

FOREIGN INVESTORS AND THE COLOMBIAN PEACE PROCESS

Andrei Gomez-Suarez\*, Nicolás M. Perrone\*\*, Enrique Prieto Ríos\*\*\*

ABSTRACT

The International Investment Regime (IIR) materialises in international arbitral tribunals that protect the rights of foreign investors. ¿Could these tribunals hamper the implementation of exceptional measures agreed to end armed conflicts? The principle of proportionality, usually employed to balance competing demands such as the interests of international investors and the right of states to self-determination, could fall short when it comes to the concept of a nation and a society's right to peace. Focusing on the Colombian peace process, this article argues that the agreement on land redistribution, a cornerstone of the peace agreements, benefits the whole society, including foreign investors. However, the colonialist nature of the IIR could lead foreign investors, who see their investments and expected profits affected, to demand compensation for governmental land acquisition. The transition from war to peace in Colombia will be played out in these kinds of legal battles, and only the determination of the government to stand for Colombians' right to peace will ensure that international investors do not become an obstacle for sustainable peace. The Colombian case suggests powerful lessons for the willingness of transitional states to defend their people's right to peace in international tribunals.

INTRODUCTION

Since the beginning of the peace process between the President of Colombia Juan Manuel Santos (2010-2018) and the Revolutionary Armed Forces of Colombia-People's Army (*Fuerzas Armadas Revolucionarias de Colombia* FARC-EP), the optimism amongst the international community has been on the rise. The United Nations Security Council Resolution in January 2016 creating a political mission to verify a bilateral ceasefire,<sup>1</sup> the participation of five delegations of victims who contributed to the agreement on the creation of a Comprehensive System of Truth, Justice, Reparations and Non-Repetition reached in December 2015, the implementation of a demining programme which began in July 2015, the report of the Historic Commission of the Conflict and its Victims released in February 2015, are all achievements which have served to counter the scepticism from different

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\* Andrei Gomez-Suarez is Lecturer on Transitional Justice at the University of Los Andes, research associate at the Centre for Criminology at the University of Oxford and member of the Sussex Centre for Conflict and Security Research at the University of Sussex. Email: ag210@sussex.ac.uk.

\*\* Nicolás Marcelo Perrone is an Assistant Professor at the Universidad Externado de Colombia. PhD, London School of Economics and Political Science. Email: nicolas.perrone@uexternado.edu.co.

\*\*\* Enrique Prieto-Rios is a Visiting Lecturer at Universidad de los Andes- School of Law and PhD Candidate at Birkbeck University of London – School of Law. Email: ea.prieto@uniandes.edu.co.

<sup>1</sup> United Nations Security Council (2016), see: <http://www.un.org/apps/news/story.asp?NewsID=53091#.VriUdfkrLnA> (retrieved 9 February 2016).

sectors that worried that the final peace agreement would be a blank check for impunity.<sup>2</sup>

Colombian public opinion's outlook is also changing. Although the 2014 presidential race showed that a large number of Colombians opposed the Santos-FARC peace talks, a broad alliance between leftist parties and President Santos' National Unity political platform (which includes the Liberal and Conservative parties, among others) helped him to achieve victory, demonstrating that most Colombians finally turned in favour of his peace policy.<sup>3</sup> Moreover, President Santos' inauguration speech suggested that his second term in office was to be dedicated to convincing Colombians that the time for peace has come.<sup>4</sup> This was never going to be an easy task, but a clever media strategy has enabled Santos to present the achievements of the negotiations thus far as evidence that what the parties are agreeing are the minimum agreements necessary for the modernisation of Colombia. The agreements reached so far are: (1) a comprehensive agrarian development policy, (2) political participation, (3) combating illicit drugs, and (4) a comprehensive transitional justice mechanism.

The agreement on political participation,<sup>5</sup> the second point of the agenda, seeks to transform Colombia's democracy. It does not only envisage political guarantees for opposition parties but also, after the first failed attempt of demobilising and reintegrating FARC in the 1980s,<sup>6</sup> it establishes the creation of a Comprehensive Security Mechanism to avoid spirals of violence against demobilised FARC members who go into politics.<sup>7</sup> The visits of Army General Javier Florez and four other Generals of the Colombian Armed Forces to the negotiation table to discuss the mechanism for a bilateral ceasefire suggests that an important sector of the military is willing to offer protection to those who decide to give up their weapons.<sup>8</sup> However, inside spoilers within the army continue to pose a challenge to the peace process, in particular because of the political support they receive from former president Alvaro Uribe's Democratic Centre (*Centro Democrático*) Party.<sup>9</sup>

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<sup>2</sup>In a recent visit to Colombia, Professor Claus Kress said that the Colombian peace process had convinced many key actors of the international community, see: <http://www.semana.com/nacion/articulo/la-paz-en-colombia-tendra-repercusiones-en-todo-el-mundo/400100-3> (retrieved 25 Aug 2014).

<sup>3</sup> For an analysis of the presidential race see: <http://www.aljazeera.com/indepth/opinion/2014/06/colombia-runoff-elections-2014612112739436880.html> (retrieved 25 August 2014).

<sup>4</sup> <http://www.aljazeera.com/indepth/opinion/2014/08/santos-2014-2018-new-beginning-2014810202423843968.html> (retrieved 25 August 2014).

<sup>5</sup> The agreement on political participation can be read at: [https://www.mesadeconversaciones.com.co/sites/default/files/Borrador%20Conjunto%20-%20Participaci\\_n%20Pol\\_tica.pdf](https://www.mesadeconversaciones.com.co/sites/default/files/Borrador%20Conjunto%20-%20Participaci_n%20Pol_tica.pdf) (retrieved 9 February 2016)

<sup>6</sup> Andrei Gomez-Suarez *Genocide, Geopolitics and Transnational Networks* (2015)

<sup>7</sup> Andrei Gomez-Suarez and Jonathan Newman, "Safeguarding political guarantees in the Colombian peace process: Have Santos and FARC learned the lessons from the past?", 35:4 *Third World Quarterly* (2013), p. 819.

<sup>8</sup> See: <http://www.semana.com/nacion/articulo/cinco-generales-viajaran-la-habana-reunirse-con-las-farc/419596-3> (retrieved 24 March 2015).

<sup>9</sup> Hacker Andres Sepulveda's recent statements show the links between sectors of the army and the Centro Democrático Party in a campaign against the peace process, see:

The agreement on combating illicit drugs is another element which demonstrates that the parties are seeking to establish the basic elements to bring a long-lasting peace to Colombia.<sup>10</sup> It not only aims to tackle drug trafficking, the fuel that maintains the conflict, but also to put an end to the corruption of financial networks and legal institutions by state officials and criminals who benefit from the conflict. The Comprehensive Substitution of Illegal Crops Programme, the Comprehensive Strategy against Corruption (which contains a strategy to combat money laundering), and the promotion of an international conference to discuss the global 'war on drugs', are all substantive elements of the agreement. The implementation of these programmes and strategies will be a serious challenge for a long-lasting peace in Colombia.

The agreement on transitional justice seeks to dismantle the culture of impunity in Colombia.<sup>11</sup> The parties agreed on the basic foundations for the creation of a comprehensive system that will include: (1) a Truth Commission, with national and international commissioners; (2) a Special Jurisdiction for Peace, made up of twenty-four magistrates to ensure the investigation, prosecution and sentencing of those most responsible for the gravest crimes; (3) the strengthening of the reparations scheme put in place by the Land Restitution and Victims' Law (Law 1448 of 2011); and (4) early acts of recognition of wrongdoings by the parties as part of the guarantees of non-repetition.<sup>12</sup>

Despite the importance of each of the above mentioned agreements, this article will focus on the challenges of implementing the first point of the agenda, which establishes the mechanisms to bring about a Comprehensive Agrarian Development Policy (CADP), for the rural areas in Colombia.<sup>13</sup> The issue of land has been at the heart of the conflict since its inception.<sup>14</sup> FARC was created as a reaction to the military attack of Marquetalia, which was a plot of land in which displaced families had settled as a result of the violent dispossession of land and the expulsion of peasants produced by the period of civil war known as *La*

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<http://www.semana.com/nacion/articulo/el-ventilador-del-hacker/400101-3> (retrieved 25 August 2014).

<sup>10</sup> The agreement to combat illicit drugs can be found at: [https://www.mesadeconversaciones.com.co/sites/default/files/Borrador%20Conjunto%20-%20Soluci\\_n%20al%20problema%20de%20las%20drogas%20il\\_citas.pdf](https://www.mesadeconversaciones.com.co/sites/default/files/Borrador%20Conjunto%20-%20Soluci_n%20al%20problema%20de%20las%20drogas%20il_citas.pdf) (retrieved 9 February 2016).

<sup>11</sup> The agreement on transitional justice is available at: <https://www.mesadeconversaciones.com.co/sites/default/files/comunicado-conjunto-60-ingles-1443452175.pdf> (retrieved 9 February 2016)

<sup>12</sup> See Andrei Gomez-Suarez "Logros del Proceso de Paz y Retos para la Sociedad Civil: una contextualización de la negociación entre el gobierno Santos y las FARC" en O. Gomez Paz, *Víctimas y Posconflicto* (2016).

<sup>13</sup> The agreement can be accessed in: [https://www.mesadeconversaciones.com.co/sites/default/files/Borrador%20Conjunto%20-%20Pol\\_tica%20de%20desarrollo%20agrario%20integral.pdf](https://www.mesadeconversaciones.com.co/sites/default/files/Borrador%20Conjunto%20-%20Pol_tica%20de%20desarrollo%20agrario%20integral.pdf) (retrieved 9 February 2016).

<sup>14</sup> Alejandro Reyes, *Guerreros y Campesinos* (2009). See also Reyes' blog for recent entries on developments in the Colombian peace process and the land issue:

<http://alejandroyesposada.wordpress.com/> (retrieved 25 August 2014).

*Violencia*.<sup>15</sup> The CADP, as we will see below, is not only necessary to end of the armed conflict by getting to its source, but also to improve the countryside, which in most of Colombia could be said to resemble a feudal system.

The centrality of the CADP for reaching peace in Colombia poses the question, to what extent might those who hold rights to property in the countryside oppose peace, either by resisting the termination of their property rights, or by demanding burdensome compensations? To answer this, we must analyse the relative strength of these property rights vis-à-vis the right of the Colombian society to peace. Strong private property rights can threaten the society and any space for imagination and reform. In the context of today's Colombia, strong property rights could constitute an obstacle to social peace by fuelling conflict about land, and by blocking any potential deal to reach peace among Colombians.

While currently most analyses look at the internal challenges to the CADP, including domestic property rights,<sup>16</sup> we explore the challenges posed by international factors, more specifically, by foreign investor rights.<sup>17</sup> As Colombia's internal processes are determined by the international system of which it is part, this article unveils the limits that the international investment regime (IIR) could pose in bringing about a redistribution of land in a post-conflict Colombia. It first discusses the developments of the IIR and the impact in Colombia before the Santos-FARC peace talks. It explores the content of the agreement on a CADP. The final part outlines the challenges of the implementation of the CADP in the framework of the IIR of which Colombia is part.

## 1. THE INTERNATIONAL INVESTMENT REGIME

### *a. The structure and features of the IIR*

The IIR comprises a set of instruments and institutions for the promotion and protection of foreign investments worldwide. Bilateral Investment Treaties (BITs), Free Trade Agreements (FTAs) that contain investment chapters, and any other international treaties with similar aims and characteristics are among the most important instruments of the regime. The treaties' aim is to establish the rules between two or more states with regard to the treatment and protection offered to foreign investors of States' parties within the territory of the other party, and the establishment of investor-state arbitration to resolve disputes. These disputes can be resolved by either an ad-hoc tribunal or an institutional arbitral tribunal. Ad-hoc tribunals act independently of any international institution and depend entirely upon the regulations agreed by the parties. Institutional tribunals, on the other hand, are linked to organisations that specialise in arbitral procedures. The

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<sup>15</sup> Maria Saffon, "The Project of Land Restitution in Colombia: An Illustration of the Civilizing force of Hypocrisy?", 12:2 *Revista de Estudios Socio-Juridicos* (2010), p. 119. La Violencia is the civil war between the Liberal and Conservative Parties in Colombia, which lasted between 1948 and 1965.

<sup>16</sup> Juan David Gutierrez-Rodriguez "Investing for peace? On the use of resource revenues to finance an eventual post-conflict process in Colombia" 6:1 *Revista Análisis Internacional* (2015), p.221

<sup>17</sup> See Nicolás Perrone, "The International Investment Regime and Foreign Investors' Rights: Another view of a popular story", 11:3 *Manchester Journal of International Economic Law* (2014), pp. 397-420.

most important is the International Centre for Settlement of Investment Disputes (ICSID), which is part of the World Bank.<sup>18</sup>

The terms in investment treaties tend to be broad and vague. Some examples include the meaning and extent of what constitutes a violation of the right to a fair and equitable treatment by the host state, the scope of indirect expropriation, or what could be understood as an investment. Thus, any legal, judicial or administrative decision adopted by the host government could be regarded as affecting foreign investor rights and the standards of protection included in the treaties. The treaties do not generally include obligations for the foreign investor to do with things such as protection of the environment, compliance with human rights obligations, the transference of know-how, or the promotion of economic growth.

The IIR seeks to protect foreign investors against the possible wrongful acts of host states. This results in an unbalanced instrument in favour of transnational corporations (TNCs) — which in the majority of cases come from capital-exporting states — that have rights but no correlative duties or responsibilities.

Colombia has followed the same patterns of other capital-importing countries signing international investment treaties with the aim of attracting more foreign investors in order to reach their development goals.<sup>19</sup> Looking at the criticisms against the IIR, it is likely that Colombia, like other capital importer countries that have suffered the same fate,<sup>20</sup> will see its ability to resolve internal matters of public interest curtailed by the threat of being sued by foreign investors before international arbitral tribunals or by the decisions adopted by such tribunals.

*b. The Post-colonial origins of IIR and further historical development*

The current IIR emerged as an international legal response to the processes of decolonisation in order to protect the economic interests of Western investors in the newly decolonised countries.<sup>21</sup> The regime is a product of colonialism and imperialism, which began in the seventeenth century and 'formally' lasted until the twentieth century.<sup>22</sup> It is not possible to separate the IIR from its socio-political historical origins, which continue to shape its current realities.

European conceptions of property, rights and economy formed the essential basis for the current IIR.<sup>23</sup> It was not until the 1990s, however, that the IIR came to the fore as a result of different factors, including the influence of the World Bank and

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<sup>18</sup> Jeswald Salacuse, "The Emerging Global Regime for Investment," 51 *Harvard International Law Journal* (2010), p. 429.

<sup>19</sup> Jeswald Salacuse and Nicholas Sullivan, "Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain", 46 *Harvard International Law Journal* (2005), p. 67.

<sup>20</sup> There are several well known cases including cases of Argentina, Ecuador, Greece and others explained later in this document.

<sup>21</sup> Jeswald Salacuse, *The Law of Investment Treaties* (2010), p. 83.

<sup>22</sup> Kate Miles, "International Investment Law: Origins, Imperialism and Conceptualizing the Environment", 21 *Colorado Journal of International Environmental Law and Policy* (2010), p. 1.

<sup>23</sup> *Ibid.*

the International Monetary Fund (IMF) on 'Third-World' countries. The IIR has ever since been portrayed as a suitable instrument to attract foreign investment, and promote economic growth and development.<sup>24</sup>

With the end of World War II and with the more evident weakening of the global colonial project, decolonisation movements in Africa and Asia gained in strength and popularity (especially during the 1950s and 60s). Facing this reality, North America and Western Europe began to be persuaded that the best option for continuing control of colonial territories and avoiding communist subversion was to allow the claims to the right of self-determination.<sup>25</sup> However, the independence of the countries posed a challenge to Western economic interests, especially regarding access to raw materials and the protection of investments made in such territories.

Western colonial powers responded to the decolonisation process by pursuing an institutional shift in the structure of international politics and international law. This shift consisted of rearranging the international structure so as to guarantee that while claims of self-determination were fulfilled, the new independent countries would be locked within a Western political, economic and legal framework,<sup>26</sup> protecting Western economic interests.<sup>27</sup> It is within this shift and context that the current IIR started to take form as a clear application of imperialist policies.

Capital-exporting states argued that there were well-established rules of international law binding new states to comply with obligations acquired prior to their independence. The logic is that the former colonies had to adhere to rules already in place; accordingly, if expropriation was pursued by the new independent countries, the new decolonised countries would have to pay full compensation in accordance with rules of international law.<sup>28</sup>

In this way, the whole structure of the IIR was constructed on the need to protect foreign investors against the possible actions of 'backwards' societies ('the other') that were gaining independence and that did not give so much importance to the rights of property. In this regard, Fanon states:

Now the scapegoat for white society — which is based on myths of progress, civilization, liberalism, education, enlighten, refinement — will be precisely the force that opposes the expansion and triumph of these myths. This brutal opposing force is supplied by the negro.<sup>29</sup>

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<sup>24</sup> See Tagi Sagafi-nejad and John Dunning, *The UN and Transnational Corporations: From code of conduct to global compact* (2008), pp. 138-40.

<sup>25</sup> Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (2011.), p. 45.

<sup>26</sup> *Ibid.*

<sup>27</sup> Boaventura de Sousa Santos, "Between Prospero and Caliban: Colonialism, Postcolonialism, and Inter-Identity", in M. Morana and C. Jauregui (eds.), *Revisiting the Colonial Question in Latin America* (2008), p. 144.

<sup>28</sup> See Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2004).

<sup>29</sup> Frantz Fanon, *Black Skin, White Masks* (1986 [1952]), p. 194.,

The evolution of the IIR took different directions on either side of the Atlantic. In the United States, a new program launched in 1946 on treaties of Friendship, Commerce and Navigation (FCN) focused on the protection of Investments abroad.<sup>30</sup> From 1946 to 1966, the United States concluded 35 new FCN agreements.<sup>31</sup> Parallel to this, Western European countries began to launch their own program for the protection of their investments in the new independent countries. The first Bilateral Investment Treaty (BIT) was signed in 1959 between Pakistan and Germany, three years after the transformation of Pakistan into a Islamic democratic republic.<sup>32</sup> The treaty aimed to protect the property of German nationals against any direct expropriation that might be adopted by the Government of Pakistan.<sup>33</sup> France concluded its first BIT in 1960, Switzerland in 1961, the Netherlands in 1963, Norway in 1966 and the United Kingdom in 1975.<sup>34</sup>

In the 1990s, IIR reached its full potential; the figures show that the number of BITs signed during the 1990s increased from 385 to 1857,<sup>35</sup> compared to 386 agreements signed between 1959 and 1989.<sup>36</sup> Different factors contributed in the success of BITs during the 1980s and 1990s. They include the end of the gold parity in the 1970s,<sup>37</sup> the debt crisis in Latin America in the 1980s, the reduction in the contribution of the USA to multilateral development banks,<sup>38</sup> the heavy economic and technological dependence of foreign investments by third world countries, the lack of trust of foreign investors in local governments and courts, and the fall of the Soviet Union. The latter was perceived as the 'end of the history' and countries had no other option but to surrender to the impositions of the post-colonial capitalist market. According to the IMF and World Bank, foreign investment was an essential requirement for modernisation, economic growth and development.<sup>39</sup> Thus, third world countries had to focus on making themselves more attractive to foreign investors with internal reforms and signing treaties which, according to the recipe, would end up attracting huge flows of investment to the country.<sup>40</sup>

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<sup>30</sup> Kenneth Vandeveld, "A Brief History Of International Investment Agreements", 12 *U.C. Davis Journal of International Law & Policy* (2005), p. 157.

<sup>31</sup> With the entry into force in 1948 of The General Agreement on Tariffs and Trade (GATT) to regulate trade and commerce among countries, the old FCN treaties began to diminish in importance.

<sup>32</sup> Story of Pakistan, *The Constitution of 1956*, <http://storyofpakistan.com/the-constitution-of-1956> (retrieved 03 February 2016).

<sup>33</sup> Treaty for the Promotion and Protection of Investments (Pakistan - Federal Republic of Germany) (Signed 25 November 1959).

<sup>34</sup> Kenneth Vandeveld, above n 30.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> Asha Kaushal, "Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime", 50 *Harvard International Law Journal* (2009), p. 491.

<sup>38</sup> Kenneth Vandeveld, above n 30.

<sup>39</sup> Gilbert Rist, *The History of Development. From Western Origins to Global Faith* (2006), p. 113.

<sup>40</sup> Margot Salomon, "Winners and others: accounting for international law's favourites", in C. Gearty and C. Douzinas (eds.), *The Cambridge Companion to Human Rights Law* (2012), p. 281.

*c. Colombia and the IIR*

By 2013, the network of BITs signed reached 3240 worldwide, and Colombia is participating in the global share.<sup>41</sup> In the 1990s, Colombia started a program of negotiating BITs for the protection of foreign investments in Colombia.<sup>42</sup> This program started under the Government of President Cesar Gaviria Trujillo, with the support of the then Minister of Foreign Trade Juan Manuel Santos Calderon (current President of Colombia). By 1998, Colombia had negotiated and signed BITs with the United Kingdom (1995), Cuba (1995), Peru (1996) and Spain (1997). These BITs were declared by the Colombian Constitutional Court as partially not in accordance with the Colombian Constitution of 1991.<sup>43</sup> According to the ruling, the requirement of compensation described in the BITs was at the time different to the requirement of compensation described in article 58 of the Colombian Constitution, which allowed the Colombian Congress under certain circumstances to expropriate without payment of compensation.<sup>44</sup>

Due to the fact that the Constitution was undermining Colombian efforts to become more attractive to foreign investors, the government pursued a constitutional reform in 1999 removing the faculty of Congress to expropriate without the payment of compensation. Article 58 of the Colombian Constitution was amended in accordance with the BIT's requirement of payment of compensation in all expropriations.<sup>45</sup> After the constitutional amendment was effective, Colombia continued its policy to create a pro-investor environment signing various BITs with different countries. The following is the list of BITs signed, ratified and in force in Colombia:<sup>46</sup>

| <b>Country</b>            | <b>Date entering into force.</b> | <b>Law</b>       | <b>Decision of Constitutional Review by the Constitutional Court.</b> |
|---------------------------|----------------------------------|------------------|---|
| BIT with Chile 2001       | 2002                             | Act 672 of 2001  | C-294 of 2002   |
| BIT with Spain 2006       | 2007                             | Act 1096 of 2006 | C-309 of 2007   |
| BIT with Switzerland 2008 | 2009                             | Act 1198 of 2008 | C-150 of 2009   |
| BIT with Peru 2009        | 2010                             | Act 1342 of 2009 | C-377 of 2010   |
| BIT with India            | 2012                             | Act 1449 of 2011 | C-123 of 2012   |

<sup>41</sup> United Nations Conference on Trade and Development (UNCTAD), 'World Investment Report' 2014 xxiii <[http://unctad.org/en/publicationslibrary/wir2014\\_en.pdf](http://unctad.org/en/publicationslibrary/wir2014_en.pdf)> (retrieved 19 March 2015).

<sup>42</sup> Enrique Prieto Ríos, "BITs y la Constitución de 1991: Internacionalización de la Economía dentro de un Estado Social de Derecho", 13: 1 *Estudios Socio Jurídicos* (2011), p. 109.

<sup>43</sup> See Decisions of Constitutional Review by the Colombian Constitutional Court: C-358 of 1996, C-379 of 1996, C-008 of 1997.

<sup>44</sup> Article 58: Con todo, el legislador, por razones de equidad, podrá determinar los casos en que no haya lugar al pago de indemnización, mediante el voto favorable de la mayoría absoluta de los miembros de una y otra cámara. Las razones de equidad, así como los motivos de utilidad pública o de interés social, invocados por el legislador, no serán controvertibles judicialmente.'

<sup>45</sup> Legislative Act 01 of 1999 (*Acto Legislativo*) (Colombia)

<sup>46</sup> Procolombia, 'Colombia y los Acuerdos Internacionales de Inversión,' <http://www.colombia.invierte.com.co/aspectos-legales/colombia-y-los-acuerdos-internacionales-de-inversion>> (retrieved 18 March 2015).



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|-----------------------------|------|------------------|---------------|
| BIT with China 2011         | 2012 | Act 1462 of 2011 | C-199 of 2012 |
| BIT with the United Kingdom | 2014 | Act 1464 of 2011 | C-169 of 2012 |

The following is the list of BITs that are either under negotiation or are pending ratification by Colombia or the other party to the treaty:<sup>47</sup>

| <b>Country</b>             | <b>Status</b>  |
|----------------------------|--|
| BIT with South Korea       | Pending approval by the Colombian Congress.                        |
| BIT with Kuwait            | In negotiation   |
| BIT with Singapore         | In negotiation   |
| BIT with Japan             | Pending approval by the Colombian Congress.                        |
| BIT with Turkey            | In negotiation   |
| BIT with Uruguay           | In negotiation   |
| BIT with Qatar             | In negotiation   |
| BIT with Azerbaijan        | In negotiation   |
| BIT with Russia            | In negotiation   |
| BIT with Belgium-Luxemburg | Subscribed, pending approval by the legislative in both countries. |
| BIT with Ecuador           | In negotiation   |

The Following are the Foreign Trade Agreements (FTA) ratified and in force in Colombia, that contain a chapter for the protection of foreign investments:

| <b>Country</b>  | <b>Date entering into force.</b> | <b>Law</b>                           | <b>Decision of Constitutional Review by the Constitutional Court.</b> |
|---|----------------------------------|--------------------------------------|---|
| FTA with Mexico (Chapter XVII)  | 1999, modified in 2011           | Act 172 of 1994 and Act 1457 of 2011 | C-178 of 1995<br>C-051 of 2012  |
| FTA with Chile (Chapter IX)   | 2009                             | Act 1189 of 2008                     | C-031 of 2009   |
| FTA with the Triangle of the North - Guatemala, Salvador and Honduras (Chapter XII) | 2010                             | Act 1241 of 2008                     | C-446 of 2009   |
| FTA with the USA (Chapter X)  | 2012                             | Act 1143 of 2007                     | C-751 of 2008   |
| FTA with Canada (Chapter VIII)  | 2011                             | Act 1363 of 2009                     | C-608 of 2010   |
| FTA with  | 2011                             | Act 1372 of 2010                     | C-941 of 2010.  |

<sup>47</sup> *Ibid.*

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|---|--|--|--|
| Switzerland and Liechtenstein (Chapter V) |  |  |  |
| The FTA with the European Union (E.U.)    | Pending approval in the parliaments of the EU member countries |  |  |

**2. THE COMPREHENSIVE AGRARIAN DEVELOPMENT POLICY: A PARTIAL AGREEMENT OF THE SANTOS-FARC PEACE TALKS**

Colombia is one of the most unequal countries in terms of land distribution. As part of the Government’s efforts to satisfy the rights of the victims of the armed conflict, President Santos presented the Land Restitution and Victims’ Law, issued by Congress as Law 1448 of 2011. The “Victims’ Law” created three important transitional institutions: the National Victims’ Unit, the National Centre for Historical Memory (NCHM), and the Land Restitution Unit (LRU). According the 2013 NCMH Report *¡Basta Ya!*, 8.3 million hectares have been appropriated by land grabbers, and the National Registry of Victims shows that there are 6.4 million victims of forced displacement in Colombia;<sup>48</sup> the second largest humanitarian crisis in the world, after Syria. The LRU is the institution in charge of carrying out the legal procedures to give back illegally stolen land and formalise land titles to those displaced in the context of the armed conflict after 1991. Moreover, the LRU created and maintains the Illegal Land-grab Registry. By October 2015, victims had made 56.328 formal claims.<sup>49</sup> Despite these unprecedented developments, a 2014 Amnesty International Report sent a warning call to the Colombian government:

Sustainable land restitution will not be possible unless the authorities acknowledge and address the part played by large-scale economic interests, notably the extractive industries, logging, monocultures such as agro-fuels, as well as drug trafficking, in contributing to and benefiting from the illegal acquisition of land.<sup>50</sup>

The unequal distribution of land is one of the root causes of the armed conflict. The last failed attempt at an agrarian reform was carried out by President Carlos Lleras (1966-1970). It was not until 2011 that the Santos Administration showed that it was willing to address the land issue. However, any attempt to solve the agrarian issue necessarily means finding a negotiated solution to the armed conflict. Contrary to previous negotiations,<sup>51</sup> this time the Colombian Government

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<sup>48</sup> For the National Registry of Victims see: <http://rni.unidadvictimas.gov.co/?q=node/107> (30 oct 2015)

<sup>49</sup> <https://www.restituciondetierras.gov.co/web/guest/pdf-transparencia/-/pdf/10184&c364aba6-5722-4101-ba61-c420017b20c7> (retrieved 24 March 2015).

<sup>50</sup> [https://www.amnesty.nl/sites/default/files/public/land\\_restiution\\_eng.pdf](https://www.amnesty.nl/sites/default/files/public/land_restiution_eng.pdf) page 55 (retrieved 24 march 2015).

<sup>51</sup> For a comprehensive analysis of previous negotiations, see Carlos Medina Gallego, *Conflicto armada y procesos de paz en Colombia: Memoria casos FARC-EP y ELN* (2009).

and FARC started the current peace talks with the land issue as the first point on the agenda. However, according to an Oxfam report, Transnational Companies' land interests could be one of the main obstacles for the Colombian state to implement the partial agreement on the CADP reached in Havana, unless properly addressed by the Colombian government.<sup>52</sup>

In May 2013, after six months of negotiations, the Colombian Government and FARC reached a partial agreement on rural development; the formal agreement was made public on 21 June. The negotiation teams took into account over 3000 proposals that Colombians sent individually and collectively to the negotiation table. The negotiation teams also asked the United Nations Development Programme (UNDP) and the Centre for Thought and Monitoring of the National University (CTM-NU) to organise a national forum to receive proposals; more than 1600 people gathered in Bogota between December 17 and 19. In January 2014, after reviewing and organising the outputs of more than 20 roundtables, the UNDP and the CTM-NU submitted 546 proposals to the negotiation table.<sup>53</sup> Additionally, experts on Colombia's land issues were invited to Havana to offer recommendations.

According to the Office of the High Commissioner for Peace, the agreement reached on the agrarian question seeks to achieve the well-being of the people in the countryside (peasant farmers, indigenous and afro-Colombian communities, among others), and the integration of peripheral regions with the economic centres to close the gap between rural and urban areas. It is important to note that the CADP is important not only to end the armed conflict, but also to achieve the government's aim for Colombia to be accepted in the Organisation for Economic and Development Cooperation (OECD).

The agreement on a CADP has four pillars. The first pillar is to democratise the use of land. The parties agreed the creation of a Land Fund, which will distribute land free of charge. "This process will aim to regularise property title rights and consequently deconcentrate and promote an equitable land distribution."<sup>54</sup> This Fund would be mainly created with lands wrongfully and illegally acquired, without affecting small farmers who could benefit from title formalisation programs. Underexploited lands, which do not fulfil the ecological and social function of private property, would also be part of the Fund. Judicial and administrative property procedures, land acquisition, or expropriation with compensation for social interest will be used to acquire the lands for the Fund. The existing Forestry Reserve Zones (FRZs) will be protected, and in some cases,

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<sup>52</sup> Oxfam Research Reports, *Divide and purchase: how landownership is being concentrated in Colombia*, September 2013, available at: <http://www.oxfam.org/sites/www.oxfam.org/files/rr-divide-and-purchase-land-concentration-colombia-211013-en.pdf> (retrieved 1 September 2014).

<sup>53</sup> See <http://www.elespectador.com/noticias/paz/desarrollo-agrario-del-foro-mesa-articulo-395849> (retrieved 30 August 2014).

<sup>54</sup> Primer informe conjunto de la mesa de conversaciones entre el gobierno de la república de Colombia y las fuerzas armadas revolucionarias de Colombia-ejército del pueblo (FARC-EP), La Habana 21 June 2014, available at: <https://www.mesadeconversaciones.com.co/comunicados/primer-informe-conjunto-de-la-mesa-de-conversaciones-la-habana-21-de-junio-de-2013> (retrieved 31 August 2014), p. 7.

through community participation, nearby land with agricultural and livestock usage will be integrated into enlarged FRZs.<sup>55</sup> Some lands owned by TNCs or foreign investors could become part of the Land Fund if it is found that they were illegally appropriated in the past by the person or company that sold the land to the TNCs.<sup>56</sup> It is important to note, however, that at the time of writing, the parties had not reached an agreement on the size of the Land Fund.<sup>57</sup>

The access to land from the Fund will be complemented with subsidies, credits, technical assistance and support to establish successful trading schemes. The state will offer small farmers special credits and subsidies to help them to buy land, and will create a plan to formalise titles for small and medium properties. To ensure the protection of such transactions, the government agreed to create an agrarian jurisdiction.

In order to ensure productive use of land, the government will update the national land registry and the tax system to make sure that landowners contribute according to the size of their property. The last element of the pillar on use of land is that the parties agreed to protect the agricultural frontier and environmental special zones.<sup>58</sup>

The second pillar of the CADP is to establish special development programs which focus on reconstructing the regions most affected by the armed conflict. Such programs will rely on participatory mechanisms ensuring that by decentralising the implementation of the agreement in a short time-span these regions will change, making reconciliation possible.<sup>59</sup>

The third pillar consists of national plans that will aim at radically reducing poverty and eradicating extreme poverty in the countryside. Some of these plans will focus on improving infrastructure by building roads, recovering and extending irrigation and drainage systems, and by ensuring electricity and internet access for whole Colombian population. Other plans will concentrate on improving health and education systems, and housing and public services in the regions most affected by the armed conflict. Finally, national plans will centre on increasing productivity and consolidating the transition from an informal to formal labour market in the countryside.<sup>60</sup>

The fourth and last pillar is a special system of food security, which is based on strengthening local and regional markets and creating strategies against hunger.

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<sup>55</sup> *Ibid.*, p. 8.

<sup>56</sup> <http://www.lafm.com.co/noticias/jorge-enrique-robledo-denuncia-142766>.

<sup>57</sup> <http://www.las2orillas.co/la-verdad-lo-que-esta-ocurriendo-en-la-mesa-de-la-habana/> (retrieved 25 ago 2015).

<sup>58</sup> *Ibid.*, p. 9.

<sup>59</sup> Sergio Jaramillo, Alto Comisionado para la Paz, *Congreso Latinoamericano de Ciencia Política*, Universidad de los Andes. Bogotá, 16 de Octubre de 2013 available at: [http://www.altocomisionadoparalapaz.gov.co/herramientas/discursos/Documents/Intervencion\\_Sergio\\_Jaramillo\\_Congreso\\_de\\_ciencia\\_politica\\_16\\_de\\_octubre.pdf](http://www.altocomisionadoparalapaz.gov.co/herramientas/discursos/Documents/Intervencion_Sergio_Jaramillo_Congreso_de_ciencia_politica_16_de_octubre.pdf) (retrieved 1 September 2014).

<sup>60</sup> Oficina del Alto Comisionado para la Paz, *Entérese del proceso de paz*, Junio 2014 available at: [http://www.altocomisionadoparalapaz.gov.co/herramientas/documentos-y-publicaciones/Documents/Enterease%20del%20proceso%20de%20paz\\_260614\\_digital.pdf](http://www.altocomisionadoparalapaz.gov.co/herramientas/documentos-y-publicaciones/Documents/Enterease%20del%20proceso%20de%20paz_260614_digital.pdf) (retrieved 1 September 2014).

The four pillars complement and depend on each other. Political analyst Alejandro Reyes said, “the agreement on the agrarian issue takes decisions and creates tools to substantially impact the structure of land property in Colombia.”<sup>61</sup>

Because of the scope of this article, we are concerned with the first pillar of the CADP which, as previously mentioned, refers to the distribution of land. However, it must be noted that since the parties have not agreed the location(s) and size of the Land Fund yet, it is not possible to refer to concrete examples in which the dispute between TNCs and the Colombian State is already taking place. Land distribution does not depend exclusively on the political willingness of the government and the financial support of the international community. Instead, foreign investors (TNCs) are key actors that could reshape the Land Fund, represent delay or halt the full implementation of land distribution as their economic interest could be affected and the IIR (of which Colombia is part of) is in place to protect such interests.

A current issue that exemplifies the concern regarding the implementation of the agreement is related to the Rural Areas of Interest of Economic and Social Development (RAIES). RAIES is a governmental initiative that aims at bringing together the interest of peasant farmers (small landowners) and the interests of agrobusiness. The RAIES were the result of a growing issue regarding land titles. The RAIES have been heavily criticised. NGOs such as OXFAM and the Colombian Commission of Jurists, argued that instead of giving back the land to peasant farmers who were originally displaced by the armed conflict, the RAIES would give the land to Agrobusinesses.<sup>62</sup> Allocating lands to foreign investors under the RAIES scheme raises a serious question: ¿what will happen if these lands are later part of the Land Fund? This would affect the investments and expected profits of TNCs. In that scenario, the foreign investor could challenge any measure before an international arbitral tribunal. The next section outlines the possible outcome of international legal disputes associated with the implementation of the CADP in Colombia.

### 3. LAW, PEACE AND FOREIGN INVESTOR RIGHTS

#### *a. Law and the struggle for peace*

Law is a site of social struggle where opposing values clash, and some interests eventually prevail over others. In Colombia, law is today a site of the struggle for peace. The legal order is fundamental in the peace process, not only for the criminal responsibility of many Colombians but also because of the economic implications of the armed conflict. Put simply, *law shapes the kind of peace that is*

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<sup>61</sup> <http://alejandroyesposada.wordpress.com/2013/06/21/impacto-potencial-del-acuerdo-agrario-sobre-la-estructura-de-propiedad-de-la-tierra/> (retrieved 1 September 2014).

<sup>62</sup> For the statement of the Colombian Commission of Jurists see: [http://www.coljuristas.org/documentos/adicionales/acaparamiento\\_baldios.pdf](http://www.coljuristas.org/documentos/adicionales/acaparamiento_baldios.pdf) (retrieved 9 February 2016) and for Oxfam criticisms: <https://www.oxfam.org/es/colombia-las-falacias-detras-de-zidres-una-ley-de-subdesarrollo-rural> (retrieved 9 February 2016)

*possible and the means to reach peace*.<sup>63</sup> The previous sections examined the bargaining rules applicable when foreign investors are involved, and outlined the agreements to resolve one of the structural causes of the armed conflict: the one related to land. They described the legal regime that applies to foreign investors, including their rights to land, and the importance of the CADP for reaching a peace deal in La Havana. The implementation of the latter will have serious economic implications both for national and transnational companies.

However, the CADP does not only entail complex economic readjustments, but also a legal dispute for rights, duties and privileges.<sup>64</sup> At first glance, there are essentially two opposing actors in a land distribution mechanism (the Land Fund, part of the first pillar of the CADP). On the one hand, the current landowners who conduct business activities to obtain profit, ranging from farming to mining. The latter are normally referred to as investors. This section focuses on the position of foreign investors who are protected by either a BIT or a FTA. On the other hand, there are peasant farmers who lost land because of the armed conflict, most of them people of limited economic resources. As part of the peace process, Colombia could decide to privilege the situation of the people who have been dispossessed — most of who were never investors — for reasons of fairness or equity. However, this decision could affect the interests of foreign investors and the existing legislation.<sup>65</sup>

The constitutional mechanism to scrutinise a political decision of this nature is the principle of proportionality.<sup>66</sup> The premise of this legal reasoning is that no value should take complete precedence over the other. On the contrary, the law should find a fair and reasonable balance. In the case just described, these two individual rights serve different values. The security of foreign investor rights is a means to wealth-maximisation and profit, whereas for dispossessed peasant farmers, land represents a way of life and material autonomy and reparations for harm done in the armed conflict.<sup>67</sup> Balancing this struggle of interests and values through proportionality is not easy. Proportionality aims to provide equal respect to both values, but these values are often incommensurable and cannot be judged according to the same metric.<sup>68</sup>

This difficulty is multiplied when one moves from an individual to a large social perspective. The latter does not alter the position of foreign investors who

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<sup>63</sup> See Duncan Kennedy, "The Stakes of Law, or Hale and Foucault!", *XV Legal Studies Forum* (1991), p. 327.

<sup>64</sup> Wesley Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning", *23:1 The Yale Law Journal* (1913), p. 16.

<sup>65</sup> We assume the good will of the state. However, many analysts have criticised President Santos' ambiguous position, and suggested that when the interest of TNCs are under risk the afrocolombians and peasant farmer's land rights are ignored. See <http://www.verdadabierta.com/lucha-por-la-tierra/5936-las-contradicciones-de-santos-con-la-restitucion> (retrieved 25 August 2015).

<sup>66</sup> Robert Alexy, *A theory of constitutional rights* (2010), pp. 101-9.

<sup>67</sup> See Carol Rose, "Takings' and the Practices of Property: Property as Wealth, Property as 'Propriety'", in Carol Rose, *Property and Persuasion* (1994), p. 50.

<sup>68</sup> Gregory Alexander, Eduardo Peñalver, Joseph Singer and Laura Underkuffler, "A Statement of Progressive Property", *94 Cornell Law Review* (2009), p. 743.

demand security to carry out farming and mining activities. But against these individual interests, there are now not only dispossessed peasant farmers, but also the entire society. Colombians are demanding to end the armed conflict and set the foundations for sustainable peace. For them, it is a question of sovereignty and self-determination.<sup>69</sup> The CADP cannot be seen in this context as a measure to favour some individuals over others only, because it is in fact a large and mutual social effort to reach peace. Like in the post-colonial period, the bargaining rules that govern these large social negotiations can turn peace into a reachable public goal or a simple utopia.<sup>70</sup>

*b. Colombians' right to peace*

In the context of the Havana negotiations, the CADP is instrumental to the ultimate goal of peace. Dispossessed peasant farmers have obviously more to win from a land redistribution. Losing their entitlements over land hinders their way of life, transforming them into unskilled workers in cities, if not homeless.<sup>71</sup> This transformation can lead to tension, conflict and violence. To a large extent, this kind of tension has been fuelling the ongoing armed conflict. For this reason, addressing the needs of dispossessed peasant farmers is a concern for the entire Colombian society and, as such, the claim for land redistribution is an intrinsic part of the struggle for peace and a fair social order. It is difficult to envision peace in a country where five million people have been dispossessed of their homes or land.<sup>72</sup>

Against this background, the CADP is a means to fulfil the right to peace. According to the Red Cross, peace is

a dynamic process of cooperation among all States and peoples, cooperation founded on respect for freedom, independence, national sovereignty, equality, human rights, as well as on a fair and equitable distribution of resources to meet the needs of peoples.<sup>73</sup>

The United Nations has been examining the existence of a right to peace since the early 1980s without reaching a substantial consensus.<sup>74</sup> This is surprising given

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<sup>69</sup> John Fried, "The United Nations' Effort to Establish a Right of the Peoples to Peace", 2 *Pace Yearbook of International Law* (1990), pp. 21, 42.

<sup>70</sup> Antony Anghie, above n 28, p. 196.

<sup>71</sup> As Lehari has noted, property rules can destroy community. Amnon Lehari, "How Property Can Create, Maintain, or Destroy Community", 10:1 *Theoretical Inquiries in Law* (2009), p. 43.

<sup>72</sup> This figure is reported by Human Rights Watch and UNHCR. The government of Colombia claims that dispossessed people in the country reach 3,7 million, according to figures of 2011. See <http://www.hrw.org/es/world-report/2014/country-chapters/122015> (retrieved 24 March 2015); <http://www.acnur.org/t3/operaciones/situacion-colombia/desplazamiento-interno-en-colombia/> (retrieved 24 March 2015).

<sup>73</sup> Cited in John Fried, above n 69, p. 23.

<sup>74</sup> Cora Weiss, "In focus: the human right to peace", IHRFG e-Newsletter, June 25, 2010. Available at [https://www.ihrfg.org/sites/default/files/InFocus\\_HumanRightPeace\\_CoraWeiss\\_0.pdf](https://www.ihrfg.org/sites/default/files/InFocus_HumanRightPeace_CoraWeiss_0.pdf) (retrieved 24 February 2015).

that, as one commentator has noted, '[s]earching for documented proof of the existence of a global right to peace would be unnecessary pedantry.'<sup>75</sup>

A look at the debate at the United Nations shows that this lack of consensus may relate to the IIR, foreign investor rights and the colonial origin of this regime. The right to peace is intrinsically connected with the idea of self-determination and the respect of different cultures and communities. It is difficult to reach peace when people have been dispossessed of their land and their culture. During decolonisation, newly independent countries and their leaders hoped that sovereignty was going to be a means to reach peace and fairness. But some of the measures to reach this substantive notion of peace, such as land reforms, were blocked by foreign investor rights, international customary law and the IIR.<sup>76</sup>

This does not mean that the IIR is against formal peace; after all, security and stability are necessary to carry out business as usual.<sup>77</sup> It is rather a question of substance. Countries like the United States, France and the United Kingdom abstained from voting on the UN declaration of the right to peace because a dense view of peace could affect their interests.<sup>78</sup> The issue is not the goal of formal peace, it is the means to obtain substantive peace along the lines defined by the Red Cross.

As a means to reach peace, the CADP would not constitute the kind of state regulation that foreign investors usually challenge using investment arbitration. The CADP is neither a regulation nor a typical governmental measure. The CADP would be part of a constitutional decision in material terms. A peace deal for Colombia would be a part of Kelsen's *Grundnorm* (or the basic norm)<sup>79</sup> or Rawls's overlapping consensus.<sup>80</sup> In the concrete case of the Havana negotiations, any deal would be the result of a decision-making process involving most stakeholders, which, according to President Santos, would also require the approval of the population in a referendum. As such, the CADP would be an expression of the right of self-determination. The question is whether this use of the right of self-determination requires compensation to the owners of land, including many foreign investors. As explained in Section 1, the 1991 Colombian Constitution permitted expropriations by Congress without compensation for special situations, but this clause was repealed in 1999.

In this context, legally-acquired private property rights cannot be completely disregarded. But the discussion then needs to begin by distinguishing between those property rights that are considered invalid and illegitimate according to

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<sup>75</sup> John Fried, above n 69, p. 24.

<sup>76</sup> See Anthony Anghie, above n 28, pp. 196-244.

<sup>77</sup> See *Occidental v Ecuador* (Number 1), LCIA Case No. UN3467, Award, 1 July 2004, ¶ 183; *CMS v Argentina*, ICSID Case No. ARB/01/8, Award, May 12, 2005, ¶ 274; *LG&E v Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶ 125; *Azurix v Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶ 360.

<sup>78</sup> John Fried, above n 69, p. 22.

<sup>79</sup> Hans Kelsen, *Pure theory of law* (1967).

<sup>80</sup> John Rawls, "The Idea of an Overlapping Consensus", 7 *Oxford Journal of Legal Studies* (1987), p. 1.



Colombian law because they are the result of forced displacement and fraud, and those legal property rights that need to be expropriated to reach an acceptable level of sustainable peace in Colombia. The first case would be the easiest because most investment tribunals have found that an investment—to be protected under a BIT or an FTA—needs to be acquired according to the laws of the host state. An award along these lines, nevertheless, would depend on the procedural and substantive legitimacy of the legal procedure that determined the illegality of the rights.<sup>81</sup>

Where the property rights were legally acquired, and need to be expropriated to carry out the CADP, the question is the amount of compensation. It may be impossible in the context of the peace process to compensate every individual expectation. While it is indisputable under law that foreign investors deserve the same compensation than domestic investors, it is more difficult to claim that the former can escape their duty to contribute to peace in the same way as nationals. This is because the goal of the CADP is not to benefit private individuals or the state to the detriment of foreign investors, but to make peace possible in Colombia. The next section explores this problem in more detail.

*c. Foreign investor rights and peace in the context of the IIR: lessons for Colombia from elsewhere*

After decolonisation, the protection of foreign investor rights has been an obstacle for reaching substantive peace in many latitudes.<sup>82</sup> As we will see below, some of these antecedents resemble Colombia's present situation. Although some international lawyers have claimed in the past that states have no right to expropriate foreign investors, this right has always been recognised or, at least, tolerated.<sup>83</sup> The problem is the obligation to pay large sums to foreign investors as compensations.<sup>84</sup> The IIR does not prohibit or penalise regular expropriations. But it creates certain conditions for their legality: they need to be for a public purpose, non-discriminatory, and against the payment of the market value as compensation.<sup>85</sup>

In the early 20th century, the Mexican Revolution promoted a large land reform to pacify the country and remedy historical inequalities. Colonisation had left the country with an unfair distribution of land as a result of conquest, plunder and war. Those property rights produced a situation of tension that in part triggered the revolution. When implementing the reform, Mexico did not ignore the existing

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<sup>81</sup> Nicolás Perrone, "Los Derechos de los Inversores Extranjeros sobre la Tierra según los Tratados de Protección de Inversiones: Una visión desde Latinoamérica" 9 *Anuario Colombiano de Derecho Internacional* (2016), pp. 273, 283-8.

<sup>82</sup> See David Schneiderman, "The Global Regime of Investor Rights: Return to the Standards of Civilised Justice?" 5:1 *Transnational Legal Theory* (2014), p. 60.

<sup>83</sup> Bin Cheng, "The Rationale of Compensation for Expropriation", 44 *Transactions of the Grotius Society*, Problems of Public and Private International Law, Transactions for the Year 1958- (1958), pp. 267, 291.

<sup>84</sup> Nicolás Perrone, above n 81, at 300-1.

<sup>85</sup> August Reinisch, "Legality of Expropriations," in A. Reinisch (ed.), *Standards of investment protection* (2008), p. 171.

property rights. It offered to pay what it considered was a 'fair' compensation. This attitude led to the intervention of the United States in favour of its nationals. The legal issue was not the right of Mexico to expropriate or redistribute land. The government of the United States accepted this right but demanded the payment of 'prompt, adequate and effective' compensations (i.e. The Hull formula).<sup>86</sup> This formula required the payment of a market price, which obviously implied for Mexico a large obstacle to carrying out the reform.

Two more recent cases are the land reform in Zimbabwe and the black empowerment laws in South Africa. These two cases start from a similar scenario. At the end of the colonial or the apartheid period, the distribution of resources was the result of unjust circumstances. This did not mean that every private owner in these countries had been involved in acts of violence, but the dominant patterns of distribution were the result of colonial laws and privileges.

In the case of Zimbabwe, the government decided in the 1980s to end this situation. It expropriated large areas of land without paying any compensation, basing their logic on the original illegitimacy of the rights. Foreign investors took the case before investment tribunals, according to the IIR, and obtained favourable awards forcing Zimbabwe to pay market price compensations.<sup>87</sup> The case of South Africa is slightly different. This country established a more sophisticated mechanism in the mining sector that empowered black people to acquire rights over mines paying a price below the market value. Foreign investors, however, were not being compensated for the difference between the price effectively paid and the market price. Some of these investors brought disputes against South Africa before an investment tribunal, which ended in a settlement in 2010.<sup>88</sup>

There is a fourth relevant antecedent where the foreign investor has still not filed an investment arbitration; the case of Paraguay and the struggle for the ancestral land of the Sawhoyamaxa community. The state of Paraguay has an obligation to protect and return the ancestral land of this indigenous community. But the different governments of this country have resisted making the necessary expropriations. The main argument for not complying with this obligation was a BIT between Paraguay and Germany, which is applicable given that German nationals own part of the Sawhoyamaxa land. In 2006, however, the Inter-American Court of Human Rights (ICHR) did not accept this argument, since the treaty in question allows Paraguay to expropriate against compensation, and because, in any case, a BIT needs to be consistent with the Inter-American Convention of Human Rights.<sup>89</sup> Paraguay has only recently implemented this decision, passing the expropriation law 5194 in June 2014. Unsurprisingly, foreign

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<sup>86</sup> Charles Lipson, *Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Centuries* (1985), pp. 79-81.

<sup>87</sup> *Bernardus Henricus Funnekotter and ors v Zimbabwe*, ICSID Case No ARB/05/6 Award, 15 April 2009.

<sup>88</sup> *Piero Foresti v South Africa*, ICSID Case No. ARB(AF)/07/01, Award, 4 August 2010.

<sup>89</sup> *Comunidad Indígena Sawhoyamaxa v Paraguay*, Inter-American Court of Human Rights, decision, 29 March 2006.

investors immediately challenged this measure domestically, claiming that the amount of compensation was inadequate.<sup>90</sup>

It is unlikely that the situation in Colombia would be radically different. For the IIR, expropriations are possible, but there is a price to pay for peace: the market price of foreign investor assets. Following the reasoning of the ICHR in *Sawhoyamaxa*, Colombia would have the authority to carry out the necessary expropriations to implement the CADP. The problem is the compensation it may need to pay to foreign investors, which may amount to the full reparation of large farming or mining undertakings. Investment law literature and awards do not seem to provide Colombia with many options. The principles of balancing and proportionality have been applied in expropriation cases, but essentially to distinguish between a regulation and an expropriation.<sup>91</sup> Tribunals tend to find that any measure that implies a total deprivation of the right cannot be a regulation, and are therefore subject to compensation.<sup>92</sup>

Many developing countries claimed during the 1960s and 1970s that situations like the Colombian one, where the measures are an expression of the right to self-determination, should be subject to a different standard of compensation.<sup>93</sup> This view, however, has been historically resisted by developed countries — like the recognition of the right to peace — and it presently has little legal value in the IIR.

This outcome could be criticised from the perspective of Colombians' right to peace. The metric that investment tribunals would use to balance foreign investor rights and peace in Colombia is questionable. Investment tribunals normally rely on proportionality to distinguish between a regulation and an arbitrary measure. But peace is substantively different to a regulation and the individual interests of foreign investors. It would represent a keystone of the Colombian society, benefiting everybody, *including foreign investors*. This needs to be included in the legal reasoning, if not to exempt Colombia of the obligation to pay compensation, then at least to reduce substantially the amount.

The argument that foreign investors should not contribute to peace — or any other social goal of host states — is simply unfair.<sup>94</sup> These individuals benefit from the general situation in the country to make a profit, but do not want to contribute to it. This privilege is illegitimate and unreasonable. The IIR may be justifiable when host states abuse foreign investors. But any privilege beyond this situation is

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<sup>90</sup> Luke Peterson, "Foreign Landowners Fail in Challenge of Paraguayan Expropriation Law that gives effect to earlier ruling of Interamerican Court of Human Rights", *IAReporter*, 8 October 2014.

<sup>91</sup> *LG&E v Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶ 194; *TECMED S.A. v Mexico*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶ 115.

<sup>92</sup> *TECMED v Mexico*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, ¶ 122, 121-2; *Compañía del Desarrollo de Santa Elena v Costa Rica*, ICSID case No. ARB/96/1, Award, 17 February 2000, ¶ 72; *L&E v Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶ 191; *Azurix v Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶ 309-11.

<sup>93</sup> Anthony Anghie, above n 28, pp. 213-23.

<sup>94</sup> See *TECMED v Mexico*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, ¶ 122; *Azurix v Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶ 310-1.

a positive discrimination of strong and powerful TNCs, which does nothing but remind us of the colonial origin of the IIR.

#### CONCLUSIONS

The right to peace is a fundamental goal of any society. Instead of pursuing a military victory, President Santos has engaged in a negotiated solution to the armed conflict with FARC. Opting for a political settlement implies an agreement to bringing about socio-economic transformations to structures that have been the sources of the armed struggle. FARC's armed struggle is related to the unequal distribution of land in Colombia. In some regions of Colombia, big landowners have been replaced today by TNCs and foreign investors who have managed to acquire large portions of land. Therefore, the land distribution pillar of the CADP that aims at changing radically the use of land in conflict-torn regions of the country will necessarily involve considering TNCs and foreign investors as stakeholders of the peace process.

These negotiations will inevitably bring about the question of foreign investor rights and the IIR. The colonial past of this regime makes it an instrument for the protection of TNCs' interests. The IIR could be thus an obstacle for societies experiencing a transition from war to peace. In the case of Colombia, it could be used for TNCs to demand compensations for land acquisition that could put at risk the implementation of the redistribution of land agreed as part of the CADP.

The transition from war to peace opens up opportunities and brings about new challenges for a whole society. Multiple 'hidden peace processes' unfold after signing a peace agreement which last for many decades and usually take place in the sites where the idea of democratic nation states crystallise: in the (re)production and practice of law. In order for the IIR not to be an obstacle there needs to be a strong stance from the highest levels of the executive branch of the state to stand up for the Colombians' right to peace and give national concerns priority and allow for these 'hidden peace processes' to flourish.