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Seeing Santurbán through ISDS: A sociolegal case study of *Eco Oro* v. *Colombia*

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Abstract
This article aims to enrich the emerging, multi-coloured tapestry of 'international law in context' through a study of how international economic law operates in complex investment-related disputes. Focusing on the *Eco Oro* v. *Colombia* investor-state arbitration, and drawing on both doctrinal analysis and sociolegal research, the study investigates how different actors make sense of the issues, of the dispute, and of the law. Besides shedding light on the neglected multi-actor, multi-layered dimensions of investment disputes, and on tensions between often incommensurable values, juxtaposing arbitral proceedings and underlying social realities highlights how investor-state arbitration involves a socio-political process of re-presenting actors, territory, the environment, and livelihoods through the prism of international arrangements that are primarily designed to protect foreign investment. The findings provide policy pointers on the need for systemic reform of international investment law, moving away from the predominant emphasis on investment protection and investor-state dispute settlement, towards a governance model that effectively considers the social, political, and environmental dimensions of foreign investment projects.

Keywords: environment; local communities; international law in context; investment law; ISDS

1. Introduction

This article aims to enrich the emerging multi-coloured tapestry of 'international law in context' through a sociolegal and historically informed study of how international economic law operates in complex disputes.[1] It draws on a case study of the dispute over the páramo of Santurbán to examine how different values and aspirations are represented, balanced and contested, and what interests are ultimately prioritized in the making of legal decisions under investor-state dispute settlement (ISDS). Specifically, the case study discusses the *Eco Oro* v. *Colombia* arbitration,[2]

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[1]See, for example, M. Langford, C. A. Rodríguez-Garavito and J. Rossi (eds.), *Social Rights Judgments and the Politics of Compliance: Making it Stick*, (2017); S. Puig, *At the Margins of Globalization: Indigenous Peoples and International Economic Law* (2021); J. Gathii (ed.), *The Performance of Africa's International Courts: Using International Litigation for Political, Legal, and Social Change* (2020), 211–53; L. Eslava and S. Pahuja, 'The State and International Law: A Reading from the Global South', (2020) 11(1) *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 118, 145–6; D. Alessandrini, 'A Not So "New Dawn" for International Economic Law and Development: Towards a Social Reproduction Approach to GVCs', (2022) 33(1) *European Journal of International Law* 131.

[2]*Eco Oro Minerals Corp. v. The Republic of Colombia*, ICSID Case No. ARB/16/41.

situating it in its wider local, national, and global legal and political economy context. The study investigates how different actors make sense of the issues, of the dispute and of the law, and explores tensions between these perspectives and the argumentations developed in international legal proceedings. Besides resting on legal and sociolegal methods, the research draws on insights from the international political economy literature, such as those shedding light on the disaggregated nature of the state, and considers the longer-term historical trajectories and the territorial dimensions of foreign investment relations.[3] The analysis highlights the complexities of investment realities and the limits of ISDS in addressing multi-actor, multi-layered disputes.[4]

The dispute over the Santurbán páramo – a high-altitude wetland ecosystem on the Colombian Andes, close to the border with Venezuela – involves diverse actors, competing economic, social, and environmental considerations, and different views on how to reconcile them. Over the years, the dispute affected relations between activists advocating for the protection of a fragile ecosystem and a key source of water on the one hand, and mining companies and artisanal miners on the other. It also exposed rifts between artisanal and large-scale miners, between the executive and the judiciary, and among multiple government agencies having different institutional mandates. There are global dimensions as well. Markets represent the Santurbán páramo as a source of gold to feed the global economy, while environmentalists consider it an important carbon sink, and thus an ecosystem deserving protection as part of efforts to address climate change.[5] In this wider context, the dispute engaged relations between the Colombian state and several Canadian foreign investors operating in the mining sector, leading to three separate investor-state arbitrations: in addition to the *Eco Oro* case, two other arbitrations were pending at the time of writing, all brought under the Canada-Colombia Free Trade Agreement (FTA).[6]

The study embeds the discussion of the *Eco Oro* arbitration in this wider socio-political context, to explore how international proceedings manage different values and aspirations over the same territory and peoples. We draw inspiration from Nancy Fraser's scholarship that highlights that when actors struggle for the recognition of their identity or their way of life, efficiency language or adversarial dispute settlement are inadequate to resolve the underlying conflicts; tensions often involve incommensurable values, meaning that they cannot be appropriately understood or examined through a single metric. Instead, Fraser claims we should address conflicts of recognition through governance models ensuring equal representation and participation.[7]

The research draws on legal analysis of available documentation related to the *Eco Oro* arbitration,[8] as well as relevant domestic law (national constitution, mining code, environmental

[3]See, e.g., B. Duarte-Abadía and R. Boelens, 'Disputes over Territorial Boundaries and Diverging Valuation Languages: The Santurbán Hydrosocial Highlands Territory in Colombia', (2016) 41(1) *Water International* 15; J. Calvert, *The Politics of Investment Treaties in Latin America* (2022); Z. Phillips Williams, *The Political Economy of Investment Arbitration* (2022).

[4]On the place of local communities in international investment law see also L. Cotula and N. M. Perrone, 'Investors' International Law and its Asymmetries: The Case of Local Communities', in J. Ho and M. Sattorova (eds.), *Investors' International Law* (2021), 71.

[5]Constitutional Court of the Republic of Colombia, Judgment C-035 of 8 February 2016, esp. paras. 149–150; and *Eco Oro Minerals Corp. v. The Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum of9 September 2021, para. 636.

[6]2008 Free Trade Agreement between Canada and the Republic of Colombia. The two other arbitrations are *Red Eagle Exploration Limited v. Republic of Colombia*, ICSID Case No. ARB/18/12; and *Galway Gold Inc. v. Republic of Colombia*, ICSID Case No. ARB/18/13.

[7]'What looms, accordingly, is not just the threat of partiality, but the specter of *incommensurability*. Can substantively heterogeneous claims be fairly weighed on a single balance? And failing that, what remains of the ideal of impartiality?' N. Fraser, *Scales of Justice: Reimagining Political Space in a Globalizing World* (2010), 3. Also, N. Fraser and A. Honneth, *Redistribution or Recognition? A Political- Philosophical Exchange* (2003).

[8]At the time of writing, this included the Notice of Intent, the Request for Arbitration, a number of procedural orders and the tribunal's Decision on Jurisdiction, Liability and Directions on Quantum see note 5, *supra*. Most of the parties' pleadings were not publicly available but the Decision on Jurisdiction, Liability and Directions on Quantum summarizes the key arguments.

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regulations), international (investment) law, and the transnational legal order related to the project. This analysis does not seek to provide a comprehensive discussion of the many doctrinal issues at play. Rather, it focuses on selected dimensions of the case to interrogate the ways in which the arbitral tribunal represented the relevant actors and the environment, and ultimately balanced the competing interests and values.

The case study partly draws on sociolegal research the authors conducted in December 2019. This involved interviews with actors primarily located in Bucaramanga, a centre of environmental activism on the protection of the Santurbán páramo, and in California and Vetas, two high-altitude mining municipalities in and around the páramo, as well as interviews with government officials, judges, legal professionals, environmental advocates, and other actors in Bogotá. Further, the visits to Bucaramanga, California, and Vetas enabled the authors to observe key sites of the dispute, including the páramo of Santurbán, and to access books, photographs, landmarks, and other artifacts that embody or capture the history of the place.

The findings reveal deep-seated tensions that are unlikely to be comprehensively resolved through litigation, let alone ISDS. The framing of investor-state arbitration places at centre stage one set of interests, those of a foreign investor, as investment protection treaties task the arbitral tribunal with investigating whether those interests were unduly interfered with – namely, whether certain protection standards were breached, whether any exceptions excused the breach, and whether the investor is owed any compensation. At root, however, the different visions of the dispute surrounding the páramo of Santurbán reflect competing imaginaries of territory,[9] and their unfolding both within and outside the legal proceedings illuminates the ways in which international law is implicated in the construction of territory and statehood.

The findings contribute insights for ongoing debates about reforming international investment law. On one level, the research indicates that the outcomes of legal proceedings hinge not only on how arbitral tribunals interpret the law but also on underlying assumptions affecting the ways in which arbitrators represent actors, territory, and interests. At the same time, the findings point to structural factors that shape the arbitral tribunals' jurisdiction and room for action, making it very difficult for the tribunals to effectively address political tensions that are grounded in competing identities and values.[10] These aspects highlight the case for deep reform of international investment law, to develop a system that can do justice to the complexities of investment realities and disputes.

The remainder of the article is structured as follows. Section 2 provides a brief overview of the dispute. Section 3 examines the multi-actor dimension of the Santurbán páramo dispute. It presents a socially grounded account of the conflict, contrasting it with the ways in which arbitrators construed the actors, their interests and values, and their role in the dispute and the arbitral proceedings. Section 4 examines the multiple and competing views on the environment advanced by different actors in the Santurbán dispute, and how these views were represented and addressed in the merits decision of the *Eco Oro* case. Considering both the majority decision and the partial dissents, and focusing particularly on the tribunal's discussion of the minimum standard of treatment under customary international law, this section sheds light on representations of 'the environment' through the prism of ISDS. The conclusion (Section 5) brings together key threads from the exploration and outlines implications for reforming international investment law.

2. Overview of the dispute

Eco Oro began its operations in Colombia in 1994 – under the name of Greystar – with the acquisition of an existing gold mining permit.[11] The investor began exploration activities in the La

[9]A. Escobar, *Territories of Difference: Place, Movements, Life, Redes* (2008); A. Escobar 'Thinking-Feeling with the Earth: Territorial Struggles and the Ontological Dimension of the Epistemologies of the South', (2016) 11(1) *Revista de Antropología Iberoamericana* 11.

[10]See Fraser, *supra* note 7, at 6–10, 15–16.

[11]See *Eco Oro Minerals Corp. v. The Republic of Colombia*, *supra* note 5, para. 98.

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Angostura village, located within the municipality of California, close to the Vetas area, within the Santander department – an area that also hosts the páramo of Santurbán. Mining had a longstanding tradition in this locality, with many residents of California and Vetas practising small-scale artisanal mining. In 1996, the regional mining authority requested Greystar to submit an environmental management plan. The authorities subsequently accepted Greystar's plan, highlighting that the approval referred only to the exploration stage.[12] In 1997, the firm announced a multi-million gold project, and a year later it indicated that confirmed reserves were twice as large as initially expected.[13]

But progress slowed down in the following years. FARC and ELN, two guerrilla groups, were present in the region, and Greystar had to halt its operations.[14] Meanwhile, the Colombian Constitutional Court issued decisions C-339/02 and T-666,[15] establishing the state's obligation to protect páramos and clarifying that areas of ecological importance – including páramos – require higher levels of protection.[16] In 2002, Greystar requested the consolidation of the multiple mining titles it had acquired in the area over time, so as to reflect the cumulative scale of its La Angostura project.[17] A year later, a military battalion was set up in the area allowing Greystar to resume its operations.[18] In 2005, the Mining Ministry commented on the national importance of Greystar's project and Greystar received an award for its 'outstanding performance during its exploration stage'.[19]

In 2007, the mining authorities consolidated Greystar's mining titles, signing Concession Contract 3452 for the totality of the project.[20] The following year, the regional mining authority approved the environmental handling of the exploration phase.[21] In 2009, the International Finance Corporation (IFC) decided to invest in the La Angostura project.[22] Yet, not all news was positive for the project. The Constitutional Court reiterated that environmental authorities may exclude certain areas from mining (decision C-443),[23] and a reform of the Mining Code explicitly stated that mining could be prohibited in páramos ecosystems.[24]

The environmental implications of the La Angostura project gained greater prominence in the 2010s. Greystar sought an environmental licence for an open-pit mine in 2009, but the Environmental Agency ordered that the request be returned to the investor on the ground that considerations about the ecological value of the páramo of Santurbán ruled out an open-pit mine.[25] This order was accompanied by demonstrations in Bucaramanga, the lowland regional capital of the Santander department, against the project and in favour of protecting the páramo ecosystem and the right to water – the páramo being a major source of drinkable water for the urban population.[26] But while demonstrations continued in Bucaramanga, the mining authorities reiterated their support for the project; in 2011, the authorities designated Greystar's La Angostura venture as a Project of National Interest.[27]

[12]Ibid., para. 101.

[13]'This estimate was again updated in November 2005', ibid.

[14]Ibid., Annex A: Chronology of Relevant Facts, at 3.

[15]Colombian Constitutional Court, Judgment C-339 of 7 May 2002, available at www.corteconstitucional.gov.co/Relatoria/2002/C-339-02.htm; Colombian Constitutional Court, Sentencia T-666, 15 August 2002, available at www.corteconstitucional.gov.co/relatoria/2002/T-666-02.htm.

[16]See *Eco Oro Minerals Corp. v. The Republic of Colombia*, *supra* note 5, Annex A: Chronology of Relevant Facts, at 3.

[17]Ibid., at 4.

[18]See Duarte-Abadía and Boelens, *supra* note 3, at 20.

[19]Ibid., at 5.

[20]See *Eco Oro Minerals Corp. v. The Republic of Colombia*, *supra* note 5, para. 104.

[21]Ibid., para. 106.

[22]Ibid., para. 107.

[23]Colombian Constitutional Court, Judgement C-443 of 8 July 2009, available at https://www.corteconstitucional.gov.co/relatoria/2009/C-443-09.htm.

[24]See *Eco Oro Minerals Corp. v. The Republic of Colombia*, *supra* note 5, Annex A: Chronology of Relevant Facts, at 5.

[25]Ibid., paras. 109, 113.

[26]Ibid., para. 118.

[27]Ibid., para. 122.

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A significant challenge affecting the project was that there remained uncertainty as to the precise boundaries of the páramo of Santurbán. There existed a cartography of the páramos in Colombia, produced by a government-linked but independent research organization – the Alexander Von Humboldt Institute – but this document provided no specific boundaries.[28] Over the years, government-led initiatives to delimit the páramo as a protected area ran into considerable difficulties, owing to the likely economic impacts of delimitation and associated restrictions on livelihood activities (small- and large-scale mining, small-scale farming) and the increasingly fraught relations between lowland and highland residents. The former were primarily concerned about environmental protection and drinkable water, and the latter were preoccupied with their livelihoods, dependent on economic activities in and around the páramo.[29]

In mid-2011, Greystar proposed an underground mine and requested terms of reference for an environmental impact assessment. It also sought an extension of the exploration phase and changed its name to Eco Oro as a marketing strategy.[30] But in 2013, the slow progress with the delimitation of the páramo forced Eco Oro to request a suspension of exploration activities. In this period, the firm reported to the authorities what it saw as several instances of illegal mining on the part of artisanal miners (*galafardos*).[31] Ultimately, a ministerial resolution – Resolution 2090 of 2014 – delimited the páramo of Santurbán, dividing the area into three different zones (the preservation, restoration, and sustainable use zones).[32] Eco Oro's project was in principle feasible under the terms of the Resolution, but this hinged on the specific boundaries of each zone and an authorization to mine in the restoration zone.

While demonstrations continued in Bucaramanga, and tensions escalated between the residents of Bucaramanga and those of California and Vetas, Eco Oro continued to enjoy the support of Colombia's mining authorities. Law 1753 of 2015 approved the National Development Plan for 2014–2018, including provisions regarding mining in páramo areas.[33] In January 2016, Eco Oro requested new terms of reference to obtain an environmental licence for an underground project.

Meanwhile, citizen groups concerned about the environmental impacts of large-scale mining in the fragile páramo ecosystem had initiated legal actions before Colombia's Constitutional Court. In 2016, the court issued a first judgment, declaring Law 1753 unconstitutional as regards its allowing mining within the páramo (decision C-035).[34] In late 2017, a second Constitutional Court ruling declared that the existing páramo delimitation under Resolution 2090 was unconstitutional due to lack of compliance with consultation requirements (decision T-361/17).[35] The court ordered the government to carry out a new delimitation within a year. Controversy around the project – including a case that environmental activists brought before the IFC's Compliance Advisor Ombudsman – prompted the IFC to divest from Eco Oro.[36]

Though mining authorities continued to support the La Angostura project, in March 2016 Eco Oro informed the Colombian government of its intention to file an arbitration claim under the investment chapter of the Canada-Colombia FTA.[37] The arbitral tribunal tasked with settling the

[28]Ibid., para. 126.

[29]See Duarte-Abadía and Boelens, *supra* note 3, at 19–23.

[30]See *Eco Oro Minerals Corp. v. The Republic of Colombia*, *supra* note 5, paras. 130–131.

[31]Ibid., paras. 139–140.

[32]Ibid., para. 154.

[33]Ibid., para. 158.

[34]See Judgment C-035 of 8 February 2016, *supra* note 5.

[35]Constitutional Court of the Republic of Colombia, Judgment T-361/17 of 30 May 2017.

[36]See *Eco Oro Minerals Corp. v. The Republic of Colombia*, *supra* note 5, para. 168. See CAO, Compliance Monitoring Report – IFC Investment in Eco Oro (Project #27961) Colombia, 15 June 2018. The CAO found that 'IFC's appraisal and supervision documentation did not promptly capture regulatory actions relevant to IFC's assessment of client capacity and commitment', at 16. Available at www.cao-ombudsman.org/sites/default/files/downloads/EcoOroMonitoring-June25.pdf.

[37]*Eco Oro Minerals Corp. v. The Republic of Colombia*, Notice of Arbitration, 7 March 2016.

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dispute consisted of Juliet Blanch (President), Horacio A. Grigera Naón (appointed by claimant), and Philippe Sands (appointed by respondent). The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) governs the arbitral proceedings.[38]

During the proceedings, the Comité para la Defensa del Agua y el Páramo de Santurbán (hereinafter Comité Santurbán) – the grassroots organization that led environmental mobilization in Bucaramanga – filed a request to submit a non-party contribution (*amicus curiae*), together with the Center for International Environmental Law (CIEL), the Asociación Interamericana para la Defensa del Ambiente (AIDA), MiningWatch Canada, the Institute for Policy Studies (IPS) and the Centre for Research on Multinational Corporations (SOMO). The submission would focus 'on international law regarding human rights and particularly the right to live in a healthy environment'.[39] However, the arbitral tribunal rejected the petition, noting that the applicants did not show 'how generalised issues of human rights, and particularly the right to live in a healthy environment' might help the tribunal to resolve the specific dispute.[40]

In September 2021, the arbitral tribunal issued a lengthy decision covering questions of jurisdiction, merit, and key principles concerning the calculation of any damages (hereinafter Merits Decision).[41] The decision covers many complex issues and features two partially dissenting opinions from arbitrators Grigera Naón and Sands; a detailed review is beyond the scope of this article. By way of extreme synthesis, the decision rejected Eco Oro's claim that Colombia's actions expropriated the La Angostura project; and upheld Eco Oro's claim that Colombia breached the minimum standard of treatment prescribed by customary international law, compliance with which is required by the Canada-Colombia FTA.

A majority of Blanch and Grigera Naón dismissed Colombia's argument that the investor never acquired exploitation rights, finding that 'the rights a party acquired under a concession agreement were indivisible', and Eco Oro thus held rights that could be subject to expropriation.[42] Though the tribunal had little doubt that Colombia's actions substantially deprived Eco Oro of its investment, a majority of Blanch and Sands found that Colombian's measures were a legitimate exercise of its police powers: the measures were non-discriminatory, aimed at protecting the environment, and based on reasonable scientific standards, in the context of a difficult dispute that required balancing competing interests, including those of lowland and highland communities; and while Colombia's conduct was not flawless, the problems were not sufficiently egregious to denote lack of good faith.[43]

Meanwhile, a majority of Blanch and Grigera Naón found that Colombia breached its international obligations under of the minimum standard of treatment. The majority reasoned that Eco Oro had legitimate expectations that 'it would be entitled to undertake mining exploitation', and 'that Colombia would ensure a predictable commercial framework for business planning and investment'.[44] Colombian authorities supported the project for years despite its international and constitutional obligations to protect páramos. Inconsistency in the actions of different governmental agencies, and of executive and judicial authorities, and ultimately the authorities' failure to conclusively delimit the páramo all created confusion and uncertainty.[45] The conduct was deemed below what a reasonable investor could expect from a host state.

[38]1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 575 UNTS 159.
[39]*Eco Oro Minerals Corp. v. The Republic of Colombia*, Procedural Order No. 6, para. 18.
[40]Ibid., para. 28.
[41]See *Eco Oro Minerals Corp. v. The Republic of Colombia*, *supra* note 5.
[42]Ibid., para. 439.
[43]Ibid., paras. 643, 678.
[44]Ibid., para. 804.
[45]Ibid., paras. 820, 777.

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Lastly, the tribunal considered whether Colombia's breach of the minimum standard of treatment was excused by the general exception clause contained in the Colombia-Canada FTA.[46] In the course of the proceedings, the Canadian government made a non-disputing-party submission to the tribunal, arguing that legitimate regulatory actions could 'constitute breaches of the investment obligations in the first place' but that the general exception acts as a 'final "safety net" to protect the state's exercise of regulatory powers'.[47] If the general exception applies, the submission noted, there is no liability and payment of compensation is not required. A majority of Blanch and Grigera Naón disagreed. The arbitrators noted that 'neither environmental protection nor investment protection is subservient to the other, they must co-exist in a mutually beneficial manner'.[48] According to the majority opinion, the exception clause enabled Colombia to take environmental measures, but this did not prevent an investor from claiming payment of compensation.[49]

The two partial dissenters, Grigera Naón and Sands, approached the case quite differently. Grigera Naón considered that Colombia's measures constituted an indirect expropriation, finding Colombia's actions to be disproportionate, inconsistent, and abusive.[50] Sands distanced himself from the finding on legitimate expectations, holding that the investor did not carry out adequate due diligence and that the right to exploit 'was premised the relevant environmental authorisations being obtained'.[51] Sands also considered that a degree of inconsistency in state conduct is inevitable in complex disputes where multiple interests are at stake, and found that Colombia's conduct – while not unproblematic – did not breach the international minimum standard of treatment under customary international law.[52] The dissenting arbitrator did not discuss the general exception clause because – for him – Colombia did not commit any breach.

3. The actors: The arbitral proceedings in the light of a socially grounded account

In such a complex investment dispute, a first set of questions, for a sociolegal study, concerns the identity of the key actors involved, the interests and world visions they advance, and how these are reflected in the legal proceedings. Section 3.1 provides a socially grounded account of the *Eco Oro* dispute, which Section 3.2 juxtaposes to the tribunal's approach.

3.1 A socially grounded account

The dispute over the Santurbán páramo presents considerable complexities that are grounded in long-term historical trajectories and in multi-layered relations connecting actors not only within the local territory but also in national and global processes that advance diverse, competing economic and environmental visions. In Santurbán, the 'global', 'national', and 'local' have long been intertwined in multiple ways. These interactions are highly visible in the local territory, ranging from the mining companies' logos displayed on the social infrastructure the companies financed, to makeshift road signs expressing popular sentiments against 'multinationals'.[53] Local leaders and residents are mindful of their proximity to the 'global', retracing the long history

[46]See Colombia-Canada FTA, *supra* note 6, Art. 2201.

[47]See *Eco Oro Minerals Corp. v. The Republic of Colombia*, *supra* note 5, para. 373.

[48]Ibid., para. 828.

[49]Ibid., para. 830.

[50]*Eco Oro Minerals Corp. v. The Republic of Colombia*, Partial Dissenting Opinion of Horacio A. Grigera, 9 September 2021, paras. 31–32.

[51]*Eco Oro Minerals Corp. v. The Republic of Colombia*, Partial Dissent of Professor Philippe Sands QC, 9 September 2021, paras. 16–18.

[52]Ibid., paras. 33, 37.

[53]Authors' direct observation (California and Vetas, December 2019).

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and profoundly changed realities of foreign actors' involvement in mining since the late 1800s.[54] In different periods, they recall, French, American, German, and Japanese miners explored and extracted gold and other minerals from the region, though mainly on a relatively small scale.[55]

The two highland towns of California and Vetas have different histories. Agriculture used to provide a foundation for the livelihoods of California's residents. This changed from the early 1900s, residents explain, when foreign investors brought technology, restructured the town's economy, and played an important political role.[56] For example, the local museum showcases the story of a French gold mining company that played a central role in the political division of the municipality in 1908. After the foreigners left, the community adapted their techniques and continued mining; agriculture became a secondary activity.[57] The locals embraced the global and national appetite for gold, turning California into a mining town.

Vetas lies closer to the Santurbán páramo, at 3,800 metres above sea level. It has a longer mining history, dating back to indigenous Chitareros who extracted gold from the area before the arrival of the Spanish conquistadores.[58] Rumours spread rapidly, and the Spanish soon came to the area looking for gold. They founded the town of Vetas in 1555. In the late 1800s, miners from other parts of Colombia and from the United States moved to Vetas, bringing knowledge and capital for gold exploration and extraction. As in California, local families took over the mines when the foreigners left. Vetas' largest mining site, La Reina de Oro, dates from that period and presently operates under a 1992 exploration and extraction licence.[59]

In the late 1990s, global mining interests returned to the Santurbán area. While earlier experiences with foreign investment primarily centred on relatively small-scale mining activities, the new wave of investors envisaged larger-scale projects. The Canadian firm Greystar was one of several firms that arrived in the region, obtaining the necessary permits to begin exploration in an area located between California and Vetas. In the late 2000s, Greystar took several steps to move to the extraction phase; as discussed, it obtained financing from the IFC and submitted plans for an open-pit mine to the Colombian authorities.

These developments were part of a wider wave of mining investments in the region, reflecting renewed business interest to invest in Colombia's mining sector and government policies to attract foreign investment. In 2009, for example, the owners of La Reina de Oro mine, a longstanding mine located in the municipality of Vetas, signed an option contract with Galway, another Canadian company, for the company to acquire the mining project. The owners of La Reina de Oro rejected Galway's initial attempt to activate this option and take over the project in 2013, but the issue was finally resolved in favour of Galway by an arbitration tribunal in Bucaramanga, the regional capital.[60]

This influx of foreign investors created a different dynamic compared to the one that seems to have characterized earlier waves. Should the companies leave, the locals would find it more difficult to take over the mines, as they had done in the past, due to the large-scale, industrial nature of the activities. Large-scale mining would extract and process most of the gold reserves within a relatively short period of time, bringing important revenues to the Colombian state but

[54]Interviews with former major, leader of a local small-scale miners' association and other residents (California, 12–13 December 2019).

[55]Ibid.; Y. Delgado Muñoz, *Vetas entre el frío y el oro* (2005), 114–15, 120–1.

[56]Interviews with former major, leader of California's association of miners and other local residents (California, 12–13 December 2019).

[57]Interview with local residents (California, 12–13 December 2019); Document titled 'Historia de Vetas' Museo de Vetas; Carlos Chacón Soto, 'Cuando los Franceses llegaron a California', undated newspaper article found in *Hotel El Gran Mezón*, California.

[58]R. C. West, *La minería de aluvión en Colombia durante el periodo colonial* (1972).

[59]See Delgado Muñoz, *supra* note 55, at 121; A. Osejo and P. Ungar '¿Agua sí, oro no? Anclajes del extractivismo y el ambientalismo en el páramo de Santurbán', (2017) 84 *Universitas Humanística* 143.

[60]See *Galway Gold Inc. v. Republic of Colombia*, *supra* note 6; Solicitud de Arbitraje (21 March 2018), para. 27.

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also raising questions about the more distant future. Local residents expressed concerns that large-scale mining would crowd out the small-scale artisanal mining in California and Vetas.[61]

In this evolving context, Eco Oro and its La Angostura project embodied a specific model of connecting the local, the national and the global. In line with a common practice in the mining sector, Eco Oro only owned this project, and might have possibly sold it to a larger company had the project moved to the extraction phase. 'Junior' firms like Eco Oro are central players in the mining industry worldwide, as they identify and develop mining opportunities that the large players take over when the project is ready to move to production.[62] For national authorities seeking to encourage foreign investment and generate public revenue, businesses like Eco Oro can play a helpful role by gathering an initial amount of capital in global financial centres – in this case, the Toronto Stock Exchange – and setting up a project that could later attract bigger businesses. The model also involves close collaboration with the national government, which, as discussed, supported the project in various ways, including business-friendly regulation, prizes for the company's conduct, and representations made by the Colombian authorities.[63]

The prospect of large-scale mining also highlighted the likely environmental impacts of the activities. Here too, there are strong linkages between local, national and global processes. There are global pressures to protect the environment, resulting from public opinion and international laws and institutions. For example, Article 5 of the Paris Agreement requires states to 'conserve and enhance, as appropriate, sinks and reservoirs of greenhouse gases'.[64] At the national level, there are laws, agencies, and social support for environmental protection. Meanwhile, advocacy on protecting the páramo was led by local actors concerned about their territory, water, and the environment – particularly the citizens of Bucaramanga organized through the Comité Santurbán. In an interview in Bogotá, a legal officer from AIDA, one of the organizations that applied to make an *amicus curiae* submission, noted that grassroots activists often reach out to global and regional organizations, to make their struggles more visible and secure greater leverage vis-à-vis the state and the investor.[65] Just as Eco Oro connects the global and the local by bringing technology and capital to extract gold, so organizations like the Comité and AIDA take local concerns about mining to the global level, all the way to legal arenas such as investor-state arbitration.

The interplay of competing interests concerning mining and environmental protection also operates within the state apparatus, at both national and local levels, as Colombia is 'a unitary, decentralized republic, with autonomy of its territorial entities'.[66] Colombia's National Mining Agency experienced these tensions first-hand.[67] Tasked with promoting mining sector development as a key component of Colombia's economic growth strategy, the agency interfaces both with the large-scale industrial miners, playing an important role in attracting foreign investment, and with artisanal miners. Two legal officers working for the agency highlighted that Colombia is tightening mining standards, including environmental ones, while they have been working to support and 'formalize' artisanal miners; but in practice, both recognized, it is larger-scale foreign investors that are better able to comply with the standards.[68]

Meanwhile, the environment ministry is primarily responsible for environmental protection, including by vetting the miners' impact assessment studies, which can create tensions with the

[61]See interviews in Duarte-Abadía and Boelens, *supra* note 3, at 23–4.

[62]M. L. Dougherty, 'The Global Gold Mining Industry: Materiality, Rent-Seeking, Junior Firms and Canadian Corporate Citizenship', (2013) 17 *Competition & Change* 339.

[63]See *Eco Oro Minerals Corp. v. The Republic of Colombia*, *supra* note 5, Annex A: Chronology of Relevant Facts, at 3–5. See also P. Van der Veen, F. Remy and J. P. Williams, *A Mining Strategy for Latin America and the Caribbean: Estrategia minera para América Latina y El Caribe* (1997).

[64]2015 Paris Agreement, 3156 UNTS 79.

[65]Interviews with an AIDA officer (Bogotá, 16 December 2019).

[66]Colombian National Constitution of 1991, Art. 1.

[67]Interview with two legal officers of the National Mining Agency (Bogotá, 16 December 2019).

[68]Ibid.

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mandate of the National Mining Agency. The Humboldt Institute, connected to the ministry, was tasked with preparing preliminary plans for the delimitation of the páramo. An expert at the institute described the local, national and global pressures experienced during the process, due to the high stakes and the complexities of the dispute, and the difficult coexistence of social/consultative and ecological/technical dimensions in the páramo delimitation process.[69] The interventions by Colombia's Constitutional Court (judgments C-035 and T-361) also illustrate the disaggregated nature of the state and the complexity of social, economic, and environmental interests it can represent through its diverse institutional structures.

These institutions grapple not only with highly heterogeneous constituencies of interests, but also with systemic tensions within the legal system. A jurist at the Constitutional Court and two private-sector lawyers working on international investment law and on business and human rights were cognizant of these normative tensions, which extractive-industry projects highlight particularly clearly.[70] They described Colombia's 1991 Constitution as a 'green constitution', yet they conceded that the law – and national development plans – tend to give prominence to mining as a fundamental economic activity.[71] The two private lawyers regarded Colombia's legal system as 'inconsistent', recognizing that these ambiguities can create uncertainty and give rise to difficult disputes, for which the judiciary can find no obvious solution.[72] Further, the jurist at the Constitutional Court admitted that disputes over extractive industry projects can raise deeper-level questions of political organization and territorial governance – for example, unresolved questions about the legal powers of municipalities in promoting, regulating or prohibiting extractive activities.[73]

The tensions between economic and environmental considerations also operate in the areas surrounding the Santurbán páramo, and views can diverge sharply over how those considerations should be reconciled, or even over whether this reconciling is possible in the first place. In an interview in Bucaramanga, a representative of the Santander regional government presented views broadly comparable to those advanced by the national government: the priority must be to create economic opportunities through environmentally sustainable projects. The representative also stressed, however, that foreign investors should adapt to domestic institutions and be responsive to local demands.[74] Meanwhile, the advocacy activities of the Comité Santurbán primarily centred on the ecological imperative to protect the páramo, with strong links made to human rights, particularly the right to water.[75] That said, different emphases coexisted within this broad framing: at the time of our visit, some members of the Comité advocated for a scientific-based delimitation of the páramo to protect water and the environment, and promoted alternative non-mining development projects for the region;[76] while other Comité members accepted the continuation of small-scale mining, which was not perceived as a serious threat to the páramo or to water.[77]

Similar tensions could be observed amongst the residents of California and Vetas, which are located closer to the páramo. Most people in the two municipalities are miners, and their way of life is closely tied to mining. Many saw the industrial miners as a source of employment opportunities, as well as public revenues and social infrastructure in the two municipalities. But there were also concerns about the land footprint of industrial mining and its likely implications

[69]Interview with an officer of the Humboldt Institute (Bogotá, 9 December 2019).

[70]Interviews conducted in Bogotá (9–10 December 2019).

[71]Ibid.

[72]Interviews with two Colombian law firm partners (Bogotá, 10 December 2019).

[73]Interview with a senior legal officer of the Colombia Constitutional Court (Bogotá, 9 December 2019). See also X. Sierra-Camargo, 'The "Consultas Populares" in Colombia: Restrictions on Mechanisms for Citizen Participation in Foreign Extractive Projects from the Perspective of the Capitalocene', (2022) 19(6) *Globalizations* 865.

[74]Interview with an advisor of the regional governor (Bucaramanga, 15 December 2019).

[75]See the Comité's Facebook page www.facebook.com/comitesanturban and Twitter feed (@ComiteSanturban).

[76]Interview with members of the Comité Santurbán (Bucaramanga, 11 December 2019).

[77]Interview with members of the Comité Santurbán (Bucaramanga, 15 December 2019).

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for the livelihoods of artisanal miners. A leader of a small-scale mining co-operative called for the safeguarding of a reasonable land area where small-scale miners could continue their way of life.[78] The then newly-elected major of California and an advisor to the regional government were sympathetic to this demand.[79] For local politicians, California should find a balance that works for the town, involving foreign investors but maximizing the benefits for the local community. They felt that investors rarely engage seriously with the local level, preferring to concentrate instead on the national authorities. At the same time, the residents of California and Vetas felt a strong connection to the páramo and a concern about protecting this ecosystem and the water flowing from it. (A sign located at the entrance to California captured this plurality of values and aspirations: 'Welcome to California: Environmental and Mining Municipality'.[80])

None of these tensions was closer to being resolved after the ISDS claims hit the state. Interviews in Bogotá, Bucaramanga, and California indicated that actors continued to advance their vision or interest, with the ISDS proceedings bringing an additional layer of complexity. The ISDS proceedings increased the prominence of government officials responsible for defending Colombia before arbitral tribunals, whose views of the dispute are partly mediated by the global law firms hired to defend the state in the proceedings.[81] In fact, media reports from early 2016 suggest that ISDS proceedings increased the tensions around Santurbán, opening up a new space for confrontation, rather than offering opportunities to develop mutually acceptable solutions.[82]

What emerges, then, are the contours of a multi-actor dispute with overlapping economic, social, and environmental dimensions; a dispute where different actors advance not only different interests and concerns but also, more fundamentally, competing imaginaries of the same territory,[83] configuring the area in and around the páramo of Santurbán as an ecosystem, a sociocultural foundation, a source of water, a basis for economic activities both small- and large-scale, and a springboard for national economic growth. Each of these imaginaries is embedded and constructed in their social interactions, culture, and values. As the arrival of large-scale extractive industry projects increases the economic, social, environmental, and political stakes, disconnections and ambiguities in legal frameworks set the scene for complex conflicts that are inherently difficult for any given legal proceeding to adequately represent and conclusively settle.

3.2 'Dramatis personae' in ISDS

In the *Eco Oro* Merits Decision, the section describing the relevant actors of the dispute is titled 'Dramatis personae': a Latin phrase usually translated as 'the characters of a play'.[84] The section identifies the main characters of the Santurbán play as being the Eco Oro company (the Claimant) and the government of Colombia (the Respondent), as represented in the case by a number of different agencies. This approach reflects the structural framing of investment treaties and FTAs that include an investment chapter; the mutual obligations of states as regards the treatment of investors and investments originating from the other state(s); and ISDS which enables investors to submit disputes with the state to international arbitration. But while consistent with the applicable Canada-Colombia FTA, this framing inherently flattens the substantially richer factual fabric of

[78]Interview with a leader of a small-scale mining co-operative (California, 13 December 2019).

[79]Interview with the 2019 incoming major of California (Bucaramanga, 15 December 2019); interview with an advisor of the regional governor (Bucaramanga, 15 December 2019).

[80]Authors' observation, December 2019.

[81]Interview with a legal officer of the National Agency for Legal Defence of the State (Bogotá, 10 December 2019).

[82]This space gives additional visibility and significance to foreign investor rights vis-à-vis national sovereignty (see, e.g., www.elespectador.com/economia/mineria-seguridad-juridica-o-soberania-article-624030/ and vis-à-vis local rights see, e.g., www.semana.com/medio-ambiente/articulo/santurban-el-fracaso-de-la-delimitacion/34878/.

[83]See Duarte-Abadía and Boelens, *supra* note 3, at 19–23.

[84]See *Eco Oro Minerals Corp. v. The Republic of Colombia*, *supra* note 5, para. 80.

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the dispute over the Santurbán páramo, which as discussed entails protagonist roles also for diverse actors located in Bucaramanga, California, and Vetas.

In line with the nature of arbitral proceedings, the characterization of the '*dramatis personae*' largely responds to the arguments advanced by the parties in the course of the arbitral proceedings, as interpreted by the arbitral tribunal. The Merits Decision describes Eco Oro as one of the first firms to invest in Colombia in the 1990s. The tribunal noted that, on several occasions, the Colombian government cited Eco Oro as a positive example to prospective investors, and designated its project as a national priority.[85] The arbitrators also observed that Eco Oro received financing from the International Financial Corporation, acted according to Colombian laws, and reported cases of illegal mining to the authorities.[86] Further, the firm was prized for its responsible organization and environmental excellence in Canada and Colombia.[87] The tribunal examined whether Eco Oro had carried out proper due diligence on Colombia's environmental regulations, ultimately concluding that it did not.[88] But the arbitrators reached different conclusions on the implications of this finding, with the majority holding that no due diligence would have brought clarity to an uncertain legal system or alerted the investor about Colombia's inconsistent conduct.[89]

The Merits Decision does not discuss in detail the firm's business model and its relationship with local actors. The analysis of corporate issues primarily responds to Colombia's argument that the firm did not qualify as a Canadian investor protected under the Canada-Colombia FTA.[90] On the other hand, there is little in the decision about the company's relations with actors in Bucaramanga, California, and Vetas, about actual jobs and livelihood opportunities in the context of alternative options (such as small-scale mining), and about local opinion more generally. The decision includes maps and makes brief historical references to local life in the context of its discussing Eco Oro's project, for example highlighting that the area had a 'longstanding mining tradition' and that foreign investors have operated there since the early nineteenth and twentieth centuries.[91] But beyond these references – articulated through the prism of the investor's venture – the primary concern is about the relationship between the investor and the state.

The tribunal's discussion of the respondent follows a comparable approach. Colombia is described both as an environmentally responsible state – a country with a green constitution – and a country open to mining: 'Mining has been one of its key sectors'.[92] The country hosts multiple environmental agencies, highlighting its concern for the environment: the Ministry of the Environment, the National Agency of Environmental Licences, the Humboldt Institute and regional environmental agencies (though the latter play only a modest role in the dispute).[93] Colombia also has two central mining agencies: the Mining Ministry and the National Agency for Mines. This highlights the strategic importance Colombia attaches to mining as a driver of economic growth, even though its laws and regulations have evolved, following the international trend, to ensure that this activity is carried out in a sustainable manner.

In the Merits Decision's discussion of the conduct of Colombia's authorities, the main issue for consideration was whether steps taken by the regulatory agencies, and interpretive changes over

[85]Ibid., paras. 80–82, 122, 137, 157, 191.

[86]Ibid., paras. 96–140.

[87]Ibid., paras. 82, 162, 174

[88]Ibid., para. 694 (discussing investment-backed expectations in the context of the indirect expropriation claim).

[89]Ibid., paras. 767–770 (discussing legitimate expectations in the context of the minimum standard of treatment claim). Arbitrator Philippe Sands disagreed with the majority on this point. See *Eco Oro Minerals v. Colombia*, ICSID Case No. ARB/16/41, Partial Dissent of Professor Philippe Sands QC, 9 September 2021, para. 18.

[90]On this point, the tribunal reasoned that 'It is not disputed that Eco Oro has maintained business functions in Canada since 1987 (the issue being whether or not those functions were substantial)'. See *Eco Oro Minerals Corp. v. The Republic of Colombia*, *supra* note 5, para. 249.

[91]Ibid., paras. 96–7.

[92]Ibid., para. 85.

[93]Ibid., paras. 87–95.

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time, created undue uncertainties for the investor – thus responding to the claims articulated by Eco Oro and the defences put forward by the Colombian government. The Merits Decision carefully reviews the measures, statements, and representations of the national mining and environmental authorities. It also considers the positions articulated by the Attorney General, the Consejo de Estado, and the Constitutional Court in relation to investors' vested rights, environmental protection, and the need for local participation in the delimitation process. In this analysis, the role of local actors and perspectives in influencing the conduct of different state institutions remains largely in the background.

This absence or re-representation of the local dimensions in the Merits Decision reflects the structure of ISDS. The investor and the state are the two parties to the dispute. Their legal counsels develop the legal arguments that frame the dispute; the arbitral tribunal is tasked with deciding on those arguments. The diverse universe of actors in Bucaramanga, California, and Vetas had no opportunity to frame the facts of the dispute. As noted, the tribunal rejected an application to file an *amicus curiae* submission, presented by an alliance of environmental organizations including the Comité Santurbán. In rejecting the petition, the tribunal held that 'we do not find that a knowledge of "the Santurbán páramo and attendant social and environmental issues" could, as such, assist the Tribunal in determining this dispute, in a manner that goes beyond the likely submissions of the Parties'.[94]

The main source of references to local actors and perspectives in the Merits Decision is judgment T-361 of the Constitutional Court, which responded to a legal action initiated by local activists and ordered authorities to conduct a new páramo delimitation with adequate public participation. The tribunal relied on statements by the environmental minister and the director of the Humboldt Institute to conclude that, unlike the technical aspects, the social dimension of the delimitation process was inadequate. The breaches in failing to consult, the arbitrators clarified, 'were not directed towards Eco Oro but to the local farmers and miners'.[95] During the proceedings, the director of the Humboldt Institute recognized local interests and their contribution in conserving the environment, adding nonetheless that '[i]t is very important that the social and economic aspects do not become algorithms for constructing the proposal for a delimitation';[96] they 'always entail specific interests' and could turn the ecological line on the identification 'very chaotic'.[97]

The tribunal's decision features other brief references to local actors, again either from the perspective of the investor or the central state. In parts of the decision, the residents of California, and Vetas are represented as seen by Eco Oro, as involved in '*galafardeo*' or 'unauthorized mining activities'.[98] Meanwhile, those who care about water and the environment in Bucaramanga are seen as operating in tension with the people in the vicinity of the páramo;[99] in this way, the complex interplay of concerns and aspirations in Bucaramanga, California, and Vetas is distilled into a contestation between two opposed fronts that prioritize mining or environmental considerations.

Examining the details of the legal reasoning, references to local actors return on two further occasions. Firstly, they serve as a comparator when discussing whether the measures affecting Eco Oro were discriminatory or arbitrary. The arbitral tribunal observed that 'many artisanal miners and local populations were equally concerned at the prospect of losing both their mining rights (to the extent they had such rights) and their livelihood, which had been dependent upon mining being undertaken in their localities'.[100] Colombia had to 'balance the competing interests', which

[94]*Eco Oro Minerals v. Colombia*, ICSID Case No. ARB/16/41, Procedural Order No. 6, Decision on Non-Disputing Parties' Application, 18 February 2019, para. 33.

[95]See *Eco Oro Minerals Corp. v. The Republic of Colombia*, *supra* note 5, paras. 678, 657–679.

[96]Ibid., para. 670.

[97]Ibid., para. 670.

[98]Ibid., paras. 140, 817.

[99]Ibid., paras. 118, 665, 673.

[100]Ibid., para. 640.

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for the tribunal's majority should have involved the government offering Eco Oro some form of compensation, as it did in the case of some local actors.[101] In this exercise, references to local actors feature for the purposes of establishing whether the investor's rights had been infringed, in a comparison that relates small-scale miners who have lived in the region for generations and whose basic livelihoods rested on mining, to a proposed industrial mining project operated by a larger-scale foreign investor. Secondly, references to local actors feature in arbitrator Grigera Naón's partial dissent, who argued that the social unrest caused by the people of Bucaramanga, Vetas, and California was the key cause of the uncertainties faced by Eco Oro. Grigera Naón opined that Colombia 'should have been aware of the clash of interests between different sectors of its population', a clash that caused the state's 'meandering conduct' regarding the delimitation.[102] Seen through this prism, the local actors are, in effect, the problem that state agencies failed to foresee or appropriately manage.

4. The environment in investor-state arbitration

Having explored the 'Dramatis personae' of ISDS, the analysis now centres on the substantive aspects of the *Eco Oro* arbitration, honing in on how the environment was understood and represented both inside and outside the arbitral proceedings. Section 4.1 examines competing visions of the environment as they emerged in the multi-actor, multi-layered dispute over the paramo of Santurbán, seen against the background of established approaches to frame environmental issues in ISDS. Section 4.2 analyses how the *Eco Oro* tribunal made sense of these issues, through the prism of applicable investment protection standards and environmental exceptions, and how this framing affected the balancing of the different interests at play in the dispute.

4.1 Reframing the environmental question

The substantive question that lies at the centre of the *Eco Oro* arbitration presents parallels with many other environment-related investment disputes: under what circumstances should a state compensate foreign investors for the adverse impacts of its actions to protect the environment? The question is consequential: over the years, the broad protections offered by investment treaties and the large amounts many arbitral tribunals have awarded to investors have prompted concerns that the investment treaty regime can make it more difficult for states to take environmental measures – a problem commonly referred to as 'regulatory chill'.[103]

These issues have accompanied investment treaty arbitration since its meteoric rise at the turn of the century, starting from early cases such as *Ethyl* v. *Canada* and *Metalclad* v. *Mexico*.[104] As Behn and Langford noted in their quantitative study of 49 treaty-based investor-state arbitrations that presented environmental dimensions, arbitral tribunals have long discussed issues concerning environmental regulation – in some cases extensively so.[105] Further, several arbitral tribunals examined issues of public participation or mobilization with regard to environmental decision-making. In the 2003 *Tecmed* v. *Mexico* award, for example, the arbitral tribunal discussed the non-renewal of an environmental permit in the context of public protests

[101]Ibid., para. 641.

[102]*Eco Oro Minerals v. Colombia*, ICSID Case No. ARB/16/41, Partial Dissenting Opinion of Horacio A. Grigera, 9 September 2021, para. 24.

[103]K. Tienhaara 'Regulatory Chill in a Warming World: The Threat to Climate Change Policy Posed by Investor-State Dispute Settlement', (2018) 7(2) *Transnational Environmental Law* 229.

[104]*Ethyl Corporation v. The Government of Canada*, NAFTA/UNCITRAL, Award on Jurisdiction of 24 June 1998; *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award of 30 August 2000.

[105]D. Behn and M. Langford, 'Trumping the Environment? An Empirical Perspective on the Legitimacy of Investment Treaty Arbitration', (2017) 18 *Journal of World Investment & Trade* 14.

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against the landfill managed by the investor.[106] The tribunal was chaired by Horacio A. Grigera Naón, who would go on to serve as the claimant-appointed arbitrator in the *Eco Oro* case.

In other words, the broad contours of the factual fabric in the *Eco Oro* case are not uncommon in investor-state disputes, particularly as regards investments in sectors such as infrastructure and the extractive industries. The arbitral tribunal's extensive discussion of the environmental dimensions in the Merits Decision is also not without precedent. However, when examined in the light of a socially grounded account of the dispute, analysing the *Eco Oro* decision provides new perspectives on key parameters of the debate, problematizing the ways in which environmental issues are understood and addressed in the settlement of investor-state disputes. Seen in this light, the question is not just whether ISDS tribunals consider the environment in their decisions but whose vision of the environment – whose imaginary of the territory – is ultimately reflected and prioritized in ISDS.

The multi-actor nature of the Santurbán dispute highlights the need to recentre debates about regulatory chill beyond the conventional investor-state dyad. While some positions in this debate cast the state either as a benevolent regulator unduly constrained by international investment law, or as an opportunistic predator requiring international discipline, in practice diverse political economy factors produce complex patterns of state conduct that, depending on the circumstances, may – or may not – advance public interests. Pressure from organized citizens can therefore be an important factor in public action.

These considerations resonate with the factual fabric of the *Eco Oro* case. Until late in the process, the government's mining agency repeatedly expressed support for the project, on grounds of its expected contribution to Colombia's economic growth. At the same time, citizen groups challenged what they saw as the government's environmental inaction, both in the streets and in the courts, and the Constitutional Court ultimately invalidated government measures designed to exempt existing mining projects from new environmental regulations. This court decision was a central aspect in the arbitration. In assessing regulatory chill, then, it is necessary to consider the disaggregated nature of the state (reflected for example in relations between executive and judiciary), the relationship between citizens and multiple state institutions, and whether investment protections can make it harder for citizen groups to obtain what they seek from the courts or their representatives in government.[107]

More fundamentally, the *Eco Oro* arbitration highlights questions about how environmental issues are framed in the proceedings and the tribunal's decision. For example, the environmental aspects of the arbitration mainly revolved around the protection of a specific mountain ecosystem, the páramo, which Colombian law defines primarily by reference to a specified altitude and certain biological parameters.[108] Constitutional Court judgment C-035 and the *Eco Oro* Merits Decision both discuss the ecological value of the páramo, including as a biodiversity hotspot and a carbon sink.[109] But in the wider Santurbán dispute, there was also contestation about territorial organization and the nature of the environmental resources that should be protected in the first place. Activists in the regional capital Bucaramanga emphasized the need to protect *water* as well

[106] *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003. See also *Metalclad v. Mexico*, *supra* note 104, paras. 86, 92. See D. Schneiderman, 'Local Resistance: At the Margins of Investment Law', (2022) 19(6) *Globalizations* 897.

[107] For a detailed discussion of these aspects in relation to the *Eco Oro* arbitration see A. Sands, 'Unpacking Regulatory Chill: The Case of Mining in the Santurbán Páramo in Colombia', *International Institute for Environment and Development*, 21 December 2020, available at iied.org/unpacking-regulatory-chill-case-mining-santurban-paramo-colombia; A. Sands, 'Regulatory Chill and Domestic Law: Mining in the Santurbán Páramo' (2023) 22(1) *World Trade Review* 55. See also Cotula and Perrone, *supra* note 4.

[108] See A. E. García Bustamante and Y. E. Leal Espear, 'Análisis a la protección del Estado a los ecosistemas de Páramo' (2019) 24 *Justicia* 166, at 2–6.

[109] See Judgment C-035 of 8 February 2016, *supra* note 5, especially paras. 149–150; *Eco Oro Minerals Corp. v. The Republic of Colombia*, *supra* note 5, para. 636.

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as the mountain ecosystem itself; as already noted, the lowland city of Bucaramanga relies heavily on water that flows from the páramo.

After Constitutional Court judgment T-361 invalidated the first páramo delimitation, the Comité Santurbán, together with the Bucaramanga-based public-interest lawyers that spearheaded the court case,[110] presented an 'alternative delimitation proposal' that envisaged the conduct of hydrological studies in order to protect not just the páramo but the watershed as a whole.[111] This alternative framing drew strong connections between the environment and human rights, particularly the right to water. It carried significant practical implications for territorial organization, as it would have extended protection to a larger area than that determined by altitude and biological parameters alone, and it would have affected decisions that were at that time pending about other proposed mining projects located outside the legally defined páramo but within the watershed.

Meanwhile, environmental concerns expressed in the mountain municipality of California emphasized the intimate connection between the páramo as an ecosystem and local culture, history, and identity.[112] The work of the Humboldt Institute and the long-running dispute over the delimitation of the páramo also illustrate the complex relationship between ecological and social aspects, and between technical expertise and public participation, in environmental decision-making. Activists advocated for the participation of communities in and around the páramo in the delimitation process, and the Constitutional Court ultimately struck down the government's initial delimitation and required a new one that would better consider the social dimensions based on more effective public participation.[113]

This interface between technical and 'community' dimensions in environmental governance has already come up in investor-state arbitration – particularly in the case *Bilcon* v. *Canada*, in which the tribunal's majority concluded that Canada's breach of the applicable treaty standards was partly linked to the fact that a comprehensive environmental impact assessment process relied heavily on 'core community values' and the socio-cultural dimensions of environmental impacts and decision-making.[114] The *Bilcon* decisions attracted some criticism: a Canadian law expert criticized the award for displaying a 'lack of familiarity' with the applicable law and environmental assessment processes, and for drawing simplistic comparisons in the context of a process that is 'intended to be flexible, iterative'.[115]

Large mining projects often reveal divides between grassroots conceptions of the environment that emphasize the strong connections between territory, culture, identity, and social processes on the one hand, and approaches that view the environment primarily as 'natural resources' to be exploited on the other – so long as mining operations deploy 'best practice' environmental management systems to mitigate damage and manage risk. The former may highlight the inherent tensions between core community values and extractive activities and may sustain public advocacy to stop or fundamentally rethink mining projects – as illustrated by the dispute in Santurbán; while the latter may highlight the compatibility of ecological and economic considerations, achieved through the use of best-available technologies and production methods.[116] These divides

[110]The Corporación Colectivo de Abogados Luis Carlos Pérez (CCALCP), available at www.ccalcp.org/.

[111]Comité Santurbán and CCALCP, 'Pronunciamiento de accionantes tutela Santurbán en fase de consulta e iniciativa', 26 May 2019, available at www.ccalcp.org/mediateca/2019-06-07%20Fase%20de%20consulta%20e%20iniciativa-%20pronunciamiento%20accionantes.pdf, especially at 6; interviews with representatives of the CCALCP (Bucaramanga, 11 December 2019), and with members of the Comité Santurbán (Bucaramanga, 11 December 2019).

[112]Interview with a local government official from California (Bucaramanga, 16 December 2019).

[113]See Judgment T-361, *supra* note 35. Interview with an officer of the Humboldt Institute (Bogotá, 9 December 2019).

[114]*William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. The Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability of 17 March 2015.

[115]M. Doelle, 'The Bilcon NAFTA Tribunal: A Clash of Investor Protection and Sustainability-Based Environmental Assessments', in S. D. Berger (ed.), *Key Developments in Environmental Law* (2017), 99, at 120–121.

[116]On the tension between democracy, technocracy, and expertise see J. Pickering, K. Bäckstrand and D. Schlosberg, 'Between Environmental and Ecological Democracy: Theory and Practice at the Democracy- Environment Nexus', (2020) 22(1) *Journal of Environmental Policy & Planning* 1, especially at 8–9.

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ultimately reflect incommensurable values about the environment, and different views of territorial organization, with local residents often expressing concern for their 'sense of place' or 'desire for self-reliance'.[117]

In complex environmental disputes such as that over the Santurbán páramo, different actors advance competing views on how multiple policy objectives should be prioritized or reconciled, and they pull state agencies in different directions, with new evidence, technologies or understandings shifting the balance of considerations over time. In turn, these processes can affect patterns of state conduct that respond, to varying degrees, to competing demands. Environmental decision-making becomes then a highly contested political arena.

The discussion highlights how notions of 'the environment' are complex social constructs. The framing of environmental issues entails specific assumptions, for example about the significance attached to the social embeddedness of ecosystems and to different ecological goods (such as a mountain ecosystem, the water flowing from it, and its influence on the global climate), and about the relationship between technical problems and social processes in land use planning and territorial governance. In the Santurbán dispute, the positions advanced by diverse actors – about the páramo, water, small- and large-scale mining, the place of scientific expertise, and the conduct of public consultations – ultimately reflected different ways to see the environment and its relationship with humans. Inevitably, tribunals choose between these competing values or imaginaries when settling a dispute, even though the choice is rarely explicit in the legal reasoning but rather implicit in background beliefs and institutional incentives. It is implicit in who can bring disputes and how, in how arbitrators define the minimum standard of treatment, in the way tribunals balance competing interests, and in how arbitrators interpret exceptions. These circumstances compound the need to interrogate more deeply how environmental issues are framed in ISDS processes, and how the framing affects the ways in which tribunals apply the law, make sense of contestation, and ultimately render their decision.

4.2 Seeing the environment through the minimum standard of treatment under customary international law

The procedural exclusions and inclusions of ISDS have a bearing on representations of the environment in the arbitral proceedings: as the multi-actor dispute is flattened around the binary proceeding between an investor and a state, an arbitral tribunal's understanding of the environmental issues at play is mediated by the arguments put forward by the two disputing parties, which structurally marginalizes other views about the environment and how to reconcile environmental with socioeconomic interests. It is also mediated by the need for the arbitral tribunal to examine environmental aspects through the prism of the investment protection standards set in the treaty on which the tribunal's jurisdiction is based, and of any environmental exceptions that may be included in the treaty.

In the *Eco Oro* Merits Decision, these aspects emerge in the tribunal's discussion of the minimum standard of treatment (MST) for foreign investment under customary international law, which the Canada-Colombia FTA requires the parties to accord to each other's investments.[118] The arbitral tribunal delivered a split decision on the normative content of this standard,[119] with arbitrator Philippe Sands filing a partially dissenting opinion.[120] More directly relevant to the analysis are the different approaches taken by the majority decision and the partial dissent in applying the MST standard to the complexities of the dispute, particularly as regards the

[117]*Clayton/Bilcon v. Canada*, PCA Case No. 2009- 04, Dissenting Opinion of Donald McRae, 10 March 2015, para. 16.
[118]See Colombia-Canada FTA, *supra* note 6, Art. 805(1).
[119]See *Eco Oro Minerals Corp. v. The Republic of Colombia*, *supra* note 5, paras. 744, 748, 749, 754, 757, 762.
[120]See *Eco Oro Minerals Corp. v. Colombia*, Partial Dissent of Professor Philippe Sands QC, *supra* note 51, para. 8.

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existence of multiple actors, interests and considerations, and the implications of these complexities when construing 'the environment' and assessing the legality of state conduct.

The majority of the tribunal held that Colombia breached the MST standard owing to delays in the páramo delimitation, to uncertainty and confusion, and to inconsistent treatment of Eco Oro by government agencies, particularly those responsible for mining and for environmental protection. Notions of good faith, coherence and consistency in state action featured prominently in the majority's decision. For example, the tribunal majority held that:

> Colombia should have ensured that its various arms took the necessary steps to comply with Colombia's constitutional obligation to protect the páramo such that they acted in parallel and in a coordinated manner with respect to [the mining concession] ... It has failed to act coherently, consistently or definitively in its management of the Santurbán Páramo and in so doing has infringed a sense of fairness, equity and reasonableness and indeed has shown a flagrant disregard for the basic principles of fairness.[121]

While not questioning the environmental considerations per se, this reasoning emphasizes inconsistency of the actions of different state organs, including government agencies and the Constitutional Court, and the effects these inconsistencies had on the investor's legitimate expectations, and on the stability and predictability of the regulatory framework governing the investment. The majority's approach echoes a long line of arbitral jurisprudence that can be traced to the *Tecmed* v. *Mexico* award, which in a similarly complex dispute held that states should be expected to act in a consistent and predictable way in their relations with foreign investors concerning 'the environment'.

Cited with approval by some subsequent investor-state tribunals, the *Tecmed* approach has also been critiqued in the scholarly literature for embodying an unrealistic view of government,[122] in sharp contrast with the insights that the political economy literature provides on the disaggregated nature of the state and the complex factors that drive the action of different sectoral ministries, of government bodies at local and central levels, and of the executive, legislative, and judicial branches of the state. In some respects, the discussion of inconsistencies in state conduct reflects the ways in which investment lawyers make sense of the complexity and contestation that characterize environmental decision-making. Seen through the prism of the legal protections applicable to one actor (or set of actors) involved in the dispute, environmental governance stands as something that states must render 'predictable', to enable investors develop and implement their business plans.

On the other hand, arbitrator Philippe Sands' partial dissent recognizes the difficult trade-offs involved in environmental decisions, particularly in the face of the transitions needed to confront climate change and biodiversity loss.[123] It also appreciates that a degree of inconsistency is part of life in environment-related multi-actor disputes, and argues that the standard of review under international investment law must be a deferential one, with international liability requiring particularly egregious violations. As the partial dissent put it:

> ... tribunals must be sensitive to the difficulties of government decision-making in the face of legitimate objectives that pull in different directions ... As concern about the protection of the environment increases, states are increasingly likely to be confronted with decisions that involve complex trade-offs, making internal government debate – and changes of direction – more likely .... None of this, in my view, is sufficient to itself cast doubt on the

[121]See *Eco Oro Minerals Corp. v. The Republic of Colombia*, *supra* note 5, para. 821.

[122]D. Schneiderman, 'Investing in Democracy? Political Process and International Investment Law', (2010) 60 *University of Toronto law Journal* 909.

[123]See *Eco Oro Minerals Corp. v. Colombia*, Partial Dissent of Professor Philippe Sands QC, *supra* note 51, para. 33.

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> sincerity of the government's stated objectives. These decisions and their consequences are not extraordinary in any sense, but have become routine and the business of government.[124]

Arbitrator Sands' dissent further noted that '[t]he comportment of Colombia may not be perfect' but it also praised 'the obvious diligence with which the Constitutional Court of Colombia addressed matters of considerable complexity'.[125] Viewed in this light, the series of legislative and regulatory acts, the litigation before the Constitutional Court, and the Court's request for a new delimitation were deemed a manifestation of the rule of law rather than its negation.[126]

At root, the majority decision and the partial dissent exemplify different approaches to making sense of 'the realities of governmental decision-making in legitimate domains',[127] of the extent to which investment dispute settlement can cater for the plurality of interests and perspectives that characterize investment processes, and ultimately of 'the environment' as a public policy issue. While the majority decision places investor expectations at the centre of regulatory frameworks governing foreign investment, the partial dissent highlights the inherent instability of ecological parameters themselves, and thus the inevitable evolution in the balancing acts of environmental decision-making, particularly in the face of rapid environmental change and an impending climate disaster, and of contestation over competing views about the environment and optimal policy responses.

Value judgments are at play: in multi-actor disputes, focusing on stability and predictability for one actor, and on that actor's 'legitimate expectations', obscures other patterns of stability/instability, and other sets of expectations about how governments should act and address tensions between competing expectations. The different approaches also have practical implications: if investor expectations are at centre stage, environmental concerns are inherently subordinated, or assumed to be necessarily consistent with investment protection. As the tribunal's majority noted, the Preamble to the Canada-Colombia FTA states that its object and purpose is to ensure a predictable commercial framework for business planning and investment in a manner that is consistent with environmental protection. And in its non-disputing party submission, the government of Canada highlighted that 'the Parties [to the FTA] did not view their investment obligations as being at odds with the protection of … their environment and human rights obligations', and that 'trade and environment policies are mutually supportive…'.[128] The majority concluded that 'neither environmental protection nor investment protection is subservient to the other, they must co-exist in a mutually beneficial manner'.[129]

In practice, however, the *Eco Oro* dispute provides abundant evidence of the tensions and trade-offs that can arise in real-life investment contexts between commercial and environmental imperatives, and between social actors that are differently positioned in relation to those imperatives. When applied to these circumstances, the assumed mutual supportiveness of investment and environmental goals reflects a particular conception of the environment, one in which we should care about the environment but we can continue extracting from it, provided that rigorous administrative processes and effective management systems are in place to mitigate damage and manage risk. In this approach, for example, the unsustainable patterns of consumption that drive extractive activities are not fundamentally questioned. The result is a hollowing out of environmental objectives in general, and of the community and environmental concerns advanced by diverse local actors not directly represented in the dispute – even if 'the environment' is considered at length in the arbitral decision.

[124]Ibid., paras. 28–29.
[125]Ibid., para. 23.
[126]Ibid.
[127]Ibid., para 30.
[128]Cited in *Eco Oro Minerals Corp. v. The Republic of Colombia*, *supra* note 5, para. 376.
[129]Ibid., para. 828.

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This outcome was compounded by the majority's application of the environmental exception clause contained in the Canada-Colombia FTA. Article 2201(3) of the treaty clarifies that, subject to certain requirements, 'nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing [environmental] measures'.[130] In a sparsely argued section of the decision, the tribunal's majority held that this exception clause does not rule out the state's duty to compensate the claimant – it merely permits states to take action provided certain requirements are satisfied, which is itself deemed consistent with payment of some form of compensation.[131]

As compensation is the main remedy for breaches of investment treaties and investment chapters in FTAs, this formalistic interpretation deprives the environmental exception of practical relevance in an ISDS context.[132] In addition, the interpretive approach does not engage with questions of regulatory chill, and the concern that large compensation amounts can constrain environmental decision-making in practice, even without formally prohibiting it. Through the leverage that an entitlement to large amounts of compensation can offer to foreign investors, ISDS can have spillover effects on the wider range of actors involved in the underlying dispute, and on these actors' ability to advance their vision of the environment and the territory.

In the dispute over Santurbán, this aspect emerged in the form of concerns, among environmental activists, about whether Colombian authorities were delaying decisions on other proposed mining projects located in or near the paramo, in order to first consider the outcomes of the *Eco Oro* arbitration; and whether arbitrations about the discontinued projects could make it more difficult for the activists to persuade public authorities to reject the new applications. When the Comité Santurbán disseminated on social media a government letter indicating that the investment treaty most directly relevant to a proposed mining project was yet to come into force, it received more than 1,000 likes and reposts in less than 24 hours.[133] 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. These considerations compound the need to (re)consider regulatory chill not only with regards to relations between an investor and the state, but as a complex multi-actor phenomenon as well.

Alternative framings of environmental issues can outline a different way to piece together the multiple considerations at play. At a time when ecological imperatives require systemic action to reorient economies towards more sustainable trajectories, certain forms of regulatory stability can lead to path dependency and ultimately a climate disaster. In this context, protecting the environment, and reconciling competing interests over long investment cycles, requires a dynamic and fact-sensitive approach that considers the rule of law as a quality of process rather than a freezing of substantive rights or expectations. In the words of arbitrator Philippe Sands:

> In the age of climate change and significant loss of biological diversity, it is clear that society finds itself in a state of transition. The law – including international law – must take account of that state of transition, which gives rise to numerous uncertainties.[134]

[130]Art. 2201(3) of the FTA: '(3) For the purposes of Chapter Eight (Investment), subject to the requirement that such measures are not applied in a manner that constitute arbitrary or unjustifiable discrimination between investment or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:

(a) To protect human, animal or plant life or health, which the Parties understand to include environmental measures necessary to protect human, animal or plant life and health;

(b) To ensure compliance with laws and regulations that are not inconsistent with this Agreement; or

(c) For the conservation of living or non-living exhaustible natural resources.'

[131]See *Eco Oro Minerals Corp. v. The Republic of Colombia*, *supra* note 5, paras. 822–837.

[132]See also J. Benton Heath, 'Eco Oro and the Twilight of Policy Exceptionalism', *Investment Treaty News*, 20 December 2021, available at www.iisd.org/itn/en/2021/12/20/eco-oro-and-the-twilight-of-policy-exceptionalism/.

[133]Tweet available at twitter.com/ComiteSanturban/status/1275092867975954434 (22 June 2020).

[134]See *Eco Oro Minerals Corp. v. Colombia*, Partial Dissent of Professor Philippe Sands QC, *supra* note 51, para. 33.

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Though not determinative of the outcomes of the *Eco Oro* dispute, this partial dissent suggests that a different approach to understanding the interplay of environmental and economic issues would be viable within the existing parameters of investment treaties and ISDS. At the same time, even this approach leaves open questions as regards multi-actor disputes where environmental action flows, at least in part, not from scientific findings or a global consensus but from 'core community values' concerning ways to reconcile human activity with environmental considerations.

Beyond the global environmental concerns cited in the partial dissent, such as climate change and biodiversity loss, environmental advocacy in Santurbán was steeped in territorial processes that highlighted the connections between the páramo and the culture, history, identity, and human rights of the people living in and around it. As discussed, public advocacy in Bucaramanga centred heavily around the right to water, and the *amicus curiae* application submitted by the Comité Santurbán and other non-governmental organizations highlighted the connections between human rights and the environment; while environmental concerns expressed in California emphasized the intimate connection between the páramo and local culture, history, and identity. These interdependences between people and ecosystems highlight questions of territorial governance that escape the confines of environmental problems defined in primarily technocratic terms. Colombia's Constitutional Court recognized this challenge, in that its decision T-361 required the public administration to enhance the social dimension of the páramo delimitation process. Importantly, the judges did not venture to resolve the tensions between the competing territorial imaginaries; instead, they required the government to use participatory mechanisms for discussion and decision-making.

Ultimately, the Merits Decision highlights the limits of ISDS in adequately reconciling incommensurable values about the environment and humans' relation to it. This issue connects closely to the procedural inclusions and exclusions of ISDS, and to questions about whose perspectives frame the dispute settlement process. While all legal proceedings – including in domestic legal systems – entail some degree of reductivism relative to complex social realities, the dispute over the Santurbán páramo suggests that domestic courts, such as Colombia's Constitutional Court, can create spaces to bring together multiple perspectives, owing to a wider jurisdictional remit that is not confined to investment protection matters and that can encompass a broader range of public and private interests. Domestic courts can also call on other branches of government to use non-adversarial and participatory procedures to resolve certain issues. On the other hand, the primary emphasis on investment protection in international investment treaties, the binary structure of investor-state arbitration and the narrow entry points for third parties to participate in the proceedings all tend to limit the field of inquiry as regards the environment in the context of ISDS, compressing complex sets of environmental considerations and marginalizing certain perspectives not only on how those considerations should be addressed but also on the way the environment itself is conceived of.

5. Conclusion

Discussions about international investment law often neglect the socio-political aspects of foreign investment projects. Positions for or against the use of investment treaties and ISDS to resolve investment disputes typically focus on the contours of states' right to regulate or the arbitrators' aptitude to resolve public law cases. This sociolegal study of an investment arbitration brought neglected aspects to the foreground. Insofar as international investment treaties are primarily centred on the protection of one particular set of interests, and on the relationship between two particular actors, they flatten complex multi-actor and multi-layered environmental disputes, they prioritize certain rights and expectations over others, and they create tensions with pluralistic decision-making in environmental matters – potentially with adverse consequences for the ability of other actors to advance their own vision of the environment and of public policy.

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The *Eco Oro* decision suggests that the problem with ISDS proceedings is not that arbitral tribunals necessarily fail to consider environmental issues; but that they re-present those issues through the prism imposed by their own 'metric', skewing parameters on the basis of international arrangements that are explicitly designed to protect one set of interests. These re-presentations are primarily shaped by the structure of investment treaties and ISDS, which is centred on investment protection and the investor-state dyad; by the competing arguments developed by the claimant and the respondent; and ultimately by the analysis of the tribunal. This process of re-presentation can obscure the often incommensurable values at stake, such as between competing visions of what 'the environment' is, and it frames as 'inconsistencies' a state's attempts to govern the environment or organize the territory. As this re-presenting influences the outcome of the legal dispute, even a lengthy discussion of environmental issues in the arbitral decision does not, in itself, conclusively indicate that those issues have been adequately addressed.

These dimensions are difficult to track just by analysing the awards and even the official documentation produced through arbitral proceedings. Rather, shedding light on the 'invisibilities' of investor-state arbitration requires going beyond the official papers, and taking a deeper dive through empirically grounded case studies. This raises methodological questions as well as opportunities for the study of international law as it operates in practice, highlighting the benefit of sociolegal approaches that can help bridge the re-presentation gaps between legal proceedings and social realities. In policy terms, the findings indicate that the prevalent focus on settling disputes between investors and states fails to deliver broadly acceptable ways forward in complex disputes that interrogate internationally recognized policy priorities such as combating climate change and biodiversity loss, which inherently require reconciling multiple and competing expectations.

In some respects, the *Eco Oro* decision highlights that the ways in which arbitral tribunals interpret the treaties matters a great deal: formalistic interpretations of environmental exceptions can deprive them of practical significance in an ISDS context; while arbitrator Philippe Sands' partial dissent exemplifies an approach for considering some of the complexities that characterize multi-actor disputes even within the parameters of existing international investment law. At the same time, the case study illustrates how structural features of international investment law ultimately limit the tribunals' room for action. The treaties' primary emphasis on investment protection and the binary structure of investor-state arbitration fundamentally shape the legal dispute, in terms of the rules the tribunals must apply, the procedures they must follow, and the legal arguments they must engage with. These structural features exacerbate the limitations that any adversarial dispute settlement mechanism faces when addressing claims that involve incommensurable values.

Tackling these structural factors requires systemic reform of investment treaties and ISDS, moving away from the predominant emphasis on investment protection, towards a more integrated approach that considers the governance of foreign investment in more holistic terms. This may involve, for example, terminating or deeply reforming old treaties to devise new international instruments that can recognize and protect a wider range of interests in investment processes; enhancing the articulation between international investment law and other fields of international law, including on human rights and the environment; and developing new systems to address issues that arise in long-term investment relations, through mechanisms that facilitate ongoing participation and co-operation as much as dispute settlement and that do justice to the complexities of investment realities and disputes.

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