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Red Eagle v. Colombia: Colombia's Decisions to Protect Páramos Do Not Constitute a Violation of the Minimum Standard of Treatment vis-à-vis an Investor with No Vested Right

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On February 28, 2024, the arbitral tribunal in the arbitration between Red Eagle Exploration Limited (“Red Eagle”) and Colombia (ICSID Case No. ARB/18/13) issued an award under the Canada-Colombia FTA (2008) (“FTA”). In this post, we discuss the background to this decision as well as the tribunal’s ruling regarding the merits (minimum standard of treatment and expropriation claims). We do not discuss the tribunal’s jurisdictional reasoning.

Relevant Background

According to the [award](#), in 2001, Colombia adopted its [Mining Code](#) (Law 685), which provides that mining rights are vested if (i) a mining title exists, (ii) an environmental license is issued, and (iii) a Mining Works Program (“PTO”) has been approved. To obtain an environmental license, the investor must obtain approval from the environmental authority of (i) an Environmental Impact Assessment and (ii) an Environmental Management Plan (“PMA”).

Article 34 of the Mining Code establishes that no exploration and exploitation can be performed in areas declared and delimited by environmental authorities as “protected areas,” called “mining exclusion zones.” Article 36 sets forth the effects of said prohibition: if any mining work is carried out in protected areas, the mining authority may demand its removal and proceed with eviction without additional payment, compensation, or reparation. In 2002, the Constitutional Court of Colombia (“Court”), in Judgment [C-339](#), ruled on the constitutionality of these provisions, stating that *páramos* are part of the mining exclusion zones and are constitutionally protected.

Between 2009 and 2010, Red Eagle secured 11 option contracts to acquire equal mining titles to develop a large-scale gold mining project in Colombia (“Project”). Between 2010 and 2012, Red Eagle acquired the 11 mining titles, which were assigned and registered according to Colombian law. Red Eagle did not apply for an environmental license or a PTO for the Project.

In February 2010, Colombia enacted [Law 1382](#), which explicitly designated *páramos* as mining exclusion zones, and introduced a grandfathering provision, that allowed existing mining activities within these zones to continue until the mining title expiration. Under Law 1382, the *páramo* area

shall be identified by the cartographic information provided by the Alexander Von Humboldt Investigation Institute (“Von Humboldt Institute”). Accordingly, in May 2011, the Von Humboldt Institute issued Resolution No. 937, which adopted the cartographic information of a 2007 *Páramo* Atlas to identify and delimit Colombian *páramos*. According to this delimitation, part of the area of Red Eagle’s mining titles overlapped with one of the Colombian *páramos*.

As indicated by the Tribunal, during 2010 and 2011, Eco Oro’s application for an environmental license in an adjacent mining zone to Red Eagle’s mining titles was seriously impacted by the *Santurbán Páramo*’s preliminary and temporary delimitation.

In May 2011, the Court issued Judgments [C-366](#) and [C-367](#) declaring Law 1382 unconstitutional. In June 2011, Colombia enacted [Law 1450](#), which reaffirmed the prohibition of mining in *páramos* with immediate effect and ordered Colombia’s national environmental authority to issue cartographic delimitation of *páramos*.

In December 2014, Colombia’s national environmental authority issued [Resolution 2090](#), delimiting the *Santurbán Páramo* in an almost identical area as the one contained in the 2007 *Páramo* Atlas, which overlapped with the area of Red Eagle’s mining titles. In June 2015, Colombia enacted [Law 1753](#), ratifying the mining ban in *páramos*, but reviving a grandfathering provision alike Law 1382. Such provision was declared unconstitutional in Judgment [C-035](#) of 2016 because it authorized mining activities in projects with pre-acquired environmental licenses in *páramo* areas.

In May 2016, the National Mining Agency of Colombia (“ANM”) informed Red Eagle that mining activities were prohibited in a portion of its concessioned area because it overlapped with the *Santurbán Páramo*. The ANM further reiterated this in April, August 2017, and December 2019.

In May 2017, the Court issued Judgement [T-361](#), whereby it declared Resolution 2090 void based on the lack of participation by communities located within the *Santurbán Páramo* and ordered the environmental authority to issue a new resolution for a broader delimitation of the *Santurbán Páramo* through a participatory process. The lack of a new delimitation and the prior prohibition to Red Eagle’s mining activities led Red Eagle to conclude that the Project was not viable. Therefore, on March 21, 2018, Red Eagle initiated an ICSID arbitration claiming compensation for damages that allegedly exceeded CAD\$ 110,000,000.

The ICSID Arbitration

In the arbitration, Colombia proposed several jurisdictional objections that were rejected by the tribunal. In the merits of the case, Red Eagle argued that (i) Colombia adopted measures that frustrated its legitimate expectations; (ii) Colombia’s conduct was nontransparent and inconsistent; (iii) Colombia’s measures have been unreasonable or arbitrary; as well as (iv) disproportionate and discriminatory. By majority, the tribunal declared that Colombia did not breach any of its obligations under the FTA. The tribunal’s decision emphasized that the conduct of the State has to reach a certain level for it to rise to a breach of the Minimum Standard of Treatment (“MST”). The tribunal pondered the policy objectives pursued by Colombia with the scope of economic interests of the investor, taking into account the legal status of its investment under the local laws to conclude that without vested rights, there was no illegality in the issuance of the decisions taken by different state authorities.

1. Minimum Standard of Treatment

According to Article 805 of the FTA, Colombia “shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens”. The tribunal ruled that FET should not be taken as a self-standing standard, it is part of MST and must not go beyond its scope.

The tribunal analyzed whether the customary MST protected Red Eagle’s legitimate expectation and concluded that it was necessary to support its protection on the existence of state practice and *opinion juris* as any rule of customary international law. The majority of the tribunal decided that there was insufficient evidence to consider the doctrine of legitimate expectations as part of the customary MST. Although acknowledging that a State’s failure to fulfill promises to investors may constitute a breach of the MST, no privileged treatment is afforded to legitimate expectations. The majority of the tribunal accepted that a breach of MST can occur if the investor can prove the existence of a quasi-contractual relationship between the State and the investor, where the State has intentionally induced the investment. Nonetheless, this relationship alone does not automatically constitute a breach of MST.

Red Eagle did not substantiate neither any specific representation nor promise from Colombia nor a quasi-contractual relationship. In fact, by the date of its investment, Red Eagle knew that mining was prohibited in *páramos*. Red Eagle also knew that its Project was never grandfathered, that the Mining Code did not ‘stabilize’ the laws applicable to its mining projects, and that Red Eagle should have known that the Ministry of Environment had rejected an environmental license to Eco Oro in 2011 in a nearby location to its Project.

The tribunal stated Colombia acted transparently, publicizing the *páramo* delimitation, to the point that Red Eagle itself took the chance to participate in such delimitation. The investor should have known that laws are subject to constitutional control in Colombia.

The tribunal also stated that Red Eagle failed to provide sufficient evidence of arbitrariness or unreasonableness, highlighting that the measures at issue did not deprive them of any vested right. The tribunal considered that in issuing Colombia’s measures, specifically Resolution 2090, Colombia made a deliberative process considering a variety of interests and factors. This behavior showed that Colombia acted with a legitimate purpose, giving meaningful consideration to competing economic, environmental, and social interests to produce a balanced policy. Although there could be other ways in which this balance could have been reached, some of which may have been less harmful to the Red Eagle’s economic interests, the mere existence of these alternatives does not undermine the legitimacy of the conclusion adopted by Colombia. The tribunal clarified that it has no business questioning how Colombia chose to balance these competing interests unless the choice was arbitrary or discriminatory, which did not happen.

The tribunal recognized Colombia’s efforts to protect *páramos* as proportionate and nondiscriminatory, given their environmental relevance. The tribunal emphasized the difficulty of government decision-making in balancing competing priorities, particularly concerning environmental protection, stating that Colombia did not go further than it was necessary to pursue its objectives. The mining ban was limited to the *páramo* area, and Red Eagle was able to access the resources within its mining titles, which were located outside of the *páramo* ecosystems. The

tribunal pointed out that Red Eagle did not identify alternative measures which Colombia could have achieved to protect the environment with a lesser effect on the Red Eagle's economic interests. The mining ban was not discriminatory. Not only are illegal small miners not in similar circumstances to Red Eagle's Project, but it is unreasonable for an investor to assume that limitations on mining in *páramo* areas would not apply to their project simply because the State struggles to prevent illegal mining activities. Therefore, the tribunal concluded that Red Eagle's claims lacked merit and upheld Colombia's actions as consistent with its legal obligations.

Mr. Martínez de Hoz, an arbitrator in this case, **dissented**. In his opinion, although the threshold for a breach of the MST is stringent, it includes an obligation to the State not to frustrate the investors' legitimate expectations. Red Eagle had the legitimate expectation of carrying out mining activities when it acquired the mining titles, because the signals from Colombia's regulatory framework were "mixed and unclear," creating legal uncertainty contrary to the MST.

Martínez de Hoz cited *Eco Oro v. Colombia* ("Eco Oro"), where, as described in a previous [post](#), the tribunal concluded that Colombia failed to provide Eco Oro's investment within the MST. In Eco Oro, a case under the same FTA, the tribunal analyzed the frustration of the investor's legitimate expectations as a breach of the MST. The tribunal found that the regulatory framework since Eco Oro's investment (starting in 1994) was a "roller-coaster," and that Eco Oro was left in limbo for a very considerable period, with no certainty of the final delimitation of the *Santurban Páramo*. In contrast, when Red Eagle invested in Colombia, the *páramo* mining ban was already in place, in effect and known to Red Eagle. In any case, as described by the tribunal, in a matter of this complexity, considering the protection of the environment, there is inevitably a degree of uncertainty, and that in no case should be regarded as arbitrary.

2. Indirect Expropriation

Red Eagle unsuccessfully claimed that Colombia had unlawfully indirectly expropriated its investment. The tribunal ruled that it was not satisfied that, as a matter of domestic law, Red Eagle ever acquired a vested right to engage in mining activities in the *páramo* area. Red Eagle's right to carry out mining was conditioned on the issuance of an environmental license and to the approval of a PTO, which was at the discretion of Colombia, and was never applied for or granted. The tribunal added that in any case the measures adopted by Colombia did fall within the scope of the Colombia's police powers and were plainly designed and applied to protect the public policy goal of environmental protection. Therefore, the tribunal decided that Colombia did not indirectly expropriate any investment from Red Eagle.

The environmental exception of Article 2201(3) of the FTA was not analyzed by the tribunal in this case, since that exception applies if there has been a breach of an obligation of Chapter Eight of the FTA, which was not the case here.

Conclusion

The tribunal confirms Colombia's compliance with its international obligations and upholds its right to enact and enforce measures to protect protected ecosystems such as the *páramos*. By dismissing Red Eagle's claims, the tribunal acknowledged Colombia's legitimate exercise of

regulatory powers in the interest of environmental protection. This decision underscores Colombia's commitment to environmental conservation. This award sheds light on the interpretation of the MST and the burden placed on investors under the FTA. The decision underlines the significance of clarifying the scope and content of the MST, emphasizing that the doctrine of legitimate expectations may not be considered part of the customary MST.


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