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Abstract
This paper intends to illustrate current challenges around the conceptualization and articulation of land tenure security in Colombia. This situation is explained by the existence of tensions between divergent normative rationales within the country’s policy agenda. On the one hand, the implementation of a transitional justice project intended to achieve sustainable peace in the country through the compensation of victims and execution of structural adjustments in the rural side. And on the other, the systematic conclusion of international investment agreements so as to attract foreign investment by means of the provision of a stable legal environment. It is contended that these two policies, although part of a single and apparently coherent development strategy, are pushing the management of land and natural resources in opposite directions and consequently, generate a problematic inconsistency in the rationalization of land tenure security. Therefore, such tension might be reproduced in the exacerbation of legal conflicts over the access and use of lands at the rural side.

Key Words
Land tenure security; Colombia; transitional justice; peacebuilding; economic globalization; international investment agreements.

I. Introduction
Colombia’s current socioeconomic governance landscape is characterized by two objectives that reveal the centrality of land and natural resources in its development strategy. On the one hand, the country is determined to become a competitive player in the global economic scenario, for which it intends to assume a very specific role: a provider of commodities and consequently, a successful foreign capital importer so as to count with the necessary resources to conduct the former task. And on the other, after more than 50 years of an internal armed conflict that is grounded in structural issues around the unequal access to land, it is going through a process of transition with the purpose of putting an end to confrontations and assure durable peace and stability.
Both goals have been directly addressed by the state within its policy agenda, according to which they have been identified as constitutive of the country’s development strategy for the coming years. In order to attract transnational capitals, Colombia has decided to systematically negotiate international investment agreements (hereinafter IIAs) with the most prominent capital-exporting countries – USA, Canada and the European Union among others –, so as to provide a stable legal environment to foreign investors and their property rights and economic interests, thus incentivizing their establishment and operation in the country. In turn, the aim at achieving durable peace and stability has motivated the Colombian government to implement a transitional justice project (henceforward TJP) that builds on the recognition and satisfaction of the victims’ rights of justice, truth and reparation, as well as on the negotiation of substantial accords with the insurgency, one of which gravitates around the implementation of structural changes at the level of rural development.

Provided the content and extent of the latter policies – which directly or indirectly touch upon the administration of land and natural resources –, it is not odd to notice that land tenure security (hereinafter LTS)\(^1\) is a key element in the effective implementation of both governance processes. While in the context of foreign investment protection LTS is understood as the materialization of a stable and predictable environment to conduct a profitable economic activity, within the peacebuilding scenario it is rationalized as the formal supplement to consolidate the effects of the retributive and redistributive measures intended to compensate the victims of the conflict and produce structural transformations in the country. However, although these two policies are said to be part of a single and apparently coherent development strategy, recent facts are revealing that they are pushing the management of land and natural resources in opposite directions and consequently, the uniform articulation of LTS towards the achievement of the country’s socioeconomic objectives has become challenging due to the resulting superposition of interests.

This paper intends to illustrate the current challenges around the conceptualization and articulation of LTS in Colombia, which are explained by an alleged tension between divergent normative rationalities within the country’s policy agenda, and which might be reproduced in the

\(^1\) For the purposes of this paper, land tenure security is assumed as the condition under which property rights on lands are formally allocated in head of an individual or a community, and whose enforcement by public authorities is effective. This conceptualization is introduced in accordance with World Bank’s official view, which is found in the 2011 document *The World Bank Land Tenure Policy.*
exacerbation of legal conflicts over the access and use of lands at the rural side. In concrete, this paper suggests that the configuration of a supplementary scheme for the protection of foreign investors’ property rights by means of the systematic conclusion of IIAs has the potential to preclude the effectiveness of a number of restorative and redistributive policies part of the country’s transitional justice project, which are fundamental for the achievement of durable peace and stability in the country. In front of such problematique, the state – which is depicted as both a sovereign entity and as an agency for the implementation of the policies under analysis – has a fundamental role in the harmonization of such colliding visions, towards the consolidation of a compact and reliable tenure security system that could respond to such – normative, social and economic – requests.

In order to develop the latter argumentation, the paper is divided in four parts. The first one elaborates on the rationalization of LTS from the point of view of economic globalization and in particular, the protection of foreign investors through international investment agreements. Next, LTS is analyzed in the context of transitional justice and peacebuilding, emphasizing in its supplementary character as a consolidator of both the effective reparation of victims and the addressing of structural issues that have to be remedied so as to find durable solutions to the conflict. Thereafter, the alleged tension between these two policies will be exemplified with the illustration of a recent case – the Embera Katio’s Alto Adagueda Community in North West Colombia –, in which the restitution of communal territories to an indigenous community collided with the prior assignment of mining titles to three big transnational mining companies. Finally, some concluding remarks will be provided.

II. Land tenure security in the context of international investment agreements and foreign investment protection

Under the context of the implementation of an economic liberalization program – commonly known as apertura económica – by means of a comprehensive package of structural reforms, throughout the decade of 1990 Colombia progressively adopted foreign investment as an essential economic asset towards the achievement of its socioeconomic goals. After 50 years of a closed economic model based on the protection of the national industry through an import-substitution policy, a straight control of the payments balance and the proliferation of additional tariff and non-tariff barriers to free trade and investment, the country considered necessary to become a
competitive player at the global market by assuming a very clear role: a land and natural resources provider. Yet, as the performance of such role required high amounts of financial resources and technical expertise with which the country didn’t count with, it became necessary to think about effective ways to incentivize the arrival of transnational corporations in the national economy and thus cover such lack.

Therefore, in order to justify the drafting of new policies and norms for the attraction of foreign investment, transnational capital mobility was normatively depicted as a fundamental element within the internationalization and integration strategy mandated by the country’s constitutional framework, as well as a natural promoter of economic growth. In that regard, it was asserted that as long as the attainment of alternative sources of financing and technology could increase the country’s levels of international trade and employment, the domestic market had to become competitive at the global level in order to attract as many foreign investors as possible. Hence, such competitiveness depended on the implementation of policy and regulatory adjustments aimed at liberalizing the rules concerning the access, treatment and protection of foreign investors, especially their property rights.

However, at the outset of the 1990’s, Colombia wasn’t the only country considering the arrival of transnational business and their resources as a feasible alternative to invigorate its economic dynamics. In fact, many states with comparable features shared such view and were similarly advancing in the modification of their domestic legal frameworks to attract foreign investment, which happened to be considered as an attractive means to supplement national savings and the resources lent by regional and international financial institutions. Following a global tendency and under the spectrum of the legal reforms made in the context of apertura económica, Colombia started negotiating IIAs in 1992 at both regional and international levels. By December 2014, Colombia had entered into 22 IIAs, 12 of which bilateral investment treaties and 10 free trade agreements. From the IIAs entered into by Colombia, hence, it is possible to identify the country’s self-disposition to perform as a capital-importing country.

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2 Three negotiation paths can be identified. The first one corresponds to the aim at attracting capitals from developed countries – the United States, Canada, the European Union, United Kingdom, Switzerland, Japan, Spain and France –, which have traditionally been the principal capital-exporting countries and some are also Colombia’s main commercial partners. The second trail is oriented to propitiate the arrival of investors from countries identified as emerging economies – China, India, Singapore, Korea, Turkey and Israel –, which have the potential to become the
Assuming a political economy rationale, the dynamic created by IIAs resembles the idea of a market with scarce resources – coming from capital-exporting countries – which are to be distributed among many prospective recipients, who recognize each other as competitors in the race for assuring the optimal arrival of investment flows. In consequence, countries like Colombia are compelled to develop competitive advantages so as to encourage investors to establish at their jurisdiction and in so doing gain preferential access to said scarce resources. Under such context, the generation of competitive advantages depends on two elements. First, the nature of the decision-makers – foreign investors –, who are transnational private entities legally incorporated at certain home country, whose object is the conduction of a lucrative economic activity at a host country. And second, the fact that transnational capital mobility is framed in the political context of the nation-state and the mechanisms through which inter-state relations are conducted: international law.

Now, from a normative standpoint, the latter rationalization implies the state’s compromise to assure investors that they will be protected from risks that might affect their property rights and economic interests, including the ones caused by their own sovereign acts. In turn, such commitment leads to the generation of legitimate expectations on the investors regarding the conduct of public authorities, which not only must safeguard the formers’ entitlements, but should not interfere with the normal functioning of the private sphere. In other words, comparative advantages crystallize in the production of a stable legal environment in which foreign investors can foresee the rules and conditions under which they will conduct an economic activity.

Embracing this normative rationale, Colombia decided to implement a policy of IIAs negotiation as a means to offer a favorable legal climate to foreign investors located within its jurisdiction, which is built on the imposition of a series of behavioral standards to the state vis-à-vis the entitlements and economic interests of investors, and is articulated on the basis of inter-state reciprocity. Although their formulation is quite broad, the rationality behind these standards is very sharp in requiring specific institutional patterns of conduct so as to assure that investors have their entitlements and expectations duly covered. On the one hand, a number of standards focus in the
greatest sources of capital remains to be globally distributed in the short term. Finally, the third focus lies at the regional level, where Colombia has successfully negotiated treaties with states sharing political views and likewise compromise with economic globalization, in the context of both the Pacific Alliance – Mexico, Chile, Peru, Panama and Costa Rica –, and the North Triangle economic integration area – El Salvador, Honduras and Guatemala.
way investors should be treated with respect to other – national or foreign – economic actors and in accordance with the international principle of fairness and equitability. And the other, there are specific provisions aimed at protecting foreign investor’s property rights and economic expectations from the regulatory action of public authorities by restricting the application of direct and indirect expropriatory measures. Thus, the greatest potential of these standards to assure that foreign investors will face no unexpected changes in the initial conditions of operation comes from the fact that they can be directly enforced by an international arbitral tribunal, in case of an eventual dispute with regards to the occurrence of prejudices from the state’s actions or omissions.

Under the precedent normative context and provided that the activities normally conducted by transnational businesses in Colombia – mostly agricultural, forestry and extractive enterprises – are deeply associated with the access and use of lands and natural resources, LTS has been understood as a conditio sine qua non for a stable environment of operation. In that regard, foreign investors have identified the existence of clear and enforceable property rights, as well as the verification of predictability from the conduct of public authorities in charge of the administration of the country’s land tenure regime, as the foundations of a profitable economic activity. In consequence, the IIAs concluded by Colombia have been structured as a supplementary source of legal stability to foreign investors, additional to the conditions of predictability and enforceability provided by the country’s ordinary land tenure regime, embedded in its constitution and developed by the domestic civil legislation.

In particular, by creating concrete expectations with respect to the behavior of the state in the orbit of foreign investors’ property rights, the standards embedded in the IIAs enlarge the protection of their economic interests. First, in accordance with the direct expropriation standards, the host state cannot expropriate foreign investor’s assets – including not only lands but other associated economic entitlements, such as exploitation titles or concessions – without the existence of a public interest, a non-discriminatory measure, and the payment of a prompt, adequate and effective

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3 Generally, these include standards of national treatment, most-favored-nation treatment, fair and equitable treatment, and a minimum standard of treatment with correlative requirements for the state.

4 According to data provided by Procolombia, in 2014 32.5% of foreign investment established in the country corresponds to the oil sector, 13.3% to the mining sector. In turn, in the same period 166 USM were invested in the agriculture sector, mostly in land acquisition. See http://www.procolombia.co/sites/default/files/report.de_inversion_a_2014-a_iii_trim.pdf (accessed January 29, 2015).
compensation. This way, the eventual execution of restorative or redistributive measures affecting the interests of the safeguarded private parties is conditioned to the availability of resources to cover the compensatory costs. In addition, by means of the indirect expropriation standards public authorities are expected to act in way that foreign investor’s property rights are not harmed, even if such affectation does not involve the formal transfer of ownership. Therefore, the regulatory activity of public powers is conditioned to the sustainability of the legitimate expectations established in favor of transnational businesses.

With regards to the potential of these standards to be subject of acknowledgement and adjudication by international investment tribunals, a couple of cases in which foreign investor’s land rights were affected by direct expropriations or regulatory measures are illustrative of the degree of protection that this dynamic brings to transnational businesses. In the 2009 case Funnekotter v. Zimbabwe, an arbitral tribunal decided that by implementing a Land Acquisition Act by means of which a number of farms owned by Dutch nationals were occupied and redistributed to peasants, the sued country has committed acts tantamount to expropriation and thus was responsible to indemnify the affected investors. On the other hand, in the 2010 case Foresti v. South Africa a group of Italian investors sued South Africa due to the impact of its Black Economic Empowerment legislation – aimed to address past racial discrimination arising from apartheid – on their assets, and also obtained a favorable decision from the arbitral court. In both cases, LTS was projected in favor of foreign investors as their property rights were safeguarded from the regulatory action of the state, regardless of its motives and purposes.

In conclusion, it is possible to assert that since LTS is a driver of foreign investment in Colombia, the IIAs concluded by the country with capital-exporting countries have been designed to supplement domestic legislation so as to offer a predictable and stable land tenure system. In that regard, it must be noted that although no new entitlements than the ones already existent in the domestic laws are attributed to foreign investors, IIAs impose specific obligations on the host state by means of the legitimate expectations created on transnational business regarding the superfluous protection of their property rights and economic interests. Thus, an evident connection between land tenure security and free enterprise is verified, which results in the fact that IIAs have

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5 It is important to mention that to date, although Colombia has systematically concluded IIAs with a great number of capital-exporting countries, it has not been sued by a foreign investor before an international arbitral tribunal.
developed a supplementary regime to guarantee LTS, to the extent that foreign investors’ property rights tend to become untouchable from any type of intervention, even the one from the regulatory activity of state authorities.

III. Land tenure security in the context of transitional justice and land restitution regulatory measures

For more than 50 years, Colombia has been immersed in a long confrontation between a variety of official, paralegal, and subversive actors. Rooted in historical discriminatory patterns, the conflict has a notable economic dimension since has reproduced violent disputes over valuable assets such as land and natural resources. As many as five million Colombians have been internally displaced from their traditional locations, most of which are peasants from the rural areas where the disputed assets and interests are located, as well as indigenous peoples and afro-Colombian communities which in the same way were uprooted from their traditional places of habitat. Consequently, there is a causal relation between the strategic motivations of the conflict – territorial domination and primary accumulation of capital – and the affectation of peoples’ human rights, including their rights to justice, truth and reparation when rationalized as victims.

The election of Juan Manuel Santos as president in 2010 represented a significant departure from previous attempts to find a solution to internal conflict – both in ideological and pragmatic terms –, according to which no structural transformations at the socioeconomic level were considered as necessary to achieve a durable peace. Peculiarly, the Uribe Administration (2002-2010) had depicted guerrilla groups as terrorists, denied the existence of an internal conflict and supported the enforcement of military actions as the exclusive alternative to violence. In contrast to such position, in May 2011 the Government made a public statement recognizing the existence of an internal conflict the causes of which were rooted in historical inequalities, and highlighted the need to place victims at the center of concern through a transitional justice process.

Colombian TJP’s normative rationale gravitates around its identification with a peacebuilding function, in that it occupies a preponderant role in the creation of conditions of durable peace at a society affected by a long-range structural conflict. Hence, it is considered that both putting an end to the armed conflict and addressing the rights of the victims are the primary steps of a further
process of reconstruction, transformation and reconciliation –the post-conflict–, idea that reflects not only domestic aims but a global public interest.

In order to comply with said function, the TPJ is generally structured in two policy initiatives which, in any case, are intrinsically related. The first corresponds to the proper implementation of transitional justice regulatory measures to address and satisfy the victims’ right to justice, truth and reparation, and is materialized in Law 1448 – better known as Ley de Víctimas y Restitución de Tierras – and its supplementary norms. The second is aimed at providing the peace process that the Colombian government is currently carrying out with the subversive group Farc with a legal basis to reinforce the compromises reached by the parties, in particular the ones associated with the implementation of land and other agrarian-oriented reforms in the rural side to remedy the conflict’s root causes. Thus, the content of Colombian TJP echoes the way in which the state performs as a regulatory authority to produce structural changes in society.

The Ley de Víctimas was designed as a general framework recognizing victims as subjects of special protection, and consequently consecrates their right to be properly repaired in accordance with the conflict’s causes and dynamics. In that regard, due to the specificities of the harm suffered by those affected and the territorial nature of the conflict – most of the incidents took place at the rural side and are directly related to the forced dispossession or abandonment of lands –, land restitution was placed as the core component of such process. Hence, the determination of the circumstances associated with the forceful appropriation of such assets as well as the most feasible way to redress victims occupy a primary spot within the legal instrument. Since land restitution is consequently assumed as the most suitable way to restore victims, substantial regulation defining the content and extent of the right to be properly repaired was developed.6 Additionally, Law 1448 created institutions to assume the task of repairing a massive number of claimants.7 Further,

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6 In general terms, the following points define the right to be properly repaired: a. material and legal restitution should be considered as the primary option; b. in case material restitution is not possible, alternative restitution through an equivalent land is possible; c. If restitution is not possible, victims will be compensated with the value of lands; d. authorities should advocate for the consolidation of property rights in case that victims occupy a vacant lot, which in turn should be considered as a case of either alternative restitution or administrative compensation, the latter if they didn’t own land before; e. in the case of afro communities or indigenous peoples who are covered by special regimes of property holding, collective compensation is possible.

7 Law 1448 and complementary regulation created a Land Restitution Administrative Unit, a Victims Administrative Unit, regional inter-institutional instances to define local-oriented policies, and a registry system on dispossessed and forcibly abandoned lands.
administrative and judicial procedures were consecrated so as to both concretize land restitution and allow counterclaims in case of a collision with juxtaposing entitlements.\(^8\)

Alongside the aim at recognizing and making effective the victims’ rights to justice, truth and reparation, the Santos administration always had in sight the intention to explore the possibility to find a negotiated exit to the armed conflict and thus, a starting point for a phase of post-conflict peacebuilding. In that sense, in September 2012 the government revealed the existence of a preliminary rapprochement with Farc. Such exploratory process concluded with the signature of a general accord in August 2012, which expressed the intention to start formal peace negotiations and established a 6-points discussion agenda. Not surprisingly, the first point was related to the implementation of a new scheme of rural development as a way to support local integration and equitable socioeconomic conditions\(^9\). As a result, in May 2013 the parties announced the conclusion of an accord establishing programmatic elements towards the implementation of a prospective agrarian reform.

According to the press statement released by the parties, the abovementioned agreement should be considered as a milestone for the structural transformation of Colombia’s rural and agrarian background, and it is focused on the small-scale farmer’s interests, the access and redistribution of lands, the fight against poverty, the encouragement of agriculture in the country, and the reactivation of rural economy. Very telling is the political statement included within the Agrarian Accord, according to which the parties consider that such instrument is aimed at reverse the effects of the conflict, including the implementation of restitution actions in favor of the victims of land dispossession and forced displacement. Six concrete measures were advanced to be subject of implementation as part of the validation of a further final agreements between the parties:

a. The creation of a lands-fund for the purpose of their distribution among poor and marginalized population.

\(^8\) In order to be operative, the *Ley de Víctimas* consecrates two types of procedures. First, an administrative procedure intended to attend the early reclamation of a victim so as to determine whether his pretentions are valid according to probed facts and a series of especial legal presumptions in relation to claimants’ situation. Second, in case of opposition to an administrative act deciding in favor of a victim, the Law contemplates the initiation of a judicial procedure so as to study rejections stemming from the evolving legal controversy.

\(^9\) The first point of the agreement’s discussion agenda refers to integral rural development policies, including the following aspects: 1. Land access and use; 2. Local-oriented development programs; 3. Infrastructure and lands adaptation; 4. Social development, including health, housing, education and poverty eradication; 5. Productive aspects of agriculture and microfinances; 6. Food security.
b. The development of specific mechanisms aiming at the consolidation of property rights to supplement the procedures instituted by the Victims Law.

c. The creation of an Agrarian Jurisdiction to solve conflicts taking place at the rural side and with the occasion of controversies around the access to and use of lands.

d. The modernization of the cadastral registry on lands and rural property.

e. The development of mechanisms to grant access to social guarantees at the rural side.

f. The consolidation of mechanisms regarding the closing of the agricultural border and the constitution of peasant reserve zones.

As with the case of foreign investment protection via the provision of a stable environment of operation by means of the conclusion of IIAs, the Colombian transitional justice project has included LTS as a fundamental component for the accomplishment of its restorative and distributional objectives. In the realm of the peacebuilding rationale, the measures aimed at securing the property rights of those being either repaired or benefitted by the structural transformations in the rural side, are envisaged as a normative supplement without which said process could become durable and sustainable. In particular, the existence of LTS measures gravitating around the TJP secures the effectiveness of the land restitution program and the due implementation of an alternative agrarian development scheme with the purpose of producing structural transformations in the country’s rural side.

As to this point, post-conflict land policy – prominently including LTS measures – is key for the promotion of further transitional justice objectives such as democratization, human dignity and the rule of law. Whereas the TJP is being implemented in the context of a neoliberal economic system – under which lands and natural resources are valuable commodities around which a market for their negotiation is well established –, LTS would secure that the goal of guarantee durable solutions to conflict and social inequalities can be achieved. Further, LTS becomes critical to the consolidations of TJP in a time when a distinctive land rush process has permeated the global scenario. The growing demand for agricultural products, biofuels, carbon sequestration, and conservation uses has exacerbated the corresponding market. Under this situation, the territories

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10 According to UN Habitat, Land tenure insecurity is a widespread problem in Colombia, which has a history of conflict and violent land takings. Since 1985, internal displaced personas have abandoned an estimated 4 million hectares.
that are being restored to the victims of the conflict and the lands allocated as part of the upcoming rural development scheme, would certainly be the immediate objective of said dynamic.

IV. Land tenure security to the limit: The Emberá Katío communities located at the Alto Adáigua Resguardo

Having introduced the alternative normative rationales embedded in two policies that occupy a primary spot in Colombia’s development agenda – on the one hand the protection of foreign investment via international investment agreements, and the implementation of a transitional justice project on the other –, the next step to illustrate the existence of an essential tension between their corresponding conceptualization and articulation of land tenure security is to provide a concrete example of their problematic interaction. In the context of a territorial restitution process aimed at the effective reparation of an indigenous community affected by the conflict and other underlying factors – the Emberá Katío communities located at the Alto Adáigua resguardo –, group of decisions issued by different transitional justice judicial authorities affected the economic interests of several transnational mining corporations that had been operating in such territory through subsidiaries, by virtue of a concession granted by the state.

Context and facts of the case

The Emberá Katío people has inhabited western Colombia – particularly in the Chocó Department and the Darién region, which borders with Panama – since immemorial times. As a consequence of the contact with European conquerors and later on, with modern Colombian citizens, they had to adapt to the territorial demands of the nascent national project and grouped around resguardos\(^1\) so as to gain recognition and protection from the Colombian state with the aim of preserving their self-determination. In accordance with their ancestral traditions and culture, the Emberá Katío people has developed a unique relation with territory and natural resources, which builds on interdependence and survival, and surpasses the common occidental understandings around ownership and economic exploitation.

\(^1\) These are indigenous reservations, established by Colombian law so as to delimit the zones where indigenous peoples live and develop themselves as social groups with certain level of autonomy, based on their right to self-determination. According to the 1991 Constitution,
In particular, the Emberá Katio’s *Alto Andágueda resguardo*, located in the Bagadó municipality at the Chocó Department, was recognized and constituted in 1979 by means of a resolution issued by “Instituto Colombiano de Reforma Agraria – INCORA”, which was the public authority in charge of such matters\(^\text{12}\). Having a geographical extension of 50,000 hectares, it is considered that by 2012 the resguardo was formed by 31 communities, 1454 families and around 7,000 individuals. In 1996, around 7,000 hectares of the resguardo were recognized by public authorities as an *indigenous mining zone*, according to which as a consequence of the allocation of a preference entitlement in head of the indigenous community, said zone could be directly exploited by the Emberá people. According to the conditions given by the public authority in charge of its approval, said concession lasted until 2012.

Due to its site and particular features, the territory where the resguardo is located has been one of the most affected by Colombia’s internal armed conflict. Its geostrategic location – it adjoins with Panama and has access to both oceans in which the country has coasts – has led to the presence of the major armed actors (guerrilla, paramilitary groups, criminal bands, etc.), which have permanently disputed the chance to use it as a scenario to conduct their activities, especially the ones associated with drug trafficking, smuggling, kidnapping and extortion. On the other hand, there are plenty of virgin lands and valuable mineral resources that lie unexploited, for which said actors have sought their appropriation as a means to finance the unlawful actions. Under such context, the high intensity of the warfare between the country’s armed forces and the illegal armed actors has deeply impacted civilian population, mostly indigenous peoples, afro-Colombian communities and peasants. Consequently, since the year 2000 a great number of indigenous leaders have been assassinated and the community’s property has resulted affected by the combat actions, leading to massive waves of forced displacement that deeply affected the very – physical and cultural – survival of the Emberá Katio’s *Alto Andágueda resguardo*.

As part of the country’s development strategy – progressively implemented since the beginning of the decade of 1990 in the context of economic liberalization, but whose consolidation took place during Álvaro Uribe Velez's presidential period –, since the year 2008 a great number of concession contracts between the State and private parties started to be concluded, result of which

\(^{12}\) Nowadays the public entity in charge of Colombia’s rural development public policies is Incoder, which inherited Incora’s mandate regarding the constitution of *resguardos*. 

14
was the massive granting of mining titles to national and international companies to extract mineral resources in areas such as the Bagadó municipality. In that regard, by the time this regulatory dynamic reached its peak in 2012, 31,000 hectares of the latter administrative entity had been either commended to a number or mining companies specialized in the extraction of gold, or their concession were under consideration by the Agencia Nacional de Minería\textsuperscript{13}. In sum, the area object of economic interest overlapped in 62\% the Alto Andágueda resguardo. With respect to the involved companies, even though they had been incorporated in Colombia, they represented the interests of at least three major transnational mining corporations / foreign investors: AngloGold Ashanti (UK/South Africa), Glencore (UK/Switzerland), and Continental Gold (Canada)\textsuperscript{14}.

Legal procedures and decision

In accordance with the Ley de Víctimas and supplementary norms\textsuperscript{15}, in December 2012 the Chocó regional branch of the Unidad de Restitución de Tierras\textsuperscript{16} initiated a territorial restitution procedure on behalf of the Emberá Katío communities of the Alto Andágueda resguardo before a local court in Quibdó, the capital of the Department of Chocó. As the first line of action and aiming at preserving indigenous people’s rights over their territories while a final decision had been taken, the Unidad requested the precautionary suspension of all the mining titles located within the resguardo, as well as the deferral of the study of new concession solicitudes. The court decided to grant said injunction, and supported its decision in two grounds. First, the fact that as a consequence of the dynamics of the conflict that led to the dispossession of their lands, the indigenous community lost the opportunity to inhabit, manage and enjoy their territory and natural resources collectively owned. And second, that in the case under study the granting of mining titles resulted from incomplete procedures, as no prior consultation was carried out with the communities of the Alto Andágueda resguardo, thus affecting their fundamental rights to self-

\textsuperscript{13} The Agencia Nacional de Minería is the country’s public entity in charge of administering the state’s mineral resources. Therefore, it studies and grants mining titles and other types of related concessions.

\textsuperscript{14} It is important to point out that Colombia has entered in international investment agreements with Switzerland (2008), Canada (2010) and the UK (2010), which contain specific norms on the protection of foreign investment and have instituted investor-state arbitration as the means to solve eventual disputes around the breaching of said safeguards.

\textsuperscript{15} And in particular Decree 4633, which supplements Law 1448 as to the protection of indigenous people’s right of compensation as victims of the armed conflict.

\textsuperscript{16} In turn, the Unidad de Restitución de Víctimas is the institution in charge of managing the land restitution component of Colombian transitional justice project, including the representation of victims before the courts in charge of addressing and deciding upon the territorial restitution procedures.
determination. In other words, the lack of prior consultation prevented the Emberá Katíos from fixing their development priorities over the use of ancestral lands and natural resources, intervening in the discussion over the collateral damages that mineral exploitation could cause in their territory and personhood, and the consequent negotiation on eventual indemnifications for said affectations.

Interestingly, whereas the latter precautionary measure was issued by a court of law – a public institution –, the greatest opposition to the protection of Emberá Katío’s territorial rights came from the Agencia Nacional de Minería – another public institution –, which considered that since it had granted the suspended mining titles, its rights to access to justice and due process had been infringed by the judicial decision made by the Quibdó court. In consequence, it brought an acción de tutela – a constitutional action aimed at preserving someone’s fundamental rights from the acción or omission of public authorities – against the injunction, looking for the reestablishment of the companies’ economic entitlements. In November 2013, a higher court from the same jurisdiction – the High Tribunal of Medellin – decided to deny the protection sought by the Agencia, based on the fact that the behavior of said institution when granting the concessions to the mining companies disregarded two factors. First, the situation of accentuated vulnerability of the Emberá Katío communities as a consequence of armed conflict and other underlying factors. And second, the distinctive relation that indigenous peoples have with their ancestral territories and the consequent special protection that the country’s constitution gives to such dynamic. Therefore, as the high tribunal pointed out, said territories couldn’t be subject of the same treatment given to common private property, and every effort to secure indigenous people’s land tenure – including the suspension of mining titles – was justified.

After that the precautionary measures decision uttered by the Quibdó Court was endorsed by Medellin’s High Tribunal by rejecting the opposition introduced by the Agencia Nacional de Minería, said judicial body assumed the task of bringing out a final decision on the territorial restitution of the Alto Andágueda resguardo. Supplementary to the material restitution of the territory, the Unidad requested the tribunal to undertake additional actions; request the clarification of the boundaries of the resguardo in order to update the cadastral registry; declare the inexistence of the concession contracts concluded between the state and the mining companies, with the consequent annulment of the corresponding mining titles; request to the Agencia Nacional de
Minería the denial of any solicitudes of mining titles on the area subject of discussion; and order the creation of an indigenous mining zone in favor of the Emberá Katío communities to exploit the resources located at the Alto Andágueda resguardo. Once the evidence on the grave affliction suffered by the Emberá Katío communities as a consequence of the armed conflict and other underlying factors was assessed and credited, the tribunal entered to study the arguments of the opponents – the mining companies –, which deserve to be illustrated in depth.

The mining companies – which received the ideological support of the Agencia Nacional de Minería – centered their opposition to the claimants’ pretention as to the cancellation of the concession contracts concluded with the Colombian state and the corresponding annulment of their mining titles in five grounds. First, the apparent lack of causal nexus between the victimization of the indigenous communities and the granting of economic prerogatives to the mining companies within the area where the resguardo is located. Second, the fact that Colombian subsoil and its resources entirely belongs to the state, regardless of the owners of the superposed territories. Third, the impossibility of restoring territorial rights that never belonged to the indigenous communities. Fourth, that declaring the annulment of the mining titles under study would imply the transgression of the mining companies’ legitimate expectations. And fifth, the improper use of the territorial restitution procedure in which the Emberá Katío communities would incur in case of the incidental obtention of mining titles.

In that respect, the opponents manifested that the conclusion of concession contracts between the state and the mining companies did not cause any direct affectation to the communities; neither it is linked to the armed conflict nor is a consequence of the forced displacement of the Emberá Katío people. Thus, the licensee businesses are not responsible for their territorial dispossession. Likewise, they insisted in that the territorial restitution procedure wasn’t aimed at affecting clear and well-established property and mining rights that were legitimately obtained by the mining companies, nor to violate the pre-established norms and procedures on the acquisition of such rights, as pretended by the communities of the Alto Andágueda resguardo when requiring the creation of an indigenous mining zone within such areas as part of the tribunal’s adjudication.

In order to set the foundations of its decision, the tribunal started by raising a number of crucial precisions. With regards to the nature and scope the judicial process being carried out, the tribunal pointed out that it was entirely permeated by a transitional justice paradigm, according to which
it is aimed at breaking with the continuum of the ordinary domestic legal norms (civil and agrarian) so as to remedy past harms associated with the conflict and produce tangible transformations in society. Therefore, transitional justice judges were invested with special prerogatives to call the action of a great number of public authorities in different levels. Next, it brought a comprehensive legal base to decide upon the case; not only did it include international legal documents such as ILO’s Covenant No. 169 and the UN Declaration on the rights of indigenous peoples, but recognized indigenous peoples’ norms – ley de origen, ley natural, derecho mayor or derecho propio – as part of the relevant norms to determine the conditions under which their territorial rights had to be restituted. Finally, the tribunal depicted the Alto Andágueda resguardo – the administrative entity recognized by the state – as a subject of special protection and a rights-holder. Hence, the resguardo is entitled with a fundamental right to collective territory or collective ownership, built on the country’s constitutional order as private property is depicted in an ample way. In consequence, the ordinary legal and economic dimensions of private ownership are surpassed by the concept of indigenous territory, and lands are to be understood not as a mere commodity but as a geographical, social, cultural and religious site, essential for their self-determination.

Henceforth and considering the particular elements of the case, the tribunal characterized the legal exploitation of natural resources as an underlying process to the armed conflict affecting the territorial and cultural integrity of the Alto Andágueda resguardo. Thus, the territory ancestrally possessed by the Emberá Kátios communities had been put into risk as the mining project under development with occasion of the concession contracts covered 62% of the resguardo and had a prolonged duration (around 40 years). Said situation, joint by the fact that both the mining concessions already granted and the ones under study omitted the realization of a prior consultation process with the indigenous communities, had the potential to increment the territorial damages and social changes produced by the conflict.

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17 Article 58 of Colombian constitution recognizes communal property for indigenous peoples and afro-Colombian communities, and recalls the social function of private ownership as a limitation to the exercise of such entitlement.

18 The tribunal made reference to an essential tension between economic development – a dynamic supported by public interest – and the protection of the country’s ethnical diversity. Said tension results, asserted the tribunal, in the existence of contentious discourses on how nature is seen; one utilitarian according to which land and natural resources are to be commoditized, and another focused on nature’s constitutive part of peoples’ identity. Under such context, Prior consultation appears as a mechanism to harmonize said opposed visions of nature. Therefore, it reminded the rule coined by the Colombian constitutional court according to which every act, project, activity or initiative with
Having presented a link between the advance of the mining project and the situation of the affected indigenous communities, the tribunal passed to determine the conditions under which the territorial restitution process had to be conducted and its further effects on the opponents’ mining titles. Proved the dispossession the Emberá Katío communities’ territory, it was necessary to establish whether a legal presumption on the inexistence of administrative acts recognizing or granting non-possessory rights over the affected territory should be applied in the case. This, since the concession contracts concluded between the state and the companies could be seen as regulatory actions that implicitly constitute a mining easement over the resguardo in order to allow the conduction of the project.

While the tribunal decided that the case didn’t fit within the legal presumptions – it established a difference between an administrative act and an administrative contract and denied that the conclusion of a concession contract to exploit resources superposed with the indigenous territory implied the inherent establishment of an easement —, it decided that the suspension of the concession and corresponding mining titles ordered by the Quibdó Court through the 2013 should remain until a prior consultation procedure with the communities of the Alto Andágueda resguardo was carried out. Finally, with regards to the constitution of an indigenous mining zone, the tribunal considered that such injunction would exceed its jurisdiction. Yet, it urged the Agencia Nacional de Minería to consider that option, as the authority in charge of that kind of regulatory procedures.

At the moment, no arrangement has been achieved between the mining companies and the indigenous community as to the effective conduction of a prior consultation procedure. Therefore, the mining titles remain suspended and the operation of the project has caused an evident economic detriment to said businesses. Moreover, it is quite possible that the latter have considered introducing a claim against Colombia before an international arbitral tribunal, provided the existence of the abovementioned IIAs.

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19 This presumption is coined by the Ley de Víctimas in order to secure the land tenure rights of the victims.
20 An easement is a non-possessory right to use and/or enter onto the real property of another without possessing it.
V. Analysis and concluding remarks

The introduction of the case of the Emberá Katío communities of the Alto Andágueda resguardo had the purpose of illustrating the challenges around the conceptualization and articulation of land tenure security in Colombia in an epoch of transition. The emerging tension between two normative rationales, embedded in primary socioeconomic policy initiatives allegedly part of a single and coherent strategy of development, reveals the centrality of land and natural resources in the current global governance landscape, to the extent it has incidentally become the subject of concern of regulatory areas as divergent as the promotion and protection of foreign investment on the one hand, and post-conflict peacebuilding on the other.

In particular, the decision uttered by the High Court of Medellín reveals how territory is an object of permanent dispute in the context of the uncontainable advance of an economic model in need of productive means and a stable legal environment towards a certain and predictable market. Yet, the counterweight exercised by human rights and social justice claims on behalf of historically disadvantaged population – such as peasants and indigenous peoples – has been revitalized and empowered by means of the emergence of a TJP in Colombia. This way, the judicial decision reminds the fundamental role of the state as a regulatory authority in the management of land tenure, and calls the attention of public administration to act in a consistent way and, in case of eventual controversies between competing interests, to find mechanisms of solution in accordance with the country’s normative order.

Although the core of the legal process under analysis was the adjudication on the restitution of the territorial rights of an indigenous community, the dénouement of the case ended up encompassing a further discussion: the extent to which clear and well-established economic entitlements, derived from the conclusion of a legal pact between the state and a private party, could legitimately be affected by a subsequent and exceptional regulatory measure. In that regard, the tribunal considered that although the integrity and survival of the Emberá Katío people were principally affected by a systematic dynamic of territorial dispossession linked to the armed conflict, the further implementation of an extractive project that ignored their special condition of vulnerability and their right to participate in the making of decisions related with the exploitation of natural resources located within their lands created a risk to the effective consolidation of the territorial
restitution process. Thus, while it did not decide upon the definitive cancellation of the mining titles granted to the subsidiaries of the transnational corporations, in the name of transitional justice it maintained their suspension until said risks had been dully addressed.

On the other hand, the arguments formulated by the opponents reflect an alternative position to the latter issue. Whilst the Colombian state *promised* a stable legal environment in which foreign investors could foresee the rules and conditions under which they would conduct an economic activity in the country – including the existence of a secure land tenure regime formed by clear and enforceable property rights –, their resulting legitimate expectations were affected by the regulatory activity of the state, expectations that rested upon the concession contracts and the corresponding mining titles granted. Even more, when the case is extrapolated to a larger scale, the TJP and particularly its restorative and redistributive regulatory dynamics are seen as a threat to LTS in the context of the protection of foreign investors.

Considering the fact that at the three transnational corporations involved in the case were originally constituted in countries with which Colombia had concluded international investment agreements, it is neither exotic nor disproportionate to consider the possibility that they would resort to the specific standards and mechanisms included in said legal instruments to protect foreign investors, and consequently sue the state before an international arbitral tribunal. In such situation – and bringing up the aforementioned *Funnekotter* and *Foresti* cases –, the disruption of a secure and predictable land tenure regime by means of a regulatory action, regardless of its origin and purposes, could generate an incident of state responsibility that would affect the territorial restitution of the Emberá Katío people, and in a bigger picture, potentially preclude the effectiveness of the restorative and redistributive dimensions of the country’s TJP as a matter of regulatory chill.

The precedent case is only one of a kind, and although each situation embeds particular elements that could imply different judicial outcomes, one thing is certain: from the standpoint of LTS, the effective implementation of Colombian TJP will generate winners and losers. The challenge, hence, is to find a way to address these type of situations that considers the alternative nature of the interests around the access and use of land and natural resources, the need to avoid bigger impacts to the country’s policy agenda, and the conviction that at the end, no economic objective
can surpass the ultimate goal of placing human dignity at the core of the country’s normative system.