
Kluwer Arbitration Blog

New Generation Investment Treaties and Environmental Exceptions: A Case Study of Treaty Interpretation in *Eco Oro Minerals Corp. v. Colombia*

Roopa Mathews (LALIVE) and Dilber Devitre (Homburger) · Monday, April 11th, 2022

Environmental concerns now play an increasing role in investment disputes. In this regard, this post analyses the interpretation of an environmental carve-out in an investment treaty in the decision on jurisdiction and liability in *Eco Oro Minerals Corp. (“Eco Oro”) v. Colombia*.

Background and Award

This dispute arose from Colombia’s measures adopted in connection with the [páramo ecosystem](#) in the Santurbán highlands. Páramos play a central role in maintaining biodiversity due to their unique capacity to absorb and restore water.

Eco Oro, a Canadian mining company, held mining exploration and exploitation rights in an area that overlapped with the Santurbán páramo. Starting in 1994, Eco Oro invested over US\$250 million over two decades in its mining project in Colombia. At the time of Eco Oro’s initial investments, there were no restrictions on mining activities in the páramos, nor were the páramos delimited or protected by law.

In 2012, Colombia adopted several measures to delimit the Santurbán páramo and suspended mining activities therein but granted some exceptions for companies that held mining rights in the area. However, in February 2016, the Colombian Constitutional Court struck down the exception to the ban on mining in the páramo ecosystems that would have permitted Eco Oro to continue its operations. Based on this decision, in August 2016, the National Mining Agency issued a resolution withdrawing Eco Oro’s permits in areas overlapping with the páramo.

Following this, in December 2016, Eco Oro filed a request for arbitration under the [Canada-Colombia Free Trade Agreement \(“FTA”\)](#), invoking Articles 805 (Minimum Standard of Treatment) and 811 (Expropriation). Eco Oro claimed that the measures taken by Colombia had deprived it of its rights under the concession contract and thus destroyed the value of its investment.

The majority of the Tribunal upheld Eco Oro's claims under Article 805 of the FTA, finding that Colombia had failed to treat Eco Oro in accordance with the minimum standard of treatment. While accepting that a State cannot be bound to the rules and regulations in force at the time the investment is made, the majority held that several of Colombia's actions had frustrated Eco Oro's legitimate expectations.

The Tribunal's Interpretation of the Environmental Carve-out in *Eco Oro*

One of the key issues in dispute was the environmental carve-out in Article 2201(3) of the FTA. This provision, modelled after Article XX of the GATT, provides that, as long as measures are not applied in a manner that constitute arbitrary unjustifiable discrimination, or a disguised restriction on international trade or investment, nothing in the agreement shall be construed to prevent a Party from adopting measures necessary:

a. "to protect human, animal or plant life or health, includ[ing] environmental measures necessary to protect human, animal or plant life and health; or (...) c. for the conservation of living or non-living exhaustible natural resources."

Relying on Article 31(1) of the VCLT, the Tribunal concluded that the "ordinary meaning [of Article 2201(3)] is that it does not prevent the payment of compensation (which payment does not prevent Colombia from adopting or enforcing measures to protect the environment) but only applies when a State is seeking to pass (adopt) or implement (enforce), inter alia, environmental measures" (paragraph 367). According to the Tribunal, had the Contracting Parties intended that a measure could be taken pursuant to Article 2201(3) without any liability for compensation, it would have been drafted in similar terms as Annex 811(2)(b), which makes explicit that the taking of such a measure would not give rise to any right to seek compensation. Therefore, the Tribunal concluded that Colombia's actions should not have been taken without the payment of compensation, which it deemed to be a fundamental principle of international law.

The Environmental Carve-out and New Generation Treaties

The Tribunal's finding that Colombia was still liable for compensation, notwithstanding the environmental exception has attracted flak. This interpretation is at odds with the generally accepted interpretation of Article XX of the GATT, after which the carve-out in Article 2201(3) of the Canada-Colombia FTA is modelled. According to this interpretation of Article XX of the GATT, if an exception to a violation is upheld, the State is under no obligation to change the measure or compensate the investor. The Tribunal's analysis in *Eco Oro* is even more interesting since Canada, Colombia's counterparty to the FTA, stated in its non-disputing party submission that no compensation was due to the investor if the measure in question

met the requirements of [Article 2201\(3\)](#) since “*there is no violation of the Agreement and no State liability*” ([paragraph 16](#); [paragraph 836](#)).

While the Tribunal relied on [Article 31\(1\) of the VCLT](#) to conclude that the “*ordinary meaning*” of the provision in question did not prevent the payment of compensation when a State sought to pass or implement *inter alia* environmental measures, the Tribunal did not accept Canada’s submission that payment of compensation is not required in such circumstances. In doing so, the Tribunal [disregarded Articles 31\(2\)\(a\) and 31\(3\) of the VCLT](#) which provide that any agreement between the parties regarding the interpretation of the treaty or the application of its provisions shall be relevant for interpretation. Other than stating that “*it cannot accept Canada’s statement*” because it did “*not comport with the ordinary meaning of the Article [2201(3)] when construed in the context of the FTA as a whole and specifically in the context of Chapter Eight [(the Investment Chapter)]*” ([paragraph 836](#)), the Tribunal did not explain its decision further. To address specifically the issue of inconsistency in treaty interpretation in investment arbitration, submissions from the governments of Costa Rica, Peru, Israel, Japan, Mexico and Peru during the sessions of [UNCITRAL Working Group III](#) have indicated that “*the use of binding joint interpretation of treaty provisions by Parties should be encouraged, and it should be ensured that such joint interpretations would be binding on the ISDS tribunals*” ([paragraph 8](#)).

The majority’s decision to place environmental protection and investment protection on an equal footing has drawn criticism from practitioners and academics alike. The Canada-Colombia FTA forms part of the “[new generation](#)” of investment treaties that, among others, provide guidance as to how public policy issues, such as environmental protection and human rights violations, should be addressed in the context of investment protection. These provisions are included in new generation BITs as a response to the criticisms levelled against the investor-State dispute settlement system. Some [commentators](#) have, however, [questioned the utility](#) of these new generation treaties (which contain considerably lengthier investment chapters), if arbitral tribunals continue to interpret them in the same manner as treaties which do not contain such express and detailed exceptions to investment protection.

The Tribunal’s approach to treaty interpretation raises the question of whether States will be inclined to push for different, and potentially stronger, wording to safeguard environmental protections in treaties going forward. For example, [Canada’s 2021 Foreign Investment Promotion and Protection Agreement Model](#) (“FIPA Model Treaty”) does not include the same GATT-style language. Instead, it affirms the Parties’ right to regulate based on “*legitimate policy objectives, such as with respect to the protection of the environment and addressing climate change*” (Article 3). Likewise, concerning the ability of the treaty parties to adopt binding interpretations of the underlying obligations, Canada appears to be moving in the same direction. Its 2021 FIPA Model Treaty provides that “[i]f serious concerns arise as regards matters of interpretation, the Minister for International Trade of Canada and [the contracting party] may agree to adopt an interpretation of this Agreement[, which] shall be binding on a Tribunal established under this Section.” ([Article 32\(2\)](#)).

The Interpretation of Environmental Carve-outs in Similar Cases

The interpretation of environmental carve-outs has been tested in several investment arbitration proceedings. For example, the decision in *Eco Oro* is consistent with *Infinito Gold v. Costa Rica*. There, the tribunal held that the environmental carve-out in the *Canada-Costa Rica BIT*, which contains similar GATT-style language as that in the *Canada-Colombia BIT*, did not exempt Costa Rica from liability for breaches of its fair and equitable treatment obligation.

Both *Eco Oro* and *Infinito Gold* stand in contrast to the decision in *David Aven v. Costa Rica*. There, the tribunal held that the rights of investors are subordinate to the right of States to ensure that investments are carried out in a manner sensitive to environmental concerns, according to the carve-out provisions contained in Chapter Seventeen of the *Central America-Dominican Republic-United States Free Trade Agreement* (“CAFTA-DR”). The tribunal, however, made clear that such subordination is not absolute, but that adoption and enforcement of laws relating to environmental concerns are to be fair and non-discriminatory through due process of law.

Conclusion

Treaty interpretation of environmental carve-outs can vary significantly from case to case depending on the underlying treaty as well as the composition of the arbitral tribunal. The lack of uniformity in treaty interpretation, and thus, the lack of predictability in the outcome of investment proceedings, is currently being addressed by the UNCITRAL WGIII in proposals for ISDS reform. While the impact of *Eco Oro* on pending investment arbitration proceedings involving environmental carve-outs remains uncertain, this decision evidences crucial questions for debate: Are carve-outs in new generation investment treaties fit for purpose? Will treaty drafters pull away from including GATT-style carve-outs in investment treaties?

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe [here](#). To submit a proposal for a blog post, please consult our [Editorial Guidelines](#).

Profile Navigator and Relationship Indicator

Includes 7,300+ profiles of arbitrators, expert witnesses, counsels & 13,500+ relationships to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.

Learn more about the newly-updated *Profile Navigator and Relationship Indicator*



This entry was posted on Monday, April 11th, 2022 at 8:00 am and is filed under [Arbitral Award](#), [Arbitration clause](#), [Canada](#), [Colombia](#), [ICSID](#), [ICSID Arbitration](#), [International environmental disputes](#), [Treaty Interpretation](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.