

RED EAGLE VIES FOR GOLD: THE TRIBUNAL IN *RED EAGLE V. COLOMBIA* FINDS COLOMBIA NOT LIABLE FOR TREATY BREACH WHILE DIVERGING FROM THE TRIBUNAL IN *ECO ORO V. COLOMBIA*

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I. INTRODUCTION

The majority ICSID¹ Tribunal in *Red Eagle Exploration Limited v. Republic of Colombia*² dismissed all the claims of Red Eagle Exploration [“**Claimant**”] brought under the Canada-Colombia FTA.³ A three-member Tribunal comprising Dr. Andrés Rigo Sureda (President, appointed by agreement of the parties), Mr. José A. Martínez de Hoz (Arbitrator, appointed by the Claimant), and Prof. Philippe Sands (Arbitrator, appointed by the Respondent), rendered an award dated February 28, 2024, with Dr. Rigo Sureda and Prof. Sands forming the majority, and Mr. Martínez de Hoz penning the dissent.

This piece attempts to explore the decision of the Tribunal and the reasoning it used to arrive at the outcome that Colombia had not breached its treaty obligations. The article further delineates Colombia’s objection to the Tribunal’s jurisdiction by invoking the environmental exception provision of the FTA. Finally, the case comment concludes by critically comparing the majority’s decision in *Red Eagle*, to the majority’s decision in *Eco Oro v. Republic of Colombia* (“*Eco Oro*”)⁴, a case arising out of similar circumstances under the same FTA.

II. BACKGROUND

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¹ International Centre for Settlement of Investment Disputes (“ICSID”) established in 1966 under the auspices of the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*.

² ICSID Case No. ARB/18/12.

³ *Free Trade Agreement between Canada and the Republic of Colombia*, dated November 21, 2008, which entered into force on August 15, 2011.

⁴ *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on *quantum*, September 9, 2021.

In brief, the dispute concerned the prohibition of gold mining in the Colombian *páramos*.⁵ Between the period of June 2010 and October 2013, the Claimant, a Canadian gold mining company, acquired mining titles and exploration permits [**“mining titles”**] in the Santurbán *páramo*, in Vetás, located in the northeastern region of Colombia. Meanwhile, in 2010, the Colombian Government banned mining in the *páramos*.⁶ This initial ban was found to be unconstitutional by the Constitutional Court of Colombia, as the Court found that the ban was contended to have been enforced without consulting the indigenous and afro-descendant people of the region.⁷

Thereafter, the mining ban in the *páramos* was reinstated in 2011.⁸ This ban was subsequently ratified in 2015.⁹ In 2014, the Santurbán *páramo* was delimited,¹⁰ and the delimitation substantially overlapped with the Claimant’s mining titles. The ban, however, was protected by a grandfathering provision for titles with pre-acquired environmental licenses before February 9, 2010. The 2015 ratification was then challenged before the Colombian Constitutional Court, and the Court ruled that the said grandfathering provision was unconstitutional. The Court additionally directed that a more expansive delimitation is required to be carried out in the Santurbán *páramo*, where the majority of the Claimant’s project was situated.¹¹ This meant that there could be no exception to the mining ban imposed in the *páramos*, leading to a reduction of the areas sanctioned to the Claimant. This blanket ban on mining, coupled with the impending threat of further delimitation of the Santurbán *páramo*, ultimately led to RE abandoning the project as it was no longer viable.

III. CONTENTIONS OF THE PARTIES

A. Claimant’s Contentions

⁵ *Páramos* are described in Resolution 769, August 5, 2002, Article 2 of the Ministry of the Environment as a “*High mountain ecosystem, located between the upper limit of the Andean forest and, if applicable, with the lower limit of glaciers or perpetual snow, in which a herbaceous and grassland vegetation dominates, frequently frailejones and may have low and shrubby forest formations and present wetlands such as rivers, ravines, streams, peat bogs, swamps, lakes and lagoons.*”

⁶ Law 1382, February 9, 2010.

⁷ Constitutional Court, Judgment C-367, May 11, 2011.

⁸ Law 1450, June 16, 2011.

⁹ Law 1753, June 9, 2015.

¹⁰ Ministry of Environment and Sustainable Development, Resolution No. 2090, December 19, 2014.

¹¹ Constitutional Court, Judgment C-035, February 8, 2016.

The Claimant filed its claims under the FTA in 2018, seeking compensation of USD 87 million plus interest.¹² On merits, the Claimant, *inter alia*, contended that Colombia had overwhelmingly breached the minimum standard of treatment [“MST”] under customary international law, including fair and equitable treatment standard [“FET”] contained in Article 805 of the FTA, and the most favored nation treatment [“MFN”] under Article 804 of the FTA. Through this breach, the Claimant argued, Colombia had adopted measures that breached the FET standard and specifically frustrated the Claimant’s legitimate expectations by failing to provide a stable and predictable legal framework for its investments. The Claimant also contended that Colombia acted in a discriminatory, non-transparent, unreasonable, and arbitrary manner, and its conduct amounted to expropriation of its investment under Article 811 of the FTA. The Claimant opposed the jurisdictional objections of Colombia that measures taken under the pretext of environmental protection could not be adjudicated.

B. Colombia’s Defense

Colombia filed its jurisdictional objections and, in its defense, *inter alia*, argued that the measures implementing the ban, fall squarely within the ambit of Article 2201(3),¹³ i.e., the general exception clause under the FTA, which permitted that those measures could be taken for environmental purposes. This position was taken by Colombia as a jurisdictional objection, by which it argued that it had not consented to arbitrate under the FTA for measures having an environmental purpose. Colombia also argued that it had exercised its police powers legitimately under Article 811 of the FTA, and, therefore, its conduct could not amount to expropriation.

¹² Notice of Intent dated 14 September 2017.

¹³ Article 2201(3) of the FTA (which is not included in the investment chapter but in a separate chapter on “Exceptions”) provides:

“For the purposes of Chapter Eight (Investment), subject to the requirement that such measures are not applied in a manner that constitute arbitrary or unjustifiable discrimination between investment or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:

- 1. To protect human, animal or plant life or health, which the Parties understand to include environmental measures necessary to protect human, animal or plant life and health;*
- 2. To ensure compliance with laws and regulations that are not inconsistent with this Agreement; or*
- 3. For the conservation of living or non-living exhaustible natural resources.”*

IV. ANALYSIS OF THE TRIBUNAL (MAJORITY)

A. On Jurisdiction

The majority of the Tribunal upheld its jurisdiction by finding that the Claimant had brought its claims within the *ratione temporis* jurisdiction of the Tribunal, and that Colombia had not adduced enough evidence to demonstrate that the Claimant could be denied benefits under Chapter 8 (Investment) of the FTA. It further found that Colombia's *ratione materiae* objection under Article 2201(3) of the FTA, which provides that the Contracting Parties to the FTA can adopt measures that are necessary to protect the environment ("environmental exception"), was not an objection to the jurisdiction of the Tribunal, but rather a defense on the merits.

To arrive at this conclusion, it followed the reasoning of another Tribunal in *Eco Oro v. Colombia*,¹⁴ which was in *seisin* of substantially similar disputes under the same FTA, to rule that all forms of environmental measures *per se* were not excluded from Chapter Eight, and rather that these exceptions only apply once there has been a determination of a breach of a primary obligation, such as MST or FET in Chapter Eight.¹⁵ The Tribunal, therefore, upheld its jurisdiction over the claims.

B. On merits

i. *On whether Colombia violated MST, including FET*

¹⁴ Supra (note 4), ¶¶ 379-380.

¹⁵ *Red Eagle Exploration Limited v. Republic of Colombia*, ICSID Case No. ARB/18/12, ¶174-175.

The Tribunal considered the construction of Article 805 of the FTA¹⁶ and held that there was a certain degree of “ambivalence”¹⁷ in the FTA, as the wording of the FET provision did not go beyond MST to create “*additional substantive rights*”. The Tribunal referred to the award in *Waste Management, Inc. v. United Mexican States*,¹⁸ to examine the contours of the linkage between MST and FET as conduct which is “*arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory [...], or involves a lack of due process leading to an outcome which offends judicial propriety*”.¹⁹ The Tribunal then moved on to hold that MST cannot be extended or broadened by the operation of the MFN clause in Article 804 of the FTA in view of the binding interpretation of the Canada-Colombia Joint Commission on the construction of the MFN standard.²⁰

On the issue of whether the Claimant’s legitimate expectations had been breached, the Tribunal concluded that under customary international law, there was insufficient evidence either through general and consistent state practice or subjective acceptance of such practice as law through *opinio juris* to support the argument that legitimate expectations form a part of MST. The Tribunal also arrived at the finding that the Claimant could not prove that it had placed reliance on any representation by Colombia under a “*quasi-contractual relationship*”²¹ between the parties to induce breach of MST, as held by the Tribunal in *Glamis Gold v. United States*.²² Accordingly,

¹⁶ Article 805 of the Treaty is reproduced below:
 “1. Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security. The concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

2. The obligation in paragraph 1 to provide ‘fair and equitable treatment’ includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process.

3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

Footnote 2 of Article 805 states that “it is understood that the term ‘customary international law’ refers to international custom, as evidence of a general practice accepted as law, in accordance with subparagraph 1(b) of Article 38 of the Statute of the International Court of Justice.”

¹⁷ Supra (note 14), ¶ 286.

¹⁸ *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/03, Award, April 30, 2004, ¶ 98.

¹⁹ Supra (note 14), ¶ 287.

²⁰ *Decision of the Canada-Colombia Joint Commission - Interpretation of Certain Chapter Eight Provisions*, October 24, 2017 (available at: <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/fta-ale/decision-interpretation-notes.aspx?lang=eng>).

²¹ Supra (note 14), ¶ 294.

²² *Glamis Gold Ltd v. United States of America*, UNCITRAL, Award, June 8, 2009, ¶766.

the Tribunal concluded that Colombia's conduct did not fulfill the threshold required to breach MST.

ii. On whether Colombia indirectly expropriated the Claimant's investment

The Claimant argued that Colombia had indirectly expropriated its mining titles under Article 811 of the FTA. The Tribunal noted that any claim for expropriation, needs to be underpinned by the “*existence of a vested right of which it has been deprived*”.²³ The Tribunal was not satisfied that the Claimant had ever acquired a “*vested right*”, as the mining titles were always “*conditional on being granted an environmental license*”.²⁴ The Claimant had also failed to establish the “*rare circumstances*”²⁵ under which public policy measures may fall outside the scope of a State's police powers as there was no vested right founded on Colombia's representations to begin with, which amounted to expropriation.²⁶ Consequently, the Tribunal ruled that the claim failed at the first hurdle of establishing a “*vested right*” to demonstrate an expropriatory breach, and accordingly dismissed the claim.²⁷

iii. On whether the environmental exception under Article 2201 of the FTA was applicable

Colombia contended that measures were taken to protect *páramo* ecosystems as per the environmental exception enumerated in Article 2201(3).²⁸ On the other hand, the Claimant contended that treaty exceptions must be restrictively interpreted to preclude “*an escape route*”²⁹ to host States from performing their treaty obligations.

In its finding, however, the Tribunal reiterated that exceptions under Article 2201(3) would only apply if there had been a breach of a “*primary obligation*”³⁰ under Chapter 8 (Investment), i.e.,

²³ Supra (note 14), ¶399.

²⁴ Supra (note 14), ¶ 399.

²⁵ Supra (note 14), ¶ 401.

²⁶ Supra (note 14), ¶ 401.

²⁷ Supra (note 14), ¶400.

²⁸ Supra (note 12).

²⁹ Supra (note 14), ¶407.

³⁰ Supra (note 14), ¶428.

breach of MST or an expropriatory breach, which the Claimant failed to prove. Thus, the need to engage in a discussion on the environmental exception did not arise.

V. DISSENTING AWARD

In his dissenting award, Mr. Martínez de Hoz opined that Colombia displayed “*mixed and unclear*”³¹ signals concerning its regulatory framework and observed that Colombia had repeatedly changed its policies and rules, giving rise to a breach of legitimate expectations. The dissenting award referred to the Tribunal’s decision in *Eco Oro*³² to find that Colombia had not exercised due diligence in granting mining titles over environmentally sensitive areas.³³ The dissenting arbitrator also found that the Claimant had legitimate expectations which were negated by Colombia’s constant modifications to its regulatory framework, in addition to it not carrying out a delimitation within time, in terms of the Constitutional Court Judgment dated February 8, 2016.³⁴ This conduct, as a result, made mining activities unviable for the Claimant.

On the point of invocation of the environmental exception under Article 2201(3), the dissenting arbitrator opined that measures protected under the right to invoke environmental exception did not exclude Colombia’s right to compensate the Claimant under international law. The dissenting award, however, did not find that Colombia had indirectly expropriated the Claimant’s investment, given the requirement that an “*aggravating factor*”, set out under Article 811 of the FTA, was missing.

VI. DIVERGENCE BETWEEN THE DECISIONS IN RED EAGLE AND ECO ORO: A CRITICAL ANALYSIS

The majority award in *Red Eagle* is in stark contrast with the findings of the majority in *Eco Oro*,³⁵ where substantially similar claims arising under the same FTA, found Colombia liable under the FTA for breach of MST, as Colombia’s inconsistent conduct in delimiting the Santurbán páramo

³¹ Supra (note 14), ¶ 58 of Dissenting Opinion dated February 23, 2024.

³² Supra (note 4).

³³ Supra (note 14), ¶76 of Dissenting Opinion dated February 23, 2024.

³⁴ Supra (note 11).

³⁵ Supra (note 14).

had breached the *Eco Oro*'s legitimate expectations of a conducive regulatory framework, including an expectation for a stable and predictable legal environment. The majority also found that the environmental exception under Article 2201(3) of the FTA, could not relieve Colombia from its obligation to pay compensation under international law (similar to Mr. Martínez de Hoz's dissent in *Red Eagle*).

The majority in *Eco Oro*,³⁶ however, found that the mining ban in the *paramos* qualified as a legitimate exercise of Colombia's police powers under Annex 811(2) of the FTA, resulting in no expropriatory breach. Notably, Prof. Sands (Colombia's appointee in both cases) penned a dissenting award in *Eco Oro*,³⁷ finding that the threshold for finding a breach of MST is much higher than that of FET (including legitimate expectations) and found no evidence that spawned legitimate expectations.

Of particular interest, in relation to *Red Eagle*'s³⁸ treaty interpretation on MST excluding legitimate expectations, is the majority's decision in *Eco Oro*, by which it propounded an unprecedented two-pronged analysis to discern a breach of MST.³⁹ *Firstly*, the Tribunal noted that the conduct under consideration must be a breach of legitimate expectations, i.e., that the host state failed to provide a stable and transparent investment environment or acted in bad faith. *Secondly*, the Tribunal should examine whether these circumstances were unacceptable from an international law perspective. The upshot of this unique, novel interpretation in *Eco Oro* is that the standard of legitimate expectations under FET falls under the scope of MST, which diametrically contrasts the finding in *Red Eagle*. In *Red Eagle*, the majority found that the legitimate expectations standard could not form a part of MST, which required a higher threshold to establish a breach.

VII. CONCLUSION: A NOVEL ARENA FOR TREATY INTERPRETATIONS?

Both *Red Eagle* and *Eco Oro* drastically diverge in the finding of legitimate expectations under the scope of MST and Colombia's conduct under the same factual matrix. The high threshold of MST and the exclusion of legitimate expectations from MST under customary international law,

³⁶ Supra (note 14).

³⁷ Supra (note 14).

³⁸ Supra (note 2).

³⁹ Supra (note 14), ¶762.

set out by the majority in *Red Eagle*, is subverted by the finding in *Eco Oro*, that legitimate expectations fall under the realm of MST. Strikingly, *Red Eagle* underscored that it could not find any state practice or *opinio juris* to include legitimate expectations under customary international law MST. *Eco Oro*, therefore, stretches treaty practice to create a novel, unprecedented, two-pronged approach to determining a breach of MST.

In sum, the diverging views of the ICSID Tribunals in *Red Eagle* and *Eco Oro* show a dichotomy of treaty interpretations of the same treaty which could engender novel interpretations of MST and legitimate expectations under international law. The exact ramifications of these decisions remain to be seen.
