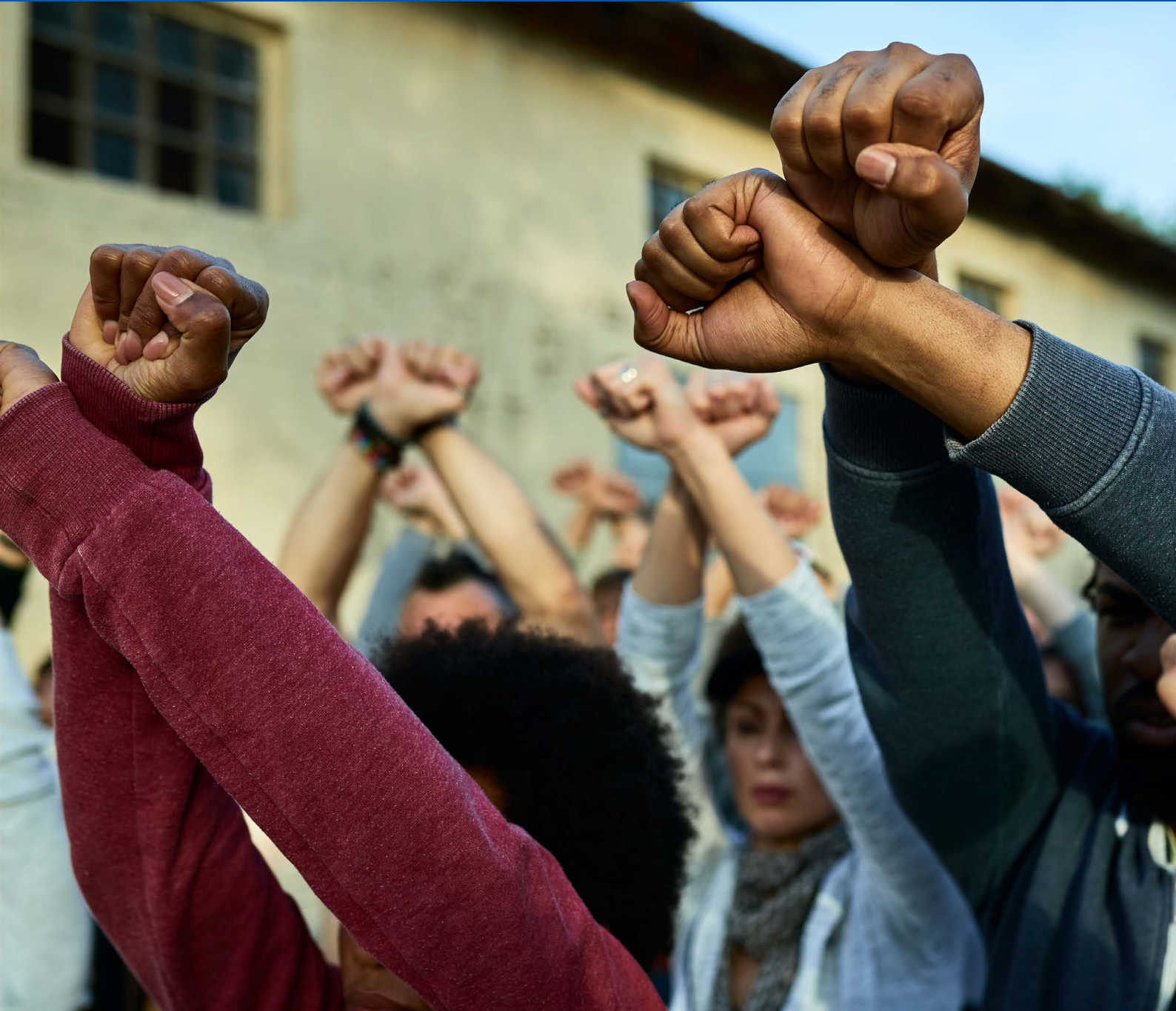




**Columbia Center**  
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AND COLUMBIA CLIMATE SCHOOL



## **How the International Investment Law Regime Undermines Access to Justice for Investment-Affected Stakeholders**

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with contributions by

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# International Investment Law Regime

For over a decade now, the international investment law regime, which includes investment treaties and their central pillar, the investor-state dispute settlement (ISDS) mechanism, has been facing sustained calls for reform. These have largely centered on the concerns regarding the high costs of ISDS, the restrictions placed by the investment treaty regime on the right—or duty—of states to regulate in the public interest, and the questionable benefits arising from these treaties in the first place. Several states have taken proactive measures: some have revised investment treaty standards to better protect their regulatory powers;<sup>1</sup> others have introduced new approaches to investment promotion, protection, and dispute settlement that more closely align with their sustainable development objectives;<sup>2</sup> and some states have withdrawn from the investment treaty regime altogether.<sup>3</sup> In addition, reforms to the regime are taking place at the multilateral level within the United Nations Commission on International Trade Law (UNCITRAL),<sup>4</sup> the Organization for Economic Cooperation and Development (OECD),<sup>5</sup> the World Trade Organization (WTO),<sup>6</sup> and through other regional fora.<sup>7</sup>

Despite being the subject of extensive and prolonged public debate for several years, these reforms have continued to reinforce the binary structure of the regime. This structure restricts the focus of investment relations solely to investors and host states, disregarding the actual or potential impacts of investment projects, relations, disputes and awards on the rights and interests of other impacted stakeholders. In particular, large-scale, land-based investment projects involve a broad network of people and relations, and often intersect with local communities whose social identity, way of life, and livelihoods are intimately

- 1 See Crina Baltag, Riddhi Joshi and Kabir Duggal, “Recent Trends in Investment Arbitration on the Right to Regulate, Environment, Health and Corporate Social Responsibility: Too Much or Too Little?” 38(2) *ICSID Review* (2023) 381; Catharine Titi, “The Right to Regulate,” in Makane Moïse Mbengue, Stefanie Schacherer (eds.), *Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)*, 15 Studies in European Economic Law and Regulation (Springer, Cham, 2019) 159; Naimeh Masumy and Carrie Shu Shang, “Analyzing the Anatomy of Innovative Investment Treaty Drafting: The Quest to Safeguard the Right to Regulate,” 2023(1) *Journal of Dispute Resolution* (2023).
- 2 See Markus Gehring and Marios Tokas, “Synergies and Approaches to Climate Change in International Investment Agreements: Comparative Analysis of Investment Liberalization and Investment Protection Provisions in European Union Agreements,” 23 *The Journal of World Investment & Trade* (2022) 778; UNCTAD, “Investment Facilitation in International Investment Agreements: Trends and Policy Options,” *IIA Issues Note*, Issue 3 (September 2023), [https://unctad.org/system/files/official-document/diaepcbinf2023d5\\_en.pdf](https://unctad.org/system/files/official-document/diaepcbinf2023d5_en.pdf); UNCTAD, “Recent Developments in the IIA Regime: Accelerating IIA Reform,” *IIA Issues Note*, Issue 3 (August 2021), [https://unctad.org/system/files/official-document/diaepcbinf2021d6\\_en.pdf](https://unctad.org/system/files/official-document/diaepcbinf2021d6_en.pdf).
- 3 Public Citizen, “Termination of Bilateral Investment Treaties Has Not Negatively Affected Countries’ Foreign Direct Investment Inflows,” *Public Citizen Research Brief* (16 April 2018), [https://www.citizen.org/wp-content/uploads/pcgtw\\_fdi-inflows-from-bit-termination\\_1.pdf](https://www.citizen.org/wp-content/uploads/pcgtw_fdi-inflows-from-bit-termination_1.pdf); Cecilia Olivet, “Why did Ecuador terminate all its Bilateral investment treaties?,” *TNI* (25 May 2017), <https://www.tni.org/en/article/why-did-ecuador-terminate-all-its-bilateral-investment-treaties>; Mohammad Mossallam, “Process Matters: South Africa’s Experience Exiting its BITs,” *The Global Economic Governance*, Working Paper 2015/97 (January 2015), [https://www.geg.ox.ac.uk/sites/default/files/GEG%20WP\\_97%20Process%20matters%20-%20South%20Africa%20experience%20exiting%20its%20BITs%20Mohammad%20Mossallam.pdf](https://www.geg.ox.ac.uk/sites/default/files/GEG%20WP_97%20Process%20matters%20-%20South%20Africa%20experience%20exiting%20its%20BITs%20Mohammad%20Mossallam.pdf).
- 4 See “UNCITRAL Working Group III: Investor-State Dispute Settlement Reform,” United Nations Commission On International Trade Law, [https://unctral.un.org/en/working\\_groups/3/investor-state](https://unctral.un.org/en/working_groups/3/investor-state).
- 5 See OECD, *The Future of Investment Treaties*, <https://www.oecd.org/investment/investment-policy/investment-treaties.htm>.
- 6 See “Members Hold Robust Discussions on Implementing Trade Facilitation Agreement,” World Trade Organization, June 16, 2023, [https://www.wto.org/english/news\\_e/news23\\_e/fac\\_16jun23\\_e.htm](https://www.wto.org/english/news_e/news23_e/fac_16jun23_e.htm).
- 7 Craig D. Gaver and Yusuf Kumtepe, “Checking in on the OIC Investment Agreement: New Arbitrations, But Slow Progress on Creating A Permanent Dispute Settlement Mechanism,” *Kluwer Arbitration Blog* (17 March 2023), <https://arbitrationblog.kluwerarbitration.com/2023/03/17/checking-in-on-the-oic-investment-agreement-new-arbitrations-but-slow-progress-on-creating-a-permanent-dispute-settlement-mechanism/>; Danish, Hamed El-Kady, Makane Moïse Mbengue, Suzy H. Nikiéma and Daniel Uribe, “The Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area: What’s in it and What’s Next for the Continent?,” *ISD Investment Treaty News* (1 July 2023), <https://www.iisd.org/itn/en/2023/07/01/the-protocol-on-investment-to-the-agreement-establishing-the-african-continental-free-trade-area-whats-in-it-and-whats-next-for-the-continent/>.

connected to the land and natural resources at stake.<sup>8</sup> It is this category of investments, which result in the creation of a new “project” with a large land footprint, that is the topic of this paper. The consequences of these types of investments can be significant, as they often lead to land expropriations, negative human health consequences, water pollution, air contamination, deforestation, or shifts in migration patterns within the area,<sup>9</sup> thereby impacting the rights and interests of people in these communities and the environment more broadly.

From the perspective of investment-affected communities,<sup>10</sup> foreign investments arise out of a partnership between the investor and the state.<sup>11</sup> After all, it is the government that facilitates the establishment and development of these very projects. Meanwhile, these impacted people are often not consulted or involved in project establishment or development, and many may not even know that a project has been approved until after it has been approved or once it is operational. According to scholarship in this area,<sup>12</sup> these affected individuals and communities often find themselves in a situation where they must assert their rights against the negative impacts of such projects, or resist these projects by mobilizing, protesting, or resorting to legal (and non-legal) measures against the investor and/or the state. This dynamic is frequently reflected in investment disputes, in which foreign investors challenge measures that state agencies have taken in response to, *inter alia*, local opposition to investments, in an attempt to safeguard their economic interests.<sup>13</sup>

However, even though the underlying investments, government measures, ISDS disputes, and any resulting awards often implicate local people and communities in profound ways, these stakeholders find it difficult, if not impossible, to assert their rights and have their concerns addressed in investment policy making, in the establishment or continuation of investment projects, and in any ensuing investor-state disputes that may arise under investment treaties (or investment contracts). In fact, the voices of investment-affected people are effectively, and in most cases, actually excluded from the “institutional logic” of the investment treaty regime.<sup>14</sup> This is because of the narrow scope of the applicable treaties and the limited consideration given to human rights and domestic legal frameworks in ISDS proceedings. In addition, these communities often encounter legal and practical obstacles

8 Lorenzo Cotula and Nicolás Perrone, “Reforming Investor-State Dispute Settlement: What About Third-Party Rights?” (Feb 2019), 2, <http://pubs.iied.org/17638IIED> [Cotula and Perrone, 2019].

9 Cotula and Perrone, 2019, 2.

10 We use the term “investment-affected communities,” “investment-affected people,” “investment-affected stakeholders,” and “investment-affected rights holders” interchangeably, to refer to individuals and/or communities who are impacted by an ISDS claim or the investment underlying the ISDS claim. The concept of such a “group” is a paradigm that makes sense only in some contexts, i.e. where a whole community is impacted or transformed in some important way by an investment. However, we acknowledge that there are many situations in which impacted communities are sharply divided and may include “winners” and “losers” in these large-scale investment scenarios, and thus making a “cohesive” group an unlikely situation.

11 Cotula and Perrone, 2019, 2.

12 Nicolás Perrone, “The International Investment Regime and Local Populations: Are the Weakest Voices Unheard?” 7(3) *Transnational Legal Theory* (2016) 383 [Perrone, 2016]; Lorenzo Cotula, “(Dis)integration in Global Resource Governance: Extractivism, Human Rights, and Investment Treaties,” 23 *Journal of International Economic Law* (2020) 431; CCSI and UN Working Group, “Impacts of the International Investment Regime on Access to Justice,” Roundtable Outcome Paper (September 2018), <https://ccsi.columbia.edu/sites/default/files/content/docs/events/CCSI-and-UNWGBHR-International-Investment-Regime-and-Access-to-Justice-Outcome-Document-Final.pdf> [CCSI and UN WG Outcome Paper, 2018]; Kaitlin Y. Cordes, Lise Johnson, and Sam Szoke-Burke, “Land Deal Dilemmas: Grievances, Human Rights, and Investor Protections” (March 2016), [https://ccsi.columbia.edu/sites/default/files/content/docs/our%20focus/extractive%20industries/CCSI\\_Land-deal-dilemmas.pdf](https://ccsi.columbia.edu/sites/default/files/content/docs/our%20focus/extractive%20industries/CCSI_Land-deal-dilemmas.pdf) [Cordes et al., 2016]; Jesse Coleman, Kaitlin Y. Cordes, and Lise Johnson, “Human Rights Law and the Investment Treaty Regime,” in Surya Deva and David Birchall (eds) *Research Handbook on Human Rights and Business* (2020) 290.

13 Cotula and Perrone, 2019, 2; Nicolás M. Perrone, “Local Communities and ISDS,” in Nicolás M. Perrone (ed) *Investment Treaties and the Legal Imagination: How Foreign Investors Play By Their Own Rules* (Oxford, Oxford University Press, 2021) 172 [Perrone, 2021]; Ibrinke T. Odumosu-Ayanu, “Local Communities, Indigenous Peoples, and Reform/Redefinition of International Investment Law,” *Journal of World Investment & Trade*, Vol 24 (2023) 792.

14 David Schneiderman, “Local resistance: at the margins of investment law” 19(6) *Globalizations* (2022) 897, 899 [Schneiderman, 2022].

when seeking to protect their rights and interests under other instruments and fora, like international human rights law, or domestic and regional judicial systems. This is because victories won by investment-affected communities at these other fora are often pyrrhic since they may ultimately be undermined by the investment treaty regime if or when the investor succeeds in its ISDS claim.

It is this local dimension, which has received little attention in public debate and action on reform at the global, regional, and national levels, that is the focus of this paper. We draw on a group of 13 investor-state claims (and two potential claims)<sup>15</sup> that relate to the rights and interests of impacted communities and identify ways in which their access to justice is undermined, hampered or denied entirely by the ISDS mechanism.<sup>16</sup> Before describing the ways that access to justice is undermined or denied in these ISDS cases, we first define the term “access to justice” below.

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15 The cases included in this report are: *Bear Creek v. Peru*; *Burlington Resources v. Ecuador*; *Chevron v. Ecuador*; *Copper Mesa v. Ecuador*; *Eco Oro v. Colombia*; *Gabriel Resources v. Romania*; *Infinito Gold v. Costa Rica*; *KCA v. Guatemala*; *Kingsgate Consolidated v. Thailand*; *Pac Rim Cayman v. El Salvador*; *Renco v. Perú*; *South American Silver v. Bolivia*; and *von Pezold v. Zimbabwe*. Two projects that we reference—the *Marlin Mine* in Guatemala and *Newcrest Mining* in Indonesia—are not ISDS cases, but are important for the regulatory chill analysis near the end of the report.

16 This brief has benefited by extensive work and framing by Jesse Coleman, Lead Researcher at CCSI, over the past several years. The categories included here have served as the basis for subsequent work, including in CCSI and UN WG Outcome Paper, 2018.

# What is Access to Justice?

Several terms are used in international human rights instruments and in literature on business and human rights that relate to access to justice.<sup>17</sup> In the most narrow sense, access to justice enables individuals to protect themselves against violations of their rights or interests by accessing a dispute resolution body to obtain an effective remedy if it is found that their rights have been infringed.<sup>18</sup> Access to justice is therefore both a process, i.e., the right of access to an effective remedy, and a goal, i.e., the remedy will necessarily result in justice being served.<sup>19</sup>

The right of access to an effective remedy is a core tenet in international and regional human rights law, and can apply to individuals and, in certain instances, groups of individuals or communities.<sup>20</sup> To realize this right, the bearers of the duties and responsibilities concerning this right—i.e., states and non-state actors, respectively—must provide meaningful access to appropriate and effective remedial mechanisms to such individuals and communities. These mechanisms should address various barriers, including legal, practical, informational, and others, that may hinder individuals and communities from accessing remedies and safeguarding their rights and interests.<sup>21</sup> For instance, the lack of critical information concerning various aspects of state or corporate conduct or the impact of such conduct on local communities and the environment can greatly undermine the right of access to remedy.<sup>22</sup> Thus, the mere access to remedial mechanisms is insufficient when other such barriers exist.

Coupled with the right of access to an effective remedy is the right to an effective outcome at the end of the remedial process.<sup>23</sup> Although the effectiveness of a remedial mechanism is closely linked to achieving an effective outcome, these are distinct elements because an effective process may not always guarantee an effective outcome.<sup>24</sup> Rights holders must therefore have access to effective remedial mechanisms that are capable of delivering effective outcomes.

17 Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, UN Doc A/72/162 (18 July 2017), para 16 [Report of WG, 2017].

18 “Handbook on European Law Relating to Access to Justice,” *European Union Agency for Fundamental Rights and Council of Europe* (2016), 16, [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-ecthr-2016-handbook-on-access-to-justice\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-ecthr-2016-handbook-on-access-to-justice_en.pdf).

19 Report of WG, 2017, para 16.

20 The Universal Declaration of Human Rights (article 8) and the International Covenant on Civil and Political Rights (article 2(3)) codify the “right to an effective remedy,” whereas other international treaties, like the Convention on the Rights of Persons with Disabilities (article 13), mention “effective access to justice.” In addition, under the United Nations Guiding Principles (UNGPs), victims of human rights abuse have a right to access effective remedies.

21 CCSI, “Enabling a Just Transition: Protecting Human Rights in Renewable Energy Projects” (April 2023), 16, [https://ccsi.columbia.edu/sites/default/files/content/publications/final\\_RenewablesAndHumanRights%20%28Brief%29.pdf](https://ccsi.columbia.edu/sites/default/files/content/publications/final_RenewablesAndHumanRights%20%28Brief%29.pdf).

22 Nicola Jägers, “Access to Effective Remedy: The Role of Information,” in Surya Deva and David Birchall (eds), *Research Handbook on Human Rights and Business* (Cheltenham, Edward Elgar Publishing Ltd, 2020) 403, 404 [Jägers, 2020] (“Under international human rights law and under the United Nations Guiding Principles (UNGPs), victims of human rights abuse have a right to effective remedies. Yet victims of abuse involving companies are often unable to secure access to effective remedies. A critical factor is the lack of access to human rights-relevant information. In practice, there are huge power and information disparities presenting formidable obstacles for affected individuals and communities seeking remedy after negative corporate impacts on human rights. Lack of information on corporate activities and impacts makes it difficult for victims to pursue a robust legal claim. Such information is either absent or in the hands of the corporate defendant. In addition, the lack of information on complex, opaque legal and operational structures can make it difficult for victims of corporate human rights abuse to start legal proceedings against a multinational corporation. Claimants face a challenge when corporations do not make this information available and/or the government institution responsible for providing public information is uncooperative.”). With respect to information concerning environmental matters, individuals have a right to access information according to the Aarhus Convention; see “Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters” (1998), [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg\\_no=XXVII-13&chapter=27](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=XXVII-13&chapter=27).

23 Report of WG, 2017, para 15.

24 Report of WG, 2017, paras 14-15.

In a broader sense, access to justice is about individuals and communities being able to proactively assert and enjoy their rights and interests. In this sense, access to justice extends beyond access to formal legal mechanisms and effective outcomes offered for a specific set of human rights violations.<sup>25</sup> It addresses more extensive issues of social, economic, and political injustices that can undermine a wide array of human rights. Access to justice, therefore, includes a meaningful opportunity to be heard, secure one's rights and obtain the law's protection.

Within the investment treaty regime space, access to justice in a broad sense can include access to pre-investment information or meaningful consultation concerning the approval of a project or the outcome of human rights and environmental impact assessments of a project. This information may be critical for those seeking to prevent environmental destruction or human rights abuses related to the operation of that project.<sup>26</sup> Access to justice can also include the right of such communities to meaningfully participate in disputes and processes in which their rights and interests are at stake. When these rights holders are not involved, allowed, or able to participate in a meaningful way, they have the right to advance their cause through alternative strategies, which is also an element of accessing justice. Such strategies may include extra-institutional strategies, such as disruptive action through rallies, strikes, or civil disobedience, or political opportunity strategies, such as lobbying efforts to drive legislative reforms.<sup>27</sup> Relatedly, when such stakeholders resort to alternative strategies, access to justice also includes the right not to be threatened, violated, or repressed as a result of their dissent or dissatisfaction of the status quo. In these ways, achieving access to justice necessitates more fundamental changes within the social, economic, or political fabric of domestic and international structures and practices, that may go beyond investment treaties, but that may still be relevant to ISDS tribunals and awards.

In this paper, we look at how these various aspects of access to justice for investment-affected communities are undermined or denied by the ISDS mechanism within the investment treaty regime.

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<sup>25</sup> Report of WG, 2017, para 16.

<sup>26</sup> Jägers, 2020, 405.

<sup>27</sup> Ladan Mehranvar, "Constructing and Contesting Hegemony: Counter-Hegemonic Resistance to the International Investment Law Regime," *unpublished LLM thesis, University of Toronto* (2009), 46.

# How the International Investment Treaty Regime Undermines Access to Justice for Communities

There are multiple ways in which investment-affected rights holders' access to justice can be undermined, hampered, or completely denied within the investment treaty regime, and in particular, the ISDS mechanism. These include those instances in which (1) investment tribunals favor the laws that protect investors' economic interests over the laws and rules that protect human rights or community interests; (2) the regime denies or limits the participation of investment-affected communities and organizations, even in the limited *amicus curiae* role they may play in ISDS proceedings; (3) ISDS awards either directly or effectively undermine legal outcomes obtained by local communities or organizations in other fora; (4) investment tribunals minimize or gloss over the violence and repression created or amplified by foreign investors or host states toward such communities and individuals in their deliberations; and (5) an ISDS claim, or the threat of a claim, can be used by foreign investors to unduly restrict legitimate domestic regulation in host countries. Quite often these various ways in which justice is denied or undermined are combined in the same case or dispute, which then exacerbate the injustice endured by those individuals and communities impacted by such investments.

## ***1. Tribunals gloss over the lack of meaningful consultation and participation of investment-affected communities***

Investment-affected communities often face barriers accessing justice even *before* the establishment of an investment project. Large-scale investment projects—whether in agriculture, extractive industries, forestry, or renewable energy—are often negotiated between host governments and investor companies, without the presence or meaningful participation of the people who risk being affected (adversely or not) by such projects. The obligation of a state to guarantee meaningful engagement and participation of investment-affected communities with regard to development policies and projects becomes ever more drastic when impacted people's lives and livelihoods and the environment are at stake.<sup>28</sup> Indeed, the Aarhus Convention,<sup>29</sup> the 1992 Rio Declaration on Environment

<sup>28</sup> Carla García Zendejas and Layla Hughes, "Submission to the Office of the United Nations High Commissioner for Human Rights on the Draft Guidelines on Effective Implementation of the Right to Participate in Public Affairs by the Center for International Environmental Law," CIEL (11 February 2018), 2, <https://www.ohchr.org/sites/default/files/Documents/Issues/EqualParticipation/DraftGuidelines/CIEL.pdf>.

<sup>29</sup> The Aarhus Convention is a multilateral environmental treaty that is ratified by 47 states throughout Europe and Central Asia; see "Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters" (1998), [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XXVII-13&chapter=27](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27).

and Development,<sup>30</sup> and the Escazú Agreement,<sup>31</sup> all establish the fundamental right of individuals to participate in decision-making processes that affect their lives and the environment (see Box below). This commitment to public participation is complemented by two additional pillars within these agreements: the right to access information and the right to access justice. The latter pillar not only reinforces the importance of the first two pillars by allowing the public to access justice when the two other rights are infringed, but also empowers the public to challenge government decisions related to environmental issues.<sup>32</sup>

In land-based and natural resource investment projects in particular, relevant requirements for meaningful participation of—or consultations with—affected communities are often not satisfied. Outside of the three agreements already mentioned, these requirements may also be included in environmental and social impact assessment (ESIA) processes, in relation to the right to free, prior and informed consent (FPIC)<sup>33</sup> or some iteration of FPIC under international or domestic law, or under industry or finance-related standards. This situation becomes especially concerning when the underlying investment agreement grants the investor company rights to lands or resources to which local communities have legitimate claims.<sup>34</sup>

There are also practical reasons for why access to information and a right to meaningful participation is important. By informing and engaging communities from the earliest feasible point in a project’s conceptualization, delays can be minimized, consensus can be built, expectations can be better managed and aligned, and the community’s support for the project to operate can be obtained.<sup>35</sup>

30 “Rio Declaration on Environment and Development,” A/CONF.151/26 (Vol. I) (12 August 1992), [https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_CONF.151\\_26\\_Vol.I\\_Declaration.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf) (Principle 10 establishes the following: “Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”). The Rio Declaration thus identifies three pillars of public participation in environmental matters: access to information, access to participate in decision-making processes, and access to justice.

31 “Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean” (4 March 2018), <https://www.cepal.org/en/subsidiary-bodies/regional-agreement-access-information-public-participation-and-justice/text-regional-agreement>.

32 Aarhus Convention, “Access to Justice” (1998), <https://unece.org/environment-policy/public-participation/access-to-justice>.

33 Free, Prior, and Informed Consent (FPIC) is a right of Indigenous and Tribal Peoples under international and regional law, including the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), but also binding instruments such as the International Labour Organization (ILO) Convention 169 (article 6) and the Aarhus Convention (article 6). The right has been extended to project-affected communities who do not identify as Indigenous in certain cases, and good practice (and industry standards) increasingly apply FPIC to all communities affected by large-scale projects; for instance, through the opinion of legal bodies such as the International Council of Mining and Metals (ICMM) and the United Nations Guiding Principles on Business and Human Rights. Domestic laws in certain African (e.g. Liberia and Sierra Leone) and Latin American (e.g. Guatemala, Peru) countries also require FPIC beyond Indigenous Peoples. For more on FPIC, see CCSI, “Enabling a just transition: protecting human rights in renewable energy projects” (April 2023), box 4, [https://ccsi.columbia.edu/sites/default/files/content/docs/publications/final\\_RenewablesAndHumanRights%20%28Brief%29.pdf](https://ccsi.columbia.edu/sites/default/files/content/docs/publications/final_RenewablesAndHumanRights%20%28Brief%29.pdf).

34 Sam Szoke-Burke, and Kaitlin Y. Cordes, “Mechanisms for Consultation and Free, Prior and Informed Consent in the Negotiation of Investment Contracts,” 41(1) *Northwestern Journal on International Law & Business* (2020) 49, 50 [Szoke-Burke and Cordes, 2020]. See also Cordes et al., 2016, 12-19.

35 S. James Anaya and Sergio Puig, “Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples” 67(4) *The University of Toronto Law Journal* (2017) 435.

## WHAT IS MEANINGFUL PARTICIPATION?

In practice, a meaningful participatory process involves informing and consulting with affected communities, obtaining their FPIC when or if applicable, and giving them the opportunity to participate and influence decision-making processes before any permits are granted or investment contracts are negotiated and signed. This goes beyond passively transferring information or having general discussions about proposed projects with impacted communities as part of a presentation, for instance. It involves allocating sufficient time and opportunities for community perspectives to be integrated into a culturally-appropriate decision-making process regarding the proposed project and for the execution of that project.<sup>36</sup> FPIC, in particular, recognizes the right of Indigenous Peoples to have autonomy and sovereignty over their lands and resources.<sup>37</sup> This includes the right to reject the establishment of an investment project. Meaningful participation of investment-impacted communities should thus include access to relevant information, such that they are able to understand it, the ability to influence project proposals, and to engage with relevant stakeholders in the development, execution, and continuation of an investment project.<sup>38</sup>

According to the language in most—if not all—investment treaties, arbitral tribunals are required to apply the law of the host state and any applicable rules of international law, to address the issues in the ISDS dispute.<sup>39</sup> Thus, even though the legal requirements for community consultation or participation, access to information, or the requirement of FPIC, is not included in investment treaty law, investment tribunals are still required to take these other legal instruments and requirements into account in their deliberations. However, there are many instances where tribunals prioritize safeguarding an investors' interests and expectations and awarding them substantial compensation, irrespective of whether those investors acted contrary to domestic or international laws outside of investment treaty law.<sup>40</sup> Meanwhile, states have been reprimanded for not adequately safeguarding investors' security or interests amidst citizen protests against investment projects.<sup>41</sup>

The following cases involve foreign investments in which such consultative or participatory processes are missing altogether or are far from adequate, and yet receive little to no regard by the sitting investment tribunal.

<sup>36</sup> Szoke-Burke and Cordes, 2020, 54.

<sup>37</sup> Kelly Dudine and Sam Szoke-Burke, "Government Briefing: Incorporating Free, Prior and Informed Consent into Investment Approval Processes," CCSI (July 2020), 2, box 2, [https://ccsi.columbia.edu/sites/default/files/content/Briefing-FPIC%20and%20investment%20approval%20\(July%202020\).pdf](https://ccsi.columbia.edu/sites/default/files/content/Briefing-FPIC%20and%20investment%20approval%20(July%202020).pdf) ("While initially emerging as a right of Indigenous and tribal peoples, FPIC is increasingly required by various industry and multi-stakeholder initiative standards to be obtained from all affected communities. These include the principles and criteria of the Forest Stewardship Council and the Roundtable on Sustainable Palm Oil, and the EO100 Standard for Responsible Energy. Investment managers also increasingly screen potential investments for environmental, social and governance (ESG) risks, meaning that projects with human rights abuse allegations or risks, including due to a failure to obtain FPIC, may find it increasingly difficult to secure capital.")

<sup>38</sup> Szoke-Burke and Cordes, 2020, 53.

<sup>39</sup> See, e.g., *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Bizkaia Ur Partuergoa v. the Argentine Republic*, ICSID Case No. ARB/07/26, Award (8 December 2016), para 1202. Also, *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No ARB/14/21, Partial Dissenting Opinion of Professor Philippe Sands QC (12 September 2017), paras 10-11 [Bear Creek, Partial Dissenting Opinion].

<sup>40</sup> Jesse Coleman, Kaitlin Y. Cordes and Lise Johnson, "Human Rights Law and the Investment Treaty Regime," (CCSI Working Paper 2019, New York: CCSI, June 2019), 3, [https://ccsi.columbia.edu/sites/default/files/content/docs/Coleman-Cordes-and-Johnson-Human-Rights-Law-and-the-Investment-Treaty-Regime\\_0.pdf](https://ccsi.columbia.edu/sites/default/files/content/docs/Coleman-Cordes-and-Johnson-Human-Rights-Law-and-the-Investment-Treaty-Regime_0.pdf) [Coleman et al., 2019].

<sup>41</sup> *Copper Mesa Mining Corporation v Republic of Ecuador*, PCA No 2012-2, Award (Redacted) (15 March 2016), para 6.83 ("Plainly, the Government in Quito could hardly have declared war on its own people. Yet, in the Tribunal's view, it could not do nothing.")

The case of *Bear Creek v. Perú* is one such example. In this dispute, Bear Creek, a Canadian mining company, engaged in exploratory work in the Santa Ana mine site in Perú (a rural area bordering Bolivia) that it eventually sought to bring to production.<sup>42</sup> Peruvian law, however, incorporates several legal requirements that a company must undertake prior to exploitation of a mine. For instance, Bear Creek had to reach agreements with all landowners on the mine site to ensure permission for surface land use,<sup>43</sup> and would need several governmental authorizations to develop the mine.<sup>44</sup> Before the company could secure these government authorizations, the law required a complete ESIA for the production or exploitation stage. Only with the approval of an ESIA could the company seek other authorizations required to begin mining operations (e.g., authorizations for water use, transportation, power supply, etc.).<sup>45</sup> Although Bear Creek submitted an ESIA for the project, the government identified several deficiencies preventing its formal approval.<sup>46</sup> In addition, an important element of the ESIA at the time was the requirement of mining developers and government officials to engage in consultations with all affected communities via a “Citizen Participation Plan,”<sup>47</sup> which is a necessary step toward securing community approval to operate.<sup>48</sup>



Credit: Alejandro Alvarez Posted June 9, 2022 In Mining

The company engaged in varying levels of outreach with several Aymara communities as it deemed sufficient to fulfill its legal requirements.<sup>49</sup> However, there was disagreement among the affected communities, Bear Creek, and government officials, regarding the adequacy and efficacy of these informational activities.<sup>50</sup> According to the communities

42 *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No. ARB/14/21, Award (30 November 2017), paras 120, 123 [Bear Creek, Award]; *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No. ARB/14/21, Claimant’s Memorial on the Merits (29 May 2015), paras 20, 44–48 [Bear Creek, Claimant’s Memorial].

43 *Bear Creek, Award*, para 259.

44 *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No. ARB/14/21, Expert Report of Luis Rodríguez-Mariátegui Canny (6 October 2015), para 40 [Bear Creek, First Canny Report].

45 *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No. ARB/14/21, Witness Statement of Felipe Antonio Ramírez Delpino (6 October 2015), para 5 [Bear Creek, Delpino Statement]; *Bear Creek, First Canny Report*, para 40.

46 *Bear Creek, Award*, para 177.

47 See *Bear Creek, First Canny Report*, paras 49–60 for an explanation of the CPP/PPC requirement of the ESIA.

48 *Bear Creek, Award*, para 259.

49 *Bear Creek, Claimants’ Memorial*, para 61.

50 *Bear Creek, Award*, paras 159, 218–68, 408, especially para 262; *Bear Creek, Partial Dissenting Opinion*, para 33.

and some government authorities,<sup>51</sup> the company allegedly did not involve all communities that would be impacted by the mining project, ignored the traditional collective decision-making process of the community, made highly technical presentations in Spanish that were poorly translated,<sup>52</sup> did not provide all relevant information to the communities, and did not adequately regard the concerns or opinions of the population.<sup>53</sup> In time, a highly contentious opposition movement began. Local communities protested the negative environmental impacts of the project, especially the impact on water resources, but also the social and cultural impacts of the project.<sup>54</sup> After several weeks of protest and escalation of violence, the Peruvian government issued a decree that revoked the investor's concession. It also placed a moratorium on further mining in the region, and enacted a new law on prior consultation with Indigenous Peoples.<sup>55</sup>

At the time the project was terminated, Bear Creek had not obtained any approvals required for the exploitation phase of the project.<sup>56</sup> In fact, according to the Ministry of the Environment in Peru, before 2012, the approval rate of an ESIA for mining activities, which is only one of several critical steps in the process of obtaining permission to operate the mine,<sup>57</sup> was 17%.<sup>58</sup> Despite the project's uncertain future, the investor sued Perú under the Canada-Perú Free Trade Agreement for USD 296.6 million, representing the expected profitability of the Santa Ana project,<sup>59</sup> contending, among other things, that the government's actions amounted to an indirect expropriation of its investment. Under most domestic laws, if an investor does not secure the necessary approvals to obtain a permit, it cannot recover any of the project's development costs, much less its expected future profits. This is precisely the risk of doing business, particularly in highly regulated and controversial industries and activities.<sup>60</sup>

In its decision, the tribunal acknowledges that Peruvian law ensures the right of local communities to participate at various stages of the project and that the investor had to obtain these communities' support throughout the investment. It even recognized that, "the Santa Ana Project was still at an early stage and that it had not received many of the government approvals and environmental permits it needed to proceed."<sup>61</sup> Therefore, the tribunal concluded that, "there was little prospect for the Project to obtain the necessary social license to allow it to proceed to operation, even

51 *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No. ARB/14/21, Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction (6 October 2015), para 181 [Bear Creek, Respondent's Counter-Memorial] ("... the DGAAM [General Directorate of Environmental Mining Affairs] and MINAG [Ministry of Agriculture] issued a total of 196 observations ... identifying deficiencies in Bear Creek's EIA... includ[ing] ... deficiencies in Bear Creek's Community Relations Plan..."). See also Bear Creek, Award, at para 409 ("April 26, 2011: Regional President of Puno asked the central Government to intervene by suspending the activities of the Santa Ana Project run by Claimant; the letter to Minister of Energy and Mines, referenced discontent and rejection in district of Kelluyo and reported concerns voiced by affected communities, which included lack of transparency and due consultation.").

52 Bear Creek, Award, para 261.

53 *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No. ARB/14/21, Amicus Brief (9 May 2016), 17 [Bear Creek, Amicus Brief]

54 Bear Creek, Award, paras 152–201.

55 Bear Creek, Award, paras 200–203.

56 Bear Creek, Award, para 426. The company was in the early phases of applying for regulatory approvals; its ESIA had not been approved; it had secured none of the 99 land-use agreements that would have been necessary to complete the project; and it had not obtained at least 40 other permits and authorizations required to construct and operate a mine at Santa Ana. See Bear Creek, Award, paras 201, 426; Bear Creek, First Canny Report, paras 107–108.

57 Bear Creek, Respondent's Counter-Memorial, para 166.

58 Ministerio del Ambiente (Peru), "Informe Nacional del Estado del Ambiente 2012 – 2013" (2012-2013), 28, <https://sinia.minam.gob.pe/documentos/informe-nacional-estado-ambiente-2012-2013>.

59 Bear Creek, Claimants' Memorial, para 245. For the Corani project, the investor claimed an amount of USD 225.6 million. Together with the Santa Ana project, Bear Creek claimed a total of USD 522.2 million in damages.

60 Lisa Sachs, Lise Johnson, and Ella Merrill, "Environmental Injustice: How treaties undermine human rights related to the environment," 18 *La Revue des Juristes de Sciences Po* (January 2020) 90, 97 [Sachs et al., 2020].

61 Bear Creek, Award, para 600.

assuming it had received all necessary environmental and other permits.”<sup>62</sup> Yet, the majority blamed the government for the project’s demise, stating that Perú was aware of, but did not object to, the investor’s outreach activities,<sup>63</sup> and therefore, the investor “could take it for granted to have complied with all legal requirements with regard to its outreach to the local communities.”<sup>64</sup>

It is unclear what legal systems allow and protect such reliance, and shield companies’ assumptions of legality from subsequent challenge by other interested and affected actors who might contest it. At the end, the investor was awarded USD 18.2 million plus interest, as well as 75% of its legal fees and arbitration costs, which brought the cost of the claim to over USD 30 million.<sup>65</sup> ISDS awards for projects, such as this one, without a fully approved ESIA and other permits represent a windfall to the investor and, at the same time, effectively ignore the outcome determinative role that ESIA and other participatory processes are supposed to play in project development.<sup>66</sup>

The lack of meaningful community consultation is also evident in the case **South American Silver v. Bolivia**. In this case, the mining site was located at the intersection of five Indigenous Communities in North Potosí, Bolivia. The site, which the company had started to explore and manage since 2003,<sup>67</sup> interfered with these communities’ constitutional and ancestral rights to preserve and protect their environment and territories; and infringed on their right to self-government, which includes the right to decide their means of development insofar as it affects their territories.<sup>68</sup> This right is guaranteed in the Bolivian Constitution.<sup>69</sup> However, the project was established without the participation, consultation or consent of the affected Indigenous Communities, contrary to Bolivian law.<sup>70</sup>

In late 2010, several Indigenous Communities passed a resolution vote, calling for the investor to halt its mining activities.<sup>71</sup> The resolution cited multiple grievances, including allegations of abuse of authority, contamination, disrespect toward Indigenous authorities, deception, threats against community members, and responsibility for the rape of women in the community.<sup>72</sup> In response to this, the investor appears to have established a “community relations program,” formalized in the beginning of 2011,<sup>73</sup> while continuing its mining activities.<sup>74</sup> The idea of the program was allegedly to “develop positive relations

62 Bear Creek, Award, para 600. In his Partial Dissenting Opinion, Professor Sands went as far as to note that “by the time Supreme Decree 032 was adopted the prospects for the Santa Ana Project were already dismal, if indeed they continued to exist at all;” see Bear Creek, Partial Dissenting Opinion, para 38 (emphasis added).

63 Bear Creek, Award, para 411. See also Bear Creek, Delpino Statement, para 20 (“After Bear Creek’s public hearing had concluded, I was informed that some groups such as members of the Kelluyo communities, representatives of the *Frente de Defensa de Recursos Naturales* of the Puno Southern Zone and the mayor of Desaguadero categorically rejected the project.”).

64 Bear Creek, Award, paras 411–12. However, the tribunal states that “the parties disagree regarding their respective roles and obligations in the outreach to the local communities...;” see Bear Creek, Award, para 565.

65 Bear Creek, Award, para 738.

66 Sachs et al., 2020, 97.

67 *South American Silver Limited v. The Plurinational State of Bolivia*, PCA Case No. 2013-15, Claimant’s Statement of Claim and Memorial (24 September 2014), para 2 [South American Silver, Claimant’s Memorial].

68 *South American Silver Limited v. The Plurinational State of Bolivia*, PCA Case No. 2013-15, Award (22 November 2018), para 377 [South American Silver, Award]; see also Political Constitution of the Plurinational State of Bolivia, article 30 (7 February 2009).

69 South American Silver, Award, para 371.

70 *South American Silver Limited v. The Plurinational State of Bolivia*, PCA Case No. 2013-15, Objections to Jurisdiction, Admissibility and Counter-Memorial on the Merits (31 March 2015), paras 94–95 [South American Silver, Counter Memorial]; South American Silver, Award, paras 371, 479–481.

71 South American Silver, Award, para 114.

72 South American Silver, Award, para 114.

73 South American Silver, Claimant’s Memorial, para 47.

74 South American Silver, Award, para 122.

with the local communities”<sup>75</sup> and to contribute “to the needs of the communities affected by the Project.”<sup>76</sup> According to evidence before the tribunal, however, the focus of the community relations strategy was actually to “convinc[e] a part of the community to support the Project against its objectors,”<sup>77</sup> and it did so by imposing its own decision-making process based on majority-rule.<sup>78</sup>

This strategy was problematic for several reasons. It seems to have been implemented with the intention of gaining support in the most remote communities, which were least affected by the project, while simultaneously silencing opposition in the directly affected communities.<sup>79</sup> Rather than contributing to community needs, the strategy created a deeper division among communities.<sup>80</sup> Moreover, the strategy employed by the investor posed challenges within the Indigenous Communities due to their specific decision-making mechanisms, which rely on consensus- and unanimity-based processes.<sup>81</sup> As achieving the necessary consensus for the project was deemed impossible, the investor resorted to fabricating it through various schemes, including the use of force, intimidation, unauthorized entry into the Indigenous Community territories, and failure to recognize the legitimate authorities, all in disregard for the right to self-government.<sup>82</sup> Thus, the investor’s “community relations program” appears to have had insincere intentions, which only amplified opposition to the project and the investor.

The investor seems to have also supported, coordinated, monitored and controlled a new Indigenous organization that was created later in 2011, with the purpose of weakening opposition to the project and imposing support to advance the mining project.<sup>83</sup> This organization contributed to and intensified the violent clashes among community members, and between the police and community members, which culminated in the death of one such member.<sup>84</sup>

Even though the investment tribunal could not “conclude that the Company ha[d] directly and exclusively generated the hostilities or ... was the sole cause of the social conflict and the severe clashes in the area,”<sup>85</sup> it did state that,

[T]he Company undertook certain community relations activities which led to unrest in the communities directly affected by the Project and which were questioned by its own advisors, and that, as the conflict ensued, the Company adopted a strategy that contributed to increase the divisions among the Indigenous Communities, the radicalization of the opposition groups and the practical impossibility of seeking the consensus that its advisors warned would be necessary in order to operate in the region. The documents provided by Witness X render an account of an aggressive strategy that helped worsen the conflict and that is very far from the search for consensus or agreement, and which intended to show majority support and to weaken the Project’s objectors.<sup>86</sup>

<sup>75</sup> South American Silver, Award, para 477.

<sup>76</sup> South American Silver, Award, para 478.

<sup>77</sup> South American Silver, Award, para 479.

<sup>78</sup> South American Silver, Award, para 373.

<sup>79</sup> South American Silver, Award, para 373.

<sup>80</sup> South American Silver, Award, para 373; South American Silver, Counter Memorial, para 100.

<sup>81</sup> South American Silver, Award, paras 372, 479; South American Silver, Counter Memorial, para 55.

<sup>82</sup> South American Silver, Award, para 372; South American Silver, Counter Memorial, para 309.

<sup>83</sup> South American Silver, Award, paras 479, 496, 507.

<sup>84</sup> South American Silver, Award, paras 502–503.

<sup>85</sup> South American Silver, Award, para 505.

<sup>86</sup> South American Silver, Award, para 505.

Despite this, the investor was awarded USD 18.7 million plus interest in its ISDS case, which was brought under the Bolivia–United Kingdom Bilateral Investment Treaty.<sup>87</sup>

In the more recent case of *KCA v. Guatemala*, a Nevada-based mining corporation Kappes, Cassidy & Associates (KCA) is suing the Guatemalan Government over a dispute related to two gold and silver mining projects.<sup>88</sup> The investor in this case had promised, through its ESIA, to plan and execute its mining projects “with the highest standards of environmental and social management.”<sup>89</sup> However, the ESIA includes notes of meetings held with local populations, in which participation by the communities involved was minimal or absent altogether. In fact, local communities were not meaningfully consulted, and the investor adopted a violent approach toward protesters from the beginning, actions that were entirely counterproductive to gaining the community’s support for their operations.<sup>90</sup>

Prior to the filing of the ISDS claim, a legal-environmental advocacy organization, CALAS, brought a suit against the Ministry of Energy and Mines, on behalf of the affected communities, for granting a mining license to the foreign investor without conducting a community consultation.<sup>91</sup> Guatemala, being a signatory to International Labour Organization (ILO) Convention 169, was required to ensure consultations with Indigenous populations regarding projects that could impact their territory. In addition, since 1996, the Guatemalan Constitutional Court has recognized the existence of the right to prior consultation as a human right, rooted in international human rights law.<sup>92</sup>

The Guatemalan Constitutional Court upheld the Supreme Court ruling that KCA’s license had been granted without the required community consultation.<sup>93</sup> The company argued that its meeting with municipal officials was sufficient to give due notice, but the lower court disagreed, noting that consultations are not intended to provide adequate notice to nearby residents.<sup>94</sup> In any case, the court concluded that the local population was not aware of the project and had no opportunity to express its opinion.<sup>95</sup> As a result of these decisions, the investor’s license to operate the mine was suspended for lack of prior consultation with affected communities (and for lack of a construction permit). In response, KCA lodged an ISDS claim against Guatemala for USD 350 million, alleging that the government violated the Central America-Dominican Republic Free Trade Agreement (CAFTA-DR) by not providing adequate protection and security to KCA’s investment against community protests, and being unfairly treated. Although the case is still pending, it will be interesting to see the extent to which the tribunal takes into account the lack of prior consultation or FPIC of the investment-affected communities, and whether it faults the investor, the state, both or neither.

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87 South American Silver, Award, para 938.

88 *Daniel W. Kappes and Kappes, Cassidy & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Notice of Arbitration (9 November 2018), para 36.

89 *Daniel W. Kappes and Kappes, Cassidy & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Counter Memorial (7 December 2020), para 52 [KCA, Counter Memorial].

90 KCA, Counter Memorial, paras 53–55.

91 Rose J. Spalding, *Breaking Ground: From Extraction Booms to Mining Bans in Latin America* (Oxford: Oxford University Press, 2023), 237 [Spalding, 2023].

92 KCA, Counter Memorial, para 51.

93 Spalding, 2023, 237.

94 Decision of the Third Civil Court of First Instance, Case No. 01050-2014-00871 (13 July 2015), 21, cited in KCA, Counter Memorial, para 63.

95 Decision of the Third Civil Court of First Instance, Case No. 01050-2014-00871 (13 July 2015), 25, cited in KCA, Counter Memorial, para 63.

These cases demonstrate the ways in which the investment treaty regime is set up to elevate and reward the actions and expectations of investors, regardless of whether they have complied with domestic or international legal requirements or responsibilities to respect the rights of other stakeholders,<sup>96</sup> or despite inciting violence among communities to create divisions within these groups. Instead, the regime focuses on the protection of investors' interests against actions taken by the host state, and on the resulting scope of such rights and expectations.<sup>97</sup> As a result, investment tribunals often overlook the issues that matter most to local communities, including whether the resource at the heart of the dispute should have been exploited or privatized in the first place, whether investment-affected rights holders were properly consulted with prior to the establishment of the project, whether they were active participants in the development of the investment located on their territory, or whether the investor did all that it could have done (not *should* have done) to engage with and gain the support of the affected communities.<sup>98</sup> By overlooking these issues, investment tribunals continue to undermine local communities' potential to access justice.

## 2. *The exclusionary nature of ISDS*

Another way in which the investment treaty regime deprives local communities and individuals of their access to justice is its failure to provide these stakeholders with the opportunity to participate or intervene as third parties when their rights and interests are implicated in investor-state disputes.<sup>99</sup> Not only are third parties, such as local communities and individuals, unable to assert their rights and interests and seek justice through the ISDS mechanism, they are also often barred from engaging or participating in these proceedings, even as third parties or friends of the court, regardless of the direct consequences the investment, the dispute, and the outcome have on their daily lives and livelihoods. Apart from being exclusionary, ISDS also lacks transparency. In numerous instances, minimal or no information about claims and awards is disclosed to investment-affected stakeholders or to the broader public. When such information is available, it is frequently presented solely in English, which may not be widely understood within the communities that are interested or affected.<sup>100</sup>

While investment-affected rights holders have the option to apply for participation as *amicus curiae* (friend of the court) in an ISDS case, there are two significant problems with this. First, this form of participation is entirely discretionary and subject to the tribunal's decision. The three arbitrators presiding over the case have the authority to decide whether to accept or reject *amicus curiae* submissions and to set limitations on such submissions. The option to submit *amicus* briefs is thus not a "right" or a guarantee. Second, the purpose of this participation is to assist the tribunal rather than serve as an effective and practical means for communities to seek justice for state violations or corporate abuses resulting

<sup>96</sup> Coleman et al., 2019, 3.

<sup>97</sup> Perrone, 2016, 385.

<sup>98</sup> Perrone, 2016, 383–4.

<sup>99</sup> CCSI and UN WG Outcome Paper, 2018, 10.

<sup>100</sup> CCSI and UN WG Outcome Paper, 2018, 10.

from investments.<sup>101</sup> In reality, investment-affected rights holders are often geographically and cognitively distant from ISDS proceedings. Participating as *amicus curiae* is a complex process that demands significant resources and lacks adequate space and support for meaningful expression of their concerns or assertion of their rights.<sup>102</sup> Therefore, this limited avenue for involvement not only fails to address the broader issues faced by those impacted by investments but it also fails to serve as a means for affected communities to participate (even at the fringes) in a process that ultimately impacts their very rights and interests.

In some instances, tribunals have rejected applications to file *amicus* submissions altogether, depriving investment-affected rights holders of the already limited possibility of voicing their concerns in the ISDS proceeding. In the ***von Pezold v. Zimbabwe*** case, the Swiss and/or German investors claimed that their investments in three Zimbabwean agricultural estates had been confiscated as part of the country's land reform program. The estates engaged in various activities including forestry and farming. The Berlin-based European Center for Constitutional and Human Rights and four Indigenous Communities in Zimbabwe applied to participate as *amicus curiae* on the basis that the von Pezold family's property was located on the communities' pre-colonial, ancestral land.<sup>103</sup> The *amicus* argued that their participation was necessary because the tribunal's decision could impact "the determination of rights and access to land inhabited by Indigenous [C]ommunities, which may impede their enjoyment of their internationally recognized rights to land and to consultation in relation to their ancestral lands."<sup>104</sup>



Credit: IISD | 16 May 2016

The tribunal, however, denied the petition in its entirety, even though it was the only way in which the parties and arbitrators would have had access to the colonial and historical context that had a direct bearing on the investment and its relationship with the local populations. In coming to their decision, the tribunal cited four reasons for its decision.

101 CCSI and UN WG Outcome Paper, 2018, 10.

102 CCSI and UN WG Outcome Paper, 2018, 10.

103 *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Procedural Order No. 2 (26 June 2012), para 1 [von Pezold, PO 2].

104 *von Pezold*, PO 2, para 21.

First, the participation of the amicus may have unfairly prejudiced the claimant because the communities and their chiefs lacked “independence” from the state due to their affiliation with people within the Zimbabwean government.<sup>105</sup> Second, the tribunal did not have the competence to interpret Indigenous People’s rights, nor to determine whether the relevant groups were Indigenous or not.<sup>106</sup> Third, the tribunal’s mandate did not include the consideration of international human rights obligations, and it was unconvinced that the rules of general international law extended to international human rights law.<sup>107</sup> Lastly, their participation would be inappropriate given that neither the state nor the investor raised Indigenous rights issues. Consequently, the tribunal concluded that the putative rights of the Indigenous groups were outside the scope of the dispute.<sup>108</sup>

The ***Eco Oro v. Colombia*** case presented another opportunity for local communities and organizations to inform the tribunal of the rights and interests of other stakeholders (and the environment) impacted by the investment project, the dispute in question, and the eventual outcome.<sup>109</sup> The dispute arose from Colombia’s measures adopted to protect the páramo ecosystem in the Santurbán highlands. This ecosystem not only supplies water to an entire region but also plays a pivotal role in preserving biodiversity. It possesses a distinctive ability to retain, restore, and distribute water across vast expanses, contributing significantly to the overall ecological balance of the region.<sup>110</sup>



Credit: Taringa

Given the mining projects’ potential impacts on the environment, mobilization efforts among local communities and groups led to two cases before Colombia’s Constitutional Court.<sup>111</sup> In its rulings, the Constitutional Court placed strong emphasis on human rights, including the right to a healthy environment, and the need to balance the various

105 von Pezold, PO 2, paras 50–56, 62.

106 von Pezold, PO 2, paras 57–58.

107 von Pezold, PO 2, paras 57–58.

108 von Pezold, PO 2, paras 57–58.

109 Nicolás M. Perrone, “Investment Treaty Law and Matters of Recognition: Locating the Concerns of Local Communities,” 24 *Journal of World Investment & Trade* (2023) 437, 449.

110 Jimena Sierra, “Is the Arbitral Award in the *Eco Oro v Colombia* Dispute “Bad Law”?” *Afronomics Law* (11 November 2021), <https://www.afronomicslaw.org/category/analysis/arbitral-award-eco-oro-v-colombia-dispute-bad-law>.

111 Lorenzo Cotula, “Investment disputes from below: whose rights matter?” IIED Publication (23 July 2020), <https://www.iied.org/investment-disputes-below-whose-rights-matter> [Cotula, 2020].

interests involved.<sup>112</sup> After the Constitutional Court tightened the páramo's protections, the government applied new mining restrictions on existing projects, including Eco Oro's concessions. In response, the company initiated an ISDS claim against Colombia, seeking about USD 700 million in damages.<sup>113</sup>

An alliance of six organizations, including Comité Santurbán, which played a central role in the Constitutional Court cases, submitted an amicus petition. All six organizations have deep expertise in international investment law, environmental law, and human rights law. While the case documents were not made available to them, the petitioners anticipated “focusing on international law regarding human rights and particularly the right to live in a healthy environment.”<sup>114</sup> The tribunal, in agreement with the investor, rejected the petitioners' application. It noted that the petitioners did not satisfy “even the most minimum requirements that would be needed to establish that issues of human rights, and particularly the right to live in a healthy environment, may be said to form a part of the scope of the dispute.”<sup>115</sup> After all, according to the tribunal, the case simply involved an investor seeking compensation for breaches of a free trade agreement.<sup>116</sup> In its decision, the tribunal found in favor of the investor.

The most recent case in which an amicus curiae submission was denied by an ISDS tribunal is that of *KCA v. Guatemala*. In this case, the company argues that it was unfairly treated—given a 2016 Guatemalan Constitutional Court decision that upheld the suspension of its mining project—and that there was a lack of state protection of company interests given ongoing community protests that allegedly prevented exploration work on one of its projects.<sup>117</sup> Local opposition to the projects began as early as 2010, when the investment-affected communities denounced the potential environmental and health impacts of the project, especially in relation to their water supplies, as well as the imposition of the mining projects against their will.<sup>118</sup> A simple act of resistance—a woman standing in front of a moving excavator, refusing to move—instigated a resistance movement, “La Puya,” in early 2012.<sup>119</sup> Following years of protests and blockades organized by local communities, the company's mining license was eventually suspended for lack of consultation with the Indigenous communities and the failure to obtain a valid construction permit from the municipality.<sup>120</sup>

112 More specifically, the Court reasoned that the environmental value of the páramo as a water source, a carbon sink and a biodiversity hotspot outweighed the companies' interest in mining within the páramo ecosystem. See Cotula, 2020.

113 *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum (9 September 2021), para 76 [Eco Oro, Decision on Liability].

114 *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Procedural Order No. 6, Decision on Non-Disputing Parties' Application (18 February 2019), para 18 [Eco Oro, PO 6].

115 Eco Oro, PO 6, paras 30, 28, 35.

116 Eco Oro, PO 6, para 28. See also Schneiderman, 2022, 903 (The tribunal would later seek the guidance of the treaty parties on three points: the parameters of the exceptions clause, which allows state parties to adopt measures “to protect human animal or plant life or health, which the parties understand to include environmental measures;” whether the precautionary principle (mentioned in the Constitutional Court ruling) might have “any impact on the consideration of its rights and obligations under international law;” and the role the duty not to “risk irreversible” harm to the páramo played in cases where violation of “investors' rights” has been established. As it turns out, the dispute did concern the human right to a healthy environment); see *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Procedural Order No. 11, Decision on Non-Disputing Parties' Application (28 January 2020), para 3.

117 CIEL, “Input from the Center for International Environmental Law (CIEL) to the Upcoming Report on the Global Water Crisis by the U.N. Special Rapporteur on Human Rights & Environment,” *Submission* (20 Nov 2020), 27, <https://www.ohchr.org/sites/default/files/Documents/Issues/Environment/EnvironmentWater/Civil%20Society/CIEL.pdf>.

118 James Rodríguez, “Police Violently Evict the La Puya Peaceful Mining Resistance,” *Vice* (24 May 2014), [https://www.vice.com/en\\_us/article/sgdmna/violent-eviction-of-the-la-puya-peaceful-mining-resistance](https://www.vice.com/en_us/article/sgdmna/violent-eviction-of-the-la-puya-peaceful-mining-resistance) [Rodríguez, 2014]; Mining Watch, “International Groups Denounce US Mining Company's Multi-Million Dollar Claim Against Guatemala and Express Solidarity with Communities Peacefully Defending Land and Life at ‘La Puya,’” (31 January 2019), <https://miningwatch.ca/sites/default/files/internationalstatementlapuyaengjan2019.pdf>.

119 Rodríguez, 2014.

120 KCA, Counter Memorial, para 225.

Shortly after the ISDS case was initiated, La Puya attempted (twice) to weigh in on the proceeding with an amicus curiae submission. In their petition, La Puya introduced itself as an “environmental justice movement,” whose members belong to communities that had been impacted by the investor’s mining project. The petitioner stated that it has an ongoing interest in the proceedings and would provide a unique perspective to the tribunal that is still within the scope of the dispute, allowing the tribunal to gain a better understanding of the situation on the ground. This included information about the deficiencies in the environmental impact studies, a description of the physical and psychological impact of the mining project on the community, as well as evidence regarding suspected acts of bribery and corruption, none of which the state nor the investor would raise during the arbitration.<sup>121</sup> While the respondent state did not oppose La Puya’s participation as amicus in the proceeding, the claimant investor opposed the application because it allegedly “fails to disclose fundamental and critical information bearing on [the] Applicant’s identity and independence,” and thus “fail[s] to meet any of the requirements for the admission of its proposed amicus curiae submission.”<sup>122</sup>

The tribunal, siding with the investor, rejected La Puya’s petition since counsel failed to provide appropriate information regarding who actually leads La Puya in practice and “on what basis such individual(s) can be legitimately recognized to represent the interests, and present the perspectives, of the local communities on whose behalf they purport to speak.”<sup>123</sup>

In these three cases, the tribunals have taken an extremely narrow and regressive position on the criteria to allow amicus to participate in these proceedings. First, it is apparent that at least some tribunals do not want to acknowledge or consider the relevance of human rights issues to the dispute, especially if neither disputing party has made an express reference to such frameworks. For them, ISDS claims simply concern a commercial transaction in dispute between two parties. Any other factual or legal issues related to the matters before them seem to be tangential and therefore irrelevant. Second, it appears that some tribunals require the amicus applicant to be neutral, and therefore deny their submissions if they are adverse to the investor’s interests. Satisfying this requirement would likely pose a significant challenge, if not prove impossible, for third parties whose rights are potentially affected in and by ISDS cases. Finally, the tribunal in KCA, at least, appears to side wholly with the investor, questioning the legitimacy, identity and internal structure of the petitioner, La Puya. Thus, despite the limited potential of amicus submissions to enable investment-affected communities to express their concerns and offer a broader perspective on the issues at play, ISDS tribunals have the authority to entirely deny them access to participate even in this highly restrictive forum.

There is another set of cases where tribunals have granted permission for amicus submissions but have imposed stringent constraints on their scope and length. This essentially curtails

121 *Daniel W. Kappes and Kappes, Cassidy & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Petition for La Puya Amicus Participation (29 June 2020); Lisa Bohner, “Community members submit renewed petition for amicus participation in Guatemalan mining dispute,” *IAREporter* (22 July 2020), <https://www.iareporter.com/articles/community-members-submit-renewed-petition-for-amicus-participation-in-guatemalan-mining-dispute/>; Spalding, 2023, 239; Lisa Bohmer, “ICSID Tribunal Finds that “Environmental Justice Movement” Without Legal Personality or Identified Representative Cannot Submit Amicus Curiae Brief,” *IAREporter* (23 March 2021), <https://www.iareporter.com/articles/icsid-tribunal-finds-that-environmental-justice-movement-without-legal-personality-or-identified-representative-cannot-submit-amicus-curiae-brief/>.

122 *Daniel W. Kappes and Kappes, Cassidy & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Procedural Order No. 5, On Renewed Amici Curiae Application for Leave to File Non-Disputing Party Submissions (5 February 2021), para 27 [KCA, PO 5].

123 KCA, PO 5, para 40.

their genuine involvement and participation. For example, in *Gabriel Resources v. Romania*, after an investor-state dispute arose about a mining project that threatened historic sites, now declared UNESCO sites, non-governmental organizations (NGOs) filed an application to participate in the ISDS proceeding as amicus curiae. When considering the substantive merits of the application, the tribunal stated that it had “serious doubts” that the amici would bring a new perspective to the proceeding.<sup>124</sup> The tribunal agreed with the investor’s argument that the amici had failed to show that they had expertise on the legal issues to be addressed by the tribunal. However, it did acknowledge that the amici had a particular knowledge of factual matters that might assist the proceeding.<sup>125</sup> Furthermore, the tribunal expressed doubts that the amici had a significant interest in the matter.<sup>126</sup> It also noted that the outcome of the arbitration would not determine whether the mining project would be implemented or not, and therefore questioned what interest the amici might have in the proceeding.<sup>127</sup>

At the end, the tribunal allowed the application for amicus curiae participation, but placed strict limits on the form and substance of the submission: allowing only issues and legal matters within the scope of the amici’s expertise, denying any reference or reliance on testimonies,<sup>128</sup> and declining the amici’s request to attend hearings.<sup>129</sup> These restrictions, in addition to the tribunal’s critical comments with respect to the amici’s contribution, demonstrate the uphill battle third parties face when trying to assert the interests and concerns of other rights holders in ISDS disputes and proceedings.

In another case, *Infinito Gold v. Costa Rica*, the contents of the amicus curiae submissions were similarly restricted. In this case, the Canadian investor brought a claim against Costa Rica over the revocation of its gold mining concession, after it had definitively lost its legal battles in the domestic legal system of the host country.<sup>130</sup> A Costa Rican environmental NGO requested to participate as amicus in the ISDS case given its role as a litigant in the domestic proceedings against both the investor and the state.<sup>131</sup> One of these domestic proceedings resulted in a court order to investigate various officials for alleged misconduct in issuing the disputed environmental impact assessment to the investor.<sup>132</sup> The NGO argued that it could provide the tribunal useful information and evidence about the Costa Rican judicial and administrative process, the factual and legal issues leading to the cancellation of the investor’s concession, and the ongoing corruption proceedings related to the award of the concession to the investor.<sup>133</sup>

While the investor argued against the NGO’s involvement in the ISDS case, the tribunal ultimately allowed its participation—which was restricted to only submitting written briefs—because of its involvement in the domestic court proceedings. In compliance with the tribunal’s guidance, the amicus was obliged to limit its submissions to including only factual and legal matters not already mentioned by either the claimant or respondent.<sup>134</sup>

124 *Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania*, ICSID Case No. ARB/15/31, Procedural Order No. 19, (7 December 2018), paras 58, 60 [Gabriel Resources, PO 19].

125 Gabriel Resources, PO 19, para 60.

126 Gabriel Resources, PO 19, para 63.

127 Gabriel Resources, PO 19, para 63.

128 Gabriel Resources, PO 19, para 66.

129 Gabriel Resources, PO 19, para 74.

130 *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award (3 June 2021), paras 109, 111–114 [Infinito, Award].

131 Ridhi Kabra, “Local NGO Opponent of Claimant-Investor is Granted Permission to Intervene in Costa Rica Gold Mine Arbitration, and Given Access to Documents,” *IA Reporter* (8 June 2016), <https://www.iareporter.com/articles/local-ngo-opponent-of-claimant-investor-is-granted-permission-to-intervene-in-costa-rica-gold-mine-arbitration-and-given-access-to-documents-but-not-hearings/>.

132 See *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Decision on Jurisdiction (4 December 2017), para 125 [Infinito, Decision on Jurisdiction].

133 *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Procedural Order No. 2 (1 June 2016), paras 9–16.

134 *Infinito*, Award, para 123.

Relatedly, where tribunals have permitted amicus submissions, they have given minimal consideration to the information presented in those submissions.<sup>135</sup> In fact, the record to date reveals that investment tribunals are not that interested in receiving this type of assistance.<sup>136</sup> For example, in *Pac Rim Cayman v. El Salvador*, the ISDS tribunal permitted an amicus submission by an environmental NGO on behalf of a group of organizations, including La Mesa.<sup>137</sup> The submission outlined the relevant international human rights law, emphasizing the need for a regulatory framework to safeguard environmental protection from risks associated with extractive industries.<sup>138</sup> It presented an argument advocating for the full respect of the rights of communities affected by investment projects, rooted in the principles of sustainable development outlined in the *Rio Declaration on Environment and Development*. Additionally, the submission furnished evidence of local repression and violence, leading to fatalities, directly attributed to the investment in the region.<sup>139</sup>



Credit: Association of Economic and Social Development (ADES).

The award only briefly mentioned the amici submission. The tribunal discounted the submission by indicating that the organizations were not privy to much of the evidence in the dispute, and that it was “inappropriate” to consider the specific legal arguments relating to human rights law that was advanced by the amici.<sup>140</sup>

Ironically, the problem of information asymmetries in ISDS is part of the fabric of the regime itself. Investment-affected rights holders face challenges in accessing information about the content of the law and about the specific dispute arising from the investment. These challenges stem from the overall lack of transparency within the investment arbitration

135 For a discussion of community perspectives in investor-state claims, see Lorenzo Cotula and Mika Schröder, “Community Perspectives in Investor-State Arbitration,” IIED (June 2017), <http://pubs.iied.org/12603IIED/>. See also CCSI, “Submission as an ‘Other Person’ pursuant to article 836 and Annex 836.1 of the Peru-Canada FTA” in *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No. ARB/14/21 (9 July 2016), <https://ccsi.columbia.edu/sites/default/files/content/docs/our%20focus/Bear-Creek%20Written-Submission-CCSI.pdf>.

136 Schneiderman, 2022, 901.

137 *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Procedural Order No. 8 (23 March 2011), 2.

138 *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Claimant’s Letter to the Tribunal re Amicus Curiae (18 March 2011), 6 [Pac Rim, Claimant’s Letter].

139 Pac Rim, Claimant’s Letter, 10.

140 *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Award (16 May 2016), para 3.30.

system, as well as barriers such as language differences and outsized costs associated with participating in disputes. Relatedly, investment lawyers have gone so far as to insist that amici pay for the privilege of making submissions by undertaking to pay investor-side legal costs.<sup>141</sup> These structural obstacles effectively prevent amici from contributing meaningful submissions regarding their—or local communities’—concerns, rights and interests, including the applicable human rights laws and environmental obligations. As a result, even those permitted to participate as amicus curiae are limited in their ability to effectively engage in, and impact, the process and the eventual outcome.

The issues concerning the exclusionary nature of ISDS proceedings can have far-reaching implications beyond the specific dispute outcomes. For instance, they can impact how cases are perceived and how the concept of “investment law” evolves over time.<sup>142</sup> Participation barriers restrict the way investments, conflicts, and concerns are presented to tribunals, impacting how these issues are subsequently recorded in the formal legal records of the cases, in awards, and in documents that might influence other similar disputes.<sup>143</sup> Compounding the problem of limited input in the proceedings is the partial disclosure of facts and law in the various outputs, including the awards. This has the potential to lead to a representation of incidents, causes, and effects that significantly deviates from the genuine perceptions and experiences of investment-affected communities.<sup>144</sup>

In the case of *Copper Mesa v. Ecuador*, local opposition to the development of a mining project existed even before the Canadian investor acquired its concessions. As opposition intensified during the following two years, the investor contracted and subcontracted armed men in uniform who used “tear gas canisters and fir[ed] weapons at local villagers and officials.”<sup>145</sup> Aside from all the other shortcomings of the tribunal’s reasoning, significant portions of the award detailing the company’s violent interactions with the local communities on various occasions were heavily redacted. Not only were the voices of local community members missing from the proceedings altogether, the violence and abuses they faced and that were perpetrated by the foreign investor against them, were essentially erased from the record, forever.<sup>146</sup>

Investment tribunals have also limited input in proceedings by way of restricting or denying other types of international instruments that may (or should) be relevant to the dispute. For example, in the case of *South American Silver v. Bolivia*, while there was no amicus curiae submission, Bolivia requested that the tribunal examine the case not only in light of the international laws relating to foreign investors, but also the international laws and customary rules relating to Indigenous Peoples. These included instruments such as the ILO Convention 169, the American Convention of Human Rights, and the United Nations Declaration on the Rights of Indigenous Peoples. For Bolivia, this request was consistent with a systemic interpretation of international law under the Vienna Convention on the Law of Treaties.<sup>147</sup> However, the tribunal did not agree that it should apply international rules on

<sup>141</sup> Schneiderman, 2022, 901.

<sup>142</sup> CCSI and UN WG Outcome Paper, 2018, 11.

<sup>143</sup> CCSI and UN WG Outcome Paper, 2018, 11.

<sup>144</sup> CCSI and UN WG Outcome Paper, 2018, 11.

<sup>145</sup> *Copper Mesa Mining Corporation v. The Republic of Ecuador*, PCA No. 2012-2, Award (15 March 2016), paras 4.170, 4.265 [Copper Mesa, Award].

<sup>146</sup> See The Tribunal, 2023.

<sup>147</sup> Perrone, 2021, 191–192.

human rights that “do not constitute customary law,” nor was it satisfied that Bolivia or the United Kingdom were parties to the human rights treaties invoked.<sup>148</sup> In addition, the tribunal noted that Bolivia failed to explain “how these [international human rights] rules conflict with the [Bilateral Investment] Treaty or why they should prevail over its provisions.”<sup>149</sup>

The arbitrators ultimately held that although the disputed measure had complied with the investment treaty requirements for a lawful expropriation relating to public purpose and social benefit, as well as due process, it did not fulfill the compensation requirement, and therefore made the expropriation unlawful.<sup>150</sup> Thus, despite Bolivia’s attempt to emphasize the role and relevance of the rights of investment-affected Indigenous Communities, and to integrate those rights with, and elevate them over, treaty obligations, the tribunal was unconvinced that such rights had a place in ISDS cases. This again serves as an illustration of how the regime restricts the already-limited access to justice that could have been achieved for the impacted Indigenous Peoples in this specific case.

### 3. *Undermining remedies obtained by rights holders*

Investor-state arbitration can also undermine or deny justice entirely for investment-affected rights holders by directly hindering, terminating, or weakening proceedings or results already achieved by such individuals or communities in other fora against the investor or the state.<sup>151</sup> The protracted case involving Chevron, Ecuador, and the Lago Agrio plaintiffs serves as a prime illustration of this phenomenon: where an environmental dispute in which local communities were seeking remediation for one of the worst environmental disasters in history ultimately transformed into a denial of justice claim by the corporation in ISDS.<sup>152</sup>

Texaco, acquired by Chevron in 2001, had been conducting oil drilling operations in the northern Ecuadorian Amazon of Lago Agrio since the 1960s. The region is home to numerous Indigenous and Peasant Communities and serves as a biodiversity hotspot. Following Texaco’s departure in 1992, the profound impact of three decades of oil extraction and environmental degradation prompted the affected communities to pursue environmental restoration and seek reparations for the harm caused by the oil company in the Amazon. Their aim was to hold the company accountable for its actions.<sup>153</sup> In February 2011, after a nearly two decade-long litigation process, an Ecuadorian court ruled in favor of the Lago Agrio plaintiffs and against Chevron, granting the plaintiffs a multi-billion dollar award for damages and remedial costs resulting from the adverse environmental, health, and social impacts suffered by communities in the Lago Agrio region due to Chevron’s (and its predecessor, Texaco’s) oil operations (“Lago Agrio Judgment”).

148 South American Silver, Award, para 217.

149 South American Silver, Award, para 217.

150 South American Silver, Award, para 610.

151 CCSI and UN WG Outcome Paper, 2018, 11.

152 Diane Desierto, “From the Indigenous Peoples’ Environmental Catastrophe in the Amazon to the Investors’ Dispute on Denial of Justice: The Chevron v. Ecuador August 2018 PCA Arbitral Award and the Dearth of International Environmental Remedies for Private Victims,” *Blog of the European Journal of International Law* (13 September 2018), <https://www.ejiltalk.org/from-indigenous-peoples-environmental-catastrophe-in-the-amazon-to-investors-dispute-on-denial-of-justice-the-chevron-v-ecuador-2018-pca-arbitral-award/> [Desierto, 2018].

153 Aldo Orellana López, “Chevron vs Ecuador: International Arbitration and Corporate Impunity,” *openDemocracy* (27 March 2019), <https://www.opendemocracy.net/en/democraciaabierta/chevron-vs-ecuador-international-arbitration-and-corporate-impunity/>.

Even though Chevron appealed this decision, it was consistently upheld by various courts in Ecuador. During the course of the case in the Ecuadorian courts, Chevron initiated an ISDS claim against Ecuador. The company accused the legal professionals and judges involved in the domestic lawsuits of committing serious fraud and corruption, i.e., a “denial of justice.”<sup>154</sup> The investment tribunal issued a series of interim measures and, ultimately, in 2018, found in favor of Chevron. Concerning the Lago Agrio Judgment, the tribunal ordered Ecuador “to remove the status of enforceability from the Lago Agrio Judgment ...[,] to preclude any of the Lago Agrio Plaintiffs [...] from enforcing any part of the Lago Agrio Judgment... [and to] advise promptly in writing any State (including its judicial branch), where the Lago Agrio Plaintiffs may be seeking directly or indirectly, now or in the future, the enforcement or recognition of any part of the Lago Agrio Judgment [...] of this Tribunal’s declarations and orders regarding the Respondent’s internationally wrongful acts comprising a denial of justice resulting from the Lago Agrio Judgment.”<sup>155</sup> In addition, the tribunal ordered Ecuador to compensate Chevron for alleged economic and moral damages caused to the company, with the specific amount still pending.<sup>156</sup>

Not only were the affected communities unable to participate or voice their concerns or their interests in the ISDS arbitration, the tribunal’s emphasis on fraud and corruption eclipsed the urgency of the decades-long environmental damage and health problems by effectively nullifying the remedies obtained by these communities in one of the few forums available to them.<sup>157</sup> Even today, the area remains heavily contaminated, and locals continue to suffer from the pollution left behind.

While the Chevron case *directly* undermined a legal victory obtained by the plaintiffs at the domestic level, there are a number of cases in which the ISDS award *effectively* undermines or weakens domestic victories won by local communities or environmental organizations. In those cases, the state—and ultimately, the taxpayers—are liable to pay the foreign investor at the ISDS level, which essentially negates any true sense of achievement obtained by these communities and environmental organizations at any other level or fora.

The case of *Infinito Gold v. Costa Rica* is one such case. In 2010, after a series of domestic court cases brought by various NGOs against the company that culminated in decisions both in favor and against the investor, a Costa Rican administrative tribunal (TCA) finally annulled the investor’s exploitation concession. It ruled that the concession for the mine was obtained illegally, thus denying the investor permission to proceed with the project.<sup>158</sup> In addition, the TCA ordered that the investor, together with Costa Rica, restore the mine site by remediating the environmental damage the project had caused.<sup>159</sup> Moreover, criminal investigations were ordered into various government officials for having granted the investor a concession by converting an (earlier) annulled concession into a valid one, and for designating the project as one of ‘national interest.’<sup>160</sup> It found that these

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154 *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador (II)*, PCA Case No. 2009-23, Claimant’s Notice of Arbitration (23 September 2009), para 4.

155 *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador (II)*, PCA Case No. 2009-23, Second Partial Award on Track II (30 August 2018), para 10.13(i)-(iii).

156 *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador (II)*, PCA Case No. 2009-23, Second Partial Award on Track II (30 August 2018), para 9.119.

157 Desierto, 2018.

158 *Infinito*, Decision on Jurisdiction, paras 122–123.

159 *Infinito*, Decision on Jurisdiction, para 107.

160 *Infinito*, Decision on Jurisdiction, paras 93–94. The Costa Rican court also ordered the investor, together with Costa Rica, to restore the site for the environmental damage the Project had caused (para 107).

decisions were “part of a knowing and intentional conspiracy between public servants to disregard the laws of Costa Rica.”<sup>161</sup> In addition to the criminal investigations, former President Arias faced a criminal proceeding for extortion, stemming from an alleged USD 200,000 donation made by Infinito Gold to Arias’ non-profit organization<sup>162</sup> just days before the national interest decree was signed.<sup>163</sup>

Infinito Gold was unsuccessful in its appeals to both the Administrative Chamber and the Constitutional Chamber of the Supreme Court in Costa Rica.<sup>164</sup> As a result, its mining concession was canceled. Despite having lost its legal battles in Costa Rican courts, the investor successfully brought an ISDS claim against Costa Rica on the basis that the revocation of its concession violated its right to the fair and equitable treatment standard under the Canada-Costa Rica Bilateral Investment Treaty.<sup>165</sup> Although the tribunal did not award damages in this case, it did find that Costa Rica violated its treaty obligations. In doing so, the tribunal effectively undermined the victories won by environmentalists and NGOs at the domestic court and administrative levels—which had definitively ruled against the legality of the investor’s concession under domestic law—by finding that the investor’s treaty rights had been violated by Costa Rica.

In the **Renco v. Perú** case, the dispute centered on Renco’s operation of a metallurgical complex between 1997 and 2009 in the town of La Oroya, in Perú. Constructed in 1921, the complex was outdated and recognized as the main source of air, soil, and water contamination in the region, marking it as one of the most polluted sites in the world.<sup>166</sup> The Peruvian government was aware of the severe health and environmental issues in La Oroya from at least 1999 when the Ministry of Health reported that 99.1% of the individuals examined had a level of lead in their blood higher than the level recommended by the World Health Organization.<sup>167</sup> This was later confirmed by other independent studies.<sup>168</sup> One such study also showed that the air quality deteriorated drastically from 1997 to 2000, the period in which Renco was in control of the complex. The main toxic emissions included sulfur dioxide, lead, small particles, as well as significant levels of arsenic and cadmium.<sup>169</sup> All of these pollutants surpassed internationally accepted levels, presenting severe health risks for the community.<sup>170</sup> This casted doubts as

161 Infinito, Decision on Jurisdiction, para 124 (According to APREFLOFAS, a Costa Rican NGO, this shows that “the Costa Rican courts not only found that the grant of the Concession and the subsequent ‘conversion’ were illegal under Costa Rican Law, but also that there was sufficient evidence to suggest the occurrence of criminal conduct under the Costa Rican Criminal Code, such as malfeasance in office or official misconduct.”).

162 Infinito, Decision on Jurisdiction, paras 125, 135 (According to the NGO, the extortion proceedings against Arias were terminated for lack of evidence).

163 Erick Carvajal, “Jueza Sobre Óscar Arias: Había Pruebas Que lo Vinculaban con los Hechos pero Nunca se le Indagó,” *MiningWatch Canada* (22 February 2019), <https://miningwatch.ca/es/news/2019/2/22/jueza-sobre-scar-arias-hab-pruebas-que-lo-vinculaban-con-los-hechos-pero-nunca-se-le>.

164 Infinito, Award, paras 105–112.

165 Infinito, Award, paras 581–586, 799. See also Lisa Bohmer, “Tribunal Hearing Gold Mining Dispute with Costa Rica Upholds some (but not all) Claims for FET Breaches, but Declines to Award Damages; Brigitte Stern Pens a Separate Opinion,” *IAReporter* (4 June 2021), <https://www.iareporter.com/articles/tribunal-hearing-gold-mining-dispute-with-costa-rica-upholds-some-but-not-all-claims-for-fet-breaches-but-declines-to-award-damages-brigitte-stern-pens-a-separate-opinion/>.

166 Giovanna Gismondi, “The Renco Group, Inc. v. Republic of Peru: An Assessment of the Investors’ Contentions in the Context of Environmental Degradation,” *Harvard International Law Journal* (24 October 2017), <https://journals.law.harvard.edu/ilj/2017/10/the-renco-group-inc-v-republic-of-peru-an-assessment-of-the-investors-contentions-in-the-context-of-environmental-degradation/> [Gismondi, 2017]. See also Marco Aquino, “World Bank Panel Rejects Lawsuit Against Peru Over Smelter,” *Reuters* (18 July 2016), <https://www.reuters.com/article/us-peru-worldbank-renco-idUSKCN0ZY2C4>.

167 Gismondi, 2017; “La Oroya, Perú,” *Global Atlas of Environmental Justice* (June 2016), <https://ejatlas.org/conflict/la-oroya-peru/>; África Melis, “La Oroya (Perú): Campeón de Contaminación Ambiental en América,” *Sin Permiso* (12 October 2008), <https://www.sinpermiso.info/textos/la-oroya-per-campen-de-contaminacin-ambiental-en-america/>; International Federation for Human Rights (FIDH), “Peru: Metallurgical Complex of La Oroya: When Investor Protection Threatens Human Rights” (December 2012), 10, <https://www.fidh.org/IMG/pdf/final-ukversion.pdf> [FIDH, 2012].

168 Gismondi, 2017; FIDH, 2012, 10–12.

169 FIDH, 2012, 11 and fn 48.

170 FIDH, 2012, 11 and fn 50.

to the investor’s ability—or willingness—to implement effective measures to prevent further environmental and health harm to the local community.<sup>171</sup>



*Credit: Giuliano Koren*

Due to government inaction to remedy the crisis, in 2002, the residents of La Oroya filed a domestic claim against Perú for inaction of its obligation to protect their right to health and to a healthy environment. At first and second instance hearings, the courts ruled in favor of the residents and in 2006, the Constitutional Court of Perú ordered the state to implement a series of measures within 30 days.<sup>172</sup> In parallel, several NGOs asked for precautionary measures from the Inter-American Commission on Human Rights (IACHR) on behalf of a group of 65 affected persons.<sup>173</sup> A number of measures were ordered by the IACHR, including the adoption of measures to provide diagnosis for the beneficiaries and establish specialized and adequate medical treatment for those at risk.<sup>174</sup> After nearly 15 years of proceedings, the IACHR found Perú internationally responsible for violating the human rights of La Oroya residents by not fulfilling its regulatory and supervisory obligations over the metallurgical complex. The case has been referred to the Inter-American Court of Human Rights (IACtHR) for remediation measures, and the court’s ruling is still pending.<sup>175</sup>

Meanwhile, between 2007 and 2013, a suit against Renco was filed by a group of US and Peruvian lawyers on behalf of over 1700 children in La Oroya in the State Court of Missouri, which is where the company is headquartered, for injuries and damage caused by lead

<sup>171</sup> Gismondi, 2017.

<sup>172</sup> FIDH, 2012, 17.

<sup>173</sup> FIDH, 2012, 17; AIDA, “People Harmed by Environmental Contamination in La Oroya Have Been Waiting for Seven Years for the State to Guarantee Their Rights” (31 August 2014), <https://aida-americas.org/en/press/people-harmed-environmental-contamination-la-oroya-have-been-waiting-seven-years-state>.

<sup>174</sup> FIDH, 2012, 17.

<sup>175</sup> La Organización de los Estados Americanos (OEA), “CIDH Presenta Caso ante la Corte IDH Sobre Responsabilidad de Perú por efectos de la Contaminación en la Comunidad de La Oroya” (14 October 2021), <https://www.oas.org/es/CIDH/jsForm/?File=es/cidh/prensa/comunicados/2021/274.asp>.

exposure and environmental contamination.<sup>176</sup> In 2011, the investor asked the State Court of Missouri to stay the proceedings pending its ISDS case with Perú, which it had initiated that year. Renco was claiming at least USD 800 million in damages in the arbitration case.<sup>177</sup> Some advocates speculated that the investor's intention was to move the case out of the Missouri court system, where the plaintiffs had a decent chance of success, to a federal jurisdiction.<sup>178</sup> Having achieved successful federalization of its case, the investor then tried to derail the proceedings and evade justice before the Missouri court system by asserting that the ISDS case should take precedence, an attempt which eventually failed.<sup>179</sup>

The company's first ISDS claim was dismissed on jurisdictional grounds due to the investor's failure to submit a valid waiver. In 2018, however, Renco initiated a second ISDS claim, which is still pending. While this case has not yet interfered with the Missouri proceeding, it stands as yet another example of how ISDS can serve as a powerful tool for foreign investors to bypass unfavorable (or potentially unfavorable) proceedings and outcomes—and at the same time, undermine access to justice pursued by impacted communities—in other fora.

The ***Eco Oro v. Colombia*** case is also on point. In the first ruling of the Colombian Constitutional Court, one of two decisions that prompted the ISDS case, the Constitutional Court struck down the exemptions that the government had provided to existing mining projects, including Eco Oro's project. These exemptions were in response to earlier measures passed by the state to restrict mining in the páramo ecosystems. The Constitutional Court noted that while Colombia's Constitution protects the companies' rights, those rights are not limitless. In its analysis, the Constitutional Court found that these “especially vulnerable, fragile [páramo] ecosystems”<sup>180</sup> are a “key piece in the regulation of the water cycle,”<sup>181</sup> carbon sinks that “contribut[e] to mitigating the effects of global warming,”<sup>182</sup> and “spaces of great biodiversity.”<sup>183</sup> As such, protecting the páramo outweighed the companies' interest in mining inside the páramo.<sup>184</sup> In its second ruling, the Constitutional Court struck down the government's first delimitation of the páramo, calling for a new delimitation to be completed with community participation in and around the páramo.<sup>185</sup>

Despite these rulings' strong emphasis on the protection of the environment and the right to a healthy environment, the ISDS tribunal found in favor of Eco Oro. It concluded that Colombia had failed to treat Eco Oro with the minimum standard of treatment by failing to give fair and equitable treatment to its investments in Colombia. The tribunal attributed

176 Gismondj, 2017. See also Shayna Posses, “Renco Can't Shake Claims Over Poisoning in Peru, Court Told,” *Law 360* (3 October 2017), <https://www.law360.com/articles/970829/rengo-can-t-shake-claims-over-poisoning-in-peru-court-told>; Public Citizen, “Renco Uses US-Peru FTA to Evade Justice for La Oroya Pollution,” *Public Citizen* (December 2012), <https://www.citizen.org/article/rengo-uses-u-s-peru-fta-to-evade-justice-for-la-oroya-pollution/>; *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Claimant's Memorial on Liability (20 February 2014), paras 6, 76–78; FIDH, 2012, 18.

177 Jarrod Hepburn, “As Peruvian Citizen Sue U.S. Mining Investors for Environmental Harms, Mining Company Makes Good on Threat of Treaty Arbitration in Effort to Indemnify Against Potential Losses,” *IAReporter* (17 May 2011), <https://www.iareporter.com/articles/as-peruvian-citizens-sue-u-s-mining-investors-for-environmental-harms-mining-company-makes-good-on-threat-of-treaty-arbitration-in-effort-to-indemnify-against-potential-losses/>.

178 FIDH, 2012, 19.

179 Public Citizen, “Renco Group Uses Trade Pact Foreign Investor Provisions to Chill Peru's Environment and Health Policy, Undermine Justice” (12 March 2012), 14, <https://www.citizen.org/article/rengo-uses-trade-pact-foreign-investor-privileges-to-chill-perus-environment-and-health-policy-undermine-justice/>.

180 “Normas sobre Creación y Ampliación de Áreas de Reservas Estratégicas Mineras,” Judgment C-035/16 (no date), para 172, <https://www.corteconstitucional.gov.co/relatoria/2016/c-035-16.htm> [Judgment C-035/16].

181 Judgment C-035/16, para 142.

182 Judgment C-035/16, paras 142, 151.

183 Judgment C-035/16, para 1.

184 Cotula, 2020.

185 Cotula, 2020.

this outcome to the state’s lack of coherent or consistent management of the Santurbán Páramo, stating that it had violated principles of fairness, equity and reasonableness and demonstrated “a flagrant disregard for the basic principles of fairness.”<sup>186</sup> And even though the relevant treaty includes an exceptions clause, which allows state parties to adopt measures “to protect human animal or plant life or health” that would otherwise be inconsistent with their substantive treaty obligations, the tribunal rendered it of no value. It reasoned that even if the exception applies to a measure, “this does not prevent an investor [from] claiming... that such a measure entitles it to the payment of compensation.”<sup>187</sup>

As in other cases described above, access to ISDS in this case allowed the investor to circumvent domestic judicial decisions, which had weighed the economic interests of the investor against the public interest, in this case, the fragile ecosystem of the páramo, and found in favor of the latter. According to the majority in the *Eco Oro v. Colombia* case, the government’s “conduct amount[ed] to gross unfairness or manifest arbitrariness falling below acceptable standards”<sup>188</sup> due to its “arbitrary vacillation and inaction”<sup>189</sup> in delimiting the páramo, and in failing “to act coherently, consistently or definitively”<sup>190</sup> across different branches and ministries to protect the páramo ecosystems and to clarify Eco Oro’s ability to pursue its mining project. The majority based its decision on an extensive list of misconduct on the part of the state—as opposed to weighing and balancing the various rights and interests in dispute—and found that those breaches led to a violation of customary international law, including the obligation to provide fair and equitable treatment.<sup>191</sup> Thus, the domestic court decisions were ultimately a hollow victory for those fighting to preserve the environment and the public interest more generally.

In his partial dissenting opinion, Professor Sands addresses the challenge of reconciling the tribunal’s interpretation of customary international law with the governance of extractive industry projects in vital and complex ecosystems.<sup>192</sup> This is made even more complex when considering the presence of different government entities tasked to promote distinct, and at times conflicting, policy objectives and interests.<sup>193</sup> The majority appears to assume that existing state practice with respect to the governance of mining investments should demonstrate clear, uncontested, and speedy implementation. However, in legal systems that include guidelines for environmental protection and avenues for diverse stakeholders to raise questions about the approval and regulation of extractive projects, the path to project approval often brims with uncertainty.<sup>194</sup> This is because these projects can yield profound and enduring impacts, both beneficial and detrimental, which might only surface through such processes of contestation. The ‘inconsistencies’ and ‘vacillations’ observed by the majority reflect an intentional and important division of labor, where distinct government bodies possess distinct expertise and mandates, and where distinct branches

186 *Eco Oro*, Decision on Liability, para 821.

187 *Eco Oro*, Decision on Liability, para 830.

188 *Eco Oro*, Decision on Liability, para 820.

189 *Eco Oro*, Decision on Liability, para 821.

190 *Eco Oro*, Decision on Liability, para 821.

191 *Eco Oro*, Decision on Liability, para. 821

192 *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Partial Dissent of Professor Philippe Sands QC (9 September 2021).

193 Lise Johnson, Maria Antonia Tigre, and Michael Burger, “Eco Oro Case Note,” *File with CCSI* (unpublished), 16 [Johnson et al., unpublished].

194 Johnson et al., unpublished, 16.

of government undertake distinct roles to advance and monitor short and long-term interests.<sup>195</sup> This approach aids in scrutinizing and counterbalancing power dynamics.<sup>196</sup>

Rather than simply admonishing the government to improve processes in and around these complex issues, the tribunal majority declared that, as a result of the delays and uncertainty faced by the investor (in addition to a laundry list of misconduct by the state), the government should compensate the investor for the fair market value of its planned project.<sup>197</sup> According to the investor, this entitles it to roughly USD 700 million in damages, plus interest. The final award, however, is still pending.

Investor-state arbitration cases can also preemptively prevent investment-affected rights holders from seeking justice in other legal fora. In *Burlington Resources v. Ecuador*, the environmental harms caused by the foreign investor's oil extraction activities affected several Indigenous Communities nearby. This included the destruction of their drinking water sources, and the cutting down of trees and plants that were significant to them for cultural, environmental and subsistence reasons.<sup>198</sup> In response to the investor's claim against Ecuador, Ecuador filed counterclaims against the company for breaching its environmental protection and infrastructure obligations under Ecuadorian law. While Ecuador won on its counterclaims, receiving a small portion of its requested relief (USD 42 million),<sup>199</sup> the tribunal awarded the investor a hefty compensation of nearly USD 380 million, plus interest.<sup>200</sup> Importantly, Ecuador waived its right to bring any further claims against Burlington or its subsidiaries in any other fora, as required in the parties' jurisdictional agreement.<sup>201</sup> This meant that the Indigenous Communities impacted by the environmental contamination produced by the project were barred from being represented by their own government against the investor in other domestic fora, denying them access to justice.

In this way, ISDS cases can also deprive investment-affected communities and the public at large of their right to access justice under domestic or regional human rights and environmental agreements. For instance, when a government waives its right to bring further claims against a company as part of an ISDS decision, or settles an ISDS dispute with a foreign investor by granting permits, easing environmental standards, or compromising on environmental protections, the resulting award or settlement can carry significant implications for other rights holders. Since these decisions and settlements are legally binding under international law, those affected by them typically have limited or no opportunity for judicial review within their own domestic or regional court systems. This prompts the question of whether such decisions or settlements might potentially infringe upon the access to justice provisions found in Article 9(2) of the Aarhus Convention or Article 8 of the Escazú Agreement.<sup>202</sup>

195 Johnson et al., unpublished, 16.

196 Johnson et al., unpublished, 16.

197 Eco Oro, Decision on Liability, paras 893–902.

198 *The Kichwa Indigenous People Of Sarayaku Sarayaku v. Ecuador*, IACtHR, Judgement on the Merits and Reparations (27 June 2012), para 105 and fn 306, 353, [https://corteidh.or.cr/docs/casos/articulos/seriec\\_245\\_ing.pdf](https://corteidh.or.cr/docs/casos/articulos/seriec_245_ing.pdf).

199 *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/05, Decision on Counterclaims (7 February 2017), para 1075 [Burlington, Decision on Counterclaims].

200 *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/05, Decision on Reconsideration and Award (7 February 2017), para 635.

201 Burlington, Decision on Counterclaims, para 1078.

202 Reed McCalib, "Aarhus Task Force on Access to Justice Should Address Problems with Investor-State Dispute Settlement," *CIEL Blog Post* (28 February 2018), <https://www.ciel.org/aarhus-task-force-access-justice-isds/>.

#### 4. Criminalization and repression

Investment-affected communities are sometimes subjected to criminalization and repression by their own governments or by foreign investors and their affiliates. This may occur because these communities have initiated legal strategies available to them at the domestic or regional level, the outcome of which can potentially threaten the viability of an investment project. It may also occur where impacted communities cannot (or choose not to) access legal remedial mechanisms or when effective remedies are unavailable. Instead, they may choose to advance their cause and seek redress through alternative strategies, including mobilizing against investment projects through rallies and protests, which may threaten the continuation of the project by creating a break in the investor-state relationship.

The significant harms associated with unsuccessful projects could motivate host states to clamp down or quash such actions by criminalizing or repressing these communities or specific members of these communities. These types of measures are taken to prevent the closure of the project, or to avoid costly ISDS claims that may be initiated by the aggrieved investor, including the substantial liabilities that may result from such claims. Even so, arbitration tribunals have, on occasion, held governments liable for not adequately safeguarding investments during protests or instances of opposition by local communities.

Similarly, opposition to investment projects may prompt investors to repress such actions by initiating or supporting campaigns of disinformation, or by perpetrating threats of, or actual violence toward dissenting voices either by hiring private security forces or by supporting members of the community to carry through such violence. Indeed, many cases include evidence that the claimant investor was responsible for fomenting violence, either directly against individuals in the impacted community or indirectly through creating a cleavage between community members that oppose the project and those that support it. Yet, the majority of such violence and repression, especially where it is carried out by the investor, is either glossed over or minimized by investment tribunals. This is another way in which investment-affected communities and individuals face barriers to accessing justice.

In the case of *Copper Mesa v. Ecuador*, for example, even though the Canadian company was aware of local opposition to the project before acquiring the concession, it began filing lawsuits and criminal complaints against community members who were opposed to the project the same year it acquired the concessions. This included a libel lawsuit against “Intag,” the local newspaper, for USD 1 million in damages for publishing allegedly “adverse anti-mining” stories.<sup>203</sup> During the following two years, local opposition to the project increased and the investor’s response to the opposition intensified, particularly when Copper Mesa, through its local subsidiary, contracted and subcontracted<sup>204</sup> armed men in uniform,<sup>205</sup> who were involved in altercations with community members opposing the project.<sup>206</sup> As the tribunal put it, “[i]t was miraculous that no one had been killed during one or more of these violent incidents.”<sup>207</sup> In fact, several of these violent altercations—including

<sup>203</sup> Copper Mesa, Award, paras 4.65, 4.78.

<sup>204</sup> Copper Mesa, Award, para 4.179.

<sup>205</sup> Copper Mesa, Award, para 4.265.

<sup>206</sup> Copper Mesa, Award, para 4.180.

<sup>207</sup> Copper Mesa, Award, para 4.265.

the “violent entry” of “40 plain-clothed persons connected with [Copper Mesa]... carrying tear gas bombs, 40 machetes, 1 dagger, and 4 dogs, to threaten the inhabitants”<sup>208</sup>—were caught on camera and made into a documentary film,<sup>209</sup> which would later be produced as evidence in the arbitration.<sup>210</sup>



Credit: Elisabeth Weydt | 2006

Although the investment tribunal recognized that the investor had introduced “the reckless escalation of violence” into the area,<sup>211</sup> and that it had acquired “a malign reputation for intimidation, threats, deception, mendacity and violence amongst members of the local communities,”<sup>212</sup> it did not view this egregious behavior as a basis to reject the claim at the outset. This was because, according to the tribunal, Ecuador was aware of the company’s conduct, but did not act in a timely manner.<sup>213</sup> In addition, rather than base its decision on the investor’s actions being willfully driven by its senior management, the tribunal ‘preferred’ instead to view these actions as negligence.<sup>214</sup>

Interestingly, in its analysis of the obligations owed by the state to the investor, the tribunal turned to the dual role played by the state, recognizing that “the Government in Quito could hardly have declared war on its own people ... [y]et, in the Tribunal’s view, it could not do nothing.”<sup>215</sup> According to the tribunal then, Ecuador had not done enough to assist the investor. This implies that a central government’s duties to a foreign investor can override the role and protection granted to its own citizens under the Constitution and the expressed views of local governments and communities,

208 Copper Mesa, Award, para 4.230.

209 Malcolm Rogge, “Under Rich Earth,” *Documentary Film* (2008), <https://www.youtube.com/watch?v=QRinnhejBlw>.

210 Copper Mesa, Award, paras 4.228, 4.230.

211 Copper Mesa, Award, para 4.265.

212 Copper Mesa, Award, para 4.265.

213 Copper Mesa, Award, paras 5.63, 5.64.

214 Copper Mesa, Award, para 6.100.

215 Copper Mesa, Award, para 6.83.

the majority of which had “voiced their opposition to the mining activities in an irrevocable manner.”<sup>216</sup>

Furthermore, the tribunal’s reasoning in this case puts the state in an impossible position of having to take action to aid the investor, even in situations where the investor has either contributed to or caused both the social unrest and the potential infringement of the rights of affected individuals and communities. In order to account for its contributory negligence, the tribunal granted a (mere) 30% discount to the USD 19.5 million plus interest compensation package it awarded the investor.<sup>217</sup> For the communities that suffered the violence and repression, however, this was a slap in the face.<sup>218</sup>

In the *Bear Creek v. Perú* dispute, a number of Aymara communities, who were concerned about the environmental and social impacts of the mining project, sought dialogue with representatives of Bear Creek in order to express their concerns as early as 2008.<sup>219</sup> The Kelluyo local government—one of two districts most directly affected by the project<sup>220</sup>—wrote letters to Puno officials in 2011, voicing the community’s concerns and requesting the presence of a Puno official to clarify the issue of mining on their lands.<sup>221</sup> As these efforts were unsuccessful, a number of people from these communities ultimately resorted to protests in an attempt to convey their concerns and frustration that they were not being consulted with, and that their wishes regarding how the project should proceed were not being taken into account.<sup>222</sup>

In time, a highly contentious opposition movement began. Local communities protested the negative environmental impacts of the project, especially the impact on water resources; the social impacts of the project, particularly the unequal distribution of project benefits among the communities; and the cultural impacts of the project, as the geographical space represented a spiritual bond for the communities.<sup>223</sup> These protests started in late 2008 with the burning of a mining camp,<sup>224</sup> but grew in intensity in 2011, resulting in damage to government and commercial property, massive demonstrations, blockades, and strikes.<sup>225</sup> In June 2011, six Peruvian citizens died in a clash between the National Police and the Aymara during protests in Puno.<sup>226</sup>

The government was under severe political pressure from many fronts to take action to end the protests, avoid further casualties, and find a solution. Following a meeting with protestors, Peruvian authorities decided the only way to diffuse the crisis was to respond to

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216 Copper Mesa, Award, para 4.52 (In one passage, the tribunal views the State’s conduct as “arbitrary, in the sense that it was unreasonable and disproportionate at that time to side so completely with the anti-miners [so] as to make it impossible, both legally and physically, for the [Investor] to complete its EIS, with inevitable consequences” (para 6.84). In another passage, the Tribunal states that “the Ministry tried to appease the anti-miners by restricting the Claimant’s farming and community activities” (para 6.78)).

217 Copper Mesa, Award, para 6.102.

218 For more on the reactions of community members to this “discounted” award, see Malcolm Rogge, “The Tribunal,” *Documentary Film* (CCSI 2023), <https://ccsi.columbia.edu/thetribunal> [The Tribunal, 2023].

219 Bear Creek, Amicus Brief, 5.

220 Bear Creek, Award, para 219.

221 Bear Creek, Award, paras 409, 164, 170.

222 First, there were the protests in October 2008, which ended with part of the mining camp being burnt and destroyed (Bear Creek, Amicus Brief, 5); and then, starting in March 2011, there were ongoing protests until the project was canceled in June 2011 (Bear Creek, Amicus Brief, 8–11; Bear Creek, Respondent’s Counter-Memorial, paras 94–96).

223 Bear Creek, Award, paras 152–201.

224 Bear Creek, Award, para 155.

225 Bear Creek, Award, paras 169–78, 182, 187–88, 190.

226 Bear Creek, Award, para 197.

the concerns of the local communities.<sup>227</sup> The government placed a moratorium on further mining in the region and enacted a new law on prior consultation with Indigenous Peoples. The government also issued a decree, which repealed the original decree that had been issued for the mining project, thereby eliminating the legal prerequisite for Bear Creek's concession rights in the region.<sup>228</sup>

In 2014, Bear Creek commenced ISDS proceedings against Perú, alleging that, through the adoption of the decree, Perú violated its obligations under the Perú-Canada Free Trade Agreement.<sup>229</sup> In its decision, the tribunal acknowledged that “opposition to the Project was expressed clearly and repeatedly by certain sectors of the local community, and that opposition focused not only on the Project but on the role of [the] Claimant.”<sup>230</sup> Nevertheless, the majority, citing an earlier ISDS case, held that “[f]or the international responsibility of a State to be excluded or reduced based on the investor's omission or fault, it is necessary not only to prove said omission or fault, but also to establish a causal link between [the omission or fault] and the harm suffered.”<sup>231</sup> According to the majority, Perú was unable to prove that the social unrest had been caused by—or could have been attributed to—the activities of Bear Creek,<sup>232</sup> since the investor's conduct was not recognized by government officials as breaching any legal requirements at the relevant time.<sup>233</sup>

The tribunal's reasoning effectively muted the competing contentions and allegations of fault by local communities, allowing the investor to avoid responsibility because certain government officials had likewise not listened to those stakeholders' views and concerns. The tribunal's fault test thereby entrenches power asymmetries when high-level officials stand to gain (personally or institutionally) from advancing projects and consequently pay little heed to the rights and voices of local communities where risks of negative impacts from an investment are often concentrated.<sup>234</sup> The tribunal awarded Bear Creek its alleged sunk costs, at USD 18.2 million plus interest.

It is worth noting that while one of the arbitrators, Professor Sands, agreed with the majority's conclusion that Perú had indirectly expropriated Bear Creek's investment and that it was unlawful, he dissented on the ground that the amount of sunk costs awarded should have been reduced due to the investor's role in contributing to the social unrest that resulted in the government's decision to issue the disputed decree.<sup>235</sup>

After the exit of Bear Creek from the Puno region, one hundred leaders of the protest movement faced criminal charges because of their involvement in the mobilizations.<sup>236</sup> They were accused of obstructing the functioning of public services, disturbing the peace,

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227 Bear Creek, Respondent's Counter-Memorial, paras 124–129.

228 Bear Creek, Award, paras 200–203.

229 Bear Creek, Award, paras 9, 113.

230 Bear Creek, Award, para 405. See also Bear Creek, Award, para 409 (providing examples of community and local officials' opposition to the project and/or the conduct of relevant consultation processes); and Bear Creek, Amicus Brief, 9, 15.

231 Bear Creek, Award, para 410.

232 Bear Creek, Award, paras 411–412.

233 Bear Creek, Award, para 412.

234 See, e.g., Lisa Caripis, “Combating Corruption in Mining Approvals: Assessing the Risks in 18 Resource-Rich Countries,” *Transparency International* (2017), [https://images.transparencycdn.org/images/2017\\_CombatingCorruptionInMiningApprovals\\_EN.pdf](https://images.transparencycdn.org/images/2017_CombatingCorruptionInMiningApprovals_EN.pdf).

235 See Bear Creek, Partial Dissenting Opinion, paras 38–39.

236 Bear Creek, Amicus Brief, 11; Thomas McDonagh and Aldo Orellana López, “Criminalisation Brought to New Extremes in Case of Aymara Indigenous Communities in Peru,” *OpenDemocracy* (11 July 2018), <https://www.opendemocracy.net/en/democraciaabierta/hammer-comes-down-on-social-protest-in-peru-c/> [McDonagh and López, 2018].

and aggravated extortion.<sup>237</sup> After a number of hearings, ten went on to face trial, nine of which were acquitted in July 2017 due to insufficient evidence. Walter Aduviri, the governor of Puno and one of the main spokespersons of the communities during the protests, was sentenced to seven years of prison and fined approximately USD 600,000. He went into hiding after the issuance of a warrant for his arrest in late 2017.<sup>238</sup> In late 2019, however, he was apprehended and imprisoned.<sup>239</sup> Thus, it appears that the criminalization and repression of impacted communities by the state, at least in this case, continued even after the exit of the investor from the region.

Another relevant investment dispute in which violence and repression against local communities was present but undermined by the tribunal, is the **South American Silver v. Bolivia** case. Here, the mining project site was located at the intersection of five Indigenous Communities in North Potosí, Bolivia. Even in the drilling and exploration stage, the investor's activities led to the contamination of a sacred place for the communities.<sup>240</sup> If the project were to proceed, it would have further destroyed sacred sites, and the surrounding lagoons, rivers and lakes, which the communities relied on for drinking water and their livelihoods more generally.<sup>241</sup> In response to the mine's environmental and social impacts, the affected communities exercised their right to self-determination and passed a number of resolutions against the mining project, including a resolution that the company cease its mining activities.<sup>242</sup> They accused the investor of polluting their sacred spaces,<sup>243</sup> abusing its authority, disrespecting Indigenous Communities, deceiving and threatening community members, including baseless criminal claims against community leaders,<sup>244</sup> and condoning the rape of women from the community.<sup>245</sup> The investor, aware of this opposition, attempted to divide the communities by funding and organizing a group in the region, which appeared to be a new Indigenous organization, supportive of the mining project.<sup>246</sup> Its members, however, included people from communities living further from the project so as to outnumber those resisting it in communities living closer to the project.<sup>247</sup>

Despite the alleged efforts by the government and the investor to find (or impose) a solution to appease the Indigenous Communities that were opposing the project,<sup>248</sup> tensions culminated in violent clashes and riots.<sup>249</sup> These included the abduction of community

237 Bear Creek, Amicus Brief, 11.

238 McDonagh and López, 2018; Reuters Staff, "Peru Court Orders Indigenous Governor of Mining Region to Six Years in Prison," *Reuters* (14 August 2019), <https://www.reuters.com/article/us-peru-mining/peru-court-orders-indigenous-governor-of-mining-region-to-six-years-in-prison-idUSKCN1V422Z> ("Peru court orders indigenous governor of mining region to six years in prison.").

239 Gestión, "Confirman sentencia de seis años de prisión para Walter Aduviri," *Gestión* (20 December 2019), <https://gestion.pe/peru/walter-aduviri-confirman-sentencia-de-seis-anos-de-prision-para-suspendido-gobernador-regional-de-puno-nndc-noticia/>. See also Carlos Fernández, "Puno: piden que Walter Aduviri cumpla aislamiento en su casa para evitar contagio de COVID-19," *El Comercio* (29 April 2020), <https://elcomercio.pe/peru/puno/puno-piden-que-walter-aduviri-cumpla-aislamiento-en-su-casa-para-evitar-contagio-de-covid-19-noticia/> (According to Peruvian news, he has been placed on house arrest since April 2020 due to the spread of COVID-19 in Peruvian prisons).

240 South American Silver, Award, para 113.

241 Georgina Jiménez and Jorge Campanini, "Breve Cronología del Conflicto Minero en Mallku Khota," *PetroPress* (2012), <https://www.cedib.org/wp-content/uploads/2012/10/mallku-khota.pdf>.

242 South American Silver, Award, para 114.

243 South American Silver, Award, para 113.

244 South American Silver, Award, para 374.

245 South American Silver, Award, paras 114-115, 125.

246 South American Silver, Award, para 138.

247 Perrone, 2021, p 190; South American Silver, Counter-Memorial, paras 65, 141; South American Silver, Award, para 115.

248 South American Silver, Award, paras 119-120, 122, 134-137, 140, 142, 144, 159.

249 South American Silver, Award, paras 147, 150, 152, 154.

members by both sides,<sup>250</sup> as well as the abduction of three policemen,<sup>251</sup> a march by community members that reached La Paz, where forceful riots occurred,<sup>252</sup> a blockade formed by community members to forbid access to the project site,<sup>253</sup> and finally the death of a community member and injury to 13 members, which were triggered by the intervention of the police.<sup>254</sup> This death and the surrounding violence was so severe that the United Nations High Commissioner for Human Rights Office in Bolivia cited this incident in their annual report for 2012.<sup>255</sup> The day after this death, the government reached an agreement with the Indigenous Communities to pacify the area by annulling and reverting the mining concessions.<sup>256</sup>

The investor took the dispute to ISDS, alleging that Bolivia's actions constituted, *inter alia*, an expropriation of the investment under the UK-Bolivia Bilateral Investment Treaty,<sup>257</sup> and was awarded USD 18.7 million plus compound interest.<sup>258</sup> Even though Bolivia argued that the investor's compensation should be reduced by 75% given that its own actions and omissions contributed to the damages it claimed to have suffered,<sup>259</sup> the tribunal held that this was impermissible. It stated that "the violation of the Treaty arose from Bolivia's failure to compensate or offer to provide compensation, a violation that ... is not attributable to the investor nor based on the conduct that the [state] attributes to the investor."<sup>260</sup> Thus, the tribunal's only concern was that Bolivia did not fulfill the compensation requirement of the expropriation provision of the treaty, and therefore, had breached its treaty obligations. Even though the tribunal included some of the tactics employed by the investor toward the local communities in its decision,<sup>261</sup> finding that, "there is no doubt that there was a conflict that aggravated and led to serious acts of violence,"<sup>262</sup> the conduct of the investor—however egregious and abhorrent—was deemed irrelevant in the tribunal's final ruling.

In the *KCA v. Guatemala* case, community members peacefully demonstrated against a gold mining operation because of concerns that the project would lead to water depletion and contamination, putting their health and livelihood at risk. The resistance movement—known as "La Puya"—sustained an around-the-clock protest camp at the mining site for 10 years in the face of violent police harassment and repression, anti-riot intervention, acts of intimidation and various legal challenges.<sup>263</sup> For instance, one of the leaders of the movement was targeted for leading and participating in non-violent protests and became the subject of an assassination attempt, which left her with permanent injuries.<sup>264</sup>

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250 South American Silver, Award, paras 147, 160.

251 South American Silver, Award, para 162.

252 South American Silver, Award, para 154.

253 South American Silver, Award, para 157.

254 South American Silver, Award, para 162.

255 South American Silver, Counter-Memorial, para 173.

256 South American Silver, Award, para 163.

257 South American Silver, Award, para 182 (The violations alleged by the investor included Bolivia's failure to treat the investments fairly and equitably, and afford full protection and security; and impaired the investor's investments through unreasonable and discriminatory measures and treated its investments less favorably than investments of its own investors).

258 South American Silver, Award, para 938.

259 South American Silver, Award, para 788.

260 South American Silver, Award, para 875.

261 South American Silver, Award, paras 472–507.

262 South American Silver, Award, para 559.

263 Ava Peters, "The Forgotten Voices: Power Imbalances in Guatemalan Investor-State Dispute Settlements," *Princeton Legal Journal* (26 October 2021), <https://legaljournal.princeton.edu/category/environmental-law/> [Peters, 2021].

264 Peters, 2021; *KCA v. Guatemala*, Counter Memorial, para 40.

There is very little evidence of KCA engaging in a meaningful way with the affected communities—other than conducting a series of presentations<sup>265</sup>—in order to obtain their support to operate their mine. Instead, according to Guatemala and La Puya, it appears that the investor resorted to aggressive tactics in order to repress the peaceful resistance movement. The company sent ex-military personnel to threaten the protesters and attack the women who mostly constituted the resistance.<sup>266</sup> Security forces used tear gas and beat the protesters, including children.<sup>267</sup> Company-commissioned helicopters flew over the region in an attempt to intimidate the community, and dropped leaflets criticizing local politicians.<sup>268</sup> In fact, the project was only able to proceed following multiple instances of harsh police repression against the movement, which forcibly cleared the way for equipment onto the mining site, resulting in injuries to individuals involved.<sup>269</sup> The conflict eventually turned to the domestic court system in Guatemala, which resulted in the suspension of the project license in 2016.



Credit: Guatemala Human Rights Commission – USA (GHRC)

The investor, KCA, brought an ISDS claim against Guatemala in late 2018, seeking damages of at least USD 350 million, plus interest and costs, for a number of alleged breaches under the CAFTA-DR, including that the state had failed to protect the mine site against continuous protests and blockades.<sup>270</sup> While the case is still pending, it is noteworthy that the tribunal twice rejected the amicus submission of La Puya, which had indicated that it would provide a description of the physical and psychological impact of the investment on the community. It will be interesting to see how (or whether) the investor’s violent conduct toward La Puya members is considered by the tribunal in its deliberations. Or whether, like

<sup>265</sup> KCA, Memorial, paras 30-32.

<sup>266</sup> KCA, Counter Memorial, para 55.

<sup>267</sup> KCA, Counter Memorial, para 57.

<sup>268</sup> KCA, Counter Memorial, para 57.

<sup>269</sup> Ana Sandoval, “A Mining Lawsuit in Guatemala Shows How Trade Courts Put Big Corporations First,” *Inequality* (5 December 2022), <https://inequality.org/research/guatemala-mining-lawsuit/>.

<sup>270</sup> Jarrod Hepburn, “Guatemala Reveals its Preliminary Objections to Kappes’ Mining Arbitration under DR-CAFTA,” *IAReporter* (1 September 2019), <https://www.iareporter.com/articles/guatemala-reveals-its-preliminary-objections-to-kappes-mining-arbitration-under-dr-cafta/>.

the *Bear Creek* and *Copper Mesa* cases, the tribunal will fault the state for the social unrest and eventual downfall of the project because either it did not acknowledge the company's (mis)conduct at the relevant time or it did recognize its unruly conduct, but did not act in a timely manner. Or whether, like the *South American Silver* case, the tribunal will deem the conduct of the investor irrelevant so long as the state breached one of its treaty obligations.

## 5. Regulatory chill

Investment treaties do not explicitly forbid a state from adopting measures necessary to fulfill its human rights or environmental obligations. In fact, some more recent treaties are including “right to regulate” clauses ostensibly safeguarding a state's flexibility in regulating for the public interest.<sup>271</sup> However, investment treaties can still deter states from enacting or enforcing critical measures for fear of an ISDS claim against them.<sup>272</sup> The regulatory chill hypothesis posits that because of apprehensions about ISDS, governments may refrain from timely and effective implementation, modification or enforcement of regulations in the public interest,<sup>273</sup> because such regulations may have a negative impact, either directly or indirectly, on investments or influence an investor's expectations.

While methodological constraints make it difficult to comprehensively document the far-reaching impacts of regulatory chill, a growing number of examples provide useful insights on the constraints placed by investment treaties and ISDS on the ability of states to regulate. An example of regulatory chill would be a state delaying the adoption of mining regulations to maintain a favorable investment climate in order to avoid triggering ISDS claims by foreign mining companies. Another example would be a state adjusting its policies either in response to specific concerns raised by an investor or due to the threat of arbitration from a particular investor.<sup>274</sup> Regarding the potential impact of regulatory chill on access to justice for investment-affected rights holders, governments might hesitate to implement regulations or undertake actions that could enhance access to justice in various aspects. For instance, if new environmental laws were to introduce improved redress mechanisms for environmental harms, if new due diligence laws were to incorporate FPIC requirements imposed on investors, or if a new rule were implemented to ban an environmentally destructive form of mining in protected areas, the reluctance to enact such laws could lead to fewer opportunities for impacted communities to seek redress, to meaningfully participate in investment decisions, or to enjoy a cleaner and healthier environment.<sup>275</sup>

The **Marlin Mine in Guatemala**, owned and operated by a Canadian company, is a good example of the potential impact of ISDS on the decision-making processes of governments and their responses to issues raised by communities. The dispute, however, never made it to investor-state arbitration. In 2010, eighteen Mayan Indigenous Communities brought a

271 See Crina Baltag, Riddhi Joshi, and Kabir Duggal, “Recent Trends in Investment Arbitration on the Right to Regulate, Environment, Health and Corporate Social Responsibility: Too Much or Too Little?,” 38(2) *ICSID Review - Foreign Investment Law Journal* (2023) 381.

272 CCSI and UN WG Outcome Paper, 2018, 15.

273 Kyla Tienhaara, “Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement,” 7(2) *Transnational Environmental Law* (2018) 229, 232.

274 CCSI and UN WG Outcome Paper, 2018, 15.

275 CCSI and UN WG Outcome Paper, 2018, 15.

claim before the IACHR, requesting that the Guatemalan Government temporarily suspend the operations of the mining project.<sup>276</sup> The IACHR took action by issuing precautionary measures, which were intended to provide a protective space while an assessment of the complaint from the affected communities took place. The complaint included issues related to water contamination, human rights violations, health problems, and the overall well-being of the communities.<sup>277</sup>

Initially, the Guatemalan Government agreed to suspend the mine's operations. However, despite this commitment, it reopened the mine a short time later.<sup>278</sup> Internal documents, which were obtained through a Freedom of Information request, revealed that the government cited the potential for arbitration as a reason for avoiding the suspension, stating that the project's suspension could prompt the investor "to invoke clauses of the free trade agreement and resort to international arbitration to claim damages from the state."<sup>279</sup> Thus, the fear of an ISDS claim meant that the Indigenous Communities' victory before the IACHR was quashed, and their interests and rights sidelined by the state.

In the case of *Kingsgate Consolidated v. Thailand*, the Thai Government shut down the largest gold mine in the country due to concerns from the local population about the mine's negative health and environmental impacts.<sup>280</sup> Specifically, in 2015, a government investigation team found that more than 300 people at the Chatree Mine tested positive for arsenic and manganese.<sup>281</sup> These heavy metals, as well as cyanide, from the company's disposal area had contaminated the nearby environment, including spring water in the nearby paddy fields, resulting in serious harmful effects on the health of local residents.<sup>282</sup> The investor rejected Thailand's allegations that its gold mine had any negative health or safety impacts on the local population,<sup>283</sup> and instead blamed pesticides used by local farmers as the source of the toxic substances found in the area.<sup>284</sup>

In 2017, the investor initiated an ISDS claim against Thailand,<sup>285</sup> however, in February 2022, it declared that it had reached an agreement with the Thai Government to reopen the mine.<sup>286</sup> The government reversed its shut-down order in late 2021, granting Kingsgate a 10-year lease for the mining operations to continue. In exchange, the parties to the dispute agreed

276 See Jen Moore and Manuel Perez Rocha, "Extraction Casino: Mining Companies Gambling with Latin American Lives and Sovereignty Through Supranational Arbitration," *Institute for Policy Studies* (April 2019), 27, <https://ips-dc.org/wp-content/uploads/2019/07/ISDS-Mining-Latin-America-Report-Formatted-ENGLISH.pdf> [Extraction Casino, 2019].

277 Comisión InterAmericana de Derechos Humanos, Medida Cautelar MC-260-07 para Comunidades del pueblo maya (Sipakepense y Mam) de los municipios de Sipacapa y San Miguel Ixtahacán en el Departamento de San Marcos, Guatemala (20 May 2010), <https://www.oas.org/es/cidh/decisiones/cautelares.asp?Country=GTM&Year=2010&searchText=260-07>.

278 Manuel Perez Rocha and Julia Paley, "What 'Free Trade' Has Done to Central America," *Common Dreams* (21 November 2014), <https://www.commondreams.org/views/2014/11/21/what-free-trade-has-done-central-america>.

279 Extraction Casino, 2019, 27.

280 "Report Claims Poisonous Leak at Phichit Gold Mine," *The Nation* (28 February 2018), <https://www.nationthailand.com/in-focus/30339901> [Phichit Gold Mine, 2018].

281 Reuters Staff, "Thailand to Shut Sole Gold Mine over Environmental Concerns," *Reuters* (10 May 2016), <https://www.reuters.com/article/us-thailand-australia-mine-idUKKCN0Y11KU>; Amy Sawitta Lefevre and James Regan, "Thailand's Biggest Gold Mine Told to Address Contamination Fears," *Reuters* (16 January 2015), <https://www.reuters.com/article/thailand-australia-mine/thailands-biggest-gold-mine-told-to-address-contamination-fears-idUSL3N0UV2XK20150116>.

282 Phichit Gold Mine, 2018.

283 Jarrod Hepburn, "Australian Investor Makes Good on BIT Arbitration Threat Against Thailand – And also Takes its Political Risk Insurer to Court," *IA Reporter* (2 November 2017), <https://www.iareporter.com/articles/australian-investor-makes-good-on-bit-arbitration-threat-against-thailand-and-takes-its-political-risk-insurer-to-court/> [Hepburn, 2017].

284 Apornrath Phoonphongphiphat, "Australian Miner Kingsgate Resumes Gold Operation in Thailand," *Nikkei Asia*, (22 February 2023), <https://asia.nikkei.com/Business/Materials/Australian-miner-Kingsgate-resumes-gold-operation-in-Thailand>.

285 Hepburn, 2017.

286 Kingsgate Web Admin, "Licenses Now Approved Paving the Way for a Chatree Gold Mine Re-start," *Kingsgate* (19 January 2022), <https://www.kingsgate.com.au/approved-for-restart/>.

to postpone the issuance of the ISDS award until 31 December 2022.<sup>287</sup> As of the writing of this report, no award has been issued in this case. Thus, the fear of an unfavorable ISDS outcome not only led to the continuation of the negative health and environmental impacts of the mine for the impacted communities, but it also quashed the favorable outcome that these communities had achieved in shutting down the mine site due to their concerns.

In a similar case, this time in Indonesia, an Australian company, **Newcrest Mining**, obtained a concession to explore for gold on a densely forested island in the Maluku archipelago during the 32-year rule of President Suharto, Indonesia's military dictator. After Suharto was ousted from power in 1998, the new parliament passed a forestry law in 1999, banning the environmentally destructive open-pit mining method in protected forests, particularly those posing a threat to the water supply.<sup>288</sup> With the passage of this law, many companies had to suspend their operations, including Newcrest Mining.<sup>289</sup> However, they fought back, arguing that the law violated contracts they had signed under the former dictator.<sup>290</sup> In 2004, Newcrest, as well as 12 other mining companies, were granted an exemption from the prohibition, which allowed them to re-open vast pits in some of the country's most pristine ecosystems.<sup>291</sup> Organizations on the ground, however, note that Newcrest had begun operations in 2003, in violation of the forestry law.<sup>292</sup>



Credit: Newcrest Mining

287 Ross Smyth-Kirk, "Thailand Update," *Kingsgate Reporting* (11 February 2022), <https://www.kingsgate.com.au/wp-content/uploads/2022/02/2339951.pdf>; Girish Deepak, "Southeast Asia Round-Up: Award in Dispute with Thailand is Delayed by Joint Consent, Myanmar Faces Multiple Arbitration Threats, and a Rail Company Brings Claim Against the Philippines," *IAReporter* (13 May 2022), <https://www.iareporter.com/articles/southeast-asia-round-up-award-in-dispute-with-thailand-is-delayed-by-joint-consent-myanmar-faces-multiple-arbitration-threats-and-a-rail-company-brings-claim-against-the-philippines/>.

288 Philip Jacobson, "Australian Miner Used Arbitration Threat to Upend Indonesian Environmental Law," *Eco-Business* (19 September 2016), <https://www.eco-business.com/news/australian-miner-used-arbitration-threat-to-upend-indonesian-environmental-law/> [Jacobson, 2016]; Chris Hamby, "The Secret Threat That Makes Corporations More Powerful Than Countries," *BuzzFeed News* (30 August 2016), <https://www.buzzfeednews.com/article/chrisamby/the-billion-dollar-ultimatum> [Hamby, 2016].

289 "Indonesia Allows Newcrest to Mine Protected Forest," *ABC News* (16 July 2004), <https://www.abc.net.au/news/2004-07-16/indonesia-allows-newcrest-to-mine-protected-forest/2010474> [ABC News, 2004].

290 Hamby, 2016.

291 Jacobson, 2016.

292 "Lawsuit: Newcrest's Indonesian mining violations challenged," *Mines and Communities* (28 April 2004), <http://www.minesandcommunities.org/article.php?a=1333> [MAC, 2004].

In one violent incident in January 2004, Indonesia's paramilitary force, employed by Newcrest, opened fire during protests against the mining company's activities. One man was shot and killed, another was almost beaten to death, and hundreds were arrested, among them a clergyman and a village head.<sup>293</sup> In a statement to BuzzFeed News, Newcrest initially claimed that it was unaware of any threats or ISDS actions related to the enforcement of the 1999 forestry law.<sup>294</sup> However, in an interview in Jakarta, a former Newcrest executive claimed that the company had indeed made the threat during a meeting with mining ministry officials: "If we cannot mine in this area," Syahrir AB recalls telling them, "we will wash our hands [of] Indonesia and go to international arbitration."<sup>295</sup> Additional interviews and documents reviewed by BuzzFeed News reveal that other foreign mining companies also issued similar warnings, threatening billion-dollar lawsuits if compelled to comply with the new forestry law. These were confirmed by the Mining Ministry's chief lawyer at the time, Soetisna Prawira, which caused the government to cave in to the companies' demands.<sup>296</sup> As a result, there was no (publicly available) ISDS claim made in this case.

In another case, ***Gabriel Resources v. Romania***, the Romanian Government withdrew its attempt to designate the Roşia Montană Mining Landscape as a United Nations Educational, Scientific and Cultural Organization (UNESCO) World Heritage Site because of an ISDS claim brought by a Canadian mining company.<sup>297</sup> The dispute arose out of Romania's alleged failure to issue an environmental permit required to start the exploitation of a gold deposit.<sup>298</sup> The controversy surrounding the mine escalated in 2013 when the government introduced a draft law to approve the project, which led to widespread public opposition. The proposed mine would destroy the cultural heritage of Roşia Montană and force the relocation of 2000 inhabitants.<sup>299</sup> Ultimately, the draft law was rejected by a parliamentary committee and the national senate in 2014,<sup>300</sup> but in response, Gabriel Resources declared that it would "assess all possible actions open to it, including the formal notification of its intentions to commence litigation for multiple breaches of international investment treaties."<sup>301</sup>

293 "Brutal Crackdown at Newcrest's Halmahera Mine Leaves One Dead," *Down to Earth No 60* (February 2004), <https://www.downtoearth-indonesia.org/story/brutal-crackdown-newcrests-halmahera-mine-leaves-one-dead>; MAC, 2004.

294 Hamby, 2016.

295 Hamby, 2016.

296 Jacobson, 2016; ABC News, 2004.

297 Douglas Main, "In Transylvania, A Fierce Battle over Gold and Roman History," *National Geographic* (9 April 2019), <https://www.nationalgeographic.co.uk/2018/07/in-transylvania-a-fierce-battle-over-gold-and-roman-history>.

298 Erik Brouwer, "ICSID Tribunal Hearing High-stakes Gold Mining Dispute with Romania Rejects Late-stage Amicus Application by NGOs," *IAREporter* (10 July 2023), <https://www.iareporter.com/articles/icsid-tribunal-hearing-high-stakes-gold-mining-dispute-with-romania-rejects-late-stage-amicus-application-by-ngos/>; Gabriel Resources, "Gabriel Files for International Arbitration Against Romania," *Gabriel Resources Press Release* (21 July 2015), [http://www.gabrielresources.com/documents/BI\\_T\\_release\\_210715\\_final\\_for\\_filing\\_001.pdf](http://www.gabrielresources.com/documents/BI_T_release_210715_final_for_filing_001.pdf); Susan Taylor, "Canada's Gabriel Resources to Seek \$4.4 Bln in Damages from Romania," *Reuters* (29 June 2017), <https://www.reuters.com/article/gabriel-romania-court-idUJSL1N1JK0QU>.

299 *Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania*, ICSID Case No. ARB/15/31, Respondent's Counter Memorial (22 February 2018), para 8.

300 Gus Van Harten, *The Trouble with Foreign Investor Protection* (Oxford: Oxford University Press, 2020), 121 [Van Harten, 2020]; Simona Manea, "The Dispute over the Rosia Montana Mining Project Represents an Opportunity to Reshape Romania's Sustainable Development Policy," *LSE European Institute European Politics and Policy* (28 November 2013), <https://blogs.lse.ac.uk/europpblog/2013/11/28/the-dispute-over-the-rosia-montana-mining-project-represents-an-opportunity-to-reshape-romania-sustainable-development-policy-2/>.

301 Eric Reguly, "Gabriel Threatens Romania with Billion-Dollar Lawsuit," *The Globe and Mail* (11 September 2013), <https://www.theglobeandmail.com/report-on-business/international-business/european-business/gabriel-resources-ceo-vows-to-sue-if-romania-kills-europes-biggest-gold-mine/article14240950/> [Reguly, 2013].

In July 2015, the investor initiated an ISDS claim, demanding USD 4.4 billion in damages (for sunk costs and future lost profits).<sup>302</sup> The company's CEO reportedly said that "[o]ur case is very strong and we will make it very public that Romania's effort to attract foreign investment will suffer greatly."<sup>303</sup> Romania's Culture Minister, on the other hand, characterized the claim as a "threat to national security."<sup>304</sup> Given that the site was recognized as having "the most significant, extensive and technically diverse underground Roman gold mining complex currently known in the world,"<sup>305</sup> among other attributes, the government's withdrawal of its bid for UNESCO recognition not only jeopardized the conservation and protection of Roșia Montană, but also left Gabriel Resources with the opportunity to press the government to approve the mine.<sup>306</sup>

In addition to dropping the bid, the Romanian Government proposed a new mining law in early 2019, which would allow the issuance of new mining permits.<sup>307</sup> Even if the mine is ultimately not approved under the new mining law or otherwise, the risk is that Gabriel Resources could still walk away with a vast amount of public money in compensation for a mine that was not yet operational.<sup>308</sup> In addition, the favorable outcome achieved at the domestic level by widespread public opposition was once again undermined for fear of an ISDS award against the state.

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302 Lisa Bohmer, "After a Year of Sparring Over Confidentiality, Full Details of Miner's Legal Arguments Finally Surface in \$4.4 Billion Claim Against Romania," *IARporter* (17 July 2018), <https://www.iareporter.com/articles/after-a-year-of-sparring-over-confidentiality-full-details-of-miners-legal-arguments-finally-surface-in-4-4-billion-claim-against-romania/>; *Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania*, ICSID Case No. ARB/15/31, Claimants' Memorial (30 June 2017), para 931.

303 Reguly, 2013.

304 Van Harten, 2020, 121.

305 International Council on Monuments and Sites (ICOMOS), "Evaluations of Nominations of Cultural and Mixed Properties," ICOMOS Report for the World Heritage Committee (2018), 245, [https://www.icomos.org/images/DOCUMENTS/World\\_Heritage/Volumes\\_Evaluation/ICOMOS\\_Evaluation\\_Volume\\_WHList\\_2018\\_EN.pdf](https://www.icomos.org/images/DOCUMENTS/World_Heritage/Volumes_Evaluation/ICOMOS_Evaluation_Volume_WHList_2018_EN.pdf).

306 Van Harten, 2020, 123.

307 Claudia Ciobanu and Mihai Stoica, "Roșia Montană: Seeds of Utopia in Town Almost Lost to Gold Mining," *Aljazeera* (24 April 2019), <https://www.aljazeera.com/gallery/2019/4/24/rosia-montana-seeds-of-utopia-in-town-almost-lost-to-gold-mining>.

308 Lora Verheecke, Pia Eberhardt, Cecilia Olivet and Sam Cossar-Gilbert, "Red Carpet Courts: 10 Stories of How the Rich and Powerful Hijacked Justice," *Friends of the Earth Europe and International, the Transnational Institute (TNI) and Corporate Europe Observatory (CEO)* (June 2019), 17, <https://10isdsstories.org/wp-content/uploads/2019/06/red-carpet-courts-WEB.pdf>.

# Conclusion

As states are increasingly recognizing the need to assess their existing investment treaties and policies for future texts, and are more strategically considering the costs and benefits of these treaties,<sup>309</sup> it is critical for them to also consider the impact of these treaties on their citizens. The cases highlighted above illustrate how the extensive network of individuals and communities who suffer adverse impacts from large-scale investment projects often find themselves marginalized right from the project's inception. The consequences of such investments, including adverse effects on human health, environmental destruction, air and water pollution, deforestation and land seizures, ultimately have profound impacts on the lives and livelihoods of those closely connected to the land. Yet, the binary structure of ISDS is not designed to hear the voices, interests or concerns of rights holders who have experienced or are at risk of experiencing such environmental, social or economic degradation as a result of these investments.<sup>310</sup>

In fact, local voices are simply excluded from the inherent logic of the regime by design. Even in situations where they do give voice to their experiences outside of the investment law regime, ISDS proceedings have repeatedly undermined, impeded or entirely denied their ability to pursue access to justice. There are myriad ways in which this is done. The regime elevates the international laws that protect (and reward) investors' economic interests and expectations over and above those that protect the rights, interests or expectations of local communities and the environment. The regime denies (or restricts) the involvement of impacted individuals and communities, even at the margins of ISDS proceedings, as *amicus curiae*. In addition, the regime directly or effectively undermines legal outcomes obtained by impacted groups in other fora. It also minimizes or glosses over the violence and repression experienced by individuals and communities that stand up to oppose harmful investment projects, preferring instead to emphasize shortcomings in substance and in process exhibited by host governments vis-à-vis foreign investors. And finally, the regime serves as a tool for foreign investors to circumvent legitimate domestic regulations that are aimed at protecting the public interest.

Thus, the forums where investment laws are made and take shape emerge as “uninviting spaces”<sup>311</sup> for local voices and their supporters. Instead of participating in international legal spaces where such voices and interests are deemed irrelevant, it might be high time for states to consider whether and how they can disentangle themselves from such a regime.

309 Lise Johnson, Lisa Sachs, Brooke Güven, and Jesse Coleman, “Costs and Benefits of Investment Treaties: Practical Considerations for States,” *CCSI Policy Paper* (March 2018), 5, <https://ccsi.columbia.edu/sites/default/files/content/docs/publications/07-Columbia-IIA-investor-policy-briefing-ENG-mr.pdf>.

310 Schneiderman, 2022, 898.

311 Schneiderman, 2022, 897.



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