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ORIGINAL ARTICLE

Regulatory Chill and Domestic Law: Mining in the Santurbán Páramo

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Abstract

A persisting question about investment treaties is whether they lead to regulatory chill – the reluctance to regulate on environmental and social issues due to fear of investment claims. The literature on this topic has been predominantly focussed on how the state responds to international pressures, and little has been written about what happens within the state itself. This article aims to fill that gap by analysing the interplay of domestic laws and institutions in the context of potential investment claims, based on the case study of mining in the Santurbán *páramo* region in Colombia. The article shows that even though Colombia had created laws and institutions that internalized international investment law, it did not bring about regulatory chill in the case of Santurbán; this is due to the role of domestic constitutional law and the Constitutional Court. This case study also adds to the understanding of how the Liberal International Order is shifting from international to domestic governance, by showing how domestic laws and institutions can have diverging priorities when determining how the risk of investment claims is dealt with.

Key words: ISDS; investment law; constitutional law; Colombia; investment treaty

1. Introduction

There is a persisting question in international investment law as to whether states may be discouraged from adopting environmental or social regulations due to fears of being challenged in investment arbitration – the so-called 'regulatory chill'.[1] As yet, there are scarce detailed empirical case studies of whether and how regulatory chill might occur. Rather, the focus has been on comparing the regulatory conduct of several countries[2] or analysing the investment regime as a whole.[3]

[1]L. Strohm (2002) 'Pollution Havens and the Transfer of Environmental Risk', *Global Environmental Politics* 2(2), 29–36; S. Brunnermeier and A. Levinson (2004) 'Examining the Evidence on Environmental Regulations and Industry Location', *Journal of Environment and Development* 13(1), 6–41; S.W. Schill (2007) 'Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change?', *Journal of International Arbitration* 24, 469; K. Tienhaara (2009) *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy*. Cambridge University Press; G.Van Harten and D.N. Scott (2016) 'Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada', *Journal of International Dispute Settlement* 7, 92.

[2]M. Sattorova (2018) *The Impact of Investment Treaty Law on Host States Electronic Resource: Enabling Good Governance?* Hart Publishing; Tienhaara, supra n. 1.

[3]L.N. Skovgaard Poulsen (2015) *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries*. Cambridge University Press; J. Bonnitcha, L.N. Skovgaard Poulsen, and M. Waibel (2017) *The Political Economy of the Investment Treaty Regime*. Oxford University Press; E. Janeba (2021) 'Investor State Dispute Settlement and Host Country Regulation: Insights from Economic Theory', in J. Chaisse, L. Choukroune, and S. Jusoh (eds.), *Handbook of International Investment Law and Policy*. Springer, https://doi.org/10.1007/978-981-13-3615-7_119 (accessed 31 January 2022).

Sattorova's work involved interviews with government officials and analysis of legislation in five developing countries, showing that many government officials had little awareness of investment treaty law, and even when they did, it mostly did not translate into legal reform.[4] This would imply that there would be little risk of regulatory chill. Tienhaara analysed the legal materials of arbitration proceedings in several countries, focussing in particular on how international arbitration was affecting existing conflicts over environmental legislation.[5] These comparative methods have led to the regulatory chill debate focusing on how the state responds to the international community, but little has been written about what happens within the state itself regarding investment claims.[6]

In parallel, academic literature on international economic law has pointed to the resurging importance of domestic law in the regulation of the international economic order. The Liberal International Order, the global system of multilateralized rules for economic governance, which emerged after the Second World War, has increasingly been questioned by states. In investment law, this has manifested itself in the backlash against international investment law and arbitration, the launching of a reform process, and some countries exiting the regime.[7] However, the retreat from the Liberal International Order does not necessarily mean a retreat from globalization. Rather, as this special issue of the World Trade Review shows, there has been a domestication of international economic law rules, including through the proliferation of domestic investment laws. Domestication refers to 'the transition from the use of international to domestic legal instruments for the regulation of cross-border trade and investment flows'.[8] It occurs through, for example, the issuing of domestic laws that incorporate rights for foreign investors or other incentives for foreign direct investment, but also through adapting the broader legal framework that applies to foreign investment – e.g. property law. The move from the international to domestic in international economic law is an attempt to achieve the same end of attracting foreign investment while exercising more domestic control. This has also led to a resurgence of interest in domestic investment laws in legal scholarship.[9]

This article brings these two themes of scholarship together to explore the question of whether investment treaties lead to regulatory chill with a focus on the role of domestic laws and the domestic political context.[10] There has been a tendency to address the question of the impact of investment treaties and regulatory chill in hypothetical terms; empirical studies on the topic are only starting to emerge.[11] This study builds on this scholarship, while taking the question

[4]M. Sattorova (2015) 'The Impact of Investment Treaty Law on Host State Behavior: Some Doctrinal, Empirical, and Interdisciplinary Insights', in S. Lalani and R.P. Lazo (eds.), *The Role of the State in Investor–State Arbitration.* Brill| Nijhoff, https://brill.com/view/book/edcoll/9789004282254/B9789004282254-s008.xml (accessed 14 April 2020); Sattorova, supra n. 2).

[5]Tienhaara, supra n. 1.

[6]But see J. Calvert (2018) 'Civil Society and Investor–State Dispute Settlement: Assessing the Social Dimensions of Investment Disputes in Latin America', *New Political Economy* 23, 46.

[7]M. Waibel et al. (eds.) (2010) *The Backlash against Investment Arbitration [Electronic Resource]: Perceptions and Reality.* Kluwer Law International, https://ezproxy-prd.bodleian.ox.ac.uk/login?url=http://www.kluwerarbitration.com/book-toc.aspx?book=TOC_BIA_2010_V01 (accessed 11 October 2021); G. Dimitropoulos (2020) 'The Conditions for Reform: A Typology of "Backlash" and Lessons for Reform in International Investment Law and Arbitration', *Law and Practice of International Courts and Tribunals* 18, 416.

[8]J. Chaisse and G. Dimitropoulos, 'Domestic Investment Laws and International Economic Law in the Liberal International Order', this special issue

[9]J. Bonnitcha (2017) 'Investment Laws of ASEAN Countries: A Comparative Review', www.iisd.org/publications/investment-laws-asean-countries-comparative-review (accessed 11 October 2021); D.N. Dagbanja (2014) 'The Changing Pattern and Future of Foreign Investment Law and Policy in Ghana: The Role of International Investment Treaties', *African Yearbook of International Law* 19, 81; J. Hepburn (2018) 'Domestic Investment Statutes In International Law', *American Journal of International Law* 112, 658.

[10]G. Dimitropoulos, 'The Right to Hospitality in International Economic Law: Domestic Investment Laws and the Right to Invest', this special issue.

[11]L. Cotula (2017) 'Democracy and International Investment Law', *Leiden Journal of International Law* 30, 351; Harten and Scott, supra n. 1; Sattorova, supra n. 2.

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to a more granular level and analysing it through the lens of an in-depth case study. This allows a better understanding of what are the domestic laws and what is happening within the state, both in the interactions of state agencies, and state–society relations. It treats the state as a complex body consisting of many actors with different incentives and modes of operating. Case study research lends itself well to asking 'how' and 'why' questions and explaining a complex chain of events.[12] In that way, it gives more insight into the interplay between the impact of Investor State Dispute Settlement (ISDS) and the complexity of domestic laws and politics, and how these determine the choices of policymakers.

The research is based on the case of foreign investment in mining in Santurbán, Colombia, which led to ISDS cases brought against Colombia by companies such as Eco Oro.[13] Latin America has been significantly involved in ISDS cases over the past 20 years, with countries in the region facing the highest number of cases worldwide. It is also a region with a history of challenging this type of dispute resolution. The Calvo doctrine, which was prominent among Latin American governments in the early twentieth century, stated that foreign investors should not have a separate form of protection available to them, but like domestic investors they should be required to bring their cases in domestic courts.[14] Nonetheless, a major reversal in the stance of most Latin American countries occurred in the 1980s, and most signed Bilateral Investment Treaties (BITs) and subscribed to the International Centre for the Settlement of Investment Disputes. However, since then certain countries have attempted to exit international investment arbitration – for example, Ecuador denounced the ICSID convention in 2007 and terminated many of its BITs. It nonetheless re-joined the ICSID convention in 2021.[15]

Colombia has been much more consistent in its adherence to the international arbitration system, with a continuity of governments supportive of foreign investment (although with the election of Gustavo Petro as Colombia's president in 2022 – with a strong anti-extractivist stance – this could shift in the near future). At the same time, Colombia has been one of the main targets of ISDS cases (apart from the extraordinary case of Argentina).[16] In this political context, treaties and ISDS were likely to have some level of influence on policymaking. In the Santurbán case, mining companies had started exploration in the region, but several court decisions prohibited mining in the ecologically vulnerable areas of the *páramos*.[17] Subsequently, the companies brought investment claims against Colombia. The case represented an interesting puzzle as the circumstances were particularly favourable to regulatory chill: there were laws and institutions encouraging foreign investment, and foreign investment in mining was a priority for consecutive governments. And yet, even in these circumstances, a total ban on mining was enforced by the domestic courts, leading to the question why regulatory chill did not occur in this case. Based on over 30 interviews conducted with officials, lawyers, and civil society representatives involved in the process and policy and legal documents in their historical context, a step-by-step analysis of the decision-making process leading to the prohibition of mining in the *páramos* was undertaken.

This study shows that while Colombia had created laws and institutions that internalized international investment law in its domestic system, they did not bring about regulatory chill in the

[12]R.K. Yin (2018), *Case Study Research and Applications: Design and Methods,* 6th edn. Sage.

[13]*Eco Oro Minerals Corp v. Republic of Colombia* [2021].

[14]P. Lazo (2016) 'Two Worlds Apart: The Changing Features of International Investment Agreements in Latin America', in A. Tanzi (ed.), *International Investment Law in Latin America: Problems and Prospects* Brill Nijhoff, 71.

[15]UNCTAD, Investment Policy Hub, 'Ecuador – Signs the ICSID Convention | Investment Policy Monitor | UNCTAD Investment Policy Hub', https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3728/ecuador-signs-the-icsid-convention (accessed 10 March 2022).

[16]R.P. Lazo and A. Wang (2021) 'Intra-Latin America Investor–State Dispute Settlement', in J. Chaisse, L. Choukroune, and S. Jusoh (eds.), *Handbook of International Investment Law and Policy.* Springer, https://doi.org/10.1007/978-981-13-3615-7_44 (accessed 29 January 2022).

[17]A highland ecosystem, which exists only in the Andes.

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case of Santurbán due to the diverse ways in which institutions within the state responded to the possibility of investment claims.

Firstly, international investment law was brought into an already existing complex web of domestic institutions and laws, including constitutional and property laws, and it had to be applied within that context. The primacy of constitutional law over other domestic laws and international investment agreements effectively limited the extent of regulatory chill. Historically, the parallel development of domestic investment laws, structures for facilitating investment, and the Colombian Constitution, created a complex hierarchy of rights. An analysis of these structures leads to a more nuanced understanding of how domestic investment law transposes international investment law into the domestic legislation. The domestication of the Liberal International Order may lead to internalizing some of the rules of international investment law, but this may be counterbalanced by other domestic laws, such as constitutional law.[18] Even in the context of a country that prioritized foreign investment, such as Colombia, there are other factors – constitutional rights and a court actively exercising its role of checking government power – which impact decisions regarding international investment.

Secondly, institutions within the state do not necessarily respond in the same way to the risk of investment claims. This study unpacks what took place within the state in the case of Santurbán to show that this was driven by diverse methods of reasoning and the incentives of the state's institutions. This approach reflects the discussion of the nature of the state in international relations literature. Rather than constituting a unitary whole, the state is better understood as constructed of many actors responding to diverse incentives.[19] In applying this approach to investment treaties, it becomes clear that states do not make choices relating to international investment law; decisions are always taken by specific people or groups of people.[20] The specific relationships between the actors within the state, and the political context, are crucial to the decisions taken regarding investment arbitration.[21]

States are disaggregated – their institutions perform diverse functions. The variety of such functions is the foundation of the system of checks and balances between the legislative, executive, and judiciary. There is an inherent tension between an expectation of consistency in state action, and the system of checks and balances that can lead to decisions being overturned or processes slowed down for the sake of better quality decision-making And yet, arbitral tribunals have frequently interpreted the standard of Fair and Equitable Treatment (FET) as including stability, predictability, and consistency,[22] and failure to create such a regime was found to constitute

[18]G. Dimitropoulos (2020) 'National Sovereignty and International Investment Law: Sovereignty Reassertion and Prospects for Reform', *Journal of World Investment and Trade* 71, 94–95.

[19]T. Skocpol (1985) 'Bringing the State Back in: Strategies of Analysis in Current Research', in P.B. Evans, Dietrich Rueschemeyer, and Theda Skocpol (eds.), *Bringing the State Back in [Electronic Resource]*. Cambridge University Press https://ezproxy-prd.bodleian.ox.ac.uk/login?url=http://dx.doi.org/10.1017/CBO9780511628283 (accessed 21 April 2020); B. Geddes (1990) 'Building "State" Autonomy in Brazil, 1930–1964', *Comparative Politics* 22, 217; B. Geddes (1994) *Politician's Dilemma: Building State Capacity in Latin America.* University of California Press; J.S. Migdal, A. Kohli, and V. Shue (1994) *State Power and Social Forces: Domination and Transformation in the Third World.* Cambridge University Press; E. Huber (1995) 'Assessments of State Strength', in P.H. Smith (ed.), *Latin America in Comparative Perspective: New Approaches to Methods and Analysis*. Westview; H.D. Soifer (2009) 'The Sources of Infrastructural Power: Evidence from Nineteenth-Century Chilean Education.(Report)', *Latin American Research Review* 44, 158.

[20]Sattorova, supra n. 4, 177.

[21]M.E. Schneider (2015) 'The Role of the State in Investor–State Arbitration: Introductory Remarks', in S. Lalani and R.P. Lazo (eds), *The Role of the State in Investor–State Arbitration*. Brill|Nijhoff, 4, https://brill.com/view/book/edcoll/9789004282254/B9789004282254-s002.xml (accessed 14 April 2020); Z. Williams (2015) 'Domestic Demands and International Agreements: What Causes Investor–State Disputes?', in S. Lalani and R.P. Lazo (eds.), *The Role of the State in Investor–State Arbitration*. Brill|Nijhoff, https://brill.com/view/book/edcoll/9789004282254/B9789004282254-s002.xml (accessed 14 April 2020); Calvert, supra n. 6.

[22]*Metalclad Corporation v. The United Mexican States,* ICSID Case No. ARB(AF)/97/1; *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States,* ICSID Case No. ARB(AF)/00/2; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador,* ICSID Case No. ARB/06/11

sufficient ground for compensation from the host state.[23] A similar tension between the requirement of predictability, and the understanding of the diverse functions of the state, is evident in the diverging opinions of the arbiters in the *Eco Oro* case (see below).

The article is structured as follows: the second section presents how investment law was domesticated in the national legal system, including how it interacted with constitutional law, which was being developed in parallel, and the historical and political context of that process. The third section analyses the role that the diversity of state institutions played with regards to regulatory chill. After setting out the Santurbán context, the section analyses the partial regulatory chill caused by the government's decision to allow existing licence holders to continue mining, and the reversal of that regulatory chill by the Constitutional Court's judgement prohibiting all mining in the *páramos*. State institutions do not operate in a void – they are influenced by interest groups. The fourth section analyses how the interactions between the state institutions reflected their responsiveness to interest groups.

2. Preparing for Investment Claims

Introducing investment law into a domestic legal system does not happen in a void, as there are plenty of interactions with already existing domestic laws. This section lays out Colombia's institutional framework for investment law, and constitutional law in relation to investment claims. It analyses these areas of law in an historical context, showing how the developments in investment law and constitutional law over the last 20 years in Colombia are intertwined with each other.

2.1 Domesticating Investment Law

Colombia started opening up its economy to foreign investment in the early 1990s, under Cesar Gaviria's government. The 1991 Constitution was designed to facilitate these economic reforms and ensure the legal framework that would encourage foreign investment. It also provided the space for the subsequent introduction of domestic investment laws and other laws relating to foreign investment.[24]

In the first instance, Law 9 of 1991 (Ley de Cambios Internacionales) established a legal basis for foreign investment, building on the Constitution. It incorporated the recommendations of the International Monetary Fund (IMF), including principles such as national treatment of foreign investors, in Art. 15 paragraph 4. The Government also issued a general authorization for foreign investment, which applied to most investments, with the important exception of public services, for which an explicit authorization was required.[25]

In the early 2000s, the Conservative governments of Andrés Pastrana and Alváro Uribe were intent on attracting more foreign investment. There was a broad consensus amongst the political elites that opening the economy to international markets was key to domestic growth; the soaring fiscal deficit and an economic crisis further led an acceleration of the efforts to attract foreign investment. At this time, Decree 2080 of 2000 was adopted, implementing the 1991 Law and building the domestic investment law regime. The Decree regulates foreign direct investment, except when superseded by international treaties. Article 2 of the Decree incorporates the principle of national treatment for foreign investors directly into domestic law. It also sets out that foreign investment is welcome in all sectors of the economy – with certain exceptions linked to national security, hazardous waste, and network television concessions. However, it allows the government to restrict the entry of foreign capital by decree. Compared to other domestic

[23]Sattorova, supra n. 2, 9.

[24]United Nations Conference on Trade and Development, *Investment Policy Review – Colombia* (UN 2006), www.un-ilibrary.org/content/books/9789211555479 (accessed 5 September 2021).

[25]Consejo Nacional de Política Económica y Social (CONPES), Resolution 51 of 1991.

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investment laws, it is not as far-reaching – it does not include an arbitration clause. Where there is no international treaty granting access to international arbitration, all disputes are meant to be resolved as per Colombian law.[26]

Pastrana also enacted other reforms to facilitate foreign investment in the economy, such as a new mining code, involving the granting of mining titles on a 'first come, first served' basis, which made it much easier for foreign companies to obtain these rights to the resources.[27] Following the election of Álvaro Uribe in 2002, further legal reforms were introduced to create incentives for the extractive industries; state resources were privatized, and labour rules loosened.

The Uribe government had also significantly increased the defence budget, as part of its strategy to combat guerrilla insurgents through increased military action. The rising costs of the military programme, coupled with a growing fiscal deficit, led to an attempt to attract more capital through growing mining investments in the mid-2000s.[28] This included a further expansion of free-market policies and incentives for foreign investors. For example, a law was passed in 2005 that allowed the creation of investor–state contracts guaranteeing legal stability.[29] Legal stability was defined as the maintenance of legal norms identified as important to the proposed investment. Many such contracts were signed by the governments until the Law was abrogated in 2012.[30,31] This shows the extent to which Uribe's government was willing to limit regulatory space in order to attract foreign investment.

2.2 Institution-Building to Attract Foreign Investment

The Santos government (2010–2018) was similarly keen on attracting foreign investment, including in the mining sector, facilitated by favourable legislation and, initially, high commodity prices. The slump in commodity prices around 2013 caused a further push to promote the mining industries.[32] However, the Santos government was more focused on institution building as a means of attracting foreign investment – creating mechanisms of legal stability and competitive fiscal policy, amongst others.[33] A formal strategy was developed on how to prevent and respond to investment claims. This strategy existed before the first claims arose, contrary to the findings that many countries ignore the risk of arbitration until they are faced with a claim.[34] The legal framework of the strategy was set out in 2010 in a document of the National Council of Social and Economic Policy[35] and Decree 1859 of 2012. In the 2010 strategy, the government recognized the risk of its public employees' lack of experience with international investment agreement (IIA) commitments, which was likely to lead to investment arbitration.[36] It set out the objective of training government officials on how their actions could breach IIA provisions. The government organized dozens of workshops on Colombia's IIA commitments, and published reports such as 'Know Colombia's Investment Commitments and Obligations' (in collaboration with the

[26]See Article 14 of the Decree. This distinguishes it from the 42 states that have granted consent to international arbitration via their domestic law, see T.L. Berge and T. St John (2021) 'Asymmetric Diffusion: World Bank "Best Practice" and the Spread of Arbitration in National Investment Laws', *Review of International Political Economy* 28, 584.

[27]Mining Code (Law 685 of 2001). Law 685 of 2001.

[28]K. Sankey (2018) 'Extractive Capital, Imperialism, and the Colombian State', *Latin American Perspectives* 45, 52, 63–64.

[29]Ley de Estabilidad Jurídica para Los Inversionistas (Law 963 of 2005).

[30]Ley por la cual se expiden normas en materia tributaria y se dictan otras dispociones (Law 1607 of 2012), art. 166 Law 1607 of 2012, art. 166.

[31]F. Azuero, A. Guzmán, and M.A. Trujillo (2017) 'Contratos de estabilidad jurídica en Colombia: un análisis desde la economía de la información y la economía política', *Innovar* 27, 125.

[32]A.B. Llévano, 'La locomotora minera: a una velocidad para Santos, a otra para los mineros', *La Silla Vacía*, 21 February 2013, https://lasillavacia.com/historia/sector-minero-no-comparte-optimismo-de-santos-41593 (accessed 5 May 2020).

[33]Sankey, supra n. 28, 64.

[34]L.S. Poulsen and E. Aisbett (2013) 'When The Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning', *World Politics* 65, 273.

[35]CONPES 36842 of 2010.

[36]USAID (2013) 'Investor–State Dispute Prevention Strategies: Selected Case Studies', 13.

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Inter-American Development Bank), and 'Prevention and Management of Investor–State disputes under IIAs' (in collaboration with the EU).[37] The strategy was not only concerned with avoiding disputes, but also aimed at improving the overall investment climate. It created the Investment Attraction Facilitation System (SIFAI), a public–private mechanism that gathers information on encouraging investment through legal reform. The SIFAI also allows collective complaints to be voiced by a group of investors. However, this mechanism is not used much, because investors frequently have individual complaints.[38] The SIFAI exemplified the government's focus on creating a pro-investor environment, as it actively encourages the participation of investors in legal reform.

In addition to the bodies created in the CONPES strategy, the Santos government reformed the institutions responsible for defending the state when faced with international litigation. The 2010–2014 National Development Plan created a specialized agency responsible for both defending the state and preventing possible cases, the Agencía Nacional de Defensa Jurídica del Estado (ANDJE). It also runs programmes to train officials on how to avoid the risk of investment claims.[39] The Santos government also pursued an investor-friendly environment through a national arbitration law – Law 1563 of 2012 – which is based on the UNCITRAL Model Arbitration Law – a model that international investors are familiar with.[40]

2.3 Mechanism for Internalization of Costs

The literature on regulatory chill notes that whether the cost of arbitration will be a deterrent to regulation depends on which part of the state will end up paying that cost.[41] As questioned by the Colombian academic Rene Urueña, if a decision depends on a local authority, but the costs of claims are paid by the central government, why should the local authority choose to minimize the risk of arbitration?[42] For arbitration costs to create incentives, there would need to be a form of internalization, a loss-allocation mechanism internal to the state, or another system for controlling risk-increasing activities of state officials.[43]

It is unclear whether such a transfer of costs is possible under Colombian law, and whether it would apply to the Santurbán case. There is a legal procedure that allows the central government to seek redress against the state official who is considered liable for the international breach, the *acción de repetición*. However, only a few of my interviewees believed this action to have any significant impact on official behaviour.[44] The legal procedure is based on Article 2 of Law 678 from 2001, which defines it as 'a civil action of patrimonial character that should be exercised against a current or former public official, who as a consequence of their wilful misconduct, or seriously wrongful conduct caused the State to be obliged to pay compensation, stemming from a judgement, conciliation or other form of terminating a conflict'. Articles 5 and 6 of the same law define what wilful misconduct (*conducta dolosa*) and seriously wrongful conduct (*culpa grave*) are. The former relates to an official wilfully acting in pursuit of objectives extraneous to the goals of their official functions. The latter occurs where the damage caused is a consequence of direct violation

[37]Ibid 16.

[38]Interview with senior government official, Bogotá, August 2019.

[39]Agencia Nacional de Defensa Jurídica del Estado (2018) 'Balance de Gestión', www.defensajuridica.gov.co/servicios-al-ciudadano/ley_transparencia/documentos_2018/informe_empalme_final_251018.PDF; Agencia de Defensa Jurídica del Estado, 'Informe de Gestión' (2019).

[40]J. Chaisse and G. Dimitropoulos, 'Domestic Investment Laws and International Economic Law in the Liberal International Order', this special issue.

[41]Bonnitcha, Poulsen, and Waibel, supra n. 3.

[42]Interview with Rene Urueña, professor at Universidad de Los Andes specializing in investment law, Bogotá, 6 August 2019.

[43]Sattorova, supra n. 2.

[44]Interview with Carlos Lozano, Acosta, Environmental Lawyer, formerly at AIDA-Americas, Bogotá, 6 August 2019.

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of the law or the constitution, or an inexcusable omission or breach of their exercise of official duties.

The *acción de repetición* could be used against an official if they were perceived to have acted contrary to their functions, or in a seriously wrongful manner. It is unclear to what extent this action has any effect on official behaviour, as only one of my respondents seemed to be influenced by it.

While the impact of the formal route for transferring costs is unclear, a few interviewees mentioned pressures that were informal, following the line of the central government. For instance, a junior official might receive a phone call from a more senior official in their department, directing them to change a particular regulatory proposal. This type of informal power could also limit the officials' autonomy to disregard the risk of investment claims.

2.4 History of Colombian Constitutional Law in its Relationship to Investment Law

The domestication of international investment law into the Colombian legal system described above took place in parallel with important developments in Colombian constitutional law, and the interactions between the two show the need to understand domestication of IEL in its broader context. The current Colombian Constitution was enacted in 1991 during the government of Cesar Gaviria, who was also a proponent of the free-market reforms with a view to opening the Colombian economy to international investment. A new Constitution was deemed necessary in order to ensure the rule of law, which was thought to be a precondition for economic development and growth. The prevailing understanding was that a well-functioning market economy requires clear rules and the protection of individual rights, in particular, property rights.[45] Gaviria was not, however, a proponent of including enforceable socio-economic rights in the Constitution. Rather, he argued that while negative rights are enforceable, socio-economic rights should be developed by the legislature as appropriate to the circumstances. Nonetheless, a large proportion of the Constituent Assembly did not agree with this perspective and succeeded in including social rights in the Constitution as substantive goals for the Colombian government. This was partly because social groups that were traditionally excluded from Colombian electoral politics, such as representatives of indigenous movements, were involved in the constitution making process.[46] The 1991 Constitution is thus based on a dual logic of both favouring the rule of the free market (for example, by providing autonomy to the central bank) and protecting rights consistent with an interventionist social democracy (for example, the principle of the social function of property).[47]

The interaction between constitutional law and investment law, and their mutual influences, became very clear in the 1990s. The Constitutional Court found that the prohibition of expropriation without compensation contained in the free trade agreement negotiated with the UK was unconstitutional, as it violated Article 58 of the Constitution, which allowed expropriation without compensation in certain circumstances.[48] Following this judgement, Article 58 was derogated in 1999, in a clear move to facilitate investment in the country.

At the same time, the Constitutional Court was awarded vast powers of review via the 1991 Constitution through the institution of the *tutela*. The *tutela* is a mechanism for rights-review in all courts; the *tutela* was relatively easy to bring to court, due to low costs and simple procedures and grew in popularity over the 1990s. The Constitutional Court significantly expanded the possibilities for use of the *tutela* by ruling strongly on the responsibility of judges to protect

[45]R.M. Nunes (2010) 'Ideational Origins of Progressive Judicial Activism: The Colombian Constitutional Court and the Right to Health', *Latin American Politics and Society* 52, 67, 76.

[46]R.U. Yepes (2007) 'Judicialization of Politics in Colombia: Cases, Merits and Risks', *Sur. Revista Internacional de Direitos Humanos* 4, 52.

[47]Nunes, supra n. 45, 78.

[48]Colombian Constitutional Court. Case C-358/96 of 1996 (Reporting judges Dr. Carlos Gaviria Díaz and Dr. José Gregorio Hernández Galindo; 14.08.1996).

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fundamental rights.[49] The Court's increasing involvement in the protection of rights led to an implementation of a regime radically different from what the Gaviria government had envisioned. Social rights were being judicially enforced, including the state's obligation to pay welfare benefits. The right to health, in particular, has been invoked very frequently – famously, the Constitutional Court had found that the Colombian health legislation was not satisfactory, and was granting applicants rights to access specific medicines and procedures that were not granted in the state programmes.[50]

The strong role of the Colombian Constitutional Court in protecting fundamental rights and creating a check on executive power is part of a broader trend in Latin America since the 1990s for the interpretations of human rights to be more expansive and assertive.[51] This was manifest through the proliferation of new constitutions that included a broader range of fundamental rights. Judicial actors also became bolder in upholding human rights against the intervention of governments.[52] There was increasing social demand for judicial involvement in political controversies,[53] and human rights were increasingly recognized as an established part of constitutional law. As a result, courts gained in importance as political actors.[54]

The Constitutional Court has thus gained a reputation as a strong and independent institution for the protection of fundamental rights.[55] The Santurbán *páramo* case shows that this role is relevant to understanding regulatory chill, and the interactions between international investment law and domestic laws. The Court was empowered to use rights-review to control policy-making, while ignoring the potential effects that might have in terms of international arbitration. Judicial rights review can be a way of preventing regulatory chill; the Court may stop the executive and legislature from being excessively accommodating to the interests of foreign investors when that may jeopardize fundamental rights.

3. The Role of Domestic Law and State Actors in Regulatory Chill

Domestic investment laws, constitutional law, and the interactions and influences on state actors were all factors that contributed to the effect that investment claims had in the Santurbán *páramo* case. This section analyses the decisions of the government and the Court judgements that dealt with mining in the *páramos*. They represent an instance of partial regulatory chill, allowing mining to continue within the ecological zones for existing licence holders, which was subsequently reversed by the Constitutional Court. Analysing the multiple actors in the state, their diverse methods of operating, and their priorities and responsiveness to interest groups, provides a more nuanced picture of when and how regulatory chill might occur.

3.1 The Santurbán Páramo Saga

The concept that states are reluctant to regulate when there is a risk of investment claims being brought against them assumes that the relevant policymakers are aware of the investment treaty

[49]Nunes, supra n. 45, 83.

[50]Ibid., 89.

[51]M.G. Villegas (2014) 'Derecho a falta de democracia: la juridización del régimen político colombiano', *Análisis Político* 27, 167.

[52]E.A. González-Ocantos (2016) *Shifting Legal Visions: Judicial Change and Human Rights Trials in Latin America*. Cambridge Core, August , /core/books/shifting-legal-visions/CC9D850D90D984A72AA455DC32A8C56D (accessed 24 April 2020); J. Couso, A. Huneeus, and R. Sieder (2013) *Cultures of Legality: Judicialization and Political Activism in Latin America*. Cambridge University Press.

[53]E. Peruzzotti and C. Smulovitz (2006) *Enforcing the Rule of Law: Social Accountability in the New Latin American Democracies*. University of Pittsburgh Press, www.loc.gov/catdir/toc/ecip061/2005028747.html (accessed 19 March 2020).

[54]G. Helmke and J.R. Figueroa (2013) *Courts in Latin America*. Cambridge University Press.

[55]Ibid.

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obligations and how they are related to their area of policy. Research indicates that this is not necessarily the case. Poulsen has argued that the majority of developing country policymakers were not aware of the possibility of investment claims until they were faced with the first investment arbitration.[56] This study was based on both qualitative and quantitative data from a large range of countries. Other studies have approached the issue of awareness of investment treaties in a more localized and context-focused manner. According to a study of five developing countries, based on interviews with officials at different levels of administration, many government officials had remained unaware of investment treaties even after the state had become a respondent in investment arbitration.[57] Nonetheless, in other contexts, knowledge of the arbitration cases against the state was substantial and was clearly affecting the decision-making of officials.[58]

Creating similar obligations in domestic law could induce regulatory chill, raising awareness of the possibility of investment claims. As the Santurbán case shows, domestic investment law is likely to be part of a broader process of promoting foreign investment in the economy, intended to facilitate foreign investment. This raises the question of what effect domestic investment law might have on the occurrence of regulatory chill.

In Colombia, domestic investment laws were put in place to attract and facilitate foreign investment. Contrary to many developing country cases discussed in the literature, these were accompanied by programmes and strategies aimed at raising awareness of the potential impact of investment treaties.[59] This section shows that the domestic institutions and investment laws did have an impact on the officials' awareness of potential of investment claims, and their chosen approach to regulate on the delimitation of the Santurbán *páramo*.

A former government official informed me that when the delimitation of the *páramos* was being debated, a risk assessment based on international law was conducted by the Ministry of Commerce. It took into account the risk of arbitration claims being brought by foreign investors in the regions affected by delimitations.[60] The conduct of risk assessments, which evidences an advanced knowledge of the effects of international law, together with a set-up of domestic investment law facilitating foreign investment, would suggest a fairly high likelihood of regulatory chill occurring.

The first *páramo* that the government attempted to delimit was Santurbán, 'a dramatic one', as explained to me by a former official from the Ministry of Environment.[61] The process was incredibly difficult, and the delimitation was frequently delayed. The drama and difficulty came from the fact that Santurbán is a traditional mining region. In the area of the *páramo,* there are significant amounts of gold, which had been exploited for hundreds of years by small-scale miners in the towns of California and Vetas. Multinational companies bought the titles to the resource from many of these miners and began mining explorations in these areas. At the same time, activists in Bucaramanga and Floridablanca, cities in the areas surrounding the *páramo*, protested against mining in these areas due to water pollution in rivers that flow from the *páramo* to their towns.

This explains why the deadline for a final delimitation of the *páramo* has been frequently postponed. The obligation to delimit the *páramos* was included in the National Development Plan Santos I (NDP) in 2010, which also reiterated the prohibition of mining in the *páramos*, with an exception for those who had a consolidated right to mine before the initial prohibition was passed in February 2010. It then took three years for the Santurbán *páramo* to have its first delimitation. In the process of delimitation, the Instituto Alexander von Humboldt (IvH), a scientific institute providing technical services to the government, delivered an area of reference for

[56]Poulsen, supra n 3.

[57]Sattorova, supra n. 2.

[58]Harten and Scott, supra n. 1.

[59]Sattorova, supra n. 2; Poulsen, supra n. 3; Poulsen and Aisbett, supra n. 34.

[60]Interview with senior government official, Bogotá, August 2019.

[61]Interview with Andrés Gómez Rey, Academic and lawyer, former official at the Ministry of Environment (2014–2016), Bogotá, 13 August 2019.

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the government, which was meant to serve as a scientific basis for delimiting the *páramo*. Nonetheless, the final delimitation was smaller than that area – although it did include areas of 'special protection' outside the *páramo*. A few years later, this delimitation was questioned by the Constitutional Court, which in a constitutional review of the NDP 2010 found that the process of delimitation vested unfettered discretion on the government, which could depart from the technical advice of the IvH with no limits. It also found that the exclusion from the prohibition of mining of those with rights consolidated before 2010 was unconstitutional, and the prohibition had to be a total one.

Following that, another case regarding Santurbán was brought to the Constitutional Court; this time in the form of an individual rights claim (*tutela*). It challenged the Resolution that enacted the delimitation on the basis that it had not sufficiently consulted the local population in the process. Based on the right to participation in environmental governance, the Court found that the delimitation had to be redrawn, in a process that would involve the locally affected populations to a larger extent.[62]

The decisions regarding the *páramo* and the prohibition of mining led to mining companies losing their chance of obtaining an environmental licence, and having to cease their exploration activities. This resulted in investment claims brought by several Canadian mining companies (Eco Oro, Red Eagle, Galway Gold) against Colombia. The claims were brought under the Canada–Colombia Free Trade Agreement, which includes ISDS for the settlement of disputes. The companies based their claims on the legal uncertainty regarding the delimitation of the *páramo*, referring to clauses such as the minimum standard of treatment and the prohibition of expropriation without adequate compensation. They added external pressure to what was already a complex clash of multiple divergent interests posing distinct pressures on the state.

The tribunal's award in *Eco Oro vs Colombia*, issued in 2021, finds that Colombia's actions had not amounted to expropriation of Eco Oro's investment, but they did violate the minimum standard of treatment and fair and equitable treatment standard.[63] The tribunal holds that the process of delimiting the *páramo* was subject to excessive delays and had created legal uncertainty. Various assurances and communications of Colombian government agencies created legitimate expectations that Eco Oro would be allowed to apply for an environmental licence for its mining project. The tribunal also states that Colombia did not provide a sufficiently stable business environment for the mining companies in the region.[64]

The tribunal's decision evidences a problematic perception of the state under international investment law that can be raised as a more general critique of the investment regime. The tribunal notes the divergent views of the institutions within the state and holds that the divergence resulted in the lack of a stable business environment. However, it does not recognize that it is common for state institutions to take different approaches, particularly in a process as complex as the delimitation of a new protected zone in a populated area. As the dissenting arbiter, Professor Philippe Sands points out in paragraph 28 of his separate opinion:

> In determining whether measures taken by a state are arbitrary to the point of being shocking, tribunals must be sensitive to the difficulties of government decision-making in the face of legitimate objectives that pull in different directions.

A deeper look within the structures of the state, the domestic laws and policies, allows for a more realistic view of the internal processes of a state that determines both its actions towards foreign investors, and any potential for regulatory chill. It also shows that the perception that some arbitration tribunals have of the state is problematic, as they require it to act in a unitary manner and

[62]Colombian Constitutional Court, Case T-361/17 of 2017 (reporting judge Alberto Rojas Ríos; 30.05.17).
[63]ICSID case No. ARB.16/41.
[64]Ibid., see for example at para. 748.

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ensure stability and consistency as a priority (based on an interpretation of the FET standard).[65] This perception contrasts with the understanding of the diverse functions of the state and how they interact with each other to create a system of checks and balances. A judiciary overturning the decision of the legislative based on sound constitutional grounds may lead to less stability of the business environment (in the short-term), but it is a sign of a well-functioning legal system where state institutions control each other. There is therefore a normative dimension to understanding the disaggregated nature of the state – the correct functioning of the state may lead to decisions being changed or overturned.

3.2 The Sunset Clause: Partial Regulatory Chill

The initial decision of the government regarding mining in the *páramos* allowed consolidated mining titles to continue, via a sunset clause in the Law 1753. This section argues that this was partially related to the perceived risk of investment claims, and therefore constituted an element of regulatory chill.

It is useful to place the sunset clause, which allows existing mining to continue in its historical and political context. The Santos governments relied on foreign investment in extractive industries for state revenue, continuing the trend from previous governments. Mining remained the most important export sector – at 20% of total exports between 2010 and 2015.[66] As Carlos Cante, the vice-minister for mining in the second Santos government described in an interview, large-scale mining with the involvement of foreign investors was seen as crucial to the economic development of Colombia.[67] The slump in commodity prices in 2013 did not detract the government from extractive industries; rather, it led to their further expansion.[68] The second Santos government (2014–2018) granted new advantages to mining companies, including shortening the process for obtaining environmental licences.[69] At the same time, there was a clear willingness within the Santos governments to put in place measures for environmental protection; a priority that was not shared with the previous government. The Santos government in 2010 began the process of delimiting many environmental areas, but in that process, it had to deal with previously assigned mining titles. The officials in the Santos government perceived it as a definite rupture with previous policies regarding natural resources, emphasizing the complexities involved in creating a system of environmental protection where mining titles had already been granted. As the former Minister of Energy and Mining, German Arcé, told me:

> What happened in the Santos administration? These titles had already been assigned. Prior to the Santos administration. Only after we arrived at the discussion, we started the track of defining areas of special protection, 99.9% of all protected areas are from the Santos administration.

What was the government's approach to dealing with the tension between the policy of creating protected areas, and the many mining titles already assigned? Minister Arcé emphasized that the mining titles themselves did not grant the right to exploit the resource, and as that was clear in Colombian law, there was little risk of investment claims being brought. Nonetheless, when pressed on the issue, the former Minister acknowledged that: 'there is always a risk, as you need to go to a tribunal, and someone has to understand the legal order, these tribunals take place outside of Colombia, so understanding the whole sequence is a lot to ask'.[70] As discussed

[65]Sattorova, supra n. 2, 9.
[66]Sankey, supra n. 28, 65.
[67]Interview with Carlos Cante, Vice-Minister for Mining (2016–2018), Bogotá, 12 September 2019.
[68]Llévano, supra n. 32.
[69]Daniel Alejandro Grisales González and Alfonso Insuasty Rodríguez, 'Minería y Derechos de Las Victimas', 26.
[70]Interview with German Arcé, Minister of Energy and Mining (2016–2018), Bogotá, 12 August 2019.

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above, the Ministry of Commerce had conducted a risk assessment based on international investment law, which shows that at least some members of the executive were aware of the risk posed by investment claims.

Furthermore, according to my interviewees, including Andrés Gómez Rey, a former Ministry of Environment official and legal academic who worked on the delimitation of the Santurbán *páramo*, the reason for the non-retroactive prohibition was primarily to avoid paying compensation, both to domestic and foreign miners, which could be due under domestic law as well as investment treaties. The consideration of possible investment claims, therefore, did have an impact on the decision to refrain from prohibiting mining prospectively. Yet, Andrés Gómez Rey also emphasized the fact that the concern was about miners who already had all the required documents and permits, whereas those who only had a mining title were considered to have low chances of winning a potential ISDS case. It is surprising that some cases that Colombia is facing today, including Eco Oro, have been brought by companies that only had a mining title.[71]

Therefore, there was an element of regulatory chill in the decisions that were made by the Santos government officials; the decision to prohibit mining was partly motivated by the willingness to avoid potential claims for compensation. In this case, there was an attempt to prevent the risk of investment claims by making the prohibition on mining only prospective, and thus delimiting the *páramo* on the assumption that those who had already established their mining license in the area would be able to continue.

3.3 The Constitutional Court Cases: Reversing the Chill

The decision of the government brought about a partial regulatory chill, but the Constitutional Court reversed it in 2016.[72] The Court based its reasoning on human rights enshrined in the Constitution, finding that allowing existing mining to continue would not guarantee the rights to a healthy environment, water, and national heritage. The Constitutional Court further questioned the process of delimiting the Santurbán *páramo* following a *tutela* brought in 2017.[73] These judgements show that domestic laws and decision-making processes are not unitary when it comes to their approach to potential investment claims or the risk of them bringing about the regulatory chill. Constitutional law, its interplay with other domestic laws, and the functioning of an independent constitutional tribunal are critical factors when determining whether regulatory chill is likely to occur.

In the 2016 court case, the majority of the judges found that any mining in the *páramos* was unconstitutional, invalidating the sunset clause that allowed those with consolidated titles to continue. Some dissenting judges argued in favour of the sunset clause referring to the risk of investment claims. However, the majority of judges made their decision based on the constitutional rights to a healthy environment, water, and national heritage. In Colombian constitutional law, as in many constitutional orders, the constitution and the fundamental rights in the *bloque de constitucionalidad*[74] are at the top of the legal hierarchy of norms.[75] Therefore, in deciding based on fundamental rights, the judges were fulfilling their role as guardians of the constitution. In the case, the judges described their function to be counterbalancing the short-term perspective of the executive with a more long-term view of the constitutional problem.[76]

The majority held that selectively refraining from applying the prohibition of mining to those who had obtained a contract and environmental licence before 2010 according to Article 173(1)

[71]Interview with Andrés Gómez Rey.

[72]Colombian Constitutional Court, Case C-035/16 of 2016 (reporting judge Gloria Stella Ortiz Delgado; 08.02.16).

[73]T-361/17, 2017, supra n. 62.

[74]The *bloque de constitucionalidad* integrates into Colombian constitutional law certain international human rights and humanitarian treaties; see Quinche Ramírez, M. (2018). *Derecho Constitucional Colombiano*. Editorial Temis.

[75]Art. 4, 53, 93, 94, and 214 of the Colombian Constitution.

[76]C-035/16, para. 176.

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of the National Development Plan Santos II, Law 1753 of 2015, was unconstitutional, as it did not guarantee the right to (a) a healthy environment, (b) water, and (c) national heritage. Based on these constitutional rights, the Court found that all mining in the *páramos,* whether new or already existing, had to be immediately prohibited. In their dissenting opinion, Judges Linares and Guerrero disagreed with the view that Article 173 para. 1 is unconstitutional. Their reasoning was based on three main arguments. First, they found that the method of interpretation of the Constitution that the Court adopted does not follow the canons of interpretation found in case law. Second, they stated that the Court's review of the article, which is part of the Law establishing the National Development Plan, infringed upon the democratic principle, as the National Development Plan is a law approved by Congress, created in a widely participatory process, involving many consultations.[77] Following these two arguments, Linares and Guerrero referred to the negative consequences that the immediate prohibition might have and criticized the majority judgement for failing to take these into account:

> In the first place, this Court has had to consider that the immediate application of the prohibition- the result of a decision finding it to be unconstitutional- could, in some cases, be interpreted in the light of clauses of treaties ratified by Colombia, like in the form of an indirect expropriation that places international responsibility on the State. This risk should have been appreciated by this institution, as the fulfilment of international commitments is relevant in virtue of art. 9 of the Constitution which demands respect of principles of international law accepted by Colombia. This Tribunal cannot ignore the possible state responsibility that the norms in question were meant to prevent.[78]

Therefore, Judges Linares and Guerrero based their dissenting opinion on the possibility of causing investment claims, among other reasons, and they even went so far as to claim that this should have been obvious to the Court, which was under the obligation to consider the same. However, the majority decided the case based on constitutional law principles, and did not consider the risk of an investment claim to be a convincing legal argument.

In C-035/16, the Court referred to several constitutional rights and principles which had to be balanced against each other. It considered the principle of economic freedom and qualified it by the right of the state to intervene in economic activity. It then referred to the rights of those who had already acquired mining titles and stated that:

> in view of articles 1, 58, 80 and 95 of the Colombian Constitution, the protection of the environment takes priority over individual economic rights acquired through environmental licenses and concession contracts, in the circumstances where it is proven that the economic activity creates damage, or where there is merit in applying the principle of precaution to avoid harm to non-renewable natural resources and human health.[79]

The Court acknowledged both the utility of the *páramo* as providing water to the surrounding villages, as well as its value as a unique ecosystem. It discussed the fundamental right to water of the inhabitants of the towns that rely on water sources from the *páramo*. It specified that this right had to be made effective through positive obligations placed on the state:

> The fundamental right to water is made effective through the fulfilment of the state's obligations to guarantee the availability, accessibility, and quality of the resource. For this reason,

[77]Para. 5.3–4.
[78]Para. 5.5.
[79]Para. 128.

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> for the state to comply with such obligations, it is necessary to put in place special protection of the ecosystems which 'produce' such resources, as the *páramo* does.[80]

The Court also discussed the protection of the *páramo* as an ecosystem that is valuable in itself and requires protection. It based its reasoning on the concept of the 'Ecological Constitution', which is based on the right to a healthy environment enforceable via rights-review.[81] While it recognized that the competence to delimit the *páramo* was in the hands of the Ministry of Environment, which received technical advice from the Instituto von Humboldt, it found that the Ministry had an unfettered discretion with regard to the delimitation. There was no obligation in place limiting the extent of deviation from the area of reference provided by the IvH, which did not provide a sufficient safeguard for protecting the *páramo*.

> The full discretion for delimiting the *páramos* has generated problems for the creation of protective measures, for the permitted use of resources (…) and for the determination of administrative agencies.[82]

The tribunal in the *Eco Oro v Colombia* case cites the Constitutional Court's judgement on several occasions, and in fact, refers to quotes from it to explain the ecological importance of the *páramo* ecosystem. It does not regard the Constitutional Court's judgement as a violation of the MST or FET. Rather, the tribunal focusses on the level of inconsistency of the government's decisions relating to the delimitation of the *páramo* (which the government had a constitutional obligation to pursue). It is the lack of clarity and inconsistency of these decisions that are found to violate the standards of treatment.[83] But as mentioned above, this relies on a problematic perception of the state as being tasked primarily with ensuring the consistency and stability of the business environment. It does not take into account the complexity of interests to which the state needs to respond or the possibility that decisions will take some time or may need to be changed.

In 2017, two civil society organizations brought a case against the Ministry of Environment alleging that the existing delimitation of the *páramo* had breached the right of the affected population to participate in the delimitation.[84] The action was brought by the means of a tutela. The groups comprised of two civil society organizations – Corporación Colectivo de Abogados Luis Carlos Pérez, a human rights NGO, and Comité de Santurbán, an activist organization focused on mobilizing efforts to protect the ecosystem of the *páramo* and the access to water of populations in cities surrounding it.

The tutela was brought once the arbitration case between Eco Oro and the Colombian state had already been initiated. Therefore, there was clearly an awareness of the Court on the risk of investment claims. Therefore, there was no doubt as to the importance of the delimitation for international investors. Nonetheless, the Court still decided to declare the delimitation of the *páramo* unconstitutional, requiring a more participatory process.

The tribunal in *Eco Oro vs Colombia* criticizes this judgement, stating that 'there was a marked lack of clarity as to the true meaning of the effect of this decision given the vague terms used'.[85] However, throughout the arbitral award, the tribunal does not give much attention to the cities surrounding the *páramo,* and their dependence on the ecosystem for access to water. The tribunal focuses on the tension between mining and protecting the environment but does not discuss the diverse interests of the populations living in the *páramo* and its surroundings in much detail. This may have led to an under, appreciation of the need for local participation in the process of

[80]Para. 164.
[81]Art. 86 and 88 of the Constitution.
[82]Para. 140 of the Judgement.
[83]Para. 803.
[84]T-361/17.
[85]*Eco Oro v Colombia,* para. 799.

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delimiting the *páramo,* which has huge social significance. This is another example of where the tribunal has a simplistic view of the state and the multiple local interests at play.

3.4 Domestic State Actors and Interest Groups

In addition to analysing the methods of reasoning and priorities of state institutions, it is helpful to understand their relationships with relevant interest groups. State institutions do not operate in a void – they react to, and are influenced by, particular parts of society. The institutions' responsiveness to the demands of given interest groups, or lack of it, was an important factor in determining whether regulatory chill occurred.

The social impact of the delimitation was an important consideration for the officials deciding where the *páramo* starts and ends. The bureaucrats from the Ministry of Environment whom I interviewed emphasized the difficulty of drawing the limits of the *páramo* in areas where most people had always relied on mining for their livelihoods.[86] They spoke about the town of Vetas, which according to the boundaries of the *páramo* drawn by the Instituto von Humboldt would find itself entirely within the protected areas, which would mean that all mining and agriculture would be prohibited within that town.

The government and bureaucracy's consideration of the situation of domestic miners shows that they were responsive to the interests of those groups. The risks of international arbitration had been assessed and considered, but at the same time the interests of the local population inhabiting the area of Santurbán were crucial to the officials' decisions on the delimitation. The reason for the solely prospective prohibition of mining was both to protect the local miners in places such as Vetas and California, and to avoid paying compensation, both to local and foreign miners. The fact that the interests of the domestic miners were intertwined with those of the multinational mining companies highlights how complex it is to analyse the impact of the risk of arbitration in a context where there are conflicting domestic interests at stake. To fully understand the influence of the risk of claims, it is necessary to observe its interactions with the domestic influences.

The government was considering the interests of those living within the *páramo,* but it was less responsive to the interests of the local activist groups from towns relying on the water from the *páramo*. The fact that these groups had less influence on the government, coupled with the Ministry of Environment's lack of technical and financial capacity to pursue deeper involvement with these groups and their arguments influenced the Ministry's approach to the delimitation.[87] This is evidenced by the way the Ministry of Environment considered the input of IvH. While the IvH took the interests of those relying on the water of the *páramo* into account, the Ministry adopted a different approach by attempting to appease the communities in the *páramo*. It was more concerned with opposition from those villages than the demands of social movements in Bucaramanga and Floridablanca for a more extensive protection of the *páramo*.

The Constitutional Court, due to the nature of its constitutional function, is supposed to make decisions based on laws and constitutional principles, rather than in response to the demands of interest groups. That is the approach that Court took in the 2016 case, where it found that all

[86]Interview with Andrés Gómez Rey; Interview with academic and lawyer, former official at the Ministry of Environment, Bogotá, August 2019.

[87]Which reinforces the argument that capacity needs to be analysed at the level of the institutions within the state, not as that of the state as a whole. See: Geddes, *Politician's Dilemma: Building State Capacity in Latin America,* supra n. 19 (n 20); K. Bersch et al. (2017) 'Bureaucratic Capacity and Political Autonomy Within National States: Mapping the Archipelago of Excellence in Brazil', in M.A. Centeno, A. Kohli and D.J. Yashar, with D. Mistree (eds.), *States in the Developing World.* Cambridge University Press, www.cambridge.org/core/product/identifier/9781316665657%23CT-bp-6/type/book_part (accessed 14 March 2020); M.A. Centeno et al. (2017) 'Unpacking States in the Developing World: Capacity, Performance, and Politics', in Centeno et al.,(accessed 18 March 2020); E.M. McDonnell (2017) 'Patchwork Leviathan: How Pockets of Bureaucratic Governance Flourish within Institutionally Diverse Developing States', *American Sociological Review* 82, 476.

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mining in the *páramos* should be prohibited, the majority of the Court did not regard the potential effects of their decisions on investment claims or miners within the *páramo* to be decisive in their reasoning. This approach evidenced a distance from interest groups critical to the effective functioning of an independent judiciary.

Nonetheless, such distance from the groups which are likely to be most affected by the decisions can also have negative consequences, if it impedes a deeper understanding of the issue under consideration. In the analysed case, the total prohibition of mining in case C-035/16 created significant difficulties for populations living within and around the *páramo,* as it meant that they could not continue with their existing livelihoods. The conflicting interests at stake and the complexity of the process meant that a total prohibition of mining, unaccompanied by other policies to aid the transition to alternative livelihoods, created significant concern among the local populations.

The 2017 case T-361/17 represents the Court's increased understanding of the complex problem of the mining and other economic activity in the *páramo*. In analysing the question of whether the process of delimiting the *páramo* had impinged on individual rights, it gave more attention to the interests of the affected population than in 2016. In the earlier case, it had not fully considered the ways in which the prohibition of economic activities in the *páramo* would affect the local population; in this case, it recognized the importance of involving the affected groups in the decision-making process. It explicitly recognized that its previous decision had an adverse effect on those populations:

> In the C-035/2016 decision, the Court resolved the dilemma in favour of protecting natural resources and sustainable development. However, this decision left in limbo thousands of people who made their livelihoods through their productive activities in the *páramos*, which lead to the possibility of causing significant harm to the economic situation of these marginalised populations.[88]

Therefore, the judges considered that the Resolution delimiting the *páramo* did not adequately provide for the right to participation of the local population, taking a different approach from the 2016 case. The Court refocussed on the need to involve the local population in the decision-making process. It also shows a deeper understanding of the ways in which the *páramo* can be managed, as the Court recognizes that there can be more solutions that protect the *páramo* but which do not amount to a total prohibition on mining, affecting artisanal miners as well as mining companies. Through gaining a deeper understanding of the issue the Court develops its application of constitutional principles.

4. Conclusion

The case of mining in the Santurbán *páramo* shows that the domestic legal and institutional context, including the interactions between the different actors in the state, is critical to whether the investment treaty regime is likely to lead to regulatory chill. While there are some laws and policies which are likely to deter the state from regulating if that might bring about investment claims, other domestic laws – such as constitutional law – can act to counterbalance the effect of the former. This can be observed in the Colombian case, where the 'ecological constitution' safeguarding rights such as the right to a healthy and safe environment developed in parallel to the set of domestic investment laws and policies facilitating foreign investment.

This historical and political context resulted in a series of decisions regarding mining and protection of the *páramo* ecosystem that first led to a partial regulatory chill – an incomplete prohibition of mining that allowed those with existing titles to continue their activities.

[88]Para. 19.3 of the Judgement.

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The Constitutional Court decision reversed this effect by requiring that all mining be prohibited, even in the face of risking claims for compensation. This showed that regulatory chill is dependent on the interplay of domestic laws and state institutions, their relative priorities, methods of reasoning, and the interest groups that they respond to.

More broadly, the Santurbán case exemplifies how the domestication of international investment law should be seen as a process that is not just about incorporating the protection of foreign investors into domestic law, but also fitting them within an existing complex web of domestic laws, including constitutional and property rights.

To fully understand the impacts of the investment law regime – both international, and domesticated – it is important to open the black box of the state and perceive the diverse processes that occur within it. This approach is more likely to give a realistic account of the impacts of international investment law, its interaction with domestic laws, and how they relate to a variety of interests involved in cases regarding foreign investment.

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