Is the Arbitral Award in the Eco Oro v Colombia Dispute "Bad Law"?

By:

Jimena Sierra

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On October 31, the 2021 UN Climate Change Conference, better known as COP26 began to discuss the progress, setbacks and new challenges in the face of the serious environmental crisis we are going through as global citizens. Various mandataries reiterated their commitment to environmental protection and reaffirmed the need to take urgent measures to counteract the climate crisis we are going through. For instance, Prime Minister of Canada Justin Trudeau announced that Canada will impose a hard cap on emissions from the oil and gas sector. However, despite commitments by some governments and demands from different sectors of society to address the serious consequences of this crisis, some actors such as large foreign investors and overpaid arbitrators seem to remain indifferent in the face of this reality. In fact, they continue to make juridical and interpretative manoeuvres that end up prioritizing certain economic interests over other interests at the global level, that go beyond national interests, and that are key to protect in order to counteract serious problems derived from said crisis, such as global warming.

This is illustrated by the award issued in the case, Eco Oro v Colombia, in which an arbitral tribunal adopted a highly unusual argument to condemn the Colombian state after it decided to protect a special ecosystem that is key to climate change mitigation. This is not the first time that arbitration tribunals have shown their lack of sensitivity to this theme. In other memorable cases such as Santa Elena v Costa Rica or Clayton/Bilcon v Canada, similar decisions were adopted. As these cases illustrate, regardless of the type of treaty or the clauses agreed by the parties, private economic interests of large corporations end up taking priority over other interests of great importance at the global level like environment. Likewise, the importance of legal certainty demanded by investors is not reflected in the same way in ISDS disputes when arbitrators decide in cases of great importance for States and for the entire international community.

Eco Minerals Corp. and the Republic of Colombia (ICSID Case No. ARB/16/41) was decided on September 9, 2021. Based on the Free Trade Agreement between Canada and the Republic of Colombia (signed on 21 November 2008 and entered into force on 15 August 2011), the tribunal decided that Colombia must compensate Eco Minerals Corp. This compensation was necessitated by the fact that the tribunal found that Colombia violated its legitimate expectations by adopting various measures addressed to protect a páramo ecosystem in Santurbán. This ecosystem provides water to an entire region and also plays a significant role in maintaining biodiversity, with a unique capacity to retain, restore and distribute water across extended areas.

Eco oro (formerly known as Greystar Resources Limited), a corporation constituted under the laws of British Columbia, Canada, and trading publicly on the Canadian Securities Exchange (formerly, on the Toronto Stock Exchange), alleged that Colombia breached its obligations under (i) Article 805 of the FTA by means of the unlawful, creeping and indirect expropriation of its investment; and (ii) Article 811 of the FTA by failing to accord Eco Oro's investment the minimum standard of treatment ("MST").

Although the amount of compensation is yet to be determined, Colombia has lost the case and will therefore have to compensate the company, which claimed an amount equivalent to 764 million USD. In spite of this, the National Agency for the Legal Defence of the State (ANDJE) – which is the office in

charge with defending Colombia in international litigation -issued a statement the day after the award was known, applauding the tribunal's decision. According to ANDJE the good news was that the tribunal rejected the claim based on the indirect expropriation standard (art. 811) of the FTA Canada-Colombia. Likewise, the Eco Oro CEO also welcomed the tribunal's decision, precisely because the award makes it clear that the Colombian state was found liable.

ANDJE explained that the tribunal recognised that the prohibition on mining in páramos is a legitimate manifestation of the state's so-called "right to regulate" , which is the name that international investment law doctrine has given to the attribute of state sovereignty, by virtue of which the state has the power to act in the public interest. However, it is not entirely clear from the Agency's optimistic pronouncement why the Colombian state should respond, especially considering that the tribunal itself recognised that Colombia acted in good faith when protecting the public interest of the environment. According to the tribunal, the challenged measures "were motivated both by a genuine belief in the importance of protecting the páramo ecosystem and pursuant to Colombia's longstanding legal obligation to protect it (…) they are a legitimate exercise of Colombia's police powers and do not constitute indirect expropriation".

Dissenting opinion

Meanwhile, the inconsistency of the tribunal's decision is fully explained by arbitrator Philippe Sands in his dissenting opinion, who partially distanced himself from the opinion of his peers. He argued that the reasoning used by the tribunal to declare the State liable based on article 805 of the Canada-Colombia FTA a (minimum international treatment) is completely unusual. According to Sands, the FTA language "makes clear – as the Majority recognises – that the standard of protection which has been granted to the investor is the Minimum Standard of Treatment ('MST'), the one that exists in customary international law. The standard to be applied by the Tribunal is not the Fair and Equitable Treatment ('FET') standard, one that is to be found and applied in other investment protection agreements".

For this reason, Sands suggests that the award may very well constitute a rewriting of the text agreed under the Canada-Colombia FTA. According to Sands: “The Majority’s analysis undercuts the plain meaning of the FTA and well-established principles of customary law. The effect of its approach is to significantly lower the bar, and in effect rewrite the FTA and the content and effect of MST”. Moreover, he clarifies that although certain tribunals have sought to equate or meld the MST and FET standards, “the two standards may share a common aim of imposing restrictions on the manner and extent to which a state is required to treat a foreign investor in its territory, but they do so in different ways. A breach of the customary MST standard would invariably give rise to a breach of the FET standards, but the reverse is generally not the case. This is because the MST standard sets a much higher bar”.

Sands explained that the expectations allegedly created by the statements of state authorities cannot be protected under the international minimum standard of treatment and that these assertions do not imply a quasi-contractual commitment. On this point, Sands was emphatic that “there is no evidence before the Tribunal to establish that the Respondent gave a “quasi-contractual” commitment that the Claimant would have the right to exploit the entirety of the Concession area”.

In this regard, he pointed out that the notion of legitimate expectations “has become a recognised element of the FET standard, but its role in the context of an MST inquiry is not yet established”, and “as acknowledged by the Majority, in the context of the MST the failure to observe a claimant’s legitimate expectations is just one factor a tribunal may take into account in determining whether there has been a breach of the MST. The claimant must still show that the failure to observe its legitimate expectations was, in the circumstances, serious enough to amount to egregious and shocking behaviour”.

Sands dissent further argued he did not find it reasonable that the argument used by the tribunal to dismiss the Colombian State’s liability based on the indirect expropriation standard was the same it used to declare the State liable based on article 805 (minimum standard of treatment). Indeed, in order to dismiss the state’s liability on the basis of the indirect expropriation standard, the tribunal noted that it had not been demonstrated that the state had frustrated the so-called “legitimate expectations”, as alleged by the Canadian

company. Therefore, it is not clear why the tribunal subsequently used this same element, which had already been considered not proven, to determine Colombia's liability, but on the basis of the article 805.

According to the dissenting opinion, it is clear that Eco Oro knew that, in order to exploit the concessioned territory, it was required to obtain an environmental licence and that, at the time of the investment, the granting of such a licence was uncertain. Furthermore, the company knew (or at least should have known, by virtue of its duty of due diligence) that the concessioned territory was located in a key and protected ecosystem and that Colombia was committed to the defence of the environment. In this sense, it was foreseeable that, at the very least, within the next 30 years, which was the duration of the mining concession, the state could adopt some measure or reform consistent with its environmental commitment.

Sands' observations that the majority failed to respect the text agreed by the drafters of the FTA, and is likely to undermine protection of environment is reminiscent of another well known case, Clayton/Bilcon v Canada. Bilcon is particularly remembered because the arbitral tribunal failed to show deference vis-à-vis governmental action to protect environment. Indeed, this case involved the rejection of a project to develop and operate a quarry in Nova Scotia. After a preliminary approval, a Joint Review Panel was mandated to conduct an environmental assessment, but in its final report, the Panel recommended the rejection of the project. Based on the minimum standard of treatment under the North American Free Trade Agreement (NAFTA), the tribunal found that "the process applied by the Joint Review Panel was in breach of the investors' legitimate expectations, which were based on federal and provincial laws as well as specific representations by government officials who repeatedly encouraged Bilcon to pursue the project".

ISDS Imbalances and the Restrictions on the "Right to Regulate"

After the Eco Oro award became public, there was an immediate public debate including on social media focused on trying to understand the sui generis reasoning from the tribunal. However, the decision is so confusing that it has been regarded as "bad law" by recognized experts on this field like David Schneiderman, who also questioned the tribunal's analysis of the Art 805 claim.

This is because the since same facts led the Tribunal to conclude that the Claimant had not received a specific assurance or representation such as to give rise to a legitimate expectation. It is wholly inconsistent for the Majority to reach a different conclusion in its analysis of the claim made pursuant to Art 805. In this regard, it is worth mentioning Compañía del Desarrollo de Santa Elena S.A. v The Republic of Costa Rica (ICSID Case No. ARB/96/1), in which the tribunal ruled against the state arguing that “Expropriatory environmental measures—no matter how laudable and beneficial to society as a whole—are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state’s obligation to pay compensation remains”.

Furthermore, another concern regarding the Eco Oro award is the limited scope of some instruments like the so-called “new generation” treaties including provisions aimed at protecting higher interests such as the environment, supposedly addressed to correct some of the serious inequalities derived from ISDS. This was demonstrated by the tribunal's interpretation of the FTA Canada-Colombia, which, despite being considered one of the “new generation” treaties and including provisions aimed at protecting higher interests such as the environment, was interpreted under a sui generis argument and under the rationality of the “old generation” treaties. Likewise, the recognition of the so-called “right to regulate” did not prevent Colombia from being sanctioned for taking specific measures addressed to protect the paramo in Santurbán.

The Eco Oro decision confirms the concern about the restrictions of the instruments that are supposed to try to rebalance the imbalances of ISDS, in which investors continue to be the most favoured actors. While, for the mining company, the tribunal’s decision represents yet another stream of income, for the state it represents a matter of great national significance, which could have serious repercussions not only on its environmental policy and finances, but also on the definition of the principle of separation of powers and the system of checks and balances essential to a democracy. This is explained by the tribunal's finding that the various national authorities did not act in a coordinated manner to guarantee the investor the implementation of the mining project.

On this point, Philippe Sands also draws attention on the lack of sensitivity from the tribunal regarding crucial concerns for humanity such as global warming and the quixotic attempts by some governments in addressing these global problems. In this regard, Sands argues that "[i]n the search for balance, and in the face of competing pressures, different arms of the same government may inevitably give expression to different and potentially conflicting priorities (…) this is particularly the case when the protection of the environment or human health is at stake (one need only think of the current challenges faced by so many governments around the world as they confront the emerging reality of global warming/climate change and biodiversity losses and their consequences, or the reality of Covid-19, as governments struggle to find a way through the difficulties of protecting human health whilst also securing economic wellbeing)".

Furthermore, for the local communities, who were absent from this arbitration process, this decision may come to define their ontological relationship with their territory, with their environment, with the resources from which they derive their subsistence, such as water, and with their very lives. In 2019, the *amicus curiae* brief submitted by the local communities in the Eco Oro arbitration was rejected by a procedural order signed by the president of the Eco Oro tribunal finding the Comité's application too unspecific, so their participation was limited to the broadcast of a hearing in 2020, on a screen and in a separate room within the World Bank itself.

Comité Santurbán, which is a Civic Platform established to defend the Páramo in Santurbán, was part of an alliance of local, national and international civil society organisations, that made the amicus curiae submission with the purpose of raising public-interest issues, including the human rights to water and to a healthy environment. Lorenzo Cotula, a researcher, argues that the tribunal lost its opportunity "to see how human rights would be relevant to the investment dispute between the company and the state". Moreover, Cotula explains that although lack of specificity can make it difficult for a tribunal to assess a request, and if the application were lacking, it would not be the first time that advocates could have done with more specialist advice in highly technical legal processes, but human rights were a central concern in the decisions taken by Colombian authorities aimed at protecting the environment, and the Procedural Order's framing obscures some far-reaching implications.

The Eco Oro arbitral award demonstrates that there is still a long way to go before the adjustments that ISDS needs to make to correct its profound inequalities are taken seriously. This system not only continues to exclude the actors most affected by its decisions like local communities, but also continues to redefine, through typical private law devices, rules and substantive aspects of our democracies. Furthermore, some mechanisms supposedly conceived for the purpose of correcting the imbalances of this system, like the so-called “right to regulate”, remain ineffective and the tribunals do not seem interested in using them properly to correct the ISDS imbalances. ISDS still operates as a system extremely favourable for foreign investors and their economic interests. Moreover, its significant intrusions into the domestic legal systems of states are still leading to a chill on the operation of environmental policies. This system is putting aside some essential interests, not only at the local level and for national purposes, which ought to be taken seriously to counteract global warming.

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