Colombia before the ISDS and the disputes over natural resources in a “global coloniality” context

By:

Jimena Sierra

March 2, 2020

Since colonial times, natural resources have been commodities favoured by European empires to consolidate their economic power worldwide. These actors, now represented by the Global North States, have used legal and political devices to maintain hierarchical relationships over their former colonies. Natural resources exploitation has been key for the continuation of asymmetric relations between North and South. Using ISDS to put pressure on States and to address the state policies on natural resources illustrates how investors from the old and new empires continue to use modern legal mechanisms to control these resources in favour of their private interests. This piece focuses on the effect of the Investment State Dispute Settlement (ISDS) in Colombia as a tool to reinforce paradigms of power and hierarchies through the logic of “global coloniality”.

ISDS has been used to challenge state decisions and the regulatory capacity to protect other rights and interests different to foreign investors' including the "public" interest. In Colombia, foreign investors have filed thirteen disputes since 2016, claiming damages of approximately 22,300 million USD. This amount is equivalent to the tax revenue collected by Colombia in eight years.

Fearing the threat of multi-million dollar awards, the rise in investor claims has resulted in "regulatory chill", causing Colombian authorities to refrain from acting in accordance with their constitutional obligations and other international obligations, such as those arising out of International Human Rights treaties. From a postcolonial perspective, the alarming increase of demands against Colombia before ISDS during the last four years is problematic considering on one hand, the (neo)colonial origin of this system and of the International Investment Agreements (IIA) on which investors rely to sue the States and on the other hand, the uses of ISDS by foreign investors from the Global North to maintain the control over natural resources.

In this regard, it should be mentioned that in the 1960s, and during the decolonization process worldwide, the first IIA emerged to protect the interests of the European investors, which claimed compensation based on the recognition of the permanent sovereignty over natural resources to Global South states. This agreement came at a time when political and economic challenges required the elimination of colonial regimes and the emergence of new democracies under the rule of law. It was in this context, according to UN Resolution 1803, that the so-called "developing" states had to integrate into the world-economy and to cooperate with the developed States. One way to achieve such integration was through the "efficient" exploitation of natural resources and raw materials.

Although Colombia, unlike the new African states, had already experienced some developmental attempts since the late nineteenth century, the country was also part of the new "development" project in the 1960s, and it enacted nationalization resources policies during the second half of the 20th century. It was only in the 1990s, during the neoliberal turn, that the resources nationalization policies were withdrawn and new privatization policies were enacted in various sectors, including mining. In this era, a new constitution, a

new mining code and a new environmental legal framework were issued in Colombia alongside a new regime for the promotion and protection of foreign investors.

Seven of the thirteen lawsuits against Colombia currently before ISDS are relate to disputes over natural resources[1] and the investors have claimed damages of about 20,500 million USD. Moreover, five of these demands - Gran Colombia Gold, Cosigo Resources, Eco Oro, Galway Gold and Red Eagle - refer to cases on which the Colombian Constitutional Court had ruled in favour of the communities settled in the territories where the investors aimed to carry out the so-called “development” projects, before the foreign investors filed against Colombia. On the other hand, the case of the Swiss company Glencore was caused by a sanction filed by the Accountancy and Audit Office in Colombia. This case in turn caused the first sanction against Colombia for 50 million USD. Finally, the case of the Spanish company Gas Natural Fenosa was caused by the State intervention due to the bankruptcy of the company.

The hierarchies reproduced by ISDS can be explained under the category of “global coloniality”, a system strongly connected to global actors such as international financial organizations which have influenced mining policy across the world, and which is articulated at the local level through prestigious law firms whose clients are the mining corporations that operate in the Global South. This system perpetuates the continuity of hierarchies and asymmetric relationships between South and North. It is often the case that subaltern groups such as indigenous peoples, afro-descendants communities and peasants are dispossessed of their territories, while key economic actors from the new empires continue to define what “development” means and how the communities should be developed; which activities lead to development and which do not; and which are the ways of life allowed according to the development model. It also entails a relationship between “coloniality” and “modernity” which in turn suggests how modern actors still need subordinated and “backwards” subjects, their bodies and territories, to maintain similar forms of exploitation and dispossession from colonial times, and to maximise their profits.

I argue that it is time to explore the possibilities of a substantial reform, which

should include: the renegotiation of the current 3,200 IIA; to stop signing treaties with arbitral clauses and extremely favourable conditions for investors; the promotion of an effective sovereignty States over the space that they should regulate; and the approval of binding obligations for companies. The failure to address substantive issues in ISDS, and to only focus on procedural aspects of reform, will lead to the consolidation and re-legitimatisation of this system, under the guise of “modernizing” it.

If a serious and substantial reform of this system is not carried out, ISDS will continue to operate as a neo-colonial mechanism of dispossession that reproduces colonial legacies and that seeks to control effectively natural resources of the Global South while undermining the sovereignty of Global South States. It is time to explore a new paradigm of ISDS and to rethink ontologically the instruments within international law that might lead to a more fair and equitable global society.

---

[1] Gran Colombia Gold (USD 700 million); Galway Gold (USD 196 million); Red Eagle (31 million); Cosigo Resources (16.000 million); Eco oro (USD 764 million); Gas Natural Fenosa (USD 1600 million); Glencore International and C.I. Prodeco (USD 681 million).

View online: Colombia before the ISDS and the disputes over natural resources in a “global coloniality” context

Provided by Afronomicslaw