

Investment disputes from below: whose rights matter?

Mining, environment and livelihoods in Colombia

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Shreds of clouds drift low over the rugged ridges and the yellow-green glens, leaving behind moisture that saturates the marshy moorlands. The scattered frailejon shrubs almost burst with water, ready for their roots to release it into a triumph of streams, lakes and rivers downhill. An ancestral silence lies beneath the water's gentle burble.

Colombians call this misty Andean ecosystem páramo. A precious carbon sink, the páramo of Santurbán has sustained social identity and cultural fabric for centuries. As we trek on a winding dirt track some 3,800 metres

above sea level, Víctor – a slim, quiet fifty-something from the nearby village of Vetás – recounts the many generations whose lives unfolded on these slopes: the indigenous Chitareros; the European conquistadores, founders of Vetás; the gringos who, over a century ago, came searching for gold; and the artisanal miners whose livelihoods today depend on the gold hidden in the belly of these mountains.

To millions of people living in the lands below these high moors, the *páramo* is life: an essential source of water, and a deeply felt presence towering over their existence. In recent years, this ecological and cultural site has come under growing commercial pressures that have raised probing questions about the role, and the limitations, of law in reconciling environmental, social and economic imperatives.

Investment disputes from below

Over the past two decades, the *páramo* of Santurbán experienced a surge in large-scale mining, prompted by shifting public policies, rising gold prices and a bloody battle that, at the turn of the century, dislodged the local guerrilla units. As [international businesses poured in](#), the *páramo* became the epicentre of tensions between mining companies, public authorities and local communities, and between competing visions of development. The resulting legal wrangling has exposed the ways arrangements to protect foreign investment marginalise actors whose rights and interests are at stake.

In December 2019, I travelled to Santurbán with my colleagues, Argentinian jurist [Nicolás Perrone](#) and IIED researcher [Brendan Schwartz](#). We met activists, miners, magistrates, lawyers, mayors and government officials. We spent time with Colombian scholars, including [Paula Ungar](#) of the [Humboldt Institute](#) and [Ximena Sierra](#) at [Rosario University](#). We wanted to explore investment disputes from the bottom up and provide a platform for local actors to articulate their views.

Our concern is not about specific legal proceedings, which are ongoing and the exact circumstances of which are only partly in the public domain. Rather, we want to document how the law – particularly international law – is not only the story of judges and diplomats and lawyers in tailored suits handling complex litigation. It is also the story of women and men who feel the impacts of rules and proceedings in their lives yet are often excluded from decision making.

Existing arrangements for managing investment disputes do not reflect complex local realities. A locally grounded perspective provides insights for reforming those arrangements. It also challenges us to recognise the complex intersections between national, international and contractual arrangements and to rethink the way international law is conceived – not just as a practice located in the global centres of international diplomacy, but a phenomenon that is experienced, and to some extent shaped, at the grassroots as well.

Amidst the glass towers built on gold

In Bogotá, the modern high-rise buildings lining the broad, multi-lane Carrera 7 roadway house banks, insurance companies and government agencies. In the reception area of the National Agency for the Legal Defence of the State, a professionally made video plays on a loop, explaining how the Agency represents the Colombian government in litigation.

Here a small team of lawyers handles disputes with multinationals conducted under an international arrangement known as [investor-state dispute settlement \(ISDS\)](#). This arrangement enables multinationals to initiate legal proceedings against a state over conduct they believe breaches the state's legal commitments – for example, under an applicable trade or investment treaty. The cases are settled via arbitration, by specially convened tribunals. If the arbitral tribunal decides in favour of the business, it usually orders the state to pay compensation.

These days this is a busy team. Until a few years ago, Colombia had never faced a (publicly known) treaty-based investor-state arbitration. But since 2016, foreign investors have initiated at least [fourteen publicly known investor-state arbitrations](#) against the government, and more claims are in the pipeline. Six arbitrations relate to the [mining sector](#), most are ongoing.

[Colombia's situation](#) is not unique: hundreds of these arbitrations have taken place around the world, and other countries – from Argentina to

Spain – have experienced similar ISDS booms. The booms have been fuelled by legal arrangements that provide broad protections to multinationals' rights and their "[legitimate expectations](#)"; by businesses' direct access to international redress; and by very large compensation awards – over US\$4bn, plus interest, in [one case against Pakistan](#) – that sustain an international industry of arbitrators, lawyers and [financiers](#).

Colombia has a diversified economy but the country's history is drenched in gold and many commercial activities today are directly or indirectly built on gold mining. In Colombia, as in many other resource-rich countries in the global South, the ISDS boom follows years of law and treaty-making aimed at attracting foreign investment. Colombian jurist Ximena Sierra has documented the [close connections](#) between international investment treaty negotiations and national law reforms to promote industrial-scale mining, including a mining code adopted in 2001.

The stakes are high in the ongoing arbitrations. Legal expert Federico Suárez Ricaurte reported that, should the multinationals get all they want, Colombia would have to pay damages worth [more than one tenth of its entire national budget](#) for 2019 – plus interest and legal and arbitration costs.

Several arbitrations concern disputes over social and environmental measures. In the case of the *páramo* of Santurbán, Canadian mining companies have initiated three arbitrations against Colombia's government. The companies are relying on the ISDS clauses of the trade

agreement between Canada and Colombia to seek compensation for measures protecting the *páramo*.

“Water before gold”

The lowland city of Bucaramanga lies in the shadow of the massive Andean *cordillera*, or mountain ranges. The *páramo* of Santurbán is 2,000 metres above the city’s skyline. But millions of people here and in the surrounding lowlands feel a strong connection to it.

Chatting in a popular local restaurant, activist Erwing Rodríguez-Salah explains the nature of that connection: not only does the *páramo*’s rich biodiversity make it a precious ecosystem – its distinctive hydrological cycle provides water for a growing population of some two million people in the province.

For the past few years, Erwing has been one of the most vocal activists [campaigning](#) to protect the *páramo* in the face of mining activities. He is a member of the [Committee for the Protection of Water and the Santurbán Páramo](#) (Comité Santurbán), a civic platform that has campaigned to protect the *páramo* and people’s right to water.

Ten years ago, when Canadian mining company Eco Oro (then known as Greystar) sought an environmental licence for an open-pit mine, Erwing helped build a broad anti-mining coalition. Ranging from environmental activists to business groups, the coalition organised mass demonstrations – he estimates that at one point some 40,000 people marched in the streets of Bucaramanga.

These days, Erwing and the Committee are mainly concerned about another company's [proposed project](#), which, if approved, would mine close to the mountain village of California, below the *páramo* line, but still raising public concerns about water flowing down to the lowlands.

In Bucaramanga, mobilisation on mining, water and the *páramo* has become an ingrained fact of life. Talking to people in the street reveals a deeply felt concern about the issues. A young man argues that the authorities would get the mining revenues, Bucaramanga only the polluted water. "Mining, petroleum are riches, but water is life", he says. An older man stresses that water is important for the future of his grandchildren. "Water before gold", a woman succinctly puts it.

This widespread concern is reflected in the many spontaneous citizen initiatives to raise awareness, mobilise and engage. Painter Inés Ortiz Correa organised an exhibition on mining and the *páramo*. She feels a deep personal – almost spiritual – bond with the *páramo*, and a native plant carries her uncle's name. Speaking in the gallery where her paintings are on display, Inés explains that she wants her art to remind people that "there are things more valuable than gold".

Following the protests, Eco Oro's mine design changed from open pit to underground. And over the years, public authorities have strengthened environmental protection in the *páramo*.

Mobilising the law to protect the páramo

The tightening of environmental protections reflects wider processes that have unfolded around the world since the early 1990s: just as neoliberalism triumphed and governments stepped up efforts to attract foreign investment, the 1992 Rio “Earth Summit” heightened global awareness of environmental issues. Colombia, like many countries, passed new legislation, and the 1993 [environmental law](#) was one of the country’s first legislative instruments to mention *páramos*.

Some 15 years later, the mining boom in Santurbán heightened concerns about the harm large-scale mining could cause to the *páramo* and the water it supplies and calls for further environmental regulation grew stronger. Public mobilisation ultimately led to action: while the 2001 mining code did not ban mining in the *páramos*, from 2010 Colombia’s government passed measures to restrict mining in these wetland ecosystems and delimit the Santurbán *páramo*. The government initially exempted existing mining projects from the new rules, but citizens’ groups pushed for stronger protections and initiated two cases before Colombia’s Constitutional Court.

Colombian constitutional law specialist Manuel Góngora has called this Court “one of the most solid in Latin America”. Over the years, the court’s jurisprudence has introduced many “progressive” measures into Colombia’s legal framework – from recognising that [rivers have rights](#), to free, prior and informed consent as a prerequisite for projects affecting indigenous peoples.

In its first Santurbán judgment, the Court struck down the exemption for existing mining projects ([judgment C-035, 2016](#)). The Court noted that Colombia's Constitution protects the mining companies' rights, but the Constitution's references to the "social function" of property and enterprise mean those rights are not unlimited. The environmental value of the *páramo* as a water source, a carbon sink and a biodiversity hotspot, the Court reasoned, outweighed the companies' interest in mining inside the *páramo*.

In the second judgment, the Constitutional Court upheld a claim from the Comité Santurbán and struck down the government's first delimitation of the *páramo*, calling for a new delimitation to be done with the participation of communities in and around the *páramo* ([judgment T-361, 2017](#)).

For Paula Ungar of the Humboldt Institute, this latter case interrogates the complex relationship between technical expertise and public participation, the social dimensions of the way we understand the environment, and ultimately what an "ecosystem" is. The Institute is the government's biodiversity research body responsible for mapping the *páramos*, as an input for their delimitation by the Ministry of the Environment.

In its rulings, the Constitutional Court put strong emphasis on human rights and the need to balance multiple interests – the investors' commercial interest being just one among many. The decision to remove the exemption for existing mining projects meant that several ventures could no longer go ahead as planned. This outcome could create

tensions with provisions of international treaties that require the Colombian state to protect foreign investments – including those of the Canadian mining companies operating in Santurbán.

“We want to recover our identity”

At around 2,000m altitude, the white-walled town of California lies some 1,000m below Vetas and the *páramo*. Mining pervades California’s history. And for the people of California, the past is very present.

Staying at the Hotel El Gran Mezon, a colonial house overlooking the main square, we were told this is where the French geologists lodged when they came searching for gold at the turn of the 20th century. We could see the miners’ confident expressions in faded black-and-white photos and handle the accounting books they painstakingly compiled. The mines the French excavated (well below the páramo line) are still intact – the owner of the hotel, a solidly built man with a cowboy hat, inherited some from his father.

Over time, the locals adapted the techniques brought by the French, the Germans and the Americans to run their own artisanal mines. The people of California abandoned their wheat and corn farms, and artisanal mining became not just their livelihood, but a central part of their social fabric and way of life.

For this reason, people in California, Vetas and neighbouring mining villages are often at odds with the anti-mining campaigners from the lowlands. The mining companies are very visible here, and over the years

they have invested heavily in obtaining “social licence” among the local communities.

In California, for example, the companies have paid for the restoration of many buildings and the newly built village playground on the main square carries the logo of the company now operating in the area. Many people have taken jobs with that company, directly or indirectly. Also, the company pays for security in the area and there is a concern that, if the company leaves, the security situation could deteriorate.

But people here also care deeply about the *páramo* and support for mining does not necessarily mean support for the big companies. Many here are *galafardos*, or artisanal miners. They are staunchly independent. Some are looking to partner with the industrial miners, but others think they can earn more by running their own mines than working for the companies.

Today the *galafardos* are [feeling the squeeze](#). As artisanal mining has an environmental footprint, the new *páramo* regulations restrict their activities. At the same time, exacting legal requirements make it difficult for the *galafardos* to obtain mining permits, and large-scale mining titles have reduced the areas the artisans can mine. These pressures foster suspicion of the large-scale miners.

California’s recently elected mayor, Genny Gamboa, is determined to voice these issues. She is concerned about the impact of multinationals on the environment, artisanal mining and her community. “We want to recover our identity”, she says. Soon after taking office, Genny launched

a “municipal assembly” – a new space to facilitate public participation in shaping California’ future.

Evolutions in mining intersect with Colombia’s history of conflict and its difficult transition to peace. In her [research](#) and [film-making](#), legal scholar Christiana Ochoa highlighted a paradox: Colombia’s government partly promotes foreign investment to consolidate the peace process, but large-scale investment can itself foster complex disputes.

The arbitrations begin

After Constitutional Court judgment C-035 tightened the *páramo*’s protections, the government applied the mining restrictions to existing projects. Over 50% of Eco Oro’s concession lay within the *páramo*, and the company responded by initiating arbitration proceedings. Two other Canadian companies followed suit, starting their own arbitrations.

In its [request for arbitration](#) at the World Bank-hosted International Centre for Settlement of Investment Disputes, Eco Oro argued that it invested heavily in mining exploration over the years, based on pro-mining legislation that promised stability of applicable rules, on a long-term mining concession and on reassurances from the government that it supported the project. The company also argued that, as it sought the permits to develop the mine, the government and the Constitutional Court adopted measures that made the project unviable.

The company claimed those measures – and the legal uncertainty surrounding them – frustrated its legitimate expectations, deprived it of

its rights and destroyed the value of its investment. Eco Oro is seeking [some \\$760m](#) in damages. The other two companies made broadly comparable arguments in their respective arbitration [requests](#) (though they claim to hold mining exploitation as well as exploration rights).

The three arbitrations are ongoing, many of the submissions made by the companies and the state are not publicly available, and there is little information about the parties' detailed arguments on both facts and law. It is therefore impossible to comment on the legal cases, and the arbitral tribunals will ultimately decide based on their fuller access to the parties' arguments.

But in more general policy terms, the very framing of investor-state arbitration and a procedural decision issued by the arbitral tribunal hearing the Eco Oro case illustrate misalignments between the international investment regime and the local realities of investment disputes. Exploring these misalignments can provide insights for ongoing debates about rethinking arrangements to settle investment disputes.

Whose rights does the law protect?

Investment treaties frame disputes as a bilateral relationship between an investor and a state. In the *páramo* arbitrations, tribunals must decide whether the Colombian state harmed the companies' interests by breaching the Canada-Colombia treaty, and whether the state's right and duty to regulate in the public interest would justify its actions. While a

growing number of investment treaties refer to social and environmental issues, and several [arbitral tribunals](#) have considered those issues in their decisions, the protection of foreign investment, and the boundaries of that protection, remains centre stage.

But the dispute between the company and the state, and the tension between investment protection and public-interest regulation, are just one dimension of more complex relations. Seen from Santurbán, protagonists in the dispute include the people advocating for the protection of an important ecosystem, access to water for people in the lowlands, and the culture and way of life in mining communities. These people know that state action to tighten environmental protection over the years had to be bitterly fought for through public mobilisation and court litigation, and they believe their perspective is different from the government's.

In Bucaramanga, Luis Jesús Gamboa – an activist and a key figure in the Comité Santurbán – explains his interest. He feels he has a stake as a citizen, because, if the companies win the arbitrations, the state – and thus ultimately taxpayers – would need to foot the bill; money that could fund public services would go to a business instead. But Luis Jesús also has a more direct stake.

The Comité Santurbán was part of an alliance of local, national and international civil society organisations that asked permission to make an *amicus curiae* (literally, “friend of the court”) submission in the Eco Oro arbitration. These submissions are common practice in proceedings before Colombia's Constitutional Court and the Inter-American Court of

Human Rights. With the submission, the Comité wanted to raise public-interest issues, including the human rights to water and to a healthy environment.

In 2019, a [Procedural Order](#) signed by the president of the Eco Oro tribunal rejected the Comité's request, finding their application too unspecific. In these circumstances, the tribunal did not see how human rights would be relevant to the investment dispute between the company and the state. The tribunal noted that the arbitration was about whether Colombia should compensate Eco Oro for losses – there was no question of the mining project going forward.

Lack of specificity can make it difficult for a tribunal to assess a request. And if the application were lacking, it would not be the first time that advocates could have done with more specialist advice in highly technical legal processes. But human rights were a central concern in the Constitutional Court cases. And the Procedural Order's framing obscures some far-reaching implications.

While the companies are seeking compensation, the investment treaties' emphasis on market value, and the large compensation amounts awarded by some arbitral tribunals, can create a significant burden for public finances. The risk of expensive disputes could discourage states from taking public-interest measures – a "[regulatory chill](#)" concern that some arbitrators [have explicitly recognised](#).

If the government denies an environmental licence to the company now operating in the region, that company might want to initiate its own arbitration. One question is whether the authorities are waiting for the

outcome of the Eco Oro dispute before deciding on the new application – and whether arbitrations about the discontinued projects could make it more difficult for the government to protect human and environmental rights when assessing the new mining venture.

When the Comité Santurbán [disseminated on Twitter](#) a government letter indicating that the investment treaty most directly relevant to this new venture was yet to come into force, it received over 1,000 likes and retweets in less than 24 hours. This extraordinary level of public engagement with such complex technical issues points to widespread concerns about the possible indirect impacts of investment disputes on environmental regulation.

Can justice be founded on exclusion?

The upshot is that the citizen groups that played a central role in the Constitutional Court cases are excluded from the arbitral proceedings: not only did the Eco Oro tribunal reject their *amicus curiae* application, but the *amicus curiae* arrangement is confined to one-off, informational submissions to assist the tribunal in its deliberations – it is not designed as an avenue for affected people to claim their rights.

Ironically, the Canada-Colombia trade treaty is part of a new generation of treaties that include provisions designed to facilitate transparency and public participation. It empowers arbitral tribunals to accept *amicus curiae* submissions and requires hearings to be public. Investment

lawyers see these provisions as steps forward. But in Bucaramanga and California, they seem a remote reality.

In January 2020, the Eco Oro hearing took place at the World Bank headquarters in Washington DC. The publicity requirement was met by [broadcasting the proceedings into a separate room](#) within the World Bank complex, making it very difficult for most of the people so deeply affected by this dispute – and almost everyone else – to witness the proceedings.

How framing affects rights

All legal processes are incomplete representations of more complex social realities. The ISDS mechanism is no exception. But its framing has major implications. In the words of investment law scholar Nicolás Perrone, the flattening of multi-dimensional disputes into a binary relationship between investor and state renders local perspectives [invisible](#).

Complex investment disputes such as those over the Santurbán *páramo* are narrowed down to the question of whether a state breached investment protections. And in granting differentiated international rights and redress to multinationals and local actors, and providing [unequal “negotiating chips”](#) to different groups seeking to influence state conduct, the system reinforces power imbalances between multinationals, governments and local actors. As legal scholars Daria Davitti, Jean Ho, Paolo Vargiu and Anil Yilmaz Vastardis argued in a

[sharp critique](#) of the investment treaty regime, these arrangements can have far-reaching distributive effects – protecting business interests over those of workers, communities and the environment.

With its highly technicised system of rules and institutions, ISDS gives the impression of being apolitical, but its narrow framing reflects deeply political choices about whose rights and expectations are legally protected, and about how to balance commercial and public interests.

The full implications can only be understood if ISDS is considered in the wider legal and financial architecture in which it operates, and the ways this architecture tends to favour large-scale investment over marginalised groups – from mining codes and natural resource legislation, to the legal dimensions of the [“private turn” in development aid](#) and the ways global financial institutions influence national law reform.

For legal scholar and practitioner Brooke Güven, for example, the Santurbán dispute highlights the pervasive and potentially conflicted role of World Bank Group institutions in shaping natural resource governance and investments – by promoting pro-business [mining policy reform](#), financing Eco Oro’s project (through its private sector arm, the [International Finance Corporation](#)) and then handling the investor-state dispute once the project turned sour.

The dispute also highlights some recurrent patterns affecting mining projects: subsoil resources are vested with the state, which allocates commercial concessions, but operations impact surface users in the local area and beyond. Public mobilisation against decisions people perceive

to have been taken over their heads can lead to difficult disputes, and ultimately ISDS cases. At the same time, divisions within and between communities (over mining vs environmental protection, or small vs large-scale mining) can foster complex conflicts that penetrate the social fabric and interrogate competing visions of development.

Under these circumstances, the interpretations developed by arbitral tribunals might align with the internal logics of international investment law, including the framing of investment treaties and the limited scope of the tribunals' jurisdiction; but by focusing on a narrow subset of issues, actors and rights, ISDS prioritises certain interests over others, potentially affecting relations well beyond the parties directly involved in the dispute.

A call for reflection – and action

If global investment governance were being designed from scratch today, what would it look like? A key point concerns the interconnectedness of legal arrangements at national and international levels: ISDS cannot be considered in isolation, divorced from the complex local-to-global political economy which frames it. By the time a dispute reaches an arbitral tribunal, a web of treaties, laws and contracts has already shaped the legal contours of the dispute and the rules the tribunal must apply.

Changing that overarching framework requires action at multiple levels. Depending on the context, for example, it may be necessary to

strengthen arrangements for local voice and representation in investment-related decision making, and this may involve reforming national law.

The international investment regime is also part of the problem. There are issues about who has a say in ISDS, and whose rights are considered. Existing arrangements – including those based on recent, “recalibrated” investment treaties – do not do justice to the complex realities of investment disputes. There have been [calls for deeper reforms](#) to consider ways for affected groups to articulate their rights, and for investor claims to be dismissed if affected actors cannot be joined in the proceedings. Ongoing talks at the [United Nations Commission on International Trade Law](#) might provide opportunities to consider these issues.

But reforming ISDS procedures would not address the more fundamental questions about the overall architecture of foreign investment: how to rebalance rights, obligations and means of redress for states, businesses and citizens at both national and international levels; how to improve the articulation between different rules of international law, including on [human rights](#), environmental protection and commercial relations; and how to [terminate old treaties](#) and pave the way to a more inclusive and effective system.

Listening, to inform action

We often hear, in debates about ISDS, of the policy imperative to promote foreign investment. Only more rarely do we have the opportunity to understand the concerns and aspirations of the people whose ways of life are most directly at stake.

People in Bucaramanga and California have taught me the complexities of investment disputes – and how partial and removed the ISDS system appears from the ground up. They made me realise that much scholarly literature on the investment treaty regime provides no answers to their questions. Listening to their perspectives might help us shape a governance system that does justice to local rights and realities.



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