create "special interest zones," that failed in Congress in 2013 (Bill 162 of 2013, Chamber) and a 2013 bill to regulate foreign land investment (Bill 164 of 2013, Senate), that failed in Congress in 2014.

<sup>8</sup> See Tribunal Superior de Antioquia, Sala Civil Especializada en Restitución de Tierras, septiembre 23, 2014, *Andágueda v. Continental Gold Ltd. Sucursal Colombia y otros* (Colom.).

<sup>9</sup> OXFAM, *DIVIDE AND PURCHASE: HOW LAND OWNERSHIP IS BEING CONCENTRATED IN COLOMBIA* (2013).

<sup>10</sup> *Cargill's response to Oxfam's "Smallholders at Risk" and "Divide and Purchase" reports*, CARGILL (Apr. 23, 2014).

severe<sup>11</sup> that, as a matter of resource allocation, this becomes a zero sum game: a hectare that is used in mining, or for capital-intensive agroindustry, is a hectare that will not go to transitional policies of land reform.

Here, the investment settlement dispute regime becomes important. Its effectiveness in enforcing investment obligations tilts the scale to keeping land in mining and agroindustry, not because the regime is itself biased in favor of these industries, but because foreign investors in Colombia do have a preference to invest in these industries, and the regime puts its weight behind them, backed by the risk of expensive awards. As a result, it becomes harder to move land from these industries to transitional initiatives, or at the very least, the investment regime may provide a political justification for not doing so.

### *Deciding Colombia's Peace-Related Investment Disputes*

Until now, Colombian negotiators have not seriously considered investment protection as part of the limits that international law may impose on the implementation of an eventual deal (unlike, say, human rights or international criminal law). The rejection of the Peace Accord gives them the opportunity to do so. For instance, language could be included in the new deal to the effect that the Agreement and its land reform policies are necessary to protect Colombia's essential security, a move that could set the foundation for an eventual Colombian defense in a future arbitration.<sup>12</sup>

Such a clause may be construed as not self-judging, thus opening a wide margin of arbitral interpretation.<sup>13</sup> How should investment arbitrators approach disputes that emerge from the Colombian Peace deal? The few precedents available give little guidance with regards to transitional measures in the context of investment disputes. In *Piero Foresti*, a group of Italian claimants argued that their shares in a mining operation company had been expropriated, as South Africa's postapartheid mining law required 26 percent ownership of historically disadvantaged South Africans. The dispute, though, was settled and the case discontinued.<sup>14</sup>

More substantive was *Funnkötter*.<sup>15</sup> This case involved a group of Dutch farmers that were deprived of their land by Mugabe's controversial reforms, which sought to redistribute land from white owners to the black population. Zimbabwe argued, first, that its land reform was "in the public interest and under due process of law" and hence required no compensation, and second, that it was adopted as a matter of necessity. The tribunal rejected both arguments, and decided in favor of the claimants, awarding most of the compensation. Interestingly, when debating the amount of compensation, Zimbabwe argued that discounting from the market value of the assets must be made in cases of large scale nationalizations.<sup>16</sup> The tribunal, however, rejected the argument: the value of the asset should be calculated independently "of the number and aim of the expropriations done."

<sup>11</sup> Colombia ranks 98th in Transport Infrastructure in the World Economic Forum's Competitiveness Ranking, with worse infrastructure than Botswana, Ethiopia, or Guyana.

<sup>12</sup> See William W. Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 VA. J. INT'L LAW 307 (2007). But see, José E. Alvarez & Tegan Brink, *Revisiting the Necessity Defense: Continental Casualty v. Argentina*, in 2011-2012 Y.B. INT'L INV. L. & POL'Y 315.

<sup>13</sup> See *CMS Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8, Award, para. 373 (May 12, 2005); *LG&E Energy Corp. v. Argentina*, ICSID Case No. Arb/02/1, Decision on Liability, paras. 214, 257 (Oct. 3, 2006); *Enron Corp., Ponderosa Assets, L.P. v. Argentina*, ICSID Case No. Arb/01/3, Award, para. 332 (May 22, 2007); *Sempra Energy Int'l v. Argentina*, ICSID Case No. Arb/02/16, Award, para. 385 (Sept. 28, 2007); *Continental Casualty Co. v. Argentina*, ICSID Case No. ARB/03/9, Award, para. 182 (Sept. 5, 2008); *Sempra Energy Int'l v. Argentina*, ICSID Case No. Arb 02/16, Annulment, para. 175 (June 29, 2010).

<sup>14</sup> *Piero Foresti v. South Africa*, ICSID Case No. ARB(AF)/07/01, Award (Aug. 4, 2010).

<sup>15</sup> *Bernardus Henricus Funnkötter v. Zimbabwe*, ICSID Case No ARB/05/6, Award (Apr. 15, 2009).

<sup>16</sup> *Id.* at para. 124.

In the Colombian case, one central question is whether, and to what extent, an investment tribunal should consider the transitional context that frames land reform in that country. While the precedents are not encouraging, I believe that this context should have weight. The land component of an eventual deal would be the cornerstone for the reparations of human rights abuses that occurred during the armed conflict, and is crucial for preventing more violence. As a general mindset, arbitrators should acknowledge the humanitarian dimension of their responsibility as adjudicators, instead of focusing on investment standards in isolation of their context.

This approach does not imply denying investors the protection promised in treaties. Colombia adopted obligations that must be kept. However, investment norms and arbitral procedures open a space for arbitrators to consider *all* the implications of their decision.

In the Colombian case, such an approach would have certain procedural and doctrinal consequences. Procedurally, it would imply allowing civil society organizations, and particularly Colombian victims' organizations, to participate in the investment arbitration process, to have access to the claims, and to be heard by the tribunal. Moreover, when adjudicating on land reform initiatives, an arbitrator mindful of the humanitarian implications of investment litigation in the Colombian context might also adopt a more deferential standard of review. When the right case comes along, investment arbitration tribunals will be in a position to, in effect, review the domestic legal architecture and implementation of a peace agreement. They should adopt a deferential standard, giving in principle much weight to the decisions of Colombian courts, and only exceptionally deciding land reform questions anew.<sup>17</sup>

Doctrinally, this approach might imply a stricter standard for diligence on behalf of the investor. If someone decided to invest in land in Colombia, attracted by the generous incentives in mining or agroindustry, that investor should have also considered that land tenure in Colombia has always been a central element of the conflict, making it reasonable to expect that land tenure would also be a central element of a peace agreement. Prior awards have suggested this *caveat emptor* possibility. In *Hassan Awdi*, the tribunal discussed the restitution of a historical building that had been confiscated by the Romanian communists in the 1950s, and then privatized and sold to foreign investors in the 1990s. In its reasoning, the tribunal took seriously Romania's property restitution program, and found that no expropriation had occurred, as the claimants knew that restitution was indeed a possibility when they made the investment.<sup>18</sup> Land reform and restitution is also a clear possibility in Colombia, and arbitral tribunals should expect investors to know so.

This approach could also have an impact on the calculation of investor compensation. Demanding significant amounts of money from a state that is implementing an ambitious transition program might have disastrous humanitarian effects, and might not be justified under basic principles of equity.<sup>19</sup> In his Separate Opinion in *CME*, Ian Brownlie considered relevant the disastrous effects that the award would have on the Czech Republic.<sup>20</sup> In both *Sempra* and *CMS*, the tribunals said that the Argentinean crisis had to be considered when calculating reparations: "the crisis cannot be ignored and it has specific consequences on the question of reparation."<sup>21</sup> Such particular circumstances should be also considered in the Colombian case.

<sup>17</sup> See René Uruena, *Subsidiarity and the Public-Private Distinction in Investment Treaty Arbitration*, 79 LAW & CONTEMP. PROBL. 99 (2016).

<sup>18</sup> *Mr. Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award, paras. 438-442 (Mar. 2, 2015).

<sup>19</sup> Larry May, *Jus Post Bellum, Grotius and Meionexia*, in *JUS POST BELLUM: MAPPING THE NORMATIVE FOUNDATIONS* 18 (Carsten Stahn et al. eds., 2014).

<sup>20</sup> *CME, Czech Republic B.V. v. The Czech Republic*; Separate Opinion of Professor Brownlie, paras. 75-80 (March 14, 2003).

<sup>21</sup> *CMS Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8, Award, para. 406 (May 12, 2005); *Sempra Energy Int'l v. Argentina*, ICSID Case No. Arb/02/16, Award, para. 396 (Sept. 28, 2007).

Finally, investment arbitrators approaching a Colombian case should be aware of that state's obligations under the American Convention of Human Rights. The Inter-American regime of human rights and investment protection already butted heads once, when Paraguay tried to use its obligations under the Germany-Paraguay BIT to evade restituting the traditional lands of the Sawhoyamaya indigenous community.<sup>22</sup> The Inter-American Court rejected the argument. However, the case made clear that the communicating channels between the regimes are crucial for a situation such as Colombia's: a state that has strict obligations under the regional human rights system, which can involve, as we have seen, land restitution. Foreign investment law should not be an obstacle for Colombia to fulfill its other international obligations, particularly when, according to the Inter-American Court, the right to due process has achieved *ius cogens* status.<sup>23</sup>

<sup>22</sup> Comunidad Indígena Sawhoyamaya v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146 (Mar. 29, 2006).

<sup>23</sup> Caso Goiburú y otros v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 153 (Sept. 22, 2006).