INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

RED EAGLE EXPLORATION LIMITED

– Claimant –

and

THE REPUBLIC OF COLOMBIA

– Respondent –

ICSID Case No. ARB/18/12

DISSENTING OPINION

José A. Martínez de Hoz (Co-arbitrator)

Members of the Tribunal

Dr. Andrés Rigo Sureda - President

Mr. José Martínez de Hoz - Arbitrator

Prof. Philippe Sands - Arbitrator

Secretary of the Tribunal

Ms. Catherine Kettlewell

February 23, 2024

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DISSENTING OPINION

1. Introduction

(1) I agree with the reasoning contained in Section V of the award issued by the Tribunal (the "Award") in relation to the jurisdictional objections raised by Respondent and the conclusion to uphold jurisdiction in this case.

(2) I respectfully disagree with my colleagues in relation to their reasoning and conclusions on Liability (Section VI of the Award), particularly regarding whether Colombia's measures violated Article 805 of the Free Trade Agreement between Canada and Colombia (the "FTA" or the "Treaty").

(3) I do however agree that Colombia's measures do not constitute an indirect expropriation of Claimant's investments under Article 811 of the Treaty.

(4) In view of the decision of the majority of the Tribunal, although this opinion includes certain general considerations as to the characterization and assessment of the damages claimed by Red Eagle Exploration Limited ("Red Eagle" or "Claimant"), I do not enter into a detailed analysis of the compensation payable to Claimant.

(5) All capitalized terms not defined herein shall have the meaning ascribed to them in the Award.

2. Signals to Investors. Regulatory Framework and Measures

2.1. Initial comment

(6) The Parties discussed at length during the proceedings the signals that investors generally, and Claimant in particular, would have received from Colombia regarding the likelihood of the imposition by Respondent of a ban or restrictions on mining operations in the areas forming part of the Santurbán páramo ("SP" or "Páramo"), and their implications on the legitimate expectations of Claimant. This matter was also addressed in detail in both Parties' Post-Hearing Briefs ("PHBs") in response to the first question that the Tribunal directed to the Parties on March 2, 2023.[1]

(7) I will first review the signals invoked by each of the Parties in relation to the regulatory framework in force at the time Claimant acquired its 11 mining titles (the "Mining Titles") and the subsequent measures and actions taken by Colombia's authorities. I will afterwards analyze the depth of the due diligence carried out by Claimant and finalize with my conclusions on this first issue.

[1] Question 1 of Section on Overarching issues of general consequence.

2.2. Signals stemming from the regulatory framework in force prior to Resolution 2090/2014

(8) Respondent argues that at the time Claimant acquired its Mining Titles between May 2010 and April 2012, Red Eagle knew that there was a substantial risk that they would overlap with the final delimitation of the Páramo, and that the Aquaprocesos Report prepared by Mr. Franco in December 2009 identified this risk.[2] Moreover, Respondent points out that, long before Red Eagle was even incorporated, under the 2001 Mining Code (the "Mining Code") Colombia had already signaled that it could prohibit mining in certain areas for environmental considerations, and that in 2002, through Judgement C-339, the Colombian Constitutional Court specifically identified páramo ecosystems as one of the types of areas in which the Colombian legislature was likely to enact a ban on mining in the future.[3]

(9) Law 1382, enacted in 2010, amended the Mining Code and specified for the first time that páramo ecosystems could be declared mining exclusion zones ("Mining Exclusion Zones"). However, Article 3 thereof (that amended Article 34 of the Mining Code), did not establish itself a prohibition of mining activities in páramo areas.[4]

(10) Respondent concedes that according to Law 1382, restrictions in páramo ecosystems and national parks would apply insofar as three requirements were met: (i) restrictions would only apply to areas delimited by the competent environmental authority "*based on technical, environmental and social studies*"; (ii) for a restriction to apply the Ministry of Mines and Energy should issue a previous non-binding opinion approving the restriction; and (iii) restrictions would apply to mining titles (x) issued after Law 1382 was enacted (this is, after February 9, 2010); (y) that did not have an environmental license or equivalent; and (z) where no construction, mounting and exploitation activities had been undertaken.[5]

(11) Thus, Law 1382 was a forward-looking regulation; though it contemplated the possibility that the competent authorities could establish new Mining Exclusion Zones, it also established that their identification and delineation would be subject to a number of requirements. In any case, Law 1382 fell short from identifying specific areas within the páramo ecosystem subject to a mining ban. Additionally, it established a transitional or "grandfathering" regime in respect of mining titles issued prior to February 9, 2010, which had an environmental license or equivalent.

(12) On the other hand, Colombia had a tradition of balancing the protection of property rights and environmental considerations. In fact, Colombia's Constitution protects both property rights and the right to engage in mining as well as the right to the environment and does not contain a specific prohibition on mining in páramo ecosystems.[6] Also, Law 99 of 1993, setting forth the principles of Colombian environmental policy, did not contain any specific

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[2] Resp. PHB, ¶¶ 2 and 8.

[3] *Id*, ¶ 10.

[4] Law 1382/2010, September 2010, (**Exhibit C-655**), Article 3.

[5] *Id*. See also Cl. Mem., ¶ 57; Cl. Reply, ¶ 103; Resp. C-Mem., Section III.G; and Cl. PHB, ¶¶ 16-17.

[6] Colombian Constitution, (**Exhibit C-565**), Articles 58, 79, 80 and 360. See also Hearing Tr. Day 3 (English) 698:11-14 (De Vivero Cross).

prohibition on mining in páramo ecosystems.[7] Moreover, although Resolution 769 of 2002 provided for a study of the páramos, it did not establish any mining prohibition.[8]

(13) Consistently with the above-mentioned principles, although Article 36 of the Mining Code allows for the retroactive effect of environmental regulations, it also states that compensation is payable in accordance with Article 58 of the Constitution if the investor suffers a loss of an acquired right.[9]

(14) In its submissions, Respondent also draws attention to the fact that through the *Atlas de Páramos de Colombia* (the "2007 IAVH Páramos Atlas" or the "IAVH Atlas"), published in May 2007, investors should have been put on notice by Colombia of the areas that could be considered to form part of the páramo ecosystem. Though the IAVH Atlas was prepared on a large scale of 1:400.000, Mr. Franco relied on this Atlas in the Aquaprocesos Report and concluded that three Mining Titles fell within the páramos as mapped by the IAVH Atlas.[10]

(15) Respondent also emphasizes that the IAVH Atlas, although not binding, was prepared as part of a long-running effort from the Ministry of the Environment to acquire knowledge about the páramos and was the official cartography designated by the Colombian legislature as a minimum reference for the ban on mining in páramo ecosystems. Ms. Baptiste also explained in her witness testimony that the *Instituto de Investigación Alexander Von Humboldt* ("IAVH") had prepared a map on 1:250.000 scale that was available upon request.[11]

(16) However, regardless of the discussion on whether the 1:400.000 scale of the IAVH Atlas was adequate or not for precising the extent to which Claimant's Mining Titles could eventually overlap the SP, it is a fact that the Atlas itself did not prohibit mining in any of the areas identified therein nor established any Mining Exclusion Zones, as recognized by Respondent's witness, Ms. Baptiste.[12]

(17) As explained above, Law 1382 was forward looking, did not establish any mining prohibition in respect of specific areas and set forth several requirements applying to the declaration and delimitation of Mining Exclusion Zones that had not been met at the time Red Eagle acquired its Mining Titles.[13]

(18) Colombia's Constitutional Court declared Law 1382 unconstitutional because the government had failed to carry out community consultations. Shortly thereafter, Colombia enacted Law 1450 of 2011 which prohibited mining activities in páramo ecosystems and tasked the Ministry of the Environment with the responsibility of delimiting the páramos on the basis of economic, technical, environmental and social studies. It established a process for delimiting páramo Mining Exclusion Zones at a scale of 1:25.000, a scale more than ten times more precise than the IAVH Atlas. Law 1450 was also forward looking as it

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[7] See Hearing Tr. Day 3 (English) 700:3-5 (De Vivero Cross).

[8] Cl. PHB, ¶19 and Hearing Tr. Day 3 (English) 705:7-12 (De Vivero Cross).

[9] Article 36 of the Mining Code (**Exhibit C-570**) and Article 58 of the Colombian Constitution. (**Exhibit C-565**) See also, *Eco Oro Minerals Corp. v. The Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, September 9, 2021, (**Exhibit CL-285**), ¶¶ 469-476. ("*Eco Oro v. Colombia*" or "*Eco Oro*").

[10] Resp. PHB, ¶ 11.

[11] Resp. PHB, ¶¶ 12-13. Witness Statement of Ms. Baptiste, ¶ 26; fn 12.

[12] Cl. PHB, ¶19 and Hearing Tr. Day 2 (English) 480:7-10 (Baptiste Cross).

[13] See Ministry of Mines and Energy Concept 2011-05791 of September 27, 2011 (**Exhibit C-669**). See also *Eco Oro v. Colombia* (**Exhibit CL-285**), ¶¶ 479 et seq.

referred to future delimitations. Moreover, as recognized by the Head of the Legal Department of the Ministry of Mines and Energy in a letter of September 2011, at that time the requirements for delimiting the páramos had not been met.[14]

(19) Resolution 937 of 2011 of the Ministry of the Environment adopted the cartography elaborated by the IAVH at a scale of 1:250.000 for identifying páramo ecosystems, and stated that delimitations made by the authorities would be given legal effect *provided that* the scale of the map was equal or more detailed than 1:25.000 (ten times more detailed as provided by Law 1450). This Resolution also fell short of determining the existence of any Mining Exclusion Zones, which had to be expressly established following the requirements set forth by Law 1382.[15]

(20) It has been evidenced that Claimant's process of acquisition, transfer and registration of the Mining Titles, involved 22 separate approvals from Colombian authorities for its 11 Mining Titles during the course of four years between 2010 and 2013.[16] Red Eagle filed environmental guidelines for 5 titles permitting it to carry out exploratory work. Six of the Mining Titles acquired by Claimant already had Planes de Manejo Ambiental ("PMAs") and it requested the authorities to transfer to it those 6 PMAs. The authorities approved the transfer of the PMAs for 4 Mining Titles while the approval of the transfer of the PMAs for the 2 other titles remains pending without Colombia having stated any reasons for its inaction.[17]

(21) It has also been evidenced that Colombia granted Red Eagle the permissions required to protect existing rights associated with several Mining Titles, while authorizing a suspension of exploitation activities, so Claimant could continue with remediation activities and conduct detailed exploratory work. The record shows that Colombia also continued to approve the transfer of PMAs to Red Eagle after Resolution 937 and Law 1450 were enacted, even though the *Corporación Autónoma Regional para la Defensa de la Meseta de Bucaramanga* ("CDMB") knew that the Mining Titles in question could eventually form part of páramo ecosystems. Moreover, in 2012, the Colombian authorities approved the conversion of exploitation licenses over several Mining Titles into concession contracts, and in 2015 Colombia granted 5 Concession Contracts to Red Eagle.[18]

(22) Respondent argued that these signals lacked relevance by clarifying that the CDMB had warned Red Eagle that mining exploration and exploitation was prohibited in páramo ecosystems, as identified in the IAVH Atlas, but that it had no authority to stop such activities until a final delimitation was completed. Respondent also points out that, between August 2011 and May 2013, when the CDMB approved the assignment of the PMAs associated to 4 Mining Titles, it warned Red Eagle that it would have to modify the PMAs prior to commencing

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[14] Law 1450 of June 16, 2011 (**Exhibit C-576**) and Ministry of Mines and Energy Concept 2011-05791 of September 27, 2011 (**Exhibit C-669**). *See* also Cl. Mem., ¶¶ 61-63, Cl. Reply, ¶ 139 and Cl. PHB, ¶ 19.

[15] Resolution 937 of May 25, 2011 (**Exhibit R-11**). *See* also Cl. PHB, ¶ 19 and *Eco Oro v. Colombia* (**Exhibit CL-285**), ¶¶ 485 et seq.

[16] Colombia approved the transfer of all 11 Mining Titles between May 2010 and April 2012 and their registration between June 2010 and October 2013. *See* Cl. Reply, ¶ 502 and Cl. Rej., ¶ 52.

[17] Cl. Reply, ¶¶ 93 and 504, and Cl. PHB, ¶¶ 32-34. *See* also Resolution 517 (**Exhibit C-644**).

[18] Cl. Reply, ¶¶ 141 and 502, and Cl. PHB, ¶¶ 39-40.

with exploitation activities, and that any intended mining activities would have to take into account any restrictions resulting from the overlapping with the SP.[19]

(23) Respondent adds that in December 2011, the *Agencia Nacional de Minería* ("ANM") alerted Red Eagle that it would not be able to process its *derecho de preferencia* application with regards to the areas in the Mining Titles overlapping the páramo areas, and that following the delimitation made in December 2014 by Resolution 2090 (as defined below), the ANM explicitly stated that mining was not permitted in areas of the titles overlapping the Preservation Area (as defined below) created by said resolution.[20]

(24) Finally, Respondent states that the Colombian authorities never represented to Red Eagle that its Mining Titles would be exempted from mining prohibitions related to the páramos, and that it had never given an authorization to develop a large -scale mining project in those areas.[21]

2.3. Signals stemming from Colombia's actions after the issuance of Resolution 2090/2014

(25) Resolution 2090 of the Ministry of Environment and Sustainable Development of December 19, 2014 ("Resolution 2090") delimited the SP for the first time, establishing a Mining Exclusion Zone over the Páramo.[22]

(26) Although in Section 4 below I will review in more detail the implications and impact of Resolution 2090, this resolution imposed a ban and restriction on mining activities in respect of certain areas that until then had not been specifically delimited as Mining Exclusion Zones or subject to other restrictions.

(27) Resolution 2090 distinguished two situations: (i) páramo or Preservation Areas identified in green and (ii) Restoration Areas identified in yellow.

(28) In the Preservation Areas, (i) as from February 9, 2010, new concession contracts would be prohibited as well as the granting of mining titles or environmental licenses authorizing mining activities in those areas, but (ii) mining activities covered by concession contracts or mining titles, with an environmental license or environmental control instrument or equivalent environmental management (*manejo ambiental)* granted prior to February 9, 2010, would be able to continue until their expiration, with no possibility of extension, subject to strict control by the mining and environmental authorities.[23]

(29) The Restoration Areas, although part of the páramo ecosystem identified in the IAVH Atlas, were not part of the Exclusion Mining Zone, but were considered to be functionally linked to the SP. In the Restoration Areas, mining activities could be authorized subject to applicable environmental regulations and management

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[19] Resp. PHB, ¶¶ 20 and 24.

[20] Resp. PHB, ¶ 26.

[21] Resp. PHB, ¶¶ 28-36.

[22] Resolution of the Ministry of Environment and Sustainable Development No. 2090 of December 19, 2014 (**Exhibit C-580**).

[23] Resolution 2090, Article 5 (**Exhibit C-580**).

plans ensuring that these activities would not expose to risk the conservation of the SP.[24]

(30) According to Claimant, Article 5 of Resolution 2090 provided for the "grandfathering" of existing rights, such that mining activities were allowed to continue in areas corresponding to mining titles and environmental licenses or their equivalent that were issued prior to February 9, 2010.[25]

(31) While Claimant characterizes the scope of the aforementioned grandfathering on the basis of the existing titles, according to Colombia, the grandfathering did not apply to the title *per se*, but to pre-existing "activities". Thus, the right to exploit would only materialize when a PMA or environmental license was granted or approved for a specific activity. Since Red Eagle's Vetas Project (the "Project") comprised a large-scale integrated project with activities that according to Colombia were not covered by an environmental license or equivalent issued prior to February 9, 2010 (Red Eagle never conducted activities pursuant to the PMAs associated to 6 of its Mining Titles and 5 of the Titles did not have any environmental license or equivalent), Colombia argues that the Project was not grandfathered.[26]

(32) I will address the implications of the aforementioned matter when analyzing the impact of Colombia's measures on Red Eagle's investment in Section 4 below. In any event, regardless of the issue relating to the scope of the grandfathering provided by Article 5 of Resolution 2090 and Law 1382, it is a fact that Resolution 2090 implied a change in the applicable rules by creating for the first time a Mining Exclusion Zone in the SP in areas that were found to overlap Red Eagle's Mining Titles and establishing restrictions in adjacent areas; this is, the Restoration Areas.

(33) On June 9, 2015, Colombia enacted Law 1753 ("Law 1753"). Article 173 thereof prohibited mining in areas delimited as páramos. It mandated the Ministry of Environment and Sustainable Development ("Ministry of the Environment") to delimit the páramo areas within the area defined by the IAVH Atlas at a scale of 1:100.000 or 1:25.000 when available on the basis of technical, environmental, social and economic criteria. It also provided for the grandfathering of mining exploration and exploitation activities with a contract and environmental license or instrument of environmental control and management issued prior to February 9, 2010.[27]

(34) The Parties disagree on whether Law 1753 banned mining in the Restoration Areas. According to Claimant, the text of Article 173 "*generated uncertainty by banning mining within the interior of the area delimited as páramo (potentially also within Restoration Areas).*"[28] Colombia disagrees, and states that mining is not allowed in "*areas delimited as páramos*", that the only areas delimited as such by Resolution 2090 were the Preservation Areas, and when referring to Restoration Areas Article 9 thereof states that they are "*functionally linked*" to, but not part of the SP.[29] This circumstance would confirm that the entire páramo

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[24] Resolution 2090, Article 9 (Exhibit C-580).

[25] Cl. PHB, ¶ 45.

[26] Resp. Rej., ¶¶ 109 et seq., and Resp. PHB, ¶¶ 77-86.

[27] Law 1753, Article 173 (Exhibit C-17).

[28] Cl. PHB, ¶ 47.

[29] Resp. PHB, ¶¶ 88-89.

area identified in the IAVH Atlas did not coincide with what became the Mining Exclusion Zone *(i.e.,* the Preservation Areas) under Resolution 2090.

(35) In any case, on February 8, 2016, the Colombian Constitutional Court issued Judgement C-35[30] ("Judgement C-35") that held that the transitional regime established by Law 1753 was unconstitutional *"because it determined that allowing mining activities to continue in páramo ecosystems did not fully protect the páramos from the harmful effects of the extraction of non-renewable natural resources".*[31]

(36) Respondent concedes that the elimination of the grandfathering regime of Law 1753 meant that Article 5 of Resolution 2090 lost its *base legal* (statutory foundation) and as a result ceased to be in force.[32]

(37) Colombia argues that the elimination of the grandfathering regime of Law 1753 (and by extension, Resolution 2090) had no practical effect on the Project because it was never grandfathered. Although I will return to this matter in Section 4 when analyzing the impact of Colombia's measures, it is nevertheless a fact that Judgement C-35 implied a new change of rules for the mining sector and of criteria to the extent it held that environmental protections prevailed over the acquired rights of private parties.[33]

(38) Subsequent to the issuance of Judgement C-35, the ANM sent several notices to Claimant enforcing the ban on portions of several of the Mining Titles that overlapped the SP.[34]

(39) On May 30, 2017 Colombia's Constitutional Court issued Judgment T-361 ("Judgement T-361") which held Resolution 2090 to be unconstitutional and ordered the Ministry of the Environment to issue a new delimitation within one year.[35] The Constitutional Court found that the aforementioned Ministry had not conducted an adequate and effective consultation process, and ordered it to cure the defect by holding an appropriate consultation process at the end of which a new delimitation of the SP should be published. The Constitutional Court also ruled that the new delimitation should be more expansive. However, no precisions were given as to what this meant in terms of whether the new demarcation should cover additional land or different areas or take a different form.[36]

(40) The Parties agree that Resolution 2090 remains in force. However, to date, after more than six years, Colombia has failed to issue a new delimitation of the SP as ordered by Judgement T-361. This situation increased the legal uncertainty, and as explained below, prevented in practice any subsequent mining activities and the CDMB from issuing approvals and other decisions in relation to the Claimant's Mining Titles.

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[30] Constitutional Court Judgement C-35 (**Exhibit C-18**), pp. 143-144.

[31] Resp. PHB, ¶ 92.

[32] *Id.*

[33] Judgement C-35 (**Exhibit C-18**), pp. 125-126, 142, 222-223. *See* also Cl. PHB, ¶¶ 48-49.

[34] ANM letter to Minera Vetas regarding Real Minera, dated May 17, 2016 (**Exhibit C-21**); ANM Letter to Minera Vetas regarding La Tríada de Oro, dated May 17, 2016 (**Exhibit C-490**); and ANM Technical Concept No. 168 relating to La Vereda, dated August 25, 2016 (**Exhibit C-727**).

[35] Judgement T-361 of May 30, 2017 (**Exhibit C-22**), pp. 248, 283.

[36] *Id,* pp. 262-263 and 282-284.

(41) In this regard, the record shows that following the issuance of the aforementioned judgment, the CDMB and ANM sent notices to Claimant identifying areas of the Mining Titles that could not be mined on grounds of the need to wait for a final delimitation of the SP, including also portions of Restoration Areas.[37] In addition, the CDMB failed to approve the transfer of PMAs of two titles due to the same reasons,[38] and the authorities also refused to allow Red Eagle to retain portions of its Mining Titles that could not be economically exploited, thus risking forfeiture of the title.[39]

(42) Respondent contested the relevance of the aforementioned communications of the CDMB.[40] However, it is reasonable to consider that these communications aggravated the situation of uncertainty created by the sequence of Resolution 2090, Law 1753, Judgement C-35 and Judgement T-361. In practice, the compounded effect of these legislative and regulatory changes and letters of the authorities, was to prevent any mining activity in the areas covered by the Mining Titles held by Claimant, including the Restoration Areas.[41]

(43) Based on the evidence submitted by the Parties, the uncertainty continues as of this date as the SP has not yet been delimited. In addition, recently, Colombia's President Petro declared that "*in Santurbán, there can be no mineral exploitation*", while adding that "*all mining titles in the country will be reviewed*".[42]

2.4. Claimant's Due Diligence

(44) Claimant argues that it undertook an extensive due diligence in support of its investment decision. This includes the hiring of legal, technical and environmental experts to establish the compliance of Red Eagle's Mining Titles with the existing mining regulations, and their conclusion was that the compliance with such standards permitted the development of a large-scale project.[43] In that regard, Claimant notes that it worked with the Colombian law firm Cardenas & Cardenas, which examined the legal status of each of the Mining Titles that Red Eagle considered acquiring. According to Claimant, this shows that it considered the possible implications of Law 1382 for the creation of Mining Exclusion Zones in the future, as well as the requirements for such purpose, and that Respondent's legal expert affirmed that no delimitation of the

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[37] ANM letter to Minera Vetas in relation to Real Minera of August 31, 2017, (**Exhibit C-20**). See also Hearing Tr. Day 4 (English) 796:15-20 (SRK Direct); and 968:17-19 (Sequeira Direct).

[38] Cl. PHB, ¶¶ 57-61. CDMB letter to Minera Vetas on La Vereda of December 6, 2019 (**Exhibit C-462**), and CDMB Letter to Minera Vetas on San Antonio of December 6, 2019 (**Exhibit C-1012**). See also Hearing Tr. Day 2 (English) 400:22 401:1-8 (Franco Direct); Day 2 (Spanish) 445:19-446:4 (Franco Direct); Day 3 (English) 658:4-9 (Martínez Direct); Day 4 (English) 798:15-20 (SRK Direct); Day 4 (English) 968:17-19 (Sequeira Direct).

[39] Hearing Tr. Day 2 (English) 459:10-460:1 (Franco Tribunal's Questions) and Witness Statement of Mr. Franco, ¶ 41.

[40] Resp. PHB, ¶ 104.

[41] Hearing Tr. Day 4 (English) 843:17-844:2 (SRK Redirect); Day 2 (English) 401:1-4 (Franco Direct).

[42] Cl. PHB, ¶ 63 and declarations of March 19, 2022 (**Exhibit C-1300**) and October 27, 2022 (**Exhibit C-1301**).

[43] Cl. PHB, ¶¶ 25-26.

Páramo for the purpose of creating an Exclusion Mining Zone had been completed until Resolution 2090 in December 2014.[44]

(45) Claimant's expert confirmed that at the time of acquisition of Red Eagle's Mining Titles there was no official mining exclusion for those areas, that the IAVH Atlas only constituted a "preliminary approximation" of the páramo ecosystem and did not offer sufficient detail for the creation of mining exclusion zones.[45] Claimant's witness Ms. Vásquez testified that she met the Minister of Mines and various Colombian officials to understand the scope of the law and that *"the conclusion we reached at that point was that all titles that had been granted before this law [Law 1382] would continue with their operation"*.[46]

(46) Mr. Franco, the author of the 2009 diligence report that was later hired by Claimant, testified that the titles were accompanied by the necessary exploitation licenses, and that various titles had PMAs; and that this gave Claimant reasonable grounds to believe that environmental permits could be transferred, as most were, and that it could submit new environmental guidelines for those titles that lacked environmental management plans.[47]

(47) Claimant contends that it also commissioned technical due diligence reports that conformed to the stringent National Instrument 43-101 standard that regulates disclosure of information related to mineral projects that are governed by Canadian securities laws, and they confirmed the viability of Red Eagle's project.[48]

(48) Respondent disputes Claimant's assertions on the due diligence it conducted. First, it argues that in the Aquaprocesos Report, Mr. Franco warned Red Eagle, among other matters that the titles under assessment were located in a páramo system, that the páramos would be identified in accordance with the IAVH Atlas and that three of the titles overlapped the SP. Noting that the IAVH Atlas was not a definitive delimitation, Respondent points out that Mr. Franco recommended Red Eagle to consult Ingeominas, the IAHV and the Ministry of the Environment as well as legal counsel.[49]

(49) Respondent noted that in her testimony, Ms. Vásquez was unable to provide documentary evidence of her purported meetings with government officials.[50]

(50) Respondent also noted that the opinion of the Cardenas & Cardenas law firm did not actually advise Red Eagle on the implications of the mining ban on the Project, and that it did not contain a meaningful analysis of Law 1382, still less any specific advice on its impact on the Project. Respondent characterizes the aforementioned opinion as merely having paraphrased Law 1382 at a high level and omitted to advise on a number of relevant issues, including the ability to obtain compensation under Article 58 of the Colombian Constitution or whether the existing PMAs could be modified to accommodate a large-scale project.

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[44] Cl. PHB, ¶¶ 27-28. See also Hearing Tr. Day 3 (English) 711:4-736:18; and 749:19–751:8 (De Vivero Cross).

[45] Hearing Tr. Day 2 (English) 397:4-5 (Franco Direct); Aquaprocesos Diligence Memorandum (Exhibit C-603), p. 25.

[46] Hearing Tr. Day 2 (English) 294:16-22. (Vásquez Cross).

[47] Aquaprocesos Diligence Memorandum (Exhibit C-603); Hearing Tr. Day 2 (Spanish) 438: 15-16 (Franco Direct). See also Cl. PHB, ¶ 29.

[48] See Cl. PHB, ¶ 30.

[49] Aquaprocesos Diligence Memorandum (Exhibit C-603), pp. 24-26. See also Resp. PHB, ¶ 38.

[50] Resp. PHB, ¶ 40.

Respondent notes that at the hearing Ms. Vásquez confirmed that the Cardenas & Cardenas law firm was not even asked to advise on whether any activities different from those covered in the existing PMAs would be permitted.[51]

(51) Respondent also contends that the Cardenas & Cardenas opinion includes some errors and that Red Eagle failed to produce certain documents related to its due diligence, and thus that the Tribunal should conclude that no further documents related to its due diligence exist.[52]

(52) In my view, Claimant's due diligence should be evaluated against the backdrop of the regulatory framework described in Section 2.2 above, including the absence of existing Mining Exclusion Zones over any of the areas of the Mining Titles at the time Red Eagle acquired the same, Colombia's policy of grandfathering and the lack of specific delimitation of the SP until December 2014 after Red Eagle had completed the acquisition of its Mining Titles.[53]

(53) Although the IAVH Atlas identified the páramo ecosystem in 2007, it did so at a very large scale which lacked the necessary precision to make a final determination on the extent to which the Mining Titles of Red Eagle overlapped with the SP.[54] After the publication of the IAVH Atlas in 2007, Colombia took more than seven years until it formally delimited for the first time the SP through Resolution 2090.

(54) In my opinion, considering the regulations in force at the relevant time and in the absence of defined Mining Exclusion Zones when Red Eagle acquired its titles, Colombia's position requiring Red Eagle to anticipate future regulatory changes and the delimitation of the SP is unsupported. In fact, such position, if upheld, would have led, in practice, to a total freeze of all mining investments in the region. Colombia's general statements and regulations as to environmental protection could not reasonably be considered to have alerted Red Eagle to very specific issues associated to the delimitation of the SP and the scope of future potential restrictions, as well as to the uncertainty created by the measures and actions of the Colombian authorities that followed Resolution 2090. In my opinion, Colombia's position implies shifting onto the investor the responsibility for constantly anticipating potential changes in the regulations and governmental delays in the delimitation of the páramos.

(55) In the same vein, the *Eco Oro* tribunal stated that:

"If Eco Oro should have been aware of the presence of páramo, surely all parts of the State machinery should also have been aware: the Santurbán Páramo was first identified as páramo as early as 1851. If Eco Oro is to be criticised for not understanding the potential implications of generalised statements as to environmental protection on the scope and validity of its concession rights, prior to entering into the Concession, so too should Colombia. Colombia should have understood that it should not grant concession rights over such environmentally

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[51] Resp. PHB, ¶ 44 and Hearing Tr. Day 2 (English) 327:15-20 (Vásquez Cross).

[52] Resp. Rej., ¶¶ 45-47.

[53] See *Eco Oro v. Colombia* (Exhibit CL-285), ¶ 499.

[54] The fact that, as Respondent concedes, the Restoration Areas did not form part of the SP, would confirm that the entire area identified in the IAVH Atlas did not coincide with what became a Mining Exclusion Zone (*i.e* the *Preservation Areas*).

sensitive land. If the State did not have this foresight, it cannot be right to expect Eco Oro to have had it."[55]

(56) The *Eco Oro* tribunal further concluded that:

"Eco Oro could not have anticipated through due diligence the immense confusion in the applicable legal regime created by the contradictory State decisions and changing positions of different State organs, including from the highest courts of the land, on vital State and international environmental matters, such as the delimitation of the páramo, impacting on a natural resource invaluable for Colombia and the World."[56]

(57) Moreover, the fact that, at the time of acquisition by Red Eagle of its Mining Titles, the Constitution of Colombia imposed the need to balance environmental protection with property rights and that Colombia's regulatory framework actively provided for the development of the mining activity and included grandfathering provisions protecting existing projects, created a reasonable expectation that regulatory changes affecting existing rights would be subject to compensation.[57]

2.5. Conclusions in relation to the Regulatory Framework and the Parties' conduct

(58) In my opinion, the signals from the regulatory framework and Colombia's actions and omissions were mixed and unclear.

(59) On the one hand, the delimitation of the SP was uncertain until Resolution 2090 was issued in December 2014.

(60) As explained above, Law 1382/2010 specified for the first time that páramo ecosystems could be declared Mining Exclusion Zones. However, it did not establish itself a prohibition of mining in páramo areas.[58]

(61) Moreover, the text of Law 1382 evidences that it was forward looking. Although it contemplated the possibility that the competent authorities could establish new Mining Exclusion Zones, not only their identification and delineation was subject to specific requirements, but also the law did not identify specific areas within the páramo ecosystem subject to a mining ban. In this regard, there is reasonable evidence on the record that, at the time Red Eagle acquired its Mining Titles, no Mining Exclusion Zone had been approved in respect of the areas covered by said titles.[59]

(62) The IAVH Atlas was published in 2007, and it generally identified páramo areas. The scale used by the cartography was very large (1:400.000) (as evidenced by the fact that subsequent regulations required the delimitations to be made using a much more precise scale), and though it gave a general idea as to the location of the páramos and potential overlapping of Red Eagle's Mining Titles with páramo areas, it did not constitute a definitive delimitation and was insufficient to establish with precision the details and form of the areas located within the SP. This is proven by the fact that subsequent regulations required

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[55] *Eco Oro v. Colombia*, (Exhibit CL-285), ¶695.

[56] *Id*, ¶ 696.

[57] *Id*, ¶¶ 476 and 768.

[58] See *Eco Oro v. Colombia* (Exhibit CL-285), ¶ 496.

[59] See *Id*, ¶ 499.

delimitations to be carried out with a much accurate scale and stated that the IAVH Atlas would only serve as a minimum reference. Moreover, insofar Resolution 2090 did not include the Restoration Areas within the SP (and only established that they would be only "*funcionalmente vinculadas*" to the SP[60]), this would confirm the lack of coincidence of the areas identified by the IAVH Atlas as part of the SP with the delimitation made by Resolution 2090.

(63) It should also be considered that the IAVH Atlas did not contain any prohibition to mining activities, and Colombia delayed more than seven years until it formally delimited the páramos for the first time in December 2014 through Resolution 2090. Colombia's criticism to Red Eagle for allegedly having ignored the signals stemming from the IAVH Atlas of 2007, would imply that even in the absence of the existence of a Mining Exclusion Zone (required by the regulatory framework to ban mining activities) over the areas of its Mining Titles, Claimant and other investors in a similar situation should have frozen investments and activities during such period.

(64) Law 1450 of 2011 was enacted after the Constitutional Court of Colombia declared unconstitutional Law 1382. Although it prohibited mining activities in páramo ecosystems and tasked the Ministry of the Environment to delimit the páramos, it was also forward looking as it referred to future delimitations. In fact, as explained above, there is evidence in the record that the Head of the Legal Department of the Ministry of Mining and Energy recognized in a letter of September 2011 that the requirements for delimiting the páramos had not been met.

(65) Resolution 937 of 2011 of the Ministry of the Environment adopted the cartography elaborated by the IAVH at a scale of 1:250.000 for identifying páramo ecosystems, and provided that delimitations made by the authorities would be given legal effect when the scale of the map was equal or more detailed than 1:25.000 (ten times more detailed as provided by Law 1450). This Resolution did not declare any Mining Exclusion Zones.

(66) In addition, in my view, Article 36 of the Mining Code does not support Colombia's position regarding what should have been the Claimant's expectations. Although such provision allows the retroactive application of environmental regulations, it also requires compensation in accordance with Article 58 of the Constitution of Colombia if the investor suffers a loss of an acquired right.

(67) It has also been evidenced that Colombia issued several signals of approval. During the course of three years between 2010 and 2012, the authorities issued 22 approvals in relation to 11 Mining Titles. Red Eagle also sought and obtained the approval for the transfer of PMAs in relation to 4 Mining Titles, some of which took place after the enactment of Resolution 937 and Law 1450. Colombia qualified the relevance of these approvals and pointed out that the CDMB had warned Red Eagle that mining was prohibited in páramo ecosystems (although it recognized it had no authority to stop such activities until a final delimitation was made), and that Claimant would have to modify the PMAs prior to commencing exploitation activities as well as taking into account any restrictions resulting from overlapping the SP. Nevertheless, none of these circumstances reasonably suggested the outcome that resulted from the compounded impact of Resolution 2090, Law 1753, Judgement C-35,

[60] Resp. PHB, ¶ 88.

Judgement T-361 and the subsequent communications sent by the Colombian authorities which, in practice, impaired mining in the entirety of Claimant's Mining Titles.

(68) Resolution 2090 delimited the SP for the first time in December 2014. Resolution 2090 implied a change in the rules by creating also for the first time a Mining Exclusion Zone in the SP in areas overlapping Red Eagle's Mining Titles and establishing restrictions in adjacent areas; this is, the Restoration Areas.

(69) In June 2015, Colombia enacted Law 1753 that introduced changes to the grandfathering rules established by Resolution 2090. It also created some uncertainty as to whether it also banned mining in the Restoration Areas established by Resolution 2090.

(70) In any event, Judgement C-35 of February 2016 declared Law 1753 unconstitutional and, as admitted by Colombia, this deprived the grandfathering regime created by Article 5 of Resolution 2090 from its statutory foundation. Regardless of the discussion of the extent, if any, of the practical effect of Judgment C-35 on the Project, it is clear that it implied a new change of the rules in the sector.

(71) In May 2017, Colombia's Constitutional Court, by means of Judgement T-361, declared Resolution 2090 to be unconstitutional and ordered a new delimitation of the páramos to take place within one year without giving any precisions on the criteria of the new delimitation. This delay created further uncertainty. After more than six years Colombia has not yet issued a new delimitation of the SP as ordered by said judgement.

(72) Judgement T-361 was not without consequence. As explained above, subsequently, the CDMB and ANM sent notices to Claimant identifying areas of the Mining Titles that could not be mined on grounds of the need to wait for a final delimitation of the SP, affecting also portions of Restoration Areas. The CDMB failed to approve the transfer of PMAs of two titles due to those same reasons. The authorities also refused to allow Red Eagle to retain portions of its Mining Titles that could not be economically exploited, thus risking forfeiture of the title. The unavoidable consequence of these actions was a paralysis of any mining activity in Red Eagle's titles.

(73) In fact, these communications aggravated the situation of uncertainty created by the sequence of Resolution 2090, Law 1753, Judgement C-35 and Judgement T-361. As a result of the compounded practical effect of the aforementioned legislative and regulatory changes and the letters from the authorities, Claimant could not to carry out any mining activity in the entirety of the Mining Titles, including the Restoration Areas.

(74) The above shows that Colombia repeatedly changed its policies and rules, significantly altering the pre-existing balance between mining development and environmental concerns included and recognized in Colombia's regulatory framework in effect at the time the Claimant acquired the Mining Titles.

(75) Moreover, it is also a proven fact that Colombia had a legal obligation to delineate the páramos and to do so with precision on the basis of technical, environmental, social and economic studies as required by applicable law and

court orders.[61] As of this date, the delimitation has not been approved. This failure is at the center of the dispute before this Tribunal.

(76) As pointed out by the *Eco Oro* tribunal, in a case involving substantially the same measures, it does not appear reasonable to require Claimant to anticipate the change in the policies and rules, and to exercise a due diligence that Colombia itself did not exercise when granting mining titles over environmentally sensitive areas.[62] In fact, it has been evidenced that Colombia approved the assignment and registration of Red Eagle's Mining Titles, and subsequently the transfer of PMAs in several titles knowing that they were located in the páramo ecosystem, even after the IAVH Atlas was published in 2007, although a final delimitation of the SP had not yet occurred. Colombia did not deregister any of the 5 Mining Titles that did not have PMAs.[63]

3. Whether Claimant had Vested Rights

(77) Claimant argues that pursuant to its Mining Titles it acquired the right to explore and exploit the minerals in the subsoil of those areas.[64]

(78) As explained above, Claimant contends that Colombia recognized these rights in relation to the process of acquisition, transfer and registration of its 11 Mining Titles, which, during the course of four years, involved 22 separate approvals from the Colombian authorities. Claimant also observes that Colombia approved the transfer of PMAs for 4 titles, granted permissions to protect its existing rights by authorizing a suspension of exploitation activities until Red Eagle could continue remediation activities and exploratory work, and in 2015 granted 5 Concession Contracts.[65]

(79) Claimant also points out that even in relation to the transfer of one of the PMAs which Colombia failed to approve, the ANM *de facto* recognized that the title could operate, by having requested the payment of insurances, the approval of the *Formato Básico Minero*, and the approval of a revenue declaration, among others.[66]

(80) Claimant further argues that, as a result of its investments in the acquisition of the Mining Titles and transfer of vested rights, it was able to proceed with a "systematic gold exploration program" that did not exist on paper alone but involved actual investments, time and efforts in exploratory works.[67] In that regard, according to Claimant, the need for an environmental approval does not change the nature of the vested right because those authorizations *"accompany the right, but this does not mean that they give rise to the right, but, rather, they allow for its exercise"*.[68]

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[61] See *Eco Oro v. Colombia*, (Exhibit CL-285), ¶ 766.

[62] *Eco Oro v. Colombia* (Exhibit CL-285), ¶¶ 695-696 and 766.

[63] Cl. Reply, ¶ 137.

[64] Cl. PHB, ¶¶ 14-15.

[65] See ¶¶ 21-22 above.

[66] Cl. PHB, Appendix II, Response to Tribunal's Question No. 11.

[67] Cl. PHB, ¶ 35.

[68] Cl. PHB, ¶ 15.

(81) Colombia disagrees and argues that Red Eagle had no acquired or vested right to develop the Project because it never obtained the environmental authorization (whether a PMA or an environmental license) to allow its development. If anything, Red Eagle might have acquired a right to conduct small-scale exploitation activities in certain limited areas in accordance with the terms of their respective PMAs. Colombia also contends that even if Claimant had been deprived of an opportunity to apply for such a license it would have been exceedingly unlikely to obtain one.[69]

(82) Colombia explains that the grandfathering established by Article 5 of Resolution 2090 and Article 173 of Law 1753 only applies to *mining activities* conducted under concession contracts or mining titles, as well as environmental licenses or equivalent environmental control and management instruments, granted before February 9, 2010. According to Colombia, the Project was not covered by this grandfathering provisions because that project contemplated activities that were not mining activities contemplated under the existing PMAs or any environmental license issued prior to February 9, 2010, and moreover, Red Eagle never conducted any mining activities pursuant to the PMAs associated to 6 of the 11 Mining Titles because it focused on exploratory work that did not require any authorization.[70]

(83) Colombia also states that the Project was not grandfathered because 5 of the 11 Mining Titles that comprised that project, including the "flagship" Real Minera, did not have any environmental license or equivalent instrument whatsoever.[71]

(84) Colombia further explains that the regulations, including Decree 1076 of 2015, do not allow the modification of an existing PMA to include additional activities when it intends to include activities subject to environmental licensing in areas not covered by the existing PMA.[72] In such cases a new environmental license must be sought. Thus, irrespective of the scope of the grandfathering provisions, Red Eagle could not have possibly modified the existing PMAs to incorporate new activities subject to licensing requirement and would have inevitably required to apply for a new environmental license.[73]

(85) Colombia further argues that, in any event, Red Eagle would have relinquished any rights under the existing PMAs when in 2015 it signed the Concession Contracts which expressly provide that mining was not allowed in the Preservation Areas of the SP.[74]

(86) Claimant contests Colombia's affirmations in relation to the interpretation of Decree 1076 of 2015 and the impossibility to amend the existing PMAs in order to adapt them to an integrated project comprising the different Mining Titles. According to Claimant, title integration without the need of a new environmental license is possible.[75] In support of its position, Claimant cites and quotes the

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[69] Resp. PHB, ¶¶ 68 et seq.

[70] Resp. PHB, ¶¶ 78-79.

[71] Resp. PHB, ¶ 80.

[72] Ministry of Environment and Sustainable Development Decree 1076 of 2015 (**Exhibit C-791**).

[73] Resp. PHB, ¶¶ 73-74 and 82.

[74] Resp. PHB, ¶ 84.

[75] Cl. PHB, ¶ 43.

testimony of both Claimant's and Respondent's witnesses, Mr. Franco and Mr. Pinzón.[76]

(87) Claimant also points out that, under cross examination, Respondent's witness, Mr. Pinzón, corrected his testimony and admitted that it had effectively received from Red Eagle the terms of reference for its environmental management plans; this is Claimant had effectively sought a modification of its environmental management plan.[77]

(88) Each of Claimant and Respondent focus their arguments on certain articles of Decree 1076 that, they understand, back their position. Based on the record, in my view, under the applicable regulatory framework, the holder of a mining title had the right to explore and exploit the minerals therein, although the exercise of this right would be subject to compliance with the applicable environmental regulations and the approval of an environmental license or equivalent environmental instrument.[78] Thus, regardless of the outcome of any debate on which is the proper interpretation of the relevant provisions of Decree 1076, at the inception of the Mining Titles, Red Eagle, as the holder thereof, had the right to apply for either (i) a modification of the existing PMAs to adapt them to a large-scale project such as the Project, or (ii) seek the issuance of a new environmental authorization or equivalent instrument covering the activities required for such project.

(89) Colombia argues that in any event it is "*exceedingly unlikely that Red Eagle would have secured the required environmental authorization to develop the Vetas Gold Project*".[79] According to Colombia, "*of the Mineral Resources which were rendered inaccessible, 90% of the Indicated and 33% of the Inferred Mineral Resources were open-pit resources. Open pit mining is highly environmentally destructive, and the only mooted open pit project in the páramo was abandoned due to social opposition and its impact on the páramo*".[80] Colombia further states that "*there is not a single large-scale project licensed in the páramo, nor a single other company in the whole of Colombia even planning on pursuing an open-pit project in the páramo*".[81]

(90) Colombia also states that SRK's declaration of open-pit mineral resources is "untenable" in light of the fact that Red Eagle was not expecting to mine them, and that "*Red Eagle unequivocally stated in its Reply Memorial that it was not pursuing an open-pit mine.*"[82]

(91) Claimant disagrees with Respondent's views on these matters. Claimant denies having abandoned its plan for an open-pit mine and argues that the 2014 Technical Report prepared by SRK contemplated that Real Minera (the title containing all of the Project's valuable Indicated Resources) would be exploited via an open-pit (while other portions of the project would be exploited via underground mining methods), and estimated resources on that basis. While open-pit was a convenient method to exploit the Real Minera title, it was not the

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[76] Hearing Tr. Day 2 (English) 334:18-22-335:1-9 (Franco Tribunal's Questions), and Day 3 (English) 537: 11-16 (Pinzón Cross).

[77] Cl. PHB, ¶ 43 and Hearing Tr. Day 3 (English) 566:7-17; 567:22-568:2; 569:17-19 (Pinzón Cross).

[78] See *Eco Oro v. Colombia* (Exhibit CL-285), ¶¶ 439 and 632.

[79] Resp. PHB, ¶ 75.

[80] *Id*, ¶ 120.

[81] *Id*, ¶ 121.

[82] *Id*, ¶ 122.

only method available to Red Eagle since the Real Minera mineralization could have been accessed via an underground method.[83]

(92) Claimant further argues that Real Minera was an obvious target for an open-pit mining scenario because the material was "*right there at surface*".[84]

(93) In addition to expressing its views on the reasons that supported its position that open-pit mining was viable, Claimant states that "*it is undisputed that there is no ban on open pit mining in Colombia*".[85]

(94) Claimant finally states that, in any case, foregoing the open-pit method would have resulted in the reduction of some of its mineral resources due to the increased costs of underground mining, but not their total elimination.[86]

(95) Colombia argues that the authorities rejected an environmental application by Eco Oro in an area close to Claimant's Mining Titles due to its overlapping with the SP.[87] This would confirm, in Respondent's view, that it was extremely unlikely that Red Eagle would have been able to obtain an environmental license for the Project.

(96) Claimant contends that after its environmental application was rejected, Eco Oro redeveloped its project as an underground mine and that Respondent has not offered any reason why the same could not have been done in relation to Red Eagle's Project. Claimant notes that at the Hearing, Respondent's expert, Mr. Rossi, conceded that in his report it had failed to take into account this possibility.[88] The outcome of the *Eco Oro* case also casts queries on Colombia's arguments.[89]

(97) In light of the aforementioned debate, it cannot be concluded with certainty that an application by Red Eagle to amend its PMAs to adapt to a large-scale project or a prospective application of a new environmental license or equivalent environmental instrument, would have been inevitably denied.[90]

(98) Based on its Mining Titles and considering the absence of any Mining Exclusion Zones over the areas covered thereby at the time of acquisition of said titles, Claimant had the right to explore and exploit mineral resources subject to obtaining the appropriate PMAs or equivalent environmental license.[91] Thus, it seems reasonable to conclude that the compounded impact of Colombia's measures starting with Resolution 2090, and the uncertainty and confusion derived therefrom and from certain inconsistent measures and actions of Respondent, deprived Red Eagle of its ability to access a very substantial portion of the mineral resources in its Mining Titles, and also, at least, of the opportunity to either (i) amend the existing PMAs in relation to 4 titles and the 2 other PMAs whose transfer had been sought and the authorities failed to approve in order to adapt them to a large-scale integrated project such as the Project, and/or (ii)

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[83] Cl. PHB, ¶¶ 94-96.

[84] *Id*, ¶ 96 and Hearing Tr. Day 4 (English) 788:1-7 (SRK Direct).

[85] *Id*, ¶¶ 97-99, and Hearing Tr. Day 4 (English) 902:10-20 (Rossi Cross). See also Cl. PHB, Appendix II, Response to Tribunal's Questions Nos. 19 and 20.

[86] Cl. PHB, Appendix II, Response to Question 20.

[87] Resp. C-Mem., ¶¶ 87-95.

[88] Cl. PHB, ¶ 95.

[89] See *Eco Oro v. Colombia* (Exhibit CL-285).

[90] See *Eco Oro v. Colombia* (Exhibit CL-285), ¶ 632.

[91] *Id*, ¶ 623.

to apply for a new environmental license or equivalent environmental instrument covering the new activities in its Mining Titles to be undertaken in relation to the Project.

(99) As a result of Colombia's measures and actions it is a fact that Red Eagle lost the possibility to obtain any of those instruments in relation to any prospective activities within the Preservation Areas and the Restoration Areas.[92]

(100) The fact that these rights may be difficult to value cannot mean that there is no acquired right to the extent explained above. Determining their value is a separate and distinct matter.[93]

4. Impact of the Measures

(101) According to Claimant, Colombia's measures caused Red Eagle to lose access to a significant majority of the gold reserves identified in its exploration work, in particular:

- 100% of the Indicated class mineral resources disclosed in the SRK 2014 Technical Report (the "SRK 2014 Report") are within the Páramo and restricted from mining.
- 99% of the entire resource is affected by the Páramo delimitation and Restoration Area.
- 77% of the gold disclosed in the SRK 2014 Report is contained in the 3 most mineral rich Mining Titles and is within the Páramo and restricted from mining.
- 66% of the total mineral resource of gold disclosed in the SRK 2014 Report is within the Páramo restriction.
- 51% of the total mineral resource of silver disclosed in the SRK 2014 Report is within the Páramo restriction.[94]

(102) Claimant points out that Respondent did not challenge any of these conclusions, and that Colombia's expert, Mr. Rossi, confirmed during the Hearing that he does not dispute those conclusions.[95]

(103) Respondent does however challenge the weight of the 2014 SRK Report. According to Respondent, the mineral resources declared by the SRK 2014 Report, and in particular the Indicated Resources, "*are illusory*" and "*there were never any reasonable prospects for eventual economical extraction.*"[96]

(104) Respondent argues that the SRK 2014 Report was prepared on the basis of assumptions which are both materially inaccurate and in direct contradiction with Red Eagle's contemporaneous knowledge of the relevant páramo risk. Moreover, Respondent points out that SRK testified that it was unaware of any

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[92] *Id*, ¶¶ 632-633.

[93] *See Eco Oro v. Colombia* (Exhibit CL-285), ¶ 439.

[94] SRK 2014 Technical Report, ¶¶ 85-93 and Cl. PHB, ¶ 52. See also Hearing Tr. Day 4 (English) 796:19-14 (SRK Direct).

[95] Cl. PHB, ¶ 53; and Hearing Tr. Day 4 (English) 932:12-19 (Rossi Cross).

[96] Resp. PHB, ¶ 116.

risk associated with the protection of the páramos.[97] Respondent contends that SRK's failure to conduct an independent analysis denotes lack of professionalism.[98]

(105) Respondent also argues that the open-pit resources should not have been declared by the SRK 2014 Report because there was no prospect of them being developed, and that of the mineral resources which were rendered inaccessible, 90% of the Indicated and 33% of the Inferred mineral resources were open-pit.[99]

(106) Respondent further states that *"if Red Eagle's licensing prospects were not zero, they would, at best, be exceedingly speculative."*[100]

(107) Respondent also contends that Red Eagle's Mining Titles were not rendered valueless by the measures taken by Colombia because they retained exploration potential.[101] Claimant notes that on cross examination, Colombia's expert, Mr. Rossi, conceded that exploration targets cannot support an economic viability of the Project (which can only be based on Indicated and Measured Resources), and that he admitted that his analysis was based on the incorrect assumption that mining was permitted in the areas of the Project that were designated as Restoration Areas (yellow).[102]

(108) In relation to the impact of Respondent's measures that gave rise to the controversy, both Parties have addressed extensively in their submissions and at the Hearing the legal implications of the status of Red Eagle's Mining Titles and of the different laws, regulations, judgments and other actions of the authorities of Colombia. These arguments have been summarized in previous sections of this Dissenting Opinion.[103] Hence, to avoid repetitions, I will only refer briefly to the respective positions of the Parties.

(109) Respondent argues that the Project was not grandfathered by Resolution 2090 or Law 1753 because, among other reasons, it contemplated activities that were not mining activities conducted pursuant to an environmental license or equivalent instrument issued before February 9, 2010.[104] Colombia also contends that the different measures had no practical implications on Red Eagle's rights nor on the acreage and development of the Project and did not introduce additional restrictions.[105]

(110) Claimant focuses on the series of actions of Colombia's authorities recognizing the Mining Titles and the right to exploit associated thereto, on its ability to amend the existing PMAs or to apply for a new environmental license, as well as the repeated changes in the rules and regulatory criteria, and the uncertainties and confusion resulting from Resolution 2090, Law 1753, Judgment C-35, Judgment T-361 and the communications issued by the ANM and CDMB, and

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[97] *Id*, ¶ 117. *See* also Hearing Tr. Day 4 (English) 816:14-817:5 (Dishaw Cross).

[98] Resp. PHB, ¶ 119.

[99] Resp. PHB, ¶ 120. *See* also ¶¶ 89-96 above.

[100] Resp. PHB, ¶ 137. *See* also ¶¶ 89-90 above.

[101] Resp. PHB, ¶ 112.

[102] Cl. PHB, ¶¶ 54-56.

[103] *See* Section 2 above.

[104] Resp. PHB, ¶¶ 77-86.

[105] *Id*, ¶¶ 87-105.

their practical effect of banning mining in the entirety of the areas covered by the Mining Titles.[106]

(111) Respondent also argues that Claimant recognized in public presentations and in the Management Discussion and Analysis ("MD&A") for the first quarter of 2016, after the issuance of Judgment C-35, that Colombia's measures had not affected the Project or its Mining Titles, and that it failed to write-off the Vetas Project.[107] Respondent also cites the MD&A for the first quarter of 2018 in which Red Eagle stated that the company *"will be able to progress the Vetas Gold property"* and a presentation made by Mr Slater, Red Eagle's CEO, in a conference in Vancouver in May 2018 in which he did not mention that the Project had been destroyed by Colombia's measures.[108]

(112) Claimant responds to these arguments pointing out that Colombia continued to enforce the mining restrictions even after the Constitutional Court through Judgement T-361 ruled that Resolution 2090 that had delimited the páramos was unconstitutional. As a result of this ruling, and pending the final delimitation of the páramos as ordered by such Court, the authorities prohibited mining in the entirety of the Mining Titles of Red Eagle, even in the Restoration Areas (yellow), and refrained from approving any transfer or updating of PMAs. Claimant's expert, Mr. Dishaw, testified that they were under the impression that mining was only restricted in the Preservation Areas (green), but not in the Restoration Areas.[109]

(113) Regardless of the divergent views of the Parties on most of the relevant issues, in my opinion, as explained above, the reiterated changes of rules imposed by Colombia since Resolution 2090, as well as the uncertainty and confusion derived therefrom and from the inconsistencies of some of these measures and actions, had the compounded effect of impeding Red Eagle to access a very substantial portion of the mineral resources in its Mining Titles. They also deprived Claimant, at least, of the opportunity to amend the existing PMAs to adapt them to a large-scale integrated project as the Project or to apply for a new environmental license or equivalent instrument for such a project.

(114) The uncertainty associated to the fact that the viability of exploration projects, such as Claimant's activities, is confirmed at a later pre-feasibility or feasibility stage, and that their value is difficult to assess, does not mean that these projects do not have any value at all. These and the other uncertainties identified by Respondent such as those related to the viability of open-pit mining in the context of the páramos and its impact on the volume of recoverable mining resources, particularly the Indicated Resources, and the licensing risk of the Project, do have an impact on the value of Red Eagle's project and on the compensation payable to Claimant for having been deprived from the aforementioned loss of opportunity. This matter will be addressed in Section 6 below.

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[106] *See* Sections 2 and 3 above.

[107] Resp. PHB, ¶¶ 95-103. *See also* Resp. C-Mem., ¶ 463.

[108] Resp. PHB, ¶¶ 103 and 109-111.

[109] Cl. PHB, ¶¶ 57-60.

5. Did Colombia Violate the Treaty?

5.1. Article 805 of the FTA

(115) The Parties discussed at length the issues relating to the scope of the minimum standard of treatment ("MST"), the extent to which such standard evolved and its convergence with the standard of fair and equitable treatment ("FET"), and in particular whether the MST encompasses protection of, *inter alia*, legitimate expectations and transparency.[110] The Award has also summarized the positions of both Parties in Section VI.[111]

(116) Article 805 requires each contracting party to:

> *"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."*[112]

(117) As mentioned, the Parties disagree on the relationship between MST and FET. The starting point of the analysis should be the text of the Treaty.

(118) By stating that the Contracting Parties must accord investments *"treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment"*, Article 805 of the Treaty indicates that FET is considered part of international law. However, in clarifying this rule, paragraph 1 thereof specifies that the concept of fair and equitable treatment does *"not require treatment in addition to beyond that which is required by the customary international law minimum standard of treatment of aliens."*

(119) This can only mean that FET is prescribed by Article 805 of the Treaty to the extent that standard of treatment is mandatory under the customary international law minimum standard.

(120) The foregoing leads to the question of the content of the MST and of the FET obligation incorporated into it.

(121) It is now broadly accepted that in light of the evolutionary character of the concept of the international law minimum standard of treatment, the high

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[110] Cl. Mem. Section III-B-1; Cl. Reply, Section IV -A-1; Resp. C-Mem, Section VII-B; and Resp. Rej. Section VIII-A.

[111] See Award, Section VI-B-1.

[112] Treaty (Exhibit CL-1), Article 805.

threshold test formulated almost a century ago in *Neer*,[113] is no longer the applicable standard. Thus, most tribunals reject the idea that today a breach of the MST can only be found in the presence of an "outrageous" behavior in *Neer* and its progeny.[114]

(122) Moreover, many tribunals have held that there is a convergence between the treatment guaranteed by the MST and the FET.[115]

(123) Nevertheless, numerous investment tribunals have held that the threshold for a breach of the MST is high,[116] and that a significant deference and margin of appreciation should be given to governmental judgement in certain matters.[117]

(124) In addition to the level of protection to which investors are entitled under the MST, the Parties also disagree on which specific obligations are encompassed within the MST protection under Article 805 of the Treaty, including legitimate expectations and transparency. In particular, Respondent submits that the MST does not include the concepts of legitimate expectations and transparency.[118]

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[113] *L.F.H. Neer and Pauline Neer (USA) v. United Mexican States* ("Neer") (1926) (**Exhibit RL-64**).

[114] *William Ralph Clayton and others v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015 ("Clayton v. Canada"), (**Exhibit CL-114**), ¶¶ 433 and 440; *Mondev International Ltd. v. United States of America*, NAFTA, Chapter Eleven, ICSID Case No. ARB (AF)/99/2, Award, October 11, 2002 ("Mondev v. United States"), (**Exhibit CL-28**), ¶¶ 116-119 and 123-125; *ADF Group Inc. v. United States of America*, NAFTA, Chapter Eleven, ICSID Case No. ARB(AF)/00/1, Award, January 9, 2003 ("ADF Group v. United States"), (**Exhibit CL-30**), ¶ 179; *Waste Management, Inc. v. United Mexican States*, NAFTA, Chapter Eleven, ICSID Case No. ARB(AF)/00/3, Award April 30, 2004 ("Waste Management v. Mexico"), (**Exhibit CL-32**), ¶¶ 91, 93 and 98; *Merrill & Ring Forestry L.P. v. The Government of Canada*, NAFTA, Chapter Eleven, UNCITRAL, Award, March 21, 2010 ("Merril v. Canada"), (**Exhibit CL-79**), ¶¶ 207-208, 210- 213; and *Eco Oro*, ¶ 744.

[115] *Merril v. Canada*, (**Exhibit CL-79**), ¶¶ 207-208, 210- 213; *Clayton v. Canada*, (**Exhibit CL114**), ¶ 433; *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award on the Merits, April 10, 2001, ("Pope & Talbot v. Canada"), (**Exhibit CL-262**), ¶ 118; *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, June 29, 2012, ("RDC v. Guatemala"), (**Exhibit CL-98**), ¶ 219; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, July 29,2008, ("Rumeli v. Kazakhstan") (**Exhibit CL-63**), ¶ 611; *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, August 18, 2008 ("Duke v. Ecuador"), (**Exhibit CL-65**), ¶ 337; *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, July 14, 2006, ("Azurix v. Argentina"), (**Exhibit CL-44**), ¶¶ 361 and 364; and *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, July 24, 2008, ("Biwater Gauff v. Tanzania"), (**Exhibit CL-62**), ¶ 592.

[116] *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Award, January 26, 2006, ("Thunderbird v. Mexico"), (**Exhibit CL-42**), ¶ 194; *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, November 3, 2015 ("Al Tamimi v. Oman"), (**Exhibit RL-114**), ¶ 382; *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, June 8, 2008, ("Glamis v. United States of America"), (**Exhibit CL-61**), ¶ 614.

[117] *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, November 13, 2000, ("S.D. Myers v. Canada"), (**Exhibit CL-20**), ¶ 261; *Thunderbird v. Mexico* (**Exhibit CL-42**), ¶127; *Philip Morris Brands SARL, Philip Morris Products S.A. and Abal Hermanos S.A v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, July 8, 2016, ("Philip Morris v. Uruguay"), (**Exhibit RL-118**), ¶ 399; *Glamis v. United States of America* (**Exhibit RL-61**), ¶ 80; *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, November 30, 2018, ("RREEF v. Spain"), (**Exhibit RL-128**), ¶ 468; and *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, November 30, 2012, ("Electrabel v. Hungary"), (**Exhibit RL-107**), ¶ 8.35.

[118] Cl. Mem., ¶¶ 128-146; Cl. Reply, ¶¶ 428-429; Resp. C-Mem., ¶¶ 396-403; Resp. Rej., ¶¶ 304, 306-316 and 333-335.

The Award also summarizes the respective positions of the Parties on these matters.[119] I will therefore not reproduce this debate.

(125) Many investment arbitration tribunals have brought the concept of legitimate expectations within the purview of provisions on the treatment of aliens under the MST. According to case law, the protection of legitimate expectations stems from the good faith principle in customary international law.[120]

(126) Several NAFTA tribunals have recognized that legitimate expectations which met certain requirements, including by reference to an objective standard, were protected under Article 1105.[121]

(127) Moreover, several tribunals have included within the concept of legitimate expectations the stability and predictability of the legal framework and of preexisting government decisions.[122]

(128) Based on the above, in my opinion, although the requirements for finding a violation of the MST contained in Article 805 of the Treaty are stringent, it does include an obligation not to frustrate the investor's legitimate expectations, provided they are reasonable and objective in light of the circumstances and the State's conduct.[123]

(129) While malicious intent, willful neglect of duty or bad faith are not required elements of the MST under customary international law,[124] *"there must be some aggravating factor such that the acts identified comprise more than a minor derogation from that which is deemed to be internationally acceptable (...) whilst set against the high measure of deference that international law extends to States to regulate matters within their own borders."*[125]

(130) Thus, although I share the view that the MST has evolved and is nowadays broader than the standard set out in *Neer*, in analyzing whether Colombia's conduct infringes Article 805 of the Treaty, I will not consider the FET as a standalone standard, but the minimum standard as described above without interpreting expansively Colombia's obligation thereunder.

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[119] Award, ¶¶ 179-227 and 228-282.

[120] *Thunderbird v. Mexico* (Exhibit CL-42), ¶ 147; *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, ("*El Paso v. Argentina*") (Exhibit CL-89), ¶ 348; and *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, May 29, 2003, ("*Tecmed v. Mexico*"), (Exhibit CL-31), ¶ 153.

[121] *Glamis v. United States of America* (Exhibit CL-61), ¶ 621; *Mobil Investments Canada Inc. & Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and Principles of Quantum, May 22, 2012, ("*Mobil v. Canada*"), (Exhibit CL-95), ¶ 152; and *Clayton v. Canada* (Exhibit CL 114), ¶¶ 445 and 455.

[122] *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award on Jurisdiction and Merits, March 17, 2006, ("*Saluka v. Czech Republic*"), (Exhibit CL-18), ¶ 301; *Suez, Sociedad General de Aguas de Barcelona S.A and Vivendi Universal S.A v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, July 30, 2010. ("*Suez v. Argentina*"), (Exhibit CL-81), ¶ 222; *El Paso v. Argentina* (Exhibit CL-89), ¶¶ 513-514 and 517; *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, October 2, 2006, ("*ADC v. Hungary*"), (Exhibit CL-47) ¶¶ 423-424; *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, May 4, 2017, ("*Eiser v. Spain*"), (Exhibit CL-124), ¶ 425; and *Tecmed v. Mexico* (Exhibit CL-31), ¶ 154.

[123] See, for example, *El Paso v. Argentina* (Exhibit CL-89), ¶¶ 356-359.

[124] *Id* ¶ 357; *Mondev v. United States* (Exhibit CL-28), ¶ 116; and *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Award, December 24, 2007, ("*BG v. Argentina*"), (Exhibit CL-55), ¶ 301.

[125] *Eco Oro v. Colombia* (Exhibit CL-285), ¶ 755.

(131) Based on the factual and regulatory background described in Sections 2 and 3 above, in my opinion, Red Eagle had legitimate expectations at the time it acquired the Mining Titles that: (i) it would be entitled to undertake exploration and exploitation activities in the areas covered thereby, including the right to apply for and pursue the issuance of the necessary environmental licenses or equivalent; (ii) in the event Colombia were to deprive it from any portion of such rights (including the right to adapt existing PMAs to a large-scale integrated project such as the Project or to apply for a new environmental license or equivalent for such purpose), compensation would be payable by Colombia; and (iii) Colombia would ensure a predictable legal framework for business planning and investments in the aforementioned activities.

(132) As explained in Section 2, Colombia repeatedly changed its policies and rules governing the activities covered by Red Eagle's Mining Titles. Resolution 2090 of December 2014 implied a change in the rules by creating for the first time a Mining Exclusion Zone in areas overlapping with Claimant's Mining Titles and established restrictions in adjacent areas (Restoration Areas) also overlapping said titles. In June 2015, Colombia enacted Law 1753 that introduced changes to the grandfathering rules established by Resolution 2090. Some of the subsequent changes were inconsistent with previous changes, such as the case of Law 1753 and Judgment C-35. This judgement held that the transitional regime established by Law 1753 was unconstitutional because it considered that allowing mining activities to continue in the páramos did not protect the páramos from the harmful consequences of mineral extraction. Judgment C-35 not only implied a change of rules and of criteria to the extent it held that environmental protections prevailed over the acquired rights of investors, but moreover, by eliminating the grandfathering regime of Law 1753, it deprived Article 5 of Resolution 2090 of its statutory foundation, and as a consequence such regime ceased to be in force.[126]

(133) In May 2017, Judgment T-361 implied a new change in the rules as it declared unconstitutional Resolution 2090 and ordered a new delimitation of the páramos to take place within one year.

(134) In addition to the reiterated regulatory changes, through its constant omissions, actions and inconsistent behavior, Colombia created uncertainty, that coupled with the modifications of the rules, in practice, rendered unviable mining activities in the entirety of Red Eagle's Mining Titles, including in the Restoration Areas.[127]

(135) Although the IAVH Atlas of 2007 contained a preliminary delimitation of the páramos at a large scale, Colombia delayed more than seven years until it delimited the páramos in December 2014 at a more precise scale through Resolution 2090. Colombia's fluctuating regulations created uncertainty and confusion, when, for example, Law 1753 cast doubts on whether it had banned mining also in the Restoration Areas. This situation worsened, when as explained, Judgement C-35 deprived the then existing grandfathering regime of its legal basis.[128]

(136) The uncertainty and confusion was compounded by Judgement T-361 when it declared Resolution 2090 to be unconstitutional and ordered a new delimitation

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[126] See Sections 2.3 and 2.5 above.

[127] *Id.*

[128] *Id.*

of the páramos more expansive than the one set forth by Resolution 2090, but without giving any precisions as to what this meant in terms of whether the new demarcation should cover additional land or different areas or take a different form, thus affecting any planning on mining activities within Red Eagle's Mining Titles. Moreover, although Judgement T-361 ordered that the new delimitation be made within one year, after more than six years Colombia continues to fail to issue a new delimitation of the SP. Unsurprisingly, this uncertainty prevented mining in Red Eagle's Mining Titles as it led the mining authorities, pending delimitation of the SP, to issue notices halting any mining or to reject the approval of the transfer to Claimant of certain existing PMAs. The authorities also refused to allow Red Eagle to retain portions of its Mining Titles that could not be exploited in these circumstances, thus risking forfeiture of the title.[129]

(137) The aforementioned constant changes and sometimes contradictory decisions of the different authorities of Colombia, as well as the ensuing uncertainty, caused – *inter alia* - by its (continuing) delay to delimit the páramos, derived in what the *Eco Oro* tribunal characterized as a *"regulatory roller-coaster"* and a situation of *"limbo"* for mining investors.[130]

(138) In my opinion, although there is no evidence that Colombia acted in bad faith, the confusion and uncertainty created by the aforementioned actions and omissions of Respondent, viewed as a whole, amount to a failure to ensure a predictable and stable regulatory framework in a way that constitutes gross unfairness and manifest arbitrariness falling below acceptable international standards. This is not a minor derogation of Colombia's international obligations nor a minor inconsistency or inadequacy of conduct, but a behavior that amounts to a failure to accord Red Eagle's investment a treatment in accordance with the customary international law minimum standard of treatment of aliens, including the obligation to provide fair and equitable treatment as required by Article 805 of the Treaty.

(139) Respondent has argued throughout this arbitration that Claimant did not have legitimate expectations regarding the possibility of developing the Project, due to the absence of specific representations from the Colombian authorities that they would not impose a ban and/or restrictions on mining activities in the páramo areas covered by Red Eagle's Mining Titles, and the absence of a due diligence by Claimant that would have alerted it as to the existence of the risk of such ban on mining in the páramos.[131]

(140) In Section 2.4 above, I addressed the issue of due diligence, and concluded that when evaluated against the backdrop of the regulatory framework in force when Red Eagle acquired the Mining Titles and the absence of Mining Exclusion Zones in the areas covered by such titles at such time, Colombia's position on this point implies shifting onto the investor the responsibility of anticipating constant changes in the regulations and delays in the delimitation of the páramos.[132]

(141) As to the question of the extent, specificity and significance of the representations given by Respondent, as explained above, Colombia's breach of Article 805 of the Treaty derives from a number of actions and omissions described in this Opinion, including its failure to delimit the SP in a precise and

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[129] *Id.*

[130] *Eco Oro v. Colombia* (Exhibit CL-285), ¶¶ 695-696, 791, 806 and 814-815.

[131] See Section 2.4 above.

[132] See ¶¶ 54-57 above.

definitive manner that, viewed as a whole, exceed the issue of a breach of any specific representation, but rather constitute a behavior of gross unfairness and manifest arbitrariness that falls below acceptable international standards.

5.2. Article 2201(3) of the FTA

(142) Claimant[133] and Respondent[134] also discussed the meaning and implications of Article 2201(3) of the Treaty. I will therefore not replicate this debate.

(143) Article 2201(3) provides that:

> *"3. 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:*
>
> *(a) 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;*
>
> *(b) to ensure compliance with laws and regulations that are not inconsistent with this Agreement; or*
>
> *(c) for the conservation of living or non-living exhaustible natural resources."*[135]

(144) The Treaty includes a number of provisions whereby investment protections are not subordinated to environmental protections, but rather that both types of protections are mutually supportive.[136]

(145) The Treaty provisions should be analyzed as a whole. On this basis, it can be reasonably inferred that had the intention of Canada and Colombia been that a measure taken pursuant to Article 2201(3) would not entail any liability for compensation, it would be expected that this Article would have been drafted in similar terms as Annex 811(2)(b) which expressly excludes the characterization of indirect expropriation in respect of any measure that meets the requirements set forth in said Annex,[137] thus excluding liability for compensation. As stated by

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[133] Cl. Reply, ¶¶ 557-593; and Cl. PHB, ¶¶ 81-85.

[134] Resp. C-Mem., ¶¶ 488-505; Resp. Rej., ¶¶ 397-413; and Resp. PHB, ¶¶ 60-67.

[135] Treaty (**Exhibit CL-1**), Article 2201(3).

[136] See, for example Article 1701: *"Affirmations. (1) The Parties recognize that each Party has sovereign rights and responsibilities to conserve and protect its environment and affirm their environmental obligations under their domestic law, as well as their international obligations under multilateral environmental agreements to which they are party. (2) The Parties recognize the mutual supportiveness between trade and environment policies and the need of implementing this Agreement in a manner consistent with environmental protection and conservation and sustainable use of their resources."* Article 1704 establishes that: "[the] *Parties recognize the importance of balancing trade obligations and environmental obligations, and affirm that the Agreement on the Environment complements this Agreement, and that the two are mutually supportive.*" Treaty, (**Exhibit CL-1**), Articles 1701 and 1704 (emphasis added).

[137] Annex 811(2)(b): *Except in rare circumstances , such as when a measure or series of measures is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted in good faith, non-discriminatory measures by a Party that are designed and applied to protect legitimate public welfare objectives, for example health, safety and the protection of the environment, do not constitute indirect expropriation".* Treaty (**Exhibit CL-1**), Annex 811 (emphasis added).

the *Eco Oro* tribunal *"it is simply not credible that the Contracting Parties left such an important provision of non-liability to be implied when considering the operation of Article 2201(3)."*[138]

(146) Moreover, if Article 2201(3) were interpreted to exclude liability in the circumstances contemplated thereby for any damages caused by Colombia as a result of a breach of its obligations under Chapter Eight of the Treaty, then the text of Annex 811 would become unnecessary or redundant.[139]

(147) Thus, in my opinion, Article 2201(3) of the Treaty does not necessarily exclude the wrongfulness of an action or conduct of the State in violation of the Treaty such as Article 805.

(148) In this regard, Article 2201(3) of the Treaty is not comparable with certain provisions contained in some bilateral investment treaties that provide that the State is not precluded from taking certain measures in exceptional circumstances. This is the case of Article XI of the Argentina-U.S.A. bilateral investment treaty that provides that *"This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security or the Protection of its own essential security interests."*[140]

(149) The exceptional circumstances referred to in the aforementioned provision are not comparable to those contemplated in Article 2201(3).

(150) Even if it were assumed that Article 2201(3) would preclude the wrongfulness of an action of Colombia otherwise in breach of the Treaty, international law contemplates situations in which the invocation of a circumstance that precludes wrongfulness does not exclude the obligation to compensate. Such is the case of Article 27(b) of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts.

(151) Pursuant to Article 27(b) thereof:

"Consequences of invoking a circumstance precluding wrongfulness. The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to.... (b) the question of compensation for any material loss caused by the act in question."[141]

(152) Thus, in my opinion Article 2201(3) of the Treaty does not exclude Colombia's obligation to compensate Red Eagle for any damages arising out of a breach of Article 805 thereof.

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[138] *Eco Oro v. Colombia* (Exhibit C-285), ¶ 829.

[139] Canada supported Colombia's view in relation to the consequences of Article 2201(3) of the Treaty. See Canada's Non-Disputing Party Submission, ¶¶ 48-56. However, the expression of this view does not constitute a binding joint declaration under the Treaty.

[140] Treaty between United States of America and the Republic of Argentina concerning the Reciprocal Encouragement and Protection of Investment, signed on November 14, 1991, and entered into force on October 20, 1994, Article XI.

[141] International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts (2001) (Exhibits CL-17/CL-202/RL-115).

5.3 Article 811 of the FTA

(153) The Award describes in detail the position of the Parties on whether Colombia's measures constituted an expropriation of Claimant's investment.[142]

(154) Claimant's claim is for indirect expropriation[143] and is based on Article 811 of the Treaty. The concept of indirect expropriation is set forth in Annex 811(2) of the Treaty that provides:

> *"2. The second situation is indirect expropriation, which results from a measure or series of measures of a Party that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure.*
>
> *(a) The determination of whether a measure or series of measures of a Party constitute an indirect expropriation requires a case-by-case, fact-based inquiry that considers among other factors:*
>
> *(i) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred,*
>
> *(ii) the extent to which the measure or series of measures interfere with distinct, reasonable investment-backed expectations, and*
>
> *(iii) the character of the measure or series of measures;*
>
> (b) *Except in rare circumstances, such as when a measure or series of measures is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted in good faith, non-discriminatory measures by a Party that are designed and applied to protect legitimate public welfare objectives, for example health, safety and the protection of the environment, do not constitute indirect expropriation."*[144]

(155) Thus, in order to succeed on its indirect expropriation claim, Claimant must establish that (a) it had vested rights which were covered investments under the Treaty at the time of Colombia's measures, and (b) that the fact-based inquiry to be made pursuant to Annex 811(2)(a) leads to the conclusion that the measures constitute an indirect expropriation considering, among other factors, (i) the economic impact of the measures; (ii) the extent to which the measures interfere with distinct, reasonable investment-backed expectations; and (iii) the character of the measures.

(156) In Sections 4 and 5 above, I concluded that, in my opinion, Colombia's measures and actions deprived Red Eagle from certain vested rights, including the access to a very substantial portion of the mineral resources in its Mining Titles and the opportunity to adapt its existing PMAs to a large-scale mining project and/or apply for a new environmental license or equivalent instrument. I also concluded that these rights had economic value, although such value may be difficult to assess.

(157) I do, however, agree with Respondent and the majority of the Tribunal that Claimant has been unable to identify any distinct reasonable investment-backed

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[142] See Section VI-C-1 of the Award.

[143] Cl. Mem., ¶ 168.

[144] Treaty (**Exhibit CL-1**), Annex 811(2).

expectations on which it relied.[145] As explained in Section 5.1 above, in my opinion, Red Eagle had reasonable expectations (different from investment-backed expectations required by Annex 811 of the Treaty)[146] that Colombia would maintain a stable and predictable legal framework and not create the regulatory confusion and uncertainty described above.[147] However, Red Eagle has not identified any specific representations from Colombia's authorities in the sense that they would not impose a ban or restrictions in páramo areas overlapping Claimant's Mining Titles or that it would be able to develop the Project.[148]

(158) Regarding the "character" of Colombia's measures, I also agree with Respondent and the majority of the Tribunal that the measures were *bona fide* regulatory measures adopted to protect the environment and did not target Claimant's Mining Titles in particular.[149]

(159) Thus, for Colombia's measures to constitute an actionable indirect expropriation under Article 811 and Annex 811 of the Treaty, as opposed to a legitimate exercise of State police powers, there must be an aggravating element or factor in the conduct of the State that does not appear in this case.

(160) In spite of the uncertainty and confusion created by Colombia, I do not find elements to conclude that Colombia did not act in good faith in the exercise of its regulatory powers.

(161) Therefore, the measures taken by Colombia qualify as an exercise of police powers, and do not constitute an indirect expropriation, unless they were to comprise a rare circumstance mentioned in Annex 811(2)(b) that, in my view, does not exist in this case.

6. Damages

(162) In light of the decision of the majority of the Tribunal dismissing Claimant's claim for violation of the Treaty, I will not elaborate in detail on this matter.

(163) Claimant based its calculation of damages on its sunk costs by reference to its audited financial statements. Claimant's expert, Mr. Sequeira, concluded that Red Eagle invested a total of USD 70,704,000 (before interest) in pursuit of the Project.[150]

(164) Claimant criticizes Respondent's arguments (i) that it should not receive compensation for areas outside the Mining Exclusion Zones determined by Resolution 2090, on grounds of the absence of the residual value of the mineral resources in those areas due to the integrated nature of the Project, and (ii) in relation to the non-exploration expenses incurred by Red Eagle because such expenses were also incurred in pursuit of the Project.[151]

(165) Claimant also rebuts Respondent's argument that sunk costs would overcompensate Claimant because the loss it suffered would fluctuate

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[145] See Resp. Rej., ¶¶ 382-383 and Award, ¶¶ 403-404.

[146] See *Eco Oro v. Colombia* (Exhibit CL-285), ¶ 861.

[147] See Sections 2.4 and 2.5 above.

[148] See Resp. Rej., ¶¶ 382-383 and Award, ¶¶ 403-404.

[149] See Resp. Rej., ¶ 387 and Award, ¶ 308.

[150] Cl. PHB, ¶ 112 and Cl. Reply, ¶ 666.

[151] Cl. PHB, ¶¶ 114-115.

(according to Colombia) between USD 1.6 and USD 4.5 million. Claimant criticizes Brattle's alternative fair market value ("FMV") methodology which it characterizes as "fatally flawed" on grounds that (i) it is based on the wrong assumption that Red Eagle could continue to carry out mining activities in the Restoration Areas (yellow), and (ii) that the "but-for" FMV of the Project was based on the historical purchase terms of the Mining Titles agreed to by Red Eagle, ignoring the integrated nature of the Project.[152]

(166) Claimant offers three alternative calculations for the value of the Project. The first one is based on the "but-for" FMV of the Project at the end of 2012 and adjusts that value using three market indices of gold mining companies. The second alternative is based on the analysis of comparable transactions for similar gold mining assets, and the third alternative is based on a multiple of exploration costs approach. These alternative valuations yield a value between USD 46.81 million (calculated *ex-ante*) and USD 87.21 million (calculated *ex-post; i.e.* at the date of the award). Claimant compares these figures with its purported sunk cost of approximately USD 70 million, stating that there is no significant deviation.[153]

(167) Respondent criticizes Claimant's approach in relation to the first FMV alternative on grounds that it ignores the supposedly disappointing 2014 SRK Report on Maiden Resources estimate as well as the Colombian asset market turndown between 2013 and 2016.[154] Respondent contends that Claimant's second FMV alternative based on comparable transactions is flawed because the transactions were not adequate comparators.[155] As to Claimant's third FMV alternative, Brattle argues that although admitted by the CIMVAL Code for the Valuation of Mineral Properties of the Canadian Institute of Mining, Claimant's expert, Mr. Sequeira, was not qualified to apply the Prospectivity Enhancement Multiplier.[156]

(168) In any case, Respondent points out that Claimant's allegation that its FMV estimate of the Mining Titles as at the date of the award is higher than its sunk costs claim, is misleading. This because, although the FMV of the Mining Titles as at the date of the award (approximately USD 87 million) is higher than the approximately USD 70 million sunk cost figure claimed by Red Eagle, the latter figure does not include interest that Claimant claims from September 2017 onwards, which would drive the figure up to between USD 112 million and 130 million. In contrast, when claiming damages on the basis of FMV of the Mining Titles as at the date of the award, there would be no pre-judgement interest.[157]

(169) I concluded in Sections 3 and 5 above that Respondent's measures deprived Red Eagle from access to a very significant portion of the mineral resources in its Mining Titles and the opportunity to obtain a modification of the existing PMAs to adapt them to a large-scale integrated project or to obtain a new environmental license for such purpose; this is, Claimant was deprived from the opportunity to pursue the Project and eventually make a success of it.

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[152] *Id*, ¶¶ 116-118.

[153] Cl. PHB, ¶ 120 and Cl. Reply, ¶¶ 650-652.

[154] Hearing Tr. Day 4 (English) 1067:16-1068:1 (Brattle Direct). See also Resp. PHB, ¶¶ 150-153.

[155] Id, 1068:2-17 (Brattle Direct). See also Resp. PHB, ¶ 154.

[156] Resp. PHB, ¶ 155.

[157] Resp. PHB, ¶ 133.

(170) As stated above, exploration projects may be difficult to value, but they are not worthless. Moreover, the aforementioned opportunity had some value. However, it is necessarily less valuable than the value of a developed project or one with a favorable pre-feasibility or feasibility study which would require assessing the environmental licensing risk.

(171) The facts of the cases cited by Respondent relating to the circumstances in which sunk costs have been admitted involving projects in a more advanced stage than the Project differ from the circumstances in this case.[158] This circumstance, coupled with the significant difference between the sunk cost figure claimed by Red Eagle (including interest) and a purported conservative FMV of the Mining Titles, leads me to conclude that the use of sunk costs in this case would be inappropriate.

(172) Moreover, Claimant has not submitted an alternative valuation on the value of its loss of opportunity of pursuing the Project. This circumstance prevents quantifying such value, due to the speculative nature of such an exercise without additional information as the one that could have been obtained in a subsequent quantum phase in this proceeding in the context of a different decision of the majority of the Tribunal.

7. Conclusions

(173) Based on the foregoing, in my opinion, through the different measures and actions taken by the Colombian authorities beginning with Resolution 2090, Respondent breached its obligations under Article 805 of the Treaty.

(174) Notwithstanding the foregoing conclusion, the amount of any compensation payable to Claimant should be determined considering that it was deprived by the aforementioned measures of the opportunity to pursue the Project, whose loss of opportunity is less valuable than the value of a developed project or one with a favorable pre-feasibility or feasibility study. The assessment of this value, which should include a discount based on the uncertainties inherent to the development of a large-scale mining project (including the licensing risk) cannot be carried out in this case on the basis of the information submitted by the Claimant and, in any event, would depend on additional information that could be potentially produced during a subsequent quantum phase of this arbitration had there been a finding of the Tribunal or a majority of the Tribunal that Colombia violated the Treaty.

[Signed]

José A. Martínez de Hoz

February 23, 2024

[158] Resp. PHB, ¶¶ 138-146.